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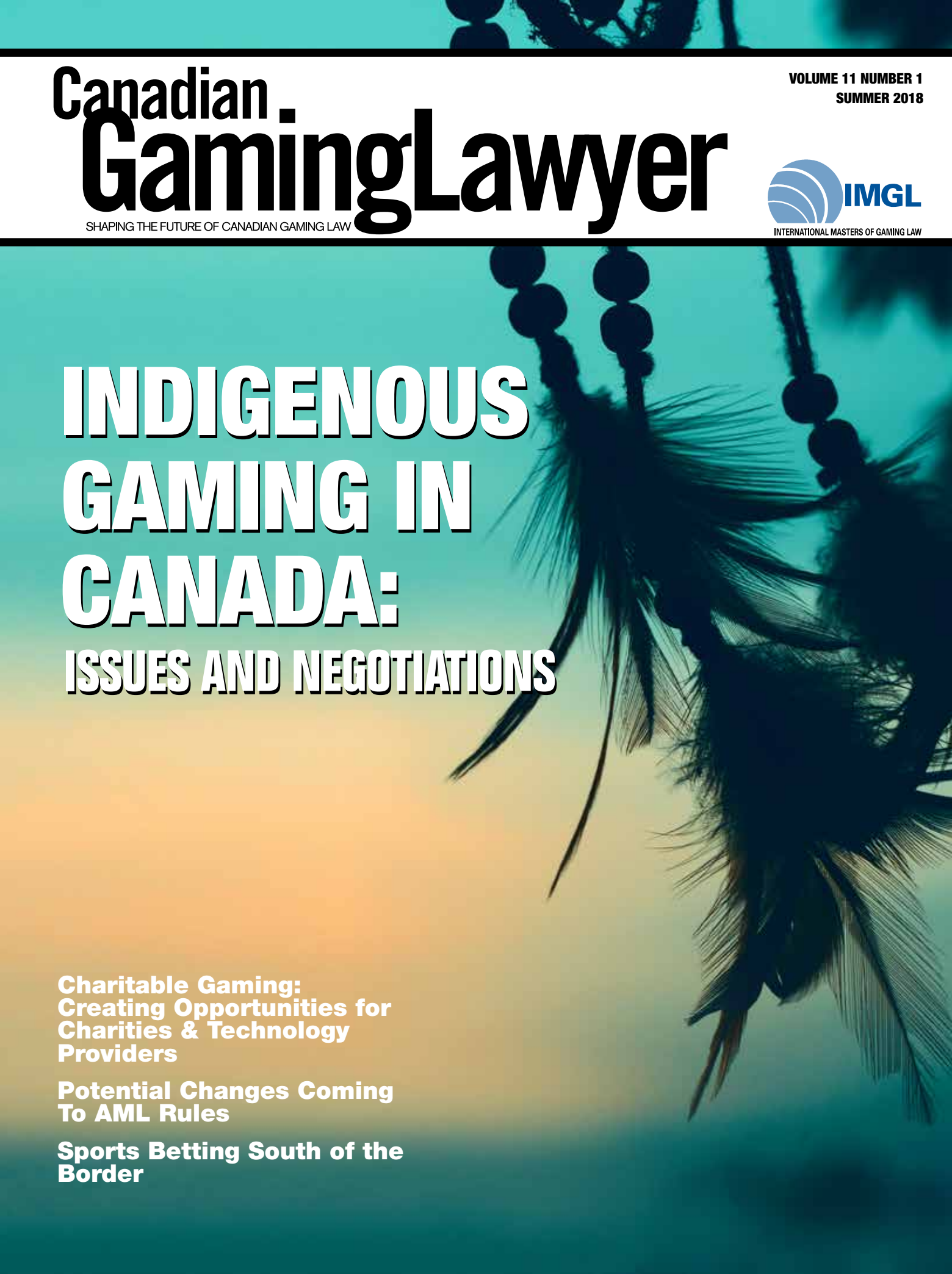

INDIGENOUS GAMING IN CANADA:
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Indigenous Gaming Issues In Canada

The current division of jurisdiction over gaming in Canada came about as a result of a Federal-Provincial Agreement that was entered into in 1985, intended to address differences that had arisen between those governments since the introduction of a liberalized regime for gaming and betting in 1967. The legacy of this 1985 Federal-Provincial Agreement is that the Canadian Criminal Code provides that only provincial governments have the full authority to govern ("conduct and manage") gaming in Canada. Charitable and religious organizations can also conduct and manage gaming, but the right of any charitable or religious entity to do so exists at the whim of the provincial governments.

During the negotiations over this 1985 Federal-Provincial Agreement, gaming was being carried out on the reserves of Indigenous people throughout Canada, but this fact did not earn them a seat at the negotiating table. The new division of powers was dictated to Indigenous people without consultation.

Section 35(1) of the Constitution Act, 1982 extends protections over what it refers to as "Aboriginal rights," which is generally understood to include a right to self-government. However, this has been of little assistance to Indigenous governments seeking to regulate gaming on their territories. In 1996, the Supreme Court of Canada in R. v. Pamajewon held that because neither gaming nor the regulation of gaming was an "integral part" of the cultures of two Ontario First Nations in question at the time of European contact, self-government rights associated with gaming were not protected by section 35(1). The Court did not state that such a constitutional right could never be recognized in the case of any First Nation; however, the test the Court set for the establishment of such a right presents overwhelming obstacles to the recognition of a constitutionally protected right to self-government over gaming-related economic activity.

However, the law relating to Indigenous constitutional rights moves quickly. In the summer of 2014, the Supreme Court rendered two landmark decisions that set out principles that would likely have been unthinkable to the Court that decided Pamajewon 18 years earlier. The judgments in Tsilhqot'in Nation v. British Columbia and Grassy Narrows First Nation v. Ontario (Natural Resources) shook the foundations of the federal structure of Canada, indicating that the law of the land is no longer exhaustively distributed between the federal and provincial governments.

In Grassy Narrows, the Supreme Court held that the acknowledged right of the provinces to "take up" land is not unconditional. Rather, it must be exercised in conformity with the honour of the Crown and be subject to the fiduciary duties imposed upon the Crown in dealing with Indigenous interests. In Tsilhqot'in Nation, the Supreme Court expanded upon the requirement for governments to consult and accommodate Indigenous interests before proceeding with natural resources projects, stopping just short of requiring prior Indigenous consent to such projects. This advance in the jurisprudence took place a mere 10 years after the Supreme Court first imposed the duties of consultation and accommodation upon governments.

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These decisions forced governments to reassess the strategies and processes they had put in place to address their duty to consult with Indigenous people over resources projects. Such decisions validate efforts by Indigenous people to have the courts revisit tests established by the Supreme Court in the 1990s for the establishment of constitutionally protected self-government rights, including those relating to the conduct and regulation of gaming.

The Supreme Court has acknowledged the concept of an Indigenous sovereignty that predated the European arrival, in which Indigenous people lived in organized societies and exercised political authority as independent nations. This recognition gives rise to the core component of the inherent "Aboriginal" right to self-government, arising from the right to use the land over which it had sovereignty as it may determine, including for economic purposes.

Courts have clearly recognized that Indigenous people prior to European contact formed self-governing nations engaged in a form of communal living involving rights and responsibilities that were effectively administered within bands. These self-government rights were integral to Indigenous culture, providing the foundation for the survival of Indigenous people over countless generations and governing how they lived, occupied, and used the lands prior to first contact.

Contact with Europeans eventually led to the assertion of Crown sovereignty, but Indigenous laws survived the assertion of Crown sovereignty. These laws were absorbed into the common law as rights, unless they were surrendered voluntarily by the treaty process, or the government extinguished them or they were incompatible with the Crown's assertion of sovereignty.

Under this analysis, the right of Indigenous people to use their land for economic purposes relating to gaming would be compatible with Crown sovereignty as long as the gaming is carried out in a highly regulated environment, governed by standards comparable to those provided by a provincial gaming commission.

To date, courts interpreting section 35(1) have looked at the self-government rights of Indigenous people on a basis described by some commentators as the "Empty Box": Indigenous people begin with the assumption that they have no "Aboriginal" rights worthy of constitutional recognition, and must seek to establish rights singly, filling the box with a right to hunt here, a right to fish there. This much-criticized approach resulted in the Pamajewon decision.

The "Empty Box" approach fails to take a realistic approach to reconciling the existence of pre-existing Indigenous rights with the assertion of Crown sovereignty. The courts have acknowledged the existence of prior Indigenous sovereignty, and it necessarily follows that before the assertion of Crown sovereignty, Indigenous people had a "Full Box" of jurisdictional powers, since they formed independent nations that had complete authority over their own territories and citizens.

Under an analysis consistent with the "Full Box" approach, unless it can be established that an Indigenous right of self-government was surrendered voluntarily by treaty or extinguished by explicit government action, the test should focus on whether that Indigenous right can be exercised in a manner compatible with Crown sovereignty. In that analysis, the onus of proving that an Indigenous right cannot be exercised because it offends Crown sovereignty should rest upon the Crown.

The recognition that Indigenous people had plenary jurisdiction at the time of European colonization leads to an analysis whereby Crown and Indigenous jurisdiction in the modern era would be reconciled using the doctrine of sovereign incompatibility. If an Indigenous right of self-governance is incompatible with Crown sovereignty, Crown sovereignty must prevail. If such a self-governance right is not incompatible with Crown sovereignty, it continues to be available to the Indigenous people in question.

This plenary jurisdiction was acknowledged by the Crown in the Royal Proclamation of 1763. The historical record demonstrates that before European contact, Indigenous people were organized into societies, with intricate political and commercial alliances among themselves and regulation of land use. The arrival of Europeans drew the Indigenous people into European-based intrigues, conflicts and commercial activity. The Crown eventually attempted to stabilize relations between Indigenous people and colonists by way of the Royal Proclamation of 1763, which refers to Indigenous people living under Crown protection on lands within the Crown's dominion and territories, while acknowledging that the Crown did not own unceded Indigenous lands and could not appropriate them, but had to purchase them on a nation-to-nation basis.

The legal import of the Royal Proclamation of 1763 is that the Crown and Indigenous people simultaneously held sovereign rights to the same land, resulting in shared sovereignty. The only way the Crown could obtain plenary jurisdiction over Indigenous lands was to purchase those lands. By necessary implication, this means that plenary jurisdiction over the lands occupied by Indigenous people throughout North America belonged to them prior to the arrival of Europeans, when the "shared sovereignty" regime began to be established.

In order to diminish an inherent right of Indigenous people, the Crown

would have to show there has been a clear extinguishment of the right, either unilaterally through surrender or by valid legislation prior to 1982. In the absence of such extinguishment or surrender, any legislative restriction of those rights would be an infringement that the Crown would have to justify, pursuant to the test as set out in R. v. Sparrow. In establishing justification, the Crown is required to demonstrate good faith efforts to consult with Indigenous people claiming infringement.

In the 2001 decision in R. v. Mitchell, two judges of the Supreme Court adopted a "doctrine of sovereign incompatibility" test. This test opened the door to moving the legal analysis away from the more artificial construct of whether a specific, narrowly defined "right" is "integral" to the Indigenous culture (the test applied in Pamajewon) and towards an analysis dealing with real issues of sovereign compatibility. This analysis, if more widely accepted, could open the door to a "Full Box" test for Indigenous rights.

The failure of the provincial and federal governments to consult with Indigenous people in the making of the 1985 Federal-Provincial Agreement was a breach of the Crown's duty to consult and a failure to adhere to its fiduciary obligations and the honour of the Crown. To this day, the federal government continues to refuse to consult with Indigenous people on gaming jurisdictional matters, on the grounds that the federal government delegated its power to regulate gaming in the 1985 Federal-Provincial Agreement. In so doing, it is relying upon the fruits of the Crown's dereliction of duty in 1985 to justify the continuing inaction on the issue. This novel adverse impact of the failure of 1985 arguably imposes a new duty to consult on the part of the federal government in the area of gaming jurisdiction.

A strategy that sought to shape the development of the law in this area, in pursuit of a court-recognized Indigenous jurisdiction over gaming, would require patience and years of struggle in litigation. The litigants in Tsilhqot'in Nation and Grassy Narrows demonstrated such determination, and in the result the courts demonstrated an ability to see old issues through a new lens. With self-government negotiations moving at a glacial pace across Canada, the courts may be open to revisiting the principles applied in assessing self-government claims in order to move matters forward. The determination of Indigenous people to achieve economic development through gaming could well be the test case that brings those principles to the fore. CGL

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