Backgrounder
BC First Nations Gaming Revenue Sharing Model
June 6, 2019

Introduction

The BC First Nations Gaming Revenue Sharing and Financial Agreement (the "**Revenue Sharing Agreement"**) represents a historic achievement for all First Nations in British Columbia. It is the result of over 25 years of tireless efforts by the British Columbia Assembly of First Nations, the First Nations Summit and the Union of British Columbia Indian Chiefs (collectively, the "**Provincial Territorial Organizations**" or "**PTOs**").

The First Nations Leadership Council (as coordinating body for the PTOs) and the First Nations Gaming Commission (the "**Gaming Commission**") have successfully negotiated a 25-year agreement with the province of British Columbia (the "**Province**") to share a portion of the Province's gaming revenues with British Columbia First Nations.

History

British Columbia has been the only province in Canada that historically has not shared gaming revenues with First Nations. Since 1993, the First Nations Leadership Council (initially through the Steering Committee and later through the Gaming Commission) has funded and led negotiations with the Province, extensively discussing and researching the issues and objectives of gaming revenue sharing and considering various gaming revenue sharing models from across Canada.

In 2013, the Gaming Commission negotiated a commitment to gaming revenue sharing from the NDP opposition government. When the NDP was not elected, the Liberal government shut down conversations entirely. After the most recent provincial election in 2017, the incoming NDP government fulfilled their commitment to share gaming revenues with British Columbia First Nations by including the commitment in provincial mandate letters and in the February 2019 Budget announcement.

The BC First Nations Gaming Revenue Sharing Limited Partnership (the "**Partnership**") has been established as a fully First Nations-owned and controlled entity to serve as a conduit for gaming revenues flowing from the Province to First Nations. The Partnership is a non-political, commercial entity that is fully inclusive of all British Columbia First Nations, who will have a role in the evolution of the Partnership and its arrangements with the Province over the next 25 years.

BC First Nations Gaming Revenue Sharing and Financial Agreement

The Province will share 7% of net gaming revenues with British Columbia First Nations. Over the 25-year term of the BC First Nations Gaming Revenue Sharing and Financial Agreement (the "**Revenue Sharing Agreement**"), an estimated $3 billion will be shared for the betterment of First Nations communities.

The following general categories of approved purposes ("**Approved Purposes**") at the community level have been defined:

(i) health and wellness;
(ii) infrastructure, safety, transportation and housing;
(iii) economic and business development;

(iv) education, language, culture and training;
(v) community development and environmental protection; and
(vi) capacity building, fiscal management and governance of First Nations and their territories and members.

The only restriction on the use of funds is that the funds may not be paid as per capita distributions to members. This however does not prohibit the distribution of funds to individuals for purposes of participating in an approved program; for example, those related to education, training or health.

Prior to expenditure, funds may be invested either in short term investments or in professionally managed investment accounts. Funds may also be utilized to secure or support borrowing or securitization for the purposes of financing an Approved Purpose; or used to repay existing debt incurred for an Approved Purpose. Funds may also be pooled by two or more First Nations for a joint Approved Purpose.

The sharing of gaming revenues through the Revenue Sharing Agreement is not based on Aboriginal rights and title. The Revenue Sharing Agreement does not affirm the purported transfer of jurisdiction over gaming from the federal government of Canada to the Province in 1985, nor is it meant to address the legacy gap in revenue sharing with First Nations from that time to present. What this means in practice is that the current arrangements do not prevent a First Nation from making rights-based claims, for example with respect to the siting of casinos.

The Partnership

Drawing on the Ontario model, the Partnership will receive, administer and distribute funds to British Columbia First Nations. The Partnership is a British Columbia limited partnership managed by its general partner (the "**General Partner**"). All First Nations who participate in gaming revenue sharing will be equal partners in the Partnership and equal shareholders in the General Partner. As limited partners, First Nations make fundamental decisions with respect to the Partnership, and as shareholders they elect the board of directors of the General Partner.

The Partnership is designed to be a non-political commercial entity that administers the receipt and distribution of gaming revenues pursuant to the Revenue Sharing Agreement. The placement of the Partnership between the Province and First Nations participating in the revenue sharing has major advantages compared to existing revenue sharing and contribution agreements with the Province. The use of the Partnership allows a First Nations-controlled entity to administer funds to First Nations, for First Nations.

To reduce the paternalistic Provincial monitoring of funds expenditures, the Partnership and an independent third-party accounting firm will verify limited partners' use of funds and compliance with reporting and auditing requirements. Compliance will be construed within the scope of First Nations' cultures, traditions, values, beliefs, methods and practices. Such assessments will be done in a just and equitable manner with a view to assisting First Nations in compliance rather than disciplining them for non-compliance.

The Partnership has wide discretion outside of Provincial influence to help non-compliant First Nations meet their obligations and to determine consequences for non-compliance. This approach provides First Nations greater control over how the funds are distributed, and how reporting is monitored and enforced.

A Living Agreement Subject to Ongoing Review

The Revenue Sharing Agreement recognizes that we are in an exciting period of change for First Nations. It is a living agreement which will evolve to reflect the ongoing relationship between the Province and British Columbia First Nations, as well as changes which affect First Nations.

Periodic reviews are built into the model and are designed to build in as much flexibility as possible for change to suit the needs of all First Nations revenue recipients both in the near future and over the 25-year term.

The periodic review mechanism was adapted from developments at the forefront of the First Nations treaty world. Periodic reviews of the Revenue Sharing Agreement are contemplated at 5-year intervals. These 5-year review periods provide an opportunity to evaluate and update the Revenue Sharing Agreement based on progress made towards defined common objectives.

Pursuant to the review mechanism, the Revenue Sharing Agreement may also be updated to recognize developments in law or policy, changing modes of gaming, and the new approaches to the formula for sharing revenues.

A particular emphasis has been placed on the rights of First Nations to self-determination. Examples of topics that will be discussed include changing approaches to First Nations membership, and determination by First Nations of their political and governance structures, for example aggregations of First Nations into Nations, Tribal Councils or other groupings.

The periodic review process compels a discussion, and changes are consent-based between the PTOs, the Partnership and the Province.

Although the initial revenue sharing arrangement has been based on the recognition of existing First Nations entities, it is not intended to entrench colonial modes of determining First Nations groupings, population, remoteness, or other factors. The priority, however, has been to get funds out the door and to communities as soon as possible with a flexible set of arrangements controlled by First Nations that can be changed over time to reflect self-determination and other First Nations values and desires.

List of Eligible First Nations

The initial list of First Nations eligible to participate in revenue sharing ("**Eligible First Nations**") includes all *Indian Act* Indian Bands, Treaty First Nations (including Nisga'a Nation) and self-governing First Nations established pursuant to statute.

The initial list of Eligible First Nations assists in providing financial benefits to communities quickly and efficiently, but is only a starting point. The Partnership supports the goal of moving away from colonial definitions of Indigenous peoples by the process of self-determination. As a practical matter, the initial list reflects entities which currently have the administrative capacity in place to administer funds and to deliver services to communities, and which have corresponding accountability mechanisms in place.

As a fundamental principle, the Revenue Sharing Agreement recognizes the rights of First Nations to determine their own political and governance structures. Several mechanisms have been implemented to facilitate the adaptation of the initial list of Eligible First Nations in accordance with the rights of First Nations to self-determination.

New or re-constituted First Nations may become Eligible First Nations through various mechanisms. The General Partner may recognize newly established Indian Bands, Treaty First Nations or self-governing First Nations. As governance of a First Nation changes, for example from an Indian Band to a hereditary structure, an entity on the list of Eligible First Nations may direct the General Partner to replace it with the new governance entity. Alternatively, the PTOs may, with Limited Partner ratification, or the Limited Partners may, by Extraordinary Resolution, change the list of Eligible First Nations. The principles applicable to such changes include participation in revenue sharing by all First Nations communities in the Province in a fair and equitable manner, without discrimination or duplication.

Distribution Formula

The Initial Distribution Formula was developed as a principled approach to distributions of revenues. A recommendation was brought before the Chiefs in Assemblies at the Provincial Territorial Organizations and was open to comment from First Nations leadership. In 2018, the Chiefs in Assemblies at the Provincial Territorial Organizations each approved an Initial Distribution Formula as follows:

50% of revenues distributed to each First Nation equally,
40% of revenues distributed by population, and
10% of revenues distributed for isolated and remote First Nations communities.

The idea behind the Distribution Formula is to provide funds as close to the ground as possible, to meet socioeconomic development requirements, to provide flexibility to be tailored to the wants of all First Nations communities in the future, and to leave no community behind. As a guiding principle, the Distribution Formula will be applied in a fair and equitable manner and so as not to disincentivize the consolidation of First Nations into aggregated entities.

As with the eligibility criteria for participating First Nations, the Initial Distribution Formula is a starting point and is scheduled for review after a 5-year period.

Initially, the population and remoteness aspects of the Distribution Formula will be determined and calculated in accordance with Canada's remoteness classification system and existing published population information. As with other matters, it is recognized that modes of recognizing membership and remoteness of First Nations are evolving. A more comprehensive, First Nations-led study of remoteness is contemplated in the future. In recognition of changing modes of membership, for example as Treaty First Nations determine their citizenship criteria, re-examination of the population will be an important topic for consideration at the initial periodic review and subsequent periodic reviews.

Conclusion

The British Columbia gaming revenue sharing model distributes First Nations' share of Provincial gaming revenue through a limited partnership owned and controlled by British Columbia First Nations. The Partnership receives and distributes revenues to the limited partners and monitors their compliance with use of funds and with reporting and auditing requirements with the assistance of an independent, third-party accounting firm. Flexibility is a core feature of the British Columbia model, with built-in provisions to allow the model to adapt over time as First Nations' needs, values and desires evolve over the 25-year term of the Revenue Sharing Agreement.