

Preliminary Notice of Motion

Court File No:

FEDERAL COURT

BETWEEN:

MAGIC PALACE, STANLEY MYIOW AND BARRY ALFRED

Applicants

- and -

KAHNAWÀ:KE GAMING COMMISSION and MOHAWK COUNCIL OF KAHNAWÀ:KE

Respondents

NOTICE OF PRELIMINARY MOTION

TAKE NOTICE THAT the Applicants will make a motion to the Federal Court on **October 15, 2024, at 9:30** or as soon thereafter as the motion can be heard, at the Federal Court at 30 McGill Street, Montreal, (QC).

THE MOTION IS FOR

- (a) An order seeking an extension of time for bringing an application for judicial review under section 18.1 (2) of the *Federal Courts Act*, per section 8 of the *Federal Court Rules*, as applicable,
- (b) An order pursuant to section 50(1) of the *Federal Courts Act*, staying this proceeding until such time as the action in the Superior Court of Quebec [Court File No. 505-17-014638-243] is fully and finally disposed of, including all appeals to the Quebec Court of Appeal, applications for leave to appeal to the Supreme Court of Canada, and appeals to the Supreme Court of Canada or the expiry of the times for commencing such appeals, or applications for leave to appeal.
- (c) If the order requested in item (b) is granted, a further order that the Applicants have not submitted to the jurisdiction of this Court by bringing a motion for extension of time and stay of proceedings, which serve only to preserve the Applicants rights.

THE GROUNDS FOR THE MOTION ARE as follows:

Overview

1. Counsel for Applicants seek an extension of time for the judicial review of the May 13, 2024, and June 3, 2024, decisions by the Kahnawà:ke Gaming Commission which dismissed the Applicants' various requests for a fair hearing and documentary disclosure (the "**Decisions**") which maintains the suspension of Magic Palace's Poker Room Licence and effectively barred further challenge of the same.
2. On May 27, 2024, prior to the present application, the Applicants filed an *Originating Application for Stay of Execution and Judicial Review* against the KGC (defendant) and the MCK (as an impleaded party) before the Superior Court of Quebec, subsequently amended on June 11 (the whole, referred to as the "**Originating Application for Judicial Review**").
3. In parallel to the *Originating Application for Judicial Review*, the Applicants filed a related proceeding before the Superior Court of Quebec against the MCK, seeking complementary relief based on identical facts.
4. The *Originating Application for Judicial Review* raises identical grounds and seeks similar conclusions to the present application regarding the contested Decisions.
5. On July 3, 2024, in response to the proceedings brought against them, the KGC filed an *Application by the Defendant for Declinatory Exception* (the "**Declinatory Exception**") contesting the Superior Court of Quebec's subject-matter jurisdiction over the judicial review of the KGC's actions.
6. Considering the KGC's Declinatory Exception the Applicants now seek identical relief from the Federal Court of the May 13 Decision in the event that the Superior Court of Quebec declines jurisdiction.
7. Notwithstanding this Application, the Applicants contest the grounds raised by the KGC in the Declinatory Exception and reiterate that the Superior Court of Quebec remains the appropriate forum for the conclusions sought in the *Originating Application for Judicial Review*.
8. The present Application is filed as a conservative measure pending adjudication on the Superior Court of Quebec's jurisdiction, without prejudice or admission, and does not constitute an attornment to the jurisdiction of this Court.



9. In parallel to the present Application seeking the review of the Decisions, in which the suspension of Magic Palace's PR Licence became in essence, final, the Applicants seek similar relief regarding an extension of time for the review of suspension and invalidation of other gaming licences per section 18.1 of the *Federal Courts Act* as well as a stay of the proceedings before the Federal Court per section 50(1) of the *Federal Courts Act*, pending the Superior Court of Quebec's ruling on the jurisdiction issue.

The Applicants

10. Magic Palace is a 23,000-square-foot gaming facility located on the Territory. It offers over 400 EGDs, a high-stakes poker room (PR), and a high-end restaurant. Originally a small poker room (PR), it was refurbished and rebranded several times before expanding into its current form in 2019.
11. Messrs. Stanley Myiow and Barry Alfred are the co-owners of Magic Palace and oversee its operations.
12. In its capacity as a gaming facility, Magic Palace's operations depend on the issuance and validity of a number of licences, namely a PR Licence as well as an Operator's Licence for Electronic Gaming Devices (the "**EGD Licence**").

The Respondents

13. The KGC is an independent regulatory body created by the MCK pursuant to the *Kahnawà:ke Gaming Law*, K.R.L. c. G-1.
14. Its role is to oversee and regulate land-based and online gaming operations on the Territory, ensuring compliance with established standards and protecting the integrity of gaming activities.
15. In this context, the KGC is responsible for the issuance and surveillance of PR and EGD licences.
16. The MCK delivers governmental, administrative, and operational services to the Territory's members under the leadership of the Council of Chiefs, an elected body comprised of 12 elected Ratitsénhaiens (representatives).
17. In 1996, asserting its inherent right to self-determination under s. 35(1) of the *Constitution Act*, the MCK enacted the Gaming Law, creating the KGC.
18. The MCK's inherent jurisdiction over gaming has remained unchallenged for three decades, and formal recognition is underway (Bill S-268).
19. The MCK oversees the KGC including through an appointed MCK Chief acting as a "liaison" between the two organizations. The MCK liaison sits on formal weekly KGC meetings.



The Suspension of the PR Licence

20. On March 25 and 26, 2024, the MCK-KGC successively notified a cascade of evolving formal notices (collectively, the “**Notices**”) to Magic Palace, which effectively suspended and invalidated the EGD licence:
 - i. On March 25, 2024, the KGC suspended the EGD licences pending the completion of a so-called “Show Cause Hearing” (the “**Suspension**”);
 - ii. The same day, while the EGD licences were suspended and Magic Palace closed, the MCK issued a notice of immediate termination of the EGD-related Royalty Agreement, citing the KGC’s findings (the “**Termination**”); and
 - iii. The next day, on March 26, 2024, citing the MCK’s Termination, the KGC amended its previous Suspension notice, immediately invalidating the EGD licence and annulling the EGD Show Cause Hearing (the “**Invalidation**”).

21. Since the Notices, the Applicants have attempted to preserve their rights and exhausted all legal avenues before the MCK-KGC to address the Suspension and Invalidation:
 - i. Without delay, Magic Palace contested the Notices and sought the disclosure of fundamental evidence, such as the full Spectrum report (“the “**Report**”) and other evidence relied upon by the KGC for issuing its Suspension and Invalidation Notices (the “**KGC Notices**”);
 - ii. Instead, the KGC unlawfully demanded that the Applicants pay \$15,000 for the “Show Cause Hearing” hearing’s “costs” (the “**First Hearing**”), which it set on April 26, 2024—the first day allowed by its regulations— while withholding the Report on which it based its findings, despite having received it two months prior until days before the Applicants’ evidence production deadline, communicating a redacted version;
 - iii. During the First Hearing, the Applicants demonstrated examples of and sought remedies for the KGC’s violations of natural justice, including the right to be heard on the Suspension and Invalidation of the EGD licences impacting its operations;
 - iv. On May 13, 2024, the KGC rendered a decision dismissing the entirety of the Plaintiff’s requests, including basic documentary disclosure, and concluded that the Applicants could not be heard on their EGD Invalidation, blaming the MCK’s Termination of the Royalty Agreement;
 - v. On May 22, 2024, after being put on notice, the MCK refused or neglected to reinstate the Royalty Agreement;



- vi. On June 3, 2024, the KGC rendered a decision in which it maintained the suspension of the PR Licence and deferred its final decision on the matter, pending the resolution of the *Originating Application for Judicial Review* filed on May 27, 2024. In doing so, the suspension of the PR Licence became final pending adjudication by the Superior Court.
22. Through their actions, the KGC-MCK have violated their obligations and untenably deadlocked the Applicants, violating the most basic hallmarks of natural justice and procedural fairness. Specifically, the Applicants raise the following grounds:
- i. The KGC violated natural justice and due process rules: The KGC contravened *audi alteram partem* and the principle of legality, by refusing to communicate the evidence relied upon in issuing the KGC Notices, including, strikingly, two previously undisclosed third-party reports in its possession and by sanctioning the Applicants for alleged violations of inexistent regulations;
 - ii. The MCK-KGC's conduct has created a strong objective appearance of prejudgement: The MCK-KGC's conduct prior to and during the Show Cause Hearing process suggests a predetermined outcome, evidenced by the KGC's prejudicial statements, misleading the Spectrum investigators by omitting crucial information about the Investor's role, and sharing an incomplete Report with the MCK before the Hearing, while public statements and termination notices from entities under MCK's control or influence further undermined the process's impartiality;
 - iii. The MCK-KGC failed to ensure institutional independence and structural impartiality: The KGC violated the *nemo iudex in causa sua* rule by combining investigative and adjudicative roles, presuming guilt, and concealing evidence of its failures. The KGC's independence is further compromised by its financial and governance ties with the MCK, which acts as both a legislative body and gaming operator, appointing KGC members who oversee its gaming operations. Consequently, a well-informed observer would reasonably fear that their rights to an independent and impartial tribunal were compromised.
 - iv. The MCK-KGC's combined actions untenably deadlock the Applicants: The combined actions of the MCK-KGC prevent the Applicants from exercising their rights to be informed, heard, and to a full and proper defence, leading to the permanent closure of their 15-year operations, evidenced by the KGC dismissing due process requests, barring Applicants from EGD license hearings, and the MCK's refusal to reinstate the Royalty Agreement, resulting in a self-perpetuating Catch-22 that permanently bars the Applicants from their primary revenue-generating activity, which accounts for 95% of their revenue.



The Interests of Justice Favour an Extension of Time and Hearing this Application

23. Following an initial filing on August 2nd, 2024, and directions from this Court on the issue of timeliness provided on August 15, 2024, the Applicants now submit an application for an extension of time per section 8 of the *Federal Court Rules*.
24. Notwithstanding the relief sought in relation to the timeliness of the application, the Applicants maintain that an extension of time is not required, as subsection 18.1(2) is inapplicable in the case at bar.
25. The interests of justice favour hearing this application despite the passage of the 30-day filing deadline referred to in subsection 18.1(2) of the Federal Courts Act. As will be argued at length, the Applicants have consistently demonstrated:
 - i. A continuing intention to pursue the application, as demonstrated by the parallel proceedings before the Superior Court of Quebec;
 - ii. A strong case on the merits of the application;
 - iii. The absence of prejudice arising from the delay for the Respondent – given the identical grounds for review previously raised before the Superior Court of Quebec – which were raised in a timely manner; and
 - iv. A reasonable justification for the delay. Specifically, they timely filed the *Originating Application for Judicial Review* before the Superior Court of Quebec, and proactively initiated the present proceedings before the Federal Court within 30 days of the jurisdictional challenge raised by the Respondent KGC.

The Interest of Justice Favours the Suspension of Proceedings

26. In the context of an application for judicial review, this Court has the power to make any interim orders it deems appropriate, per section 18.2 of the *Federal Courts Act*.
27. Namely, this Court may exercise its discretion to order a stay of proceedings in cases which are proceeding within another court or jurisdiction, per section 50 (1) (a) of the *Federal Courts Act*.
28. Given the pending proceedings before the Superior Court of Quebec and the jurisdiction issue raised by the KGC, which will be heard on September 11, 2024, it is in the interest of justice to suspend the present proceedings pending the ruling on the jurisdiction issue.
29. The rules of judicial economy and proportionality further favour the suspension of the present application, which is filed for conservatory purposes and may be rendered moot should the Superior Court of Quebec retain jurisdiction.



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

30. Affidavit evidence from:

- a. Mark Jocks, to be sworn;
- b. Barry Alfred, to be sworn;
- c. Stanley Myiow, to be sworn;
- d. Rosalie Rioux-Massé, to be sworn.

31. The following documents:

- a. Copy of the decision rendered by the KGC on May 13, 2024;
- b. Copy of the *Originating Application for Stay of Execution and Judicial Review*, filed and served before the Superior Court of Quebec on May 27, 2024;
- c. Copy of the decision rendered by the KGC on June 3, 2024.
- d. Copy of the *Amended Originating Application for Stay of Execution and Judicial Review*, filed and served by Applicants before the Superior Court of Quebec on June 11, 2024;
- e. Copy of the *Application by the Defendant for Declinatory Exception*, 2024, filed and served by the Respondent Kahnawà:ke Gaming Commission before the Superior Court of Quebec on July 3, 2024
- f. Copy of the Minutes of case management held before Justice Patrick Buchholz of the Quebec Superior Court regarding the *Application by the Defendant for Declinatory Exception*, dated July 18, 2024.
- g. Copy of the *Application for judicial review*, dated August 2, 2024.
- h. Copy of a letter addressed to the Registrar seeking directions on the requirement of filing a motion for extension of time, dated August 6, 2024.
- i. Copy of a letter from the Respondent KGC to the Registrar seeking directions on the requirement of filing a motion for extension of time, dated August 9, 2024.
- j. Copy of the directions provided by this Court on August 15, 2024.

AND such further and other material as counsel may advise and this Honourable Court may permit.



MONTREAL, August 26, 2024

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