STATE OF MICHIGAN
IN THE INGHAM COUNTY CIRCUIT COURT

File No. 08- 769 -AW

HON. _____

PATRICK J. DEVLIN,
In His Individual Capacity,

Plaintiff,

v.

MICHAEL A. COX,
In His Official Capacity,

Defendant.
_____/

Patrick J. Devlin (P12729)
Attorney At Law
[redacted]
Plaintiff/Attorney for Plaintiff

Michael A. Cox (P43039)
Attorney General
525 West Ottawa, Room 780
P.O. Box 30212
Lansing, MI 48909
(517) 373-1113
Defendant/Attorney for Defendant
_____/

COMPLAINT FOR MANDAMUS

There is no other pending or resolved action arising out of the same transaction or occurrence as alleged in this Complaint.

PLAINTIFF PATRICK J. DEVLIN hereby complains against Attorney General Michael A. Cox in his official capacity, as follows:

Parties, Jurisdiction, and Venue

1. Plaintiff Patrick J. Devlin is a resident of Kent County, Michigan. He brings this action in his individual capacity as an affected resident and citizen and as an officer of the Court.

2. Defendant Michael A. Cox was elected Attorney General of Michigan in the November, 2001 general election by a little over a 5,000 vote margin, and has been serving as Attorney General of Michigan since he took the oath of office on January 1, 2002. Michael A. Cox is a resident of Livonia, Wayne County, Michigan. He is a Constitutionally established State officer and has State wide duties; his principal office is located in Lansing, Ingham County, Michigan.

3. This is an action for mandamus pursuant to MCL 600.4401 et seq, and MCR 3.305, brought against Defendant Michael A. Cox in his official capacity as Michigan Attorney General. Accordingly, pursuant to the afore cited statute and Court Rule, in an action against a State officer jurisdiction and venue is properly laid in, among other places, the Ingham County Circuit Court.

Background and Common Allegations

4. The United States Congress has plenary power over the Federally recognized Indian Tribes. Generally speaking, therefore, the States do not have

jurisdiction over the Tribes. There are notable exceptions referred to below which Congress has legislated, such as liquor, gambling, and Public Law 280.

5. Because of long encountered problems with alcohol, the United States had prohibited possession, sale, and use of alcoholic beverages on Indian reservations for virtually the entire history of the United States.

6. In 1953, however, the Congress amended the United States Code to state that the criminal statutes prohibiting possession, sale, and use of alcoholic beverages on reservation would not apply, provided that the Tribe both adopt an ordinance certified by the U.S. Secretary of Interior authorizing the possession, sale, or use of alcoholic beverages on reservation, and that the liquor transactions on reservation conform to all State laws in which the reservation was located. 18 USC 1161.

7. Two violations of the federal liquor statutes constitute a federal felony. In addition, the States have concurrent jurisdiction to also impose State civil and criminal sanctions.

8. In 1983, the U.S. Supreme Court upheld the Constitutionality of 18 USC 1161. In Rice v. Rehner, 463 US 713 (1983), the Court held that in enacting Section 1161 Congress authorized, rather than preempted, state regulation of Indian liquor transactions. The decision specifically upheld requiring a seller of alcohol on a reservation to obtain a California liquor license.

9. Rehner was followed by two federal Circuit Court of Appeal decisions. In The Citizen Band of Potawatomi Indian Tribe v. Oklahoma, 975 F2d 1459

(1992), the US 10th Circuit Court of Appeals held that the Tribe was required under Section 1161 and Oklahoma State law to obtain a liquor license.

10. In Fort Belknap Indian Community of the Fort Belknap Indian Reservation, 43 F3d 428 (1994), the US 9th Circuit Court of Appeals reversed a 1992 District Court decision, and held that the State of Montana could enforce the liquor law under Section 1161 not only administratively/civilly, but also by use of State criminal law. It held that both federal and State criminal law could be used to enforce the liquor violations. Montana, like Michigan, is not a Public Law 280 State. [PL 280 permitted States to impose State civil or criminal laws in Indian Country, provided that the State passed a statute doing so.] In short, virtually all of the other States that have Tribes that sell alcoholic beverages have statutes requiring them also to be licensed under State law; and of those States that license, they routinely enforce the licenses.

11. Pursuant to all of Michigan's Constitutions going back to Statehood, including the current Michigan Constitution of 1963, three branches of State government were established. The Legislature sets policy by the passage of bills, which when signed by the Governor, or overridden if vetoed, become law. The Executive branch, of which the Attorney General is a part, is charged with faithfully enforcing and executing the laws passed by the Legislature. The Judicial branch is charged with resolving disputes that may arise under the Constitution and the laws.

12. All State officers, including the Attorney General, are required before commencement of their official duties to take an oath of office swearing to

uphold the Constitution of the United States and of Michigan, and to faithfully discharge the duties of the office according to the best of his/her ability. Const' 1963, Art XI, Sec. 1.

13. One set of laws passed by the Legislature and enacted into law involves liquor. The current laws are codified into the Michigan Liquor Control Code of 1998, as amended, being MCL 436.1101 et seq. and administrative Rules promulgated pursuant to the Code. Its predecessor which contained similar provisions was the Liquor Control Act as amended, being 1933 Ex Sess PA 8, MCL 436.1 et seq.

14. The Liquor Control Code provides that a liquor sale shall not be made unless made by a person licensed by the Commission or pursuant to a prior written Order of the Commission so providing. MCL 436.1203.

15. An Order of the Commission can only be issued after due process, and specific compliance with the contested case or Rule making provisions of the Michigan Administrative Procedures Act and any additional requirements of the Code.

16. A liquor license has consistently been held to be a privilege and not a right.

17. The Liquor Control Code makes it a felony to dispense liquor without a State liquor license. MCL 436.1909(3).

18. As part of the process in obtaining a liquor license, an applicant must file a bond or liability insurance, MCL 436.1501(1), in order to go toward satisfying possible future liability under the dram shop liability provisions of Chapter 8 of the Code.

19. Licensees are also required to comply with various statutory provisions and Rules, including making their premises and records available for inspection by law enforcement or an agent of the MLCC. Violation of the Code or Rules can subject a licensee to various sanctions, including fines, license suspension, and license revocation.

20. The Liquor Control Code and Rules also provide that licensees are required to apply for various permits such as discount and entertainment. MCL 436.1251, MCL 436.1916; R' 436.1001(1)(o). Permits are required to be prominently displayed, MCL 436.1015(2); the MLCC may suspend or revoke a permit after a hearing. MCL 436.1061.

21. Licensees must purchase alcoholic spirits from State authorized distribution agents using the State of Michigan integrated on-line ordering system. MCL 436.1206. Purchasing spirits from State agent is an incidence of licensure, and no separate permit is provided for or required.

22. Starting in the 1980's, apparently, some Michigan Tribes adopted ordinances that adopted by reference part of the Michigan liquor control law. Other Tribes adopted ordinances that adopted by reference the entire body of Michigan liquor law, including the Rules. Recitation against waiver of immunity was also made, and in some cases, recitation that the ordinance did not give the State jurisdiction over the Tribe that it otherwise would not have.

23. In August, 1993 the State of Michigan and five federally recognized Indian Tribes signed a gambling Compact. The Compacts became effective in January, 1994 after approval by the BIA and publication in the Federal

Register. The Compacts were entered into pursuant to the federal Indian Gaming Regulatory Act [IGRA, 25 USC 2701 et seq] so that the Tribes could offer Class III [Las Vegas style] gambling at casinos. [In 1998 the State signed Compacts with four more federally recognized Tribes containing similar Compact language, and the identical language contained in Section 10.]

24. At Section 10 of the Compacts a recital is made that the Tribes adopt as Tribal law at the gaming establishments those State laws encompassing sale to a minor, sale to a visibly intoxicated person, sale of adulterated or misbranded liquor, hours of operation, and similar substantive provisions. The Tribe also shall purchase spirits from the Michigan Liquor Control Commission [MLCC], and beer and wine from distributors licensed by the MLCC at the same price that such beverages are purchased by Class C licensees.

25. Based on the records supplied in response to Plaintiff's Freedom of Information Act [FOIA] request directed to the MLCC, the MLCC staff made a recommendation to the Commission to establish a made-up "permit to purchase" [not sell] spirits [not beer or wine] procedure for the Tribes. Even though Plaintiff requested the records, there is no evidence that there was a prior request made to the MLCC for such a permit by any Tribe, no evidence that any Tribe requested a contested case hearing after a denial of the permit or requested promulgation of a Rule, no evidence that there was a prior public notice of this matter as an agenda item, no transcription of the proceedings or minutes if any action took place, and no certified copy of an Order or other

evidence that the Commission in fact adopted the staff recommendation in the form of an Order. In short, the alleged Order is null and void.

26. Subsequently, all the Tribes operating casinos (1993 Compacted Tribes, and then the 1998 Compacted Tribes) submitted annual applications for a permit to purchase spirits [not beer or wine] from the MLCC, which the MLCC granted by issuing them ID numbers to purchase on-line. The applications contain factual information and are signed and certified as true by a tribal official. The applications were submitted either by U.S. Mail or facsimile. One of the factual pieces of information required to be submitted was that the Tribe had adopted a liquor ordinance that had been certified by the Secretary of the Interior. While all the Tribes certified this information in the affirmative as true, at least two Tribes in fact did not have such ordinances.

27. A check of the 19 tribal casinos indicates that all 19 are selling spirits, beer, and wine at their casino premises, and upon information and belief, amounts to hundreds of thousands of sales each year. A check of the MLCC records indicates that no Tribe has a license issued by the Michigan Liquor Control Commission to sell spirits, or beer or wine at the Tribal casinos as required by Michigan and Federal law.

28. In addition, some Tribes are also selling spirits, beer, and wine by the glass outside of the gambling casinos, at golf course clubhouses and at gas station convenience stores without any MLCC issued liquor license for the premises.

29. Conversely, some Tribes are selling spirits, beer, or wine at retail stores and gas station convenience stores on reservation land, but have obtained the

proper Michigan liquor license to do so and posted an insurance policy to cover possible dram shop liability. These locations have also been found from time to time have violated various provisions of the Code and Rules, and have been fined.

30. In addition, at least one Tribe provides a substantial number of "free" or complimentary alcoholic drinks to customers at its casino in direct violation of Michigan liquor law. All three Detroit commercial casinos are prohibited from doing so.

31. The Attorney General argued to the Michigan Supreme Court in Taxpayers of Michigan Against Casinos ["TOMAC I"] v. Governor, 471 Mich 306 (2004), that the tribal gambling compacts did not alter Michigan law, and the Supreme Court relying on that assertion upheld the validity of the tribal compacts which were not enacted by a bill. The majority opinion was authored by then Chief Justice Corrigan, and held that "In approving those Compacts by resolution, the Legislature did not modify Michigan law in any respect..." (Slip Opinion page 2). "We hold that a more accurate definition of "legislation" is one of unilateral regulation.***Here, the Legislature was required to approve the compacts only as the result of negotiations between two sovereigns...Because the tribes' consent is required by federal law, the compacts can only be described as contracts, not legislation."(Slip, pages 9-10). "Here, HCR 115 [the Joint Resolution that approved of the Compacts] neither promulgated a legislative policy as a defined and binding rule of conduct nor applied it to the general community." (Slip, page 28.)

32. Neither the attorneys for the intervening or amici Tribes or the attorneys for the Governor and Attorney General, either before or after the TOMAC I oral argument, informed the Supreme Court that at least some of the Tribes contend that the Compacts amended State liquor law to authorize them to sell spirits, beer, and wine at tribal casinos without a State liquor license; and that the Governor and Attorney General either expressly or de facto agreed with the contention and failed and refused to enforce the State liquor law.

33. Furthermore, TOMAC II, 478 Mich. 99 (2007) was argued before the Michigan Supreme Court on October 5, 2006, and decided May 30, 2007. . This was the Governor's appeal from the Court of Appeals decision on remand from TOMAC I, holding that a separation of powers violation occurred regarding the Governor unilaterally amending a Compact without legislative concurrence. Again, upon information and belief, neither the Governor, the Attorney General, nor any other interested party raised the issue in TOMAC II or the cross appeal of whether the Compacts authorized spirit, beer, or wine sales on reservations without a State liquor license and therefore amended the State Liquor Code, which amending Compacts to be effective would have required passage by bill and not resolution.

MANDAMUS

34. Plaintiff incorporates Paragraphs 1 thru 33 above as if fully set forth here.

35. The Attorney General by Constitution, statutes, and case law is the attorney for State Departments and agencies, the State's chief law enforcement officer, both for civil and criminal cases. He/she has the authority to bring

prosecutions, and has supervisory authority over prosecuting attorneys. The Attorney General also has the authority pursuant to statute to intervene in any case in the State, and pursuant to Court Rule must be served if the constitutionality of any state statute is challenged. Further, Attorney General Cox argues that his Opinions are binding on the Executive Branch and the Legislature and that they must follow them.

36. The sale of spirits, beer, and wine by tribal management without a valid MLCC issued license for tribally owned casinos [and on reservation trust land at other places such as gas station convenience stores and golf clubhouses] is clearly unlawful. Also clearly unlawful were the substantial sales of spirits, beer, and wine by two tribes without a certified liquor ordinance. Also clearly unlawful were the certifications made through the mail or wire by tribal officials that they had an ordinance, when in truth and fact they did not. Also clearly unlawful is a tribe supplying free spirits, beer, or wine to all customers, and specifically not limiting them to those customers who are there in connection with a business event or as part of a room special or promotion for overnight accommodations. MCL 436.2025(2)(c).

37. Plaintiff by written letter dated almost **four years ago**, August 6, 2004, personally informed Attorney General Cox of tribal liquor license violations, and repeatedly since then has informed Assistant Attorney General Todd Adams as well as then Assistant Attorney General John Cahill and his Assistants of these issues. In response, Plaintiff has been continually informed that the Attorney General is working on these issues, and that action

would soon be taken. Upon information and belief, the Michigan Liquor Control Commission staff has also referred these matters to the Attorney General's Office for action, but none has been taken.

38. It has recently come to light that Indian Tribes are spending large amounts of money on political contributions for State and Federal offices, and for aligned groups supporting particular candidates, as well as for lobbyists and legal representation. Jack Abramoff was involved in influence peddling, and his actions involved at least one Michigan Tribe. He has now been convicted of conspiracy to bribe and fraud.

39. Based on the facts above, hundreds of thousands of felony violations have been committed by Michigan tribal casino management. The Attorney General fails and refuses to take any corrective action, whether it be a civil suit against the tribes for a declaratory and injunctive Order to require the tribes to obtain State liquor licenses if they wish to continue liquor service (as other State Attorneys General have done), or criminal actions against tribal management. In addition, one tribe holds both the casino gambling license and liquor license at a Detroit commercial casino, and any liquor law violations would bear on its suitability to continue holding those licenses.

40. This follows a pattern of non-enforcement by the Attorney General against Indian Tribes. Even though the Attorney General is well aware of gambling Compact violations not involving revenues owed to the State, he has not brought a single case seeking injunctive enforcement in Federal Court, for such things from non-posting of card rules in each room to conducting

unauthorized promotional lotteries. Even in the two cases brought by him for Compact revenues owed to the State, he has settled them respectively for zero and fifty cents on the dollar.

41. In the case of Sault Ste. Marie Tribe of Chippewa Indians v. Engler, involving a Motion against the Hannahville Indian Community to recover an underpayment by the casino for previous years, the Attorney General refused to take any formal discovery and determine the amount of the underpayment going back prior to 1999. This may well have shorted the State and local units of government millions of dollars. The Attorney General without putting any proofs into the record settled the case in a Consent Judgment for approximately one million dollars (plus interest). When the case was remanded on a procedural issue, the Attorney General agreed to dismiss the case for no compensation.

42. In bringing suit against the Little River Tribe and the Little Traverse Bay Band Tribe in Federal Court regarding discontinuing 8% payments to the MEDC over the Club Keno game, the Attorney General did not immediately seek a temporary restraining order or preliminary injunction requiring payment into a third party escrow account, even though it threatened the continued existence of MEDC. The Attorney General tried to obtain a preliminary injunction to do so two years later, and the Attorney General's inaction was cited by the Court as one reason for denying the request. During the same case, the Attorney General's Office turned over sensitive internal documents to the Tribe, which the Tribe claims it did not read.

43. Ultimately, in the Little River and Little Traverse case the State prevailed on Motion in entirety and the State won a Judgment involving over fifty million dollars. However, upon the Tribes' appeal, the Attorney General entered into a Court settlement that was kept secret until after the passage of 40 days after the Compact Amendment was submitted by the parties to the BIA for approval by inaction. The settlement returned over $25 million that the State had won upon its Judgment against the Tribes, without any rational reasons given.

44. Another Tribe, which has not been audited for nine years by the State, refused for over two years to turn over required casino operating records to the State, and the Attorney General failed to institute any action and has apparently agreed to State review of only part of the requested records.

45. All of the tribal casinos are located within a minute or two drive time to State highways. Plaintiff regularly drives by the casinos on State highways, as well as drives on State highways throughout the State. Underage customers served at the tribal casinos, as well as visibly intoxicated persons served [including "free drinks"] at the tribal casinos, are likely to leave the casinos and drive on State highways, posing a distinct danger to Plaintiff and others.

46. However, unlike all other licensed bars in the State, the tribal casinos have not posted a bond or liability insurance policy as part of their licensure. Also unlike most if not all other licensees, the tribally owned casinos can and almost always do assert immunity to suit in State or Federal Court. Even if they consented to suit in Tribal Court, and then waived immunity, Plaintiff

would not be able to have a jury trial. In other words, if Plaintiff or his family were struck and severely damaged by an uninsured motorist who was served visibly intoxicated at a tribal casino, or was served at a tribal casino when he/she was underage, then Plaintiff would be in jeopardy of not being able to have any recovery.

47. Upon information and belief, no State law enforcement or MLCC agents monitor tribal compliance with State liquor laws. The Michigan Gaming Control Board refuses to obtain tribal casino records that monitor compliance with State liquor law; only one person once a month for a few minutes even visits a tribal casino, so there is almost no opportunity to meaningfully monitor tribal liquor compliance.

48. The Attorney General's failure or refusal to make a decision and enforce the State liquor licensing law against the tribes or tribal management constitutes a clear abuse of discretion, is in violation of his oath of office, jeopardizes Plaintiff's Constitutional rights to life, liberty, and property, and is arbitrary and capricious, and itself alone warrants this Court to issue its Writ of Mandamus to command him to act. Prosecutorial discretion only extends to a charging judgment based on unclear facts or defenses. When the facts are clear, and the statute constitutional, as here, the Attorney General cannot refuse to act and hide behind the doctrine of prosecutorial discretion. Refusing to act on or prosecute hundreds of thousands of felonies is not an act of discretion, but the opposite of it, and indicates a refusal to carry out his Constitutional oath of office.

49. Plaintiff has no other adequate legal or equitable remedy.

RELIEF

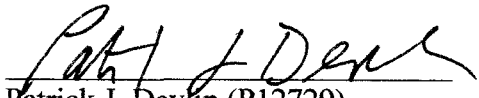
WHEREFORE, Plaintiff requests that this Court:

A. Issue its Writ of Mandamus commanding Attorney General Michael A. Cox to make an immediate decision and either immediately institute actions for declaratory and injunctive relief in the proper forums against the Tribes to require them to comply with all of the Michigan Liquor Control Code and Rules, including but not limited to licensing, and posting a bond or liquor insurance liability policy, or immediately initiating State felony criminal prosecutions against tribal management for sales of spirits, beer, and wine without a valid State issued liquor license.

B. Impose a $250.00 fine against Attorney General Michael A. Cox because he did not and does not have a justifiable excuse for having not carried out his clear and non-discretionary legal duty to make a decision and enforce the licensing provisions of the Michigan Liquor Control Code against the Tribes or tribal management.

C. Award Plaintiff costs and actual reasonable attorney fees in having to bring this action.

D. Award Plaintiff such other and further legal or equitable relief to which he may be entitled.



Patrick J. Devlin (P12729)
Plaintiff
2541 Nolan Avenue N.W.
Grand Rapids, MI 49534
(616) 633-7022

Dated: June 3, 2008