



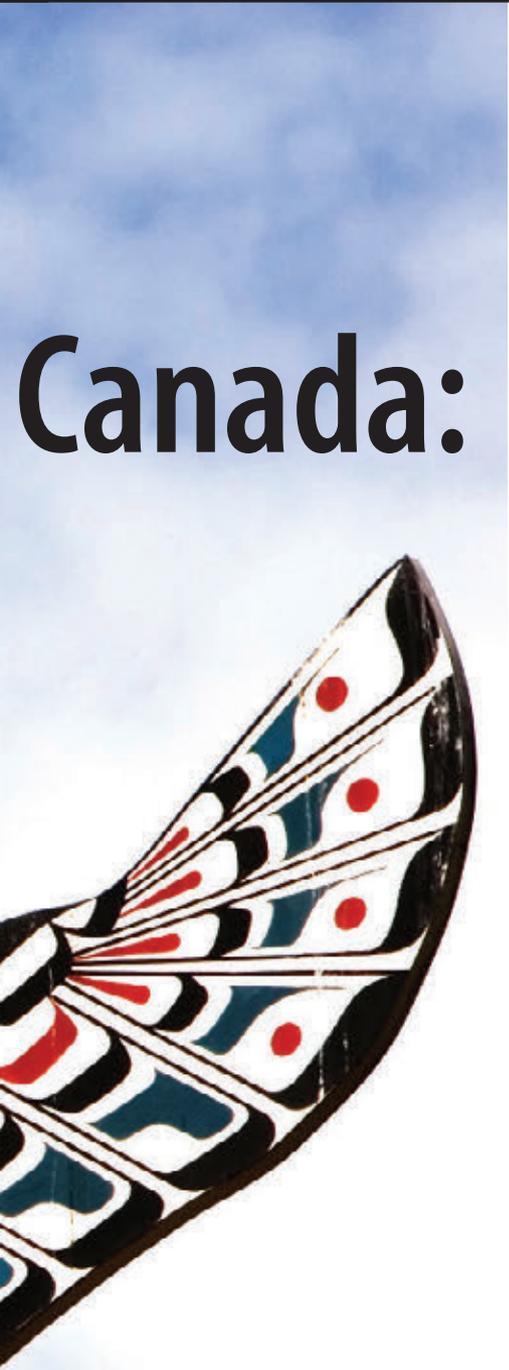
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# First Nations Gaming in A Case for Reform

*For many First Nations across Canada, wagering and gaming have formed an integral part of their culture since well before European contact. Gaming has throughout aboriginal history served as an important means of leisure and community and social interaction, as well as being a central feature of economic, diplomatic and political practices in pre- and post- contact indigenous communities.<sup>1</sup>*





# Canada:

The ability of First Nations to capitalize on gaming activities today, however, is significantly restricted by the gaming provision in the Criminal Code and the disjointed provincial regulations that provide the provinces with the monopoly on the conduct and management of gaming and betting activities.

## THE CANADIAN LANDSCAPE

### The Criminal Code

Part VII of the Criminal Code deems most forms of gaming and betting illegal. Section 207, however, provides an exception for provincial governments under which they can manage and operate their own gaming activity, or under which they can authorize charitable or religious organizations within the province to undertake their own gaming operations.

The provincial governments have passed legislation which regulates gaming and betting activity within their respective borders. Despite the relative similarity in gaming legislation generally, how the provinces have addressed First Nations gaming within this framework varies substantially across provinces.

### Provincial Approaches to First Nations Gaming

A brief survey of the different provincial regimes helps illustrate the disjointedness of the current approach to First Nations gaming in Canada.

#### British Columbia

In British Columbia, the government has not acknowledged any kind of unique relationship between First Nations and gaming. There is no arrangement between First Nations and the B.C. government and, as a result, there is practically no difference between the way in which First Nations gaming is treated from gaming in the Province generally. This despite the interest expressed by aboriginal groups in B.C. Efforts were made to establish the B.C. First Nations Gaming Initiative in 2010 – a gaming commission set up to pursue gaming opportunities on First Nations lands in B.C. Over 150 First Nations in B.C. have agreed to support the Initiative<sup>2</sup>. Despite such efforts, there is only one casino in the province which is operated by a First Nation.<sup>3</sup>

#### Alberta

Gaming in Alberta operates under the charitable model, where casino activities may only occur when eligible charitable or religious groups apply for and receive licenses to operate those activities. First Nations in Alberta are regulated and operate under the same terms and conditions as off-reserve casinos, consequently, First Nations casinos in Alberta must be associated with charitable organizations that have a connection to the host First Nation. The *Host First Nations Charitable Casino Policies Handbook*, published by the Alberta Gaming & Liquor Commission (“AGLC”) sets out these rules for First Nations gaming in the province.<sup>4</sup>

#### Saskatchewan

In 1993 the White Bear First Nation opened a casino on its reserve without provincial authorization in contravention of the Criminal Code. The justification put forward was that First Nations have the right to set up casinos on their reserves without the approval of provincial governments and to do so is within the jurisdiction of First Nations' governments.<sup>5</sup> Although shut down by the RCMP shortly after commencing operations, it has since led to a string of negotiations between the province and First Nations in Saskatchewan and to the formation of the Saskatchewan Indian Gaming Authority (“SIGA”), the agency responsible for operating all First Nations Casinos in the Province. In 1996 SIGA opened four “community supported casinos” which are in operation to this day pursuant to agreements made between SIGA and the Saskatchewan Liquor and Gaming Authority (the “Casino Operating Agreement”) and the province (the “Gaming Framework Agreement”).<sup>6</sup> Under these agreements, 50% of the net casino revenue goes into the First Nations Trust, while the remaining revenues are split between the Saskatchewan government and Community

Development Corporations. Furthermore, as of 2007, the province has delegated regulatory authority over licensing charity gaming to the Indigenous Gaming Regulators.<sup>7</sup> In the 2015–2016 fiscal year, it was reported that SIGA had total revenues of \$258.3 million.<sup>8</sup>

### Manitoba

In Manitoba, First Nations have the ability to enter into Gaming Commission Agreements with the province, under which the authority to license and regulate charitable and religious gaming events on reserves is delegated to the First Nations. Although the types of games permitted under these agreements are limited to bingo, break-open tickets, raffles, and other lottery schemes, all profits from these licensed events remain with the licensees on the reserve. First Nations in the province have recently voiced their discontent with this limited jurisdiction, as well as their intent to move towards internet gaming, however so far without success.<sup>9</sup>

### Ontario

In Ontario, there is no formal First Nations gaming regulatory authority, however three First Nations operated casinos exist in the province, all operated under the Ontario Gaming Control Act and Regulations<sup>10</sup>. Two of these properties are located roughly 100 kilometers northwest of Toronto, while the third is located 50 kilometers from the Manitoba border. First Nations in the province benefit indirectly from provincial gaming activities operated by the Ontario Lottery and Gaming Corporation. Net revenue from all gaming activities in the province is distributed according to a revenue sharing agreement, under which 1.7% of

the provincial gaming revenue generated from all gaming activities is distributed to First Nations in the province.<sup>11</sup> Besides this revenue sharing agreement, there is little by way of special treatment of First Nations gaming today.

### Quebec

In Quebec, the Régie des Alcools, des Courses et des Jeux oversees the registration of persons and enterprises that offer gaming and betting products and services within Quebec under the conduct and management of Loto-Quebec. The current framework allows First Nations in Quebec to engage in land based gaming activities by offering VLTs in liquor-licensed establishments,<sup>12</sup> as well as bingo, provided that they have been licensed by the Régie;<sup>13</sup> however, this is not a right exclusive to First Nations in the province.

There are instances of much more sophisticated First Nations gaming operations in Quebec. The Mohawk Nation of Kahnawake, 10 miles south of Montreal, established the Kahnawake Gaming Commission (“KGC”) in 1996, a self-appointed licensing authority for gaming activity within and from their territory. The KGC has developed into an internationally-known online gaming regulator, through its remote gaming regulatory commission and the operation of its server park, and also regulates land-based poker rooms and raffles. The Mohawks of Kahnawake conduct these operations under the asserted authority of their constitutionally protected rights to pursue activities which formed an integral part of their culture prior to European contact.<sup>14</sup> The KGC currently licenses over 50 online gaming operators from around the world, representing over 100 online gaming websites,<sup>15</sup> while fostering

the economic development of the local community propelled by the technical and other ancillary services jobs required to operate such an enterprise.

### A NEED FOR REFORM

As the above survey demonstrates, the status of First Nations gaming regulations and First Nations access to economic development and job creation opportunities in the gaming and betting industry in Canada is a patchwork – haphazardly developed and should be considered for reform and improvement.

This reform needs to come at the federal level. There have been proposals to establish a national aboriginal gaming body to gain more control over the regulation and operation of First Nations casinos, most notably at the annual meeting of the Assembly of First Nations in Winnipeg in 2010,<sup>16</sup> but this will be difficult until there is a coherent, centralized framework. Guidance for a national scheme in Canada can come from the enterprising approaches taken by SIGA in Saskatchewan, or more directly from the federal approach taken in the United States.

### The SIGA Model

As set out above, the Saskatchewan Indian Gaming Authority (“SIGA”) is the agency responsible for running all First Nations Casinos in Saskatchewan. SIGA operates community supported casinos under an agreement with the province. Under these agreements, a percentage of the net casino revenue goes into the First Nations Trust. While this model allows the First Nations to operate their own gaming facilities and benefit directly and indirectly from gaming revenue, the model does not address the First Nations claims to self-autonomy over

1. Belanger, Yale Deron, ed. *First nations gaming in Canada*. Univ. of Manitoba Press, 2011.

2. see Wendy Stueck (March 06, 2013). “When it comes to casinos, natives feel they’ve got game”. *The Globe and Mail*; and Justine Hunter (June 28, 2010). “B.C.’s First Nations to start their own gambling authority”. *The Globe and Mail*.

3. *Casino of the Rockies at the St. Eugene – Ktunaxa, Samson Cree & Chippewas of Rama Nations*.

4. Section 1.4.1 makes it clear that the AGLC is responsible for licensing and regulating First Nations casino facilities. Section 1.6.1 sets out that First Nations must be issued a license to operate a casino and section 1.6.2 of the Handbook and section 20(1) of the Alberta Gaming and Liquor Regulations states that only eligible charitable or religious organizations can be licensed. Section 2.1.1 of the Handbook sets out the requirements for Charities applying for a Casino License on a reserve.

5. “Bear Claw Casino Opens at White White Bear”. *Saskatchewan Indian*, Vol. 26, No. 1, December 1996, p. 12.

6. The agreements, as amended in 2002 can be found at [http://www.igr.ca/Docs/2002\\_Gaming\\_Framework\\_Agreement.pdf](http://www.igr.ca/Docs/2002_Gaming_Framework_Agreement.pdf) and [http://www.igr.ca/pub\\_docs/Casino%20Operating%20Agreement.pdf](http://www.igr.ca/pub_docs/Casino%20Operating%20Agreement.pdf)

7. Part 10 of the 2002 Framework Agreement gives the SIGA the authority to set up their own regulator for on-reserve charitable games. The 2002 SIGL Regulatory Agreement outlines the process (<http://www.igr.ca/Docs/SIGL%20Regulatory%20Agreement.pdf>)

8. SIGA Annual Report 2015–2016 ([http://www.siga.sk.ca/view-annual-reports/SIGA\\_Annual\\_Report\\_2016/files/assets/basic-html/page-1.html](http://www.siga.sk.ca/view-annual-reports/SIGA_Annual_Report_2016/files/assets/basic-html/page-1.html))

9. See Alexandra Paul (June 10, 2016). “New deal on gaming: First Nations”. *Winnipeg Free Press*, and Sean Kavanagh (September 14, 2016). “Province and First Nations casino owners compete for gambling dollars”. *CBC News*.

their historical right to engage in gaming activities for their own benefit, as a large percentage of the revenue is shared with the province and because under this model the province has no obligation to enter into such agreements (let alone negotiate in good faith as is required under the US framework). While this model would not require an overhaul of the Criminal Code in its current form, it may do a poor job of addressing the cultural and political needs of First Nations. The American model may therefore be a more appropriate model.

### The American Model

In the United States, the Indian Gaming Regulatory Act (“IGRA”), enacted in 1988, provides a centralized, national legislative basis for the operation and regulation of tribal gaming. The IGRA established the National Indian Gaming Commission (the “Commission”), an independent federal regulatory agency within the Department of the Interior established to work within this regulatory framework and to advance the objectives of the IGRA. Those objectives include the protection of gaming as a source of revenue and economic development in indigenous communities and protection of the industry from organized crime.<sup>17</sup> At least two of the three Commissioners must be members of an Indian tribe.

The IGRA divides all gaming activity into three classes.<sup>18</sup> Tribal governments have the exclusive jurisdiction to license and regulate the lowest class of gaming, which includes traditional games and social gaming for minimal prizes.<sup>19</sup> The second class of games can still be operated and regulated by tribal governments but requires that regular audits be provided to the Commission.<sup>20</sup> This class of games

includes non-banked card games, bingo, and games similar to bingo. The highest class of games include casino-style games, such as slot machines, blackjack, craps and roulette. Tribal governments have more restricted authority to conduct these types of games. In order to do so, the tribe must have negotiated a compact with its state government, which then must be approved by the Secretary of the Interior, a member of the U.S. Cabinet.<sup>21</sup> Furthermore, in order to operate and regulate the two highest classes of games, that class of gaming must be permitted in the state, and the Tribe must have adopted a gaming ordinance approved by the Commission.

This US model provides a greater degree of autonomy and self determination than the SIGA framework. Furthermore, the IGRA obliges states to enter into negotiations and deal with First Nations in good faith,<sup>22</sup> thereby propelling compacts forward rather than providing states with the legislative underpinnings to unilaterally restrict a tribe’s ability to benefit from gaming, as is the case in Canada. This framework has also proven to effectively stimulate the development of First Nations gaming operations in the U.S. Currently there are 474 gaming operations run by 256 tribes generating total annual revenue of almost USD \$30 billion.<sup>23</sup>

### WAYS FORWARD – WHY AND HOW

**Why Move Forward? Evidence from the U.S.** The US model applied in Canada can encourage the development of profitable First Nations gaming operations and the accompanying community economic development that usually follows.

With the expansion of First Nation casinos, expected benefits can include population increases from young adults moving back to reservations; increased

adult employment; a decline in the number of working poor<sup>24</sup>; and increased tourism. In the U.S., studies have shown that casino-related and non-casino related spending multiplies throughout the state’s economy, and the effects of this spending on employment and on business and government revenues reach well beyond the host reserve.<sup>25</sup> For example, in California, one study has estimated that in 2012, 56,000 jobs in the state were attributable, directly or indirectly, to tribal gaming, and nearly half of the USD\$8 billion economic output came through secondary effects (i.e. beyond the tribes own direct spending).<sup>26</sup>

Furthermore, revenue can (and must under the IGRA) be reinvested in the community to help fund education, housing, social programs and cultural preservation, through the establishment of museums and historic archive centres. The 308,000 square foot Mashantucket Pequot Museum and Research Centre, made possible by the Pequot’s Foxwoods Resort Casino, is a notable example of gaming revenues being reinvested towards the preservation of aboriginal culture.<sup>27</sup>

### How to Move Forward

The federal government could provide a carve-out for First Nations gaming, similar to that accorded to the provinces. Taking guidance from the IGRA, the federal legislation could provide a framework under which the provinces must negotiate with First Nations in good faith to arrive at a mutually beneficial compact. As discussed above, Saskatchewan has already pursued such compacts, but without a federal overlay, the ability of most First Nations in the country to access the benefits of gaming is severely restricted.

10. *Gaming Control Act, 1992, SO 1992, c. 24*

11. *Gaming Revenue Sharing and Financial Agreement, February 19, 2008, section 2.2. ([http://www.ofhlp2008.org/docs/4\\_gamingrevenuesharingandfinancialagreement.pdf](http://www.ofhlp2008.org/docs/4_gamingrevenuesharingandfinancialagreement.pdf))*

12. *L-6, r. 3 – Rules respecting video lottery machines, section 26.*

13. *S-13.1, r. 1 – By-law respecting bingo, section 2.*

14. *Section 35 of the Constitution Act 1982 recognizes and affirms existing aboriginal rights. The position of the Mohawks of Kahnawake is that they have the aboriginal right to regulate gaming on their territory, and that that right has never been extinguished.*

15. *Interactive Permit holders List, updated July 5, 2017 (<http://www.gamingcommission.ca/interactiveURL.htm>)*

16. See: <http://www.cbc.ca/news/canada/first-nations-propose-aboriginal-gaming-body-1.967319>

17. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2702*

18. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2703(8), (9), and (10).*

19. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2710(a)(1).*

20. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2710(b)(2)(C) and (D).*

21. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2702(d)(3)(B).*

22. *Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2710(d)(3)(A).*

**FIRST NATIONS INTERNET GAMING**

An overhaul in First Nations gaming legislation could also make accommodations for online gaming provisions. Part VII of the Criminal Code has not been materially revised since 1985 – well before the common adoption of the Internet. The Criminal Code in its current form is outdated both with respect to First Nations gaming and online gaming. Efforts are already being made by some First Nations to enter the online gaming industry and a complete overhaul of the gaming provisions could be an opportunity for First Nations to operate online gaming businesses. The shift towards internet gaming would allow First Nations in smaller markets, that would be

unable to attract enough visitors to a land-based casino, to benefit from a national aboriginal gaming system. For example, in the U.S., 17.3% of Indian gaming establishments generated 72.9% of the gross Indian gaming revenue in 2016. This is because most of the gaming revenue from land-based casinos comes from those close to large urban centres.

A shift towards regulating First Nations internet gaming would remove the land-based bias and allow First Nations across the country to benefit more equally. The federal government needs to address these issues in tandem, as the antiquated gaming provisions in the Criminal Code are preventing the First Nations in Canada from tapping the significant economic

development benefits of gaming, an activity that, for many groups, has been important to their culture for millennia. **CGL**

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23. National Indian Gaming Commission Gross Gaming Revenues 2012-2016 (<https://www.nigc.gov/images/uploads/reports/2016GamingRevenuesbyRangeChart.pdf>).

24. Ibid

25. See the 2014 California Tribal Gaming Impact Study (<http://cniga.com/wp-content/uploads/2017/02/EIS-Final-2014.pdf>); The Economic and Fiscal Impacts of Indian Tribes in Washington (<http://www.washingtonindiangaming.org/images/content/wigaconceptupt3.pdf>); and

26. 2014 California Tribal Gaming Impact Study.

27. Judith H. Dobrzynski (August 2, 1998). "Museum for a Tribe That Struck It Rich". *New York Times*.

28. Examples being the Mohawks of Kahnawake and the website Northern Bear Casino launched by the White Bear First Nation in 2012 and subsequently shut down in 2014 (<http://www.cB.C.ca/news/canada/saskatchewan/saskatchewan-man-launches-province-s-1st-online-casino-1.1160623> and <http://www.cB.C.ca/news/canada/saskatchewan/saskatchewan-s-1st-online-casino-shuts-down-1.2793556>)

29. National Indian Gaming Commission, 2016 Gaming Revenues by Range.

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