



A Comparative Overview of Canadian and U.S. Indigenous Gaming Law

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While both Canadian First Nations and American Indian tribes are engaged in gaming, the respective industries in each country are very different. In the United States, Indian gaming is a \$29.9 billion industry, with some 240 American Indian tribes operating over 470 gaming operations in 28 states. In Canada, the First Nations gaming industry consists of fewer than 20 casinos in five provinces, along with limited “VLT palaces” in a sixth province, with estimated combined gross revenue of \$1 billion. In the U.S., Indian gaming is widely regarded as transformational of many tribal communities. In Canada, gaming’s effects are similar and noteworthy, yet significantly less substantial and considerable.

This article provides an overview of the First Nations gaming industry in Canada in order to provide some comparative explanation for the disparate scope, size, and impacts of the indigenous gaming industries in each country.

BACKGROUND

The rise of a First Nations gaming industry followed a similar trajectory to Indian gaming in the U.S., at least initially. First Nations expressed interest in establishing reserve casinos in the 1980s. Taking their lead from American Indian tribes, First Nations claimed that operating casinos was an element of their inherent right to control reserve economic development. Federal officials challenged this argument, leading to police raids of First Nations casinos and gaming halls in Manitoba, Saskatchewan, and Ontario. While similar circumstances led to a tribal victory in the U.S. Supreme Court’s 1987 decision in *California vs. Cabazon Band of Mission Indians*, the outcome was very different in Canada. In the 1996 case that was *Cabazon’s* analog, *R. v. Pamajewon*, the Supreme Court of Canada ruled that First Nations did not possess an Aboriginal right to control and regulate casino gaming, and that on-reserve gambling facilities were not exempt from provincial legislation regulating gaming.

With the *Pamajewon* decision, provinces were now entitled to impose regulatory frameworks on First Nations casinos—while in

the U.S., under *Cabazon* and the 1988 Indian Gaming Regulatory Act (IGRA), states only had limited authority to regulate casino-style Indian gaming. First Nations soon discovered that provincial officials did not consider reserve casinos as directly tied to Aboriginal self-government, but instead as economic activity that appropriately fell under provincial authority. Accordingly, the provinces retained centralized authority for regulating First Nation casino operations while simultaneously restricting First Nations’ economic and political agency.

PROVINCIAL REGULATION

First Nation gambling ventures in Canada are regulated in one of three ways (or a combination in certain cases). First, a First Nations community may apply for a provincial casino license as a charity. Second, a First Nations community may negotiate an agreement with the host province to operate a casino, somewhat akin to the Class III tribal-state compacts required under IGRA (but without mandated protections for indigenous nation sovereignty). Third, a First Nations community may obtain a non-charitable gaming license to conduct gambling events from a provincially approved licensing body.

The different regulatory approaches have resulted in a variety of gaming models nationally. For example, the First Nations in Saskatchewan pursued the second avenue, instigating negotiations with the province to allow gaming. The successful negotiations led to the creation of the Saskatchewan Indian Gaming Authority, which provides reserve casino oversight, including licensing authority. But in Nova Scotia, ten First Nations operate “VLT palaces” housing some 580 video lottery terminals. In British Columbia, a consortium of Ktunaxa Nation, Samson Cree First Nation and Mnjikaning First Nation runs a single casino in Cranbrook. In Ontario, First Nations operate one large casino with 133 beneficiaries, along with two smaller charity casinos, in which the host charity First Nation receives a percentage of VLT revenues. And in

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Alberta the First Nations were forced to pursue a combination of the first and second options.

Provincial officials also have leveraged their authority for gambling oversight in multiple ways under the three regulatory approaches. In addition to demanding provisions dictating First Nation revenue use, Ontario and the three Prairie Provinces—Manitoba, Alberta, and Saskatchewan—demanded that First Nations pay an annual operating fee. Alberta, Manitoba, and Ontario further required First Nations to use outside casino operators. Each province with First Nations gaming, with the exception of British Columbia, insisted on revenue distribution agreements to benefit all provincial First Nations; this demand also effectively limited the number of reserve casinos, as a small number of casinos support large numbers of First Nations communities.

IMPACTS

In recent years First Nations casino operations in Canada have settled into predictable operational patterns. Apart from the negligence that temporarily plagued the Saskatchewan Indian Gaming Authority in the early 2000s, the casinos remain relatively low-profile operations and accomplished employers. Since 1996, the number of reserve casinos has grown from five to 18: one in British Columbia, five in Alberta, six in Saskatchewan, three in Manitoba, three in Ontario (one for profit and two under charity licenses), along with VLT palaces operating in Nova Scotia. Combined, these 18 operations and the VLT palaces generate an estimated \$1 billion annual gross revenues.

The majority of First Nations casinos are “repeater market” casinos, meaning that gambling is the main draw and the customer base is largely local, with patrons visiting regularly. There are four integrated resorts: Casino Rama in Ontario, the Grey Eagle Casino and River Cree Resort and Casino in Alberta, and St. Eugene Resort and Casino in British Columbia. The integrated resorts offer hotels, dining, and entertainment alongside gaming, and draw visitors to the area.

Each provincial First Nations gaming model has generated both positive and negative outcomes. Perhaps most important, First Nations that previously were reliant on generally parsimonious government funding can now count on consistent revenue streams from the casinos. Such revenue is channeled into local economic development and enhanced infrastructure in First Nations communities, leading to improved socioeconomic health for both communities and individuals. When combined with increased social service funding and delivery, First Nations are experiencing local spending increases and heightened social, political, and economic equilibrium.

First Nations casinos employ roughly 2,200 Aboriginal individuals at \$77 million annually (as a point of comparison, tribal casinos in California alone employ roughly 32,400 workers directly, with an average wage of \$14.80 per hour in 2012), though not all of these dollars remain in Aboriginal communities. However, wages can have an immediate impact, for they often are quickly spent on local products and services where available. Localized business development is encouraged and the additional revenues enable outreach as First Nations seek out economic partnerships and other

investment opportunities. Greater economic stability brings with it the ability of First Nations to focus on governance, which leads to political stability and a sense of local empowerment.

Finally, and importantly, no discernable post-casino increases in problem gambling or casino-related crime have been reported in the provincial First Nations communities or among its Aboriginal populations.

POLICY ISSUES

Yet two policy issues hinder the First Nation gaming industry reaching its true economic potential. First, as mentioned above, each province opted to divert substantial gaming revenues into provincial treasuries and away from struggling First Nations communities. In total, between 2008 and 2011, roughly \$750 million in gaming revenue was diverted from First Nations to the provinces. Under *Pamajewon's* assignment of provincial regulatory authority, the expansion of First Nations gaming has been markedly limited—18 casinos compared to over 450 tribal casinos in the U.S. Limited casino expansion diminishes the ability of First Nations to leverage gaming revenue to expand economic development through investment of gaming profits. Thus, issues surrounding revenue sharing are even more pressing in Canada, as First Nations' ability to generate and leverage gaming revenue already is constrained by provincial regulation. Further, without an analog for the federal oversight provided by the U.S. Secretary of the Interior in IGRA's compact approval process, similar safeguards do not exist for First Nations regarding provincial revenue-sharing demands.

Second, while not required under federal law, the provinces included site prescriptions requiring casinos be constructed in reserve communities. In the U.S., IGRA requires that tribal casinos be located on “Indian lands,” and as a result, the profitability of a tribal casino generally is dictated by the location of the tribe's lands—casinos located near major metropolitan cities generally are more profitable than those located in rural areas. The same has proved true in Canada: First Nations gaming properties located nearby a significant market (Toronto, Edmonton, and Calgary) provide greater benefits compared to the smaller casino properties located in more isolated areas. The provincial site prescriptions considerably compromised the profitability of most of the First Nations casinos located in the Prairie Provinces, as reserves in those provinces are generally located away from large urban populations. As in the U.S., the result is location-based market constraints, often falling most heavily on the First Nations struggling with already limited options for economic development and severe socioeconomic deficits.

LAW AND POLICY COMPARISONS

First Nations gaming in Canada provides some insight into the factors that have contributed to the success of the Indian gaming industry in the U.S. Both *Cabazon* and *Pamajewon* served as pivot points in the law and policy governing indigenous gaming. In the U.S., under *Cabazon's* holding, the law pivoted to support a broad conception of tribal sovereignty that favored federal regulation and strictly limited state regulation. This turn led to IGRA and federal public policy goals of Indian gaming as a means of strengthening

tribal governments and tribal economic development. In Canada, under *Pamajewon's* holding, the law pivoted away from Aboriginal sovereignty and toward provincial authority over gaming. This turn led to provincial control without clear guiding—or overriding—public policy goals in support of strengthening First Nation communities and governments.

A relatively broad conception of tribal sovereignty under U.S. law and a dominant role for federal, rather than state, regulation under IGRA have contributed to the growth and success of Indian gaming. The resulting success should be assessed not just in terms of casino expansion and revenue generation, but also in terms of long-lasting enhancements in tribal government infrastructure and capacity, as well as in improved socioeconomic health and quality of life for tribal members.

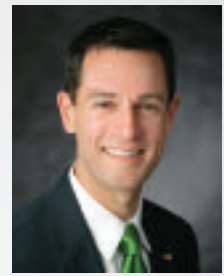
In the U.S., tribes and states have proven that they may reach cooperative and mutually beneficial policy solutions in the context of gaming, often captured in the tribal-state compacts required under IGRA. A critical prerequisite, though, is that such solutions are the product of respectful government-to-government negotiations at a level bargaining table—and overarching federal authority, as well as law and policy that supports tribal sovereignty, are necessary to encourage and ensure mutually respectful relations. In this way, Indian gaming in the U.S. has enhanced both states' and tribes' interests in and abilities to act as cooperative policymakers.



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Despite key differences in size, scope, and impacts, in Canada and the U.S., strong indigenous government institutions, thriving Native communities, and improved government-to-government relations between tribes and states—and between First Nations and provincial governments—have the potential to become gaming's most positive legacies. ❁

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