

**COURT OF APPEAL FOR ONTARIO**

**IN THE MATTER OF A REFERENCE** to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 210/2024 respecting permitting international play in an online provincial lottery scheme

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**NOTICE OF MOTION OF THE PROPOSED INTERVENERS, MOHAWK  
COUNCIL OF KAHNAWÀ:KE  
(Returnable May 1, 2024)**

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The Proposed Intervenors, Mohawk Council of Kahnawà:ke will make a motion to the Chief Justice of the Court of Appeal for Ontario or their designate on May 1, 2024, at 10am or as soon after that time as the motion can be heard, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

The motion is to be heard:

- In writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- In writing as an opposed motion under subrule 37.12.1(4);
- In person;
- By telephone conference;
- By video conference.

**THE MOTION IS FOR:**

1. The Mohawk Council of Kahnawà:ke makes this motion for leave to:
  - a. intervene in this Reference pursuant to Rule 13 of the *Rules of Civil Procedure*;
  - b. file an intervention factum on the Reference on the terms set out by the Court;and

- c. make oral submissions at the hearing of the Reference of 1 hour or such other length as this Honourable Court deems appropriate;
2. Any further or other Order that this Honourable Court may deem appropriate.

**THE GROUNDS FOR THE MOTION ARE:**

1. The Mohawk Council of Kahnawà:ke (“MCK”) is the governing body for the Kanien:kehá’ka (Mohawks) of Kahnawà:ke within the Mohawk Territory of Kahnawà:ke. The Mohawks of Kahnawà:ke have inherent rights as Indigenous peoples, and also have constitutionally protected Aboriginal and treaty rights within the meaning of s. 35(1) of the *Constitution Act, 1982*.
2. Gaming has been a part of Mohawk culture since time immemorial. In 1996, MCK enacted the *Kahnawà:ke Gaming Law* to facilitate the Nation’s modern exercise of their right to engage in, regulate, facilitate, and conduct land-based and online gaming activities. The *Kahnawà:ke Gaming Law* creates the Kahnawà:ke Gaming Commission (“KGC”), which licenses and regulates a wide range of online gaming websites which are used by players throughout Canada and the world (except in the United States). MCK also conducts and manages online gaming through Mohawk Online, a socio-economic initiative that generates revenues for the community of Kahnawà:ke.
3. MCK also actively participates in the development of the *Criminal Code of Canada*’s sections related to gaming, including by making submissions and appearing before Parliament and the Senate, engaging in litigation related to those sections, and

through discussions from time-to-time with representatives of the Government of Canada regarding those sections.

4. MCK therefore has a real and substantial interest in the subject matter of the proceeding, and would be able to make a useful contribution to the Court's consideration of the question on the Reference without causing prejudice to the immediate parties. MCK will also enrich the adversarial context in this Reference by presenting a competing viewpoint.

5. If granted leave to intervene, MCK will make the following arguments:

- a. gaming was historically prohibited in Canada;
- b. the *Criminal Code* still broadly prohibits gaming, but exempts some gaming from that prohibition so long as it falls within the narrow exception for "permitted lotteries" that Parliament has prescribed in ss. 207(1)(a) to (f) of the *Criminal Code*;
- c. s. 207(1)(a) of the *Criminal Code* permits provincial governments to conduct and manage lottery schemes in their provinces, or in other provinces if there is an arrangement between the provinces;
- d. the words "in that province" in s. 207(1)(a) are not synonymous with "in the Province" in s. 92(13) and 92(16) of the *Constitution Act, 1867*;
- e. international gaming as proposed in the Reference question would exceed the scope of s. 207(1)(a);

- f. any legislation or regulation enacted by the Legislative Assembly of Ontario permitting this would be inoperative on the basis of federal paramountcy; and
  - g. any non-legislative instruments permitting online gaming operators to do this would require those same operators to violate the *Criminal Code* in order to comply with those instruments.
6. Granting leave to intervene to MCK will not cause injustice to any party nor unduly delay these proceedings. In particular:
- a. MCK will take the record as it stands and will not seek to supplement it;
  - b. MCK will abide by the schedule set by this Court; and
  - c. MCK will seek no costs in the appeal and request that none be awarded against it.
7. Rule 13.02 and 13.03 of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavit of Chief Ross Montour, affirmed April 4, 2024.

April 8, 2024

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AND TO: **ATTORNEY GENERAL OF ONTARIO**

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Court File No.: COA-24-CV-0185

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**NOTICE OF MOTION OF THE PROPOSED  
INTERVENER**

**(MOTION FOR LEAVE TO INTERVENE)**

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