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BREAKING NEWS! BREAKING NEWS!

SUPREME COURT ALLOWS CHALLENGE TO GUN LAKE TRIBAL CASINO TO PROCEED FORWARD

On Monday, June 18, 2012, the U.S. Supreme Court issued its opinion in the closely watched *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ____ (2012). The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (or “Gun Lake Band”) in February 2011 opened Michigan’s newest Indian casino. The casino is located in the western-Michigan town of Wayland. The Gun Lake Band’s odyssey to open a tribal casino spanned over a decade and was wrought with several legal challenges.

The opening of the Gun Lake Casino seemingly represented the end of a series of lawsuits seeking to prevent the opening of the casino. Michigan Gambling Opposition was the first to bring suit. Michigan Gambling Opposition was an interest group organized to challenge the Gun Lake Band’s initial efforts to have the U.S. Department of Interior (“DOI”) take land into trust. After several years of litigation, federal courts ultimately rejected Michigan Gambling Opposition’s challenge.

Shortly after the federal courts rejected the lawsuit brought by Michigan Gambling Opposition, David Patchak launched a second legal challenge. Patchak owns property close to the site of the Gun Lake Band’s then proposed tribal casino, which has since opened at this site. Patchak did not allege that he had a legal interest in the land to be taken into trust. As the Supreme Court’s ruling teaches us, this fact is significant. Rather, Patchak brought an action under the federal Administrative Procedure Act (“APA”) asserting that the Indian Reorganization Act (“IRA”) did not authorize the Department of Interior to take land into trust for the Gun Lake Band.

The significance of Patchak’s argument lies with the U.S. Supreme Court’s decision in *Carciere v. Salazar*, 555 U.S. 379 (2009). *Carciere* held that the IRA requires an Indian tribe be “under federal jurisdiction” as of June 18, 1934, the date of enactment of the IRA, in order for the Secretary of the DOI to acquire property “for the purpose of providing land to Indians.” Patchak relied on the APA to derive standing to bring his lawsuit. Patchak also relied on the APA for a waiver of sovereign

immunity. The remedy Patchak sought is the issuance of an injunction prohibiting the DOI from taking the Gun Lake Band land into trust. The basis for the injunction, in Patchak's opinion, is that the requirements of the IRA cannot be satisfied.

The lower courts never reached the merits of Patchak's claims. The legal fight, instead, focused on whether sovereign immunity was waived and if Patchak had standing to bring his lawsuit. The federal district court said "no" and dismissed the lawsuit. The D.C. Circuit Court of Appeals responded by saying "not so fast," Patchak has standing under the APA and the APA waives sovereign immunity. The U.S. Supreme Court then granted certiorari to resolve these issues.

At the threshold, in order for Patchak to bring his claims, there must be a waiver of the federal government's sovereign immunity. The waiver of sovereign immunity can be accomplished by either (1) the provisions of the federal Quiet Title Act ("QTA"), or (2) the general provisions of the APA. The APA general waiver of sovereign immunity is negated when another statute "grants consent to suit expressly or impliedly forbids the relief which is sought" by the person bringing the lawsuit. If a court determines that sovereign immunity is waived, then it must next decide whether a person has standing to seek redress for alleged injuries.

Both the federal government and the Gun Lake Band argued that only the QTA could grant the waiver of sovereign immunity. Under the theory advanced by the federal government and Gun Lake Band, the APA waiver of sovereign immunity was negated. The Court determined that the QTA only applies to quiet title actions where a person claims an interest in the property that conflicts with, or is superior to, the government's claim in the property. After determining the QTA was not applicable to Patchak's claims, the Court reasoned that the exception causing the APA waiver of sovereign immunity to be negated did not apply. The Court then concluded that Patchak has standing under the APA to pursue his action.

So what does the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* decision mean? Initially, the decision means that a person claiming harm -- whether economic, environmental or aesthetic -- to property nearby proposed trust land, has standing under the APA to bring a lawsuit. The statute of limitations under the APA is also considerably longer than that of the QTA. However, the decision does not mean that the challenge will be successful. The Court, in a footnote to its opinion, specifically stated that the merits of Patchak's case were not before the Court. Hence, the Court did not express any view with regard to whether the Gun Lake Band was "under federal jurisdiction" as of June 18, 1934 for purposes of the IRA as required by the Carcieri decision. If the Gun Lake Band was under federal jurisdiction as of June 18, 1934, then presumptively the DOI could take the subject land into trust.

Only further lengthy legal proceedings will determine whether the

claims asserted by Patchak are sufficient to successfully challenge the DOI's taking land into trust for the benefit of the Gun Lake Band and the impact of any such decision on the ability of the Gun Lake Band to continue to operate its casino. Meanwhile, the Gun Lake Band's Casino remains in full operation.

AGCO REAFFIRMS ITS COMMITMENT TO RISK-BASED REGISTRATION, AND INTRODUCES ITS NEW STANDARDS AND REQUIREMENTS SYSTEM

by Michael D. Lipton, Q.C. and Kevin J. Weber

This month the Alcohol and Gaming Commission of Ontario ("AGCO") released a statement clarifying the nature of its new standards of gaming registration based upon the "Risk-Based Registration" concept. While these standards have been in force since September 11, 2011, the AGCO has notably reaffirmed its commitment to them by issuing a helpful restatement of these principles in June 2012, as many new companies are considering roles in the Ontario gaming industry as land-based casino operators and online gaming operators.

Risk-Based Registration is designed to refocus the regulator's decision-making process to ensure that its resources are allocated in a manner that targets applicants who represent a higher level of risk to the integrity of gaming and the public interest generally. The AGCO states that this approach "reflects a general evolution in best practice thinking about effective regulation and supports a broader transition underway in the gaming sector toward a less prescriptive and more standards-based regulatory approach."

New applicants for registration as casino operators or gaming suppliers in Ontario can expect to be subjected to an in-depth due diligence investigation. Where an applicant is familiar to Ontario regulators, either because they are renewing registrations or are applying for a registration in a new category after many years of being registered in Ontario in a different gaming capacity, they will likely undergo a more streamlined review.

All applications for registration will be evaluated according to a comprehensive set of risk criteria to determine whether additional disclosure and/or investigation is required. Those applicants identified as "lower risk" may be approved for registration without the need for additional information or personal interviews by AGCO investigators. As noted, a longstanding record of compliance with the law is a factor that will be considered in determining whether an applicant will be deemed "lower risk."

This initial risk assessment involves the review of an applicant's completed application materials as well as information obtained based on a standard background check. This information is evaluated based on five criteria; in relation to businesses applying for registration as suppliers or operators, the five criteria are:

- Honesty and integrity

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- Financial responsibility
- Compliance with the law
- Registration type
- Financial gain from registration

It remains to be seen whether the AGCO will be willing to deem a company to be a “lower risk” and therefore eligible for a streamlined registration process where it is new to Ontario, but has a long-established reputation for honesty, integrity, compliance and financial responsibility in a number of other “first tier” gaming jurisdictions, in particular those jurisdictions whose gaming regulators have entered into reciprocal information-sharing agreements with the AGCO.

A further refinement to the Ontario gaming regulatory regime has just come into force on June 1, 2012. Effective on that date, amendments to the Gaming Control Act, 1992 grant authority to the Registrar of the AGCO to establish standards and requirements related to gaming products and the operation of gaming sites (e.g. casinos, bingo halls, etc.). These standards and requirements will apply not only to registered gaming suppliers and casino operators, but also to the Ontario Lottery and Gaming Corporation (the government-owned corporation that conducts and manages all non-charitable gaming in Ontario) (“OLG”). The need to comply with these standards and requirements is tempered by an allowance for flexibility in how such compliance is achieved.

As with Risk-Based Registration, these standards and requirements will allow for increased efficiencies and reduced administrative burdens for gaming operators and suppliers who have a strong record of compliance.

Further, it will make public for the first time the expectations of the regulator in many of these areas. In Ontario, the standards set by the government in this area were for the most part enforced by contractual arrangements between the OLG and the suppliers or operators, rather than by explicit legislative or administrative provisions. As of June 1, 2012, the Registrar may establish standards and requirements related to:

1. prohibiting or restricting certain persons from entering gaming sites or playing lottery schemes (i.e. responsible gaming exclusion measures);
2. the prevention of unlawful activities;
3. the integrity of a lottery scheme;
4. surveillance, security and access related to gaming sites or lottery schemes;
5. internal controls;
6. the protection of assets, including money and money equivalents;
7. the protection of players and responsible gambling; and
8. the keeping of records, including financial records.

Like Risk-Based Registration, this is a standards-based approach to gaming regulation that it is hoped will provide suppliers and

operators with greater flexibility to continue to meet their regulatory objectives while thereby allowing the AGCO to more effectively target its resources to the areas of risk that are of most concern.

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