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 respecting permitting international play in an online provincial lottery scheme

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FACTUM OF THE INTERVENER, FLUTTER ENTERTAINMENT PLC

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PART I — OVERVIEW

1. The question on this reference is the proper interpretation of the words "in [the] province" in s. 207(1)(a) of the *Criminal Code*. This section exempts provincial lottery schemes from the general prohibition on gaming in s. 206, provided the scheme is "in [the] province".

2. This question arises because Ontario proposes to update its current online lottery scheme to unlock the potential of "pooled liquidity". Pooled liquidity entails individuals from multiple jurisdictions participating in peer-to-peer games (e.g., poker) and betting against one another. While the finer points of Ontario's pooled liquidity scheme will be developed in the future, the basic thrust the proposal is this: iGaming Ontario, a Crown corporation and agent, would conduct and manage Ontario gaming websites on which Ontario players would play; those players would interact with international players (and not players from elsewhere in Canada) playing on affiliated international sites, which would be subject to regulation in their own jurisdictions and subject to any conditions agreed to with Ontario. This would mean more available players, more available games and types of games, more significant opportunities for players, and more revenue for the province. Ontario would not be alone in enacting this model: France, Portugal, Spain, and certain U.S. states already have regulatory apparatuses that permit pooled liquidity.

3. Flutter submits that this scheme is permissible under s. 207(1)(a) because what Ontario proposes involves gaming that is conducted and managed wholly in Ontario, squarely in compliance with the requirement that the scheme be "in [the] province". The relevant principles of statutory interpretation support this conclusion. Most importantly, dynamic interpretation allows this Court to give effect to the way in which advances in technology have facilitated a modern scheme that coheres with the intention behind s. 207(1)(a). That intention, above all, is to "decriminaliz[e] [gaming] in circumstances where regulations will minimize the potential for

public harm" and to "provide the provinces with substantial room to conduct and operate provincially-run lotteries as they [see] fit, in accordance with local attitudes".[1] While Parliament could not have foreseen what Ontario now proposes when s. 207(1)(a) was enacted, this Court can nonetheless give effect to its intent to permit provincial flexibility in this legislative space.

4. CLC's[2] position to the contrary essentially rests on two arguments, both of which can be safely rejected. First, CLC argues that the decision in *Earth Future* governs. But *Earth Future* is distinguishable and has uncertain precedential force. In any event, *Earth Future* permits what Ontario proposes: a scheme entirely in Ontario, only available to players in Ontario. Second, CLC argues that Ontario's scheme will not be permissible because it will allow players outside of Ontario but within Canada to play against Ontario players, contrary to the *Criminal Code*. To the extent this is an argument about whether a permissible scheme is feasible or likely, it has no merit. The Reference Question and Schedule require this Court to assume that extra-provincial players will be excluded. Not only is this proposition not up for debate, CLC's submissions build in scandalous, irrelevant, and unjustified allegations of criminality that Flutter has had no opportunity to meaningfully respond to. The reference must not be hijacked in this way.

5. Ultimately, this reference is not about the nuances of what Ontario's scheme will look like — it is about what the law permits Ontario to do. There are many different ways in which technology could achieve the premises set out in the Reference Question and the Schedule. The legal opinion that the Lieutenant Governor has sought from this Court is whether, accepting those premises, the law provides the flexibility Ontario seeks. The answer is "yes" — it does.

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1 *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.); *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726, at para. 95, citing *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, *Great Canadian Casino Co. Ltd. v. Surrey (City of)* (1998), 53 B.C.L.R. (3d) 379, 1998 CanLII 2894 (S.C.).

2 The interveners Atlantic Lottery Corporation Inc., British Columbia Lottery Corporation, Lotteries and Gaming Saskatchewan Corporation, and Manitoba Liquor and Lotteries Corporation are referred to collectively as "CLC".

PART II — FACTS

6. The critical facts on this reference are set out in the Order in Council 210/2024 and its Schedule. The reference necessarily poses a hypothetical question: it inquires about the legality of a scheme that does not exist. The Lieutenant Governor has placed that hypothetical before the Court and the hypothetical facts and contours must be accepted within this proceeding. To do otherwise would be to answer a different question, which this Court has no jurisdiction to do.[3]

7. Accordingly, this Court should be wary of any party attempting to use additional evidence to undermine the hypothetical set out in the Order in Council and its Schedule.

8. Unfortunately, this is what CLC does. It goes beyond just litigating irrelevant facts — it makes scandalous allegations about alleged past and anticipated future criminal conduct of various parties, including Flutter. For that reason, two elements of CLC's submissions require response.

9. First, CLC places significant emphasis on its view that iGaming Ontario ("iGO") operators' affiliated international websites are operating illegally in other provinces.[4]

10. The irrelevant aspersions CLC casts on the nature of Ontario's current online gaming regime and Flutter's activities are made without any meaningful analysis. They are made without reference to any caselaw. There is no caselaw to reference: no Canadian court has ever found that allowing players physically located in Canada to participate in games operating globally, pursuant to lawful authority in their own jurisdictions, is illegal. And it is not just that no court has ever made this finding — no court has ever been asked to make this finding, as no Attorney General in Canada has prosecuted the conduct that CLC claims is so obviously offensive.[5]

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3 See *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 8.
4 See, e.g., CLC Factum, at paras. 15, 22-29.
5 See Cross-examination of William Hill, at p. 29(3)-30(15) [Joint Transcript Brief, at pp. 842-843].

11. CLC's allegations seek to commandeer the reference with a view to achieving an unearned jurisprudential advantage. CLC's interest in this advantage is no secret, as it has for some time threatened to seek remedies for the conduct that it sees as problematic.[6] This Court should not be lured into providing CLC here what it has not achieved elsewhere. Doing so would involve adjudicating CLC's allegations of criminality when the targets of its allegations — including Flutter — have not had an opportunity to adduce evidence to respond to them. The unfairness of any such adjudication could not be overstated.

12. In any event, these scandalous allegations are simply not relevant to the narrow legal question before the Court, and they are a calculated attempt to distract from that question. Providing an answer does not require engagement with CLC's opinions.

13. Second, CLC argues that "the only reasonable inference" is that, if the proposed scheme is approved, Flutter intends for Ontario players to play against Canadians in other provinces.[7]

14. This is not the only inference, it is not a reasonable one, and, most importantly, it is not even available. The Order in Council sets the terms of this reference, and it builds in an unassailable proposition: this Court's task is to determine whether the *Criminal Code* permits a lottery scheme that allows Ontario players "to participate in games and betting involving individuals outside of Canada". Likewise, the Schedule sets out an uncontestable factual matrix, at least insofar as the hypothetical scheme is concerned. It is clear 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". This proposition must be accepted.

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6 See Supplemental Affidavit of William Hill, sworn June 21, 2024, Exhibits 14-17, which are cease and desist letters sent to various entities operating online gaming websites between May and November, 2023.

7 CLC Factum, at para. 31.

15. The details of how players located in other provinces will be excluded, or how they will be prohibited from engaging with Ontario players through international websites, are neither relevant nor determinative. That said, there are many ways that this exclusion can be accomplished. George Sweny, a Vice-President of Regulatory Affairs at Flutter, details both the technological and contractual means available.[8] His evidence shows that Ontario and international jurisdictions could enter into agreements that would only permit international sites to be linked to iGO sites if both were not accessible to players in other provinces.[9] This "geofencing" is already done in Ontario.[10]

16. Simply put, what matters is the fact that players from elsewhere in Canada will be excluded, not how they will be excluded. This Court must accept that fact to answer the Reference Question.

PART III — ISSUES AND LAW

A. PRINCIPLES OF STATUTORY INTERPRETATION FAVOUR ONTARIO'S INTERPRETATION

17. The critical section in this reference, s. 207(1)(a) of the *Criminal Code*, permits the government of a province to conduct and manage a lottery scheme, as long as the scheme is "in that province". This is an exception to the general prohibition on gaming in s. 206.

18. As this Court recognized in *R. v. Andriopoulos*, what Parliament was concerned with in s. 207 was "decriminaliz[ing] [gaming] in circumstances where regulations will minimize the potential for public harm".[11] Section 207(1)(a) specifically represents a Parliamentary recognition that gaming and its concomitant risks are better addressed through functioning regulation by provincial governments than by a complete criminal prohibition.

19. Crucially, nothing in the language of s. 207(1)(a) prevents Ontario from implementing a

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8 Affidavit of George Sweny, sworn May 31, 2024, at paras. 23-28.
9 Affidavit of George Sweny, sworn May 31, 2024, at para. 27.
10 Affidavit of George Sweny, sworn May 31, 2024, at para. 17.
11 *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.).

system of gaming regulation that permits Ontario players to bet against international players. Such an interpretation must arise by implication, and only if this Court were to interpret s. 207(1)(a) to mean that it is only lawful for the government of a province to conduct and manage a lottery scheme "[entirely] in that province". This is effectively the interpretation that CLC advances.[12]

20. But well-worn canons of interpretation militate against CLC's restrictive interpretation and favour the conclusion that the proposed scheme fits within the "in that province" requirement. These principles include (i) dynamic interpretation and (ii) the strict construction of penal statutes.

(i) Dynamic interpretation invites consideration of technological advancements

(a) *The principle generally*

21. Dynamic interpretation requires that the interpretation of s. 207(1)(a) be sensitive to the ways that technology and commercial practice have developed since its enactment — all while giving effect to Parliament's intention, as the modern, purposive approach to statutory interpretation requires. As McLachlin C.J. explained in *974649 Ontario Inc.*, "[t]he intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day".[13] This principle is now memorialized in the *Interpretation Act*, which provides that "[t]he law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning".[14]

22. Four examples demonstrate how this principle has allowed legislative provisions to

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12 See CLC Factum, at paras. 53-54.
13 *R. v. 974649 Ontario Inc.*, 2001 SCC 81, at para. 38.
14 *Interpretation Act*, R.S.C., 1985, c. I-21, s. 10.

encompass technology that would not — or could not — have been in the drafters' minds.

23. First, in *John v. Ballingal*, this Court confirmed that the *Libel and Slander Act* applies to online and print newspapers, notwithstanding that only print newspapers existed at the time of enactment. Specifically, this Court recognized that a "newspaper" — a specific term in the Act — did not have to be printed. It could also include an online paper and internet publications.[15]

24. Second, in *Woods (Re)*, this Court held that being "present" at a hearing as required by s. s. 672.5(9) of the *Criminal Code* included videoconference, given the courts' ability "to consider advances in technology that did not exist when Parliament enacted the provision".[16]

25. Third, in *R. v. Walsh*, this Court held that a "visual recording" includes an Apple FaceTime video for the purposes of making a "visual recording" of an "intimate image" without consent under s. 162.1 of the *Criminal Code*. In so doing, this Court observed that "with traditional technology, such as a camera, the capture and display of the visual image are separate acts"; however, "with a livestream application, such as FaceTime, the two are simultaneous".[17] The Court reasoned that because an iPhone visually records and transmits to the recipient's screen, there is a recording. The Court held that "restricting the meaning of "recording" to outdated technology … would fail to respond to the ways in which modern technology permits sexual exploitation" and thereby "undermine the objects of s. 162.1 and the intention of Parliament in enacting it".[18]

26. Fourth, in *Therrien c. Director General of Elections of Quebec*, the Quebec Court of Appeal considered art. 429 of the *Loi électorale*, which prohibited campaign advertising for seven days after the calling of an election.[19] Specifically, the law provided that no one could "post or

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15 *John v. Ballingal*, 2017 ONCA 579, at paras. 19-32.
16 *Woods (Re)*, 2021 ONCA 190, at para. 44.
17 *R. v. Walsh*, 2021 ONCA 43, at para. 63.
18 *R. v. Walsh*, 2021 ONCA 43, at para. 68.
19 *Therrien v. Chief Electoral Officer of Québec*, 2022 QCCA 1070.

cause to be posted in a space leased for that purpose, publicity relating to the election". The appellant argued that "posting" was limited to physical spaces, such that his Facebook posts were not prohibited. The Court of Appeal rejected this, holding that while the legislature could not have envisioned social media advertising in 1995 when the section was enacted, interpreting it in this way was consistent with legislative intent to ensure electoral fairness.[20]

27. These cases demonstrate that advancements in technology do not prohibit courts from giving effect to Parliament's legislative intent. What matters is not whether Parliament could have foreseen and considered a particular technology or set of circumstances — what matters is whether the intent behind the legislation captures the circumstances before the court. In this case, it does.

(b) *The principle applied*

28. The principle of dynamic interpretation means that this Court can give effect to Parliament's intention to decriminalize gaming and give provinces the latitude to manage the potential for public harm — even in relation to technology and types of gaming that did not exist when s. 207(1)(a) was enacted.[21] This principle permits this Court to adopt an interpretation of "in [the] province" that is sensitive to the technological reality of what Ontario proposes.

29. That reality is that Ontario is in control of the entirety of the digital scheme it proposes. The Schedule confirms that "iGaming Ontario will continue to conduct and manage the iGO Sites through its agents, the Operators"; only the people of Ontario will be permitted to play on those sites. Ontario proposes to continue to legislate to the full extent necessary in respect of its own citizens. While this scheme will interact with international schemes, through pooled liquidity and whatever contractual or other arrangements make that possible, this does not change the legal

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20 *Therrien v. Chief Electoral Officer of Québec*, 2022 QCCA 1070, at para. 81.
21 *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726, at para. 95.

reality that there is a single scheme that Ontario is conducting and managing. Ontario's scheme is one in which players in Ontario are allowed to connect with international players in circumstances where Ontario deems it appropriate. Players from other provinces will be excluded. Parliament's intention to ensure that Ontario manages the risk of gaming in its province will be secure.

30. To explain this, Mr. Sweny offered an analogy: in a poker game, "a player in Ontario would be able to sit down at a virtual poker table and compete with [international] players".[22]

31. CLC seizes on this quote to make an argument with appealing simplicity. It says that to the extent that there are international players at this 'virtual table', the table cannot be located exclusively "in" Ontario; it must be located elsewhere.[23] If that is the case, CLC argues, the scheme is not being conducted and managed "in [the] province", contrary to s. 207(1)(a).

32. Dynamic interpretation assists in rejecting this attempt to establish that the contemporary digital reality cannot fit into an ostensibly analog provision. The technological truth is complex. For example, in *Equustek*, the Supreme Court recognized that the internet "has no borders — its natural habitat is global".[24] The reality is that it is difficult to locate the precise location of internet activity and those who originate it. Internet activity exists where the end user is experiencing it, where the company providing it is located, and where the data itself is located. In a sense, it is everywhere. The proper interpretation of "in [the] province" must account for this.

33. To decide whether the proposed scheme is "in [the] province", it is not necessary to decide whether the 'virtual table' is wholly located in Ontario — what matters is whether Ontario is operating a scheme in accordance with Parliament's intention that Ontario protect its own citizens

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22 Affidavit of George Sweny, sworn May 31, 2024, at para. 22.
23 CLC Factum, at para. 40.
24 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at para. 41 (emphasis added).

from the risks attendant to any scheme it conducts and manages. To do this, the scheme must be sufficiently connected to the province to ensure that it is "operat[ing] provincially-run lotteries as [it sees] fit, in accordance with local attitudes".[25] This requires that the province "exert a sufficient level of control to maintain its position as the 'operating mind' of the lottery".[26]

34. That is precisely what Ontario proposes to do. It will be in more than sufficient control of its own scheme, which is an extension of the judicially approved scheme already in place.

35. While the "virtual table" is a helpful idea, the more apt legal analogy is to cellphones connecting an international call. A person making a call on a cellphone in Ontario is subject to various federal and provincial regulations, including but not limited to: wireless rate setting under the *Telecommunications Act*, spectrum management under the *Radiocommunication Act*, privacy laws protecting personal information, and restrictions under *Highway Traffic Act* regulations.[27] The person on the other end of the call is subject to whatever regulations exist in their international jurisdiction. There is only one call connecting them, but this does not mean that Ontario or Canada is suddenly taking control of the international caller, nor does it change the reality that they are regulating the Ontario caller. Ontario proposes to develop a scheme that will protect Ontario players from the risks associated with gaming, in the manner it deems appropriate; international jurisdictions will be responsible for their own players. Mr. Sweny's evidence demonstrates that Ontario can choose those jurisdictions carefully and reach agreements with them to confirm the precise terms upon which Ontario players will be allowed to engage with international players.[28] Section 207(1)(a) provides Ontario with the flexibility to do this.

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25 *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726, at para. 95.
26 *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726, at para. 98.
27 *Telecommunications Act*, S.C. 1993, c. 38, s. 24; *Radiocommunication Act*, R.S.C., 1985, c. R-2, s. 5(1); *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; O. Reg 366/09.
28 See Affidavit of George Sweny, sworn May 31, 2024, at para. 24.

36. Ultimately, Parliament's intention to allow provinces to manage the risks of lottery schemes can accommodate the reality that those schemes no longer respect traditional borders. Today, the words "in that province" in s. 207(1)(a) must be interpreted in a manner that respects this intention above while also accounting for the radical ways in which technology has advanced since the enactment of the provision. When this ostensibly geographic requirement was enacted — first in 1969 and then in 1985 — the international reach of online lottery schemes simply did not exist. Gaming has changed drastically: the internet has made online gaming possible, practical, and, with sufficient government regulation and oversight, safe. The principle of dynamic interpretation demands an approach that accommodates this reality.

(ii) Strict construction of penal statutes resolves ambiguity in the provinces' favour

37. This principle assists in extinguishing any ambiguity that might otherwise remain in s. 207(1)(a). Strict construction of penal statutes establishes that "enactments which take away the liberty of the subject should be clear and any ambiguity resolved in favour of the subject".[29] The justification for this is that "[i]f one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication".[30] Accordingly, ambiguity in provisions that create criminal liability — which s. 207(1)(a) does by establishing the boundaries of the offence in s. 206 — should be resolved in favour of a narrower prohibition.

38. Here, it may be that s. 207(1)(a) of the *Code* is afflicted with "real" ambiguity, in the sense that the provision may be capable of more than one meaning.[31] Insofar as it is, the principle of strict construction counsels against adopting CLC's interpretation, as doing so would effectively

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29 *R. v. D.L.W.*, 2016 SCC 22, at para. 50 (emphasis added); *R. v. Mansour*, [1979] 2 S.C.R. 916, at p. 927.
30 *Marcotte v. Deputy Attorney General for Canada* (1974), [1976] 1 S.C.R. 108, at p. 115.
31 *R. v. Basque*, 2023 SCC 18, at para. 74.

expand the scope of criminal liability set out in s. 206. More fundamentally, it would be unjust to criminalize conduct that the statutory scheme does not prohibit in clear and certain terms.[32]

B. *EARTH FUTURE* DOES NOT DECIDE THIS REFERENCE

39. A significant pillar of CLC's position is the Supreme Court's endorsement in *Earth Future*, a case about the interpretation of a different subsection: s. 207(1)(b).[33] That subsection makes it is lawful for licensed charitable or religious organizations to conduct and manage a provincial lottery scheme. The Supreme Court dismissed the *Earth Future* appeal "substantially for the reasons of the Chief Justice of Prince Edward Island".[34] CLC argues that this one line decides this reference.

40. But this Court need not slavishly adhere to *Earth Future*. This is the case for two reasons.

(i) *Earth Future* is factually distinguishable

41. *Earth Future* concerned a charitable corporation proposed to market a conventional, paper-based lottery ticket scheme globally via the internet, while operating it locally from Prince Edward Island. The question in the case was whether Earth Future's global scheme was properly "in that province" such that P.E.I. could validly issue a licence to it pursuant to s. 207(1)(b).

42. The Court of Appeal's answer was "no". Its reasons included that Earth Future's scheme was very much extra-provincial and "obviously intended the Earth Future Lottery will operate and carry on business in the worldwide market".[35] The Court held it was not permissible "to conduct a lottery in the global village from its place of business in the province".[36]

43. The key distinguishing feature between *Earth Future* and this case is that Ontario's scheme

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32 *Marcotte v. Deputy Attorney General (Canada) et al.*, [1976] 1 S.C.R. 108.
33 *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, aff'd 2003 SCC 10.
34 *Reference re Earth Future Lottery*, 2003 SCC 10.
35 *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, at para. 10.
36 *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, at para. 10.

is not global in the same way. Ontario does not propose to run a single game that international players play in. It does not propose to interact with international players by advertising to them or making gaming available to them. All Ontario will be doing is continuing to conduct and manage online gaming offered by provincial operators overseen by iGO and regulated by the AGCO. Its scheme will simply interact with international schemes. In this way, Ontario's regulation and revenue capture will not touch any player outside Ontario. This takes online gaming outside the *ratio* of *Earth Future*, in which Earth Future's paper-based lottery ticket scheme was overtly and principally directed at gaming participants outside P.E.I., despite there being no plausible technological means to prohibit Canadians outside of P.E.I. from playing, contrary to s. 207(1)(b).

44. Ontario is clear that it will <u>not</u> conduct or manage international websites; it will <u>not</u> enlist operators of international websites as its agents. Instead, Ontario proposes to rely on the foreign jurisdictions for that. In considering this reliance, it bears noting that the evidence is not that pooled liquidity means instant global liquidity — to the contrary, the contractual agreements establishing pooled liquidity described in Mr. Sweny's affidavit demonstrate that other jurisdictions have carefully curated the extraterritorial partners with whom they choose to engage.[37] There is every reason to believe that Ontario will do the same, with a view to the public interest.

45. The goal of the legislative scheme established in Part VII, and of s. 207(1)(a) in particular, is to permit a province to control games played by people physically located in that province, in accordance with the province's constitutional power to regulate gaming "in the province". That is exactly what Ontario's current online lottery scheme does, regardless of whether pooled liquidity is permitted or not. By contrast, Earth Future hoped to offer its scheme to a market almost entirely outside P.E.I. — including individuals elsewhere in Canada — which was well outside P.E.I.'s

[37] See Affidavit of George Sweny, sworn May 31, 2024, at para. 24.

regulatory ambit. No such offering will happen here. *Earth Future* is distinguishable.

(ii) ***Earth Future* has uncertain precedential force**

46. While CLC argues that particular statements of *Earth Future* are binding, matters are not so straightforward due to the nature of references and the Supreme Court's endorsement.

47. A reference is "merely an advisory procedure" and thus is, "in principle, non-binding".[38] While references are "in practice treated as judicial decisions and followed by other courts",[39] that need not be the case with respect to *Earth Future*, as the only analysis in that case was done by a coordinate appellate court. The Supreme Court conducted no analysis of its own.

48. To the extent that CLC relies on the reasoning endorsed by the Supreme Court, it must be noted that it is not clear which reasons were, in fact, endorsed. The difficulty here is that an endorsement "substantially" or partly for the reasons for a lower court perpetuates "confusion as judges wonder which parts of the lower court's decision fall within that endorsement".[40]

49. Notably, even in brief endorsements, the Supreme Court does not always allow or dismiss appeals "substantially" for a particular set of reasons. Indeed, the Court has decided appeals unambiguously "for the reasons" below.[41] *Earth Future* was not one of these cases. This Court is now left to wonder which parts of the decision fall within the Supreme Court's endorsement.

50. The only sliver of insight into the Supreme Court's interpretation of *Earth Future* comes from *SOCAN*, in which Binne J. described it as being about "whether sales of tickets from an

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38 *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 151, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 40.

39 *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 152.

40 Alex Bogach, Jeremy Opolsky and Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251, at para. 33 (emphasis added).

41 See, *R. v. Ghotra*, 2021 SCC 12; *R. v. Langan*, 2020 SCC 33; *Callidus Capital Corp. v. Canada*, 2018 SCC 47. There are also appeals decided "substantially" for particular paragraphs of a specific judgment (see, e.g., *International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence*, 2018 SCC 11, at para. 1).

Internet lottery in [P.E.I.] constituted gaming "in the province" when almost all of the targeted on-line purchasers resided elsewhere".[42] The feature pointed out — that the targets of the scheme were not "in the province" — is the very feature that distinguishes this reference from *Earth Future*.

51. All of this destabilizes CLC's reliance on specific paragraphs of the P.E.I. Court of Appeal's decision. Two other considerations that Ontario raises deepen this instability.

52. The first is the difference between s. 207(1)(a) and s. 207(1)(b), the provision in *Earth Future*). Through these sections, "Parliament has adopted a more restrictive approach to lottery schemes conducted and managed by a charitable organization than the approach to those conducted and managed by provincial governments".[43] Accordingly, *Earth Future* does not easily apply here.

53. The second consideration is the more fundamental question of whether *Earth Future* remains good law in light of the advancements in the jurisprudence.[44] In addition to the developments in the general jurisprudence on territoriality that the Attorney General relies on, this Court should also consider the developments in the specific jurisprudence governing the application of Canadian law to internet activities, which has been canvassed above. To the extent that *Earth Future* might affect this Court's interpretation of s. 207(1)(a), it should be revisited in light of the evolution of the law related to jurisdiction and internet transactions and commerce.

PART IV — ORDER REQUESTED

54. Flutter respectfully requests that this Court answer the reference question in accordance with the submissions above.

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42 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para. 41.

43 Patrick J. Monahan & A. Gerold Goldlist, "Roll Again: New Developments concerning Gaming", (1999) 42 Crim. L.Q. 182, at p. 191.

44 *Canada (Attorney General) v. Bedford*, 2013 SCC 27, at para. 42; *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 44.

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

Scott C. Hutchison
Brandon Chung
Kelsey Flanagan

Counsel for the Intervener,
Flutter Entertainment plc

SCHEDULE A — AUTHORITIES TO BE CITED

Jurisprudence

1. *R. v. Andriopoulos*, [1993] O.J. No. 3427
2. *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.)
3. *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726
4. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3
5. *Great Canadian Casino Co. Ltd. v. Surrey (City of)*, 1998 CanLII 2894 (BC SC)
6. *R. v. 974649 Ontario Inc.*, 2001 SCC 81
7. *John v. Ballingall*, 2017 ONCA 579
8. *Woods (Re)*, 2021 ONCA 190
9. *R. v. Walsh*, 2021 ONCA 43
10. *Therrien v. Chief Electoral Officer of Québec*, 2022 QCCA 1070
11. *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34
12. *R. v. D.L.W.*, 2016 SCC 22
13. *R. v. Mansour*, [1979] 2 S.C.R. 916
14. *Marcotte v. Deputy Attorney General for Canada* (1974), [1976] 1 S.C.R. 108
15. *R. v. Basque*, 2023 SCC 18
16. *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8
17. *Reference re Earth Future Lottery*, 2003 SCC 10
18. *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27
19. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
20. *R. v. Ghotra*, 2021 SCC 12
21. *R. v. Langan*, 2020 SCC 33
22. *Callidus Capital Corp. v. Canada*, 2018 SCC 47

23. *International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence*, 2018 SCC 11

24. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45

25. *Carter v. Canada (Attorney General)*, 2015 SCC 5

Secondary Sources

26. Alex Bogach, Jeremy Opolsky and Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251

27. Patrick J. Monahan & A. Gerold Goldlist, "Roll Again: New Developments concerning Gaming", (1999) 42 Crim. L.Q. 182

SCHEDULE B – RELEVANT LEGISLATIVE PROVISIONS

Courts of Justice Act, R.S.O. 1990, c. 43, s. 8

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).

Gaming and Betting

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, barters, 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

206 (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

206 (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

206 (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

206 (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

206 (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**

206 (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

206 (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.

Saving

206 (8) 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 in any such property; or
>
> **(b)** [Repealed, 1999, c. 28, s. 156]
>
> **(c)** bonds, debentures, debenture stock or other securities recallable by drawing of lots and redeemable with interest and providing for payment of premiums on redemption or otherwise.

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;

(g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and

(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

207 (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.

Offence

207 (3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section

(a) in the case of the conduct, management or operation of that lottery scheme,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) is guilty of an offence punishable on summary conviction; or

(b) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction.

Definition of lottery scheme

207 (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.

Definition of slot machine

207 (4.01) In paragraph 4(c), **slot machine** means any automatic machine or slot machine, other than any automatic machine or slot machine that dispenses as prizes only one or more free games on that machine, that

(a) is used or intended to be used for any purpose other than selling merchandise or services; or

(b) is used or intended to be used for the purpose of selling merchandise or services if

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,

(ii) as a result of a given number of successive operations by the operator, the machine produces different results, or

(iii) on any operation of the machine, it discharges or emits a slug or token.

Exception — charitable or religious organization

207 (4.1) The use of a computer for the sale of a ticket, selection of a winner or the distribution of a prize in a raffle, including a 50/50 draw, is excluded from paragraph (4)(c) in so far as the raffle is authorized under paragraph (1)(b) and the proceeds are used for a charitable or religious object or purpose.

Exception re: pari-mutuel betting

207 (5) For greater certainty, nothing in this section shall be construed as authorizing the making or recording of bets on horse-races through the agency of a pari-mutuel system other than in accordance with section 204.

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

COA-24-CV-0185

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

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