



BY GREG GEMIGNANI



# Sports Betting South of the Border

*Almost a million Canadians visit Las Vegas every year. Like other visitors, they enjoy the great restaurants, shopping, casino games and sports wagering that Las Vegas has to offer. Many Canadians visit other cities and states in the United States where they can enjoy many of the same activities offered in Las Vegas, except for sports wagering. This is because of a strange quirk in U.S. federal law that is currently under review by the U.S. Supreme Court.*

In 1931, Nevada was the first state in the United States to offer legal “wide open” gambling. At that time, gambling was stereotypically viewed as a criminal activity, conducted by the unscrupulous to prey on the unfortunate. Regrettably, some of that stereotype was accurate, in particular the stereotype that many casino operators were refugee criminals from other jurisdictions. Through a series of state laws, Nevada shaped its modern gaming system to address the character of those in the gaming industry. This

culminated in the Gaming Control Act of 1959 championed by Governor Grant Sawyer. This law created the two-agency system that we enjoy today, and it is that system that served as a catalyst that transformed a pariah industry in a desert state into a legitimate global industry.

As part of Nevada’s “wide open” gambling, Nevada embraced sports wagering. Initially, sports wagering was operated by bookmakers in stand alone locations as the activity was viewed as less glamorous and attractive than

casino wagering. Also, bookmaking was a high-risk business and, despite outward appearances, the casino industry is fairly conservative. Table games and slot machines will provide a mathematical theoretical return to the house that always bears profit for the house over the long term. For a sportsbook, it is the bookmaker’s guess versus a patron’s guess as to the outcome of a sporting event or other event.

Even though Nevada embraced sports betting, the rest of the U.S. did not. Prior to 1919, sports betting laws were

sparse in the U.S. and sports betting was popular. However, the Black Sox scandal changed popular opinion regarding sports betting and most states outlawed bookmaking, stake holding, and sports betting. This didn't make the popular activity disappear, it just pushed it underground where it became a common source of revenue for organized crime.

In the post-war 1950s, the U.S. public was captivated by the image of the gangster and organized crime. Estes Kefauver, a Senator from Tennessee, held nationally televised hearings on organized crime that led to hearings on sports wagering. It became a hot issue for many politicians. In 1961, when John Kennedy became president, he appointed his brother Robert as Attorney General. Robert took up the challenge of addressing organized crime in America and pushed for legislation aimed at depriving organized crime of its money-making activities, including sports wagering. The resulting law was the Federal Wire Act of 1961.

The Federal Wire Act, essentially prohibits the transmission of bets, wagers, and information assisting in the placement of bets or wagers on across state and U.S. international borders. While there has been debate over the reach of the federal wire act, the current federal interpretation is that it applies directly to sports wagering.

Throughout the 1960s and 1970s, the U.S. Congress passed other laws to assist states in enforcing state gambling prohibitions, including sports wagering. However, there were no federal laws passed that were solely focused on sports wagering until the Professional and Amateur Sports Protection Act ("PASPA") was enacted in 1992.

While Nevada remained the only state with "wide open" sports betting, a few other states engaged in some forms of legal sports betting. Delaware's state lottery ran a three team NFL parlay product for a short time in the 1970s, Oregon's state lottery also ran a sports

betting product on NBA games from 1989 to 1991 and NFL games from 1989 until 2007. Finally, Montana offered legal low stakes charitable gambling on sporting events.

In response the success of the Oregon lottery product, the U.S. Congress introduced the intent of PASPA was to stop the spread of sports wagering in the U.S. PASPA essentially prohibits states or tribes from authorizing wagering on any sporting event or the athletic performances of athletes in sporting events and it prohibits anyone from relying on such laws to promote or conduct a sports wagering business. PASPA also contained exemptions for states that had sports wagering, and contained an exemption for New Jersey to offer sports wagering if it enacted laws to do so within one year of the enactment of PASPA.

However, this may be changing. As mentioned, New Jersey ultimately did pass laws and enacted regulations to address legal sports wagering in New Jersey, but it was 18 years too late to qualify for the PASPA exemption. In response, professional and amateur sports leagues filed suit to prevent New Jersey from acting on such laws. In a series of court opinions, PASPA was held to be constitutional by the Federal District Court in New Jersey and the Third Circuit Court of Appeals. After denying to hear the matter once, the U.S. Supreme Court decided to take up the matter and held hearings in December 2017 regarding the constitutionality of PASPA.

In the U.S. the federal government, while supreme, shares sovereignty with state governments. A doctrine was established by the U.S. Supreme Court decades ago that essentially prohibits the federal government from commandeering a state government to compel state government to act. The issue before the U.S. Supreme Court is whether PASPA violates that anti-commandeering principle.

The Court is likely to decide the matter in one of three ways:

1. PASPA is constitutional because it doesn't compel state government to act, but rather limits state governments in acting.
2. PASPA violates the anti-commandeering principles inherent in the U.S. constitution and is therefore unconstitutional in whole.
3. PASPA, as it applies to state legislatures, violates the anti-commandeering principles inherent in the U.S. constitution, and states can enact sports wagering regulations; however, PASPA as it applies to operators is constitutional and nobody can rely on state laws in non-exempted states to conduct sports wagering.

Even if PASPA is found to be unconstitutional, it will be some time before states enact legislation to regulate sports wagering. Some states have state constitutional issues, others have tribal-state compact issues, and still others will be slow to react or decide that sports wagering should remain illegal in their jurisdiction.

Currently, PASPA works to prevent states from authorizing legal sports betting, and the Federal Wire Act prohibits interstate and foreign sports betting, thus resulting in a sports betting market in the U.S. where Nevada is the only state with broad-based sports wagering, but its activities are contained within the borders of the state. If PASPA falls, then other states may seek to offer sports wagering, but without changes to the Federal Wire Act, all such activities will be contained within each authorizing state. **CGL**

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**Editor's note:** *On May 14, 2018, the U.S. Supreme Court rendered its decision voting 6 to 3 to strike down PASPA as being unconstitutional. Each U.S. state is now free to enact legislation authorizing or permitting sports betting within the state subject to the constitution in each state.*