

Court File No.:

W-22-00690830-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

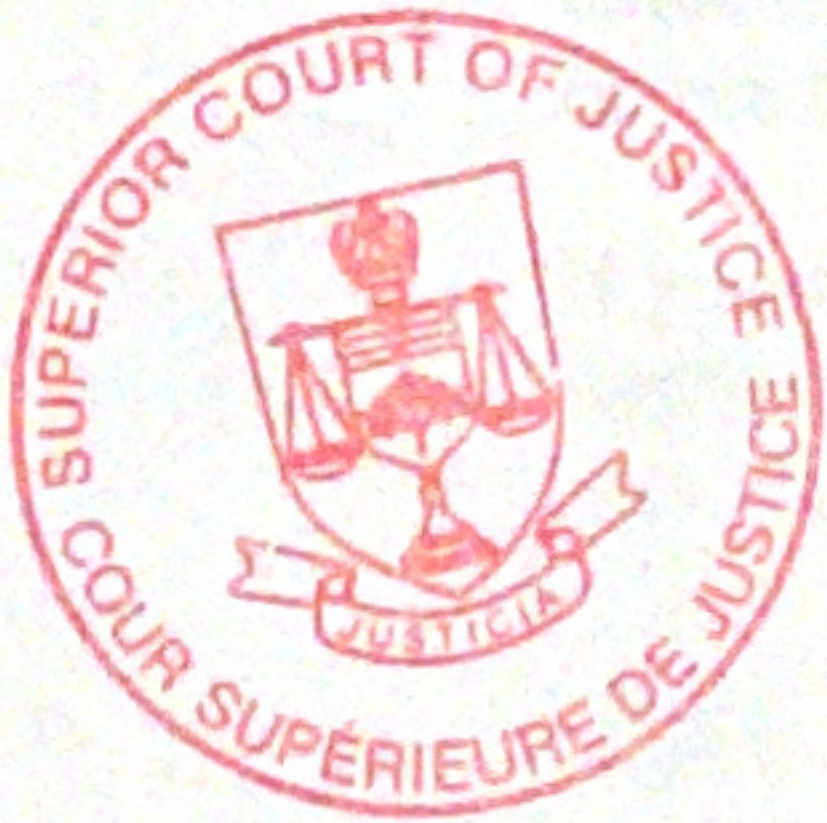
MOHAWK COUNCIL OF KAHNAWÀ:KE

Applicant

- and -

iGAMING ONTARIO and THE ATTORNEY GENERAL OF ONTARIO

Respondents



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**NOTICE OF APPLICATION**

(Pursuant to Rule 14.05(3)(h) of the *Rules of Civil Procedure*)

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TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing

- ☐ In person
- ☐ By telephone conference
- ☐ By video conference

At the following location: 330 University Ave. Toronto, ON M5G 1R7, on a day to be set by the Registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where



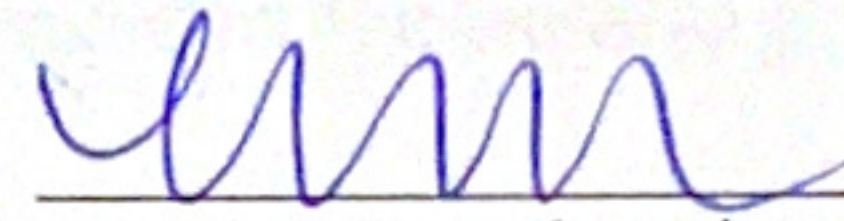
the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

If you fail to appear at the hearing, judgment may be given in your absence and without further notice to you. If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

Date: November 28, 2022

Issued by



Local registrar

Address of court office 330 University Ave. Toronto, ON M5G 1R7

8th Floor  
-14

TO: iGaming Ontario  
90 Sheppard Ave E  
Suite 200  
Toronto, Ontario M2N 0A4

Ministry of the Attorney General  
McMurtry-Scott Building  
720 Bay Street, 11th floor  
Toronto, Ontario M7A 2S9

Ministry of the Attorney General  
Constitutional Law Branch  
720 Bay Street, 4th floor  
Toronto, Ontario M7A 2S9



## APPLICATION

1. The applicant makes application for:
  - a. A declaration that the Ontario government does not “conduct and manage” online lottery schemes established and operated pursuant to the iGaming Scheme (defined *infra*) as required under s. 207(1)(a) of the *Criminal Code* (R.S.C., 1985 c. C-46);
  - b. An order quashing the iGaming Scheme because it is *ultra vires* the Legislative Assembly of Ontario to the extent it permits online lottery schemes which are not conducted and managed by the Ontario government;
  - c. In the alternative, an order declaring the iGaming Scheme inoperative or otherwise without effect to the extent it permits online lottery schemes which are not conducted and managed by the Ontario government;
  - d. The costs of this application; and
  - e. Such other relief as counsel requests and this Honourable Court deems just.
2. The grounds for the application are:
  - a. The Mohawks of Kahnawà:ke (Kahnawákeró:non) are one of the eight communities that make up the Mohawk (Kanien:keha'ka) Nation. The traditional territory of the Mohawk extends through vast regions of what is currently referred to as Quebec, Ontario, and the northeastern United States. This traditional territory has never been ceded, leaving full Mohawk title and interests intact.
  - b. The Mohawk Council of Kahnawà:ke (“MCK”) is the duly elected organization that provides governmental, administrative, and operational services to the community of Kahnawà:ke. The Mohawks of Kahnawà:ke have the capacity of an Indian Band under the *Indian Act*, R.S.C. 1985, c.

I-5, as amended, and are an Aboriginal people under section 35 of the *Constitution Act, 1982*.

- c. MCK has a longstanding interest in gaming and wagering, which have been integral parts of Mohawk culture since time immemorial. This interest has caused MCK to, among other things, appear before the Standing Committee of the House of Commons on Justice and Human Rights regarding *Bill C-218: An Act to amend the Criminal Code (sports betting)*. MCK also has specific expertise in gaming and wagering derived from its unique history and culture, and from conducting and managing their own gaming regime pursuant to their Aboriginal right to do so.
- d. iGaming Ontario (“IGO”) is a corporation without share capital continued under O. Reg. 722/21, *Lottery Subsidiary – iGaming Ontario*. IGO is mandated to, among other things, develop, undertake, and organize prescribed online lottery schemes, and “conduct and manage” those online lottery schemes in accordance with the *Criminal Code* and the *Gaming Control Act, 1992*. IGO is a subsidiary of the Alcohol and Gaming Commission of Ontario (“AGCO”). The Ministry of the Attorney General is the Ministry responsible for the AGCO and IGO.

#### **Ontario announces plans for online gaming market**

- e. In its 2019 budget, the Ontario government announced its plan to establish a “competitive market for online gambling,” which would include online gaming operated by private operators. The Ontario government repeated that plan in its 2020 budget. In a departure from past practice in Ontario, the AGCO, and not Ontario Lottery and Gaming, would “conduct and manage iGaming, in addition to having the role of regulator.”
- f. A “key part” of the Ontario government’s online gaming strategy was the legalization of single event sports wagering, which at the time was prohibited by the *Criminal Code*. On June 29, 2021, that prohibition was



repealed when *Bill C-218, An Act to amend the Criminal Code (sports betting)* received royal assent.

### **Ontario makes legislative changes to establish an online gaming market**

- g. Ontario took preliminary steps towards establishing an online gaming market on December 8, 2020, when Bill 229, *An Act to implement Budget measure and to enact, amend and repeal various statutes* received Royal Assent. The Act amended the *Alcohol and Gaming Commission of Ontario Act, 2019* and the *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996* by, among other things, empowering the Lieutenant Governor in Council to make regulations:
  - i. establishing a “lottery subsidiary” of the AGCO which has as its objects and duties “conducting and managing prescribed online lottery schemes”; and
  - ii. prescribing online lottery schemes for the subsidiary to conduct and manage.

### **Ontario establishes iGaming Ontario**

- h. On July 6, 2021, the Lieutenant Governor in Council exercised these new regulation-making powers by promulgating O. Reg. 517/21, *Lottery Subsidiary – iGaming Ontario*, which:
  - i. established the “lottery subsidiary”, IGO; and
  - ii. prescribed the online lottery schemes IGO is responsible for conducting and managing as follows:

For the purposes of the Act and this Regulation, a lottery scheme offered through a gaming site that is an electronic channel operated



by a supplier registered as an operator under the *Gaming Control Act, 1992* is prescribed as an online lottery scheme.<sup>1</sup>

- i. On November 29, 2021, the Lieutenant Governor in Council continued IGO under O. Reg. 722/21, *Lottery Subsidiary – iGaming Ontario*.

**The AGCO publishes an application guide for becoming an iGaming operator**

- j. On or about August 18, 2021, the AGCO published information to assist private operators in applying to register to operate gaming sites in Ontario’s planned online gaming market in the *Internet Gaming Operator Application Guide*. The Guide explains that in general, private operators operating a gaming site would have “control” over the site, and “ongoing responsibility for the gaming site as a whole, including key decision-making activities.”

**Ontario publishes the *Registrar’s Standards for Internet Gaming***

- k. On or about September 9, 2021, the AGCO published the *Registrar’s Standards for Internet Gaming*, which set out the regulatory standards with which operators of online gaming sites must comply. Among other things, the Standards make private operators that are registered, and which have entered into commercial agreements with IGO, responsible for the conduct and management of their online gaming platforms.

**Ontario launches online gaming market**

- l. On January 28, 2022, IGO announced that the *Registrar’s Standards for Internet Gaming* will come into force on April 4, 2022, which is the date when “private gaming operators that have registered with the AGCO and have executed an operating agreement with [IGO] can begin offering their

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<sup>1</sup> General Regulation 78/12 under the *Gaming Control Act, 1992*, defines “operator” as “a person who operates a gaming site.”



games to players in Ontario.” Despite outstanding debate about the iGaming Scheme’s<sup>2</sup> legality,<sup>3</sup> the iGaming Scheme launched on that date.

### **The iGaming Scheme is illegal**

- m. Section 206(1) of the *Criminal Code* prohibits all forms of gaming. However, s. 207(1)(a) and s. 207(4)(c) together create an exception for lottery schemes conducted and managed by the government of a province in accordance with any law enacted by the legislature of that province.
- n. Online lottery schemes established and operating under the iGaming Scheme are not conducted and managed by the Ontario government, since, among other things:
  - i. Private operators, not the province, own and operate their own proprietary platforms;
  - ii. Private operators, not the province, are responsible for key decision-making activities;
  - iii. Private operators, not the province, are responsible for meeting compliance obligations for their gaming sites;
  - iv. Private operators, not the province, have authority to retain suppliers in relation to the gaming site; and
  - v. Private operators, not the province, are the primary beneficiaries of revenue generated by the iGaming Scheme.
- o. Lottery schemes established and operating under the iGaming Scheme are conducted and managed by private operators, not the province. They

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<sup>2</sup> Defined to include the *Registrar’s Standards for Internet Gaming*, commercial agreements between iGaming Ontario and private operators, and all other instruments that permit online lottery schemes in Ontario.

<sup>3</sup> See e.g. Report of the Office of the Auditor General of Ontario, *Internet Gaming in Ontario*, December 2021, p. 7



therefore do not fall within the exception in s. 207(1)(a) and s. 207(4)(c) of the *Criminal Code*. Operators complying with the iGaming Scheme are being made to violate the prohibition in s. 206(1) of the *Criminal Code*.

**The iGaming Scheme is *ultra vires* the province**

- p. To the extent it purports to expand the exception in s. 207(1)(a) and s. 207(4)(c) of the *Criminal Code* or otherwise permit activity which Parliament has prohibited in the *Criminal Code*, the iGaming Scheme is *ultra vires* Ontario because it is in pith and substance in relation to criminal law.

**Federal paramountcy renders the iGaming Scheme inoperative**

- q. Dual compliance with the iGaming Scheme and s. 206(1) of the *Criminal Code* is impossible. The iGaming Scheme also conflicts with the purpose of s. 207(1)(a) and s. 207(4)(c). Federal paramountcy therefore renders the iGaming Scheme inoperative to the extent of the inconsistency.

**Statutes and regulations**

- (a) *Constitution Act, 1867*, ss. 91(27)
- (b) *Rules of Civil Procedure*, rules 14.05(2), 14.05(3)(h);
- (c) *Alcohol, Cannabis and Gaming Regulation and Public Protection Act*, 1996, S.O. 1996, c. 26, ss. 1.1, 4.1, 6.1, 16(d)(e);
- (d) *Alcohol and Gaming Commission of Ontario Act*, 2019, S.O. 2019, c. 15, ss. 1.1, 3(1), 4.1, 6.1, s. 16(i);
- (e) *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 206(1), 207(1)(a), 207(4);
- (f) Ontario Regulation 78/12, *General*, s. 1, 3(1); and
- (g) Ontario Regulation 722/21, *Lottery Subsidiary, iGaming Ontario*.



3. The following documentary evidence will be used at the hearing of the application:
  - a. Affidavits to be sworn; and
  - b. Such other evidence as counsel advises and this Honourable Court permits.

November 28, 2022

**OLTHUIS KLEER TOWNSHEND LLP**  
250 University Avenue, 8<sup>th</sup> Floor  
Toronto ON M5H 3E5

**RENÉE PELLETIER** (#46966N)  
rpelletier@oktlaw.com  
Tel: 416 981 9456 / Fax: 416 981 9350

**NICHOLAS KENNEDY** (#65949Q)  
nkennedy@oktlaw.com  
Tel: 416 618 5840 / Fax: 416 981 9350

Counsel for the Applicant



MOHAWK COUNCIL OF KAHNAWA'KE

and

iGAMING ONTARIO and THE  
ATTORNEY GENERAL OF ONTARIO

Applicant

Respondents

Court File No.:

CV-22-00690870-0000

SERVICE OF A TRUE COPY

ADMITTED THIS 28 DAY OF Nov, 2022

ATTORNEY GENERAL FOR ONTARIO

Per David Behr Time 10:36am

Constitutional Law Branch  
720 Bay Street 4th Floor  
Toronto, Ontario M5G 2K1

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

NOTICE OF APPLICATION

OLTHUIS KLEER TOWNSHEND LLP

250 University Avenue, 8<sup>th</sup> Floor

Toronto, ON M5H 3E5

RENÉE PELLETIER (#46966N)

[rpelletier@oktlaw.com](mailto:rpelletier@oktlaw.com)

NICHOLAS KENNEDY (#65949Q)

[nkennedy@oktlaw.com](mailto:nkennedy@oktlaw.com)

Counsel for the Applicant