

# **A COMPELLING CASE FOR THE MOHAWKS OF KAHNAWÁ:KE TO CONDUCT, FACILITATE, AND REGULATE ALL FORMS OF GAMING ON ITS LANDS AND FOR THE CREATION OF A FRAMEWORK FOR ABORIGINAL GAMING IN CANADA**

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By: Morden C. Lazarus, B.A., B.C.L.  
Edwin D. Monzon, B.A., LL.B.  
Richard B. Wodnicki, B.A., B.C.L., LL.B.

The authors are members of the law firm of Lazarus Charbonneau situated in the City of Montreal, in the Province of Quebec, Canada. They are all members in good standing of the Bar of the Province of Quebec and Richard Wodnicki is also a member of the State Bar of New York. Morden C. Lazarus, the principal of Lazarus Charbonneau, is past President of the International Association of Gaming Attorneys (IAGA), based in Las Vegas, Nevada, and has recently served as the Chairman of the Gaming Law Committee of the American Bar Association.

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I. **CULTURAL AND HISTORICAL EVIDENCE TO SUPPORT THE KAHNAWÁ:KE MOHAWK RIGHT TO CARRY OUT GAMING, AND THE FACILITATION AND REGULATION OF GAMING BY VIRTUE OF SECTION 35(1) OF THE CANADA CONSTITUTION ACT, 1982**

This section will address the issues of gaming, wagering, and the facilitation and regulation of gaming, and will demonstrate that these activities have formed an integral part of Kahnawá:ke Mohawk culture since prior to contact with European peoples, giving rise to the claim that the **Mohawks of Kahnawá:ke** are entitled to exercise their right to carry out gaming, wagering, and the facilitation and regulation of gaming by virtue of Section 35(1) of the *Canada Constitution Act, 1982*.

A) **Gaming Practices Exercised by the Mohawks of Kahnawá:ke Since Prior to Contact with European Peoples, which Form an Integral and Defining Part of their Culture:-**

The range of games played historically by **First Nations** groups throughout North America is wide and encompasses games of dexterity such as archery contests, and games of chance such as dice games. In fact, over one hundred dice games are recorded as having been historically played by Native groups throughout North America.<sup>1</sup> Among the games historically played by **First Nations** peoples are "**Beaver Tooth**", "**Half Shell**", and "**Shell Disk**", to name a few.<sup>2</sup>

If gaming has historically played an important role in the life of North American **First Nations** groups in general, it has formed a particularly central part of "**Iroquois**", and as a result, "**Mohawk**", culture and history.<sup>3</sup> In fact, it is arguable that the concept of gaming lies at the very root of the way of life of the **Mohawks of Kahnawá:ke** by virtue of the **Great Law of Peace**. The founding Constitution of the **Iroquois Confederacy**, the **Great Law of Peace** set out the principles by which the nations of the **Confederacy** would co-exist in harmony. It emphasized the fundamental primacy of resolving conflicts through peaceful means. It was as a result of this emphasis on the non-violent resolution of disputes, that the playing of games such as "**Lacrosse**" emerged as a means of resolving differences among individuals and groups within the **Iroquois Confederacy**. The **Great Law of Peace** was the Genesis by which aggressions and/or conflicts could be settled in a peaceful manner by wagering on the outcome of a game.<sup>4</sup> In effect, then, gaming lies at the core of the culture and

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<sup>1</sup> De Boer, W, "Of Dice and Women: Gambling and Exchange in Native North America", (2001) 8:3 *J. Archaeol. Meth. & Theor.* 215 at 217

<sup>2</sup> De Boer, at 223-226

<sup>3</sup> The Mohawks form part of the Iroquois Confederacy along with four other Native American groups; namely the Cayuga, Oneida, Onondaga, and Seneca nations (Testimony of Kahnawá:ke elders, Mr. Andrew Delisle, and Mr. Billy Two Rivers at Kahnawá:ke, in conversation with the undersigned authors, September 6, 2005)

<sup>4</sup> Conversation with Mr. Billy Two Rivers; November 30, 2005

history of the **Mohawks of Kahnawá:ke**, and forms a fundamental and inseparable part of their identity and culture.

Aside from "**Lacrosse**", which is discussed at length below, the **Mohawks of Kahnawá:ke** have been long reputed for a wide variety of games. The games are divided into those that rely primarily on strategy, such as dice games played with bones or fruit stones, and others, such as "**Javelin**" that require athletic ability. Among those in the strategy category, "**Peachstone**" has long been a popular and important game among the Iroquois. Although rather complex in its rules and procedures, it is essentially a kind of dice game in which the players shake a number of peach pits in a bowl, and wager on the outcome.<sup>5</sup> Referred to by Father Bruyas in his *Mohawk Lexicon of Radical Words*, "**Deer Buttons**" is a similar dice-like game, in which participants shake buttons made of elk-horn blackened on one side, with points earned depending on how many buttons of the same color turn up.<sup>6</sup>

Of the Athletic games played by the Iroquois, "**Javelin**" has long been a favorite. It involves a player throwing a rod sharpened at one end into a hoop placed on the ground. In another version, players throw the rod through the air, with points earned by the contestant who throws it furthest.<sup>7</sup> "**Snowsnake**", also a javelin-like game, is another favorite among the Iroquois. In this game, the rod, about five to seven feet in length, is made of Hickory and is thrown horizontally along the snow crust with the furthest throws earning the participants points.<sup>8</sup>

Within the Kahnawá:ke Mohawk Community itself, a wide range of games have long been played. This is evidenced by drawings from the early days of the Community which depict members playing, and wagering on, a variety of games. Participants wagered various kinds of objects including wampoons, shells, arrowheads, flintstones, and food. When Europeans arrived, the religious authorities tried to dissuade the **Mohawks of Kahnawá:ke** from gaming and wagering on the grounds that it was sinful. Subsequently, in the early part of the 20<sup>th</sup> century, government authorities further attempted to suppress gaming and wagering, yet the activity was so deeply ingrained that it continued clandestinely.<sup>9</sup>

Among the wide range of Iroquois games played in the community, the game of "**Snowsnake**" has long been enjoyed by the **Mohawks of Kahnawá:ke**. "**Snowsnake**" competitions were regularly staged between Kahnawá:ke and other communities such as the Oneida, with arrowheads, animal pelts, and food wagered on the outcome of the matches.<sup>10</sup> "**Plumstone**", an antecedent of

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<sup>5</sup> Morgan, L, *League of the Iroquois*, (Corinth: New York, 1962), at 307-312

<sup>6</sup> Beauchamp, W, "Iroquois Games", in Elizabeth Tooker (ed.), *An Iroquois Sourcebook, Vol.2: Calendric Rituals* (Garland: New York, 1985), at 269

<sup>7</sup> Morgan, at 299-301

<sup>8</sup> Morgan, at 303-305

<sup>9</sup> Kahnawá:ke interview, 09/06/05

<sup>10</sup> Kahnawá:ke interview, 09/06/05

"**Peachstone**", was historically played by the **Mohawks of Kahnawá:ke**, as well.

One such "**Plumstone**" match was observed in the 19<sup>th</sup> century by a Col. James Smith who noted,

They put a number of plum stones in a small bowl; one side of each stone is black and the other white; then they shake or hustle the bowl, calling hits, hits, honesy, rago, rago, which signifies calling for white or black or what they wish to turn up; they then turn the bowl and count the whites and blacks<sup>11</sup>

The game of "**Peachstone**" has historically been an important component in Kahanawake Mohawk ceremonies. It has traditionally been played on ceremonial occasions, with the losing party being required to supply food for the guests.<sup>12</sup>

"**Hoop and Javelin**" is another game historically played by the **Mohawks of Kahnawá:ke**. Participants are divided among those holding hoops and others throwing sticks toward the hoops. An early observer of one such match played at Kahnawá:ke in the 1700's, noted,

The boys are very expert at trundling a hoop, particularly the Cahnuaga Indians, whom I have frequently seen excel at this amusement. The game is played by any number of boys who may accidentally assemble together, some driving the hoop, while others with bows and arrows shoot at it. At this exercise they are surprisingly expert, and will stop the progress of the hoop when going with great velocity, by driving the pointed arrow into its edge; this they will do at a considerable distance, and on horseback as on foot.<sup>13</sup>

Of all the games historically played by the **Mohawks of Kahnawá:ke**, few are as well known and unique for the community of Kahnawá:ke as "**Lacrosse**".

The playing of the game by the **Mohawks of Kahnawá:ke** dates back to before contact with Europeans. It has been argued that "**Lacrosse**" was invented sometime in the 1400's,<sup>14</sup> indicating that it existed long before contact took place between Europeans and the Mohawk peoples in Canada.

Moreover, there appears to be no evidence of non-Natives having taken up the game until the nineteenth (19<sup>th</sup>) century when Anglophone Montrealers adopted "**Lacrosse**", having learned it from the Kahnawá:ke and Akwasasne Mohawks.<sup>15</sup> The game was popularized largely as a result of the efforts of a Montrealer by the name of George Beers. Beers founded the Montreal "**Lacrosse**" Club and promoted the game in the late 1800's among non-Natives. He introduced them to

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<sup>11</sup> Culin, S, *Games of the North American Indians*, (Dover: New York, 1975), at 105

<sup>12</sup> Kahnawá:ke interview, 09/06/05

<sup>13</sup> Culin, at 474

<sup>14</sup> See, <http://www.laxhistory.com>

<sup>15</sup> Vennum, T, *Native American History of Lacrosse*, <http://Lacrosse.org/museum/history.htm>, at 3

the game through a series of matches which he organized between teams from Montreal and Kahnawá:ke.<sup>16</sup>

Finally, in further reinforcing the integral nature of gaming in the culture of the **Mohawks of Kahnawá:ke**, it is important to emphasize that gaming played a central role in religious and ceremonial practices as well. "**Peachstone**", for example, was played on the last day of the Green Corn and Harvest Festivals and on the New Year's jubilee<sup>17</sup>. Gaming was therefore a crucial component of the Iroquois life-cycle, accounting for the day-to-day life of the individual and the community, and therefore forming an integral part of Mohawk culture.

Although other games have long played a central role in Iroquois religious practices,<sup>18</sup> the game of "**Lacrosse**" has played a uniquely important role in their day-to-day spiritual and religious life. Among the Iroquois, "**Lacrosse**" was held to have deep sacred significance, and was played ceremonially for almost any crisis. Since the Iroquois believe that there is a constant ongoing struggle between good and evil spirits, a "**Lacrosse**" match would be played at times of crisis to ensure that the good spirits would prevail.<sup>19</sup> Similarly, when a sick person dreamt of a "**Lacrosse**" game, it meant that a battle between the forces of life and death was being waged within them, and an actual game of "**Lacrosse**" would therefore be played as a prayer and as an effort to reinforce the ill person's struggle for life. "**Lacrosse**" games were also played ritually, according to the seasons. They were held in the Spring and Summer when rain was needed, accompanied by gift offerings and prayers to the gods, as well as in the context of the New Year Midwinter Ceremonies.<sup>20</sup>

It is important to point out that wagering was an inherent and inseparable part of the gaming practices of **First Nations** Peoples. Indeed, in his seminal work dating to the late 1800's on the history of gaming among Native peoples of North America, Andrew McFarland Davis put to rest the debate about the embeddedness of wagering in the gaming practices of **First Nations** peoples:

There are writers who seek to reduce the impressions of the extravagance indulged in by the Indians at these games. The concurrence of testimony is to the effect that there was no limit to which they would not go. Their last blanket or bead, the clothing on their backs, their wives and children, their own liberty were sometimes hazarded; and if the chances of the game went against the penalty was paid with unflinching firmness. The delivery of the wagered wives, Lescarbot

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<sup>16</sup> Vennum, T, *American Indian Lacrosse: Little Brother of War*, (Smithsonian Press: Washington, 1994), at 265-267

<sup>17</sup> Morgan, at 308

<sup>18</sup> Tooker, E, *The Iroquois Ceremonial of Midwinter*, (Syracuse University Press: Syracuse, 1970), at 26-33

<sup>19</sup> Winslow, H, *A History of Lacrosse as Played by the Iroquois Nation and Other Indian Nations of the Great Lakes Region, 1625-1850*, (City University of New York: New York, 1970), at 21-22

<sup>20</sup> Jette, M, "Primitive Indian Lacrosse: Skill or Slaughter", (1975) 13:1, *Anthropology Journal of Canada*, at 17-18

tells us, was not always accomplished with ease, but the attempt would be faithfully made and probably was often successful.<sup>21</sup>

The wagering practices of **First Nations** peoples were extreme in the sense that participants wagered significant amounts of their limited personal wealth and belongings. For example, in a 1634 account, an early European settler, in referring to the game of "**Plumstone**" as played by the Massachuset Native community, noted that the participants wagered large amounts of money, clothing, food, and even their homes.<sup>22</sup>

In another account, an early French settler in New France,<sup>23</sup> referring in a June 1721 letter to a game of dice called "**Platter**", commented on the lengths to which participants would go in staking their belongings on the outcome of a game:

They sometimes lose their rest and in some degree their very senses at it. They stake all they are worth, and several of them have been known to continue at it till they have stript themselves stark naked and lost all their movables in their cabin. Some have been known to stake their liberty for a certain time. This circumstance proves beyond all doubt how passionately fond they are of it, there being no people in the world more jealous of their liberty than our Indians.<sup>24</sup>

If wagering played a significant role in **First Nations** gaming practices in general, it played an essential and fundamental role in Iroquois gaming practices, in particular. In fact, as pointed out by an authority on Iroquois gaming,

The idea of gain or loss entered into most contests, and many were played solely for the sake of gambling. The products of hunting, fishing, trading and most wealth were expended in betting.<sup>25</sup>

So central was wagering to Iroquois gaming practices that it often got out of hand, to the point where the game was played more for the sake of the wager than for the enjoyment of the game itself:

Betting upon the result was common among the Iroquois. As this practice was never reprobated by their religious teachers, but, on the contrary, rather encouraged, it frequently led to the most reckless indulgence...The excitement and eagerness with which he watched the shifting tide of the game, was more uncontrollable than the delirious agitation of the pale-face at the race-course, or even at the gaming-table.<sup>26</sup>

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<sup>21</sup> Davis, at 142

<sup>22</sup> De Boer, at 219

<sup>23</sup> New France has approximately the same borders as the modern day Province of Quebec, Canada

<sup>24</sup> Davis, A, "Indian Games", XVII *Bulletin of the Essex Institute*, (Essex Institute: Salem, 1885), at 107.

<sup>25</sup> Smith, K. L., *The role of games, sport, and dance in Iroquois life [microform]* / by Karen Lynn Smith, Microfiche. Eugene : Microform Publications, College of Health, Physical Education and Recreation, University of Oregon, 1975. (microfiche), at 4

<sup>26</sup> Morgan, at 293

Moreover, as demonstrated by a European settler's 18<sup>th</sup> Century first person account, Iroquois wagering was taken to its literal limits, to the point where the participants were left with nothing:

...the sums bet on the play are immense for the Indians. Some have pledged their cabins; others have stripped themselves of their clothes and bet them against those of the opposing party; others have already lost everything they possess finally propose their liberty against a small bet.<sup>27</sup>

As extreme as Iroquois wagering generally was, wagers for "**Lacrosse**" games were particularly significant, and it is worth pointing out that wagering on "**Lacrosse**" matches is, in itself, a **First Nations** innovation.<sup>28</sup> As a general rule, it was standard practice for both spectators and players to wager on Iroquois "**Lacrosse**" matches, and as the historical record indicates, bettors sometimes waged very significant amounts, and occasionally lost everything.<sup>29</sup>

**B) Gaming Facilitation and Regulation Practices Exercised by the Mohawks of Kahnawá:ke Since Prior to Contact with European Peoples, and Forming an Integral and Defining Part of their Culture:-**

It is an undisputed fact that the regulation and facilitation of gaming formed a fundamental component of the historical gaming and wagering practices of the Iroquois Peoples, and, therefore, of the **Mohawks of Kahnawá:ke**. In demonstrating this point, one need only make reference to the writings on Iroquois gaming practices by Henry Morgan, the eminent expert on Iroquois culture and history:

These bets were made in a systematic manner, and the articles then deposited with the managers of a game. A bet offered by a person upon one side, in the nature of some valuable article, was matched by a similar article, or one of equal value, by some one upon the other. Personal ornaments made the usual gaming currency. Other bets were offered and taken in the same manner, until hundreds of articles were sometimes collected. These were laid aside by the managers, until the game was decided, when each article lost by the event was handed over to the winning individual, together with his own, which he had risked against it.<sup>30</sup>

The game of "**Lacrosse**" provides further proof in bolstering the argument in favor of a history of the regulation and facilitation of gaming by the **Mohawks of Kahnawá:ke**. The regulation and facilitation of "**Lacrosse**" wagering was a complex and time-consuming process. Intricate rules regulated the manner in which bets were made, categorized, and placed in trust with "stakeholders" generally reliable tribal elders who watched over the wagered items for the duration of the match.<sup>31</sup> Moreover, "**Lacrosse**" matches also involved extensive

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<sup>27</sup> Smith, at 103

<sup>28</sup> Orr, R, Lacrosse, *Annual Archaeological Report, 1914*, (L.K. Cameron:Toronto, 1914) at 20

<sup>29</sup> Vennum, *American Indian Lacrosse*, at 113-115

<sup>30</sup> Morgan, at 293

<sup>31</sup> Vennum, *American Indian Lacrosse*, at 113

regulation related to codes of conduct, scheduling rules and regulations, and methods of enforcing outcomes.

Further, as this legal opinion has emphasized, "**Lacrosse**" was intimately connected throughout history with the very basic and essential cultural and religious aspects of life among the Iroquois. Indeed, as Herbert Winslow points out in his seminal work on "**Lacrosse**" among the Iroquois, the game was considered one of the basic elements of Iroquois culture, and as they conquered and subjugated other **First Nations** groups, they made a point of teaching those peoples the game of "**Lacrosse**".<sup>32</sup> In this way, the Iroquois, and by extension, the Mohawks, effectively became custodians of "**Lacrosse**", and by determining where the game would be played (i.e. in the conquered territories), who would be taught the game (i.e. the subjugated peoples), and how others would play it (i.e. according to the specific rules in force among the Iroquois), they were in fact facilitating the game and regulating the way in which it was played in the broad sense, as well as the development of the game itself.

The Iroquois also facilitated and regulated "**Lacrosse**" through a complex set of rules which governed where, when, and how matches would be held for ritual purposes. As pointed out above, the playing of ritual "**Lacrosse**" matches adhered to a complex set of rules. The rules dictated that matches were to be played on occasions of crisis such as sickness and burial. Moreover, ritual "**Lacrosse**" matches were regulated by a strict set of rules and procedures which ensured that, for example, when played as a memorial to the dead, the dead would be at peace and not harm the living. Moreover, ritual "**Lacrosse**" matches were regulated in the sense that they were played in accordance with the rules of the "**Sky Holder**" legend which structured the match and gave it meaning in the context of the ritual ceremony.<sup>33</sup>

It is important to re-emphasize the fact that "**Lacrosse**" was a central activity in the daily life of the Iroquois, both spiritual and otherwise. As such, "**Lacrosse**" matches between rival teams were a regular occurrence. Moreover, such matches were held between **First Nations** groups from different areas, and as a result the Mohawks, like other communities, hosted matches against other Native communities. In this capacity, they regulated the matches, through their imposition and enforcement of a complex array of rules and procedures which governed the matches and the manner of play. So, for example, as evidenced in a 1797 match between the Mohawks and the Seneca, one of the rules was that items wagered in a "**Lacrosse**" match were guarded for the duration by men appointed as stakeholders, generally trusted tribal elders.<sup>34</sup>

As was the case with their gaming practices generally, the game of "**Lacrosse**" demonstrates, clearly and unequivocally, that gaming, and the facilitation and

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<sup>32</sup> Winslow, at 9

<sup>33</sup> Winslow, at 22

<sup>34</sup> Vennum, *American Indian Lacrosse*, at 113

regulation thereof, forms an integral part of the culture and history of the **Mohawks of Kahnawá:ke**, giving rise to their right and entitlement to carry out gaming, and gaming facilitation, and regulation by virtue of Section 35(1) (**Aboriginal Rights**) of the *Canada Constitution Act, 1982*.

## II. ANALYSIS OF THE VARIOUS LEGAL "TESTS" THAT THE MOHAWKS OF KAHNAWÁ:KE MUST SATISFY IN ORDER TO PROVE THEIR ENTITLEMENT TO CLAIM AN ABORIGINAL RIGHT TO CARRY OUT GAMING AND THE FACILITATION AND REGULATION OF GAMING.

### A) R. v. Sparrow : "Three Part Test":-

In *R. v. Sparrow*<sup>35</sup>, the Supreme Court of Canada was faced with the question of determining whether section 35(1) of the *Canada Constitution Act, 1982*, rendered the terms of a food fishing license held by the **Musqueam Indians**, which terms are dictated by the *Fisheries Act*<sup>36</sup>, to be unconstitutional.

The Appellant therein, Ronald Edward Sparrow, was charged under section 61(1) of the *Fisheries Act* with the offence of fishing with a drift net of 45 fathoms in length instead of the permissible 25 fathoms, as per the terms and restrictions of the Band's fishing license. Mr. Sparrow did not contest the facts alleged by the Crown.

In his Defense, Sparrow maintained that the terms and restrictions of the fishing license were inconsistent with section 35(1) of the *Canada Constitution Act, 1982*, which section states that, "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".

In addition thereto, he maintained that he was fishing in accordance with the exercise of an existing **Aboriginal Right**, recognized and affirmed by section 35(1) of the *Canada Constitution Act, 1982*.

In its analysis, the Supreme Court of Canada, under the pen of Chief Justice Dickson, set forth a "**Three Part Test**" by which all **Aboriginal Rights** must pass in order to be afforded the protection of section 35(1) of the *Canada Constitution Act, 1982*.

#### i) 1<sup>st</sup> part of the "Test": Origin of the Right claimed:-

The first part of the "**Three Part Test**" pertains to the assessment and definition of an existing **Aboriginal Right**.

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<sup>35</sup> [1990] 1 S.C.R. 1075

<sup>36</sup> R.S.C. 1970, c. F-14

Chief Justice Dickson held that only those Aboriginal and treaty rights existing at the time when the *Canada Constitution Act, 1982*, came into effect were meant to be protected by section 35(1) of said *Act*. In addition thereto, he ruled that the claimed **Aboriginal Right** must have existed prior to contact with Europeans. Consequently, extinguished rights were not revived as a consequence of the *Canada Constitution Act, 1982*.

The majority opinion in *Sparrow* further specified that an **Aboriginal Right** could not be extinguished by the simple fact that an activity may be regulated. In fact, any regulation and/or legislation must be explicitly clear to the effect that it extinguishes a specific existing **Aboriginal Right**: "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an Aboriginal right."<sup>37</sup>

Justice Dickson did, however, recognize the illogical nature of a "**Frozen Rights**" approach, which would limit the recognition of an **Aboriginal Right** to its primeval form. Instead, he endorsed a flexible and evolutive approach that permits the rights claimed to evolve into their current and modern form.

The Supreme Court of Canada did not elaborate further on the acknowledgement and recognition of an **Aboriginal Right** given that the Crown failed to effectively dispute the fact that the **Musqueams** had an **Aboriginal Right** to fish for food.

## ii) 2nd part of the "Test": Infringement:-

The second part of the "**Test**" relates to the determination of whether or not the claimed **Aboriginal Right** has been infringed. The individual and/or group claiming the infringement has the onus of proving a *Prima Facie* infringement.

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.<sup>38</sup>

## iii) 3rd part of the "Test": Justification:-

If a Court of Law comes to the conclusion as to the existence of a *Prima Facie* infringement, then the analysis moves to the third part of the "**Test**", more particularly, the issue of "**Justification**".:

The justification analysis would proceed as follows. First, is there a valid legislative purpose?...If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the

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<sup>37</sup> *R v. Sparrow*, at 1099

<sup>38</sup> *R v. Sparrow*, at 1112

interpretive principle derived from Taylor and Williams and Guérin, supra. That is the honor of the Crown is at stake in dealings with the Aboriginal peoples.<sup>39</sup>

Additionally, other considerations were advanced by the Supreme Court of Canada in *R. v. Sparrow*:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the question of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.<sup>40</sup>

**B) R. v. Van Der Peet: Elaboration of the first part of the "Three Part Test":-**

In *R. v. Sparrow*, the Supreme Court of Canada only briefly glanced upon the first part of the therein-established "**Test**". The reason being that the Crown did not reasonably contest the **Musquems' Aboriginal Right** to fish.

In *R. v. Van Der Peet*<sup>41</sup>, the Supreme Court of Canada elaborated on the first part of the "**Test**" set out in *Sparrow* and concluded that in order to declare the existence of an **Aboriginal Right**, said claimed right must pass the "**Integral to Distinctive Culture Test**":

This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying Aboriginal Rights which reflects the purposes underlying s. 35 (1), and the interests which the constitutional provision is intended to protect.<sup>42</sup>

However, before addressing the "**Integral to Distinctive Culture Test**", the Court outlined some guiding principles.

Amongst the guiding principles was the recognition, by the Court, that **Aboriginal Rights** are rights that exist because of their Aboriginal nature.

In addition thereto, the Court recognized the "**Fiduciary Duty**" of the Crown vis-à-vis Aboriginal peoples. The Court held that this duty requires that where any ambiguity exists as to what is protected by section 35(1) of the *Canada Constitution Act, 1982*, said doubt is to be resolved in favor of the Aboriginal community claiming the right.

In its purposive analysis of section 35(1), the Supreme Court found that, "the **Aboriginal Rights** recognized and affirmed by said section are best understood as, first, the means by which the Constitution recognizes the fact that prior to the

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<sup>39</sup> *R. v. Sparrow*, at 1113-1114

<sup>40</sup> *R. v. Sparrow*, at 1119

<sup>41</sup> [1996] 2 S.C.R. 507

<sup>42</sup> *R. v. Van Der Peet*, at par. 4

arrival of Europeans in North America the land was already occupied by distinct Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of "**Crown Sovereignty**" over Canadian territory"<sup>43</sup>.

The Supreme Court then clarified and refined the "**Test**" for identifying an **Aboriginal Right** ("**Integral to Distinctive Culture Test**"), the whole as can be seen from the following excerpt:

In light of the suggestion of Sparrow, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an Aboriginal Right protected by s. 35(1): in order to be an Aboriginal Right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.<sup>44</sup>

In applying the aforementioned "**Integral to Distinctive Test**", the Supreme Court enumerated the following factors and guiding principles that must be considered:

- I. Courts must take into account the perspective of Aboriginal peoples themselves;<sup>45</sup>
- II. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an **Aboriginal Right**;<sup>46</sup>
- III. In order to be integral, a practice, custom or tradition must be of central significance to an Aboriginal society;<sup>47</sup>
- IV. The practices, customs and traditions which constitute **Aboriginal Rights** are those which have continuity with the practices, customs and traditions that existed prior to contact;<sup>48</sup>
- V. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating the Aboriginal claims;<sup>49</sup>
- VI. Claims to **Aboriginal Rights** must be adjudicated on a specific rather than general basis;<sup>50</sup>

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<sup>43</sup> *R. v. Van Der Peet*, at par. 43

<sup>44</sup> *R. v. Van Der Peet*, at par. 46

<sup>45</sup> *R. v. Van Der Peet*, at par. 49

<sup>46</sup> *R. v. Van Der Peet*, at par. 51

<sup>47</sup> *R. v. Van Der Peet*, at par. 55

<sup>48</sup> *R. v. Van Der Peet*, at par. 60

<sup>49</sup> *R. v. Van Der Peet*, at par. 68

<sup>50</sup> *R. v. Van Der Peet*, at par. 69

- VII. For a practice, custom or tradition to constitute an **Aboriginal Right** it must be of independent significance to the Aboriginal culture in which it exists;<sup>51</sup>
- VIII. The "**Integral to Distinctive Culture Test**" requires that a practice, custom or tradition be distinctive; it does not require that a practice, custom or tradition be distinct;<sup>52</sup>
- IX. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence;<sup>53</sup>
- X. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.<sup>54</sup>

Ms. Van Der Peet failed the "**Integral to Distinctive Culture Test**" in part, because the Supreme Court characterized her claim as an **Aboriginal Right** to exchange fish for money or for other goods instead of characterizing it as a claim based on a right to fish to provide for a moderate livelihood:

As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the customs and tradition surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.<sup>55</sup>

Consequently, she failed to demonstrate that the exchange of fish for money or other goods was an **Aboriginal Right** of her Aboriginal community.

The Court did not elaborate and examine the claim on the basis of the remainder of the "**Test**" provided for in the *Sparrow* case.

### C) **R. v. Pamajewon: An Aboriginal Right to Gaming:-**

The decision in *R. v. Pamajewon*<sup>56</sup> was delivered a day after the Supreme Court of Canada had given greater clarity to the first portion of the *Sparrow* "**Test**". Consequently, counsel for Pamajewon did not benefit from foreknowledge of the "**Integral to Distinctive Culture Test**", which "**Test**" was used to determine whether the claimed **Aboriginal Right** was protected under section 35(1) of the *Canada Constitution Act, 1982*.

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<sup>51</sup> *R. v. Van Der Peet*, at par. 70

<sup>52</sup> *R. v. Van Der Peet*, at par. 71

<sup>53</sup> *R. v. Van Der Peet*, at par. 73

<sup>54</sup> *R. v. Van Der Peet*, at par. 74

<sup>55</sup> *R. v. Van Der Peet*, at par. 79

<sup>56</sup> [1996] 2 S.C.R. 821

Pamajewon claimed that section 35(1) of the *Canada Constitution Act, 1982*, included the right of Self-Government and that this particular right included the right to regulate gambling activities on the reserve.

In *Sparrow*, the Supreme Court disagreed with Pamajewon's characterization of the nature of the claim and instead ruled that the correct characterization was the participation in, and regulation of, high stakes gambling activities on the Reserve.

In light of the foregoing, the Supreme Court of Canada found that the evidence did not support Pamajewon's claimed **Aboriginal Right** to conduct and regulate high-stakes gaming on the Reserve:

I now turn to the second branch of the *Van Der Peet* Test, the consideration of whether the participation in, and regulation of, gambling on the reserve lands was an integral part of the distinctive cultures of the Shawanaga or Eagle First Lake Nations. The evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle First Lake Nations. In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.<sup>57</sup>

It is noteworthy to mention that the Supreme Court of Canada did not rule that the Ojibwa and Eagle Lake **First Nations** do not have the **Aboriginal Right** to conduct and regulate gaming but, rather, it found that the evidence presented was insufficient to support the existence of such a "**Right**".

Consequently, the Supreme Court of Canada did not proceed with the remainder of the *Sparrow* "**Test**", namely, the determination of whether or not the claimed **Aboriginal Right** had been infringed. Nor did it address the issue of Justification.

*Sparrow* outlined a general "**Three Part Test**" in order to determine if a claimed right should be deemed to be an **Aboriginal Right** under section 35(1) of the *Canada Constitution Act, 1982*, *Van Der Peet* clarified and refined the first part of the "**Test**", and introduced the notion of "**Integral to Distinctive Culture**".

These decisions therefore laid out the exact steps that the **Mohawks of Kahnawá:ke** need to take in order to succeed in proving that they indeed possess an **Aboriginal Right** to carry out gaming activities, by virtue of section 35(1) of the *Canada Constitution Act, 1982*.

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<sup>57</sup> *R. v. Pamajewon*, at par. 28

D) **Application of the "Test" to the factual context of the Mohawks of Kahnawá:ke:-**

i. **Characterization of the Aboriginal Right claimed:-**

The Supreme Court of Canada stated that, "Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an **Aboriginal Right**."<sup>58</sup>

In addition thereto, the Supreme Court of Canada enunciated certain factors that must be considered in order to properly characterize the nature of the **Aboriginal Right** claimed:

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal Right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right.<sup>59</sup>

The **Aboriginal Right** claimed in *Pamajewon* was the right of Self-Government; however, the Supreme Court of Canada disagreed:

When these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation.<sup>60</sup>

As a consequence thereof, and given the similarities of the *Pamajewon* case to the present matter, the **Aboriginal Right** claimed by the **Mohawks of Kahnawá:ke** should in fact be the right to carry out, facilitate, and regulate "**High Stakes**"<sup>61</sup> wagering activities. Any other characterization would be too general to meet the requirements set out by the Supreme Court of Canada.

ii. **"Integral to Distinctive Culture Test":-**

The primary and/or core "**Test**" put forth in *Van Der Peet* was labeled the "**Integral to Distinctive Culture Test**" and is as follows:

The following Test should be used to identify whether an applicant has established an Aboriginal Right protected by section 35(1): in order to be an

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<sup>58</sup> *R. v. Van Der Peet*, at par. 51

<sup>59</sup> *R. v. Van Der Peet*, at par. 53

<sup>60</sup> *R. v. Pamajewon*, at par. 26

<sup>61</sup> The *Canadian Criminal Code* defines "**High Stakes**" wagering as referring to a lottery scheme for which the value of each prize awarded exceeds the sum of five hundred dollars (\$500.00) and for which the valuable consideration paid to secure a chance to win said prize exceeds an amount of two dollars (\$2.00).

Aboriginal Right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.<sup>62</sup>

It must be noted that the Supreme Court of Canada has emphasized the following principles: i) the perspective of the Aboriginals themselves must be taken into account, ii) given the evidentiary difficulties surrounding any **Aboriginal Right** claim, the courts must not undervalue the evidence presented by the group making the claim and iii) any ambiguity must be resolved in favor of the Aboriginal group making the claim.

As has been demonstrated in the first section of the present legal opinion, entitled “Cultural and Historical Evidence to Support the Right of the Mohawks of Kahnawá:ke to Carry Out Gaming, and the Facilitation and Regulation of Gaming by Virtue of Section 35(1) of the Canada Constitution, 1982”, which section addressed the issue of gaming, wagering and the facilitation and regulation thereof, the foregoing activities formed an integral part of the Kahnawá:ke Mohawk Culture since prior to contact with the European peoples.

The foregoing **Aboriginal Right** is of central significance to Mohawk culture and has been since prior to contact, more particularly for the reasons set-out in the first section of the present legal opinion.

a. **Distinguishing:-**

The Supreme Court Justices in *R. v. Pamajewon* did not rule that the Ojibwa and Eagle Lake **First Nations** do not possess the **Aboriginal Right** to conduct and regulate gaming within their territories; rather, they found that the evidence presented at trial does not demonstrate that gambling or the regulation thereof was an integral part of the distinctive cultures of the **First Nations** claiming said **Aboriginal Rights**.

In fact, *Pamajewon's* claimed **Aboriginal Right** was supported solely by the evidence of a single witness who failed to demonstrate the centrality of gaming to the cultures of the Ojibwa and Eagle Lake **First Nations**.

The present legal opinion, at section I hereof, has gone to great lengths to establish that gaming and the facilitation and regulation of gaming has been and presently is an element of practice, custom or tradition integral to the distinctive culture of the **Mohawks of Kahnawá:ke**. The foregoing is strongly supported by historical and anthropological evidence as well as by testimonial evidence of two (2) Kahnawá:ke elders, who were interviewed at length by the authors hereof, on September 6<sup>th</sup>, 2005.

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<sup>62</sup> *R. v. Van Der Peet*, at par. 46

### iii. Extinguishment:-

Can it be said that the enactment of the Provisions of the ***Criminal Code of Canada*** prohibiting gaming had the effect of extinguishing the claimed **Aboriginal Right** to participate in and regulate high stakes gambling activities?

The Supreme Court of Canada is unequivocal when it states that only an express intention on the part of the Sovereign to extinguish **Aboriginal Rights** can effectively extinguish said rights. In the matter at hand, no such explicit intention appears from all of the relevant legislation, and more particularly, from the provisions of the ***Criminal Code of Canada***.

Accordingly, the 1985 amendments to the ***Criminal Code of Canada*** relating to gaming, did not have the effect of extinguishing **Aboriginal Rights of First Nations** in regard to gaming.

### iv. Infringement of the Aboriginal Right:-

In *R. v. Sparrow*, the Supreme Court of Canada placed the burden of proving a *Prima Facie* infringement on the group and/or individual claiming the **Aboriginal Right**.

To this end, three (3) questions must be satisfied:

1. Is the limitation unreasonable?
2. Does the regulation impose undue hardship?
3. Does the regulation deny the holders of the right their preferred means of exercising that right?

It is our considered legal opinion that in light of the fact that the **Mohawks of Kahnawá:ke** have carried out gaming, and the facilitation and regulation thereof, since before the arrival of Europeans, and that said activities constitute an integral part of their culture and identity, it would be unreasonable to limit and ban their **Aboriginal Right** to pursue those activities in the present day, to their detriment and to the benefit of the province of Quebec.

In addition thereto, the provisions of the Criminal Code of Canada regarding gaming impose an undue hardship on the **Mohawks of Kahnawá:ke** by disallowing them the opportunity to gain an economic advantage from their **Aboriginal Right**, all the while permitting the province of Quebec to benefit from this very same activity.

The *Criminal Code of Canada* provisions regarding gaming forbid the **Mohawks of Kahnawá:ke** from engaging in any and/all forms of gaming without the

consent of the Provinces and, consequently, they deny the **Mohawks of Kahnawá:ke** their preferred means of exercising this right.

v. **Justification**:-

Since its enactment in 1892, the *Criminal Code of Canada* has included provisions related to gaming. Said provisions are grouped in a section entitled "Offences against Religion, Morals and Public Convenience".

The original purpose of said provisions was to outright forbid gambling activities within the territory of Canada. At the time of the drafting of the *Code*, the Canadian public considered such activities to be vices.

Since then, the Canadian public's acceptance of gambling has reached an almost universal level. In fact since the outright criminalisation of gambling, several *Criminal Code* amendments have permitted the existence of various forms of gambling, albeit under Provincial control.

In 1985, the Provinces were given exclusive jurisdiction to regulate, manage, and conduct lotteries and lottery schemes. In 1998, *Criminal Code* provisions banning "Dice Games" were eliminated.

Since then, the Provinces have, arguably, used their jurisdiction to brazenly expand all forms of legal gambling for the sole purpose of increasing their revenue and creating for themselves a monopoly:

Given the wide license that government has granted itself, is there still any reason for a residual criminalisation of gambling? If there is, it can no longer be based on a claim that gambling is harmful since the harm is quite clearly not great enough for provincial governments to refrain from having become the main operators of this service.

In fact, the creation of a state monopoly has led to such overwhelming expansion of gambling that it is possible to speak of an expansionist monopoly. Driven by its unrestrained adoption of a private logic of maximum profit, public government has applied the substantial resources at its disposal to promote gambling.<sup>63</sup>

The foregoing unequivocally brings into question the criminal nature of the gaming provisions found in the *Criminal Code of Canada*. According to the Justification analysis cited hereinabove, the first step would be to determine whether there is a valid legislative purpose.

It is our considered opinion that the criminalization of an activity for the purpose of creating a Provincial monopoly, which is used solely for economic gain and

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<sup>63</sup> Brodeur, J. & Ouellet, G, "What is a crime? A secular answer", In, N. Desrosiers and S. Bittle (Eds.), *What is a Crime? Defining Criminal Conduct in Contemporary Society*. (UBC Press: Vancouver, 2004) at 27

which monopoly has been exploited to expand gaming without regard to its ill effects does not constitute a valid legislative purpose.

In any event, the provisions in the *Criminal Code of Canada* regarding gaming cannot be said to meet the "**Minimal Infringement Test**" in view of the undisputed and irrefutable fact that the **Mohawks of Kahnawá:ke** have never been fairly compensated, nor were they ever consulted concerning said provisions and their amendments.

It is arguable that, in granting the Province of Quebec an exclusive monopoly over gaming, to the detriment of the **Mohawks of Kahnawá:ke**, the honor and integrity of the Crown has been breached; in particular, this is self-evident, when compared to the United States model created to conduct Gaming in the United States (see appendix of the comparative analysis of the United States/Canada Indian Gaming experience). The Federal Government has failed in its **Fiduciary Duty** owed to its **First Nations**, by having not created a mechanism allowing for its **First Nations** to exercise their sovereign claims to conduct gaming on Indian lands and lands reserved for Indians.

#### **E) Conclusion:-**

For all the reasons set-out more fully hereinabove, we are of the considered legal opinion that the **Mohawks of Kahnawá:ke** possess the **Aboriginal Right** to carry out gaming, and the facilitation and regulation of gaming by virtue of section 35(1) of the *Canada Constitution Act, 1982*. More particularly, they satisfy the first part of the "**Three Part Test**", as established by the Supreme Court in *Van Der Peet*, and the remainder of the "**Three Part Test**", as established by the same Court in *Sparrow*.

Consequently, it is our considered legal opinion that the evidentiary onus placed on the **Mohawks of Kahnawá:ke** to demonstrate their claimed **Aboriginal Right** can be discharged by reason of their unquestionable factual, cultural and historical ties to gaming, the whole as is more fully described in Section I hereof.

Based on the foregoing, it can be concluded that the provisions of the *Criminal Code*, with respect to the gaming activities of the **Mohawks of Kahnawá:ke** would not apply to them, to the extent that these provisions of the *Criminal Code* would be inconsistent with the exercise of their **Aboriginal Rights**, as protected by section 35(1) of the *Canada Constitution Act, 1982*.

As an addition to the *Criminal Code* amendments of 1985, the Federal Government could have easily recognized the sovereign claims of **First Nations** to conduct and to facilitate gaming as part of their economic development. This fundamental recognition, had it been given, would have bolstered and given genuine meaning to the Federal Government's goal of creating "self-sufficiency" among Canada's **First Nations**.

On the basis of the foregoing, the **Mohawks of Kahnawá:ke** can achieve recognition of their **Aboriginal Right** to carry out gaming and the facilitation and regulation of gaming by way of negotiations with both the Federal government and the Provincial government of Quebec, without being obliged to have their **Aboriginal Right** recognized and affirmed by the Supreme Court of Canada.

### **III. ESTABLISHING THE LEGAL RIGHT OF THE MOHAWKS OF KAHNAWÁ:KE TO CARRY OUT GAMING AND THE FACILITATION AND REGULATION OF GAMING PURSUANT TO A PROCESS OF NEGOTIATION WITH THE GOVERNMENTS OF CANADA AND/OR QUEBEC:-**

It is important to emphasize that, while useful in allaying concerns regarding the legal status of gaming activities currently being conducted on Kahnawá:ke territory, a legal opinion outlining the legal arguments to be made in favour of the Mohawks in the event of prosecution for said activities, necessarily provides only a partial solution to the underlying problem; namely the lack of clarity regarding the legal status of Kahnawá:ke internet gaming. This is because it provides one side of what would be a two-sided court proceeding. In other words, it presents the arguments of the Mohawks in the event of prosecution, but of course it does not provide any answer to the ultimate outcome of said prosecution.

On the other hand, an Agreement with the Governments of Quebec and/or Canada would represent a genuine solution to the problem as it would provide legal sanction to the internet gaming operations currently being conducted on Mohawk territory and would consequently provide genuine reassurance to actual and/or potential gaming entities involved in public offerings of their securities on recognized world stock exchanges, whose servers are being hosted on lands situated within the territory known as the **Mohawk Territory of Kahnawá:ke**. In contemplating an agreement with either level of Government, the challenge is to pursue an arrangement that would render the **Mohawks of Kahnawá:ke** immune from the relevant provisions of the *Criminal Code of Canada*, that render gaming activity illegal.

#### **A) The Nature of the "Fiduciary Duty" owed to Canada's First Nations peoples by the Governments of Canada and Quebec:-**

Any discussion of an Agreement with the Federal and/or Provincial Governments must, by necessity, be carried out in the context of the overriding "**Fiduciary Duty**" owed by the Governments of Canada and Quebec to **First Nations** peoples. It is a well-established principle of Canadian law that the Government of Canada owes a "**Fiduciary Duty**" to Canada's **First Nations** Peoples.<sup>64</sup> It is, furthermore, arguable that the Provinces, as well, owe a "**Fiduciary Duty**" to **First Nations** peoples. In practical terms, this duty requires that the

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<sup>64</sup> *Guerin v. The Queen* [1984] 2 S.C.R. 335

Governments of Canada and Quebec respect, and pursue, the interests of Aboriginal Peoples. It is a well-known and unfortunate fact of history that **First Nations** Peoples have suffered to a disproportionate degree from economic disadvantage. As the experience of gaming enterprises among Native groups in the United States has demonstrated, gaming provides the prospect of economic renewal and independence to "**Native Peoples**". Indeed, the positive economic effects of Internet Gaming among the **Mohawks of Kahnawá:ke** have already been felt and the prospect for future prosperity stemming from these economic activities is real. Accordingly, it is in the very nature of the "**Fiduciary Duty**" owed by the Governments of Quebec and Canada, that they take proactive steps to develop a legal framework by which the **Mohawks of Kahnawá:ke** may pursue internet gaming activities in order to provide for their own economic self-sufficiency and sustainability.

It is important to point out that the Federal Government, in particular, has repeatedly affirmed its commitment to pursuing the interests and welfare of Canada's **First Nations** peoples. In November 1996 the "**Royal Commission on Aboriginal Peoples**" issued a report, which provided a number of recommendations to the Federal Government in regard to its relationship with **First Nations** peoples.<sup>65</sup> The most significant of the Report's recommendations related to the Federal Government's responsibility to promote and facilitate Native self-government, and economic self-sufficiency. Pursuant to the Report, the Federal Government launched, in 1997, its "**Aboriginal Action Plan**"<sup>66</sup> aimed at implementing the Report's recommendations<sup>67</sup> and economic welfare. By virtue of this program, the government affirmed its commitment to promoting Aboriginal self-government and economic welfare. This dual commitment to self-government and economic welfare has, moreover, been re-affirmed since by the Federal Government on an ongoing basis, and in detail.<sup>68</sup>

**B) Models for a prospective Agreement between Canada and/or Quebec and the Mohawks of Kahnawá:ke:-**

**i. An Agreement based on existing provisions of the Criminal Code of Canada:-**

Section 207(1)(a) of the *Criminal Code* of Canada empowers the Provinces to "manage" gaming. Accordingly, it would be possible to envisage an arrangement whereby the Government of Quebec would authorize the **Mohawks of Kahnawá:ke** to lawfully carry out (i.e. regulate and facilitate) internet gaming

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<sup>65</sup> For a review of the Report's findings, see <http://www.parl.gc.ca/information/library/PRBpubs/prb9924-e.htm>

<sup>66</sup> [http://www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html)

<sup>67</sup> Self-government is an Aboriginal Right enshrined in s.35 of the Canadian Constitution and recognized by the Federal Government of Canada in 1995; See statement, [http://www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html)

<sup>68</sup> See, for example [http://www.ainc-inac.gc.ca/ch/rcap/sg/sh67\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sh67_e.html)

activities while the Provincial Government would itself nominally "manage" said activities. Management would, of course, entail the most minimal intervention required to satisfy the definition of that term in the *Criminal Code*.

It is important to point out that s.207(1)(a) requires that said activities be carried out within the Province in question, and that in the *Earth Lottery*<sup>69</sup> case the PEI Court of Appeal held that the internet gaming activity in question did not fall under the exemption set out in s.207; namely that the activity be carried out wholly within the Province. However, the facts in issue involved significant amounts of activity (i.e. servers, computers...etc) located out of Province, and the ruling was issued at the Provincial Appellate, and it provided minimal analysis of the issues in question. If the Court's ruling stands, as it would appear based on the Court's reasoning, for the principle that internet gaming, in general, does not fall under the exemptions set out in the *Criminal Code*, this would mean that internet gaming, even where it is carried out directly by a Province, would be illegal. An interpretation of this nature would run contrary to the entire goal and purpose behind the Federal Government's delegation of gaming powers to the Provinces. In other words, since the gaming provisions were drafted before the emergence of the internet, a logical interpretation of said provisions would require the inclusion of internet based gaming within the scope of the Provinces' jurisdiction, since the Federal Government clearly intended for the Provinces to have reasonably wide-ranging jurisdiction over gaming.

It is arguable that the **Mohawks of Kahnawá:ke** would be able to satisfy the conditions set out in the "Test" in s. 207(1)(a) if they would be able to demonstrate that the majority of the activity in question (i.e. computer servers, staff...etc.) is located in Quebec. Moreover, it is unlikely that an Agreement brokered with the Government of Quebec would be challenged in the courts.

ii. **An Agreement based on s.35(1) of the Canada Constitution Act, 1982:-**

The **Mohawks of Kahnawá:ke** can also opt to seek an Agreement on the basis of their acquired rights to carry out gaming by virtue of s.35(1) of the Canadian Constitution interpreted in light of the Tests set out by the Supreme Court of Canada and in light of their culture and history of gaming. It would be in the best interests of the Federal Government and the Government of Quebec to conclude an Agreement with the **Mohawks of Kahnawá:ke** as it would establish clear boundaries to their gaming activity, and ensure that said activity would be carried out in a regulated and monitored manner.

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<sup>69</sup> Reference Re: *Earth Future Lottery* [2002] P.E.I.J. No. 34 (QL)

The *Agreement Respecting Police Services in the Kahnawá:ke Territory* provides a valuable model, as it is based upon governmental recognition of an existing **Aboriginal Right**. A tri-partite Agreement entered into in 1995 by the **Mohawks of Kahnawá:ke** and the Governments of Quebec and Canada, the "**Policing Agreement**" recognizes the Mohawks' authority to manage their own internal policing services. Along the same lines, it is possible to envision an Agreement whereby the Governments of Canada and Quebec would recognize the **Aboriginal Right** of the Mohawks to carry out gaming.

iii. **An Agreement based on Amendments to the *Criminal Code***

A more ambitious option to pursue would be an Agreement involving amendment of the *Criminal Code of Canada*. An amendment of this nature would likely take the form of a sub-provision under s.207 thereof, providing the Federal Government with the discretion to issue gaming licenses, at will. In other words, the Federal Government would obtain Parliamentary assent to an amendment to the *Criminal Code*, which amendment would enable the provision of a gaming license directly to the **Mohawks of Kahnawá:ke**. Needless to say, this would represent the "path of most resistance" as it would require the consent of Parliament and would focus an unnecessary degree of attention and scrutiny, both domestic and international, on this "Mohawk" issue.

iv. **An Agreement pursuant to The Canada/Kahnawá:ke Inter-Governmental Relations Act**

In further bolstering the Federal Government's commitment and self-assumed responsibility towards the **Mohawks of Kahnawá:ke**, it is important to point out that it has engaged, over the past few years, in repeated efforts to redefine its relationship with them in a manner that fulfills their Fiduciary obligations. In particular, it began the process to enact a *Canada/Kahnawá:ke Intergovernmental Relations Act*, which is meant to replace the *Indian Act* as regards the **Mohawks of Kahnawá:ke**. The *Draft Umbrella Agreement with Respect to Canada/Kahnawá:ke Intergovernmental Relations Act*<sup>70</sup>, concluded in 2001, sets out twenty seven (27) areas of jurisdiction in which the **Mohawks of Kahnawá:ke** would be empowered to legislate, free of the requirement to seek and obtain Federal Governmental approval. One of these, as set out in s.9(w) of the *Draft Agreement*, is gaming.<sup>71</sup> Accordingly, it is clear that the Federal Government has acknowledged its duty to ensure economic welfare and genuine self-government for the **Mohawks of Kahnawá:ke**. Further, the specific reference to gaming in the *Draft Agreement* reinforces the timely nature of an Agreement between the **Mohawks of Kahnawá:ke** and the Federal Government regarding jurisdiction over gaming. As provided for under the *Draft Agreement*,

<sup>70</sup> [http://www.ainc-inac.gc.ca/pr/agr/umb\\_e.pdf](http://www.ainc-inac.gc.ca/pr/agr/umb_e.pdf)

<sup>71</sup> For further details, see *Ibid*, the *Draft Agreement*, and [http://www.ainc-inac.gc.ca/pr/agr/jpr\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/jpr_e.html)

the negotiation of a sub-agreement covering gaming activities would, consequently, be another possible means of arriving at an Agreement, which could provide a legal framework for the current gaming activities being conducted within the territory known as the **Mohawks of Kahnawá:ke**.

**THE WHOLE RESPECTFULLY SUBMITTED.**

**MONTREAL, QUEBEC, DECEMBER 1<sup>ST</sup>, 2005**

**LAZARUS, CHARBONNEAU**