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## A Sure Thing? Online Gaming and Canada

### Abstract

The legal status of gaming activities on First Nations land within Canada is complicated. The foci of this paper are two-fold. First, we trace the origin and expansion of First Nations gaming. Second, we analyze the potential of First Nations as hubs for the growing global e-gaming industry, with an emphasis on Internet poker and online sports wagering. We conclude by positing that the Canadian regulatory scheme presents an opportunity to First Nations in connection with e-gaming.

### Keywords

First Nations, online gambling, gaming, canada, sports gambling

## A SURE THING? ONLINE GAMING AND CANADA

Ryan M. Rodenberg\* and John T. Holden\*\*

### I: Introduction

The first casinos to open in Canada, owned by the First Nations,<sup>1</sup> welcomed their first visitors in the spring of 1996.<sup>2</sup> Prior to their establishment, several communities operated lottery systems with government approval.<sup>3</sup> Their purpose for expansion and operation of gaming facilities was to create jobs and reduce reliance on government resources.<sup>4</sup> The “Royal Commission on Aboriginal Peoples” report cited the expansion of gaming as a key feature in financing self-government.<sup>5</sup> This paper focuses on the impact of the expansion of First Nations’ gaming institutions within Canada. It also specifically analyzes the potential for First Nations to serve as hubs for the global online gaming industry, with particular attention paid to Internet poker and sports gambling.

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<sup>1</sup> For purposes of this article, the authors have opted to use the phrase “First Nations” instead of “aboriginal” or “indigenous” to describe the owners, operators, or pecuniary beneficiaries of certain casinos located within Canada. First Nations generally do not include Inuit or Metis populations within Canada. The authors also use the phrase “gaming law” in a broad/generic sense and intend it to capture various forms of gaming, gambling, and related activities that blur the distinction between skill and chance, such as certain types of poker and sports betting. We use the words “gaming” and “gambling” interchangeably herein. For a detailed discussion of the difference between “gaming law” and “gambling law,” see Jeffrey A. Standen, *Gaming Law vs. Gambling Law*, 15 GAMING L. R. & ECON. 777 (2011).

<sup>2</sup> Yale D. Belanger, *GAMBLING WITH THE FUTURE: THE EVOLUTION OF ABORIGINAL GAMBLING IN CANADA* 12 (2006).

<sup>3</sup> Michael Y. Seelig & Julie H. Seelig, “Place Your Bets!” *On Gambling, Government and Society*, 24 CAN. PUB. POL’Y 91, 99 (1998).

<sup>4</sup> Heather Sterling, *Chief Crow Takes a Stand at City Hall: Casino a Sure Bet for First Nations, Promising 800-900 Jobs*, SASKATCHEWAN INDIAN May 1994, <http://www.sicc.sk.ca/archive/saskindian/a94may01.htm>.

<sup>5</sup> ABORIGINAL AFF. & N. DEV. CAN., *HIGHLIGHTS FROM THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES* (1996), available at <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

The concept of fund raising using chance-related games designed to provide economic benefit to struggling communities is not a new innovation. Early European settlers to North America noted the presence of gaming activities in a multitude of aboriginal tribes.<sup>6</sup> There are several distinctions that have been noted between the gambling activities of pre-European contact times and the present day. It is presumed that pre-European contact gambling activities and games were primarily used for entertainment and group experience.<sup>7</sup> This can be contrasted with the modern concept of casino gambling, whereby it is largely an individual experience, with the gambler's objective of leaving with more money than he began with.

Gambling was not a unique activity discovered by the Europeans upon their arrival in North America. There are references to gambling that date back to Egypt, Greece, and the Roman Empire.<sup>8</sup> The evolution of gambling has occurred separately in almost all cultures until technological advances allowed for gaming to transcend cultural boundaries and expand into the global industry it is today. The early studies of gambling in North America were first published in 1907 in *Games of the North American Indian*, a book that contained the results of more than fourteen years of research and noted more than 36 distinct games played amongst 229 North American tribes.<sup>9</sup> When the Jesuits and Puritans arrived in North America, they were the first to implement laws banning the playing of games of chance as they viewed the practice as a violation of Christian principles.<sup>10</sup>

The mid-1800s saw the enactment of an assimilation policy, targeting the First Nations people. The implementation of the Indian Act of 1876 was the Canadian government's

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<sup>6</sup> Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L. J. 205, 206-207 (1997).

<sup>7</sup> Belanger, *supra* note 2, at 24.

<sup>8</sup> David G. Schwartz, *Roll the Bones: The History of Gambling* 22 (2007).

<sup>9</sup> Belanger, *supra* note 2, at 26.

<sup>10</sup> *Id.* at 35.

legislative measure to force assimilation.<sup>11</sup> The Indian Act created the reserve system and placed agents in communities on the recommendation of officials and religious groups with the purpose of ending practices that were deemed to be immoral or against the objectives of assimilation.<sup>12</sup> The government policy of assimilation led to the dissolution of gaming and any form of wagering.<sup>13</sup> Notably, one aspect of Euro-Canadian influence that managed to infiltrate the evolving First Nations communities in the early nineteenth century was the concept of capitalism.<sup>14</sup> The unintended consequence of this would act as foreshadowing for the modern influx of gaming institutions owned and operated by First Nations in Canada.

The arrival of the twentieth century saw Canadian government officials showing less concern with First Nations gaming practices, and as a result there was a re-emergence of a number of traditional games.<sup>15</sup> First Nations within Canada followed a practice of Native Americans that saw tribes participating in rodeos as a means of travelling and reaffirming traditions as well as renewing relationships; with this, games of chance were once again part of the culture.<sup>16</sup> The 1960s brought about the open emergence of First Nations gaming and wagering.<sup>17</sup> During the 1970s, many Native American leaders sought new means for achieving economic independence for themselves.<sup>18</sup> First Nations in Canada largely followed the practice of many American-based groups.

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<sup>11</sup> Darlene Johnston, *First Nations and Canadian Citizenship*, in *BELONGING: THE MEANING AND FUTURE OF CANADIAN CITIZENSHIP* 349, 353 (William Kaplan ed., 1993).

<sup>12</sup> Katherine Pettipas, *SEVERING THE TIES THAT BIND: GOVERNMENT REPRESSION OF INDIGENOUS RELIGIOUS CEREMONIES OF THE PRAIRIES* 3 (1994).

<sup>13</sup> *Id.*

<sup>14</sup> Belanger, *supra* note 2, at 38.

<sup>15</sup> *Id.*

<sup>16</sup> Henderson, *supra* note 6, at 209-213.

<sup>17</sup> Belanger, *supra* note 2, at 39.

<sup>18</sup> Henderson, *supra* note 6, at 210.

The influence of Native American gaming on Canadian gaming practice was facilitated through the Indian Gaming Regulatory Act.<sup>19</sup> The legislation is designed to have gaming “as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”<sup>20</sup> The importance of this legislation is the ability of tribes in the United States to operate gaming houses on reservations, under the exclusive jurisdiction of the tribal council.<sup>21</sup> The transfer of power set an important precedent that, in some respects, would be followed by the provincial governments of Canada.

## **II: Canadian Gambling Legislation**

The evolution of Canadian gaming legislation has followed societal acceptance of the practice. The most significant changes to legislation have arisen in the last century, since the adoption of the Criminal Code in 1892.<sup>22</sup> Campbell and Smith outline the following changes as significant in the amendments to the Criminal Code’s section on gambling since 1892: (i) in 1900 small raffles not exceeding \$50 were permitted, provided they were organized at religious or charitable events and the proceeds were for fund-raising; (ii) in 1910 on-track betting was allowed for betting on dogs and horses at licensed tracks; (iii) in 1925 an exemption for agricultural fairs allowed for games of chance to be conducted; (iv) in 1969 the federal government could manage lottery schemes and allow religious and charitable groups to apply for a license to do the same; and (v) in 1985 the federal government transferred exclusive control to

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<sup>19</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2012).

<sup>20</sup> 25 U.S.C. § 2702(4) (2012).

<sup>21</sup> 25 U.S.C. § 2701(5) (2012).

<sup>22</sup> Colin S. Campbell & Garry J. Smith, *Canadian Gambling: Trends and Public Policy Issues*, 556 ANNALS AM. ACAD. POL. & SOC.SCI., 22,23 (1998).

the provinces.<sup>23</sup> Such changes were provided structure for current First Nations gaming within Canada.

The arrival of European settlers to Canada brought their laws and perceptions along with them. One European perception was that gambling was an immoral vice that was ripe with corruption.<sup>24</sup> The irony of this perception is that North American exploration was at least in part funded by state run lotteries.<sup>25</sup> The 1892 Criminal Code, which codified the 1802 Gaming Act of Britain, viewed gambling as an unsavoury practice, and proclaimed that the government needed to protect children and uneducated people from the dangers of gaming.<sup>26</sup>

The early 1900s saw changing attitudes towards gaming in Canada. A 1910 survey revealed that most Canadians did not oppose the activity.<sup>27</sup> The legalization of on-track betting resulted in the first large scale gambling operation in Canada, resulting in a track betting monopoly on the industry until 1969.<sup>28</sup> The most significant challenge to track betting came during World War I, when several politicians determined that the activity was counterproductive to the war effort and should be banned; the result was an embargo that lasted less than a year.<sup>29</sup>

The period beginning in the early 1920's saw the government face a catch-22 situation as they opposed gambling, but recognized the important stream of funding that such activity could have for financing education and agriculture.<sup>30</sup> Until 1960, despite efforts from numerous politicians in various provinces, no changes were made to the Criminal Codes gambling

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<sup>23</sup> *Id.*

<sup>24</sup> Belanger, *supra* note 2, at 42.

<sup>25</sup> Robert C. Johnson, *The "Running Lotteries" of the Virginia Company*, [68 No.2] THE VA. MAG. OF HIST. & BIOGRAPHY, (1960) at 156

<sup>26</sup> The Criminal Code, 55-56 Victoria, chap. 29 (1892).

<sup>27</sup> Belanger, *supra* note 2, at 45.

<sup>28</sup> Campbell & Smith, *supra* note 22, at 25.

<sup>29</sup> Belanger, *supra* note 2, at 45.

<sup>30</sup> Suzanne Morton, AT ODDS: GAMBLING AND CANADIANS, 1919-1969 51 (2003).

sections.<sup>31</sup> In 1960, the province of Quebec sought permission from the federal government to operate a lottery that would fund the construction of hospitals in Montreal and Quebec City.<sup>32</sup> While this was initially approved, within a year the federal government withdrew support.<sup>33</sup>

In 1969, the federal government's opposition to lotteries diminished with a change in power. The arrival of Pierre Trudeau as Canada's Prime Minister brought about significant changes to the Criminal Code.<sup>34</sup> Trudeau proposed allowing the provinces to regulate lotteries themselves, allowing for each individual province to determine the level of public support for a lottery system.<sup>35</sup> In 1975, a majority of the provinces had their own lotteries, but by 1976, the federal government backtracked and introduced a national lottery to pay for the 1976 Summer Olympic Games in Montreal.<sup>36</sup> In 1985, the federal government amended the Criminal Code, once again, to give the provinces full control over gaming legislation, which paved the way for the creation of casinos and other gaming houses.<sup>37</sup>

The federal government's reforms to the Criminal Code and other legislative initiatives have certainly facilitated gaming in the provinces. However, the most significant influence on First Nations gaming institutions in Canada has been the U.S. model for gaming. The initial First Nations casino venture occurred in Saskatchewan after leaders of the Federation of Saskatchewan Indian Nations went to visit the Seminole Tribe of Florida's bingo operations and returned with a truncated model.<sup>38</sup>

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<sup>31</sup> Belanger, *supra* note 2, at 49.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 50.

<sup>35</sup> Hal Pruden, *An Overview of the Gambling Provisions in Canadian Criminal Law and First Nations Gambling*, 2 J. ABORIGINAL ECON. DEV., no. 2, 2002, at 37.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 38.

<sup>38</sup> Belanger, *supra* note 2 at 70.



The most important change to Canadian gaming legislation resulted from a 1987 U.S. Supreme Court case between the State of California and the Cabazon Band of Mission Indians.<sup>39</sup> The Court determined that state governments have no authority to enact prohibitive legislation impacting gaming on reservations.<sup>40</sup> The Court specifically recognized the importance that gambling institutions provide for community economic development.<sup>41</sup>

While First Nations within Canada carefully determined the best approach for implementing a large scale gaming industry, several U.S. states continued to try to impose regulations. Florida attempted to challenge the Seminole Tribe's authority to operate bingo facilities by imposing limits on the size of pots. However, this restriction was struck down by the U.S. Supreme Court.<sup>42</sup> The *Seminole Tribe* decision solidified constitutional protection for gambling facilities on reservations in the United States.<sup>43</sup> The key challenge faced by First Nations was that they did not have the same structure and protections as their American counterparts.

The objective for First Nations leaders was clear. They wanted to use the U.S. models in Canada and bring about sustained economic development to their communities. The First Nations communities that sought to bring casinos to their areas were influenced by the success of large scale operations like the Pequots of Connecticut who built the multi-billion dollar Foxwoods casino.<sup>44</sup> Under the U.S. model, tribes operated on a largely autonomous and sovereign basis from the federal and state governments. In contrast, under the Canadian system, First Nations remained somewhat under the regulatory sphere of the government.

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<sup>39</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 218-219.

<sup>42</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996).

<sup>43</sup> *Id.* at 48.

<sup>44</sup> Belanger, *supra* note 2, at 82.

### **III: Case Study – Ontario**

The 1990s are regarded as the era in which First Nations gaming gained a foothold in most Canadian provinces. The pressure facing provincial legislatures came from groups seeking to establish economically viable and sustainable means of development for struggling communities.<sup>45</sup> Provincial officials faced a choice – do nothing and risk losing out on a potential jackpot of tax revenue or regulate the industry and impose some limits. A number of First Nations began an active lobbying effort, resulting in the provincial government of Ontario opting to allow the creation of the province's first casino.<sup>46</sup> On July 31, 1996, Casino Rama opened its doors in Orillia, Ontario.<sup>47</sup> The casino was awarded to the Mnjikaning First Nation group in 1994.<sup>48</sup> In 1995, the Progressive Conservative government came to power and imposed a win-tax of 20% on gross revenues generated by Casino Rama.<sup>49</sup> The effect of this win-tax has generated no less than \$400 million for the provincial government.<sup>50</sup>

The lead up to the opening of Casino Rama began in 1986, when the Shawanaga First Nation of Ontario first challenged the Ontario government for the right to open a casino on reserve lands. The Shawanaga argued that they had a constitutional right to operate a gaming facility.<sup>51</sup> In 1986, the Shawanaga constructed a recreational complex and began operating it as a gaming house a year later.<sup>52</sup> Shawanaga leaders, anticipating a tough response from the government, planned a legal defense whereby the group would argue that Section 81 of the

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<sup>45</sup> *Id.* at 83.

<sup>46</sup> *Id.* For a more detailed Ontario specific discussion, see Emir A. Crowne & Anthony Andreopoulos, *GTL: Gaming, Territoriality, and the Law – Comparative Approaches to Online Gaming: Lessons for Ontario*, 2 U.N.L.V. GAMING L. J.155 (2011).

<sup>47</sup> Mary Margaret Peralta, *Casino Rama in Orillia, Ontario*, Suite 101 (April 1, 2010), <http://suite101.com/article/casino-rama-in-orillia-ontario-a235309>.

<sup>48</sup> Belanger, *supra* note 2 at 83

<sup>49</sup> *Id.* at 84.

<sup>50</sup> Tracey Tyler, *Judge's Jibes key issue in Casino Rama Case*, Toronto Star (September 9, 2009), <http://www.thestar.com/article/692738>.

<sup>51</sup> Belanger, *supra* note 2, at 84.

<sup>52</sup> *Id.*

Indian Act provided them with exclusive control over gaming.<sup>53</sup> In relevant part, Section 81 of the Indian Act provides the following:

81(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,... (m) the control or prohibition of public games, sports, races, athletic contests and other amusements...<sup>54</sup>

In late 1987, Ontario Provincial Police levelled charges against the past and present chiefs of the Shawanaga nation.<sup>55</sup> Three years later, officers arrested individuals from Eagle Lake First Nation on charges of illegally operating gaming facilities.<sup>56</sup> Shortly after these cases made headlines, the Supreme Court of Canada was compelled to weigh in on lottery schemes in the case of *R. v. Furtney*.<sup>57</sup> In *R. v. Furtney*, the defendants had been charged with operating bingo halls that violated provincial statutes mandating that no more than 15% of revenue be spent on management fees and no less than 20% be directed to a charity.<sup>58</sup> The trial judge in the case found that the provision was outside the powers of the legislature, rendering it null and void. The Canadian Supreme Court, however, disagreed with the trial judge and unanimously ruled that the province was acting within its powers under Section 92 of the British North America Act of 1867.<sup>59</sup>

The result in *R v. Furtney* forced First Nations to alter their strategy, opting to make the argument used in the United States that First Nations were individually sovereign countries as evidenced by their ability to negotiate treaties with the government.<sup>60</sup> This approach also failed

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<sup>53</sup> *Id.*

<sup>54</sup> Indian Act, R.S.C. 1985, c.I-5 (Can.). <http://laws.justice.gc.ca/en/I-5/>.

<sup>55</sup> Belanger, *supra* note 2, at 85.

<sup>56</sup> *Id.* at 86.

<sup>57</sup> *R. v. Furtney*, [1991] 3 S.C.R. 89 (Can.).

<sup>58</sup> *Id.* at 94.

<sup>59</sup> *Id.* at 91.

<sup>60</sup> Belanger, *supra* note 2, at 87.

at the Supreme Court of Canada in *R. v. Jones and Pamajewon*. Jones, the Chief of the Shawanaga Reserve, (unsuccessfully) posited that the criminal code did not apply because the reserve land was sovereign territory, outside the purview such codes.<sup>61</sup>

After a series of defeats before the Supreme Court of Canada, proponents of First Nation casino expansion took a decidedly non-litigious approach, with Mnjikaning leaders and Ontario provincial government officials reaching an agreement in 1996 that would provide 65% of net casino revenue would be split amongst the province's 133 First Nations groups.<sup>62</sup> The result has been profound. Multiple full-scale casinos now operate within the province (and Canada generally), setting the stage for First Nation casinos to serve as a veritable hub for transnational online gambling, particularly in the growing and lucrative Internet poker and sports gambling sectors. However, it was not able to stop subsequent litigation over the profit sharing arrangement.<sup>63</sup>

#### **IV: Canada as (Internet) Host**

The prospect of First Nations within Canada serving as locations hosting Internet servers for gaming, and processing transactions is something which is certain to be attractive to players having second thoughts of sending their money and personal information to countries lacking a history of government stability or name recognition.<sup>64</sup> Since 1995, when the Internet was first used for gambling, the industry has grown exponentially.<sup>65</sup> The present legislation within

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<sup>61</sup> *R. v. Jones & Pamajewon*, [1991] 3 S.C.R. 110, 112 (Can.).

<sup>62</sup> James Gotowiec, "*Scorched Earth Attack*" backfires for Casino Rama's host nation, The Court (Fe. 15, 2010) <http://www.thecourt.ca/2010/02/15/sorched-earth-attack-backfires-for-casino-ramas-host-nation/>.

<sup>63</sup> *Id.*

<sup>64</sup> For example, Antigua and Curacao are two Caribbean countries that host a number of internet-based sports books.

<sup>65</sup> R. Wood & R. Williams, *Internet Gambling: Past, Present, and Future* citing In G. Smith, D. Hodgins & R. Williams (Eds.), *Research and Measurement Issues in Gambling Studies*. San Diego, California: Elsevier Publishing. Published in 2007. pages 491-514, <https://www.uleth.ca/dspace/bitstream/handle/10133/422/internet?sequence=1>

Canada allows provincial governments to offer online gaming provided the services provided comply with the federal laws of Canada.<sup>66</sup> Several provinces, including Ontario and British Columbia, allow individuals to purchase lottery tickets and place bets on sporting events.<sup>67</sup> One of the most fascinating aspects of online gaming's status in Canada is the use of First Nations reserves as hosts for internet servers other gaming facilities. The most prominent example is the Kahnawake reserve, located just outside of Montreal. The Kahnawakes position themselves as an entity completely sovereign from Canada and were recently featured on the CBS news program *60 Minutes*.<sup>68</sup>

The Kahnawake Gaming Commission ("KGC") had an operating budget of a little over \$36 million in 2011-2012 and is located on a small reserve with a population of 8,000 residents in Kahnawake, Quebec.<sup>69</sup> The Mohawks of Kahnawake operate as a sovereign nation and are (apparently) insulated from certain provincial and federal regulation.<sup>70</sup> The KGC was established in 1996 and almost immediately began to explore the opportunities of online gaming.<sup>71</sup> Kahnawake law requires that all businesses on the reserve be owned by Mohawk people. As such, in order to operate online gaming facilities, companies are required to lease server space from Mohawk Internet Technologies, a commercial operator of several servers on the reserve.<sup>72</sup> The KGC's hosting of online gaming services has been met with some legal

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<sup>66</sup> M. Lipton, *Internet Gaming: A Look at Online Gambling in Canada* (2002), [http://www.gaminglawmasters.com/jurisdictions/canada/inet\\_canada.htm](http://www.gaminglawmasters.com/jurisdictions/canada/inet_canada.htm).

<sup>67</sup> G. J. Smith, *Sports Betting in Canada*, *The International Sports Law Journal* (2011), [http://www.asser.nl/upload/documents/1172011\\_123702ISLJ%202009\\_1-2.pdf#page=108](http://www.asser.nl/upload/documents/1172011_123702ISLJ%202009_1-2.pdf#page=108)

<sup>68</sup> *60 Minutes. The Cheaters*, CBS (November 30, 2008), <http://www.cbsnews.com/video/watch/?id=4639069n>

<sup>69</sup> Kahnawake Annual Report 2011/2012, <http://www.kahnawake.com/news/annual/ar2012.pdf>.

<sup>70</sup> Frank Catania, *Internet Gaming Regulation: The Kahnawake Experience*, 5 CHAP. L. REV. 209 (2002).

<sup>71</sup> CBC News Online, *Kahnawake – Gambling on Internet Casinos*, (November 18, 2003), <http://www.cbc.ca/news/background/gambling/internetcasinos.html>.

<sup>72</sup> *Id.*

questions. Nevertheless, despite comments from various members of Parliament and investigations by the Quebec Provincial Police, KGC's operations continue to grow.<sup>73</sup>

The complex nature of the relationship between First Nations within Canada and the federal government is likely responsible for the lack of a firm government position on the KGC activities. There has been significant tension between the Mohawk people and the federal government since the 1990 Oka Crisis, a land use dispute that ended with an armed stand-off that lasted 78 days.<sup>74</sup> In the resulting state of détente, the federal and provincial governments have been careful to avoid another confrontation. Such détente was illustrated when the federal government opted against taking a definitive position in response to the Kahnawake's formal request for a designation of the as a permissible internet gaming jurisdiction.<sup>75</sup> While the Kahnawake reserve remains the only "legal" host of online gaming within North America, the potential exists for other First Nations to open their borders to providers of gaming services in need of a physical location to operate or run computer servers for a global customer base.

## **V: American Crackdown**

Multiple U.S.-based crackdowns on Internet gaming have had a ripple effect on the state of online wagering within Canada. April 15, 2011 has colloquially become known as "Black Friday" within the online poker world.<sup>76</sup> It is the date in which the United States Department of

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<sup>73</sup> Lisa Wright, *Mohawk Territory Gambling on Risky Business*, The Toronto Star. (April 19, 2008), [http://www.thestar.com/business/2008/04/19/mohawk\\_territory\\_gambling\\_on\\_a\\_risky\\_business.html](http://www.thestar.com/business/2008/04/19/mohawk_territory_gambling_on_a_risky_business.html).

<sup>74</sup> Jessica Murphy, *Peaceful Protest March Marks 20<sup>th</sup> Anniversary of Oka Crisis*, The Toronto Star (July 11, 2010), [http://www.thestar.com/news/canada/2010/07/11/peaceful\\_protest\\_march\\_marks\\_20th\\_anniversary\\_of\\_oka\\_crisis.html](http://www.thestar.com/news/canada/2010/07/11/peaceful_protest_march_marks_20th_anniversary_of_oka_crisis.html).

<sup>75</sup> D. McDonald, *All Bets are Off: A Tsunami hit the online gambling industry this month and it washed right up to the doors of a building on Highway 138 on the Kahnawake Mohawk reserve*. The Montreal Gazette (October 28, 2006), <http://www.canada.com/montrealgazette/news/business/story.html?id=ce950824-6d31-407c-a3d8-ee3ae640719f>.

<sup>76</sup> N. Rose, *Poker's Black Friday*, 15 Gaming Law Review and Economics 327 (2011).

Justice released its indictments focussed the three largest online poker sites.<sup>77</sup> The indictment sought \$3 billion in money laundering penalties as well arrest warrants for many of the sites' top executives.<sup>78</sup> Amongst the named defendants were three Canadians: (i) Isai Scheinberg, a dual citizen of Canada and Israel with a residence on the Isle of Man; (ii) Nelson Burtonick, a Canadian domiciled in Ireland; and (iii) Ryan Lang, the only indicted defendant actually living in Canada at the time.<sup>79</sup>

The relationship between Canada and the United States with regards to prosecutions is aided by having a mutual legal assistance treaty which allows for the extradition of a Canadian defendant to the United States without having to show dual criminality.<sup>80</sup> Absolute Poker, one of the web sites named in the indictment, was situated on the Kahnawake Reserve and regulated by the KGC.<sup>81</sup> To date, of the three indicted Canadians, Burtonick and Lang have been arrested, with Burtonick pleading not guilty on August 1, 2012, and being released on a \$500,000 bond.<sup>82</sup> Ryan Lang has pled guilty to conspiring to commit tax fraud as well as violations of the U.S. Unlawful Internet Gambling Enforcement Act and was scheduled for sentencing on September 24, 2012.<sup>83</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds, FBI.gov (April 15, 2011), <http://www.fbi.gov/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds>.

<sup>80</sup> Inter-American Convention on Mutual Assistance in Criminal Matters, art. 5, Apr. 14, 1996, <http://www.oas.org/juridico/english/Sigs/a-55.html>.

<sup>81</sup> Haley Hintze, *Absolute Poker Situation: Kahnawake Gaming Commission Releases Final Audit Results*, Poker News Global (Jan. 12, 2008) <http://www.pokernews.com/news/2008/01/absolute-poker-kgc-releases-final-audit-report.htm>.

<sup>82</sup> Brett Collson, *Former Full Tilt Poker Payments Director Nelson Burtonick Arrested, Released on Bail*, Poker News (April 1, 2012) <http://www.pokernews.com/news/2012/08/former-full-tilt-poker-payments-director-nelson-burtnick-13155.htm>.

<sup>83</sup> Michael Gentile, *Absolute Poker Vice President receives Lenient 14 Month Sentence*, Pokerfuse (July 24, 2012) <http://pokerfuse.com/news/law-and-regulation/absolute-poker-vice-president-receives-lenient-14-month-sentence/>.

Multi-agency federal and state investigators in Baltimore, Maryland executed a sting operation on May 23, 2011 that saw the seizure of eleven bank accounts and ten domain names of popular sports book operators.<sup>84</sup> The sting is now popularly known as “Blue Monday” in sports gambling circles. Amongst those charged in the indictments were the owners of British Columbia-based ThrillX Systems Ltd., Darren Wright and David Parchomchuk.<sup>85</sup> On June 8, 2012, Parchomchuk entered a guilty plea to one count of conspiracy to operate an illegal gambling business and was given a two-year probationary sentence.<sup>86</sup> As part of Parchomchuk’s plea arrangement, he agreed to forfeit the contents of three bank accounts located in Panama and testify regarding Wright’s role in the operation.<sup>87</sup>

The highest profile U.S. indictment of a Canadian citizen came on February 22, 2012 with the indictment of billionaire Bodog founder Calvin Ayre. The indictment of Bodog contained two counts. The first pertained to conducting a gambling business and the second related to money laundering.<sup>88</sup> The indictment alleges Bodog processed payments in excess of \$100 million.<sup>89</sup> Ayre (in)famously taunted U.S. law enforcement in a *Forbes* magazine cover story entitled “Catch Me If You Can.”<sup>90</sup> Ayre has denied accepting bets from U.S.-based customers, and issued a statement saying that internet gambling is legal under international law.<sup>91</sup> Ayre’s

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<sup>84</sup> Tricia Bishop, *Baltimore Feds Target Internet Gambling Sites*, The Baltimore Sun (May 23, 2011) [http://articles.baltimoresun.com/2011-05-23/news/bs-md-internet-gambling-20110523\\_1\\_internet-gambling-indictments-undercover-operation](http://articles.baltimoresun.com/2011-05-23/news/bs-md-internet-gambling-20110523_1_internet-gambling-indictments-undercover-operation).

<sup>85</sup> *Id.*

<sup>86</sup> David Purdum, *BetEd Justice, Just not for Clients* (June 14, 2012), <http://davidpurdumsports.com/2012/06/14/beted-justice-but-not-for-clients>.

<sup>87</sup> *Id.*

<sup>88</sup> United States v. BODOG Entertainment Group S.A., et al. Indictment, RCK:USAO 2007R00677, <http://31.cdn.bit2host.eu/wp-content/uploads/2012/02/Bodog-Indictment.pdf>

<sup>89</sup> *Id.*

<sup>90</sup> Matthew Miller, *Catch Me if You Can*, *Forbes* (March 27, 2006), <http://www.forbes.com/forbes/2006/0327/112.html>.

<sup>91</sup> Associated Press, *Bodog gambling site shut down, Canadian owner indicted*. (February 29, 2012), <http://www.cbc.ca/news/world/story/2012/02/29/bodog-calvin-ayre-indicted.html>.



present location is London, England and he regularly updates his personal website and actively communicates via Twitter to about 6,000 followers.<sup>92</sup>

The most recent U.S. action occurred on October 24, 2012 when state-level law enforcement in Nevada and New York, with assistance from the Federal Bureau of Investigation, arrested over two dozen in a wide ranging sports gambling sting. Among those arrested was Mike Colbert, the sports book director at several licensed and regulated Las Vegas-area casinos.<sup>93</sup> The 225 count indictment in New York made specific mention of offshore internet gambling activities related to Curacao-based Pinnacle.com, of the world's largest and most successful online sports book.<sup>94</sup> The Nevada Gaming Control Board's official press release described those arrested as individuals whose activities helped U.S. citizens to skirt American law and place bets offshore.<sup>95</sup>

## **VI. Conclusion**

First Nations have stayed at the forefront of Canadian gaming, particularly in connection with their venture into online gambling.<sup>96</sup> The Canadian Criminal Code's ambiguity as to online gambling has allowed these sites to operate. However, the recent decision in *R. v. Starnet Communications*, which found it illegal to offer gambling services to Canadians over the

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<sup>92</sup> CalvinAyre.com, <http://calvinayre.com/writers/calvin-ayre/> (last visited April 20, 2013).

<sup>93</sup> David Whitley, *It's Time to Follow Las Vegas' Lead and Legalize Gambling on Sports*, The Sporting News (Oct. 26, 2012), <http://aol.sportingnews.com/sport/story/2012-10-26/new-jersey-sports-betting-nfl-lawsuit-las-vegas-arrest-mike-colbert-arrested>.

<sup>94</sup> *Id.*

<sup>95</sup> Jerry Markling, *Gaming Control Board Announces Arrests in Nationwide Illegal Sports Betting Ring*, State of Nevada Gaming Control Board (Oct. 25, 2012), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=7325>.

<sup>96</sup> Alberta Gaming and Liquor Commission, *The Use of the Internet for Gaming*, 10 (Jul. 21, 2001), [http://www.aglc.ca/pdf/lpr/LPR\\_Report\\_15-Internet\\_Gaming.pdf](http://www.aglc.ca/pdf/lpr/LPR_Report_15-Internet_Gaming.pdf).

internet, has created some new hurdles.<sup>97</sup> The decision forced Starnet to move its servers to a more hospitable locale in the Caribbean.<sup>98</sup> While the *Starnet* decision seemingly limits Canadians from providing gaming services online to fellow Canadians, the decision is silent in terms of its potential applicability to First Nations. As such, the licensing of First Nations-controlled online gaming technology or lease of First Nations-owned property is possible in two specific realms – poker and sports betting.

As American efforts persist to stop online poker and online sports books from operating within their territorial boundaries, new and enterprising operations emerge. The Canadian First Nations gaming landscape appears to be a potentially inviting jurisdiction for American online gamblers because of the stability of government, similarity of law, proximity, and stable banking system. While an entity or individual who processed payments on behalf of an American would seemingly be in violation of the Unlawful Internet Gambling Enforcement Act of 2006, the geographic proximity could be attractive to potential sports bettors or poker players.<sup>99</sup> Americans could collect and deposit sums of money at First Nations casinos within Canada provided any cross-border cash over the amount of \$10,000 is reported to (and taxed by) the Internal Revenue Service.<sup>100</sup>

While Canadian legislation is certainly not hospitable to internet gambling, the First Nations' relationship with the government presents an opportunity. Enforcing a prohibition of online gambling on First Nations' reserves in Canada is difficult. The complexity of the strained

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<sup>97</sup> C.Ian Kyer & Danielle M. Hough, *Is Internet Gaming Legal in Canada: A look at Starnet*, Fasken Martineau (Jan. 2001), <http://www.fasken.com/files/Publication/ee12235e-9461-4818-966d-4daacef684ab/Presentation/PublicationAttachment/a882be52-459e-4812-8e52-6d9b371b02f5/WEBSITE-INTERNETGAMINGPAPER.PDF>.

<sup>98</sup> *Id.*

<sup>99</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

<sup>100</sup> 31 U.S.C.A. § 5332 (West 2013).

relationship between the Canadian government and First Nations has resulted in a *laissez-faire* approach taken with respect to enforcement, one which could be exploited by those seeking to play poker or bet on sports in a (virtual) location other than somewhat unfamiliar Caribbean countries or in-person in Nevada.