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Subject: Mohawk Council of Kahnawà:ke Submissions to the Standing Committee on Justice and Human Rights re Bill C-218: An Act to amend the Criminal Code (sports betting)

Wa'tkwanonhwerá:ton (Greetings)

On behalf of the Office of the Council of Chiefs of the Mohawk Council of Kahnawà:ke, please find attached our submission to the Standing Committee on the above-mentioned Bill.

We trust this information is satisfactory, should you have any questions or require further information, please do not hesitate to contact the undersigned at your convenience.

In Peace and Friendship,

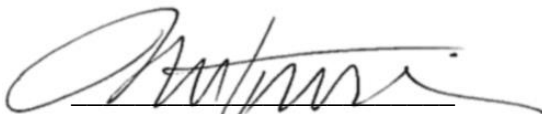
**ON BEHALF OF THE OFFICE OF THE COUNCIL OF CHIEFS
MOHAWK COUNCIL OF KAHNAWÀ:KE**



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MD/GD/RM/03112021/StandingCommittee

CC: Council of Chiefs, MCK
File

The Mohawk Council of Kahnawà:ke (“MCK”) makes these submissions to the Standing Committee on Justice and Human Rights on Bill C-218: An Act to amend the Criminal Code (sports betting).

SUMMARY

The Mohawks of Kahnawà:ke, and Mohawk people more generally, have engaged in gaming and sports betting since time immemorial. Games of chance and wagering on sporting events, such as lacrosse, are an integral part of the Mohawk culture. Gaming features in our creation stories and has been always been central to our culture and to our relationships with other nations.

The Mohawks of Kahnawà:ke have an “Aboriginal right” – an inherent Indigenous right that is protected under s. 35 of the *Constitution Act, 1982* – to conduct, facilitate, and regulate gaming and gaming related activities within and from the Mohawk Territory of Kahnawà:ke. The Mohawks of Kahnawà:ke currently exercise this right by conducting, facilitating and regulating both land-based and online gaming, including sports betting. Its sports betting brand, Sports Interaction, is operated by Mohawk Online – a company wholly owned by MCK, whose profits are re-invested in the community. The profits from Sports Interaction have done significant good in our community, including during the COVID-19 pandemic – Mohawk Online has paid out emergency dividends totalling \$4M to the Kahnawà:ke Economic Relief Measures Fund.

The proposed amendment to the *Criminal Code* in Bill C-218 does not reflect the Mohawks of Kahnawà:ke’s right and threatens the continued economic resilience of our community.

As the *Code* is currently structured, section 207(1)(a) provides an exemption for provincial governments from the broad prohibition against gaming contained in the *Code*. That exemption is limited by s. 207(4), which presently proscribes betting on a “single sport event or athletic contest” . The proposed amendment to s. 207(4) will remove that prohibition for provinces, but without recognizing Indigenous governments operating legitimate, regulated, well-established gaming on sports events—and in particular, those Indigenous governments that do so on the strength of an Aboriginal right.

MCK takes no issue with the *Code* being amended to permit provinces to facilitate sports betting. MCK does, however, take issue with the ongoing failure to amend the *Code* to reflect and accommodate the Aboriginal right held by the Mohawks of Kahnawà:ke.

MCK has been in discussions with the federal government for many years, most recently with Minister Lametti, seeking amendments to the *Code* that reflect Kahnawà:ke's Aboriginal right. The Committee has the opportunity to recommend that an amendment be made to the *Code* to remedy this situation. It is our understanding that the Committee intends to recommend an amendment to protect betting on horse-racing. We trust the Committee will not give greater protection to the horse-racing industry than to a constitutionally protected inherent Indigenous right.

RECOMMENDATION

The Mohawks of Kahnawà:ke recommend that the following amendments marked in *red italics* be made to the *Code*:

Permitted lotteries

207 (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for an Indigenous governing body to conduct and manage a lottery scheme pursuant to the terms of an agreement with the government of Canada;

(b) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;

207 (4) In this section, lottery scheme means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system of betting other than

(a) three-card monte, punch board or coin table; or

~~(b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any race or fight, or on a single sport event or athletic contest; or~~

~~(b) for the purposes of paragraphs (1)(c) to (f), a game or proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a)~~

to (g) that is operated on or through a computer, video device, slot machine or a dice game.

Definitions

197 (1) In this Part,

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982;

Please see the final section of these submissions for more on the MCK's recommended amendment.

BACKGROUND ON GAMING AT KAHNAWÀ:KE

Simply put, Mohawk people have engaged in gaming and wagering from time immemorial. These practices continued to be honoured by the Mohawks of Kahnawà:ke when the community was settled in the 17th century. This history is outlined in more detail below.

In 1996, MCK enacted the *Kahnawà:ke Gaming Law* ("KGL") on the strength of the Mohawks of Kahnawà:ke's inherent Indigenous jurisdiction. Pursuant to s. 6 of the KGL, MCK established the Kahnawà:ke Gaming Commission ("KGC") to regulate gaming activities within and from its Territory. Since that time, the KGC has been licensing and regulating online and land-based gaming within and from Kahnawà:ke.

In 2015, MCK incorporated Mohawk Online Ltd. ("Mohawk Online") to operate 'SportsInteraction.com'. Sports Interaction is an online gaming service featuring sports betting, casino and poker games. The platform is open to players over the age of 19 and resident of Canada.

Mohawk Online is a socio-economic initiative. It is wholly owned by the MCK, and its revenue is invested back into the community.

Land-based and online gaming, especially sports betting, have brought significant benefits to Kahnawà:ke, as well as to the non-Indigenous community surrounding Kahnawà:ke.

Prior to Mohawk Online's creation, MCK was operating at a deficit of approximately \$1-2M annually. This meant that MCK was constrained in its ability to fund programming and services for the community. Since Mohawk Online's creation, MCK has been operating at a surplus. This has meant that MCK has been able to fund programming to build a healthy and resilient community, and to start undoing some of the damage caused by decades of federal underfunding and assimilationist policies. MCK is now able to fund:

- Language and culture programming;
- Sports, recreation, library and youth programming; and
- Animal protection, environment and conservation programs and initiatives.

Mohawk Online's revenues are derived entirely from Sports Interaction. As stated above, Mohawk Online is wholly owned by MCK, and all profits from Mohawk Online are directed to MCK, which then directs the funds to the programming outlined above. In addition, in 2020, Mohawk Online paid \$4M in special dividends to MCK, which were directed to an emergency relief fund to support the Kahnawà:ke community suffering from COVID-19 and its impacts.

Gaming in Kahnawà:ke does not just benefit the people of Kahnawà:ke. Over the last five years, Mohawk Online alone has grown from 30 to 60 employees and is set to expand to 75 staff this year. Fifty percent of these employees are members of Kahnawà:ke, and the remaining fifty percent are employees from outside our community. Altogether, MCK's gaming operations employed 113 people in 2020, from Kahnawà:ke and the surrounding area. In addition, MCK's gaming operations generate traffic and business for the surrounding community. We estimate that in 2019, prior to the pandemic, over \$2M was generated in other economic spending associated with MCK's gaming operations.

Despite the fact that the MCK has conducted responsible, regulated gaming under the KGL for over 25 years, and despite the fact that the Mohawks of Kahnawà:ke's inherent Indigenous right to conduct, facilitate, and regulate gaming has never been challenged, MCK's gaming platforms' growth has been limited by the *Code* as currently drafted. Because the Mohawks of Kahnawà:ke's right is not reflected in the *Code*, third parties have at times been reluctant to enter into partnerships with MOL and the KGC. It is anticipated that this type of hesitation will grow if the amendment

to the *Code* passes as proposed in Bill C-218, since third parties are likely to view the explicit authorization of sports betting for the provinces in the *Code* as providing more legitimacy to provincial platforms than to sports betting conducted pursuant to the Mohawks of Kahnawà:ke's Indigenous right and jurisdiction.

This is especially frustrating to MCK in light of the circumstances surrounding the existing provincial exemption to gaming prohibitions in the *Code*. Briefly stated, the federal government failed to engage or consult with Indigenous peoples in advance of the addition of that exemption in 1985. The federal government and provinces negotiated the exemption behind closed doors to settle litigation concerning gaming brought by the provinces against Canada. The result of these negotiations was to secure a provincial (near) monopoly over commercial gaming, and to provide the federal government with badly needed funds to put towards the Calgary Olympics. The Mohawks of Kahnawà:ke's Indigenous right was not taken into account or acknowledged in the 1985 settlement and associated legislative amendments.

In most provinces in Canada, agreements between provincial governments and Indigenous governments regarding varying degrees of Indigenous participation in gaming have been put in place post-1985. That is not the case in Québec, which has consistently refused to engage in meaningful conversations about gaming with the Mohawks of Kahnawà:ke, and which does not share any part of its significant gaming revenues with the Indigenous peoples within its borders.

HISTORY OF GAMING IN KAHNAWÀ:KE

Iroquoian peoples (which include the Mohawk) have always engaged in gaming, such as wagering on games like dice, snow snake, and lacrosse (known to Mohawks as the “Little Brother of War”). While the Mohawk know this about ourselves, it is also reflected in linguistic and archaeological evidence, as well as in European records such as the *Jesuit Relations*.

It is not only that the Mohawk have always engaged in gaming – gaming is integral to our culture. Wagering, dice and lacrosse are all featured in our traditional stories. In the Iroquois story of the creation of the world, it is believed that the Creator taught humans Four Ceremonies – one of which is called “the Grand Bet, or They Strike Bowls”. Our cosmology includes both a lacrosse game and a bowl game.

Dice were often buried with our ancestors, demonstrating their importance to our ancestors and to the afterlife.

Gaming was a way of building relationships and resolving conflicts within our communities, with allies, and even with non-allied “enemy” nations. There are accounts of lacrosse games lasting days. These were occasions of relationship-building, with feasting and gatherings marking the games. One account of a game played between the Senecas and Mohawks in the 18th century estimated that 2,000 people attended to watch, and that significant betting took place.

As sports historian Donald Fisher has written,

Even though ball games served practical diplomatic and military purposes, they were also steeped in spirituality and served as agents of socialization. They promoted community stability among individuals and between generations by fostering religious continuity, social conformity, and economic equality.

...

Gambling on a ball game stabilized social life by promoting economic equality. Every time people wagered, they facilitated the redistribution of wealth and material between or within tribes.¹

Mohawk gaming was often high stakes. Historical European accounts of Iroquois gaming, including Mohawk gaming at Kahnawà:ke, remark on the high stakes often involved in wagering – tens to hundreds of thousands to millions of dollars in modern currency.

ABORIGINAL RIGHT

The Mohawks of Kahnawà:ke have an inherent Indigenous right to conduct, facilitate and regulate gaming within and from the Mohawk Territory of Kahnawà:ke. In Canadian law, the right is described as an “Aboriginal right” and has been affirmed under subsection 35(1) of the *Constitution Act, 1982*.

¹ Donald M. Fisher, *Lacrosse: A History of the Game* (Baltimore: Johns Hopkins University Press, 2002), pp. 14-16.

This right has never been extinguished.

The test in Canadian law to establish an Aboriginal right was outlined in *R v. Van der Peet*:

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.²

As outlined above, there is ample evidence demonstrating that gaming has always been an integral aspect of Mohawk culture, including the culture of the Mohawks of Kahnawà:ke. The Mohawk have always engaged in gaming within their own communities and with other nations and outsiders. Much of the historical Mohawk gaming reflected in European accounts is associated with sports betting, such as betting relating to lacrosse. The Mohawks of Kahnawà:ke meet the *Van der Peet* test to confirm their right at Canadian law.

MCK is aware that there are circumstances in which the Crown can limit the exercise of Aboriginal rights where an infringement of the right can be justified. That analysis does not come into play in this case, because MCK has developed a regulatory scheme for gaming that meets or exceeds the Crown's own standards. The *Kahnawà:ke Gaming Law* and the regulations enacted by the KGC ensure that all gaming authorized under MCK's jurisdiction is regulated with the same rigour as that authorized under provincial jurisdiction. There is therefore no need for the Crown to limit the exercise of the Mohawks of Kahnawà:ke's right, either in the name of public health or public security.

MCK has engaged with the federal government over many years to have the Mohawks of Kahnawà:ke's section 35 right reflected in legislation, including the *Code*. Most recently, MCK has been in discussions with Minister Lametti on this subject. The Minister has expressly acknowledged Kahnawà:ke's 'legitimate gaming architecture that makes Kahnawake world leaders—and it is worth supporting', but MCK has been frustrated by the failure to date for this acknowledgement to result in action. MCK welcomes the opportunity to now involve the Standing Committee in this discussion.

² *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*], at para 46.

IMPACTS OF THE BILL

MCK is concerned about the amendments to the *Code* as currently proposed in Bill C-218 for two reasons:

1. They perpetuate the injustices inflicted on Kahnawà:ke and other Indigenous peoples by virtue of the amendments to the *Code* in 1985, when the rights and interests of Indigenous peoples in the gaming industry were ignored; and
2. They infringe Kahnawà:ke's inherent Indigenous rights by undermining the ongoing success of MCK's gaming endeavours, which in turn poses a threat to the ongoing well-being and resilience of our community.

Perpetuating the 1985 Injustice

The federal government's failure to engage with Kahnawà:ke or other Indigenous governments, or to make an effort to accommodate their interests, prior to the 1985 amendments to the *Code* carving out an exemption for the provinces, was a clear breach of the Crown's fiduciary duty and a stain on the honour of the Crown. Not all Indigenous peoples may have an 'Aboriginal gaming right', but those who do, such as the Mohawks of Kahnawà:ke, should have been at the table for those conversations.

The federal government's failure to account for Aboriginal gaming rights in the 1985 amendments has meant that MCK's jurisdiction and authority to exercise its right has not been reflected in the *Code* to this point.

This is unacceptable, and the Standing Committee has the opportunity now to remedy the federal government's previous failures by recommending the amendments proposed by MCK. MCK's amendments would not negatively impact the provinces' ability to expand their gaming operations to include single event sports betting. Rather, they would simply prevent Bill C-218 from infringing on the Mohawks of Kahnawà:ke's right by damaging MCK's sports betting gaming operation.

Recommending MCK's proposed amendments would also align with the federal government's stated commitment to honour the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). UNDRIP strongly supports the right of Indigenous peoples to pursue, conserve and

reinforce their economic, social and cultural development.³ We have outlined for the Committee the significant benefits our nation derives from the exercise of our inherent Indigenous gaming right. This is precisely the type of economic development that can support a nation's social and cultural development and strengthen self-determination.

We note that it is MCK's understanding that the Standing Committee is considering recommending amendments to protect horse-race betting as it currently operates. We trust that the Standing Committee will agree that protecting the continued viability of sports betting grounded in an inherent Indigenous right – gaming that significantly benefits an Indigenous community – is no less important than protecting the current practices for horse-race betting.

Infringement of the Mohawks of Kahnawà:ke's Right

As noted above, MCK takes no issue with the *Code* being amended to permit provinces to facilitate single event sports betting. MCK does, however, take issue with the amendments as currently drafted, since they fail to recognize the Mohawks of Kahnawà:ke's gaming right and will undermine our legitimate sports betting operations. If, as currently drafted, the amendments to the *Code* explicitly authorize provincially regulated single event sports betting, but are silent as to sports betting regulated pursuant to inherent Indigenous gaming rights, we expect that third parties will be hesitant to partner with our sports betting platform, and will instead prefer to partner with provincial sports betting platforms.

As outlined above, Sports Interaction brings in significant profits to Mohawk Online, which is wholly owned by MCK. These profits are invested into our community and have empowered us to develop and expand programs crucial to our community's well-being and resilience, including language programming, environmental conservation programs, youth programming, and other services. A decrease in profits to Mohawk Online will mean a correlating decrease to the services that we are able to fund for our nation. It will also have significant impacts to the non-Indigenous community surrounding Kahnawà:ke, which relies on our gaming industry for employment and for business associated with traffic to and from Kahnawà:ke.

³ See e.g. Articles 2-5, and especially Article 5.

In light of this, we urge the Committee to recommend the amendments proposed by MCK.

MCK PROPOSED AMENDMENTS

The amendments that we propose have the benefit of righting the injustice from 1985 and of reconciling Kahnawà:ke's inherent Indigenous gaming right with Canada's *Code*. Moreover, the proposed amendments have been carefully drafted to ensure that existing gaming arrangements between provinces and Indigenous governments would not be displaced, while ensuring that Indigenous governments in provinces without such arrangements, like MCK, can deal directly with the federal government to put in place agreements regarding gaming. The proposed amendments will also ensure that the risks to MCK's sports betting operations outlined above are mitigated by including Indigenous governments in the sports-betting exemption in the *Code*. Our proposed amendments are a simple, straightforward way for the Crown to put its stated commitments to reconciliation into practice.