



## GAMING

### OVERVIEW

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The federal and provincial governments share concurrent jurisdiction over gaming. The federal government has jurisdiction over gaming under section 91(27) of the *Constitution Act, 1867*. Provincial governments have jurisdiction over gaming and the licensing of gaming activities pursuant to sections 92(7), (9) and 13) of the *Constitution Act, 1867*.

Although Aboriginal and Treaty rights defences are typically advanced in response to *Criminal Code* charges for conducting unlawful gaming activity, to date no court in Canada has been willing to recognize a First Nation section 35(1) Aboriginal or Treaty right to regulate gaming on First Nations lands on application of existing Canadian legal tests. First Nations have asserted inherent jurisdiction over gaming. However, where First Nations, in an exercise of their inherent or Treaty rights, establish or conduct gaming operations on First Nations lands, they inevitably find themselves in court defending charges for *Criminal Code* offences. Some First Nations have applied for provincial licenses to conduct gaming operations on First Nations lands. Others have entered into agreements with provincial governments to share revenues from gaming operations located on and off First Nations lands.

#### ***Criminal Code of Canada***

As all forms of gaming are considered illegal, unless the gaming activity or operation falls

within the exemptions set out at section 207 of the *Criminal Code*, at a minimum, the *Code* will have to be amended to create an exemption for a First Nation or a First Nations entity to manage and conduct gaming operations on First Nations lands.

#### ***1985 Federal/Provincial Agreement***

In 1985, the Government of Canada and the Provinces entered into an agreement regarding the management and conduct of gaming. Under the 1985 agreement, the federal government agreed to “refrain from re-entering the field of gaming and betting ... and to ensure that the rights of the Provinces in that field are not reduced or restricted.” To implement the 1985 agreement, the federal government amended the *Criminal Code* to divest itself of any capacity to conduct lottery schemes, which include casino table games, card and wheel games, slot machines and bingo games.

During the 2017 AFN Annual General Assembly, a gaming dialogue session was organized which provided the participants with an opportunity to discuss inherent jurisdiction over gaming. Many participants shared their perspectives on engaging with the provinces, the federal government and law enforcement as well as the implications of the 1985 Agreement and the possibilities for trilateral discussions between First Nations, the federal and provincial governments.

### UPDATE

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AFN National Chief Bellegarde and the AFN Executive Committee held the first Chief's Committee on Gaming on March 20, 2018, at the Dakota Dunes Casino in Whitecap, SK. This meeting brought together Chiefs from across Canada, various casino operators and regulators. Presentations covered how the gaming industry operates in various provinces and the challenges First Nations experience

under current legal frameworks. Further, it explored ways to engage with governments and to discuss possible options for First Nations to assert their inherent rights and take full advantage of the economic possibilities gaming offers. A draft Terms of Reference for the Chiefs Committee on Gaming was provided for committee members to provide feedback.

### NEXT STEPS

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The Chief's Committee on Gaming will meet in May 2018, (TBC), to discuss options to remove the existing barriers for First Nations in asserting their inherent jurisdiction over gaming and options for First Nations to fully

participate in the gaming economy in Canada. This will involve discussions on amending s. 207 of the Criminal Code with representatives from the Department of Justice (TBC).

