

Farris represents BC First Nations in historic gaming revenue sharing agreement

October 1, 2020

Farris LLP is proud to have represented First Nations leadership in British Columbia in the achievement of a historic long term gaming revenue sharing arrangement with the province which will provide over \$3 billion of financial benefits to First Nations over a 25 year period.

Al Hudec of Farris LLP was part of a technical team representing the BC First Nations Gaming Commission and the BC First Nations Leadership Council, the coordinating body for the First Nations Summit, the BC Assembly of First Nations and the Union of British Columbia Indian Chiefs. This technical team was lead by Jay Johnson, as lead negotiator and coordinator and included Bram Rogachevsky and Maya Duvage from BR Law. Mark Chu of Farris provided structuring and tax advice.

The Agreement is a major accomplishment for First Nations in British Columbia who, for the past 30 years, have advocated for gaming revenue sharing. It reflects not only the most recent developments in Aboriginal law but is also a sophisticated commercial agreement that is both innovative and precedent-setting.

The Agreement activates a statutory entitlement to a 7% share of net provincial gaming revenue which was created by the fall 2019 amendments to the *Gaming Control Act*, and enshrines the principle of preserving and maintaining the certainty of this revenue stream for 25 years through a comprehensive and robust mandatory consultation process.

The Agreement is the first in the province since the passage of the *Declaration of the Rights of Indigenous Peoples Act* to substantively incorporate the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”). The Agreement contributes to the implementation and achievement of the objectives of UNDRIP, principally by contributing towards indigenous economic self-determination. UNDRIP principles are invoked throughout the Agreement and will be used to inform and guide the implementation of the Agreement. The provisions of the Agreement will, to the greatest extent possible, be construed and interpreted in accordance with the spirit and intent of UNDRIP as it evolves pursuant to international law.

The presence of First Nations in the British Columbia gaming industry will be advanced by the appointment of an Indigenous representative director who will be a full participating member of the board of the BC Lottery Corporation and who will also represent First Nations interests. The Indigenous Director will act as a conduit for information on gaming in BC. This is the first time in the province that the dual role of a nominee director on the board of a crown corporation has been recognized and specifically incorporated in board terms of reference.

Government actions which could negatively impact the First Nation’s revenue stream trigger a mandatory ministerial level uber-consultative process that includes requirements to demonstrably integrate First

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Nations views in decision making and obtain free, prior and informed consent. Where disputes arise, the Parties are required to exhaust all alternative dispute resolution mechanisms in good faith before commencing a court proceeding. If a dispute must be resolved in court, the Agreement provides for protections against abusive litigation. For example, during litigation, the Parties must make best efforts to ensure that proceedings advance efficiently and expeditiously, and where the First Nations are successful, the province reimburses the full cost of the proceeding.

All First Nations in British Columbia are entitled to a share of British Columbia Lottery Corporation net revenues based on a Distribution Formula established by First Nations. First Nations may self-determine their governing entities which receive the funds. Funding is administered by the BC First Nations Gaming Revenue Sharing Limited Partnership.

The Partnership is an apolitical, special purpose entity tasked with the sole responsibility of administering the flow of gaming revenue and helping First Nations meet their compliance and reporting obligations. The General Partner is managed by a board of five First Nations directors selected for their accounting and other competencies pursuant to a skill requirements matrix. The Partnership governance structure contains protections against conflicts of interest, includes an advance notice bylaw for the election of directors and accommodates online proxy voting. As a flow-through entity, the Partnership allows for the distribution of funds to First Nations on a tax-free basis in accordance with their status as governmental entities.

Funds received annually from the province, together with investment income from permitted investments, will be distributed annually to Limited Partners, in accordance with their formula share. Payments are made based on estimated net income of British Columbia Lottery Corporation and reconciled in subsequent years based on actual net income. The Agreement contains detailed provisions to ensure the integrity of the net revenue calculations, including audit rights and dispute resolution through an expert third party determination.

Funds are intended to benefit First Nations communities and may be used at their discretion for six categories of broadly defined approved purposes including: health and wellness; infrastructure, safety, transportation and housing; economic and business development; education, language, culture and training; community development and environmental protection; and capacity building, fiscal management and governance of First Nations and their territories and members.

Prior to expenditure on an approved purpose, distributions may be invested in permitted short term investments for up to one year or managed accounts of a financial institution for longer periods. Funds can also be used as security for financing or to repay indebtedness for an approved purpose, or can be pooled with other First Nations' funds for joint purposes. Limited partners are subject to minimal annual reporting requirements including a one-page report on use of funds and a compliance assurance report by an independent accountant. All reporting to the province is on an aggregated basis to protect the confidentiality of individual First Nations.

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The Agreement is a truly living document which, through a periodic review process, will adapt to changes in the gaming industry as well as evolving law and policy. Every five years, the parties will review whether their common objectives are being achieved and will modernize, update and renew the Agreement as may be required.

The Agreement is without prejudice of the rights of First Nations in respect of the siting and operation of gaming facilities, and to their assertion of Aboriginal rights to pursue gaming, including challenging the 1985 decision to devolve the regulating authority over gaming from the federal to provincial governments.

The Agreement was published in the provincial gazette on October 1, 2020. A link to the Agreement can be found [here](#).