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American Indian Tribes and Canadian First Nations: The Impact of Gaming Law and Policy on the Industry

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Introduction

In the United States, Indian gaming is a $29 billion industry, with some 240 American Indian tribes operating more than 450 gaming operations in 28 states. Alan Meister, Casino City's Indian Gaming Industry Report (2016). In Canada, the First Nations gaming industry consists of fewer than 20 casinos, along with limited "VLT palaces," with estimated gross revenue of $1 billion. See Yale Belanger, *Are Canadian First Nations Casinos Providing Maximum Benefits?*, 18 UNLV Gaming Res. & Rev. J. 65 (2014).

What explains the disparate size and scope of these respective industries? What lessons can be drawn from both Indian gaming and First Nations gaming that can be applied to the economic development of, and business dealings with, tribes in both countries?

Federal Indian law in the United States is both convergent with and divergent from the law that applies to First Nations in Canada. Although originating through similar colonial histories and eras of national policy, distinct foundational law in each nation has resulted in dissimilar approaches to tribal authority and jurisdiction, application of state and provincial laws, and economic development on reservations and reserves. As gaming arguably is the predominant business sector for both American Indian tribes and Canadian First Nations, lessons learned through the gaming sector are relevant to successful economic development for indigenous nations in both countries. Given that the gaming industry involves numerous enterprises that stand to profit from partnerships with indigenous nations and people, the stakes are high for successful commercial transactions. Doing business with First Nations in Canada or Native American tribes in the United States requires specific knowledge of the applicable laws and regulations, whether in the context of a gaming transaction or other business deal on aboriginal or tribal lands.

Legal Background

In both the United States and Canada, federal law and policy impacting indigenous nations grew from a focus on land claims and government recognition, and have followed mostly parallel legal and policy development since the 19th century.

In the United States, federal law is shaped largely by the Supreme Court's interpretation of the extent of congressional power under the Indian Commerce Clause, U.S. Const. art. I, § 8. The clause, providing that Congress has authority "[t]o regulate Commerce . . . with the Indian Tribes," makes "Indian relations . . . the exclusive province of federal law," *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 234 (1985), and "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petrol. Corp. v. New Mexico,* 490 U.S. 163, 192 (1989). Congress has exercised its authority to enact a multitude of federal statutes governing American Indian tribes and people. See generally 25 U.S.C. (Indians).

Federal power over tribes is balanced against tribal sovereignty, or the inherent governmental authority of tribes as pre- and extra-constitutional nations. The Supreme Court's modern conception of tribal sovereignty stems from the "Marshall Trilogy"—three cases authored by Chief Justice John Marshall in the early 19th century. In short, tribes retain limited sovereignty, with greatest authority over tribal members and tribal lands.

Importantly, states generally do not have power over tribes under U.S. law unless delegated by Congress, as through Public Law 280, ch. 505, 67 Stat. 558 (1953), which imposes state civil and criminal jurisdiction over some tribes. In its current form, the statute gives Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—often called "Public Law 280" or "mandatory" states—extensive criminal and limited civil jurisdiction over tribes within their borders, with a few exceptions. See 18 U.S.C. § 1162, 28 U.S.C. § 1360. The statute was amended to allow other states, with tribal consent, to assume jurisdiction. See 28 U.S.C. §§ 1321–22.

In Canada, the federal government is assigned power through section 91(24) of the Constitution Act of 1867: "[I]t is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . . Indians, and Lands reserved for the Indians." As in the United States, federal authority in Canada is both exclusive and broad, as reflected in the federal Indian Act, the principal statute governing the status of Indians and First Nations and the management of reserve lands. In 2016, the Canadian Supreme Court ruled that Métis and nonstatus Indians are considered "Indians" under section 91(24), giving them access to services and other benefits. *Daniels v. Canada* (Indian Affairs and Northern Development), [2016] S.C.C. 12.

Section 35 of the Constitution Act of 1982, Rights of the Aboriginal Peoples of Canada, provides that the "existing aboriginal and treaty rights" of Indian, Inuit, and Métis peoples are "recognized and affirmed." Without enumeration or definition of "existing aboriginal and treaty rights" in the Constitution Act of 1982, the Canadian Supreme Court examined the extent of aboriginal rights, concluding that they include a range of cultural, social, political, and economic rights, including land rights, hunting and fishing rights, and the right to practice one's own culture. However, they do not include any aboriginal rights that had been extinguished by the federal government prior to 1982. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

The *Van der Peet* test in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, clarified how the Canadian Supreme Court would determine whether an asserted right was protected under section 35. In short, the court must determine that the right is "integral to a distinctive culture," with ten relevant criteria:

1) the court must take into account the perspective of Aboriginal peoples themselves;
2) the court must identify precisely the nature of the claim in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right;
3) in order to be integral, a practice, custom, or tradition must be of central significance to the Aboriginal society in question;
4) the practices, customs, and traditions that constitute Aboriginal rights are those that have continuity with the practices, customs, and traditions that existed prior to contact;
5) the court must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims;
6) claims to Aboriginal rights must be adjudicated on a specific, rather than general, basis;
7) for a practice, custom, or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists;
8) the "integral to a distinctive culture" test requires that a practice, custom, or tradition be distinctive but does not require that that practice, custom, or tradition be distinct;
9) the influence of European culture will be relevant to the inquiry only if it is demonstrated that the practice, custom, or tradition is integral only because of that influence; and
10) the court must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

The *Sparrow* test—from the landmark *Sparrow* case noted above—indicates that Canada's federal government may infringe upon a protected Aboriginal right so long as the infringement serves a "valid legislative objective" and is tailored to serve the objective, and both fair compensation and notice were provided to Aboriginal groups.

Federally acknowledged American Indian tribes and Canadian First Nations therefore maintain a similar status in relation to the federal governments of the United States and Canada, in which indigenous legal and political rights ultimately are constrained and may be curtailed by federal authority. Whereas Native American tribes derive their indigenous rights from their status as political sovereigns, however, First Nations rights follow from "traditions" and are a "defining feature of the culture." In the United States, the federal government's acknowledgement of a tribe's sovereign status automatically brings with it a full range of sovereign rights unless specifically limited. In Canada, a recognized First Nation has a defined set of Aboriginal rights that may be supplemented by additional rights recognized under the *Van der Peet* test. Although constitutionally recognized sovereignty should empower American Indian tribes to a greater degree than culturally defined practice does First Nations, whether this distinction matters in practice depends on particular context. Importantly, in each country, the federal government retains power to abrogate indigenous sovereignty.

The Advent of Gaming

Aboriginal gaming in Canada shares many similarities with tribal gaming in the United States. The most notable similarity is the impetus for Indian gaming. First Nations in Canada, like tribes in the United States, conceived of gaming as a means of alleviating the dire socio-economic conditions that shaped the daily lives of many Indians, especially those living on reservations (or reserves, as tribal lands are called in Canada). High levels of poverty and unemployment on reserves were the by-products of patterns of colonization and federal assimilationist policies paralleling, in large part, those

in the United States. See Steven Andrew Light & Kathryn R.L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise (Lawrence: University Press of Kansas, 2005), at 25–35, 98–99. Having failed to solve the so-called Indian problem, the federal governments in Canada and the United States encouraged tribal self-sufficiency, but with few on-reserve opportunities for economic development, tribal options to provide jobs to their members and raise revenue for government services were limited. Like tribes in the United States, First Nations looked to gaming, possibly as "a last-ditch effort at generating the revenue necessary for reserve economic development." Yale Belanger, Gambling with the Future: The Evolution of Aboriginal Gaming in Canada (Saskatoon: Purich Publishing, 2006), at 56.

In the late 1980s, as First Nations lobbied for reserve-based gaming, the U.S. Supreme Court decided *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). The court recognized tribal authority to regulate on-reservation gaming operations free of state interference. As such, the court's decision very much was rooted in tribal sovereignty and tribes' unique status in the American political system. The court began its opinion in the case with the statement, "The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" (quoting *United States v. Mazurie,* 419 U.S. 544 (1975), and *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980)).

In this landmark case, the Cabazon Band and Morongo Band in California operated bingo parlors and card games on their reservations. As the court observed, the tribes' gaming operations were critical to their communities' well being: "The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."

Because the high-stakes bingo games offered by the tribe violated California's stringent regulation of bingo, state officials threatened to close the Cabazon Band's bingo hall. California's theory was that, although states generally have no authority over tribes under U.S. law, Congress had provided that California law applied to tribes through Public Law 280. In an earlier case, *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court ruled that Public Law 280's grant of civil jurisdiction was not a broad authority for states to regulate tribes generally, as that "would result in the destruction of tribal institutions and values."

"In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," the *Cabazon* court reasoned, "we must conclude that California *regulates* rather than *prohibits* gambling in general and bingo in particular." (Emphasis added.) As a result, California could not impose its laws on tribal gaming operations, and as a practical matter, the *Cabazon* decision meant that any federally recognized American Indian tribe located in a state that allowed some form of legalized gambling could conduct gaming on its reservation free of state regulation.

Although the peculiarities of Public Law 280 were at the heart of the *Cabazon* case, the court's reasoning reflected the long-recognized political and legal status of tribes under U.S. law. On the heels of the *Cabazon* decision, Congress's passage of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§ 2701–21, codified tribes' right to conduct gaming and at the same time limited it by requiring a tribal-state compact for casino-style gaming. See Light & Rand, at 35–37. Nevertheless, Congress intended the IGRA to promote strong tribal governments along with reservation economic development and tribal self-sufficiency.

The *Cabazon* case and the IGRA opened the door to Indian gaming as it exists in the United States, setting the stage for the rapid growth of the industry over the last 25 years. In contrast, the status of First Nations as governments and their right to conduct gaming have taken a very different direction under Canadian law.

In 1985, Canada's federal Criminal Code was amended to give provincial governments authority to conduct and regulate gambling, including lotteries and casino-style gaming. Soon after, the Shawanaga First Nation in Ontario asserted a sovereign right to conduct gaming on its reserve. Belanger, at 52, 84–85.

Like the Cabazon Band, the Shawanaga opened a modest high-stakes bingo hall on its reserve. As did California authorities, the Ontario Provincial Police charged Shawanaga Chief Howard Pamajewon and former Chief Howard Jones with violating the province's gambling regulations. Both were convicted, leading to the landmark Canadian Supreme Court case of *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

The *Pamajewon* court first noted that Canada's Constitution Act of 1982 recognizes certain Aboriginal rights tied to the traditions and customs of First Nations, and that in order to qualify as an Aboriginal right, an activity must be "a defining feature of the culture in question." Quoting the lower court opinion, the *Pamajewon* court opined that "commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized." Gambling, the court held, simply was not an integral part of the distinctive culture of the Shawanaga.

As a result of *Pamajewon*, First Nations do not have a recognized Aboriginal right to conduct gaming on their reserves, unless a First Nation can show that gaming is a defining feature of its distinctive culture. Without such a finding, though, First Nations may operate casinos only with a provincial license and in accordance with provincial regulations.

Lessons

In the United States, the *Cabazon* decision and the passage of the IGRA swung the door open for every American Indian tribe to pursue gaming. Governed by federal law, tribes had legal clout to develop casinos with limited state regulation. In Canada, the *Pamajewon* decision effectively slammed the door closed on every First Nation to pursue gaming free of provincial laws and regulations.

The key difference in the development of Indian gaming in the United States and First Nations gaming in Canada is how each nation's federal government conceptualizes tribal rights—in the United States, tribal sovereignty is considered a "full box" of legal and political rights that includes gaming, whereas in Canada, Aboriginal rights begin with an "empty box" with the burden on the First Nations group to prove in court that it has a protected Aboriginal right. Filling the empty box with an Aboriginal right requires a First Nations group "to have that Aboriginal right clearly identified in a formal judgment of the Supreme Court of Canada, which would require the First Nations group to undergo a very lengthy process that could take somewhere between 10 and 15 years to complete—which is well beyond the means of most First Nations groups in Canada." Morden C. Lazarus & Brian T. Hall, *Canada's First Nations and the State of the First Nations Gaming Sector in Canada,* 20 Gaming L. Rev. & Econ. 315 (2016).

Further, the success of Indian gaming in the United States has expanded business dealings with tribes. This has resulted in growing expertise and sophistication of tribal governments and tribal legal systems, as well as expanded opportunities for nontribal commercial entities to do business with tribes and in tribal communities. See, e.g., Heidi McNeil Staudenmaier & Michael Coccaro, *Negotiating with a Tribe or Tribal Entity: Practical Tips for Franchisors,* 34 Franchise L.J. 35 (2014). Although gaming remains a major industry for many tribes, tribal economies are becoming more diverse, including development of private-sector entrepreneurship. See, e.g., Martin S. Bressler et al., *A Study of Native American Small Business Ownership,* 10 Res. in Bus. & Econ. J. (2014).

Although Indian gaming is not a magic bullet for the socio-economic circumstances that persist on many reservations in the United States, gaming has made a positive difference in the self-sufficiency of tribal governments and the quality of life for tribal people. For First Nations in Canada, however, gaming has not had the same positive impact. At least one Canadian gaming expert sees a critical need for reform driven by a rights-based approach:

> [A]s a consequence of the lack of any commitment on the part of the provinces of Canada to meaningfully allow for the development of First Nations gaming, it remains for the current prime minister of Canada . . . to find a solution that would provide for a process . . . whereby a particular First Nations group in Canada can attain recognition of an Aboriginal right to gaming. . . . Such a process could then springboard the development of the gaming sector on behalf of the First Nations groups of Canada—and without such a process, the First Nations gaming sector will never develop.

Lazarus & Hall, at 317.

The limited conception of First Nations' Aboriginal right to conduct gaming is of both legal and practical significance. Legally, it is a fundamental distinction between U.S. and Canadian tribal gaming law; practically, it explains in large part the very different tribal gaming industries in the United States and Canada. The relatively limited growth of First Nations gaming under provincial control arguably proves the point U.S. House Representative Morris Udall (D-Ariz.) made during the legislative debate over the IGRA (H.R. Rep. No. 488, 99th Cong., 2d Sess., at 29 (1986), supplemental views of Rep. Morris Udall (D-Ariz.)). Referencing arguments for state regulation of Indian gaming in the United States, he said, "Conferring state jurisdiction over tribal governments and their gaming activities would not insure [sic] a 'level playing field,' but would guarantee that Indian tribes could not gamble at all."

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