Canada’s First Nations and the State of the First Nations’ Gaming Sector in Canada

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In regard to the subject topic, I am embarrassed to state at this Spring meeting¹ that the United States treats its Indian tribes (or, as we refer to them in Canada, First Nations) far better than does Canada, when it comes to the worlds of either land-based or online gaming.

In the United States, there exists the Indian Gaming Regulatory Act (IGRA) and the process of developing compacts involving tribal groups and different states; whereas in Canada no such law and/or process exists anywhere to force provincial governments to recognize any Aboriginal rights which a First Nations group wishes to pursue.

First Nations groups in Canada are not provided with any legislative tool or legal process that could force any province of Canada to sit down and negotiate an agreement which would allow for that First Nations group to exploit any form of online and/or land-based gaming activity for “real money” in that province on their Reserve Lands.

Notwithstanding the passage of the Canada Constitution Act of 1982, which was one of the prize pieces of legislation of the father of the current prime minister of Canada, Pierre Elliott Trudeau, who, within the context of that piece of legislation, did provide in § 35(1) thereof that First Nations groups shall be entitled to the exercise of their Aboriginal rights, providing they would be able to demonstrate that what they were claiming as an Aboriginal right was, in fact, part of their history, their culture, and their expressed activity, which would have occurred within the historical record of that First Nations group, 400 years before the European white man touched the North Shores of the province of Quebec.

Notwithstanding the language that was used in the Canada Constitution Act of 1982, which clearly established the entitlement of First Nations to claim an Aboriginal right, as in the case of an Aboriginal right to gaming, the legislators did not provide for any mechanism, process, and/or procedure that could facilitate the recognition by a particular province of any First Nations group’s claim of entitlement to an Aboriginal right,—in this case, an Aboriginal right to gaming.

As a consequence of the foregoing, in order for a First Nations group to complete the process of establishing unequivocally its entitlement to claim an Aboriginal right in this instance, it would necessarily have 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.

Hence, the entitlement to claim an Aboriginal right under § 35(1) of the Canada Constitution Act of 1982, as decreed by the late Prime Minister Pierre Elliott Trudeau, is really an empty and unfulfilled promise, due to the refusal of all of the provinces of Canada to recognize any form of entitlement by any tribal nation or First Nations group to an Aboriginal right to gaming within a particular province.

In describing the difference between the U.S. and Canadian approaches to the sovereignty of tribes/First Nations, the analogy that is often given is that in the U.S., sovereignty is considered a “full box”—i.e., it is incumbent on the government to prove that a tribe

¹This article is based on a presentation given at the American Bar Association’s Spring 2016 meeting.
does not have a particular right—as opposed to the “empty box” approach taken in Canada, whereby a First Nations group must first prove that a particular activity is an Aboriginal right before it is recognized as such under Canadian law.

The Supreme Court of Canada’s tests to establish whether a particular activity is an Aboriginal right are excessively narrow, effectively denying First Nations any opportunity to argue that they have a broader right of self-government.

Unfortunately, not only can provinces of Canada not be forced to recognize a particular Aboriginal right to gaming on the part of any one specific First Nations group in Canada, to attempt to create a First Nations gaming enterprise is almost impossible to do without first having the appearance of violating the laws of Canada.

In the case of the province of Quebec, the province has constantly attempted to undermine the gaming activities of the Mohawks of Kahnawá:ke who have operated there since 1996. The province of Quebec has always taken the position that this type of activity is totally “illegal, irregular and unlawful.”

At a time when the United Kingdom was considering the whitelisting of various gaming jurisdictions that would permit that gaming jurisdiction’s licensees to advertise in the UK without having to be licensed therein, the UK Gaming Commission refused to whitelist the Mohawk Council of Kahnawá:ke which oversees the Kahnawá:ke Gaming Commission (KGC). A letter addressed to the Quebec government by the UK Minister of Sports, asking that the Quebec government acknowledge the entitlement of the Mohawks of Kahnawá:ke to carry on, organize, and regulate all forms of gaming within the Mohawk Territory of Kahnawá:ke was denied on the basis of a letter from the Quebec Justice Department to the UK gaming authorities refuting Kahnawá:ke’s assertion of jurisdiction over gaming.

As a result, the gaming jurisdiction regulated by the KGC within the Mohawk Territory of Kahnawá:ke was not whitelisted, which had the ultimate effect of diminishing the Kahnawá:ke gaming jurisdiction in the eyes of the gaming world. The denial effectively characterized it as an illegitimate and not well-regulated jurisdiction, despite the fact that it was operating in accordance with the standard norms adopted by other regulated and recognized gaming jurisdictions.

Consequently, First Nations gaming in Canada, from both land-based and online perspectives, is rather minimal, and will never reach its potential until such time as the federal government of Canada passes legislation which provides for a process by which a First Nations group in Canada can be legitimately recognized as having a claim to an Aboriginal right under § 35(1) of the Canada Constitution Act of 1982 and, by so doing, be in a position to force the province of Canada wherein that First Nations group is located to actually recognize that Aboriginal right. This would, by extension, allow them to negotiate the equivalent of a U.S. compact, which would be executed by and between the First Nations group and the particular province.

The status of “Sovereign or Real First Nations” gaming in Canada is such that it does not actually exist from a realistic perspective. Any and all instances of so-called First Nations gaming existing in Canada are not a result of any assertion of Aboriginal rights. While it is true that there are approximately 17 First Nations casinos, a deeper look reveals that they are more of an extension of the provinces’ interests and their gaming framework. Without meaningful justification, the provinces in every instance of the 17 casinos have interpreted their gaming rights to include the ability to manage and oversee casinos on First Nations land. Effectively, in most cases the province took the position that the Criminal Code applied to any gaming on the reserve where it was not approved by the province. The consequence was to allow the provinces to undermine and sidestep any assertion of an Aboriginal right to gaming by allowing provincial policy to impact what is an exclusive federal domain. For instance, in Ontario in 1992, the then New Democratic Party (NDP) sitting government announced that it would be opening a casino on a First Nations reservation. As a result, Casino Rama, situated on a reservation in Orillia, Ontario was born. Not long after that, the PC government imposed a 20% win tax on casino gross revenue, dramatically changing the negotiated revenue share. This change resulted in a deal whereby the First Nations Chiefs of Ontario forfeited the rights to a share of Casino Rama revenue (approximately $5.0 billion) in exchange for a payment of two hundred and one million dollars ($201.0 million) and a 1.7% share of all provincial gaming revenues.

In addition, the provinces generally impose or require that a First Nations casino utilize (and accordingly pay for) an outside operator to run the business, in addition to imposing taxes and fees, various restrictions, and prescribed uses of revenues.
on the casino, ultimately, leaving very little control, oversight, and/or profits to the First Nations.

Although the online gaming framework in Canada continues to develop, it would appear that there are no First Nations groups at this table. As a result, the provinces will likely assume that they can impose their existing land-based framework.

In closing, as 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, Justin Trudeau (who has undertaken to reach out to First Nations in Canada) to finish what his father began and create a real dialogue between First Nations and the federal government of Canada to find a solution that would provide for a process and/or a methodology whereby a particular First Nations group in Canada can attain recognition of an Aboriginal right to gaming, in accordance with § 35(1) of the Canada Constitution Act of 1982. 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.