

GAMING ON RESERVES

A DEPARTMENTAL DISCUSSION PAPER

Note:

This paper was prepared by Departmental staff and has benefited from discussions with a number of Indian leaders and from the counsel of an Advisory Group. The paper is for discussion purposes only and does not necessarily represent the views of either the Department or Indian people.

While the Advisory Group made many useful suggestions to the Task Force, its members were not asked to approve or sign off on the final discussion paper which is considered a document internal to the Department. Similarly Indian members of the Advisory Group made it clear that their names could not be used to indicate approval of the final document.

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I INTRODUCTION

(a) Problem

The year 1986 saw the relatively abrupt emergence of antagonism between some Indian communities and provincial authorities over control of gaming on reserves. Indians by and large do not accept provincial authority in this field.

There is risk of continuing confrontation unless Indian bands are either reconciled to provincial licensing, or the present legal system is revised to accommodate distinct Indian responsibility for gaming on reserves.

At present, except for pari-mutuel betting on horse races, the Criminal Code of Canada delegates to provinces the exclusive authority to regulate and control permitted forms of gaming.

(b) Issues

The heart of the matter is jurisdiction. For Indian people, provincial authority over gaming on reserve represents a diminution of the federal government's constitutional responsibility under section 91.24 of the Constitution Act, 1867, over "Indians and lands reserved for Indians". Their concern to preserve the historical primacy of federal responsibility is predicated on risk of Indian interests being subordinated to competing provincial priorities over the licensing and revenue-generating potential of gambling.

More broadly, the evolving notion of Indian self-government is causing a reassessment of the manner in which the recognized rights of Indians to manage their affairs will be regulated within the terms and spirit of historical accords, laws, and changing constitutional practice.

(c) Cultural and Social Context

Most Canadian adults gamble. Nonetheless, the language of the Criminal Code betrays a Victorian view of gambling as something intrinsically evil and to be grudgingly exempted by license.

(This attitude may be moderating. At least one provincial administration is mooting the need to de-criminalize gambling.)

In contrast, gambling has always been a socially acceptable activity in Indian communities. The importance of gambling has been attributed in the literature to long periods of forced leisure, and as well, to a polytheistic religion in which forms of gambling were often used to foretell the future.

It is important to realize that some of the differences between the Indian and the dominant Canadian view of gambling are culturally driven on both sides.

(d) Recent Developments

For years bingo and other forms of gambling have taken place on reserves just as in other communities. On Indian lands, games were usually small. Over the last decade, however, there has been an enormous growth in legal gaming across Canada. Most visible have been the heavily promoted provincial lotteries. Largely unappreciated by the public is the similar growth in expenditures on charitable and non-profit licensed gaming activities in communities. The mid 1980's, also saw the introduction in Indian communities of high stakes bingos, pull cards and other forms of gaming aimed at developing a wider market than just that of the reserves. Provincial authorities clamped down on some of these activities which were illegal.

A parallel development in the mid-1980's was growth of interest in the revenue potential of bingos to underpin economic development on Indian reserves. The U.S. experience provided stimulation. American Indian tribes successfully launched a number of multi-million dollar gaming operations. As a result of a U.S. Supreme Court Decision in 1981, these games were allowed to operate in some states completely outside of state or federal controls.

Another salient development took place in Canada in 1985 through a structural change to the system of shared authority over gambling. The federal government effectively vacated the field in favour of the provinces. This was effected by a political accord signed June 11, 1985⁽¹⁾. This political step was given statutory form by amendments to the Criminal Code in December, 1985. The question of how Indian communities might be affected does not seem to have been addressed.

(1). When the federal government had statutory authority under the Criminal Code to exercise jurisdiction in the field of gaming it was not involved in the licensing of gaming activities at the local level.

Many bands obtain provincial licenses. Some take the precaution of formally stating that the license is obtained "without prejudice" to claimed exemption from provincial regulations. Many other bands refuse to submit to provincial licensing. Police warnings have been issued. In the past eighteen months charges have been laid on four reserves: two in Alberta and two in Ontario.

In general, however, the situation appears to be one in which the provincial authorities have adopted a tacit moratorium on further prosecutions (except where unavoidable because of formal complaints) pending clarification of policy regarding gaming on Indian reserves. On the other hand, there is some awareness within the Indian community of the legitimacy of provincial concerns over the adverse aspects of unregulated gambling.

These and related issues have important financial implications for both provinces and bands for gaming is big business in Canada. In fiscal year 1985-86 sales of provincially operated lottery tickets amounted to \$2.8 billion with net profits of \$896 million. It is difficult to calculate the revenues from provincially licensed games operated by charitable and religious organizations, but estimates range between \$1.5 and \$2.7 billion. Figure I on the following page provides a breakdown.

(e) The Purpose of Discussion Paper

The purpose of this discussion paper is to:

- 1) provide an overview description of gaming regulation across the country and to review recent trends in both gaming and provincial control;
- 2) indicate the social and economic importance of gaming to Indian communities;
- 3) analyze the central issue of jurisdiction over gaming on reserves; and
- 4) identify possible options for resolving Indian concerns

This paper does not recommend any particular course of action. It undertakes to provide the necessary information and analysis on which to base any follow-up policy decisions.

The paper was prepared by a task force of Department of Indian Affairs officials assisted by an outside consultant familiar with Indian gaming. An Advisory Group comprised mainly of Indian leaders provided valuable comments and advice. Task Force and Advisory Groups members are listed in Annex II. The bands and the provincial departments and agencies with whom discussions were held are listed in Annex III.

FIGURE 1
ESTIMATES OF LEGAL GAMBLING IN CANADA, 1985/86
(\$Millions)

	Gross Revenues ⁽¹⁾		Net Proceeds	
	Estimates low	high	Estimates low	high
A. Bingo	670	980	114	167
Pull Tickets	560	820	112	164
Casinos	170	240	22	31
Raffles	<u>110</u>	<u>160</u>	<u>47</u>	<u>69</u>
Sub Total	1,510	2,200	295	431
B. Carnivals Fairs ⁽²⁾	500	1,000	70	140
C. Provincial Lotteries	2,800		900	
D. Pari-mutuel ⁽³⁾	1,600		0	
Total ⁽⁴⁾	<u>6,410</u>	<u>7,600</u>	<u>1,265</u>	<u>1,401</u>

Notes:

1. The low estimate is composed of provincially collected and estimated statistics. The high estimate includes a factor for unregulated and unreported gaming based on discussions with the Ministry of the Solicitor General and the RCMP.
2. Many jurisdictions do not require a license for these.
3. Net proceeds are zero because federal and provincial shares are reinvested in the industry.
4. Over and above this total, illegal gaming is estimated by the RCMP at \$3-5 billion.

III LEGAL BACKGROUND

(a) Gaming and the Criminal Code of Canada

Gambling is regulated by the Criminal Code of Canada. The approach in the legislation is to have a blanket prohibition against all gambling, and then to allow certain exceptions. There are two major classes of exceptions: (1) lottery schemes and (2) pari-mutuel betting.

For the purposes of the Criminal Code the term "lottery scheme" covers a wide range of gaming activities and would include bingo.

Management and Control

Since 1970 the provinces as well as the federal government have had the authority to license gaming. Since January 3, 1986, sole powers to license lottery schemes have been delegated to provinces with the federal government agreeing not to enter this field. Provinces are able to establish conditions over gaming within the general restrictions of the Criminal Code.

Permitted Games and Gaming Activities

The Criminal Code permits lotteries and slot machines, raffles, bingos, casino games (e.g. blackjack and roulette) and Nevada or breakopen tickets.

All lottery schemes (e.g. games of chance) are legal if conducted by a government of a province in accordance with legislation, or if licensed by the Lieutenant-Governor in Council (or designate) with the following exceptions:

- only the provincial government can operate slot machines;
- wheels of fortune and games of mixed chance and skill are permitted only at agricultural or fishing fairs or exhibitions;
- dice games, three card monte, punch boards, and coin tables are not permitted;
- bookmaking is illegal

A province can, under the provisions of the Criminal Code, prohibit or restrict allowable types of games through control of licensing. The manufacture and distribution of gaming supplies is legal only if the use of such supplies is legal. The provinces control this activity by setting conditions on the supply of gaming materials as a condition of licensing.

Eligibility and Prize Limit Provisions

Section 190 sets conditions on eligibility, use of proceeds, and permitted prize limits related to lottery schemes:

- provincial governments can operate in their own right permitted games without restrictions as to use of proceeds or prize limits;
- charitable or religious organizations can operate permitted games if the proceeds are for charitable or religious purposes and if licensed by the province. The Criminal Code has no restrictions on size of bets or prizes.
- agricultural or fishing fairs, or concessions at such events, if licensed by the province can operate permitted games without restrictions over size of bets or prizes, or use of proceeds;
- anyone, if licensed by the province, can operate permitted games subject to \$2 bet and \$500 prize limit, with no restrictions on use of proceeds.

Penalties

The Criminal Code allows for penalties of up to two years imprisonment for conducting illegal lottery schemes, and up to 6 months imprisonment or a fine up to \$2,000 for participating in illegal lottery schemes.

(b) Provincial Regulatory Regimes

Within the general provisions for operating lotteries and the licensing of gaming under Section 190 of the Criminal Code there is substantial variation among the provinces and territories in policies and approaches. However, every province and territory allows gaming, and every province is involved in lotteries.

Following is a description, in very general terms, of the range of approaches the provincial and territorial governments have taken to regulating gaming and licensing of charities or religious organizations. It is obvious that there is no general pattern. This could make it difficult to achieve any general agreement between provinces on the matter of Indian interests.

Administration

The provinces differ substantially in their approaches to administering gaming. The Alberta Gaming Commission and the Manitoba Lotteries Foundation represent a specialized institutional approach to reviewing and approving license applications. In other provinces license applications can be approved by an official within the Consumer Affairs or other ministry. In some cases, such as Prince Edward Island, licenses are reviewed by officials but approved by the Minister. In the Northwest Territories ministerial approval is needed if prizes are over a pre-fixed \$30,000 limit.

Some provinces have decentralized licensing authority. In Ontario, municipalities as well as six Indian bands can approve licenses for prize boards up to \$3,500. In British Columbia, New Brunswick and Newfoundland local authorities (e.g. police officers) can issue permits if prizes are low (e.g. under \$500 in B.C.).

All provinces charge license fees (except for some small prize boards). The fees may be fixed, based on the prize board, or on a percentage of the prize board or gross revenues. They may also vary by type of game.

Permitted Games and Prize Limits

All provinces and territories allow bingo, raffles, and casino games. Breakopens or Nevada pull tickets are not allowed in New Brunswick or the Yukon, and are a provincial monopoly in British Columbia through its Lottery Corporation.

Prize limits vary considerably although describing these limits is complicated by whether or not pooling of licensed prize limits or accumulating jackpots are allowed. It should be noted that in no case do prize levels approach those of provincially run lotteries. For bingo most provincial prize board limits are under \$10,000 with individual prizes restricted to \$1,000 or less. However, prize boards as high as \$100,000 have occurred in Saskatchewan, and Ontario has approved games in the \$30,000 range.

Operations of Games and Source of Supplies

Commercial bingo halls are allowed in most, but not all, provinces subject to varying restrictions. In Manitoba it is the Lotteries Foundation which operates or staffs most licensed games. In Alberta charitable groups are encouraged to form umbrella organizations to run bingo and casino games. In British Columbia and Ontario provincial policy guidelines stipulate that the charitable organization must have effective control over cash and operations if using a commercial operator. In Newfoundland, New Brunswick, and the Yukon commercial operators are not permitted.

Gaming supplies are controlled in certain provinces. Bingo paper in British Columbia and Manitoba must be bought from the provincial government. In Alberta and Ontario it must be purchased only from approved suppliers.

Frequency and Renewal

Licenses may be issued for single events or for a period of time such as a year. In the latter case there are often conditions attached to frequency, (e.g. once a week) and maximum number of events (e.g. 26). In Alberta and Manitoba in particular there is a conscious regulation of the market by controlling the number of licenses and frequency of events.

Allocation of Revenues

Most, but not all, provinces stipulate conditions concerning the allocation of revenues; for example, for bingos in Alberta it is on a 65%, 10% and 25% basis for prizes, expenses, and profits respectively. In some provinces this stipulation applies to each event while in others it is calculated on a yearly basis. The fact that provinces generally have guidelines on profits reflects the basic rationale for this type of gambling, i.e. to raise funds to charitable or religious organizations.

Financial Reporting

While financial reporting stipulations vary in detail, the actual requirement is universal. In general it is a condition of licensing that an authorized government official have access to financial records that a separate account be kept for gaming events, and that financial reports be filed commonly within a 30 or 60 day period after an event. Other conditions such as independent financial audits vary from province to province and by size of event.

Other General Conditions

As a regulatory requirement, as general policy, or on a case by case basis, provinces may set other conditions. By way of example these might include allowing only voluntary labour, (i.e. British Columbia and Alberta). Another example is consumption of alcohol at licensed events which is generally prohibited, other than in British Columbia and Ontario.

Regulations Complex

Provincial regulations add additional complexities and Task Force members were told on occasion that it is difficult for small bands, as for all small communities, to understand and comply with all of them. In this regard, there is a good deal of flexibility shown by many provinces in the application of their regulations, especially regarding smaller communities in remote areas.

Pari-mutuel Betting

While this study has concentrated on games of chance, some bands have voiced an interest in pari-mutuel betting. Section 188 of the Criminal Code provides for particular exceptions to the general prohibitions on betting in Sections 185 and 186. Specifically pari-mutuel betting on horse races, under certain conditions, is legal in Canada. The Federal Minister of Agriculture regulates and supervises the betting. Eight of the ten provinces have racing commissions to regulate and supervise the horse races themselves.

III INDIAN INTERESTS IN GAMING

Range of Interest in Gaming

This section sets out the interests and concerns reflected in discussions with Indian bands. Small scale community bingo is probably the game played most by Indian people and it is not surprising that it has received most attention. The laying of charges against bands members in Alberta and Ontario for operating unlicensed bingos has created a sense of apprehension and urgency.

Community bingos are not the only gaming issues for Indian bands, however. Some bands are interested primarily in pull tickets. Others are operating monster bingos. Still other bands are investigating the possibilities of operating casinos as part of major tourist complexes.

(a) Financial and Economic Development Considerations

A recent DIAND commissioned report entitled "Task Force on Indian Economic Development" (December 16, 1985) points out that on average there are at least one third less adults with any paid employment on reserves than there are adults with paid employment in towns and villages of comparable size and remoteness. (p.12).

Most Indian communities are on the periphery of the Canadian economic system regardless of their geographic location. This is especially so in the remote areas where there tend to be few economic opportunities. There is a limit to the number of jobs, even low-skill jobs, in the primary resources sector. Moreover, given the existing fiscal restraint, government funds cannot be expected to meet all economic development requirements.

Many bands do not have an adequate tax base on which to raise significant funds additional to what is provided by federal budgeting which must concentrate first on critical areas of need such as housing. In these circumstances, gaming provides a rare opportunity for the bands to raise revenues for community purposes by "voluntary taxation".

Our survey showed that most bingo games on reserves are modest community affairs (well within the parameters set by provincial regimes). Such prize boards range from \$ 1000 to \$ 1400 and net profits are in the range of \$ 275 to \$ 375. These yields are significant when it is noted that the average population of an Indian band in Canada is only 285. (The median band population is even smaller at 255).

The relationship between the revenues from gaming and band economic development has been pointed out by many Indian leaders. The term "economic development" is used in the Indian context in a broad sense. In most instances it does not refer to profit-oriented business investment. Bands are essentially looking for sources of revenue which will give them some financial independence from the government and allow them to carry out a variety of community projects which otherwise would not be funded. Finding some band controlled and operated source of revenue is an important contribution to increased self esteem.

A small but increasing number of bands are using gaming proceeds as a supplementary source of band operating funds. The Pas band's budget realizes about \$500,000 each year on pull tickets. The has already contributed \$1.5 million to the construction of a community arena. Renting the arena provides modest revenues but its main purpose is social and recreational and in this regard its beneficial effects are widespread.

The revenues from the Eagle Lake monster bingos are directed by and large to repaying the debt and operating expenses of a new community centre. This centre includes classrooms which now permit children to be educated on reserve rather than be bused some 30 miles to the nearest school.

(b) Outflows and the Patterns of Benefits

Indian leaders are concerned about the money that leaves the Indian community when band members gamble off reserve. A multitude of situations exist where Indian players support bingos operated by charities or religious groups in neighbouring communities but rarely see any of the bingo profits benefiting the Indian community.

There is a similar concern with provincial lotteries. Indian people believe that they buy more than their share of lottery tickets but receive less than their share of the proceeds. They find it difficult to identify any reverse flows of benefits going to the reserves from the provinces. Many Indians assume that the lottery proceeds go into some sort of special provincial fund (along the lines of the original Wintario lottery in Ontario) which they would have difficulty accessing. In fact, in all provinces lottery proceeds now go directly into consolidated revenue funds.

Most bands would like to go further and attract non Indian players to the reserves thereby reversing the net transfer of gaming profits to the community. Bands generally believe that non Indians will need an added inducement to attend games on reserve and that Indian communities should be allowed to have somewhat higher prize boards.

Indian tribes in some American states operate monster bingo and casinos free of state or federal legislation. Reported profits are in the millions. These are powerful examples for Canadian bands. This is especially true for Canadian bands along the border whose members are regular patrons of Indian operated bingo barns in the neighbouring American states.

The last mentioned point draws attention to the problem of incomes being drawn off the reserve by competing gaming operations, both nearby in Canada and externally to such mega operations as are mounted, for example, by the St. Regis tribe in New York State and the Leech Lake Tribe in Minnesota, whose patrons come by bus from within a radius of 300 miles.

(C) Regulation of Competition

There is a growing awareness among bands in the more urban areas of the value of some sorts of regulation which would curtail all out competition between operators. On the other hand, some bands wish to take the issue of market advantage further by exercising the claimed right to operate totally unregulated gaming on Indian lands. This would most likely involve monster bingos or casinos beyond the scope of any provincial gaming system.

Thus, there are two distinct although sometimes overlapping interests in the issue of jurisdiction. One is driven by the belief that Indians by virtue of inherent aboriginal rights should control gaming on reserves but in general conformity with the relevant provincial regime so as to preserve orderly markets in the region. The other interest is motivated by the need to be quite free of regulation in order to capitalize on a market advantage which would normally not be available to non Indian operators in the region.

As for unregulated and open competition amongst Indian bands, one view is that the market should be allowed to determine which gaming operators will succeed and which will fail. It is accepted that some weaker bands would lose out. It is expected that in some regions tribal councils will evolve into roles of regulating the market among member bands.

Control of competition between Indian bands is only one aspect of the problem. Harmonization of competing interests, both Indian and non Indian, must enter the picture as a consideration of economic and marketing importance which may point to optimums broader than band level organizations. In this regard the Gitksan-Wet-Suwet'En Tribal Council in British Columbia has been effective in regulating bingo operations within their region.

(d) Relative Profitability of Games

To assist in evaluating the impact of changes, profiles of three types of gaming events are set out in Figure 2 below.

The display of "small stakes bingo" is based on averages from Alberta towns and small cities, plus known activity on reserves.

It is estimated bingo events such as these would occur about every two weeks on the average reserve netting the Band about \$9,000 in the course of a year or about \$35 per capita. (assuming median band in Canada has a population of 255 people).

The second and third displays portray much larger events. The market for events such as these on reserve would vary dramatically by geographic location and proximity to metropolitan areas. The important point is that even one such casino or monster bingo would represent profits almost equal to two years of biweekly small stakes bingo.

The Alberta Gaming Commission reports a total of only 23 bands having held bingos in 1984 and 1985. Also, the total gross revenues in 1985 for the 18 bands reporting that year is a mere \$890,000 for an average of only about \$50,000 per Band. The total net revenue was \$151,000 or an average of only about \$9,000 per band. These figures would seem to understate the level of bingo activity on Alberta reserves.

FIGURE 2

FINANCIAL STRUCTURE OF THREE TYPES OF GAMING OPERATIONS

A. Small Stakes Bingo

(average of over 22,000 events held
in Alberta outside Calgary and Edmonton)

Gross revenues	\$ 1,718
Prizes	1,200
Expenses	183
Profit	335

B. Large centre/Licensed Casino

(average of 376 events held in
Calgary and Edmonton)

Gross Revenues	\$ 119,106
Winnings	93,204
Expense	10,628
Profit	15,274

C. Monster Bingo

(hypothetical case, currently illegal)

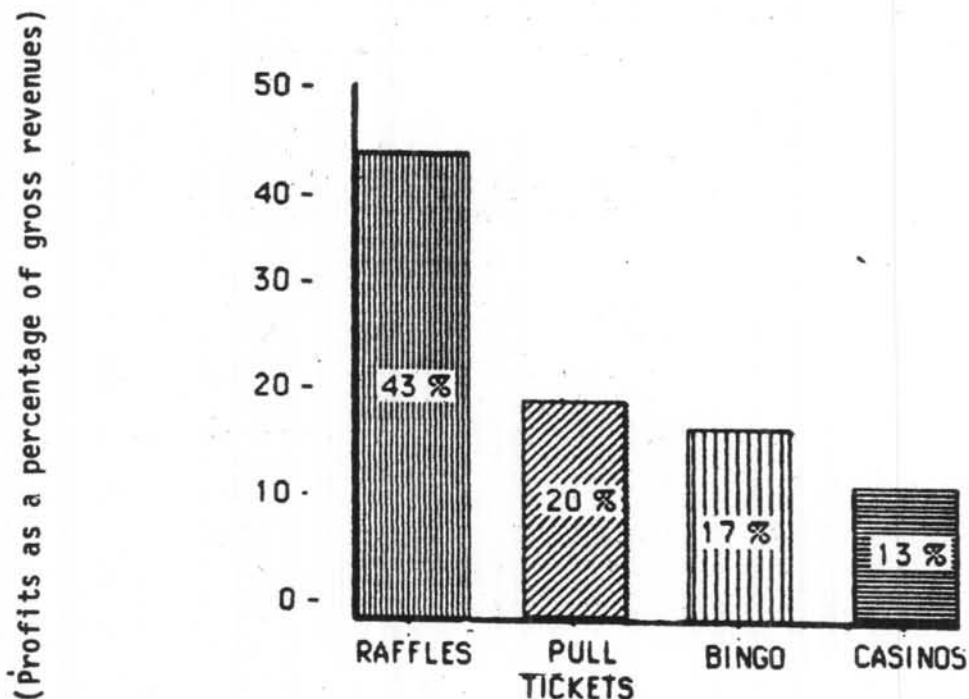
Gross Revenues	\$ 72,000
Prizes	50,000
Expenses	10,000
Profit	12,000

Notes to case C

This is the average of several large illegal events. Such a bingo, requiring over 700 players at over \$100 each, represents a big risk since profits evaporate at much less than 600 players. This event is only moderately efficient - there are many documented cases of legal bingos with more modest prize boards bringing in profits on the same scale as the prize board itself. Clearly the size and compactness of the market area determines to a great degree the optimum type and size of bingo event.

FIGURE 3

RELATIVE REVENUE GENERATION OF SEVERAL LICENSED GAMES



Notes

1. Raffles are fading partly due to the poor prize to price ratio and the broad decline of customers willing to await delayed gratification.
2. Game for game, pull tickets show higher gross revenues and higher percentage profit margins over bingos. Economies of scale seem to favour pull tickets.
3. Chart shows returns for large Canadian casinos. Small casino operations are not as profitable.

(e) Jurisdiction and Self Government

Most bands see "jurisdiction" as the central issue. Gaming is just one aspect of the broader jurisdictional issue which is being discussed in the context of self government.

Some bands would be willing to accept Federal regulation of gaming on reserves, and believe that when the changes to the Criminal Code were made in 1985, the rights of Indians were simply overlooked. Many bands, however, believe that inherent aboriginal rights and treaty rights give Indian bands authority over gaming on reserves and that neither the Federal nor provincial governments should be involved.

In terms of jurisdiction, the issue is not one of paramountcy of the Indian Act over the Criminal Code, but rather the paramountcy of inherent rights over the Criminal Code.

There has been no specific statute terminating the Indian law, thus it continues to exist. Indian criminal jurisdiction has been removed by federal and provincial policy, but these policies cannot be defined as an extinguishment. The issue has not been considered by Canadian courts.¹

It is further argued that it is impossible for a Canadian statute to unilaterally abrogate full Indian sovereignty over territory which is not the subject of treaty or land claim agreements.

These themes are surfacing in court cases, land claims, disputes over resource management, and the self-government debate generally.

¹ Quoted from paper prepared for the Task Force by Sharon Venne entitled "Indian Jurisdiction" (p. 25)

(IV) PROVINCIAL INTEREST IN GAMING

(a) Range of Interests

Gaming is of obvious importance to the provinces. To begin with they have been delegated responsibility under the Criminal Code for the management and control of gaming within their respective jurisdictions.

The provinces also have a major financial interest in gaming. In fiscal year 1985-86 sales of lottery tickets netted \$896 millions in profits. These profits were based on gross sales of \$2.8 billion, equivalent to \$112 per capita. Profits went directly to provincial treasuries.

Provincial governments also have an indirect interest in the substantial profits of gaming operations carried on by charitable and religious organizations. Data on these activities is incomplete but it is estimated that annual net profits range from \$225 to \$400 million on gross revenues of between \$1.5 and 2.7 billion.

While provinces do raise revenues by selling licenses the amounts are relatively small and most go to cover the operating costs of provincial regulatory agencies. The main interest of provincial governments in licensing is to ensure an orderly market that will optimize the gaming profits of charitable and religious organizations which are directed to a wide range of community programs and projects.

Finally, some provinces are studying the potential of casinos as a means of encouraging economic development through tourism (eg. the B.C. consideration of casinos games and slot machines on ferries between Vancouver and Victoria).

(b) General Concerns

In discussions held with provincial and territorial officials responsible for gaming licensing, there were frequent references to a number of common concerns which apply equally on and off reserves.¹

1. The exceptions were in the provinces of Alberta and Manitoba which both have highly structured, if different, specialized agencies to manage and control gaming. The Alberta Gaming Commission and the Manitoba Lottery Foundation are regarded as leading examples in Canada of the effective administration of gaming.

Most were concerned about the increasing commercialization of bingo operations. Licenses are only available to eligible charitable or religious organizations; however, commercial operators typically provide hall facilities as well as advice and organizational capacity. As evidenced in British Columbia, Saskatchewan and Ontario, there is a general tendency for the operators of the commercial bingo halls to assume effective control over prize boards, cash flow and pooling of prizes in order to assure a fixed profit both to the operator and the licensee.

This commercialization of bingo operations is responsible in large part for the growing competition between bingo events resulting in larger prize boards, increases in number of events, and reductions in profit margins. In some cases smaller events are being squeezed out. There is concern that commercial bingo halls will effectively dominate the local market.

Provincial licensing authorities are increasingly focusing on market regulation. In order not to allow unrestrained competition to lower profit margins, lottery commissions are being more strict in terms of scheduling of bingos and other events. In many instances they are also setting maximum percentages of gross receipts which can go to either prizes or operating costs. This in effect protects the profit margin. It also controls prize levels.

Another issue is the management and control systems used by licensees. Since the cash flow is difficult to audit or trace, there are strict financial management and reporting requirements imposed as a licensing condition. A concern is that these requirements are beyond the capacity of many legitimate smaller organizations.

There is no doubt that technical manipulation is possible in bingos and other games. The nature of gaming lends itself to diversion or improper use of funds. Provinces are concerned about consumer protection. Authorities everywhere raised concerns over the potential for abuse and the unwanted social side-effects of gambling. They see these problems being greater the more decentralized the control system becomes.

All provinces have a continuing concern about gaming activities being infiltrated by criminal elements. There is also a related concern about the increase in street crime which usually accompanies major gaming operations.

(The general comments above do not apply to the licensing of agricultural and fish fairs. There was little comment expressed by provincial officials about these operations although the integrity of the games at these fairs is known to be of concern.)

(c) Trends Toward Tighter Controls

There is clearly a tendency among the provinces and territories toward more specialized administration of gaming management and control. This has implications for relations between provincial governments and Indian bands as the provinces improve their capacity to monitor, control and enforce licensing. Manitoba and Alberta are in the forefront.

Manitoba has addressed the issue of commercialization by having the Lottery Commission take over the operation of all gaming in the province. It is no accident that provincial and Indian positions are more in conflict in Alberta and Manitoba than in other provinces.

Alberta has a clear policy of refusing to license organizations which have not met conditions of previous licenses, and a willingness to charge band members for unlicensed gaming on reserve land. In Manitoba the Attorney General is attempting to develop a Memorandum of Understanding with Indian bands and the Federal government aimed at ongoing consultation and review of problems in the gaming field.

(d) Attitudes toward unlicensed gaming on Indian reserves

Provincial authorities have not declared formal positions on this issue, but opinions encountered among officials tend to confirm a number of predominating factors including:

- preference by police authorities for the simplicity of "one law, one enforcement" approach.
- a view that the provincial population, including natives, represents essentially one market. It is seen as disruptive for unlicensed reserve-based high stakes bingos to draw upon that market thereby "emptying the church basements" of nearby communities.
- some sympathy and respect for aims of bands to raise money for community purposes, and recognition of traditional social role of gaming within the Indian community.
- a view that the Criminal Code restricts provincial licensing flexibility, were it desired, in regard to any modified regulatory regime for reserves.

(e) Provincial Positions

The provinces regard the existing Criminal Code as amended in December, 1985, as giving them exclusive jurisdiction over gaming on reserves.

Some provincial officials have expressed the position that the 1985 federal-provincial agreement on gaming and betting constitutes a blanket prohibition of any future federal involvement in gaming. Thus any federal measure to provide Indian bands with separate authority in this field would constitute a breach of the agreement.

The provinces are unanimous in their concern over the effect of unregulated competition on the market. They oppose the idea of any separate gambling regime on reserve, although Manitoba in particular and Ontario seem willing to consider new arrangements.

V FEDERAL INTERESTS IN GAMING ON RESERVES

The federal interest is expressed in two statutes: the Criminal Code of Canada and the Indian Act.

This circumstance points to a leadership role for the federal government in addressing a problem which ultimately derives from federal statutes.

VI THE NATURE OF THE JURISDICTIONAL DISPUTE

There is concern in Indian communities over provincial jurisdictional encroachment on gaming and other issues leading to a weakening of the special relationship with the federal government. This section describes the status quo and then sets out Indian legal arguments against provincial authority which were put forward to the Task Force. The arguments are summarized here, without conclusions on merits, to illustrate the political and legal context in which Indian views on the subject are being elaborated.

(i) Status Quo

It is the position of the federal Department of Justice that the Criminal Code of Canada delegates authority to the provinces to make regulations with regard to gaming and that the Criminal Code, as a federal statute, applies to all citizens on and off reserve lands.

The provincial view is that a separate Indian gaming regime would result in financial and social harm to the fabric of the provinces. Some provinces also referred to the June, 1985, federal-provincial agreement in which the federal government undertook to refrain from re-entering the field of gaming and betting, other than with respect to horse racing. It is argued that this agreement forecloses federal measures for Indian involvement outside of provincial authority.

(ii) Indian Arguments Against The Status Quo

Within existing legislation

Seventeen by-laws have been proposed by bands to control gaming on their reserves. All but one of these by-laws under the Indian Act were disallowed. The exception was one by-law for the The Pas band which gained approval in 1979 after expiry of the 40 day period for disallowance. This by-law required that the band operate in general conformity with the provincial system.

A number of bands are actively considering the use of by-law powers under the Indian Act to challenge provincial control over gaming. Paragraph 81(m) provides for "the control and prohibition of public games, sports, races, athletic contests, and other amusements". Section 83 provides for money by-laws, and paragraph 83(f) provides for "the raising of money from band members to support band projects".

The position of some bands is that by-laws under the Indian Act, if allowed, would supersede provincial authority over gaming on the reserve. The argument is that by-laws should be considered specific legislation which takes precedence over the provincial regulations pursuant to the Criminal Code.

Constitutional Arguments

A second Indian position against provincial authority over gaming is based on the aboriginal and treaty rights guaranteed under Section 35(1) of the Constitution Act - 1867. Several arguments have been suggested.

One view is that Section 35(1) recognizes an inherent right to self-government. A band's power to regulate gaming is presented as an instance of such inherent jurisdiction.

The case from an Indian perspective on treaty or inherent aboriginal rights is developed in greater detail in documents submitted to the Task Force by three Indian lawyers. These are referred to in Annex IV and are available upon request.

VII SCOPE FOR RESOLUTION

(a) Range of Options

Previous sections of this report demonstrate that while there are variations in each camp, the provinces and bands remain poles apart on the central issue of jurisdiction. As interpreted by the provinces, the Criminal Code clearly puts the management and control of gaming on reserves in the hands of the provinces. On the other hand, Indian bands claim that interpretations of existing laws are possible which would allow considerable powers to the bands. It must be presumed that on both sides of the issue there is some room for movement either through interpretation or amendment of existing legislation. It is not clear at this point, however, where that common middle ground might be.

1. Status Quo

If no compromise can be reached the status quo remains, at least theoretically, as an option. Under the status quo Indian bands would remain subject to provincial licensing regimes which are not well suited in many instances to take into account the special characteristics and needs of Indian communities. Indian people will continue to resist provincial regulation and conflict with provincial authorities seems inevitable. Court challenges are likely. Most of the parties to the dispute feel that the status quo is unworkable. Some change or adjustment is required.

Four other options are set out below. In options 2 and 3 jurisdiction over gaming on reserves remains with provincial governments but the regulatory regime is changed to accommodate Indian needs. In option 4 control falls under federal jurisdiction. In option 5 each individual band has jurisdiction over gaming on its own reserve. These options or variations of them represent the wide diversity of views encountered by the Task Force in discussions with bands and provincial officials.

2. Adjustments to Provincial Gaming Regimes

The provinces could meet some of the interests of bands by amending provincial regulations. Examples of areas for accommodation are prize board levels, use of paid labour as opposed to volunteers, and the definition of charitable institution. It is assumed that in the interests of orderly markets and public acceptance, the modifications made would need to be harmonized with the surrounding provincial regime. In most cases this could be accomplished by amending provincial regulations.

3. Indian Gaming Regime within Provincial Jurisdiction

This would involve the legal establishment of Indian managed gaming on reserves under the jurisdiction of the respective province. The Indian regime would by and large parallel the provincial regime although modifications would be made to take into account the special concerns of Indian communities. Use of proceeds for economic development, and by-law authority to allow band councils to issue licence illustrate the kind of major changes envisaged. Changes to Provincial legislation would be required. It would also appear be necessary to amend the Criminal Code of Canada and possibly also the Indian Act.

A case can be made that while the federal government vacated the gaming field in favour of the provinces, Ottawa may still have obligations toward Indian people for whom it has constitutional responsibilities, albeit that these obligations have yet to be defined. There might, therefore, be a case for the federal government being a third party to the agreement reached between the Indian bands and the provincial governments.

4. Indian Gaming Regime within Federal Jurisdiction

This variant would require changes in the Criminal Code and the Indian Act to place the management and control of gaming on reserves under federal jurisdiction. The regimes put in place would not be dissimilar to those in respective provinces (much like in the previous option) Provincial jurisdiction would be limited to off reserve lands.

While this option would satisfy the strong Indian preference for federal jurisdiction, it would raise organizational issues of concern to the Federal government which has no administrative capacity to monitor and control gaming activities throughout Canada. The Federal government would probably not be prepared to set up a monitoring system paralleling that which exists in each province. A variant would be to set up a self financing Federal/Indian Gaming Commission to operate the new regime, possibly in some administrative arrangement with the provinces.

5. Band Jurisdiction

In this scenario inherent aboriginal and treaty rights would take precedence over the Criminal Code and the Indian Act. Proponents of this option assume fundamental movement on the doctrine of aboriginal rights through either the courts or the political process.

Each band would have the right to control gaming on its own reserve(s). The market would determine which bands would be winners and losers. It is assumed that regional Indian institutions would be brought into existence by individual bands, as required, to control cut throat competition.

The nature of any collaborative accomodation with the provincial gaming regimes would be a matter for band-by-band bilateral negotiation.

(b) Other Considerations

Policy Constraints

Three constraining factors will be at play in the consideration of any option.

1. reluctance of Indian people to accept provincial jurisdiction
2. reluctance of provincial governments to have different gaming regimes in competition within their provincial boundaries
3. reluctance of the federal government to establish any new organization to manage and control Indian gaming at a time when DIAND is being downsized and Indians are assuming increasing responsibilities under self government.

Prospective American Model

Regardless of the jurisdiction under which a regime may operate, those mentioned above are considered to encompass all legal games. A different approach is being taken in the United States. Draft legislation being put forward proposes a National Indian Bingo Commission which would have jurisdiction on reservations over bingos and only bingos. Tribes would be subject to federal or state regulation in regard to all other forms of gambling.

Whatever is finally agreed to in the United States will have an impact in Canada, if the demonstration effect of monster bingos is any example. It may therefore be worthwhile considering the segmentation of jurisdiction as one way to provide additional scope for negotiation.

VIII CONCLUSION

This review confirms serious differences of opinion concerning the legal validity of provincial jurisdiction over gaming on reserves under the Criminal Code of Canada. Whether provincial gaming regimes have satisfactorily dealt with the rights and powers that Indians believe are due to them under the Indian Act will remain a point of contention and political representation until settled by the courts or by negotiation.

Clearly Indians do not see that their interests are well accomodated. Policy measures alone might indeed provide considerable scope for resolutions without fundamental legislative amendments.

"One of the things which is readily apparent is that so long as there is legislative fuzziness surrounding the issue, then there will always be room for debate and conflict."¹

¹ Quoted from a paper by C. Murray Sinclair entitled
"Presentation to the Federal Task Force on Indian Gaming"
(p. 7)

DIAND Task Force on Gaming on Reserves

Terms of Reference

General Objectives:

There have been increasing incidents of confrontation between provinces and bands over on-reserve enforcement of provincial gaming regulations. The Task Force on Gaming on Reserves is established to:

- to describe the nature and extent of gaming on reserves, and to assess the potential benefits for communities to be derived from increased gaming activity in the future.
- to study the subject of regulation and control of gaming on reserves and to determine how Indian jurisdiction over these functions could be achieved.
- to identify other possible means of accommodating Indian interests in increased gaming on reserves.
- to reduce the potential for additional conflict between provinces and bands in the near term by giving clear signals to bands and provinces that the situation is under study.
- to determine the appropriate nature and extent of DIAND's continued involvement in this issue.

Tasks:

- I The Task Force will prepare a report with recommendations to the Deputy Minister concerning the above objectives by December 1986.
- II The Task Force will consult with selected Indian bands and Indian associations; provincial authorities responsible for regulation, control, and enforcement of gaming; and the federal Department of Justice and the Solicitor General's Office.
- III The Task Force will have legal opinions prepared on the application of S190 of the Criminal Code of Canada on reserve lands in respect of S81(M) and S83 of the Indian Act.
- IV The Task Force will address the relevance of any recommendations against the wider policy objectives of self government and economic development for Indian communities.
- V The Task Force has the following specific tasks:
 1. To describe the provincial policies and practices concerning the control and management of gaming and to identify prospective or planned changes.
 2. To estimate the overall extent to which provincial lottery and gaming proceeds are available to bands for community projects.
 3. To identify provincial interests and concerns regarding licensed and unlicensed gaming on reserves.
 4. To describe the extent and type of gaming taking place on reserves at the current time, and identify trends and issues.
 5. To describe how existing gaming on reserve is organized and controlled and to indicate the beneficiaries of the revenues generated.
 6. To identify the role of gambling within traditional Indian culture and the relationship, if any, of traditional gambling games to the lottery schemes covered by the Criminal Code.

7. To identify Indian interests and concerns regarding both existing and expanded gaming on reserves.
8. To assess the economic and social impacts on Indian communities resulting from the possible introduction by provinces of major casinos and/or slot machine operations.
9. To identify models for Indian management and control of gaming on reserves and the changes required to provide bands with the appropriate and necessary jurisdiction.
10. To assess the relevance of studies undertaken by American Indians and the U.S. Department of the Interior given the pervasive influence of American tribally operated high stakes gambling on the expectations and rationales of Canadian Indian Bands.
11. To provide a brief technical overview of the gaming industry, i.e. - the games, the problems in enforcement, management and finance, the revenue and profits generated, the beneficiaries, the "scams" and the susceptibility of this form of commercial recreation to criminal inroads.

DIAND
Task Force on Gaming on Reserves
October 30, 1986
Doc: B106P05

Advisory Group Members

Chief Allison Bernard	Eskasoni
Chief Myles Venne	La Ronge
Chief Phillip Gardner	Eagle Lake
Mr. Konrad Sioui	Huron-Wedat
Mrs. Regina Crowchild	Sarcee
Mr. Wellington Staats	Six Nations
Mr. Richard Mosley	General Counsel, Department of Justice
Mr. Neil Overend	Executive Director, DIAND

Task Force Members

The core group of the task force included the following persons:

Neil Overend, Chairman

Bill Kilfoyle, Project Manager

Gary Schaan, member	Self-Government Policy and Constitutional Affairs Branch
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John Blanchard, member	Economic Development
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Sharon Venne, member	Contract Adviser
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Charles Webb, member	Legal Services
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Pierre Vincent, membre	Développement Économique
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The task force also benefited from the specialized knowledge of:

Richard Jackman	Statutory Requirements Division
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Sandra Smart	Communications Branch
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Mancel Barstow	Band Support Directorate
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Vittoria Romeo was secretary to the Task Force.

LIST OF BANDS AND GOVERNMENT AUTHORITIES CONTACTED
RE GAMING ON RESERVES.

1. BRITISH COLUMBIA

Bands - Burrard
- Musqueam
- Gitksan-Wet-Suwet'En Tribal Council
Provincial Government - Office of Provincial
Secretary

2. ALBERTA

Bands - Sarcee
- Hobbema Bands
- Saddle Lake

- Beaver Lake
- Blood

Provincial Government - Alberta Gaming Commission
- Office of the Attorney
General

3. SASKATCHEWAN

Bands - Onion Lake
- Cowessess

Provincial Government - Superintendent of Insurance
Registrar of Licensing and
Investigation

4. MANITOBA

Bands - Roseau River

- Le Pas

- Dakota Tipi

Provincial Government - Office of the Attorney
General

- Lotteries Commission

- General

- Lotteries Commission

5. ONTARIO

Bands - Eagle Lake

- Six Nations

- Akwesasne

Provincial government

- Office of Native Affairs

- Lottery Commission

- Office of Attorney General

6. QUEBEC

Bands - Assembly of Quebec Chiefs

- Kahnawake

- Oka

November 1986, Restigouche

Government of Québec - Régis des loteries
et cours du Québec

7. NEW BRUNSWICK

Bands - St. Mary's

Provincial Government - Intergovernmental Affairs

- Lottery Commission

8. NOVA SCOTIA

Bands - Eskasoni

- Millbrook

Provincial Government - Intergovernmental Affairs
Lottery Commission

NOTE RE BACKGROUND DOCUMENTATION

The following supporting documentation has been collected and bound together in a separate volume entitled "Annexes". (The documentation is available in English only). Copies of this volume are available upon request to the Economic Development Branch of the Department of Indian Affairs and Northern Development.

SPECIAL SUBMISSIONS

- A. "Presentation to the Federal Task Force on Indian Gaming" - by C. Murray Sinclair
- B. "Submission to Task Force on Gaming on Reserves Department of Indian Affairs" - by Vina A. Starr
- C. "Indian Jurisdiction" - by Sharon Venne

REFERENCES AND SUPPORTING DOCUMENTATION

- D. Task Force Terms of Reference (referred to as Annex I in Main Report)
- E. Task Force and Advisory Group Members
Letter of Transmittal to Advisory Group, February 18, 1987
(referred to as Annex II in Main Report)
- F. Note on Terms Used
- G. Types of Games
- H. Pari-Mutuel Betting
- I. List of Bands and Government Authorities Contacted (referred to as Annex III in Main Report)
- J. Charges and Confrontations
- K. Provincial/Territorial Gaming Profiles
- L. The American Situation

(Doc. REPORT2)