

# The Long Arm of the Law

## -- Can the UIGEA Be Applied to Canadian Gaming Operations?

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### I. Introduction

Shortly after the adoption of the Unlawful Internet Gambling Enforcement Act,<sup>1</sup> (“UIGEA”), in the closing days of the 2006 Legislative Session, many non-U.S.-facing Internet gambling operations turned their backs on the largest segment of the market for their services – U.S. customers.<sup>2</sup> This decision resulted in losses exceeding \$7.6 billion dollars on the London Stock Exchange, as Internet gaming stocks tumbled.<sup>3</sup> Did these entities fear that the United States could assert jurisdiction over their foreign operations, and prosecute the companies or their owners, for violations of the newly-minted law? Since the vast majority of Internet gambling operations have historically been located outside the United States, did Congress intend for the UIGEA to be applied extraterritorially to these non-resident entities?

As numerous online gambling sites continue to operate in Canada, under the perceived or express authority of the Kahnawake Mohawk Territory, concerns linger regarding the ability of the U.S. government to apply its Internet gambling laws – including the UIGEA – against Canadian-based online gaming entities. This fear has been magnified by the bold assertions of

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<sup>1</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367.

<sup>2</sup> C. Krafcik, “The Infancy of Prohibition - Who's In, Who's Out,” *Interactive Gaming News* (October 16, 2006), see also, A. Sullivan, “New Law Won’t Stop Internet Gambling,” *PCWorld.com* (November 21, 2006).

<sup>3</sup> Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. Times, Nov. 1, 2006, at C3.

jurisdiction by U.S. authorities against other foreign-based betting sites like BetOnSports.com<sup>4</sup> as well as prosecutions against offshore financial service providers such as Neteller<sup>5</sup> and e-Gold, for violations of federal online gambling laws.<sup>6</sup> This article will explore the complex and unsettled legal concerns surrounding extraterritorial enforcement of U.S. law in Canada, along with the related issue of extradition of Canadian citizens for criminal prosecution in the United States.<sup>7</sup>

## II. Extraterritorial Application of Federal Statutes

When it passed the UIGEA as part of the SAFE Port Act,<sup>8</sup> the United States Senate was undoubtedly aware that the vast majority of the targeted Internet gambling operations were located outside the United States of America.<sup>9</sup> Therefore, it is reasonable to assume that Congress anticipated some degree of criminal enforcement under the UIGEA, against non-resident companies or individuals. So the question then becomes: What manner of enforcement can be expected or tolerated against Canadian citizens, consistent with U.S. and international law, as well as constitutional provisions and applicable treaties?

In order to initiate criminal charges against any entity located outside of the United States for violation of federal gambling laws, the presiding judge would need to determine whether extraterritorial application of U.S. law is warranted. When faced with this question, the courts must first determine: 1) whether the United States has the power to reach the conduct in question

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<sup>4</sup> *U.S. v. BetonSports, PLC, et al.*, Case No.: 4:06-CR-00387-CEJ.

<sup>5</sup> *U.S. v. Stephen Lawrence*, Case No.: 1:07-CE-00597-PKC-1.

<sup>6</sup> *U.S. v. e-Gold, Ltd. et al.*, Case No.: 1:07-CR-00109-RMC-1

<sup>7</sup> No effort is made to evaluate the applicability or interpretation of Canadian law, as such issues are outside the scope of the author's expertise as a United States based attorney.

<sup>8</sup> Safe Accountability for Every Port Act of 2006, "SAFE Port Act," Pub. L. No. 109-347.

<sup>9</sup> As far back as 2003, Deputy Assistant Attorney General John G. Malcolm testified before a Congressional Committee that most online gambling establishments are operating in foreign jurisdictions. See, <http://www.usdoj.gov/criminal/cybercrime/malcolmTestimony318.htm>; see also, Comments of Rep. Robert Goodlatte, Bill Sponsor in the *Richmond Times-Dispatch* (April 6, 2006) ("Online gambling was "sucking billions [of dollars] out of the United States"); see also, Rep. Jim Leach, Bill Sponsor, in the *Wall Street Journal* (April 4, 2006) (Offshore online gambling has become a "haven for money laundering activities").

under traditional principles of international law; and 2) whether the statute under which the defendant is charged is intended by Congress to have extraterritorial effect.<sup>10</sup>

With respect to the initial inquiry, principles of international law recognize the ability of the government to prosecute a foreign defendant upon a showing of that individual's intent to produce "effects" in the United States, without proof of a specific overt act or effect actually occurring in this country.<sup>11</sup> While this "effects" test may seem to allow broad application of U.S. law against foreign individuals, in practice, extraterritorial enforcement is generally limited to major white collar criminal activity such as drug trafficking, child pornography and racketeering.<sup>12</sup> Theoretically, the Department of Justice could argue that online gambling produces some economic effects in the United States in the form of player losses or gambling addiction, in order to justify extraterritorial application of the UIGEA against a Canadian. Thus far, however, no published court decision has extended U.S. anti-gambling statutes to Canadians residing in Canada.

Once the court resolves the first inquiry pertaining to the power to apply the statute to foreign citizens under principles of international law, the court must then analyze the specific statute at hand to determine whether it was intended to be applied to foreign citizens. If the statute is silent as to its extraterritorial reach, there is a strong presumption against such application.<sup>13</sup> However, statutes may be given extraterritorial effect if the nature of the law permits it, and Congress intends it.<sup>14</sup>

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<sup>10</sup> *U.S. v. Noriega*, 746 F. Supp 1506 (1990); *supra* at fn. 6.

<sup>11</sup> *Id.* at fn. 4; see also, *U.S. v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979).

<sup>12</sup> *Id.*; see also, *U.S. v. Moncini*, 882 F.2d 401 (9th Cir. 1989) (Involving shipment of child pornography to Italian citizen in United States.)

<sup>13</sup> Restatement (Third) of Foreign Relations Law of the U.S. §402 (1986); N. Rose, "Gambling & The Law<sup>®</sup>: The International Law of Remote Wagering," *John Marshall Law Review*, Vol 40, No. 4, p. 1169 (Summer 2007).

<sup>14</sup> *Noriega*, at 1515.

Other federal anti-gambling statutes such as the Wire Act,<sup>15</sup> the Travel Act,<sup>16</sup> and the Wagering Paraphernalia Act<sup>17</sup> reference application to foreign commerce and travel, which may justify a finding that Congress intended those laws to be applied against foreign citizens. Some of the early Internet gambling cases seem to support this interpretation.<sup>18</sup>

Extraterritorial application can occur in other contexts as well. For example, three Canadians currently face extradition to the United States based on federal drug charges resulting from their worldwide cannabis seed selling business.<sup>19</sup> Federal racketeering laws have also routinely been interpreted to apply to activities of individuals conducted outside the United States, so long as those activities produce effects in this country, as discussed above.<sup>20</sup> It is unsettled as to what amount of the amount of activity, if any, must occur in the United States to justify the application of U.S. racketeering laws to a foreign entity. Mere preparatory activities or conduct far removed from the consummation of the offense will not suffice to establish extraterritorial application or jurisdiction.<sup>21</sup> In sum, a variety of federal, criminal offenses can apply outside of the U.S., but only in limited circumstances.

Turning specifically to the UIGEA, Congressional intent is unclear, at best. The criminal prohibitions contained in the legislation do not contain any reference to ‘foreign commerce’ as do the Wire Act, the Travel Act or the Wagering Paraphernalia Act. The operative definition of a prohibited ‘bet or wager’ in the UIGEA refers only to those activities prohibited by state,

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<sup>15</sup> Title 18, U.S.C. § 1084.

<sup>16</sup> Title 18, U.S.C. § 1952.

<sup>17</sup> Title 18, U.S.C. § 1953(a).

<sup>18</sup> *New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sp. Ct. 1999); *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), *cert den.* 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777 (2002).

<sup>19</sup> J. Emery, “No Extradition for Marc Emery, Michelle Rainey, or Greg Williams,” *CannabisCulture.com* (April 2008); “Marc Emery’s Extradition Proceedings Postponed,” *Canada.com* (January 21, 2008).

<sup>20</sup> *Noriega* at 1516-1519.

<sup>21</sup> *North South Finance Corp. v. Al Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

federal or Tribal law.<sup>22</sup> The sole discussion of the law's impact on foreign nations is contained in Sec. 803, entitled; "Internet Gambling in or through Foreign Jurisdictions." That section contains no criminal or civil prohibitions of any kind, but merely encourages cooperation between the U.S. and foreign nations in regards to information sharing on issues of money laundering, corruption or other crimes. The intent of this section appears to focus exclusively on the rendition of voluntary assistance and cooperation between nations, and would not necessarily support an interpretation that the law should be applied extraterritorially.

Notwithstanding the above, Congress certainly understood that the primary targets of its criminal prohibitions on acceptance of Internet gambling funds were foreign entities, when enacting the UIGEA.<sup>23</sup> Therefore, it could be argued that, despite the lack of clear references to foreign commerce in the criminal prohibitions, the law was always intended to be applied to illegal Internet gambling transactions, wherever they occur.

### **III. Personal Jurisdiction**

Assuming, *arguendo*, that the UIGEA can be applied extraterritorially to a Canadian citizen or company, any court entertaining such a case must also satisfy itself that it has personal jurisdiction over the particular defendant. Where foreign citizens are involved, this becomes a complicated issue involving the interplay of legal principles along with notions of comity and diplomacy between the various nations.

Initially, when resolving the issue of personal jurisdiction, the courts of the United States will look at whether requiring a foreign citizen to defend against criminal charges in this country's courts comports with notions of fair play and substantial justice.<sup>24</sup> This determination

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<sup>22</sup> 31 U.S.C. § 5362(10).

<sup>23</sup> See, fn. 9, *supra*.

<sup>24</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 LED.2d 528 (1985); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 LEd.2d 404 (1984).

focuses on whether the defendant has certain “minimum contacts” with the United States, so as to reasonably justify the assertion of personal jurisdiction over the non-resident defendant. These determinations are made on a case-by-case basis, often with little consistency. However, some authority exists for the proposition that mere advertising or promotional activities in the United States, without more, should not result on a finding of personal jurisdiction allowing the U.S. courts to hear cases against a foreign entity.<sup>25</sup> As a general proposition, the courts are reluctant to force a foreign citizen to face trial in the U.S. as a result of activity taking place beyond American borders.

Recently, however, the courts have begun to look at website activity as a basis for establishing minimum contacts and thus personal jurisdiction. Therein, the focus is on whether commercial transactions can be conducted on the subject website as a basis for determining whether the site owner should be subjected to jurisdiction in a particular forum.<sup>26</sup> The courts have adopted a sliding scale of interactivity of websites – called the *Zippo* Test - that is used in making this determination.<sup>27</sup> Purely informational websites, with no user interactivity, are at the one end of the scale, and rarely serve as a basis for establishing personal jurisdiction. On the other end of the spectrum is the fully interactive website, which allows customers to engage in commercial financial transactions via the site.<sup>28</sup> Virtually all Internet gaming websites would fall into the latter, fully interactive category, thus allowing the website activity to serve as a basis for establishing jurisdiction.

To the extent that a given Internet gambling site ceased accepting bets from U.S. customers after the adoption of the UIGEA, no interactivity with U.S. residents would exist, and

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<sup>25</sup> See, e.g., *Mesalic v. Fiber Flirt Corp*, 897 F.2d 696, 700, n. 10 (3d Cir 1990); *Miller Yacht Sales, Inc., v. Smith*, 384 F.3d 93 (3d Cir. 2004).

<sup>26</sup> See *Zippo Mfg. Co. v. Zippo.com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. P.A. 1997).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

thus the website would not likely serve as a viable basis for assertion of personal jurisdiction under this theory. However, if the site continued doing business with U.S. customers, a potential risk of establishing personal jurisdiction exists. Interestingly, no court to date has relied exclusively on the defendant's website activity as a basis for finding the existence of personal jurisdiction over a foreign resident. If such a case arose, the defendant's website activity would likely serve as only one factor in the jurisdictional analysis.

It should also be noted that a defendant's arrest while physically present in the forum jurisdiction dispenses with the entire personal jurisdiction analysis. This principle was illustrated in the high profile arrest of the Canadian co-founders of Neteller, on Internet gambling violations stemming from the processing of betting transactions through their e-wallet service.<sup>29</sup> These individuals resided in the United States when they were arrested. The same occurred in connection with the arrest of David Carruthers of BetonSports.com, while changing planes in the U.S. on his way from Britain to Costa Rica.<sup>30</sup> A defendant waives any challenges to personal jurisdiction when he or she is served with legal process while physically present in the subject jurisdiction.<sup>31</sup>

#### **IV. Extradition**

It would be one thing for the U.S. Department of Justice to seek an indictment against a Canadian citizen under the UIGEA, but it is quite another matter for that citizen to be brought across the border to face trial. In fact, it does not appear that any published judicial opinions have acknowledged or approved of extradition of Canadian citizens for gambling crimes - let

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<sup>29</sup> David Baines, "Multi-billion-dollar charges for B.C. man," *The Vancouver Sun* (January 17, 2007), found at: <http://www.canada.com/vancouver/news/story.html?id=07c327e5-3aa6-4794-b600-617b347ade24>.

<sup>30</sup> Matt Richtel, "Arrest Made in Crackdown on Internet Betting," *New York Times* (July 18, 2006), found at: <http://www.nytimes.com/2006/07/18/technology/18gamble.html>.

<sup>31</sup> *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (citing extensive precedent).

alone Internet gambling offenses. However, in order to determine the potential responsibility for compliance with the UIGEA by Canadian citizens, a review of the applicable extradition treaties and agreements is in order.

The United States and Canada are party to the Treaty on Extradition between Canada and the United States of America, entered into force on March 22, 1976 (hereinafter the “1976 Treaty”), which provides the framework for extradition of citizens between the U.S. and Canada. As with most extradition treaties, the concept of dual criminality is emphasized. That is to say, for extradition to be warranted, the criminal activity for which the foreign citizen is being sought by the prosecuting nation must be treated as criminal in both the “requesting jurisdiction” and the “requested jurisdiction.”

The 1976 Treaty allows for extradition if the offense involved is punishable by the laws of both jurisdictions by imprisonment or other forms of detention for a term exceeding one year or more.<sup>32</sup> In addition, when the allegedly criminal activity was committed outside the territory of the United States by the Canadian citizen, extradition must be granted only where the laws of the requested state provide for jurisdiction over the subject offense committed in similar circumstances.<sup>33</sup> In the absence of this dual criminality element, extradition by the Canadian government would be purely voluntary and discretionary.<sup>34</sup>

The 1976 Treaty was supplemented in 1985 by the Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (“Mutual Legal Assistance Treaty”).<sup>35</sup> Under this Treaty, extradition is justified for any offense that may be ‘prosecuted upon indictment’ in Canada, or which

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<sup>32</sup> 1976 Treaty at Article 2(1). (Office consolidation incorporating the protocol of amendments ratified and entered in to force; November 22, 1991.)

<sup>33</sup> 1976 Treaty at Article 3(2).

<sup>34</sup> *Id.*

<sup>35</sup> CTS 1990 No. 19 (Entry into force 3/18/1985).

constitutes a felony in the United States.<sup>36</sup> However, Canada may deny assistance with extradition in any case, to the extent that the request is contrary to its public interest, as determined by its Central Authority.<sup>37</sup> The United States and Canada also agree, as part of the Mutual Legal Assistance Treaty, to share information regarding the nature and location of the financial proceeds of criminal activity, to assist in forfeiture and in the collection of fines imposed as a sentence in a criminal prosecution.<sup>38</sup>

Violations of the UIGEA are considered to be a felony level offense in the United States.<sup>39</sup> While Canada has toyed with the idea of passing a law similar to the UIGEA<sup>40</sup> thus far, such legislation does not exist. However, most legal analysts agree that Internet gambling is prohibited by the Criminal Code in Canada as an offense presentable by indictment.<sup>41</sup> However, Canada's proscriptions focus on the gambling activity itself, and not the acceptance of financial transactions associated with Internet gambling, as does the UIGEA. Accordingly, the dual criminality element may be missing. This analysis boils down to how specifically similar the two criminal statutes must be, for dual criminality to exist. Obviously, each country approaches the issue of criminal legislation in a slightly different manner. Accordingly, identical precision will not be required for extradition to succeed. However, the two laws must prohibit essentially the same conduct for dual criminality to be established.<sup>42</sup> With respect to the UIGEA, dual

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<sup>36</sup> 1985 Treaty at Article 1.

<sup>37</sup> 1985 Treaty at Article 5(1)(b).

<sup>38</sup> 1985 Treaty at Article 17(1) & (2).

<sup>39</sup> 31 U.S.C. § 5366 (violations are a 5 year felony offense).

<sup>40</sup> J. Ivison, "Canada Targets Kahnawake Online Poker Sites and More for UIGEA Ban," *PokerPages.com*, (March 6, 2008).

<sup>41</sup> See Sections 202, 204 & 206, which are found in Part VII of Canadian Criminal Code R.S.C. 1985, c. C-46, as amended (per Michael D. Lipton, Q.C.)

<sup>42</sup> K. Prost, "Breaking Down the Barriers: International Cooperation in Combating Transnational Crime," ("However, the modern test for dual criminality, incorporated in many extradition treaties and instruments, focuses not on technical terms or definitions but on the substantive underlying conduct.")

criminality is arguably lacking given the distinction between online gambling, on the one hand, and acceptance of financial transactions related to gambling, on the other.

## V. Conclusions

Prosecution and extradition of Canadian citizens under the UIGEA seems to be at least theoretically possible under the relevant treaties and legal principles; however, the likelihood of this actually happening is remote. The initial determination as to whether the UIGEA was intended to apply extraterritorially seems to resolve against the Government. No reference is made to foreign commerce in the terms of the Act, and the effects produced by foreign online gambling entities are tangential at best.

Extradition appears to be a possibility, under the appropriate circumstances. Online gambling activity is punishable by a term of incarceration exceeding one year, in both the United States and Canada, thus satisfying that element of the 1976 Treaty. Acceptance of Internet gambling transactions under the UIGEA is a felony in the United States, while Internet gambling activity, itself, is prosecutable by indictment in Canada, thus satisfying the threshold requirements of the Mutual Legal Assistance Treaty. To the extent that the activity forming the basis for the alleged criminal offense occurred exclusively in Canada, as opposed to the United States, only discretionary extradition would be triggered under the 1976 Treaty, given the differences in approach to criminalizing online gambling activity taken by the respective countries.

The U.S. courts have taken jurisdiction over cases involving the criminal activity of foreigners, in appropriate cases, particularly those involving racketeering, drug, and other “vice” activities. Notably, illegal gambling activities can constitute ‘predicate offenses’ for

racketeering, under U.S. law.<sup>43</sup> While extraterritorial application of gambling statutes is exceedingly rare, some precedent arguably exists for such application, and the Congressional intent surrounding the UIGEA appears to contemplate some degree of foreign activity as triggering conduct for its criminal prohibitions.<sup>44</sup> Internet gambling operations allow bettors to conduct financial transactions via the website, including the opening of a player account and the actual placement of monetary bets. Accordingly, under the *Zippo* test for personal jurisdiction, the website activity may result in a finding of personal jurisdiction, authorizing the courts to proceed with a trial against a Canadian citizen. However, this would require the courts to apply the website jurisdiction test in a way it has never been applied with respect to legal claims against foreign citizens.

While the technical, legal basis appears to exist for this type of enforcement activity, it will be rare in practice. The United States does not exercise criminal jurisdiction over the entire globe, despite the apparent desires of some politicians. While federal authorities have sought and obtained the voluntary cooperation of foreign governments in connection with civil matters like forfeiture and asset seizures,<sup>45</sup> actual criminal prosecution is a much different matter. Issues of comity and diplomacy arise when one country seeks to enforce a controversial, politically-motivated law against citizens of a friendly, neighboring nation.

The viability of the UIGEA is uncertain at present, with various bills pending that may substantially change or even gut the criminal prohibitions entirely.<sup>46</sup> The idea of physically seizing a Canadian businessman (or woman) operating under the arguable authority of the

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<sup>43</sup> Racketeer Influenced Corrupt Organizations Act, (“RICO”), 18 U.S.C. 196.

<sup>44</sup> See fn. 9, *supra*.

<sup>45</sup> *U.S. v. Cohen*, 60 F.3d 68 (2<sup>nd</sup> Cir. 2001), *cert. den.* 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777 (2002).

<sup>46</sup> See the Internet Gambling Regulation and Enforcement Act of 2007, HR 2046, introduced by Rep. Barney Frank (D-Mass); The Internet Gambling Study Act, HR 2140, introduced by Rep. Shelley Berkeley (D-Nev); the Skilled Game Protection Act, HR 2610, introduced by Rep. Robert Wexler (D-Fla); and the Internal Revenue Code Amendment, HR 2607, introduced by Rep. James McDermott (D-Wash).

Kahnawake Mohawk Territory for violation of a law which has been widely viewed as politically motivated and subject to reversal, is unseemly at best. Diplomatic repercussions would undoubtedly result. While Canadian citizen operators might take little solace in mere diplomatic protection from U.S. extradition and prosecution, these concerns are real and render such an enforcement action unlikely at best.

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