

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*, RSO 1990, c. C.34, by Order in Council 210/2024 respecting permitting international play in an online provincial lottery scheme

**FACTUM OF ATLANTIC LOTTERY CORPORATION INC.,
BRITISH COLUMBIA LOTTERY CORPORATION,
LOTTERIES AND GAMING SASKATCHEWAN CORPORATION AND
MANITOBA LIQUOR AND LOTTERIES CORPORATION**

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PART I ~ INTRODUCTION

1. This Reference asks a straightforward question of statutory interpretation: Do the words “in that province” in subsection 207(1)(a) of the *Criminal Code*¹ mean what they say? The Attorney General of Ontario (“**Ontario**”) says the answer is “no”. Ontario says that the requirement that a provincial lottery scheme must be conducted and managed “in that province” actually means in that province *and anywhere else in the world*—so long as “the provincially-conducted lottery is sufficiently connected to the province.”² Based on this tautological test, Ontario asks this Court to bless its unprecedented lottery scheme.

2. Ontario’s argument is profoundly misguided. It ignores squarely applicable precedent from the Supreme Court of Canada. It distorts the plain meaning of the words in subsection 207(1)(a), misinterprets the neighbouring provisions of the *Criminal Code*, downplays unfavourable legislative history, and misapplies principles of constitutional

¹ *Criminal Code*, R.S.C. 1985, c. C-46 [“**Criminal Code**”], [s. 207\(1\)\(a\)](#).

² Factum of the Attorney General of Ontario (October 11, 2024) [“**AGO Factum**”], para. 4.

law. And even more, it entails a sweeping assertion of statutory authority that could be used to justify extraterritorial actions by Ontario far beyond what is at issue in this Reference. For all these reasons, Ontario's position should be firmly rejected.

3. Some of the dangers of Ontario's proposed lottery scheme are already manifest. Ontario acknowledges that the proposal described in the Reference is "based on the existing" iGaming Ontario framework.³ Yet the undisputed evidence before this Court shows that affiliates of iGaming Ontario's private operators (the "**iGO Operators**") are using the legal platform in Ontario as a springboard to promote their illegal parallel international websites (the "**International Sites**") to Canadians outside Ontario. On these International Sites, Canadians outside Ontario gamble in breach of the *Criminal Code* and without oversight by any Canadian regulator. Ontario's proposed scheme involves joining hands with these illegal operations in service of its goal to share "liquidity" across borders. Although Ontario baldly asserts that Canadians outside Ontario would somehow be barred from participating under its "hypothetical" scheme,⁴ no evidence supports that claim, and the record before this Court shows the opposite is true today.

4. Some two decades ago, an earlier Attorney General of Ontario did not mince words when confronted with a similar attempt to skirt the nation's criminal law. As he then warned: "The reference now before this Court represents the latest in a line of cases whereby a scheme to conduct gaming activity that by all appearances contravenes both the letter and spirit of the *Criminal Code*, is described by its crafters in a most creative

³ AGO Factum, para. 7.

⁴ AGO Factum, para. 5.

and charitable light, all in an attempt to escape the onerous demands of the criminal law.”⁵ That admonition is equally appropriate here, even though the Attorney General has reversed course. Ontario’s proposed scheme flouts the *Criminal Code*, and this Court should accordingly answer the Reference question in the negative.

PART II ~ FACTS

A. Parliament Has Consistently Prohibited Foreign Lotteries and Limited Provincial Lotteries to the Boundaries of the Province

5. As Ontario recognizes (at para. 12), Part VII of the *Criminal Code* generally renders gambling illegal in Canada, subject only to exceptions contained in sections 204 and 207. The exception at issue here is subsection 207(1)(a), which permits “the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme *in that province*, or in that and the other province, in accordance with any law enacted by the legislature of that province.”⁶ There is no suggestion here that Ontario is attempting to act “in conjunction with the government of another province.” Its proposed scheme must stand or fall on its own.

6. Ontario argues (at para. 60) that “the history and evolution of the *Code*’s gaming provisions and the wording of the provisions themselves evidence Parliament’s intention to respect provincial legislatures’ decisions.” But that is not the full story. Ontario largely ignores that Parliament’s deference to provincial legislatures was conditioned on the

⁵ Factum of the Intervener Attorney General of Ontario, *Reference re Earth Future Lottery* (SCC Case No. 29213) (January 30, 2003) [“**AGO Earth Future Factum**”], para. 11, Book of Authorities of the Atlantic Lottery Corporation Inc. et. al [“**CLC BOA**”], Tab 16.

⁶ *Criminal Code*, [s. 207\(1\)\(a\)](#).

understanding that (i) foreign lotteries would remain illegal,⁷ and (ii) provincially-run lotteries would operate “within provincial boundaries.”⁸ Parliament thus intended that deference to any one province would end at that province’s borders.

(i) Parliament Intended that Foreign Lotteries Would Remain Illegal

7. Foreign lotteries have been prohibited in Canada since the enactment of the first *Criminal Code* in 1892.⁹ Despite this prohibition, a Parliamentary committee reviewing Canada’s gambling laws in the mid-1950s found evidence of widespread sales of foreign lottery tickets (both real and counterfeit) to Canadians.¹⁰ Thus, when the exception permitting government-run lotteries was introduced in Parliament in 1969, Parliamentarians sought confirmation that foreign lotteries would be still prohibited.¹¹ Beyond the concerns about fraud that had been identified in the 1950s, Parliamentarians determined that foreign lotteries caused other harms by virtue of being operated by private authority outside of Canada’s boundaries. Only a small portion of their profits were directed towards social programs (and none in Canada), and only a small portion of their prizes were returned to Canadian players.¹²

⁷ House of Commons Standing Committee on Justice and Legal Affairs, 1st Session, 28th Parliament, 1968-1969 (March 11, 1969), excerpts [**“1969 Committee”**], Record of the Attorney General of Ontario (May 31, 2024) [**“AGO Record”**] Vol. 2, p. 455.

⁸ 1969 Committee, AGO Record Vol. 2, pp. 457-460; Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 33-1, No. 32 (December 11, 1985) [**“Senate Committee No. 32”**], AGO Record Vol. 2, p. 639.

⁹ Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries, Final Report on Lotteries (July 31, 1956) [**“1956 Report”**], AGO Record Vol. 2, p. 416.

¹⁰ 1956 Report, AGO Record Vol. 2, pp. 417-418.

¹¹ 1969 Committee, AGO Record Vol. 2, pp. 455-456.

¹² “Bill C-150, Criminal Law Amendment Act,” Report Stage, House of Commons Debates, 28-1, vol. VIII (April 21-22, 1969), excerpts [**“Bill C-150 Debates”**], AGO Record Vol. 2, pp. 473, 489.

8. Ontario rightly notes (at paras. 89-90) that in approaching the 1969 amendments “Parliament was concerned about international lottery schemes” and that “one of the bases for the 1969 amendments which gave rise to section 207(1)(a) was the desire to divert Canadians away from foreign lotteries”. When the amendments were adopted, John Turner, then the federal Minister of Justice and Attorney General, assured his colleagues that while “domestic lotteries” would be left to “provincial discretion”, “foreign lotteries ... are still illegal”.¹³ In contrasting “domestic” and “foreign” lotteries, members of Parliament echoed concerns first heard decades earlier, including that “a number” of the foreign lotteries “are questionable when it comes to what is happening to the money at the other end.”¹⁴ By contrast, lotteries run by either the federal or provincial government would afford Canadians “absolute” control over “all aspects” of the scheme.¹⁵

9. The gambling provisions of the *Code* were further amended in 1985 to repeal the authority of the federal government to enter the lottery business, and to clarify certain aspects of the provincial authority to conduct and manage lottery schemes. Under the 1985 amendments, lottery schemes operated on or through a computer or video device (which would eventually come to include online gambling) would exclusively be conducted and managed by provincial governments.¹⁶ Notably, however, the prohibition of foreign lotteries survived both the 1969 and 1985 amendments, and is now codified in subsection 206(7) of the *Code*.

¹³ 1969 Committee, AGO Record Vol. 2, p. 458.

¹⁴ 1969 Committee, AGO Record Vol. 2, pp. 458-459.

¹⁵ 1969 Committee, AGO Record Vol. 2, pp. 458-459.

¹⁶ Senate, Standing Senate Committee on Legal and Constitutional Affairs, Reports, 33-1, No. 35 (December 16, 1985) [**“1985 Report”**], AGO Record Vol. 2, pp. 720-721.

(ii) **Parliament Intended that Provincially-Run Lotteries Would Operate Within Provincial Boundaries**

10. Parliament's intention that provincially-run lotteries would be domestic in scope is evident from Parliament's discussions regarding the 1969 and 1985 amendments, including numerous statements in the legislative record:

- (a) "[T]he Post Office facilities cannot be used to transmit an illegal lottery. In the future if a lottery were legal, that is to say, provincially authorized, then the mails would carry it **within the province** concerned."¹⁷
- (b) "We are, therefore, leaving it to the regions ... that their provincial Attorneys General have control over whether or not there should be lotteries permitted **within provincial boundaries**."¹⁸
- (c) "During the negotiations there were representations from some provinces to broaden the scope of gambling activities **within the provinces** ..."¹⁹
- (d) "The policy of the federal government since 1969 has been to extend to the provincial governments the right to control these activities **within their boundaries**."²⁰
- (e) "No provincial government in this country is about to operate, or to approve, or to license the type of Las Vegas or Atlantic City gambling establishment that was suggested [by witnesses appearing before the committee] ... it ignores the responsibility for the public interest that the provincial governments have over activities **within their boundaries**."²¹

11. When the 1985 amendments were approved, the Chairman of the relevant Parliamentary committee reinforced this message. In a committee report, the Chairman reminded the provincial governments about the importance of ensuring that strict controls remained on any forms of legal gambling. Parliament was not deferring to the provinces

¹⁷ 1969 Committee, AGO Record Vol. 2, p. 455 (emphasis added).

¹⁸ 1969 Committee, AGO Record Vol. 2, p. 457 (emphasis added).

¹⁹ Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 33-1, No. 29 (November 26, 1985) ["**Senate Committee No. 29**"], AGO Record Vol. 2, p. 573 (emphasis added).

²⁰ Senate Committee No. 32, AGO Record Vol. 2, p. 639 (emphasis added).

²¹ Senate Committee No. 32, AGO Record Vol. 2, p. 639 (emphasis added).

so much as it was granting them a limited space within which to operate—a space that could be revoked if they failed to exercise effective control:

[W]e would urge the Department of Justice to monitor the operation of the changes very closely. ***In the future, if some of the negative consequences alleged to flow from the Bill should come to pass, we believe that the federal government should not hesitate to take initiatives to re-enter the area and bring them to a halt with appropriate amendments to the Criminal Code.***²²

12. In sum, this history shows that Canada’s legal gaming regime from its inception was founded on (i) deep skepticism of foreign lotteries and (ii) allowing each province to control gambling only within its own territorial boundaries.

B. The CLC Members Have the Sole Authority To Conduct and Manage Online Lottery Schemes Within Their Provincial Boundaries

13. Because of the legislative history described above, the provincial governments have since the 1980s had the authority to conduct and manage lottery schemes, including the exclusive authority to conduct and manage online lottery schemes, within their provincial boundaries.²³ The Canadian Lottery Coalition (“**CLC**”) is a consortium of provincial and regional crown corporations in the Atlantic Provinces, Manitoba, Québec,²⁴

²² 1985 Report, AGO Record Vol. 2, p. 721 (emphasis added).

²³ *Criminal Code*, s. 207(4)(c). Subsections 207(1)(b) through (f) provide limited authority for certain circumscribed organizations, such as charitable or religious organizations, to conduct and manage lottery schemes, but subsection 207(4)(c) excludes from that grant of authority all popular forms of electronic gambling, including online gambling.

²⁴ Loto Québec is a CLC member but is not participating in this intervention.

Saskatchewan, and British Columbia, who each have the sole authority to conduct and manage online gambling within their respective provincial boundaries.²⁵

14. To keep pace with the growing popularity of online gambling, the CLC members have established proprietary online gambling websites. To respect the limitations of their authority under subsection 207(1)(a), those websites are “geo-blocked” such that they are only available to persons physically present within their provincial boundaries.²⁶ In British Columbia, Manitoba, and Saskatchewan, for example, residents can participate in online gambling through PlayNow.com.²⁷ In New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, residents can participate in online gambling through ALC.ca.²⁸ These platforms are the only legal gambling websites within these respective provinces. Both platforms share player pools (that is, “liquidity”) among residents of the participating provinces for certain games, in accordance with agreements between the provinces.²⁹

15. The rise of online gambling brought with it an increase in illegal online gambling operators, who have been targeting Canadians for years. One example is Flutter Entertainment plc. (“**Flutter**”), an intervener in this Reference that operates some of the world’s largest gaming brands, including PokerStars and FanDuel.³⁰ Long before Ontario

²⁵ Affidavit of William Hill (sworn April 8, 2024) [“**Hill Affidavit**”], paras. 13, 15, Record of Atlantic Lottery Corporation Inc. et al. (June 24, 2024) [“**CLC Record**”], pp. 4-5.

²⁶ Hill Affidavit, para. 13, CLC Record, pp. 4-5.

²⁷ Hill Affidavit, Exhibits 10-12, CLC Record, pp. 182, 192, 203.

²⁸ Supplemental Affidavit of William Hill (sworn June 21, 2024) [“**Hill Supplemental Affidavit**”], Exhibit 9, CLC Record, p. 151.

²⁹ Hill Affidavit, para. 37, CLC Record, p. 13.

³⁰ Affidavit of George Sweny (sworn May 31, 2024) [“**Sweny Affidavit**”], para. 5, AGO Record Vol. 1, p. 361.

began to regulate private operators in 2022, these operators, including Flutter, were openly advertising and offering their online gambling platforms to Canadians in contravention of the *Criminal Code*.³¹

16. Ontario readily admits (at para. 20) that there can be no assurances that illegal online gambling sites will offer secure and reliable safeguards for users, appropriate age-gating, or responsible gambling resources. And Ontario also agrees (at para. 40) these sites harm Canadians by diverting profits earned illegally from Canadian players—estimated at \$1.34 billion in 2020—from vital social services and government programs.³²

C. Ontario Is the Only Jurisdiction Worldwide in Which a Government Conducts and Manages Private Online Gambling Operators

17. Purportedly to address the social ills of illegal online gambling, in 2021, Ontario sought to register and regulate illegal operators through iGaming Ontario, a wholly-owned subsidiary of the Alcohol and Gaming Commission of Ontario (“**AGCO**”).³³ Regrettably, it did so at the expense of Canadians outside Ontario, who have faced a marked proliferation of illegal online gambling in the period since.

18. Following the launch of Ontario’s online private gambling market in 2022, private operators who registered as iGO Operators, like Flutter, did not cease marketing to Canadians outside Ontario. While their activities became regulated within Ontario through

³¹ See Hill Supplemental Affidavit, Exhibit 7, which is a promotional YouTube video released by PokerStars in December 2018. The video highlights a player in Saskatchewan who won an online poker tournament run by PokerStars. See also Transcript of the Cross-Examination of George Sweny (September 6, 2024) [“**Sweny Transcript**”], Joint Brief of Transcripts [“**JBT**”], p. 368, qq. 253-254, where Flutter confirms that before the launch of iGaming Ontario, Ontarians could access PokerStars through PokerStars.com.

³² Hill Affidavit, para. 24, CLC Record, pp. 7-8.

³³ AGO Factum, para. 20; Hill Affidavit, para. 20, CLC Record, p. 6.

a specially-created entity that was registered by the AGCO, they continued to operate illegally throughout the rest of Canada.

19. iGaming Ontario's private online gambling market went "live" on April 4, 2022.³⁴ Under the new regime, existing operators who were marketing and offering online gambling services to Ontarians illegally were given until October 31, 2022 to register with iGaming Ontario and enter into contracts to become authorized to provide legal online gambling to individuals in Ontario. Since that time, dozens of third-party operators have registered with iGaming Ontario.³⁵

20. Ontario is the only jurisdiction in the world where a government or its agents conduct and manage private operators.³⁶ In other words, the operators in jurisdictions that Ontario now seeks to "pool" its players and funds with will not be conducted or managed by any government or its agents.

D. There Is No Dispute that Canadians Outside Ontario Can Access iGO Operators' Affiliated International Sites

21. The AGCO and iGaming Ontario did not require corporate affiliates of iGO Operators to cease their illegal operations throughout Canada to participate in Ontario's new regime. Instead, with the full knowledge and the tacit approval of Ontario, operators incorporated subsidiaries, or as iGaming Ontario describes them, "'purpose built'

³⁴ AGO Factum, para. 22.

³⁵ See Affidavit of Jesse Todres (sworn May 31, 2024) ["**Todres Affidavit**"], Exhibit D, AGO Record Vol. 1, pp. 104-126; Hill Affidavit, para. 21, CLC Record, p. 7.

³⁶ Transcript of the Cross-Examination of Jesse Todres (September 5, 2024) ["**Todres Transcript**"], JBT, pp. 23-24, q. 55.

organizations, corporations, [or] other kinds of corporate structures that are set up specifically for [Ontario’s] market.”³⁷

22. As a result, many private operators—most of whom are established global entities³⁸—now own a “purpose built” subsidiary that operates in Ontario through an iGaming domain, or “**iGO Site**” (for example, PokerStars.ca). At the same time, a separate subsidiary of the same group, using the same brand, has continued to operate illegally in the other provinces of Canada and the rest of the world through their International Site (for example, PokerStars.com).³⁹ The two subsidiaries in many cases also run separate social media accounts, one “for Ontarians” that links to an iGO Site, and the other for “all other Canadian provinces and territories” that links to an International Site.⁴⁰ To take Flutter’s PokerStars brand as an example:

Table 1 – PokerStars’ Legal and Illegal Operations in Canada

	Ontario	Other Canadian Provinces
Brand	PokerStars	PokerStars
Web Domain	PokerStars.ca	PokerStars.com ⁴¹
Subsidiary	TSG Interactive Canada Inc.	TSG Interactive Gaming Europe ⁴²
Regulator	AGCO	Malta Gaming Authority ⁴³

³⁷ Todres Transcript, JBT, pp. 78-79, q. 190.

³⁸ Todres Affidavit, para. 16, AGO Record Vol. 1, p. 31.

³⁹ See Affidavit of Ning Fung Tse (sworn June 21, 2024) [“**Tse Affidavit**”], Chart at para. 5, CLC Record, pp. 281-282; Sweny Transcript, JBT, p. 344, qq. 127-130, p. 349, q. 153.

⁴⁰ Hill Supplemental Affidavit, paras. 11-19, Figures 1-10, CLC Record, pp. 94-102.

⁴¹ See Sweny Transcript, JBT, p. 371, qq. 269-275, in which Flutter confirms that it is still generating revenue from British Columbia, Manitoba, Saskatchewan and the Atlantic Provinces through PokerStars.com; see *also*, Tse Affidavit, Exhibits 17, 43, 62, CLC Record, pp. 327-328, 377-378, 415-416, which show that the CLC was able to access PokerStars.com from within Prince Edward Island, Saskatchewan and Manitoba.

⁴² Sweny Transcript, JBT, p. 348, qq. 150-151.

⁴³ Sweny Transcript, JBT, pp. 356-357, qq. 189-192.

23. Flutter is not licenced, registered or authorized in any Canadian jurisdiction outside Ontario but earns approximately 50% of its Canadian revenues from Canadians outside Ontario⁴⁴—where Flutter has no lawful authority to operate.

24. In addition to Flutter's own evidence, the CLC conducted testing in which it attempted to access both the iGO Sites and International Sites of 19 popular iGO Operators from Prince Edward Island, Manitoba and Saskatchewan. In all three provinces, the CLC's investigator was able to access 18 of the 19 International Sites. Moreover, when the investigator attempted to access the iGO Sites from outside of Ontario, 16 of these iGO Sites re-directed him to their corresponding illegal International Sites, where he was able to register an account, deposit funds, and place a bet.⁴⁵ Flutter confirmed its understanding that if players in Prince Edward Island, British Columbia, Manitoba, or Saskatchewan attempt to access PokerStars.ca, they are re-directed to PokerStars.com.⁴⁶ The effect is that iGO Sites operate as marketing vehicles that target Canadians outside Ontario and thus aid and abet gambling through parallel illegal International Sites.

25. Since the launch of iGaming Ontario, iGO Operators and their affiliates have become emboldened to increase their illegal advertising efforts across Canada. The CLC's record is teeming with examples of such advertising, including television advertisements during prominent sporting events, venue advertisements physically

⁴⁴ Sweny Transcript, JBT, p. 408, qq. 431-434; Cross-Examination Brief of George Sweny (September 6, 2024), JBT, p. 794.

⁴⁵ Tse Affidavit, paras. 5, 11-12, CLC Record, pp. 281, 283-284.

⁴⁶ Sweny Transcript, JBT, pp. 387-392, qq. 324-351.

located in provinces outside Ontario, online advertisements and social media accounts, and various forms of print and billboard media.⁴⁷ Indeed, many iGO Operators or their affiliates are among the highest spending brands for competitive media in the Atlantic Provinces (several of which have outspent the Atlantic Lottery Corporation Inc. in its home jurisdiction).⁴⁸

26. iGaming Ontario, however, does not conduct any kind of diligence or investigation as to the activities of iGO Operators or their affiliates outside Ontario.⁴⁹ Alarming, not only does iGaming Ontario fail to monitor these activities, but the General Counsel of iGaming Ontario admitted that “I don’t know how I would be able to assess whether that same entity operates a website outside of Ontario, but within Canada.”⁵⁰

27. iGaming Ontario’s regulator, the AGCO, has taken the same position, stating that “it does not regulate gaming activities that are outside of Ontario’s jurisdiction” and that “Ontario’s framework does not regulate games offered outside of Ontario.”⁵¹ In fact, when the CLC contacted the AGCO about its specific concerns about NorthStarBets.com, the International Site operated by an affiliate of a Canadian iGO Operator,⁵² the AGCO simply

⁴⁷ Hill Supplemental Affidavit, paras. 11-35, Figures 1-15, Exhibits 1-8, CLC Record, pp. 94-110, 118-146; Tse Affidavit, paras. 10, 16, Figure 5, Exhibits 19-25, CLC Record, pp. 283, 293, 331-344. While CLC members also advertise their online sites from time to time on national broadcasts, there is no suggestion that CLC members’ online sites are available to Canadians outside the CLC members’ respective jurisdictions. By contrast, when iGO Operators advertise nationally, they know that viewers outside Ontario will be able to access their International Sites.

⁴⁸ Hill Supplemental Affidavit, para. 22, Figures 11-12, CLC Record, pp. 103-104.

⁴⁹ Todres Transcript, JBT, p. 89, qq. 216-217.

⁵⁰ Todres Transcript, JBT, pp. 78-79, qq. 190-191. Ontario’s witness went on to explain that there are covenants in the operating agreement about promoting other lottery schemes elsewhere in Ontario. However, based on the admission referenced directly above, the witness would not know how to independently verify such covenants.

⁵¹ Hill Supplemental Affidavit, Exhibits 23, 26, CLC Record, pp. 256-257, 266.

⁵² Hill Supplemental Affidavit, Exhibit 25, CLC Record, pp. 263-264.

responded that “Northstarbets.com is not an Ontario registered site and not covered by Ontario regulation.”⁵³ Under the proposed scheme, if allowed by this Court, there is no reason to believe the AGCO would act any differently. The International Sites with which Ontario wants to pool liquidity would continue to include Canadians outside Ontario.

28. The resulting gains for private operators have been significant—between 2020 and 2023, illegal online gambling revenues generated from Canadians outside Ontario are estimated to have increased by approximately 40%.⁵⁴ The resulting harms have been just as substantial. When Canadians outside Ontario gamble online on International Sites rather than sites belonging to CLC members, they unwittingly divert significant sums of money to private operators that would otherwise have gone to support public programs. Beyond lost revenues, the CLC members have also been forced to spend money to combat the growing problem of illegal operators, which has reduced the profits that they could otherwise return to their provincial governments.⁵⁵

29. Canadians outside Ontario are also harmed directly by International Sites. As conceded by Ontario, International Sites are not subject to the same regulatory scrutiny.⁵⁶ As a result, these operators are not accountable to provide online gambling in a socially responsible manner. For example, the operators of International Sites do not face the same financial data reporting regulations or pay any Canadian taxes, leading to increased

⁵³ Hill Supplemental Affidavit, Exhibit 26, CLC Record, p. 266.

⁵⁴ Hill Affidavit, para. 24, CLC Record, pp. 7-8.

⁵⁵ Hill Affidavit, para. 31, CLC Record, p. 10.

⁵⁶ Todres Affidavit, paras. 50-52, AGO Record Vol. 1, p. 41.

risks of fraud and money laundering.⁵⁷ These are many of the very operators that Ontario now seeks to merge its lottery scheme with.

E. Ontario Refuses To Confirm that the Proposed Scheme Would Exclude the International Sites Accessed by Canadians Outside Ontario

30. Ontario insists (at para. 51) that the exact details of its proposed scheme have not been and will not be determined until the Reference question is answered in the affirmative. The Reference question posits a hypothetical scenario, Ontario urges, after which iGaming Ontario and the AGCO can make a decision on who the counterparties providing shared liquidity will be.⁵⁸ But when asked whether the counterparties might include the International Sites, Ontario's principal witness stated that "at a hypothetical level *I think that could happen.*"⁵⁹

31. Ontario's evidence via Flutter does provide some insight into PokerStars' plans under the proposed model: "Using poker as an example, a player in Ontario would be able to sit down at a virtual poker table and compete with players from around the world."⁶⁰ Thus, the only reasonable inference given the experience of online gambling in Canada to date is that Flutter and other iGO Operators intend for players in Ontario (through iGO Sites, such as PokerStars.ca) and players around the world, including Canadians outside Ontario (through International Sites, such as PokerStars.com) to play together to pool

⁵⁷ Todres Affidavit, para. 52, AGO Record Vol. 1, p. 41; Sweny Affidavit, para. 32, AGO Record Vol. 1, pp. 367-368.

⁵⁸ Todres Transcript, JBT, p. 93, q. 226.

⁵⁹ Todres Transcript, JBT, pp. 129-130, q. 305 (emphasis added).

⁶⁰ Sweny Affidavit, para. 22, AGO Record Vol. 1, p. 365.

liquidity. When asked to confirm this, Flutter simply replied that a model has not been defined.⁶¹

32. Similarly, Ontario has conceded that:

- (a) the proposed scheme would be based on the existing lottery scheme conducted and managed by iGaming Ontario;⁶²
- (b) iGO Sites would be conducted and managed in the **same manner** and to the **same extent**;⁶³
- (c) neither Ontario nor iGaming Ontario would conduct, manage, or operate the International Sites; and
- (d) Ontario would not be responsible for or to individuals participating in games and betting outside of Ontario.⁶⁴

33. Flutter's and Ontario's admissions run directly contrary to Ontario's claim (at para. 50) that Canadians outside Ontario would be prevented from accessing games and betting involving Ontario players through International Sites.⁶⁵ As conceded repeatedly by Ontario, a scheme involving interprovincial play would violate the *Criminal Code*.⁶⁶

⁶¹ Sweny Transcript, JBT, p. 405, qq. 418-419.

⁶² AGO Factum, para. 7.

⁶³ AGO Factum, para. 44 (emphasis added).

⁶⁴ AGO Factum, para. 49. Ontario states that it would not be responsible for or to individuals "outside of Canada". But it has repeatedly taken the position that it does not have jurisdiction outside of Ontario. See, e.g., Todres Transcript, JBT, pp. 88-89, qq. 215-217; Hill Supplemental Affidavit, Exhibit 26, CLC Record, pp. 266-267.

⁶⁵ AGO Factum, para. 50.

⁶⁶ Todres Affidavit, para. 32, AGO Record Vol. 1, p. 36; Todres Transcript, JBT, pp. 57-58, qq. 134-139. See also Sweny Affidavit, para. 21, AGO Record Vol. 1, p. 365.

PART III ~ ISSUES & LAW

34. The Reference question before the Court is as stated in Order in Council 210/2024:

Would legal online gaming and sports betting remain lawful under the *Criminal Code* if its users were permitted to participate in games and betting involving individuals outside of Canada as described in the attached Schedule? If not, to what extent?

35. The Court should answer the question “no”, for two main reasons. *First*, the proposed scheme falls outside the exception in subsection 207(1)(a) of the *Criminal Code* to the general prohibition on gambling. *Second*, on the record before this Court, Canadians outside Ontario will be able to access the International Sites that will form part of the proposed scheme. As a result, and by Ontario’s own admission (at para. 9), the proposed scheme is unlawful because “this type of interprovincial play is only permissible pursuant to an agreement between provinces.”

A. *Earth Future* Resolves This Reference

36. Ontario’s legal argument begins (at paras. 58-98) with an extended submission that the reference to a lottery scheme “in that province” in subsection 207(1)(a) should be construed consistently with section 92 of the *Constitution Act, 1867*. But in approaching the Reference question, this Court does not write on a blank slate. While Ontario seeks to run from *Earth Future*, that decision—affirmed by a unanimous, nine-judge bench of the Supreme Court of Canada “substantially for the reasons of the Chief Justice of Prince

Edward Island”⁶⁷—controls the answer to the Reference question. It should be followed here.

(i) ***Earth Future* Resolved the Key Interpretative Question Here and Is Binding**

37. The key question in *Earth Future* was whether a Prince Edward Island-based charitable lottery scheme that sold lottery tickets over the internet to individuals around the world complied with the requirement under subsection 207(1)(b) of the *Criminal Code* that the lottery scheme be “conduct[ed] and manage[d] ... in that province.” As the Prince Edward Island Supreme Court (Appeal Division)⁶⁸ explained by way of background:

In order for a lottery to be lawful under s-s. 207(1)(b) it must, be conducted and managed **in** the province. A key aspect of the Earth Future Lottery as described in the statement of facts is its proposed use of the internet as a means of accessing the global market and having persons physically located outside Prince Edward Island participate in the lottery using its interactive website through their home computers.⁶⁹

38. Interpreting Parliament’s command in subsection 207(1)(b) that the lottery scheme be conducted “in that province” (*i.e.*, in Prince Edward Island), the *Earth Future* court concluded that the proposed scheme could not pass muster. As Chief Justice Mitchell elaborated:

In my view the above stated plan to “**conduct**” the lottery **in the global market** would render the scheme ineligible for licensing under s-s. 207(1)(b). ... [C]onducting a lottery “**from**” Prince Edward Island is not the same as conducting it “**in**” Prince Edward Island. A lottery conducted **from** Prince

⁶⁷ [Reference re Earth Future Lottery](#), 2003 SCC 10, para. 1 [[Earth Future](#)].

⁶⁸ Now styled as the Prince Edward Island Court of Appeal.

⁶⁹ [Earth Future Lottery \(P.E.I.\) \(Re\)](#), 2002 PESCAD 8, para. 10 (emphasis in original) [[Earth Future \(C.A.\)](#)], *aff’d* [Earth Future](#).

Edward Island is not necessarily conducted **in** the province. Here the intent is to conduct a lottery throughout the world. Subsection 207(1)(b) requires that the lottery scheme be conducted and managed **in** the province, **not just from the province**.⁷⁰

39. That statutory analysis applies here with equal force. As Ontario concedes (at para. 103), the relevant language in both subsections 207(1)(a) and 207(1)(b)—“to conduct and manage a lottery scheme **in that province**”—is **identical**.⁷¹ Indeed, the *Earth Future* court specifically noted that “extra-provincial and international lottery sales transactions are not permitted by s-s. 207(1)(b) **or by any other provision of s. 207**”, which would include subsection 207(1)(a).⁷²

40. As a result, the same, straightforward interpretive exercise that dictated the outcome in *Earth Future* dooms Ontario’s proposed scheme. Under the proposed scheme, players from Ontario and international jurisdictions will participate in a **single** lottery scheme for purposes of subsection 207(1)(a). As one of Ontario’s affiants explains: “Using poker as an example, a player in Ontario would be able to sit down at a virtual poker table **and compete with players from around the world**.”⁷³ That is, the Ontario player and “international” players would be playing **in a single game** (and thus a single “lottery scheme” under subsection 207(1)(a)). “Similarly,” Ontario’s affiant explains, “if daily fantasy sports were to be offered, an individual in Ontario could wager and

⁷⁰ [Earth Future \(C.A.\)](#), para. 10 (emphasis in original).

⁷¹ As Ontario also concedes (at para. 109), similar language also exists in subsections [207\(1\)\(c\)](#) of the *Criminal Code* (“to conduct and manage a lottery scheme in a province”), [207\(1\)\(d\)](#) (“to conduct and manage a lottery scheme at a public place of amusement in that province”), and [207\(1\)\(f\)](#) (“to conduct and manage in the province”). To prevail, Ontario must explain how each of these similarly-worded provisions should also command different interpretations.

⁷² [Earth Future \(C.A.\)](#), para. 13 (emphasis added).

⁷³ Sweny Affidavit, para. 22, AGO Record Vol. 1, p. 365 (emphasis added).

participate in a daily fantasy sports league *involving individuals from outside of Canada*.⁷⁴ Again, the Ontario player and “international” players would be playing *in a single game*. Thus, just like the scheme in *Earth Future*, Ontario’s proposed scheme includes both players “in” Ontario *and* players “in” other jurisdictions across the world, including the rest of Canada.

41. In the face of this binding authority, Ontario implies (at para. 99) that *Earth Future*’s precedential force is diminished because it was merely “affirmed in a one-line decision by the Supreme Court”. That brevity has not stopped the Supreme Court itself from citing its own decision.⁷⁵ Indeed, the Supreme Court’s brevity would appear to reflect how weak the contrary argument, now advanced by Ontario, was in that case. The Supreme Court did not even see fit to call on the Respondents for oral submissions during the hearing in *Earth Future*.⁷⁶

42. At any rate, the binding effect of a decision of the Supreme Court of Canada is not contingent on the length of the reasons. This Court has even observed that “[i]t is best to begin from the premise that all *obiter* from the Supreme Court of Canada should be followed.”⁷⁷ That posture of respect for the guidance from the Supreme Court is especially instructive here because the conclusion in *Earth Future*—that a lottery scheme conducted and managed from a province, but including players from outside that province, is not “in that province”—was not *obiter*; it was the *ratio* and it binds this Court.

⁷⁴ Sweny Affidavit, para. 22, AGO Record Vol. 1, p. 365 (emphasis added).

⁷⁵ See [Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers](#), 2004 SCC 45, para. 41 [[SOCAN](#)].

⁷⁶ [Earth Future](#), para. 1.

⁷⁷ [R v. Prokofiew](#), 2010 ONCA 423, para. 21, *aff’d* [2012 SCC 49](#).

(ii) **Ontario’s Attempt To Distinguish *Earth Future* Is Not Persuasive**

43. In its attempt to side-step *Earth Future*, Ontario seeks (at paras. 99-111) to distinguish *Earth Future* because it “addressed charitable lotteries not provincial lotteries.” That attempt is not persuasive.

44. The identical language in subsections 207(1)(a) and 207(1)(b) is fatal to Ontario’s argument. As the Supreme Court has observed in another case involving adjacent *Criminal Code* provisions with identical language, “[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation,”⁷⁸ known as the presumption of consistent expression. This Court has described this straightforward canon of interpretation as the “Same Words, Same Meaning Principle”.⁷⁹

45. Granted, the canon has exceptions. But as Justice Watt has explained for this Court, a departure from the interpretive rule requires context that “clearly indicates” different meanings.⁸⁰ Ontario does not come close to meeting that high bar here. Instead, Ontario merely gestures (at paras. 103-104, 111) at “cooperative federalism concerns.”

46. A genuine concern for cooperative federalism undermines Ontario’s case rather than supporting it. Ontario’s novel scheme has trampled over the interests of other provinces as iGO Operators use their legal base in Ontario to promote their illegal business in the rest of Canada with nation-wide advertising and re-directs to International Sites. Such conduct can hardly be characterized as cooperative federalism.

⁷⁸ [R v. Zeolkowski](#), [1989] 1 SCR 1378, p. 1387.

⁷⁹ [R v. Ali](#), 2019 ONCA 1006, para. 68 [[Ali](#)].

⁸⁰ [Ali](#), para. 68.

47. In any event, the ability of charitable and religious organizations to operate under the exception in subsection 207(1)(b) depends on their ability to secure a provincial licence on terms **set by the province**.⁸¹ Thus, for any province that wishes to license charities and religious organizations to benefit from pooled international liquidity, the interpretation in *Earth Future* raises similar, if not the same, cooperative federalism concerns that Ontario now flags under subsection 207(1)(a).⁸² Yet such concerns did not determine the outcome in *Earth Future*, and they should not here.

(iii) ***Earth Future* Remains Good Law**

48. Finally, Ontario contends (at para. 114) that *Earth Future* should not be followed because “the degree of technological change, particularly the growth of mobile technology, in the twenty years since *Earth Future* was decided ‘fundamentally shifts the parameters of the debate.’”⁸³ This assertion does not help Ontario’s case.

49. To be sure, Ontario is correct when it says (at para. 117) that “[a]ccessing the internet using a smartphone in one’s pocket is now ubiquitous”. But if anything, the ubiquity of online gambling militates in favour of a **narrower** interpretation of subsection

⁸¹ See [s. 207\(1\)\(b\)](#) of the *Criminal Code* (providing for the licence requirement); [s. 207\(2\)](#) (providing that the licence “may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the [province] may prescribe”).

⁸² Similarly, Ontario’s reliance (at paras. 106-108) on then-Professor Monahan and Mr. Goldlist’s law review article does not help its case. The authors accepted that the gaming activities of a provincial government must still occur “**in that jurisdiction**” and “**in a province**” (emphasis added), and were chiefly concerned with the authority of the courts to scrutinize the financial structure of provincially-managed lottery schemes under subsection 207(1)(a) in the same way that courts were prepared to review the validity of the financial relationship between charitable organizations and private operators under subsection 207(1)(b). See Patrick J. Monahan & A. Gerold Goldlist, “Roll Again: New Developments concerning Gaming” (1999) 42: Issues 2 & 3 Crim LQ 182, pp. 211-213, 225-226, Book of Authorities of Ontario, Tab 4.

⁸³ Ontario’s argument that this case involves a new legal issue is addressed directly above at paras. 47-51.

207(1)(a), given Parliament’s express concern to mitigate harms that might arise from legalized gambling. When Parliament last considered subsection 207(1)(a) in 1985, the Chairman of the responsible Parliamentary committee recognized the grave concerns, expressed by the Attorney General of Ontario and others, regarding the potential expansion of gambling activities, which would in turn increase the risk of money laundering and the potential participation of organized crime.⁸⁴ The fact that every Canadian can now access online gambling websites from the smartphone in their pocket only increases these risks—it does not render them irrelevant.

50. Ontario also appeals to policy, arguing (at para. 120) that its favoured interpretation “would permit Ontario payers to reap the benefits of sharing liquidity with players in international lotteries.” Policy cannot amend the *Criminal Code*, but in any event, there are policy arguments on both sides. The benefits of liquidity touted by Ontario and its supporting interveners mean that Ontario’s proposed scheme will strengthen not only iGO Operators, but also the International Sites that illegally target Canadians outside Ontario.⁸⁵ And as Ontario acknowledges, unregulated gambling websites “give rise to serious risks ... including problem gambling; fraud; cheating; and money laundering.”⁸⁶

51. Ultimately, the Court need not wade into these waters. If the statute that Parliament has enacted is, in fact, technologically obsolete, Ontario’s remedy lies in persuading Parliament to amend it to account for modern policy realities.⁸⁷

⁸⁴ 1985 Report, AGO Record Vol. 2, pp. 721-722.

⁸⁵ AGO Factum, paras. 42, 48-49; Hill Affidavit, paras. 30-32, 36-38, CLC Record, pp. 10, 12-13.

⁸⁶ AGO Factum, para. 39; see also Todres Affidavit, para. 52, AGO Record Vol. 1, p. 41.

⁸⁷ As Peter Hogg and others have argued, a court’s commitment to *stare decisis* should be at its zenith in the statutory context because “for non-constitutional cases, legislators can change the law

B. In the Alternative, Ontario’s Proposed Construction of Subsection 207(1)(a) Is Incorrect

52. Even independent of *Earth Future*, principles of statutory interpretation compel the same conclusion. Ontario contends (at para. 56) that “[p]roperly interpreted”, subsection 207(1)(a) requires only that any one lottery scheme—that is, any poker game or sports bet—be “sufficiently connected to the province.” But Ontario arrives at this erroneous result by ignoring well-established tools of statutory interpretation and relevant legislative history, misapplying constitutional law principles, and failing to consider the dramatic consequences of its approach.

(i) Familiar Tools of Statutory Interpretation and The Legislative History Confirm That Subsection 207(1)(a) Means What It Says

53. “[T]he best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what it says, when this can be clearly ascertained.”⁸⁸ A plain reading of subsection 207(1)(a) shows that Parliament’s use of “*in* that province” means “*in* that province”—and not “from that province”, “partially in that province”, or “in that province and anywhere else in the world so long as any overall scheme is sufficiently connected to that province”. Reading the provision in context reinforces this conclusion.⁸⁹

if they reject the judicial solution”. See Malcom Rowe & Leanna Katz, *A Practical Guide to Stare Decisis* 41 Windsor Rev. Legal & Soc. Issues 1 (2020), p. 16, CLC BOA, Tab 17; see also Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2017) (2019 Supplement) Vol. 1, ch. 8.7, §8.13, CLC BOA, Tab 18.

⁸⁸ [Ontario v. Canadian Pacific Ltd.](#), [1995] 2 SCR 1031, para. 11.

⁸⁹ [Ontario v. Canadian Pacific Ltd.](#), [1995] 2 SCR 1031, para. 11 (“[T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole.”).

54. *First*, the language of section 207 shows that far from being silent on issues of extraterritoriality, Parliament explicitly spoke to both the permissible scope of extraterritorial activities under section 207 and attached conditions to such activities where it permitted them. Each of the exceptions created for lottery schemes under subsections 207(1)(a), (b), (e), and (f) permit activities in “other province[s]”, but require the consent or cooperation of those other provinces for such activities.⁹⁰ Similarly, the exception in subsection 207(1)(h) allows “any person in Canada” to print and export certain betting-related materials to any place, but then requires that such materials be shipped only to “a place where it is ... lawful to use such a thing”.⁹¹ Thus, in each case where Parliament permitted extraterritorial activities in section 207, Parliament created an exception but also attached conditions to that exception. Against that backdrop, it would be anomalous for Parliament to have intended that provincial governments could engage in activities with “international elements” under subsection 207(1)(a) **without any restrictions whatsoever**—particularly where those activities involved otherwise illegal gambling in the rest of Canada.

55. *Second*, the fact that Parliament used distinctive language in the various provisions within section 207 to refer to extraterritorial activities is significant. While subsections 207(1)(a), (b), (e), and (f) each speak of activities in the “other province”, subsection 207(1)(h) speaks of activities in any “place”. Where Parliament “has chosen to use different terms, it must have done so intentionally in order to indicate different

⁹⁰ See *Criminal Code*, [ss. 207\(1\)\(a\)](#) (lottery schemes conducted and managed by a province), [207\(1\)\(b\)](#) (lottery schemes conducted and managed by charitable and religious organizations licensed by a province), [207\(1\)\(e\)](#) (certain sale activities in another province), and [207\(1\)\(f\)](#) (lottery schemes conducted and managed by other persons licensed by a province).

⁹¹ *Criminal Code*, [s. 207\(1\)\(h\)](#).

meanings.”⁹² The legislative history makes clear that this broader reference to “place” was designed to “permit[] Canadian companies to export materials related to lotteries and gaming” internationally.⁹³ Having thus drawn a domestic-international distinction through the use of “other province[s]” and “place[s]” in the legislative text, it is strange to believe that Parliament nevertheless understood activities “in that province” would also permit “international elements”, as Ontario urges. It certainly cannot overcome the presumption against extraterritoriality, which requires “clear words or necessary implication to the contrary”.⁹⁴

56. *Third*, where Parliament expressly authorized foreign gambling activities, it did so with unambiguous language that signalled a clear departure from its general prohibition against foreign lotteries. For example, subsection 204(1) exempts bets on certain horse races “in **or out of** Canada.”⁹⁵ Similarly, section 207.1 permits certain betting on “voyages on an **international** cruise ship.”⁹⁶ It is a familiar principle of statutory interpretation that “if a statute specifies one exception (or more) to a general rule, **other exceptions are not to be read in.**”⁹⁷ Yet Ontario’s approach effectively reads in a new exception permitting “international elements” under subsection 207(1)(a)—even though Parliament

⁹² [Agraira v. Canada \(Public Safety and Emergency Preparedness\)](#), 2013 SCC 36, para. 81.

⁹³ “Bill C-81, an Act to amend the Criminal Code (lotteries),” 2nd reading, House of Commons Debates, 33-1, vol. VI (November 6, 1985), AGO Record Vol. 2, p. 540 (discussing [s. 207\(1\)\(h\)](#) and how “Canadian companies have been highly regarded for their expertise in matters related to technology and printing”).

⁹⁴ [SOCAN](#), para. 54.

⁹⁵ *Criminal Code*, [s. 204\(1\)](#) (emphasis added).

⁹⁶ *Criminal Code*, [s. 207.1](#) (emphasis added).

⁹⁷ [Grosman v. Cookson](#), 2012 ONCA 551, para. 21 (emphasis added); see also Ruth Sullivan, *The Construction of Statutes*, 7th ed, 8.09 [3] [“**Sullivan**”], CLC BOA, Tab 19 (“Patterns in legislation are assumed to be intended rather than inadvertent. Once a pattern has been established, it becomes the basis for expectations about legislative intent.”).

has spoken clearly on other occasions where it wishes to permit lottery schemes with international elements.

57. *Fourth* and finally, Ontario attempts (at para. 91) to distance itself from the prohibition of foreign lotteries in subsection 206(7) of the *Code* by suggesting that when a province conducts a domestic lottery under subsection 207(1)(a), it is lawful “notwithstanding” any provision in Part VII, including subsection 206(7). The problem for Ontario is that the “notwithstanding” language was included in the 1969 amendment that first authorized provincial lotteries. The legislative history is clear that Parliament intended that while “domestic lotteries” would be left to “provincial discretion”, “foreign lotteries ... **are still illegal**”.⁹⁸ Simply put, it was never Parliament’s intent that provincially-run lotteries could themselves become foreign lotteries.

58. Ontario repeatedly points (at paras. 65-67) to legislative statements acknowledging the breadth of provincial autonomy. But emphasizing how broad a province’s powers under subsection 207(1)(a) may be does not answer the separate question of **where** those broad powers may be exercised geographically.

59. In sum, even if there were any ambiguity about the ordinary meaning of “in that province”, the treatment of foreign lottery schemes elsewhere in the statute and the many references in the legislative record to the territorial limits on provincial autonomy together underscore the common sense reading that “in that province” means “in that province”.

⁹⁸ 1969 Committee, AGO Record Vol. 2, p. 458 (emphasis added).

(ii) The Rules of Statutory Interpretation and Legislative History Take Precedence Over Background Principles of Constitutional Law

60. In service of its preferred interpretation, Ontario also contends (at para. 70) that subsection 207(1)(a) should be interpreted “consistent with the constitutional limitation of provincial legislative power to matters that arise ‘in each province’ or ‘in the province’” based on a version of the “real and substantial connection” test. A failure to do so, Ontario says (at para. 104), would “undermine[] the presumption of constitutionality” of subsection 207(1)(a). This argument fails for at least three reasons.

61. *First*, Ontario cannot use background principles of constitutional law to override the plain meaning of subsection 207(1)(a). “The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision.”⁹⁹ As a result, reliance on background constitutional law principles should be a last resort, not a first impulse. As Professor Sullivan has admonished, “[a] court that interprets a text so as to distort its ordinary meaning in order to ensure compliance with the *Charter* or applies the presumption of compliance without considering other evidence of legislative intent is obviously in error.”¹⁰⁰ That would be the case here under Ontario’s approach, because familiar tools of statutory interpretation, including the “Same Words, Same Meaning Principle”, resolve the meaning of “in that province” without the need for any presumption, as discussed above.

62. *Second*, Ontario’s reliance on the *Unifund* line of cases (at paras. 74-78) is misplaced because those cases concern a province’s power to regulate extra-provincial

⁹⁹ [R v. D.A.I.](#), 2012 SCC 5, para. 26.

¹⁰⁰ Sullivan, 16.02 [2], CLC BOA, Tab 19.

parties, while Ontario has expressly disclaimed any such regulatory authority in this case. As the Supreme Court recently explained, “courts have regularly applied the *Unifund* test when determining whether a provincial regulatory scheme constitutionally applies **to out-of-province defendants.**”¹⁰¹ Despite such a challenge from an out-of-province defendant, the *Unifund* test “limits, or reads down, the territorial reach of otherwise broadly framed provincial legislation, consistent with the territorial restrictions” in section 92 of the *Constitution Act, 1867*.¹⁰² Thus, for example, the *Unifund* test has been used to determine whether out-of-province defendants breached provincial securities laws.¹⁰³

63. The problem for Ontario is that it has expressly disclaimed any regulatory authority over out-of-province actors. As Ontario says (at para. 49): “**Neither Ontario nor** iGO would conduct, manage, or operate the International Sites, **which would be subject to the laws of the jurisdictions in which they operate.** Ontario would **not** be responsible for or to individuals participating in games and betting outside of Canada” (emphasis added). Ontario’s reliance on *Unifund* to justify **unregulated** conduct outside Ontario is as ironic as it is ineffective.

64. *Third*, as much as Ontario is making a more general assertion that a broad interpretation of subsection 207(1)(a) is necessitated by principles of cooperative federalism, that claim too is misguided. As Ontario has itself asserted previously, “the Criminal Law generally has been the *principal government tool* in the control of gambling,

¹⁰¹ [Sharp v. Autorité des marchés financiers](#), 2023 SCC 29, para. 105 [[Sharp](#)] (emphasis added).

¹⁰² [Sharp](#), para. 114.

¹⁰³ See, e.g., [Berger v. Saskatchewan \(Financial and Consumer Affairs Authority\)](#), 2019 SKCA 89; [McCabe v. British Columbia \(Securities Commission\)](#), 2016 BCCA 7.

first in England and later in Canada.”¹⁰⁴ And in the exercise of its criminal law powers, “Parliament is free to define the area in which it chooses to act and, in so doing, may leave other areas open to valid provincial legislation.”¹⁰⁵ In particular, “Parliament ... may define those agencies or instrumentalities exempt from the prohibition.”¹⁰⁶ The scope of such an exemption is itself “a definition of the crime” and thus “a constitutionally permissive exercise of the criminal law power.”¹⁰⁷

65. As a result, the scope of the exception in subsection 207(1)(a)—whether broad or narrow—should be informed by the well-established tools of statutory interpretation, not a pre-emptive appeal to background constitutional law principles. For the reasons discussed above, those tools of statutory interpretation foreclose Ontario’s proposed construction of subsection 207(1)(a).

(iii) Ontario’s Proposed Interpretation Risks Dramatic Consequences That Would Upset the Longstanding Interpretation of Subsection 207(1)(a)

66. Beyond the statute’s text and context, the Court should also be clear-eyed about the potentially sweeping consequences of Ontario’s proposed interpretation. If the Court agrees with Ontario that subsection 207(1)(a) allows Ontario to extend its lottery schemes to “international elements” outside the province’s boundaries, then Ontario may also one day claim the power to conduct and manage lottery schemes *in other provinces* so long as they also have a “sufficient connection” to Ontario.

¹⁰⁴ AGO Earth Future Factum, para. 7, CLC BOA, Tab 16 (emphasis in original).

¹⁰⁵ [R v. Furtney](#), [1991] 3 SCR 89, p. 102 [[Furtney](#)].

¹⁰⁶ [Furtney](#), p. 107.

¹⁰⁷ [Furtney](#), pp. 106-107; see also [RJR-MacDonald Inc. v. Canada \(Attorney General\)](#), [1995] 3 SCR 199, para. 56, *per* La Forest J., dissenting (but not on this point).

67. Subsection 207(1)(a) only requires provincial consent as long as the iGaming Ontario lottery schemes are operating “*in* [Ontario] *and* the other province[s].”¹⁰⁸ But because Ontario claims (at paras. 121-123) that a scheme that includes extraterritorial liquidity is “in” Ontario so long as the scheme has a “sufficient connection” to Ontario, by Ontario’s own logic extraterritorial liquidity that encompasses ***even other provinces*** could be “in” Ontario—without triggering the protective condition in subsection 207(1)(a) requiring the consent of other provinces for activity that intrudes on their territory.

68. To be sure, Ontario concedes (at para. 9) that it would be unlawful for players located in other Canadian provinces to participate in iGaming Ontario lottery schemes without the consent of those other provinces. That is a welcome concession for the CLC members, but it contrasts with Ontario’s refusal to accept any responsibility for illegal conduct of affiliates of iGO Operators in the rest of Canada.¹⁰⁹ Nor has Ontario explained how it would ensure Canadians outside Ontario are precluded from accessing the International Sites that would share liquidity with Ontario-based users.

69. This Court is under no obligation to accept bald assertions that Canadians outside Ontario would not participate in their proposed pooled liquidity scheme where neither iGaming Ontario, the AGCO, nor Ontario have shown either the inclination or the ability to do anything about Canadians outside Ontario accessing the very International Sites with which Ontario now wishes to pool liquidity. Moreover, even if Ontario had taken enforcement actions in the past, there could be no guarantee that a future Attorney

¹⁰⁸ *Criminal Code*, [s. 207\(1\)\(a\)](#) (emphasis added).

¹⁰⁹ See, e.g., Todres Transcript, JBT, pp. 71-73, 85-86, 88-89, qq. 176-180, 208-209, 215-217; Cross-Examination Brief of Jesse Todres (September 5, 2024), JBT, Tabs 10-15, pp. 278-314.

General of Ontario would do the same. Thus, this Court should rule that Ontario's proposed scheme—both on the plain meaning of subsection 207(1)(a) and on the record of how iGO Operators and their affiliates currently operate—would be contrary to law.

70. Ironically, it was an earlier Attorney General of Ontario who warned in *Earth Future* of the prospect that provinces would extend their lottery schemes outside their borders to other provinces if the Supreme Court adopted an expansive interpretation of subsection 207(1)(b). As the Attorney General explained, if such an expansive view of the “in that province” language were adopted:

there is nothing to stop any one of the thirteen provincial or territorial governments (or indeed, all thirteen) from establishing any number of similar high stakes lotteries with the goal of increasing the amount of gambling in other parts of Canada. ... [The provinces would] compete with each other for gambling dollars without necessary regard for the integrity of gambling regimes which impact upon communities completely beyond their own borders.¹¹⁰

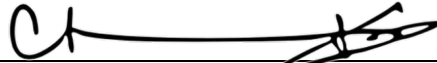
71. The same risk exists here. The Court should make no mistake about the logical implications of Ontario's dramatic assertion of statutory authority. While the issue today is international liquidity, the next case will involve a province seeking to assert authority to conduct lottery schemes that extend across the country. And indeed, even if that is not what Ontario proposes *de jure* at this time, it is what it proposes *de facto* given the ubiquity of illegal gambling using International Sites among Canadians outside Ontario.

¹¹⁰ AGO Earth Future Factum, para. 16, CLC BOA, Tab 16.

PART V ~ ANSWER REQUESTED

72. The CLC members respectfully submit that this Court should answer the Reference question “no”.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October 2024.



Chanakya A. Sethi

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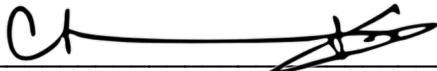
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Lotteries and Gaming Saskatchewan and
Manitoba Liquor and Lotteries
Corporation

CERTIFICATE REQUIRED BY RULE 61.12(3)(f)

1. An order under Rule 61.09 (2) is not required.
2. The CLC members estimate that four hours will be required for the CLC members' oral argument, consistent with the time provided for in the order of van Rensburg J.A. dated October 1, 2024.
3. The CLC members' factum complies with Rule 61.12 (5.1) and the order of van Rensburg J.A. dated October 1, 2024.
4. The number of words contained in Parts I to V of the CLC members' factum is 9,077 words, including all footnotes.
5. I am satisfied as to the authenticity of every authority listed in Schedule A.

October 25, 2024



Chanakya A. Sethi

Lawyer for the Interveners, Atlantic Lottery Corporation Inc., British Columbia Lottery Corporation, Lotteries and Gaming Saskatchewan and Manitoba Liquor and Lotteries Corporation

SCHEDULE “A”

LIST OF AUTHORITIES

A. JURISPRUDENCE

1. [*Agraira v. Canada \(Public Safety and Emergency Preparedness\)*](#), 2013 SCC 36
2. [*Berger v. Saskatchewan \(Financial and Consumer Affairs Authority\)*](#), 2019 SKCA 89
3. [*Earth Future Lottery \(P.E.I.\) \(Re\)*](#), 2002 PESCAD 8, *aff'd* [2003 SCC 10](#)
4. [*Grosman v. Cookson*](#), 2012 ONCA 551
5. [*McCabe v. British Columbia \(Securities Commission\)*](#), 2016 BCCA 7
6. [*Ontario v. Canadian Pacific Ltd.*](#), [1995] 2 SCR 1031
7. [*R v. Ali*](#), 2019 ONCA 1006
8. [*R v. D.A.I.*](#), 2012 SCC 5
9. [*R v. Furtney*](#), [1991] 3 SCR 89
10. [*R v. Prokofiew*](#), 2010 ONCA 423, *aff'd* [2012 SCC 49](#)
11. [*R v. Zeolkowski*](#), [1989] 1 SCR 1378
12. [*Reference re Earth Future Lottery*](#), 2003 SCC 10
13. [*RJR-MacDonald Inc. v. Canada \(Attorney General\)*](#), [1995] 3 SCR 199
14. [*Sharp v. Autorité des marchés financiers*](#), 2023 SCC 29
15. [*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*](#), 2004 SCC 45

B. SECONDARY MATERIALS

1. Factum of the Intervener Attorney General of Ontario, *Reference re Earth Future Lottery* (SCC Case No. 29213) (January 30, 2003)
2. Malcom Rowe and Leanne Katz, “A Practical Guide to Stare Decisis” 41 Windsor Rev. Legal & Soc. Issues 1 (2020)
3. Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2017) (2019 Supplement)

4. Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Ottawa: LexisNexis Canada, 2022)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

[Criminal Code](#), R.S.C. 1985, c. C-46, ss. 204(1), 206, 207(1)(a-f, h), 207(2), 207(4), 207.1

Exemption

204 (1) [Sections 201](#) and [202](#) do not apply to

(a) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

(b) a private bet between individuals not engaged in any way in the business of betting;

(c) bets made or records of bets made through the agency of a pari-mutuel system on running, trotting or pacing horse-races if

(i) the bets or records of bets are made on the race-course of an association in respect of races conducted at that race-course or another race-course in or out of Canada, and, in the case of a race conducted on a race-course situated outside Canada, the governing body that regulates the race has been certified as acceptable by the Minister of Agriculture and Agri-Food or a person designated by that Minister pursuant to subsection (8.1) and that Minister or person has permitted pari-mutuel betting in Canada on the race pursuant to that subsection, and

(ii) the provisions of this section and the regulations are complied with.

[...]

Offence in relation to lotteries and games of chance

206 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;

(b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale,

barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;

(c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;

(d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

(e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

(f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

(g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

(h) for valuable consideration carries on or plays or offers to carry on or to play, or employs any person to carry on or play in a public place or a place to which the public have access, the game of three-card monte;

(i) receives bets of any kind on the outcome of a game of three-card monte; or

(j) being the owner of a place, permits any person to play the game of three-card monte therein.

Definition of three-card monte

(2) In this section, **three-card monte** means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

Exemption for fairs

(3) Paragraphs (1)(f) and (g), in so far as they do not relate to a dice game, three-card monte, punch board or coin table, do not apply to the board of an annual fair or exhibition, or to any operator of a concession leased by that board within its own grounds and operated during the fair or exhibition on those grounds.

Definition of fair or exhibition

(3.1) For the purposes of this section, **fair or exhibition** means an event where agricultural or fishing products are presented or where activities relating to agriculture or fishing take place.

Offence

(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

Lottery sale void

(5) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending on or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged is forfeited to Her Majesty.

***Bona fide* exception**

(6) Subsection (5) does not affect any right or title to property acquired by any *bona fide* purchaser for valuable consideration without notice.

Foreign lottery included

(7) This section applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

Permitted lotteries

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

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

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof,

to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

(c) for the board of a fair or of an exhibition, or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof has

(i) designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and

(ii) issued a licence for the conduct and management of a lottery scheme to that board or operator;

(d) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme at a public place of amusement in that province if

(i) the amount or value of each prize awarded does not exceed five hundred dollars, and

(ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed two dollars;

(e) for the government of a province to agree with the government of another province that lots, cards or tickets in relation to a lottery scheme that is by any of paragraphs (a) to (d) authorized to be conducted and managed in that other province may be sold in the province;

(f) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or such other person or authority in the province as may be designated by the Lieutenant Governor in Council thereof, to conduct and manage in the province a lottery scheme that is authorized to be conducted and managed in one or more other provinces where the authority by which the lottery scheme was first authorized to be conducted and managed consents thereto;

[...]

(h) for any person to make or print anywhere in Canada or to cause to be made or printed anywhere in Canada anything relating to gaming and betting that is to be used in a place where it is or would, if certain conditions provided by law are met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver or allow to be sent, transmitted, mailed, shipped or delivered or to accept for carriage or transport or convey any such thing where the destination thereof is such a place.

[...]

Terms and conditions of licence

(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province as described in paragraph (1)(b), (c), (d) or (f) may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

[...]

Definition of lottery scheme

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

- (a) three-card monte, punch board or coin table;
- (b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any horse-race; or
- (c) for the purposes of paragraphs (1)(b) to (f), a game or proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g) that is operated on or through a computer, video device, slot machine or a dice game.

[...]

Exemption — lottery scheme on an international cruise ship

207.1 (1) Despite any of the provisions of this Part relating to gaming and betting, it is lawful for the owner or operator of an international cruise ship, or their agent, to conduct, manage or operate and for any person to participate in a lottery scheme during a voyage on an international cruise ship when all of the following conditions are satisfied:

- (a) all the people participating in the lottery scheme are located on the ship;
- (b) the lottery scheme is not linked, by any means of communication, with any lottery scheme, betting, pool selling or pool system of betting located off the ship;
- (c) the lottery scheme is not operated within five nautical miles of a Canadian port at which the ship calls or is scheduled to call; and
- (d) the ship is registered
 - (i) in Canada and its entire voyage is scheduled to be outside Canada, or
 - (ii) anywhere, including Canada, and its voyage includes some scheduled voyaging within Canada and the voyage

(A) is of at least forty-eight hours duration and includes some voyaging in international waters and at least one non-Canadian port of call including the port at which the voyage begins or ends, and

(B) is not scheduled to disembark any passengers at a Canadian port who have embarked at another Canadian port, without calling on at least one non-Canadian port between the two Canadian ports.

* * *

Criminal Code, S.C. 1892 (55-56 Vict), c. 29, Part XIV, ss. 204, 205

Betting and pool-selling

204. Every one is guilty of an indictable offence, and Betting and liable to one year's imprisonment, and to a fine not exceeding pool-selling. one thousand dollars, who-

(a.) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

(b.) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool ; or

(c.) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged; or

(d.) records or registers any bet or wager, or sells any pool, upon the result-

(i.) of any political or municipal election

(ii.) of any race;

(iii.) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals or made on the race course of an incorporated association during the actual progress of a race meeting.

Lotteries

205. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars, who-

(a.) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever ; or

(b.) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as foresaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all such property so sold, lent, given, bartered or exchanged, is liable to be forfeited to

any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any bond fide purchaser for valuable consideration, without notice.

5. This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share.

6. This section does not apply to-

(a.) the division by lot or chance of any property by joint tenants or tenants in common. or persons having joint interests (droits indivis) in any such property; or

(b.) raffles for prizes of small value at any bazaar held for any charitable object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars ;
or

(c.) any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of art produced by the labour of the members of, or published by or under the direction of, such incorporated society;

(d.) the Credit Foncier di Bas-Canada, or to the Credit Foncier Franco-Canadien.

* * *

Criminal Law Amendment Act, S.C. 1968-69 (17-18 Eliz II), c. 38, s. 13

13. The said Act is further amended by adding thereto, immediately after section 179 thereof, the following section:

Permitted lotteries

179A. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it shall be lawful

Government of Canada

(a) for the Government of Canada to conduct and manage a lottery scheme in accordance with regulations made by the Governor in Council and for that purpose for any person in accordance with such regulations to do any thing described in any of paragraphs (a) to (f) of subsection (1) or subsection (4) of section 179;

Provincial Government

(b) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and such other province, in accordance with any law enacted by the legislature of that province and for that purpose for any person in accordance with such law to do any thing described in any of paragraphs (a) to (f) of subsection (1) or subsection (4) of subsection 179;

Charitable or religious organizations

(c) for a charitable or religious organization, under the authority of a licence issued by the Lieutenant-Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant-Governor in Council thereof, to conduct and manage a lottery scheme in that province and for that purpose for any person under the authority of such licence to do any thing described in any of paragraphs (a) to (g) of subsection (1) or subsection (4) of section 179, otherwise than in relation to a dice game, three card monte, punch board or coin table, if

(i) the proceeds from the lottery scheme are used for a charitable or religious object or purpose, and

(ii) in the case of a lottery scheme conducted by the charitable or religious organization at a bazaar,

(A) the amount or value of each prize awarded does not exceed one hundred dollars, and

(B) the money or other valuable consideration paid to secure a chance to win a prize does not exceed fifty cents;

Agricultural fairs or exhibitions

(d) for an agricultural fair or exhibition or an operator of a concession leased by an agricultural fair or exhibition board, under the authority of a licence issued by the Lieutenant- Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant-Governor in Council thereof, to conduct and manage a lottery scheme in that province and for that purpose for any person under the authority of such licence to do any thing described in any of paragraphs to (f) of subsection (1) or subsection (4) of section 179; and

Other Persons

(e) for any person, under the authority of a licence issued by the Lieutenant-Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant-Governor in Council thereof, to conduct and manage a lottery scheme at a public place of amusement in that province and for that purpose for any person under the authority of such licence to do any thing described in any of paragraphs (a) to (g) of subsection (1) or subsection (4) of section 179, otherwise than in relation to a dice game, three-card monte, punch board or coin table, if

(i) the amount or value of each prize awarded does not exceed one hundred dollars, and

(ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed fifty cents.

Terms and conditions of licence

(2) Subject to this Act a licence issued by or under the authority of the Lieutenant-Governor in Council of a province as described in paragraph (c), (d) or (e) of subsection (1) may contain such terms and conditions relating to the management and conduct of the lottery scheme to which the licence relates as the Lieutenant-Governor in Council of that province or the person or authority in the province specified by him may prescribe.

Conducting lottery in province other than province where authorized

(3) Every one who, in any province other than a province in which a lottery scheme is by any paragraphs (b) to (e) of subsection (1) authorized to be managed and conducted, does any thing described in any of paragraphs (a) to (f) of subsection (1) of section 179 for the purpose of that lottery scheme is guilty of an indictable offence and liable to imprisonment for two years.

Receiving lottery tickets in province other than province where authorized

(4) Every one who, in any province other than a province in which a lottery scheme is by any of paragraphs (b) to (e) of subsection (1) authorized to be managed and conducted, does any thing authorized described in subsection (4) of section 179 for the purpose of that lottery scheme is guilty of an offence punishable on summary conviction.

“Lottery scheme”

(5) In this section, "lottery scheme" includes a game.

Exception re pari-mutuel betting

(6) Nothing in this section shall be construed as authorizing the making or recording of bets made through the agency of a pari-mutuel system, other than in accordance with section 178.

* * *

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

Court File No. COA-24-0185

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF ATLANTIC LOTTERY CORPORATION INC.,
BRITISH COLUMBIA LOTTERY CORPORATION, LOTTERIES
AND GAMING SASKATCHEWAN CORPORATION AND
MANITOBA LIQUOR AND LOTTERIES CORPORATION**

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