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Betting on Reconciliation: Law, Self-Governance, and First Nations Economic Development in Canada

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CANADA IS ENTERING AN ERA of renewed growth and vitality for Aboriginal[1] people, on the strength of modern entrepreneurship, court decisions affirming pre-existing Aboriginal rights, and an insistence that reconciliation between the Crown and Aboriginal peoples is a necessary part of this new era.[2] First Nations-operated hospitality, tourism, and gaming ventures have been among the most successful. Although gaming has the potential to impact communities negatively, some First Nations organizations have hit the jackpot, so to speak, and discovered the steady source of revenue, employment opportunities, and infrastructure development that gaming can bring to a community.

There are significant opportunities available to First Nations hospitality, tourism, and gaming businesses in the era of reconciliation, though there are also issues surrounding the Aboriginal right to establish, regulate, and operate gaming enterprises, a legal flashpoint in Canada. On that point, three models used by First Nations-operated commercial gaming organizations will be examined: the first is Casino Rama, considered by many to be the premier First Nations-operated casino in Canada. Despite an issue arising about how to distribute revenues fairly, Casino Rama's success has transcended revenue generation and evolved into development of surrounding infrastructure. The second is the provincial-scale gaming operation of the Saskatchewan Indian Gaming Authority (SIGA). Although born out of conflict between First Nations and the Saskatchewan government in the 1990s, SIGA now operates six highly successful casino and hospitality enterprises in Saskatchewan under traditional First Nations governance principles. SIGA cooperates closely with both the Saskatchewan government and the Federation of Saskatchewan Indian Nations (FSIN). The third and final example is the Kahnawake Gaming Commission (KGC). KGC licenses and hosts third-party Internet gaming sites which operate unsanctioned by the province of Québec and the Canadian federal government. These activities have laid a legal minefield to navigate, raising serious issues for the Québec and federal governments to ponder from a distance. Despite this uncertainty, KGC is profitable and considered a

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[1]The Aboriginal people in Canada are defined by section 35(2) of The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (Constitution Act, 1982) as the Indian, Inuit, and Métis peoples of Canada. Laws relating to Indians most often have their basis within the Indian Act, R.S.C. 1985, c. I-5 9 (Indian Act). For a discussion of the term "Indian," see note 9, *infra*.

[2]Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples. (Ottawa: The Commission, 1996) (Royal Commission report). This was a five-volume, 4,000-page report by the Royal Commission on Aboriginal Peoples, regarding the relationship of Aboriginal, non-Aboriginal, and government in Canada. The report was triggered, in part, by the so-called "Oka crisis" discussed later within this article. The report envisioned a new relationship, founded on reconciliation of past injustices, which recognized Aboriginal people as "self-governing nations with a unique place in Canada." The four areas the report urged the most pressing attention to were "healing, economic development, human resources development, and the building of Aboriginal institutions." *See also* Library of Parliament, Report of the Royal Commission on Aboriginal Peoples (Summary of Findings), <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb9924-e.htm>.

leading global Internet gaming enterprise. In the context of economic development, all three examples incorporate different understandings of Aboriginal rights and reconciliation.

JURISDICTION OVER GAMING AND REGULATION IN CANADA

In Canada, commercial gaming is regulated at both provincial and federal levels. Federal law prohibits specific types of gaming under the Criminal Code of Canada (Code),[3] while provincial law regulates permissible types of gaming.[4] This division was established by the Constitution Act, 1867.[5]

Gaming offenses are found within Part VII of the Code ("Disorderly houses, gaming, and betting"). Sections 201, 202, and 206 of the Code provide the basis for modern gaming offenses. Under § 201, anyone who "owns, operates, attends or permits on their land … a common gaming or betting house is subject to summary conviction not exceeding two years." Sections 202 and 206 provide similar prohibitions regarding "betting pools and lotteries." Section 207 of the Code grants provinces the authority to operate lotteries and sanction other forms of gaming.

Gaming regulation and legislation is unique to each Canadian province. For example, Ontario's regulatory scheme is a combination of the Gaming Control Act[6] and the Ontario Lottery and Gaming Corporation Act.[7] Saskatchewan's Alcohol and Gaming Regulation Act, 1997 is another example of provincial regulations on gaming.[8]

THE INTERACTION BETWEEN ABORIGINAL LAW AND GAMING REGULATION

Canadian gaming law can become complicated when it intersects with Aboriginal law. Federal jurisdiction over "Indians"—a legal term—arises by operation of § 91(24) of the Constitution Act, 1867. However, one recurring issue in Canadian law is the difficulty in determining to what extent provincial laws apply to Indians and their respective First Nations.[9] In issues involving Aboriginal rights and self governance, but not title to land, the Supreme Court of Canada (Court) has provided an analysis in three leading decisions.

ABORIGINAL RIGHTS IN CANADA

The two leading Aboriginal rights decisions in Canada are *R. v. Sparrow*[10] and *R. v. Van der Peet*.[11] Both were cases involving infringement of Aboriginal fishing rights. In *Sparrow*, the Supreme Court of Canada created a three-part test (sometimes referred to as the *Sparrow* test) to determine the protection afforded to Aboriginal rights recognized and affirmed by section 35(1) of the Constitution Act, 1982. The Court later refined the first part of the *Sparrow* test in the *Van der Peet* decision. In the *Sparrow* and *Van der Peet* decisions, the Court also described the nature of Aboriginal rights in Canada. First, it found that a fiduciary relationship exists between the Crown and Aboriginal peoples of Canada. While this relationship does not encompass all of the features found in traditional fiduciary relationships,[12] the Court insisted that one of the features is that the honor of the Crown is at stake in all of its dealings with Aboriginal peoples. Consequently, the Court held that § 35(1) is to be interpreted in a purposive, "liberal

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[3]R.S.C. 1985, c. C-46.

[4]*Id.* § 207 for what forms of gambling provinces are allowed to regulate.

[5]Commonly cited as the Constitution Act, 1867, 30 and 31 Victoria, c. 3 (Constitution Act, 1867). Section 91(27) established federal jurisdiction over prohibition of gambling. Sections 92(7), 92(9), and 92(13) allow provinces to regulate gambling not prohibited by the federal government.

[6]S.O. 1992, c 24.

[7]S.O. 1999, c 12.

[8]S.S. 1997, c. A-18.011.

[9]*See* Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 (Can.) ¶ 37: "Valid provincial legislation may apply to Indians, so long is it is a law of general application and not one that affects their Indianness, their status, or their core values." This is sometimes referred to as the "core of Indianness." Note also that many individuals who are legally Indians under Canada's Indian Act prefer to be referred to as First Nations people, their bands referred to as their First Nation (or the corresponding Indigenous name) and their reserve their "territory." Such words lack the legal certainty of the corresponding terms "Indian," "band," and "reserve," but arguably have less implied colonial connotations associated with them. For a more complete discussion of this, *see* the Royal Commission report, *supra* note 2, at Volume 5: "A Note About Terminology."

[10][1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 (Can.) (Sparrow).

[11][1996] 2 S.C.R. 507, [1990] S.C.J. No. 77 (Can.) (Van der Peet).

[12]*See* Wewaykum Indian Band v. Canada, 2003 SCC 45, [2003] 2 S.C.R. 259 (Can.) ¶ 81: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."

and generous manner," and any ambiguities are to be resolved in favor of Aboriginal peoples.[13] The Court also found that Aboriginal rights are collectively held, are not "frozen in time" in a primeval state, and are to be assessed on a case-by-case basis. Finally, the Court held that § 35(1) did not create rights or revive rights that had been extinguished, but rather protected or enshrined Aboriginal rights existing at the time of its enactment in 1982.

The three stages of the *Sparrow* test are: 1.) assessing and defining the potential Aboriginal right; 2.) establishing infringement of the right; and 3.) the Crown's opportunity to justify infringement of the right, if one is proven.[14]

1. Assessing and defining the potential Aboriginal right

The Court described a factor-based test to determine the existence of an Aboriginal right in the *Van der Peet* decision. This test is referred to as the "integral to a distinctive culture" test.[15] The burden is on an Aboriginal claimant to prove their asserted right exists. The following contextual factors are to be considered by courts adjudicating Aboriginal rights claims:

(a) A narrow identification of the precise practice subject to the claim;
(b) The perspectives of Aboriginal peoples themselves;
(c) The degree or central significance of the practice to the Aboriginal society in question;
(d) Continuity with practices that existed prior to contact;
(e) Rules of Evidence are to be approached and adapted in light of the evidentiary difficulties inherent in Aboriginal peoples' claims;
(f) Claims must be adjudicated on a specific rather than general basis;
(g) Independent significance of the practice to the Aboriginal culture in question;
(h) A practice need only be *distinctive* rather than *distinct*;
(i) Influence of European culture will only be relevant if a practice is only integral because of European influence; and
(j) The relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

The Crown may allege that it has extinguished the ability to practice a particular Aboriginal right at this first stage; however the Crown will be required to prove that it has done so with "clear and plain" intent. The Court established that "clear and plain" intent is a high burden to meet, and that mere regulation of a practice will not suffice.

2. Establishing infringement of the Aboriginal right

The burden is on an Aboriginal claimant to establish that a right has been infringed or limited. Aboriginal claimants need only meet a *prima facie*, or light, burden of proof. The following three questions are relevant when establishing if an Aboriginal right has been infringed:

(a) Is the limitation unreasonable?
(b) Does it impose undue hardship?
(c) Does it deny the holders of the right their preferred means of exercising their right?

3. Justification of infringement of the right

In the third and final stage of the *Sparrow* test, the Crown may justify infringement of the Aboriginal right, assuming that both the right and its infringement have been established in the previous two stages. This stage is somewhat analogous to the test found in *R. v. Oakes*[16] for justifying infringement of individual rights under § 1 of the Canadian Charter of Rights and Freedoms. The analysis of justification involves the following three questions:

(a) Is there a valid legislative purpose, mindful of the Honour of the Crown and its fiduciary relationship with Aboriginal peoples?
(b) Has the infringement been minimized in order to effect the legislative purpose?
(c) Have Aboriginal people been consulted?

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[13] *Van der Peet*, *supra* note 11 ¶ 23–27.
[14] *Van der Peet*, *id.* at ¶ 131.
[15] *Van der Peet*, *id.* at ¶ 59–75.
[16] [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 (Can.).

THE BEAR CLAW CASINO AND *R. V. PAMAJEWON:*[17] DO CANADIAN FIRST NATIONS HAVE AN INHERENT RIGHT TO SELF-REGULATE COMMERCIAL GAMING?

In the late 1980s, the Shawanaga and Eagle Lake First Nations established gaming enterprises (referred to as "high-stakes bingo") on their respective traditional territories without obtaining the necessary authority from the Ontario provincial government.[18] They were each charged with keeping a common gaming house under the Code. Both First Nations asserted that they possessed a broad right to self-govern economic activities on their traditional territories. In 1996, the dispute reached the Supreme Court of Canada. The Court unanimously held that the right asserted by the First Nations to "manage the use of their lands" under the broad auspices of full self-government was characterized too generally. The majority, led by Chief Justice Lamer, re-characterized the practice as the right to "participate in, and regulate, gambling activities on their respective reserve lands."[19] The Court concluded that although there was evidence of "gambling" by Anishinaabe First Nations prior to European contact, the evidence did not show it was significant enough to be integral to the cultures in question *nor* practiced on a large enough of a scale (before contact with Europeans) to correspond to the claim before them as a modern right to regulate "high-stakes gambling." The Court's holding in the *Pamajewon* decision has been roundly criticized by Aboriginal legal scholars for creating an unreasonably and disproportionately high evidentiary burden to prove an unreasonably and disproportionately narrow right. It is also criticized for using a retrospective yardstick in order to measure the importance of a practice to a culture hundreds of years ago. This attracts the rhetorical question of exactly what activities, if any, *were* practiced on a modern scale before European contact.[20]

In 1993, the White Bear First Nation opened a casino on its traditional territory in Saskatchewan after negotiations with the Saskatchewan government to do so legally were fruitless. At 4 a.m. on March 23, 1993, the RCMP tactical squad raided the casino, seized gaming equipment, closed the casino's doors, and charged Bear Claw Casino Ltd., White Bear Casino Supply and Services Ltd., and an American supplier and consultant engaged by the casino, with gaming offenses under the Code. Somewhat surprisingly, the former two accused were acquitted because of their honest belief at law that they possessed a right to self-government, while the latter was acquitted for lack of evidence. The *Pamajewon* case, which had just reached the Supreme Court of Canada, was mentioned in the judgment.[21]

SASKATCHEWAN INDIAN GAMING AUTHORITY: DEVELOPING OPPORTUNITIES THROUGH COOPERATION AND TRUST

Following the Bear Claw Casino acquittals, the Saskatchewan government and FSIN reached a "framework agreement" wherein SIGA was incorporated as a Saskatchewan not-for-profit corporation[22] to operate smaller casinos (six are now operating in total) on reserve land, while Saskatchewan Gaming Corporation (SGC), a Crown corporation created by the Saskatchewan Gaming Corporation Act,[23] operates two larger casinos on public land. Following this agreement, convictions and absolute discharges were entered by

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[17]R. v. Pamajewon, [1996] 2 S.C.R. 821, [1996] S.C.J. No. 20 (Can.) (Pamajewon).

[18]The trial judge in *Pamajewon* assessed the Eagle Lake gaming operation, and his observations were summarized by the Ontario Court of Appeal as follows: "there were about 225 resident band members, of whom about 70–80 were employable adults…the Eagle Lake Band's bingo undertaking provided six full-time and 15 part-time jobs and generated revenues of about $1,000,000 per year…the operation was professionally run and caused no social problems…the revenues generated by the bingos had provided significant benefits to the community as a whole." *See* R. v. Pamajewon, 21 O.R. (3d) 385, 120 D.L.R. (4th) 475 (Ont. C.A).

[19]Justice L'Heureux-Dubé wrote concurring reasons in which she argued that the correct re-characterization was if the First Nations possessed an Aboriginal right to gamble. In her view, this would then allow the Crown to properly justify infringement of this right, if it were proven.

[20]John Borrows, Recovering Canada: The Resurgence of Indigenous Law 68(2002).

[21]R. v. Bear Claw Casino Ltd., [1994] S.J. No. 485, [1994] 4 CNLR 81 (Sask. Prov. Ct.).

[22]Saskatchewan Indian Gaming Authority (SIGA) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, 2000 SKQB 176, [2000] S.J. No. 266 (Sask. Q.B.) (SIGA) ¶ 11: "SIGA is a non-profit corporation, created by the FSIN pursuant to The First Nations Gaming Act, an FSIN statute, and incorporated pursuant to the laws of the Province of Saskatchewan. SIGA is owned and controlled by the FSIN and its class "B" shareholders are the 10 tribal councils from across Saskatchewan."

[23]S.S. 1994, c. S-18.2.

agreement and the Crown abandoned its appeals of the questionable Bear Claw Casino acquittals mentioned above.[24] This agreement also avoided a judicial discussion of whether or not First Nations were legally subject to the Code gaming provisions and Saskatchewan provincial gaming regulations.[25]

For SIGA, casino location (a key consideration also discussed in the Casino Rama example below) is accomplished in a unique way: three of SIGA's casinos operate on "urban reserve" land obtained by First Nations under the Treaty Land Entitlement (TLE) process. The TLE process compensates First Nations for shortfalls of land promised but not delivered to them under their initial treaties with the federal government.[26] Since all of SIGA's casinos are operated on reserve land, both the casinos and employees who are status Indians under the Indian Act may assert certain tax benefits which are provided under the Indian Act.[27] There are other self-governance advantages for the casinos located on First Nations territory. For example, SIGA casinos allow patrons to smoke while gaming, contrary to Saskatchewan's province-wide ban on indoor smoking, which includes the SGC casinos.[28] This exemption is possible because the First Nations who host the casinos on their territories have enacted contrary and paramount indoor smoking by-laws pursuant to § 81(1)(a) of the Indian Act. The SIGA casinos therefore generally contain partitioned smoking and non-smoking sections. This provides an obvious competitive advantage by attracting gamers who smoke, to the chagrin of some health organizations. The province has ceded the paramountcy of these § 81(1) by-laws.[29] A minor drawback for the urban reserve model is that First Nations typically must negotiate to pay for garbage collection, fire and police services, snow removal, and other municipal services.[30]

SELF GOVERNANCE AT SIGA

SIGA has adapted and applied five traditional guiding principles of governance as modern business values: tâpwêwin ("speaking with precision and accuracy"), pimâcihowin ("the importance of making a living"), miyo-wîcêhtowin ("the value of getting along with others"), miskâsowin ("the value of finding one's sense of origin and belonging"), and wîtaskêwin ("living together on the land" and "sharing resources").[31]

Both SIGA and SGC contribute certain portions of their net income to a First Nations trust and Saskatchewan provincial coffers. In the 2009–2010 fiscal year, SIGA casinos generated revenue of approximately $200 million and a net income of approximately $60 million.[32] The income is divided, with 50% going to a trust fund for Saskatchewan First Nations (redistributed by FSIN) and 25% going to the Saskatchewan provincial coffers. The remaining 25% contributed to community development corporations based in the communities where the casinos operate. FSIN has publically expressed a desire for SIGA to retain 100% of net income eventually.[33]

SIGA currently employs approximately 2,200 people. About 71% of SIGA employees are Aboriginal, making SIGA one of the most significant employers of First Nations people in Saskatchewan.[34] SIGA and FSIN have also forged a close relationship with the First Nations University of Canada (a federated college headquartered at the University of Regina with campuses throughout

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[24]R. v. Bear Claw Casino Ltd., [1995] S.J. No. 114 (Sask. C.A.).
[25]*SIGA*, *supra* note 22, at ¶ 12.
[26]Government of Saskatchewan, Treaty Land Entitlement, <http://www.fnmr.gov.sk.ca/lands/tle/>.
[27]In some limited situations, goods and services acquired by a "band-empowered entity" (which includes a corporation) situated on a reserve may be exempt from transaction taxes under § 87 of the Indian Act. Generally speaking, income from work performed by status Indian employees on-reserve (even if performed on a reserve that is not the employee's own reserve) is income tax exempt. Courts will apply a "connecting factors" test to determine where the income should be legally situated: Williams v. Canada, [1992] 1 S.C.R. 877, 90 D.L.R. (4th) 129 and Shilling v. Canada, 2004 FCA 416, 248 D.L.R. (4th).
[28]Part III of the Tobacco Control Act, S.S. 2001, c. T-14.1.
[29]*New Sask. casino should be smoke-free, Cancer Society says*, CBC News, <http://www.cbc.ca/canada/saskatchewan/story/2007/02/07/casino.html>.
[30]Indian and Northern Affairs Canada, *Specific Claim Settlements Involving Land*, <http://www.ainc-inac.gc.ca/al/ldc/spc/pubs/spi/spi-eng.asp>.
[31]Saskatchewan Indian Gaming Authority, *Corporate Information*, SIGA, <http://www.siga.sk.ca/corporate.html>.
[32]Saskatchewan Liquor and Gaming Authority, *Factsheet,* SLGA, <http://www.slga.gov.sk.ca/Prebuilt/Public/Casino%20Fact%20Sheet.pdf>.
[33]James Wood, *Province, SIGA join forces to study Internet gambling*, Saskatoon Star-Phoenix, <http://www2.canada.com/saskatoonstarphoenix/news/third_page/story.html?id=864b238c-ecd3-4e10-b96c-ccf5e8ed3960>.
[34]SLGA, *supra* note 32.

the province) in order to educate Aboriginal business students on the business management and policy principles that relate specifically to hospitality, tourism, and gaming.[35] SIGA is also currently researching how to enter the Internet gaming market on behalf of the existing partnership with the Saskatchewan government.[36]

CASINO RAMA, ONTARIO: DIVERSIFYING BEYOND BASIC GAMING

Casino Rama is a highly successful First Nations "bricks-and-mortar" gaming enterprise located in Orillia, Ontario, slightly north of the Greater Toronto Area (GTA). Opened in 1996 on the Chippewas of Rama First Nation (Chippewas) territory, it has had Ontario provincial government authorization to operate throughout its history, and consequently has not had to contend with the type of government conflict that the White Bear, Shawanaga, and Eagle Lake First Nations have experienced. The location has also proven to be ideal.[37] The nearby GTA's population of over five million people has afforded a large customer base that has been key to the casino's financial success.[38] In recent years Casino Rama's annual revenues have reached approximately $500 million.[39]

However, that level of financial success may attract controversy in any industry, and the distribution of the casino's revenue has been a contentious issue amongst some Ontario First Nations.[40] This issue was resolved by an agreement between the government of Ontario and the Chippewas. Under the agreement, the Chippewas receive a 1.9% share of gross revenue—an estimated $8.8 million in 2011. The remaining funds are divided between the provincial government and other Ontario First Nations.[41] Casino Rama complies with the requirements of the Ontario Lottery and Gaming Authority as regulator,[42] and is managed by Penn National Gaming Inc., a Pennsylvania-based gaming management company.[43]

Despite the financial success of Casino Rama, the real strength of the project is arguably in the infrastructure development it has triggered for the Chippewas. In addition to the casino itself, a 300-room hotel, a spa, a health club, a number of restaurants and bars, and a 5,000 seat theatre have been built.[44] Casino Rama employs approximately 700 Aboriginal people, and is the largest employer of Aboriginal people in Canada.[45] It is not difficult to imagine the positive transformation this level of increased development and employment has created in a community of 1,500 people. The Chippewas have benefitted from infrastructure upgrades to schools, hospitals, roads, housing, water treatment, fire fighting, and ambulatory services.

There are two important lessons to be drawn from Casino Rama's success. First, casino location is a critical factor. Financially speaking, Casino Rama is the most successful Aboriginal casino in Canada. This can be explained in large part by its ability to draw people from the GTA and nearby Ontario "cottage country." Finding a suitable location is a challenge for many First Nations, whose traditional territories are often somewhat isolated and therefore lack the ability to draw crowds sufficient to support a hospitality facility like a casino. This may be a prohibitive factor for First Nations located in remote regions, although that same remoteness may be a draw for more "traditional" hospitality and tourism experiences, like hunting and fishing lodges. First Nations with such isolated territory may, however, consider forming joint agreements with other First Nations that are more strategically located.

Second, Casino Rama has become more than just a gaming enterprise. The presence of the hotel,

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[35]First Nations University of Canada, School of Business and Public Administration, <http://www.firstnationsuniversity.ca/default.aspx?page=20>.
[36]Wood, *supra* note 33.
[37]Albert Warson, *Casino Rama—Still the largest and most successful*, CANADIAN GAMING BUSINESS, <http://issuu.com/riccardo11/docs/gamingbusiness_junejuly2007/3?mode=a_p>.
[38]Statistics Canada, 2006 Census, <http://www12.statcan.ca/census-recensement/2006/dp-pd/prof/92-591/details/page.cfm?B1=All&Code1=535_&Code2=35&Custom=&Data=Count&Geo1=CMA&Geo2=PR&Lang=E&SearchPR=01&SearchText=Toronto&SearchType=Begins>.
[39]Warson, s*upra* note 37.
[40]*See* Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs), 2010 ONCA 47, [2010] C.N.L.R. 18 (Ont. C.A.). At issue was a revenue-sharing arrangement amongst Ontario First Nations with respect to the Casino Rama project.
[41]*Rama First Nation inks 20-year deal to run Orillia casino*, CANADIAN PRESS, <http://www.cp24.com/servlet/an/local/CTVNews/20100126/100126_casino_rama/20100126/?hub=CP24Home>.
[42]Casino Rama, *About Casino Rama*, CASINO RAMA, <https://www.casinorama.com/about-casino-rama.html>.
[43]Casino Rama, *Penn National Gaming*, CASINO RAMA, <https://www.casinorama.com/penn-national-gaming.html>.
[44]CASINO RAMA, <https://www.casinorama.com/index.html>.
[45]Warson, *supra* note 37.

restaurants, and theatre have allowed the casino to draw a larger cross-section of potential clientele, including customers seeking a more complete entertainment experience, lengthening stays and encouraging repeat visits. Casino Rama has therefore achieved the "triple crown" in becoming a true full-service hospitality, tourism, and gaming destination in Ontario. Most recently, Casino Rama announced that it will be host a mixed-martial arts fight card on April 2, 2011, almost a full month ahead of the highly-touted UFC 129 card scheduled in Toronto for April 30, 2011.[46] Perhaps following the successful Casino Rama example of establishing diverse attractions, one of SIGA's most recent enterprises includes an 80,000 square foot casino, an award-winning links style golf course, and 550-seat entertainment venue.[47]

THE MOHAWKS OF KAHNAWAKE: DEVELOPING GLOBAL OPPORTUNITIES THROUGH TECHNOLOGY

SIGA and Casino Rama are examples of situations where the province and First Nations have gradually forged a degree of cooperation through regulation, while also preserving traditional methods of self-governance. The Mohawks of Kahnawake currently find themselves where the White Bear First Nation was in 1993: asserting a right to self-regulate gaming under § 35(1) of the Constitution Act, 1982. Arguably, the venture is partly distinguished by the fact that some may take the view that the gaming does not occur physically "on or off reserve" and the Mohawks do not operate the Internet gaming sites *per se*. Mohawk Internet Technologies (MIT), authorized by the Mohawks of Kahnawake, operates a high-tech data center on Kahanawake territory. Rather than operate its own virtual casino, companies all over the world are issued permits by KGC to operate gaming sites and co-locate their Internet gaming servers within the MIT data center to serve Internet gamers internationally.

The KGC initiative took flight in 1996 when KGC was created as a band-empowered entity by the Mohawk Council of Kahnawake.[48] KGC is mandated to regulate gaming under the Kahnawake Gaming Law.[49] The Council modeled its gaming regulations on the Interactive Gambling (Player Protection) Act, 1998[50] of Queensland, Australia and subsequently created MIT as a wholly-owned, unincorporated band-empowered entity to handle the technological aspects of KGC in accordance with these standards. As of early 2010, approximately 55 permits had been issued, corresponding to roughly 500 gaming sites.[51] Among these sites are some of the largest, most successful, and well-known Internet gaming sites in the world. A 2008 Toronto Star article called the MIT data center "one of the most cutting-edge, high-tech centres for poker, casino games and sports betting in the world."[52] MIT currently employs approximately 250 people, making it the largest private employer in Kahnawake.[53]

KGC has, however, experienced some setbacks in establishing legitimacy globally, having been rejected from the United Kingdom's "whitelist" of Internet gaming jurisdictions permitted to advertise in the UK. Consequently, KGC licensees are unable to advertise in the UK. Some Internet gaming sites apparently moved or contemplated moving their operations from Kahnawake to other jurisdictions because of the UK whitelist rejection.[54] In response, KGC signed a memorandum of understanding with Antigua (whose Internet gaming authority was whitelisted by the UK) that allows

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[46]Casino Rama, *Entertainment*, CASINO RAMA, <https://www.casinorama.com/Entertainment.html>.

[47]Dakota Dunes, *About Us*, DAKOTA DUNES CASINO, <http://www.dakotadunescasino.com/InfoPage.aspx?page_id=51>.

[48]"Band-empowered entity" is a term that lacks true legal definition but appears in some Canadian federal government policies relating to the Indian Act and often, application of corresponding taxation or other laws relating to an entity, incorporated or unincorporated, that is controlled by Indians. *See, for example*, Canada Revenue Agency, *Definitions for GST/HST*, CRA-ARC, <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/glssry-eng.html#entity>.

[49]Kahnawake Gaming Commission, *Frequently Asked Questions*, GAMING COMMISSION, <http://www.gamingcommission.ca/faq.asp>. See also Murray Marshall, *Chapter 9: Kahnawake in* INTERNET GAMBLING REPORT V, (Anthony Cabot & Mark Balestra, eds., 2002) (Chapter available online at <http://www.gamingcommission.ca/docs/ArticleKahnawake.pdf>).

[50]Act No. 14 of 1998, assented to 26 March 1998.

[51]Lisa Wright, *Mohawk territory gambling on a risky business*, TORONTO STAR, <http://www.thestar.com/Business/article/416133> (Apr. 19, 2008).

[52]*Id.*

[53]Marshall, *supra* note 49, at 323.

[54]Jonny Vincent, *Poker News Casino*, GAMINGZION.COM, <http://gamingzion.com/gamblingnews/canada-online-gaming-jurisdiction-kahnawake-partners-with-antigua-1434> (Jan. 14, 2008).

mobility for licensees in either jurisdiction.[55] From a practical perspective, it is conceivable that Antigua licensees would benefit from moving to the bandwidth and redundancy offered at the MIT data center (Kahanawake is close to MAE-East),[56] while KGC licensees who are more concerned with advertising in the UK than bandwidth and redundancy would likely benefit from relocating and relicensing themselves in Antigua.

KGC: UNTANGLING POLITICS, SELF-GOVERNMENT, SOVEREIGNTY, AND THE DUTY TO CONSULT

In 2007, the Alberta government moved to stop the Alexander First Nation from setting up and operating an independent online gaming venture that resembled KGC's business, calling it illegal. However, the project failed financially before it could start operating and before any direct conflict could develop.[57] KGC, on the other hand, has operated for over ten years with no direct government intervention. Is this acquiescence? Likely not. The answer is likely found within the complex landscape that KGC currently operates on. First, the legality of the KGC under Québec and federal law (the application of which the Mohawks dispute, as noted in the sovereignty discussion below) is debated by some. The provincial and federal governments have stated that they believe the activity is illegal.[58] It is therefore more likely that the Québec and federal governments are mindful of a currently simmering land claim dispute in Caledonia, Ontario involving the Haudenosaunee as well as the so-called "Oka crisis" of 1990, an armed conflict between the Canadian military and the nearby Mohawks of Kanesatake about proposed golf course construction on sacred Mohawk traditional territory, which at the time was subject to a Mohawk land claim.[59] That 78-day conflict blackened Canada's eye internationally and at the United Nations, and burned an unforgettable image into the minds of many worldwide: a newspaper photo showing a Mohawk warrior staring down a Canadian soldier nose-to-nose, both in full combat gear. For some, that image remains an enduring symbol of the continuing tension in Canada between Aboriginal people and the Crown.[60]

On Nov. 12, 2010, almost exactly 20 years after the Oka crisis of 1990 and after three years of staunch non-cooperation, the federal government announced that it had formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples. Some have optimistically pointed to this endorsement as a commitment to building a new relationship based on respect, partnership, and reconciliation with the Aboriginal peoples of Canada.[61] Canadian opposition leader Michael Ignatieff has linked Canada's initial resistance to the Declaration (with other factors) to the most recent Canadian failure at the United Nations. On Oct. 12, 2010, Canada was not voted onto the United Nations Security Council for the first time since 1948, losing to Portugal.[62] Others have suggested that Canada's domestic policies toward Aboriginal people are contrary to the principles of the Declaration and a major factor behind Canada's recent failure to secure a seat on the Security Council.[63]

So what are the provincial and federal governments' next moves? If they have acquiesced, there is no guarantee that it will last, and the stakes involved may soon increase dramatically. Canadian provinces have begun to regulate Internet gaming, and some entered the market themselves.[64] Ontario has placed restrictions on advertising Internet

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[55]Lynn Moore, *Kahnawake commission in unique gambling pact,* MONTREAL GAZETTE, June 18, 2010.

[56]Metropolitan Area Exchange, East, or MAE-East is an Internet Exchange Point located on the eastern coast of the United States and offers high-bandwidth, high-redundancy connectivity to top tier Internet providers like AT&T, British Telecom, Verizon, and others.

[57]*High hopes dashed on Alberta First Nation after data centre closes*, CBC NEWS, <http://www.cbc.ca/canada/edmonton/story/2009/06/02/edmonton-alexander-first-nation-data-facility.html>.

[58]Wright, *supra* note 51.

[59]The Mohawks of Kahnawake, in solidarity, blockaded the Mercier bridge that crosses their territory to connect Montreal commuters to Montreal's suburbs.

[60]Shawn Atleo, letter to the editor, *Oka, 20 years later: The issues remain*, GLOBE AND MAIL, <http://www.theglobeandmail.com/news/opinions/oka-20-years-later-the-issues-remain/article1634811/> (July 12, 2010).

[61]*Id.*

[62]*Michael Ignatieff's speech to the Montreal Council on Foreign Relations*, NATIONAL POST, <http://news.nationalpost.com/2010/11/02/michael-ignatieffs-speech-to-the-montreal-council-on-foreign-relations/> (Nov. 2, 2010).

[63]Council of Canadians, *UN Security Council loss a direct result of Harper's policies, says Council of Canadians*, CANADIANS.ORG, <http://www.canadians.org/media/other/2010/12-Oct-10.html> (Nov. 12, 2010).

[64]Canadian Press, *Experts think Ontario will soon offer online gambling*, CTV NEWS, <http://toronto.ctv.ca/servlet/an/local/CTVNews/20100723/ontario-online-gambling-100723/20100723?hub=Toronto> (July 24, 2010).

gaming sites which are "operated contrary to the Code,"[65] British Columbia launched a government-run online casino in July 2010,[66] and on Dec. 1, 2010, Loto-Québec launched its *Espacejeux* Web site, which offers round-the-clock access to Internet poker, blackjack, and other virtual games of chance. It appears that rather than engaging in a direct confrontation to shut down KGC, Loto-Québec would rather try to lure customers to its regulated *Espacejeux* gaming site and away from the Internet gaming sites hosted by the KGC that Québec considers illegal. As is the case with any business involving competition and customer loyalty, this may prove to be an uphill battle for Loto-Québec due to KGC, MIT, and the gaming sites that MIT hosts in their data center's head start of over ten years of technical experience and goodwill.

Could the Mohawks prove a right to regulate high stakes gaming exists? Possibly. As noted above, the *Pamajewon* decision did not hold that an Aboriginal right to regulate gaming did not or could not exist. The Court said that it wasn't satisfied, *on the evidence adduced*, that such a practice existed before European contact or that if it did exist, that it was integral to the distinctive cultures in question. The compromise reached by FSIN and the Saskatchewan government in the White Bear dispute avoided an examination of this question altogether. Subsequent Aboriginal rights litigation has extensively developed the "integral to a distinctive culture" analysis since the *Pamajewon,* decision, and the Court has also held that evidence in Aboriginal claims is to be admitted and interpreted flexibly—even permitting trial judges to accept Aboriginal oral histories and assign appropriate weight to them as evidence.[67] Legally speaking, the Mohawks are better equipped to litigate an Aboriginal right to regulate gaming now than the White Bear, Shawanaga, and Eagle Lake First Nations were in 1996.[68]

THE SOVEREIGNTY ARGUMENT

Claims of First Nation sovereignty are also sometimes raised as an argument against government interference with First Nations. The Haudenosaunee Confederacy,[69] of which the Mohawks of Kahnawake are a part, maintains that its people remain sovereign over their traditional territories because they never signed a treaty which surrendered territorial authority,[70] were never conquered, and historically were equal allies rather than subjects of the Crown.[71] The Court has previously held in *obiter* that Aboriginal claims of parallel sovereignty are inconsistent with the ultimate goal of reconciliation between Aboriginal and non-Aboriginal Canadians, saying the following: "… [A]boriginal peoples [are] full participants with non-[A]boriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it."[72] The recommendation of the Royal Commission report was a move toward "shared sovereignty" in Canada between Aboriginal, federal, and provincial

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[65]Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A.

[66]Standardbred Canada, *Legal BC Online Gambling Up & Running*, StandardBredCanada, <http://www.standardbredcanada.ca/news/7-16-10/legal-bc-online-gambling-and-running.html>.

[67]Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.) (Mitchell) at ¶ 29–40.

[68]*See* Morden C. Lazarus, Edwin D. Monzon, Richard B. Wodnicki, *The Mohawks of Kahnawá:ke and the Case for an Aboriginal Right to Gaming under the Canada Constitution Act, 1982*, Gaming L. Rev. 10(4): 369–378 (2006), and Morden C. Lazarus, Brian Hall, *The Need for the Creation of a Framework for Aboriginal Gaming to Legally Exist in Canada: The Compelling Case of the Mohawks of Kahnawá:ke*, Gaming L. Rev. & Econ. 14(2): 95–99. In these two articles, the authors address some of the "what-ifs" that illustrate what might have happened if *Pamajewon* were decided today with a more fully developed body of Aboriginal rights case law, a more significant body of historical evidence, and a different set of facts (those of the Mohawks of Kahnawake) at the appellants' disposal. The historical evidence presented regarding the practice of gaming by the Mohawks prior to contact is very extensive, and appears at times to even approach an argument that provincial regulation of Mohawk gaming would cease to be a valid provincial law of general application and encroach the "core of Indianness." See note 9, *supra*.

[69]The Mohawks of Kahnawake, Kanesetake, and Akwasasne are all part of this confederacy, sometimes referred to as the "Six Nations." The Six Nations are the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora. The word "Haudenosaunee" means "the people of the longhouse."

[70]This is in contrast to most FSIN-affiliated First Nations who participate in SIGA's business, most of whom are signatories to the eleven Canadian "numbered treaties" signed between the period of the late nineteenth century and early twentieth century between the Crown and First Nations, which sought to surrender First Nations territorial authority over Alberta, Saskatchewan, Manitoba, and parts of B.C., Western Ontario, and the Northwest Territories.

[71]*See generally* Logan v. Styres et al., (1959) 20 D.L.R. (2d) 416, [1959] O.W.N. 361 (Ont. H.C.) and Murray Marshall in Internet Gambling Report V, *supra* note 49.

[72]*Mitchell*, *supra* note 67, at ¶ 135.

levels of government.[73] In the *Mitchell* decision, the Court held that claimed rights based on assertions of sovereignty by the Mohawks (of Akwasasne) as citizens of the Haudenosaunee Confederacy were incompatible with Canadian sovereignty and all Canadians' national interests as Canadians (inclusive of Aboriginal peoples).[74] But rather than sharing sovereignty, this stance seems to imply that First Nations, as part of reconciliation, are expected to abandon any claims of sovereignty in favor of the Canadian "common good." The Crown could instead consider reconciling its relationship as informed by First Nations and their historical understanding of their relationship with the Crown—for example, with the infamous two-row wampum belt.[75] At the end of the day, it appears that any claim to sovereignty by the Mohawks as a basis for self-regulating gaming will be subject to an examination of a compatibility with both the purpose of § 35(1) and maintaining the "common good" of combined Canadian sovereignty.

THE CROWN'S DUTY TO CONSULT ABORIGINAL PEOPLE

Finally, what of the duty to consult? Do the provincial or federal governments have a duty to consult First Nations on gaming regulation? This is also uncertain. The Court has indeed placed a duty to consult, and if appropriate, a separate duty to accommodate, on the Crown when it has real or constructive knowledge that a contemplated Crown action may adversely affect a potential Aboriginal right. This duty is grounded in the "honour of the Crown."[76] However, how this duty may apply to "non-cooperative" or allegedly illegal Internet gaming is uncertain. Although the provincial and federal governments have asserted that KGC is operating illegally, the appearance of acquiescence by both levels of government by not taking action for over a decade may prove to be problematic.

Does Québec entering KGC's market (or at least, that of KCG's hosted sites) carry with it possible infringement of a potential Aboriginal right to regulate gaming, and consequently trigger the duty to consult? What about the introduction of new provincial gaming legislation or other regulatory activity? In Canada, administrative decisions which may affect a potential Aboriginal right—even if the decision involves a previous or "historical" breach—must cross the threshold of a "novel breach" of the duty to consult in order to trigger the Crown's duty in the present. However, the Court has explicitly avoided addressing the issue of whether or not amending, enacting, or repealing legislation and regulations that may affect potential Aboriginal rights engages the Crown's duty to consult.[77] The Court's trepidation is understandable. Recognizing such a duty would raise many interesting hypothetical situations, none more interesting than the suggestion that consultation and accommodation would be required if and when Parliament decides

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[73]As quoted in *Mitchell*, *supra* note 67, at ¶130: "Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government."

[74]*Mitchell*, *supra* note 67, at ¶ 164.

[75]The two-row wampum belt is an illustration of traditional Haudenosaunee understandings of the parallel sovereign relationship with the Crown and is discussed in *Mitchell*, *supra* note 67, at ¶ 127: "In the constitutional framework envisaged by the respondent, the claimed aboriginal right is simply a manifestation of the more fundamental relationship between the aboriginal and non-aboriginal people. In the Mohawk tradition this relationship is memorialized by the 'two-row' wampum, referred to by the respondent…and described in the Haudenosaunee presentation to the Parliamentary Special Committee on Indian Self-Government in 1983 as follows:

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

Thus, in the "two-row" wampum there are two parallel paths. In one path travels the aboriginal canoe. In the other path travels the European ship. The two vessels co-exist but they never touch. Each is the sovereign of its own destiny."

[76]*See generally* Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511.

[77]Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 (Can.).

to amend or repeal the penultimate statute affecting Aboriginal interests: Canada's Indian Act. Although perhaps sensible in the near-term, a refusal to consult and accommodate Aboriginal people regarding legislation or regulatory activities which impact Indian "core interests" would show that the Indian Act still has a tremendous unilateral influence over First Nations people in Canada and is somehow immune to practical efforts toward reconciliation.[78]

Even setting the example of the Indian Act aside, extending the "novel breach" concept to legislation would perhaps include any new Internet gaming legislation or regulatory activities. Suggesting that legislative and regulatory activities which may affect Aboriginal interests should not involve consultation and accommodation seems contrary to reconciliation and may even offend common sense. After all, the duty to consult came from the justification stage of the *Sparrow* analysis, where Aboriginal consultation is one of the factors considered when assessing whether or not Crown infringement of an Aboriginal right has been just. Of course, common sense also says that Aboriginal groups must be prepared and willing to engage in meaningful consultation. From the Crown's perspective, it is difficult to conceive a better way of preventing adversarial Aboriginal rights litigation than by actively consulting Aboriginal stakeholders before legislation is enacted and before any infringement can occur. In fact, it could be said that the growing body of ongoing adversarial Aboriginal rights litigation in Canada demands attention and attracts the honour of the Crown when contemplating legislative action that may infringe rights. One obvious reason is because Parliament and legislatures now have knowledge—arguably real, but certainly of a constructive nature—of the statutes and matters which historically have adversely infringed the rights of Aboriginal peoples in Canada. Consultation on such matters could avoid a perception that may otherwise develop, that Parliament or legislatures have the wisdom or ability to "pre-justify" infringement of Aboriginal rights through legislation. Governments may find that the goal of reconciliation is better pursued by focusing on the purpose of § 35(1): the *recognition and affirmation* of Aboriginal rights, rather than by allowing both the non-existence of a right and justification of any legislative infringement to be presumed, subject only to litigation.

Pre-emptively satisfying the duty to consult by consulting with First Nations on how to legislate or regulate around a potential Aboriginal right to regulate gaming has precedent in Canada, at least from practical and political perspectives. For example, the Specific Claims Tribunal is a body created by the Specific Claims Tribunal Act to adjudicate specific First Nations land claims in Canada. That Act was developed jointly between Indian and Northern Affairs Canada and the Assembly of First Nations.[79] In the specific context of gaming, the FSIN and Saskatchewan statutes that created SIGA and SGC, respectively, were the result of extensive consultation and negotiations between FSIN and the Saskatchewan government.

Courts are also beginning to loudly disagree with the practice of some Aboriginal rights litigants conducting what are termed "collateral attacks" on provincial legislation. An Aboriginal rights litigant conducts a "collateral attack" by knowingly engaging in a practice with questionable legality (based on prior decisions or orders) in order to be charged with a criminal offence and thereby forcing further Aboriginal rights litigation. Courts have noted that one possible alternative is to bring an application before a provincial superior court to seek a preemptive declaratory judgment that an Aboriginal right exists and the practice in question is in fact constitutionally protected, before engaging in it.[80] Deep, meaningful, and ongoing Crown consultation with Aboriginal groups about legislative or regulatory matters has the potential to take exasperated courts out of the equation altogether. It would likely discourage or even eliminate the need to conduct collateral attacks or seek declaratory relief.

Issues of politics, sovereignty, and legality aside, KGC's success and SIGA's recent interest in Internet gaming show the possibilities that are presented to First Nations by technology and progress. Specifically, as Canadian provinces begin to regulate Internet gaming, opportunities for First Nations to enter this growing market will likely continue to present themselves. This is especially true of First

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[78]The Alberta Court of Appeal disagrees with this statement. *See* R. v. Lefthand, 2007 ABCA 206, [2007] 10 W.W.R. 1 ¶ 38.

[79]Indian and Northern Affairs Canada, *Government of Canada Announces New Key Step to Resolve Specific Claims in Canada*, AINC-INAC <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2007/2-2970-eng.asp> (Nov. 27, 2007). The land claim at the heart of the Oka crisis would have been subject to this tribunal's procedures.

[80]R. v. Lefthand, s*upra* note 78, at ¶ 19–34.

Nations and organizations like SIGA, who enjoy mutually beneficial working relationships with respective provincial governments. First Nations interested in Internet gaming should certainly be wary and closely follow any developments with both SIGA and KGC.

The tension between the Mohawks and the Québec government is palpable, and by launching a parallel competing venture, Québec may have set in motion a new, virtual stare-down. However, even with the spectre of conflict present, the success KGC has experienced in Internet gaming only increases speculation about the opportunities that may be available to First Nations with government support and cooperation.

CONCLUSION

In Canada, there are ample opportunities for First Nations hospitality, tourism, and gaming enterprises. Generally speaking, Casino Rama and SIGA are examples of the power that hospitality, tourism, and gaming revenue have to benefit not only First Nations communities, but also provinces at large.

SIGA is an example of the potential for prosperity where provincial governments are ready and willing to work with First Nations on economic development initiatives. By developing a good faith cooperative relationship, the entire province of Saskatchewan has benefitted. First Nations looking to move into the gaming industry (or other industries) may very well follow SIGA's example and look not only to short-term success, but also to invest in other, diversified enterprises with the revenue. SIGA's use of the five traditional guiding principles shows how traditional methods of self-governance can be retained and incorporated into cooperative government-First Nations enterprises. The use of urban reserve land and passing strategic by-laws has also allowed SIGA to capitalize on location, tax avoidance, and other competitive advantages.

Finally, KGC has shown that First Nations businesses need not be mired in conventional strategies, or based on rights that have been "frozen in time." KGC has generated substantial revenue and provided high-tech training and jobs for MIT employees. Beyond the obvious financial advantages, a strong social benefit has also resulted. The introduction of high-tech industry of any kind includes, necessarily, the introduction of technically advanced training and employment. Aboriginal employees working within a project like MIT obtain highly marketable business and technical skills that will serve them and their communities well moving forward. This is a significant advantage for the Mohawks—and for the province—as they both develop a workforce at large, providing for new revenue and other opportunities. However, First Nations looking to follow this model must be wary of the legal uncertainty surrounding self-regulation of Internet gaming. A balanced approach may be to consider looking at building initiatives with the respective provinces and private industry to cooperatively exploit these opportunities. Of course, gaming is just one possibility within an entire spectrum of possible economic initiatives.

The varying degrees of success in these three examples illustrate the potential for serious and lasting economic and social development when both First Nations and provincial governments are willing to cooperatively engage in creating new First Nations economic relations in the spirit of reconciliation. This new era of reconciliation between government and First Nations is more inclusive, and allows First Nations to play an active role in the development, implementation, and operation of ventures on their own land. Although all three examples examined above are truly successful, proponents of Aboriginal self-government and sovereignty will argue that both SIGA and KGC have been forced to achieve their success through confrontation and defiance, and criticize the Chippewa's reliance on both government and third parties to operate. Only KGC appears to have total independence from government, but it is also assuming the most risk of the three.

Reconciliation is probably not best conceptualized as a uniform, "one-size-fits-all" exercise. Imposed colonial "basket" terms, legal or otherwise, like "Aboriginal," "Native," "Indian," and "First Nation" are particularly helpful in understanding why. A Cree person from the Canadian prairies is distinct from a Coast Salish person from the Canadian west coast, and both are distinct from a Haudenosaunee person from central Canada.[81] Yet all three are legally defined as "Indians."

[81]Note that the traditional territory of the Haudenosaunee also straddles the Canada-U.S. border, complicating matters further. *See generally Mitchell*, *supra* note 67.

However, Indians are distinct from Inuit people, and both are distinct from the Métis. Yet all three are legally defined as Aboriginal under Canadian law. The differences are invariably fundamental: language, territory, traditions, values, political structure, and culture, to name but a few. An assumption that all Canadian Aboriginal people are the same is as ill-fitting as a suggestion that a Russian and an Italian person are the same because both hail from Europe. When considering this cultural distinctiveness, the Royal Commission report envisioned Aboriginal people as comprising distinct nations within Canada.[82] The Court has independently acknowledged Aboriginal distinctiveness in the "integral to a distinctive culture" test from the *Van der Peet* decision. Perhaps most important to reconciliation, Canadian Aboriginal peoples have also had distinctive experiences with the Crown, and those experiences have brought about the need for reconciliation. Therefore, it could be argued that the Crown's approach to reconciliation ought to acknowledge and respond to this same distinctiveness. For the Chippewas, at least for the time being, in the context of gaming and self-governance, reconciliation appears to mean revenue sharing, employment, and the development of sustainable infrastructure. For the FSIN, reconciliation has meant much the same, but also includes their extensive aspirations of continuously growing SIGA, increasing their responsibility, and obtaining a greater share of the benefits within their partnership with the Saskatchewan government. The only "reconciliation" that the Mohawks seek appears to be total autonomy. Perhaps granting that autonomy is part of the reconciliation needed to facilitate a source of revenue that allows the Mohawks to also sustainably plan their affairs and support their community.

Whatever approach to reconciliation is preferred by a given First Nation in an economic context, it is clear that gaming is a unique opportunity for First Nations economic development, and has provided a reliable and constant source of revenue, allowing for more sustainable economic planning and forecasting for the First Nations engaged in this business.

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[82] *See* Royal Commission report, *supra* note 2, at Volume 5: "Laying the Foundations of a Renewed Relationship."