

**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**

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**FACTUM OF THE INTERVENERS,  
NSUS GROUP INC. AND NSUS LIMITED**

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November 5, 2024

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## PART I - OVERVIEW

1. The government of Ontario, through its agent iGaming Ontario (“**iGO**”), conducts and manages online gaming (“**iGaming**”) in Ontario through private-sector operators (“**iGO Operators**”). Only players physically located in Ontario may access iGO sites in order to meet the requirement under s. 207(1)(a) of the *Criminal Code* that Ontario’s conduct and management of gaming be “in that province”. This Reference asks whether the iGaming scheme would remain legal under the *Criminal Code* if Ontario players were permitted to participate in virtual games and shared betting pools with players located outside of Canada, who would participate through international operators’ platforms available in their local jurisdictions (the “**Proposed Model**”).

2. The Interveners, NSUS Group Inc. and NSUS Limited (“**NSUS**”) submit that the answer is yes. The Proposed Model complies with the *Criminal Code* because the *Criminal Code* does not prohibit Ontario-based players from interacting with internationally-based players in the same virtual game, provided that the participation of the Ontario-based players is conducted and managed by the province of Ontario. Under the applicable definitions and provisions in the *Criminal Code*, the Ontario-based players and internationally-based players participate in the same virtual game through two legally distinct lottery schemes: one conducted and managed by Ontario involving players in Ontario, the other conducted and managed by international operators involving players outside of Canada. Ontario only conducts and manages the lottery scheme involving players in Ontario, which is consistent with even a strict territorial interpretation of “in that province” under s. 207(1)(a). Players outside of Canada would participate through separate lottery schemes or games conducted and managed by international operators, which need not fall within an exception because they are not prohibited under Part VII of the *Criminal Code*.

3. The Proposed Model is not only consistent with the scheme of gaming prohibitions and exceptions under the *Criminal Code*, but with Parliament’s intention in decriminalizing gaming and leaving it to the provinces to decide for themselves what gaming activities to permit within their borders. NSUS’s approach to the Proposed Model fully respects the authority of other provinces to conduct and manage gaming in their own jurisdictions. It also ensures that gaming in Canada remains subject to provincial oversight, including by allowing provinces to provide more competitive offerings which will encourage Ontarians to play in the regulated gaming market.

## **PART II - ISSUES / LAW / ARGUMENT**

4. The issue on this Reference is the question referred to this Court by Ontario:

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?<sup>1</sup>

5. NSUS submits that the Reference question should be answered in the affirmative.

**A. The lawfulness of the Proposed Model does not turn exclusively on the “conduct and manage” exception under s. 207(1)(a)**

6. In deciding the reference, the Court should consider the entire legislative scheme under Part VII of the *Criminal Code*. The lawfulness of the Proposed Model does not turn exclusively on the “conduct and manage” exception under s. 207(1)(a) and does not require that all aspects of the virtual game be conducted and managed by Ontario. The question is whether the Proposed Model involves an activity: (1) that is prohibited under Part VII of the *Criminal Code* and (2) that does not fit within one of the Part VII exceptions. If the activities involved in the Proposed Model

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<sup>1</sup> Order in Council 210/2024, dated February 2, 2024, p. 2, Record of the Attorney General of Ontario dated May 31, 2024 (“**AGO Record**”), Vol. I, Tab 1, p. 3.

either fit within an exception or are not prohibited by the *Criminal Code* in the first place, the Proposed Model will be lawful.

7. Organized gaming is generally prohibited in Canada through the proscriptions contained in Part VII of the *Criminal Code*.<sup>2</sup> In particular, s. 206(1) of the *Criminal Code* prohibits various activities in relation to lotteries and games of chance, including advertising, selling tickets, or conducting and managing a lottery or gambling scheme. However, s. 207(1) carves out exceptions which make it lawful to engage in activities associated with a permitted “lottery scheme”. One exception is the “conduct and manage” exception for provincial governments under s. 207(1)(a):

Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful 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.<sup>3</sup>

8. A “lottery scheme” is defined under s. 207(4) of the *Criminal Code* to include a “game”, meaning a “a game of chance or mixed chance and skill”.<sup>4</sup> Online casino and table games, including those offered in Ontario’s iGaming regime, are lottery schemes under s. 207.<sup>5</sup>

9. Beyond the conduct and manage exception for provinces, ss. 207(1)(b)-(d) set out circumstances in which other entities—a charitable or religious organization, the board of a fair

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<sup>2</sup> *R. v. Andriopoulos*, 1994 CanLII 147 (ON CA).

<sup>3</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(1)(a) [emphasis added].

<sup>4</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(4). Notably, only lotteries conducted and managed by a province under ss. 207(1)(a) and (g) may be “operated on or through a computer”. In *Earth Future*, the Prince Edward Island Supreme Court – Appeal Division held that a proposal to operate a lottery that participants would access through personal computers via the internet was “operated on or through a computer”, and, since it would be conducted and managed by a charitable organization under s. 207(1)(b), this was not permitted: *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 at para. 17, aff’d 2003 SCC 10.

<sup>5</sup> *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 at para. 9; *Tsuu T’ina Gaming Limited Partnership v. Alberta (Gaming, Liquor and Cannabis Commission)*, 2022 ABQB 162 at para. 51, aff’d 2023 ABCA 135.



or exhibition, or another person—may “conduct and manage” a lottery scheme “in the province” under a licence issued by the government of that province.<sup>6</sup>

10. There is also a broad exception under s. 207(1)(g) which permits any other activities “in the province” that are necessary to carry out a lawful lottery scheme:

Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful 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.<sup>7</sup>

11. Ontario and the members of the Canadian Lottery Corporation (the “**CLC Members**”) have focused their submissions on whether all aspects of the Proposed Model fall within the exception for permitted lotteries under s. 207(1)(a) of the *Criminal Code*. Ontario submits that “in that province” under s. 207(1)(a) of the *Criminal Code* should be interpreted to mean that a province has authority to conduct and manage a lottery scheme so long as it has a “real and substantial” or “sufficient” connection to the province.<sup>8</sup> It further argues that “in that province” imposes a “territorial requirement”, not a “territorial restriction”.<sup>9</sup> It submits that the Proposed Model is lawful because it has a real and substantial connection to Ontario and no other province.<sup>10</sup>

12. In contrast, the CLC Members urge the Court to follow the interpretation of “in that province” reached by the PEI Supreme Court – Appeal Division and upheld by the Supreme Court

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<sup>6</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 207(1)(b)-(d). The precise language in these provisions varies between “in the province”, “in that province” and “in a province”.

<sup>7</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(1)(g).

<sup>8</sup> Attorney General of Ontario Factum, para. 55.

<sup>9</sup> Attorney General of Ontario Factum, para. 3.

<sup>10</sup> Attorney General of Ontario Factum, para. 121.

of Canada in *Earth Future* under s. 207(1)(b) of the *Criminal Code*, which treated this phrase as a territorial restriction.<sup>11</sup> The CLC Members argue that the Proposed Model must be unlawful if this interpretation is followed, because, in their view, it contemplates that Ontario players and international players would be participating in a *single* “game” or “lottery scheme” as defined under s. 207(4).<sup>12</sup> Implicit in the CLC Members’ argument is an assumption that if Ontario players are permitted to participate in virtual games and shared liquidity pools with international players, Ontario must be conducting and managing a lottery scheme that is not “in that province”.

13. NSUS disagrees. In its submission, the Proposed Model can be upheld as lawful, even on the strict *Earth Future* interpretation, because Ontario only conducts and manages the iGaming scheme in Ontario through which players in Ontario participate. Ontario does not conduct and manage the foreign gaming schemes through which players located outside of Canada would interact with Ontario players. These foreign gaming schemes are not prohibited under the *Criminal Code* because they do not occur in Canada or involve Canadian players.

14. In essence, the Proposed Model contemplates two separate “lottery schemes” or games interacting with one another—one conducted and managed by Ontario involving players in Ontario, the other conducted and managed by foreign operators involving players outside of Canada. Using online poker as an example, players from within Ontario and outside Canada would sit around a single virtual table and participate in a shared pool of liquidity, with the Ontario-based players and internationally-based players playing separate “games” within the meaning of the *Criminal Code*. While this would not have been possible for an in-person game of poker, in which

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<sup>11</sup> Canadian Lottery Coalition Members Factum, paras. 36 and 52.

<sup>12</sup> Canadian Lottery Coalition Members Factum, para. 40.

all players are necessarily located in the same place, in a virtual poker game where players can participate from different jurisdictions around the world, players need not participate through the same “lottery scheme” (as defined in the *Criminal Code*) in order to play against one another. Ontario players can participate through a game conducted and managed by Ontario, while players outside of Canada can participate through a game conducted and managed by a foreign operator, each governed by the standards and regulations that apply to the operator of their respective game in their respective jurisdiction.

**B. In the Proposed Model, Ontario only conducts and manages a lottery scheme “in that province”**

15. Because Ontario must comply with the prohibitions in Part VII of the *Criminal Code*, it can only conduct and manage a lottery scheme that is “in that province”, consistent with s. 207(1)(a) of the *Criminal Code*.<sup>13</sup> NSUS submits that the Proposed Model meets this requirement, even on a strict territorial interpretation of “in that province”.

16. In *Earth Future*, the Court found that the words “in that province”, used in the exception for lotteries conducted and managed by charitable organizations under s. 207(1)(b) of the *Criminal Code*, imposed a territorial restriction.<sup>14</sup> In particular, the Court held that conducting a lottery scheme “from the province” was not sufficient—the lottery scheme must itself be “in” the borders of the province.<sup>15</sup>

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<sup>13</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(3).

<sup>14</sup> *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 at para. 10, aff’d 2003 SCC 10; *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(1)(b).

<sup>15</sup> *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 at para. 10, aff’d 2003 SCC 10.

17. The essence of the proposed lottery scheme in *Earth Future* was one that would be conducted and managed *from* Prince Edward Island but involve players *in* other jurisdictions outside the province’s borders. It was to be run out of a place of business in Prince Edward Island, but operated outside of the province—tickets would be sold online to participants physically located outside of the province, the lottery would be advertised and promoted outside the province, and sales and prizes would be paid in U.S. dollars.<sup>16</sup> The Court found that this lottery scheme exceeded the territorial scope of the exception under s. 207(1)(b) of the *Criminal Code*. It did not accept that this problem could be solved through a provision which deemed the transactions to occur in the province of Prince Edward Island.<sup>17</sup>

18. In contrast, the Proposed Model does not require Ontario to “conduct and manage” anything outside the province of Ontario. The Superior Court recently considered the meaning of “conduct and manage” in *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, where it concluded that Ontario “conducts and manages” the current iGaming scheme in Ontario under s. 207(1)(a) of the *Criminal Code* despite the fact that Ontario players play games and make bets through platforms operated by private sector iGO Operators acting as agents on behalf of iGO.<sup>18</sup> The Court interpreted “conduct and manage” to mean a sufficient level of control and decision-making power to constitute the “directing mind” of the lottery, and found that Ontario conducts and manages all aspects of the current iGaming scheme through its agent iGO.<sup>19</sup>

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<sup>16</sup> *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 at para. 13, aff’d 2003 SCC 10.

<sup>17</sup> *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 at para. 14, aff’d 2003 SCC 10.

<sup>18</sup> *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 at para. 101.

<sup>19</sup> *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 at paras. 98 and 101-104.

19. This conclusion holds true under the Proposed Model. Players located in Ontario would continue to access iGaming through Ontario-specific platforms operated by iGO Operators.<sup>20</sup> Each iGO Operator would continue to be required to enter into a standard, non-negotiable Operating Agreement with iGO, to act as an agent of iGO and to be subject to iGO's overriding control, including through conditions and policies.<sup>21</sup> iGO and iGO Operators would continue to carry out their activities in accordance with the regulations and standards established by the AGCO.<sup>22</sup> In short, the entire iGaming experience for Ontario players would continue to be conducted and managed exclusively by the government of Ontario through iGO.

20. The only difference between the Proposed Model and the iGaming scheme upheld in *iGaming Ontario* is that players in Ontario would be permitted to interact with players from jurisdictions outside of Canada.<sup>23</sup> This does not exceed the territorial scope of s. 207(1)(a) because the participation of players outside of Canada would not be "conducted and managed" by Ontario. To the contrary, players outside of Canada would interact with players in Ontario through platforms offered by international operators in their local jurisdictions, governed by local regulations.<sup>24</sup> Those international operators would not be regulated by the AGCO and would not enter into operating agreements to act as agents of iGO.

21. Based on the markers of control set out by the Superior Court in *iGaming Ontario*, this proposal does not require Ontario to "conduct and manage" anything outside of Ontario. Ontario would not have a relationship of control or decision-making power over these international

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<sup>20</sup> Schedule to Order in Council 210/2024 ("Schedule"), p. 4, AGO Record, Vol. I, Tab 2, p. 12.

<sup>21</sup> Affidavit of Jesse Todres sworn May 31, 2024 ("**Todres Affidavit**"), paras. 27-30, AGO Record, Vol. I, Tab 4, pp. 33-35.

<sup>22</sup> Todres Affidavit, paras. 7-12, AGO Record, Vol. I, Tab 4, pp. 28-30.

<sup>23</sup> Schedule, p. 4, AGO Record, Vol. I, Tab 2, p. 12.

<sup>24</sup> Schedule, p. 4, AGO Record, Vol. I, Tab 2, p. 12.

operators.<sup>25</sup> It would not act as the “directing mind” of their operational decisions in deciding which games to offer, how to advertise, or how to manage customer relations.<sup>26</sup> Ontario has no relationship of control with the international operators, and cannot be said to be “conducting and managing” those operators’ games through which players outside of Canada participate.

22. Rather, Ontario would exercise control over the lottery scheme through which players in Ontario participate, by way of its agency and regulatory relationship with iGO Operators. Ontario would continue to set and enforce regulatory standards to ensure the protection of players in Ontario. Although players located outside of Canada would be participating in the same virtual games and betting pools as players in Ontario, the Proposed Model is designed such that Ontario is only conducting and managing the “lottery scheme” through which players in Ontario participate, consistent with the territorial restriction under s. 207(1)(a) of the *Criminal Code*.

23. Given that Ontario’s conduct and management of the iGaming scheme falls within s. 207(1)(a) of the *Criminal Code*, any other activities in the province of Ontario ancillary to that scheme are lawful under s. 207(1)(g), which as set out above renders it lawful for “any person” to do “anything in the province” which is “required for the conduct, management or operation” of a permitted lottery scheme.<sup>27</sup> It also permits persons in the province to participate in the lottery scheme.<sup>28</sup> This provision ensures that any other activities that would occur in the province of Ontario in order for Ontario to conduct and manage iGaming in the province would be lawful.

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<sup>25</sup> *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 at paras. 98 and 101-104.

<sup>26</sup> *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 at para. 102.

<sup>27</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(1)(g).

<sup>28</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(1)(g).

**C. It is not prohibited under the *Criminal Code* for an international operator to conduct and manage a foreign lottery involving foreign players**

24. On the other hand, the foreign lottery schemes conducted and managed by international operators, through which internationally-based players participate, are not unlawful because they are not prohibited by any of the proscriptions contained in Part VII of the *Criminal Code*.

25. Properly interpreted, Part VII of the *Criminal Code* contains prohibitions applicable exclusively to organized gaming *occurring in Canada*. Although the prohibitions in Part VII do not expressly limit their application to Canada, such a restriction is implied by s. 6(2) of the *Criminal Code*, which provides that “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.”<sup>29</sup> It is presumed that the *Criminal Code* is limited to offences committed within the territory of Canada unless it is specifically declared to be otherwise.<sup>30</sup>

26. For example, Section 206(7) of the *Criminal Code* provides that certain activities are prohibited in relation to a “foreign lottery”, including “conducting or managing” such a scheme:

**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.<sup>31</sup>

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<sup>29</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(2).

<sup>30</sup> *R. v. Hape*, 2007 SCC 26 at para. 67.

<sup>31</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 206(7); *R. v. World Media Brokers Inc.*, 1998 CanLII 27760 (ON CJ) at 197, aff'd 2003 CanLII 42526 (ON CA).

27. In accordance with the presumption against extraterritoriality, this provision should be interpreted to be limited to those specified activities when conducted by a foreign lottery *in Canada*. Although foreign lottery is not defined, it has been held that the purpose of this prohibition on foreign lotteries—which developed long before there were exclusions for provincial lotteries—was to ensure that the prohibitions on gaming applied regardless of whether the scheme was domestic or foreign in origin.<sup>32</sup> This is because both domestic and foreign gaming, *when operating in Canada*, posed the same potential harms to the Canadian public that the prohibitions on gambling were designed to address.<sup>33</sup> There is nothing to suggest that the purpose of s. 206(7) was to regulate extraterritorial gaming in jurisdictions outside of Canada.

28. The Proposed Model contemplates that players located outside of Canada would access games and betting through platforms operated by international operators, available in their local jurisdictions.<sup>34</sup> It is not prohibited under the *Criminal Code* for people in other countries to engage in games and betting operated by international operators. Accordingly, this aspect of the Proposed Model is not unlawful under the *Criminal Code*.

29. The question of whether the Proposed Model would be unlawful if a player located in Canada participated through a platform operated by an international operator is expressly removed from consideration on this Reference based on the hypothetical proposal and assumptions set out in the Schedule to the Order in Council.<sup>35</sup> This hypothetical assumes that players located outside of Ontario but within Canada would not be permitted to participate in games or betting with Ontario players absent an agreement between Ontario and the province in which those players are

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<sup>32</sup> *R. v. World Media Brokers Inc.*, 1998 CanLII 27761 (ON CJ) at 203-207.

<sup>33</sup> *R. v. World Media Brokers Inc.*, 1998 CanLII 27761 (ON CJ) at 204.

<sup>34</sup> Schedule, p. 4, AGO Record, Vol. I, Tab 2, p. 12.

<sup>35</sup> *Reference re iGaming Ontario*, 2024 ONCA 569 at para. 16.



located.<sup>36</sup> The Reference therefore removes from the Court's consideration any issues arising under the *Criminal Code* from the inclusion of players from other Canadian provinces.

30. The Reference also does not specify the international operators or jurisdictions with which Ontario would seek to engage in pooled liquidity, or require the Court to consider issues involving advertising or marketing in Canada. The question at this stage is simply whether there is a legal impediment under the *Criminal Code* to Ontario's Proposed Model for opening liquidity pools to include players located outside of Canada. Any questions about the conduct of specific international operators *vis-à-vis* Canada are irrelevant.<sup>37</sup> Evidence relating to this conduct should be disregarded and the Court should not make any findings in this respect.

**D. The Proposed Model respects provinces' authority over gaming within their borders and encourages effective regulation over gaming in Canada**

31. An approach which treats virtual games and pooled liquidity under the Proposed Model as two separate lottery schemes, one for Ontario-based players conducted and managed by Ontario in accordance with s. 207(1)(a) of the *Criminal Code*, the other for internationally-based players conducted and managed by an international operator outside the jurisdiction of the *Criminal Code*, fully respects the intention of Parliament in both leaving the business and regulation of gaming to provinces and ensuring that gaming in Canada is subject to sufficient provincial control.

32. First, the Proposed Model is consistent with Parliament's approach to decriminalizing gaming in Canada, which left it to each province to decide what gambling activities can take place within its own jurisdiction based on the differing attitudes towards gaming across the country:

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<sup>36</sup> Schedule, p. 4, AGO Record, Vol. I, Tab 2, p. 12.

<sup>37</sup> *Reference re iGaming Ontario*, 2024 ONCA 569 at para. 16.

We feel that public opinion in this country is not unanimous about it and that it might vary from region to region. We are, therefore, leaving it to the regions, as that public opinion may be interpreted by provincial governments that their provincial Attorneys General have control over whether or not there should be lotteries permitted within provincial boundaries.<sup>38</sup>

33. In NSUS's submission, the Proposed Model respects the authority of each province to determine, within its own provincial boundaries, the extent to which its residents will engage in permitted lotteries. It does not permit Ontario to conduct and manage its iGaming scheme in any other Canadian province, or to allow residents of other provinces to access iGaming through iGO Operators. If Ontario intended to expand its iGaming scheme into other provinces, it could only do so if acting "in conjunction with" that other province under s. 207(1)(a), or through the consent and licencing procedure contemplated in s. 207(1)(f) of the *Criminal Code*.<sup>39</sup>

34. Notably, upholding the Proposed Model under the approach set out above also allows for a single, consistent interpretation of "in that province" (or "in the province" or "in a province") within the various exceptions under ss. 207(1) of the *Criminal Code*. All entities authorized to conduct and manage permitted lotteries within these exceptions, including the provinces themselves, charitable organizations and other persons who may be licenced by the provision, are subject to the same territorial restriction.

35. This approach is also consistent with Parliament's intention with respect to the activities of foreign lotteries outside of Canada. As noted above, Parliament prohibited foreign lotteries in Canada to address the harms of gaming in Canada, regardless of their source.<sup>40</sup> When gaming was

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<sup>38</sup> House of Commons Standing Committee on Justice and Legal Affairs, 1st Session, 28th Parliament, 1968-1969 (March 11, 1969), p. 331, AGO Record, Vol. II, p. 457.

<sup>39</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 207(1)(a) and 207(1)(f).

<sup>40</sup> *R. v. World Media Brokers Inc.*, 1998 CanLII 27761 (ON CJ) at 204.

subsequently decriminalized, Parliament opted for an approach that would permit lottery schemes that are either directly conducted and managed or otherwise regulated by the government of a province, ensuring that permitted lotteries would be subject to sufficient regulatory oversight by a province. Under the Proposed Model, when individuals in Canada access gaming, whether it involves players outside of Canada or not, it will be through a scheme that is conducted and managed or otherwise licenced by the government of a province.

36. In addition, the Proposed Model is consistent with Parliament's intention to ensure that gaming in Canada takes place under the regulatory oversight of a provincial government, because it encourages players in Ontario to participate in the regulated market conducted and managed by iGO through its iGO Operators, rather than the international market which does not have the same regulatory standards and oversight. Ontario's current closed liquidity system significantly restricts the experiences available for players seeking to engage in peer-to-peer gaming, including online poker.<sup>41</sup> This diminished experience is not just a problem for Ontarians who want to play poker—it is also a concern for Ontario's objective to transition internet gaming in the province to an effective regulatory regime, because large numbers of Ontario players are driven to the online poker products of unregulated black-market operators who offer international play that is not limited by Ontario's closed liquidity system.<sup>42</sup> Pooled liquidity addresses this concern by improving the province's offerings in the regulated market, which would also make the black-market offerings less attractive to Ontario players.<sup>43</sup>

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<sup>41</sup> Todres Affidavit, paras. 42-46, AGO Record, Vol. I, Tab 4, pp. 39-40.

<sup>42</sup> Todres Affidavit, para. 48, AGO Record, Vol. I, Tab 4, p. 40.

<sup>43</sup> Todres Affidavit, para. 53, AGO Record, Vol. I, Tab 4, p. 41.

37. Finally, the Proposed Model is consistent with Parliament's intention, including in its more recent amendments to Part VII of the *Criminal Code* which authorized single-event sports betting, to limit competition between the jurisdictions and ensure that gaming revenue benefits Canadians, not foreign operators.<sup>44</sup> When online poker and sports betting does not meet the needs of Ontario players, they will either play less or seek out games from unregulated operators who offer games involving larger international participant pools. Less play in the regulated market results in lower revenues for the government and registered operators.<sup>45</sup> The Proposed Model encourages Ontarians to play in the regulated market and allows all Canadian provinces to better compete against unregulated operators.

### **PART III - ANSWER REQUESTED**

38. NSUS submits that the Court should answer the Reference question in the affirmative.

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



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Graeme A. Hamilton/Teagan Markin

**BORDEN LADNER GERVAIS LLP**  
Lawyers for the Interveners, NSUS Group Inc. and  
NSUS Limited

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<sup>44</sup> Official Report, House of Commons Debates, 1st Session, 28th Parliament, 1969 (April 22, 1969), at 7826-7827, AGO Record, Vol. II, pp. 502-503; Hansard, House of Commons Debates, 2nd Session, 43rd Parliament, 2020-2021 (February 5, 2021) at 4084; Hansard, House of Commons Debates, 2nd Session, 43rd Parliament, 2020-2021 (November 3, 2020), at 1645, 1646; Hansard, Debates of the Senate, 2nd Session, 43rd Parliament, 2020-2021 (May 25, 2021) at 1507; Hansard, Debates of the Senate, 2nd Session, 43rd Parliament, 2020-2021 (May 4, 2021) at 1384; see *Safe and Regulated Sports Betting Act*, S.C. 2021, c. 20.

<sup>45</sup> Todres Affidavit, paras. 53-54, AGO Record, Vol. I, Tab 4, p. 41.

**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**

**CERTIFICATE**

I, Graeme Hamilton/Teagan Markin, certify that:

1. An Order under subrule 61.09(2) is not required;
2. The estimated time required for NSUS' argument is 30 minutes.
3. NSUS' factum complies with Rule 61.12(5.1) and the Directions of Justice van Rensburg dated October 1, 2024.
4. The number of words contained in Parts I to V of this Factum, including footnotes, is 4650.
5. The person signing this Certificate is satisfied as to the authenticity of every authority listed in Schedule A.



November 5, 2024

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**Graeme Hamilton/Teagan Markin**

Lawyers for the Interveners, NSUS Group  
Inc. and NSUS Limited

## SCHEDULE “A” – AUTHORITIES CITED

*Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, aff’d 2003 SCC 10

*Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726

*R. v. Andriopoulos*, 1994 CanLII 147 (ON CA)

*R. v. Hape*, 2007 SCC 26

*R. v. World Media Brokers Inc.*, 1998 CanLII 27760 (ON CJ), aff’d 2003 CanLII 42526 (ON CA)

*Reference re iGaming Ontario*, 2024 ONCA 569

*Tsuu T’ina Gaming Limited Partnership v. Alberta (Gaming, Liquor and Cannabis Commission)*, 2022 ABQB 162, aff’d 2023 ABCA 135

### *Secondary Sources*

Hansard, House of Commons Debates, 2nd Session, 43rd Parliament, 2020-2021 (November 3, 2020), at 1645, 1646

Hansard, House of Commons Debates, 2nd Session, 43rd Parliament, 2020-2021 (February 5, 2021) at 4084

Hansard, Debates of the Senate, 2nd Session, 43rd Parliament, 2020-2021 (May 4, 2021) at 1384

Hansard, Debates of the Senate, 2nd Session, 43rd Parliament, 2020-2021 (May 25, 2021) at 1507

## SCHEDULE “B” – LEGISLATION CITED

### *Criminal Code, R.S.C. 1985, c. C-46*

#### **Offences outside Canada**

6 (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

#### **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.

**Saving**

(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**

(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**

(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**

(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.

**Safe and Regulated Sports Betting Act, S.C. 2021, c. 20.**

**Short title**

1 *Safe and Regulated Sports Betting Act.*

**Criminal Code**

2 Paragraph 207(4)(b) of the *Criminal Code* is replaced by the following:

(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

**Coming into Force**

**Order in council**

3 This Act comes into force on a day to be fixed by order of the Governor in Council.

**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 of Appeal File No.: COA-24-CV-0185

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**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

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**FACTUM OF THE INTERVENERS, NSUS GROUP  
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