Court File No. COA-24-CV-0185

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act,* R.S.O. 1990, c. C.34, by Order in Council 210/2024 permitting international play in an online provincial lottery scheme

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PART I — OVERVIEW

1. The reference question should be answered in the affirmative. Section 207(1)(a) of the *Criminal Code* allows Ontario to conduct and manage a lottery scheme with international play, as described in Schedule to Order-in-Council 210/2024 (the "**Proposed Model**").

2. The reference before the Court "is about the legality of a hypothetical new scheme which does not currently exist", namely, a scheme as described in the Proposed Model.

Reference *Reference re iGaming Ontario*, 2024 ONCA 569, at para. 16

3. This Court has not been asked to decide whether the Proposed Model would be practicable or advisable. Nor are the activities of international gaming operators before this Court. Rather, this Court faces a simple question of statutory interpretation: whether the Proposed Model would be permitted under section 207(1)(a). It would be.

4. Section 207(1)(a) allows a provincial government to "conduct and manage a lottery scheme in that province." Section 207(1)(a) does not require the entire lottery scheme to be "in" the province; it simply provides that the government of the province may conduct and manage a lottery scheme there. Properly interpreted, section 207(1)(a) does not support a distinction between **(i)** conducting and managing a lottery scheme that is located *entirely* in the province — whether or not that lottery scheme is connected to lottery schemes outside Canada — and **(ii)** conducting and managing a lottery scheme that is located in the province and that *also* extends beyond Canada. The Proposed Model belongs in the first category, but it would also be lawful in the second.

5. Under the Proposed Model, the government of Ontario would conduct and manage a lottery scheme in Ontario. This is what section 207(1)(a) permits.

6. This interpretation is consistent with the broad and permissive conduct and manage authority that Parliament intended for the provinces. The words "in that province" in section 207(1)(a) were not intended to stop provinces from conducting and managing lottery schemes with inter*national* (as opposed to inter*provincial*) players or money. Rather, "in that province" is directed at preserving provincial autonomy. The provision establishes a provincial restriction so that each province may choose whether to establish its own lottery scheme. This restriction aside, Parliament intended to "totally withdraw[]" application of the *Criminal Code*. Parliament never intended to block provinces from allowing foreign players or money into lottery schemes in their respective jurisdictions.

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, pp. 7780-81 (Mr. Turner); at Record of the Attorney General of Ontario (May 31, 2024) [**AGO Record**], Vol 2, p. 470.

PART II — ARGUMENT

A. The Proposed Model is consistent with the text and context of section 207(1)(a)

7. Statutory interpretation proceeds by examining the text, context, and purpose of the provision in question.

Reference *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26.

8. The text of section 207(1)(a) states that, notwithstanding anything else in Part VII of the *Code*, the government of a province "either alone or in conjunction with the government of another province," may "conduct and manage a lottery scheme in that province, or in that and the other province".

9. The first important textual feature of section 207(1)(a) is that it demarcates interprovincial boundaries rather than international ones. The words "in that province" must be read in context with the words that follow, namely, "or in that and the other province." They are aimed at the borders between provinces. A provincial government may decide to conduct and manage a lottery scheme "in that province", but requires the agreement of "the government of another province" to conduct and manage a lottery scheme in that other province. There is no mention at all of international boundaries in section 207(1)(a).

10. The Proposed Model respects section 207(1)(a)'s interprovincial restriction. Under the Proposed Model, Ontario would not conduct and manage a lottery scheme anywhere in Canada except in Ontario, nor would any aspect of the scheme be located in any other Canadian province. The only new aspect to a scheme under the Proposed Model, compared to the existing, legal schemes operated by iGaming Ontario, would be the involvement of players "outside of Canada." Players located "outside of Ontario but within Canada would not be permitted to participate in games or betting" without an interprovincial agreement, just as section 207(1)(a) requires.

Reference AGO Record, Vol. 1, pp. 12-17.

11. The second important textual feature of section 207(1)(a) is that it requires Ontario to conduct and manage "in" that province. The Proposed Model respects this restriction as well. Ontario will not be conducting and managing anything outside of Ontario. The Proposed Model explicitly states that, while "iGaming Ontario will continue to conduct and manage the iGO Sites through its agents", any international players and money "would be subject to the relevant jurisdiction's legal and regulatory regime."

Reference AGO Record, Vol. 1, pp. 12-17.

12. Under the Proposed Model, Ontario would conduct and manage a lottery scheme involving international play through Ontario sites, accessible only in Ontario. Ontario would control the sites in Ontario, the payouts in Ontario, and the disposition of revenue in Ontario. Even if the lottery scheme is connected to lottery schemes elsewhere, and even if the lottery scheme itself extends outside of Canada, Ontario would conduct and manage the lottery scheme in Ontario.

Reference AGO Record, Vol. 1, pp. 12-17.

B. The Proposed Model is consistent with Parliament's purpose: to respect provincial autonomy and ensure public protection

13. The legislative history supports the legality of the Proposed Model. Legislative history "provides important information about the intention of the *Code* provisions" in section 207.

Reference *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726, at para. 49.

14. As suggested by the text, Parliament's primary concern with territorial restrictions in the context of the gaming provisions of the *Code* was on protecting provincial autonomy, *i.e.*, ensuring that each province's electorate was able to decide for itself whether to establish a lottery scheme in the province under section 207(1)(a), and how such a lottery scheme would be conducted and managed in the province. Parliament's discussions of "boundaries" and territorial limits must be viewed in this light. The legislative history reveals no concerns regarding protection of foreign players or foreign operators.

(i) The Proposed Model respects provincial autonomy

15. The discussion of "boundaries" contained in the factum of the lottery corporations must be viewed in its proper context. Parliament did not have international boundaries in mind. What is now section 207(1)(a) was intended to allow provinces to conduct and manage lottery schemes within their own jurisdictional boundaries, and thereby to preserve each province's choice to establish or not establish a lottery scheme.

Reference *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, at para. 35.

16. Prior to 1969, the "prohibitions against gambling were seen as not being consonant with the public perception of morality". Parliament therefore made the criminal law more responsive to public views, and gave provincial electorates a choice as to whether or not to establish lotteries. Following the 1969 *Criminal Code* amendments, the establishment of a lottery "would become no longer a question of criminal law but of public policy, for which the government of the day would be responsible."

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, p. 7781 (Mr. Turner); at AGO Record, Vol 2, p. 471.

17. Parliament ensured that, if a province did decide to establish lottery, that decision would be backed by meaningful power to conduct and manage. Indeed, Parliament intended to "totally withdraw[]" the application of criminal law from provincial lotteries in 1969, and leave their

conduct and management entirely to the provinces. The federal government and its criminal law would be withdrawn "from the field".[1]

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, pp. 7780-81 (Mr. Turner); at AGO Record, Vol 2, p. 470.

18. Another aspect of ensuring that provinces had a meaningful choice in whether to establish a lottery meant ensuring respect for jurisdictional boundaries; no province could decide for another whether the other should establish a lottery. The provinces would need to decide "in terms of the opinion *of your own people in the province* whether *you* want a lottery scheme". The province would "take[] upon itself before its own legislature the introduction of such legislation". And, if the public decided to have a lottery scheme, "the conditions" that would "attach to such scheme [would be] a provincial matter."

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, pp. 7781 (Mr. Turner) (emphasis added); AGO Record, Vol 2, p. 471.

19. This is the context in which Parliament's discussion of boundaries and territorial limits must be understood. Parliament's concern in limiting section 207(1)(a) to "that province" was on safeguarding each province's ability to choose whether to establish a provincial lottery. It was *not* on restricting a province's ability conduct and manage the intra-provincial aspects of lottery

[1] Ultimately, Parliament made a choice to exit the federal government from the business of government lotteries altogether. See for example Bill C-81 (1985), which was tabled out of the federal government's desire to put to rest any lingering questions about the federal government's involvement and definitively to exit the federal government from participation in lotteries: Senate Committees, 33rd Parliament, 1st Session : Standing Committee on Legal and Constitutional Affairs, vol. 2 no. 19-41, 29:14.

schemes that involve foreign players or money. Indeed, that would be inconsistent with Parliament's intent to "totally withdraw[]" the criminal law and grant a provincial government broad power to conduct and manage lottery schemes "in that province."

20. The Proposed Model does not impinge on any other province's choice to establish or not establish a provincial lottery. That is because, under the Proposed Model, "[p]layers located outside of Ontario but within Canada would not be permitted to participate in games or betting in the absence of an agreement between Ontario and the province or territory in which those players are located".

Reference AGO Record, Vol. 1, pp. 12-17.

21. In their submissions, the lottery corporations have spliced together comments by Ontario's affiants on cross-examination to suggest that Ontario will allow Canadians outside of Ontario to participate in international liquidity pools under the Proposed Model. This is despite the clear language of the Schedule, which excludes this possibility — and which binds the Court in this reference proceeding. Section 8 of the *Courts of Justice Act* limits the Court's mandate to "hearing and consider[ing]" the "question" referred to it by the Lieutenant Governor in Council. Here, the "question" incorporates the Schedule. The lottery corporations ask the Court to opine on a different question, based on different assumptions. The Court should decline to do so.

Reference *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 8(1).

22. In any event, the solution to this imagined problem is for this Court simply to confirm that the Proposed Model *as* it *is described in the Schedule* would be lawful, even if some other model might not be.

(ii) The Proposed Model ensures public protection

23. This Court has identified another "clear intent" of section 207 to have been "to decriminalize [gambling] in circumstances where regulations will minimize the potential for public harm." The Superior Court has recently confirmed that the conduct and manage power under section 207(1)(a) is a power to regulate, manage, and license lotteries in a manner that protects public safety, fairness, and integrity.

Reference *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.), at paras. 4-5.

Mohawk Council of Kahnawà:ke v. iGaming Ontario, 2024 ONSC 2726, at para. 95.

24. The Proposed Model would give Ontario sufficient control over the scheme to protect public safety, fairness, and integrity in Ontario, in the sense contemplated by section 207(1)(a). Again, Ontario would decide whether and how players in Ontario could, through Ontario-only sites, access international liquidity pools. Ontario would decide which games would be available in the province. Ontario would regulate payouts in the province. Ontario would, in other words, be in a position to protect the "public" with whose safety Parliament has entrusted it, namely, Ontarians'.

Reference AGO Record, Vol. 1, pp. 12-17.

25. Under the Proposed Model, Ontarians could play against foreign players or win foreign money, but in all respects their play would continue to be regulated by Ontario, in a manner that would protect public safety, fairness, and integrity *in* Ontario. The Proposed Model would enable Ontario to control the any proposed scheme within Ontario. Any person located in Ontario who participated in the scheme would have the protection of the regulatory scheme described in the

Schedule and confirmed by the evidence of the Attorney General of Ontario. Canadians outside of Ontario, meanwhile, would be unable to participate. The structure of the Proposed Model would satisfy Parliament's concerns about public protection.

26. In short, section 207(1)(a) contemplates that the province will exercise its conduct and manage power to ensure adequate protection for public safety, fairness, and integrity for the public *in Ontario*, and to respect the powers of other provinces to establish their own lottery schemes. The Proposed Model satisfies these requirements. The Proposed Model gives Ontario all of the control that it needs to protect public safety, fairness, and integrity in Ontario. A lottery scheme arising from the Proposed Model would be conducted and managed in Ontario, without participation by players from other provinces. Access to international liquidity pools does not change the analysis.

C. *Earth Future* does not control this reference

27. Like this reference, *Earth Future* proceeded on the basis of assumed facts. The assumed facts in *Earth Future* are markedly different from the ones that are set out in the Schedule, *i.e.*, the hypothetical facts incorporated into the reference question now before this Court. For this reason (among others), *Earth Future* can and should be distinguished.

28. The statement of facts submitted by the Attorney General of Prince Edward Island in *Earth Future* contemplated that the Province of PEI would license a charity entity called Earth Fund to "conduct and manage" a lottery scheme "from … Prince Edward Island" "in the global market", *including in other provinces of Canada*. The Court of Appeal also considered an alternative scenario in which Earth Fund "operated" the lottery in the global market.

Reference *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, at paras. 2, 10; aff'd *Reference re Earth Future Lottery*, 2003 SCC 10, at para. 1.

29. The Court of Appeal's view, substantially affirmed by the Supreme Court of Canada, was that this statement of facts set out a scheme by which the PEI government would be conducting, managing, and operating a lottery — as the Court described it — "throughout the world", including in other Canadian provinces. The Court of Appeal concluded that the PEI government could not do this. A lottery under section 207(1)(b) could not be conducted and managed except "in" the province of PEI.

Reference *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, at para. 10; aff'd *Reference re Earth Future Lottery*, 2003 SCC 10, at para. 1.

30. This case is different. Under the Proposed Model, Ontario would not conduct or manage a lottery anywhere but Ontario, and certainly not "throughout the world". Nor would Ontario conduct or manage any foreign lottery "from" this province. And, importantly, the Proposed Model would not include, but rather would specifically *ex*clude, the participation of players in other Canadian provinces. All of this differentiates the Proposed Model from the proposed Earth Fund lottery at issue in *Earth Future*.

31. Unlike PEI, which proposed to license the Earth Fund lottery through which international players (and players elsewhere in Canada) would participate, Ontario would not license (or have any other involvement with) the international sites through which international players could participate in shared liquidity pools. Nor would players elsewhere in Canada have access to those shared liquidity pools, or to the Ontario-only sites conducted and managed by the Ontario government. Under the Proposed Model, Ontario would not control players or money outside of

Ontario; its conduct and management would be limited to the province. Even if the Earth Fund lottery would have been unlawful, the Proposed Model would not be.

Reference AGO Record, Vol. 1, pp. 12-17.

D. None of the lottery corporations' scurrilous innuendo is relevant

32. The lottery corporations' factum states — and restates, and restates again — a number of erroneous assertions impugning the allegedly "illegal operations" of international gaming operators (which are not licensed or regulated by iGaming Ontario). These allegations are unfounded as a matter of law. They have never been established in any Canadian court, let alone beyond a reasonable doubt. Most importantly, they are inapposite to the reference question before the Court, which requires the Court to assume that "[p]layers located outside of Ontario but within Canada would not be permitted to participate in games or betting in the absence of an agreement between Ontario and the province or territory in which those players are located".

Reference AGO Record, Vol. 1, p. 5.

33. Gratuitous allegations of illegality are ubiquitous in the lottery corporations' factum: the words "unlawful" and "illegal" collectively appear at least 25 times to describe conduct that is not at issue in this proceeding. Why? Because the lottery corporations hope that, despite the absence of a proper record on the question of whether any gaming operator has broken the law, this Court's opinion will include *obiter* commentary about international conduct of which the lottery corporations disapprove.

34. This regrettable aspect of the lottery corporations' submissions does not assist the Court; rather, it seeks to advance the lottery corporations' private interests, which they have otherwise

pursued through a costly, but ineffective, letter-writing campaign targeting online gaming operators. The Court should not permit this proceeding to be co-opted for this collateral purpose.

Reference Record of the Atlantic Lottery Corporation, British Columbia Lottery Corporation, Lotteries and Gaming Saskatchewan and Manitoba Liquor and Lotteries Corporation (June 24, 2024) [**Lottery Corporations' Record**], Vol. 1, p. 219-267.

35. The foundation for the lottery corporations' submissions is the evidence of William Hill, a consultant "involved in" the Canadian Lottery Coalition's "federal lobbying efforts."

Reference Joint Transcript Brief [**JTB**], p. 857, ln. 1-13.

36. Mr. Hill conceded on cross-examination that nothing in his affidavits should be taken as an expression of a legal opinion, including his statements that describe the conduct of operators as "illegal" or "unlawful". Mr. Hill's unsupported characterizations of activities as "illegal", "unlawful", and so on constitute the very sort of legal opinions that he is not qualified to provide. His improper opinion evidence should be struck or, at minimum, disregarded, on this basis.

Reference JTB, p. 841, ln. 7-15; p. 843, ln. 7-14.

Hunt v. Stassen, 2019 ONSC 4466, at para. 11.

37. Mr. Hill is also (unsurprisingly) partisan, and his opinion evidence is not even a credible statement of his own opinions. In 2022, before he became a consultant and lobbyist for the lottery corporations, Mr. Hill publicly expressed the view that Ontario's online gaming model "amounts to a better gaming industry in Ontario," and that the tax-and-regulate concept underlying it "made [an] eminent amount of sense. It was a really smart idea…" Further, he acknowledged that lottery corporations oppose regulated online gaming because it compromises "their lawful monopoly".

Mr. Hill also agreed that he "would have spoken differently in 2022, had [he] then been a consultant to the [lottery corporations]".

Reference JTB, p. 831, ln. 21-25; p. 839, ln. 7-25; p. 840, ln. 5-8; p. 946 (Exhibit 2 to the Cross-Examination of Mr. William Hill).

38. Mr. Hill's "evidence" is advocacy in affidavit form. It does not assist the lottery corporations. It certainly supplies no basis on which to impugn the activities of gaming operators.

39. Relying on Mr. Hill's evidence, the lottery corporations argue that, under the Proposed Model, the international liquidity pools in which Ontario players would participate would also include players from other provinces, who would participate through international gaming sites, which international gaming operators would use similarly branded Ontario sites to advertise. This, the lottery corporations argue, would be tantamount to Ontario conducting and managing a lottery scheme in other provinces, contrary to section 207(1)(a) of the *Criminal Code*.

40. The reference question forecloses these submissions — and renders Mr. Hill's evidence irrelevant . The Schedule states that "[p]layers located outside of Ontario but within Canada would not be permitted to participate … in the absence of an agreement between Ontario and the province or territory in which those players are located". The question before this Court is whether international play, as defined in the Schedule, would be lawful, not whether some other international liquidity model would be lawful, or even whether the Proposed Model could be implemented as a practical matter.

41. If the lottery corporations ultimately believe that Ontario has not implemented international liquidity as described in the Schedule, or if they wish to argue that the activities of international

operators are unlawful, then they should attempt to advance these submissions, and to rely on Mr. Hill's evidence, in some other proceeding. They should not be permitted to do so in this reference, and thereby wrest control of the proceeding from the Attorney General.

42. "Parties may not 'tinker' with the questions posed" in a reference. It follows that evidence adduced to show that facts described the Schedule are untrue or unrealistic is irrelevant. So are the scandalous allegations of illegality that the lottery corporations have inserted into this proceeding for collateral purposes.

Reference *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 957, at paras. 41-42.

Reference re Order in Council 321/96, Respecting the Alberta Marketing Choice Program, 1997 ABCA 87, at para. 8.

43. The Court's task here is to consider the reference question based on the facts that the Lieutenant Governor in Council has asked the Court to assume. It is not open to the lottery corporations to argue that the Lieutenant Governor in Council ought to have asked the Court to assume different facts.

44. Yet, that is the end to which the lottery corporations have adduced the irrelevant, improper opinion evidence of Mr. Hill. It is also the end to which the lottery corporations invite the Court to pronounce in passing on the lawfulness of conduct that is not before the Court, and that has never been adjudged unlawful elsewhere. The Court should disregard this evidence and these submissions; it should decline to be diverted by the lottery corporations' unwarranted invective.

PART III — ORDER REQUESTED

45. The reference question should be answered in the affirmative.

46. The CGA seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2024.

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Lawyers for the Canadian Gaming Association

Time for oral argument: 30 minutes, in accordance with the Endorsement of van Rensburg J.A. dated October 1, 2024.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42
2. *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8
3. *Hunt v. Stassen*, 2019 ONSC 4466
4. *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726
5. *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.)
6. *Reference re Earth Future Lottery*, 2003 SCC 10
7. *Reference re Order in Council 321/96, Respecting the Alberta Marketing Choice Program*, 1997 ABCA 87
8. *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 957
9. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 8(1).**

References to Court of Appeal

8 (1) The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration. R.S.O. 1990, c. C.43, s. 8 (1).

Opinion of court

(2) The court shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons for it, and any judge who differs from the opinion may certify his or her opinion and reasons in the same manner. R.S.O. 1990, c. C.43, s. 8 (2).

Submissions by Attorney General

(3) On the hearing of the question, the Attorney General of Ontario is entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (3).

Same

(4) The Attorney General of Canada shall be notified and is entitled to make submissions to the court if the question relates to the constitutional validity or constitutional applicability of an Act, or of a regulation or by-law made under an Act, of the Parliament of Canada or the Legislature. R.S.O. 1990, c. C.43, s. 8 (4).

Notice

(5) The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (5).

Appointment of counsel

(6) If an interest affected is not represented by counsel, the court may request counsel to argue on behalf of the interest and the reasonable expenses of counsel shall be paid by the Minister of Finance. R.S.O. 1990, c. C.43, s. 8 (6); 2006, c. 21, Sched. A, s. 2.

Appeal

(7) The opinion of the court shall be deemed to be a judgment of the court and an appeal lies from it as from a judgment in an action. R.S.O. 1990, c. C.43, s. 8 (7).

IN THE MATTER OF A REFERENCE TO THE COURT OF APPEAL PURSUANT TO SECTION 8 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, C. C.34, BY ORDER IN COUNCIL 210/2024 PERMITTING INTERNATIONAL PLAY IN AN ONLINE PROVINCIAL LOTTERY SCHEME

Court File No. COA-24-OM-0027

COURT OF APPEAL FOR ONTARIO

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