M55003

Court File No. COA-24-CV-0185

COURT OF APPEAL FOR ONTARIO

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

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PART I - OVERVIEW

1. The outcome of this Reference will have serious consequences for the gaming industry. Participants in that industry should be represented. The Canadian Gaming Association (the "**CGA**") is a leading voice of the gaming industry in Canada. It seeks leave to intervene, file a record, and make submissions from a broad industry perspective, and thereby to assist the court.

2. The CGA is a not-for-profit corporation and a national trade association that works to advance the evolution of Canada's gaming industry. Its membership and affiliate membership includes Canada's leading gaming companies, their professional advisors, and organizations representing other industry participants and stakeholders.

3. If granted leave, the CGA will argue that the *Criminal Code* permits Ontario to allow and to regulate online gaming in which individuals outside of Canada participate, as described in the Schedule attached to Order-in-Council 210/2024 ("**International Play**"). The CGA will offer this argument from a distinct perspective: that of the Canadian gaming industry.

4. Specifically, if granted leave to intervene, the CGA will make three submissions:

   (a) The plain meaning of Section 207(1)(a) permits Ontario to regulate International Play;

   (b) Parliament's intent in passing Section 207(1)(a) was to "withdraw" the application of criminal law from provincially conducted and managed lottery schemes, and to leave provincial governments to decide questions of lottery conduct and management within their provinces. An interpretation

of the *Criminal Code* that prohibits International Play would severely limit Ontario's ability to control lottery schemes *within* Ontario, thereby frustrating the intention of Parliament;

(c) Parliament was not concerned about International Play when adopting Section 207(1)(a) and its historical precedents. Parliament granted provincial governments control over lottery schemes via Section 207(1)(a) because it viewed provincial governments as being accountable for the public interest over activities within their provinces. The Ontario public has a valid interest in regulating participation of international players in lotteries conducted and managed *within* Ontario;

5. If granted leave to file a record, the CGA will adduce the following evidence:

(a) The Affidavit of Paul Burns, sworn April 8, 2024; and

(b) If permitted by this Court, a further Affidavit of Paul Burns, to be sworn on a date prior to the deadline for submission of the CGA's record.

6. These proposed submissions and this proposed evidence meet the test for intervention in a reference to this court. Leave to intervene and to file a record should be granted.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

7. The test for leave to intervene was set out in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.) (Chambers). It directs this court to consider: (i) the nature of the case and the issues which arise in it; (ii) the likelihood of the proposed intervener being able to make a useful contribution to the

resolution of the case; and (iii) the likelihood of that useful contribution being made without causing injustice to the parties.

Reference *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.) (Chambers).

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 29, at para. 8.

Bedford v. Canada (Attorney General), 2009 ONCA 669, at para. 2.

A. This Reference engages broad interests and is appropriate for intervention

8. The issue at the first prong of the *Peel* test – the "nature" of the case and "the issues which arise" – is whether the case is likely to impact the interests of anyone beyond the immediate parties. If it does, this court will be more willing to allow interveners who can speak to the interests. This prong of the test essentially adjusts the standard used by the court to scrutinize leave applications; the standard can be more permissive (as for constitutional cases impacting broad public interests) or more strict (as for private law cases mainly impacting the immediate parties).

Reference *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 23.

See, e.g., *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2020 ONCA 842, at paras. 10-11.

See, e.g., *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 173, at para. 12.

9. The nature and issues in this case are appropriate for intervention. This case engages interests broader than those of the Attorney General of Ontario: it impacts anyone

subject to the *Criminal Code*, and in particular, gaming industry participants like those represented by the CGA. A more permissive standard ought to apply.

Reference Statement of Particulars of the Attorney General of Ontario, at paras. 3, 7, 10.

10. The Reference also raises the constitutional issue of whether, and how far, a federal statute ousts the ability of a province to regulate a matter reserved to it by s. 92 of the *Constitution Act, 1867*. In constitutional cases, which are the most ripe for intervention, this Court has applied an especially loose "*Bedford* test" to proposed interveners. On the *Bedford* test, a party should be granted intervener status if it has a real, substantial, and identifiable interest in the subject matter of the proceeding, or an important perspective distinct from the immediate parties, or is a well-recognized group with a special expertise and broadly identifiable membership base.

Reference *Bedford* (Ont. C.A., 2009), at para. 2.

11. The CGA satisfies each of these requirements of the *Bedford* test. It is an organization that represents the interests of industry participants, and so plainly has a real, substantial, and identifiable interest in the subject matter of this Reference. If granted leave, the CGA will offer factual insight drawn from the industry's experience operating in the online gaming market, which the Attorney General cannot. The CGA is a primary source of information and expertise on gaming in Canada, undertaking significant research activities, providing accurate industry data and assisting in the development of industry-wide programs and approaches for relevant and critical issues.

Reference Affidavit of Paul Burns, sworn April 8, 2024 (Motion Record, tab 2, p. 11) ["**Affidavit of Paul Burns**"], at para. 9.

12. Further, the CGA is a well-recognized industry group with expertise and experience in legal advocacy on behalf of its members. The CGA serves as the gaming industry's main resource in undertaking sector-wide advocacy. Since its founding, the CGA has made a number of important contributions to the development of law and policy as it relates to the gaming sector. By way of example:

(a) In 2020, the CGA intervened in the case of *Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19.

(b) On behalf of the CGA's membership, and particularly gaming operators, the CGA campaigned successfully against proposed federal legislation that would have restricted gaming devices to facilities of at least a certain size.

(c) When Parliament considered amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, as it relates to casinos, the CGA met with senior federal officials, made written submissions, and testified before a Senate committee on the subject.

Reference Affidavit of Paul Burns, at paras. 6-8.

B. The CGA will make a useful contribution from an important perspective

13. What constitutes a "useful contribution" for the purpose of the second prong of the *Peel* test will depend on the circumstances of the case. At its core, a useful contribution helps the court to decide the legal issue in the case.

Reference *Baldwin v. Imperial Metals Corporation,* 2021 ONCA 114, at para. 3.

Reference re Greenhouse Gas Pollution Pricing Act (Ont. C.A., 2019), at para. 11.

14. A "useful contribution" might also offer "an important perspective" on the legal issue "that will not be offered by the parties."

Reference *Canadian Federation of Students* (Ont. C.A., 2020), at para. 13.

Issasi v. Rosenzweig, 2011 ONCA 198, at para. 13.

15. The CGA's contributions would be useful in both these senses.

16. The CGA proposes to offer the perspective of the Ontario gaming industry, which will assist the court in determining the interpretive issues before it. It has deep, industry-wide knowledge regarding how online gaming platforms work in Ontario today. If granted leave, the CGA will leverage this knowledge to argue that the *Criminal Code* should be interpreted to permit Ontario to allow regulated International Play. The CGA plans to argue as follows.

(i) The plain meaning of section 207(1)(a) permits Ontario to regulate International Play

17. In the internet age, the words "conducted and managed in" a province do not imply that all subscribers or customers must be physically located in the province. The words used in Section 207(1)(a), in their grammatical and ordinary sense, do not prohibit International Play, nor is this the interpretation of the *Criminal Code* that best achieves Parliamentary or regulatory objectives in an internet age.

18. Internet activity often has no meaningful fixed geolocation, or has many such locations at the same time. In *Google Inc. v. Equustek Solutions Inc*., the Supreme Court of Canada noted that the internet "has no borders—its natural habitat is global." If an activity has to be entirely within the province to be regulated within the province, then the provinces' power to regulate commerce (including property and civil rights) will quickly become illusory.

Reference *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34, at para. 41.

(ii) Parliament intended to leave regulation of International Play to the provinces

19. The primary concern of Parliament in adopting what became Section 207(1)(a) was to "withdraw" the criminal law from provincially regulated lottery schemes and leave their regulation solely to each of the provinces. This intent was manifested in 1969 and 1985, when what is now Section 207(1)(a) was first adopted and was amended into its current form.

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, pp. 7780-81.

Canada, Senate, *Standing Committee on Legal and Constitutional Affairs*, "Appendix LEG-31-C: Federal/Provincial Agreement" in Proceedings, 33rd Parl, 1st sess., vol. 2 (4 December 1985) at 29:13.

20. An interpretation of the *Criminal Code* that prohibits International Play would severely limit Ontario's ability to allow regulated gaming *within* Ontario, thereby frustrating the intention of Parliament. The limitation would be "severe" because of the

great importance of International Play to the gaming market in Ontario. If International Play is restricted, there are fewer players available to contribute to prize pools, and consequently, games that rely upon such pools become less attractive to players. Games dependent on significant international liquidity (especially peer-to-peer games) become commercially unviable. Companies dependent on these games then withdraw them from the Ontario market or change their operations, shaping the conduct and management of lotteries *within* Ontario. The CGA is well placed to comment on these crucial facts because it represents Ontario gaming operators affected by them.

Reference Affidavit of Paul Burns, at paras. 18-23.

(iii) The Ontario public has a valid interest in regulating International Play

21. An interpretation of Section 207(1)(a) that prohibits provincial lotteries from allowing International Play would also not accord with Parliament's purpose in withdrawing the criminal law from provincially conducted and managed lotteries.

22. The reason Parliament handed control of lottery schemes to provincial governments via Section 207(1)(a) is because it viewed provincial governments as sufficiently accountable for the public interest within their provinces. Section 207(1)(a) reflected Parliament's intent that provincially conducted and managed lottery schemes "become no longer a question of criminal law but of public policy, for which the government of the day would be responsible."

Reference *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969, pp. 7780-81.

Canada, Senate, *Standing Committee on Legal and Constitutional Affairs*, "Appendix LEG-31-C: Federal/Provincial Agreement" in Proceedings, 33rd Parl, 1st sess., vol. 2 (4 December 1985), p. 32:15.

23. The Ontario public has a valid interest in regulating the participation of international players in lotteries conducted and managed within Ontario because, among other reasons, the question of whether International Play is permitted:

(a) determines what games are commercially viable for Ontario (via its licensed agents) to offer to the public *within* Ontario; and

(b) determines whether Ontario may offer regulated alternatives to illegal International Play to the public *within* Ontario, and thereby dissuade illegal play.

(iv) CGA can provide additional factual background

24. The CGA is also well-placed to offer an overview of the gaming industry in Canada and abroad. This perspective relates to a major issue raised by the Attorney General of Ontario: namely, what the online, networked gaming industry is like today, and therefore how the facts at issue in the case of *Reference re Earth Future Lottery,* 2002 PESCAD 8, aff'd 2003 SCC 10, have changed since that case was decided more than twenty years ago.

Reference Statement of Particulars of the Attorney General of Ontario, at paras. 11-13.

25. All of these submissions will be "useful contributions" to this Reference.

C. There will be no injustice

26. This Court has refused to allow an intervener if its participation in the case would prejudice the immediate parties – for example, if the proposed intervener was planning to file materials too late, or to raise issues that might prejudice a party.

Reference See, e.g., *Foster v. West*, 2021 ONCA 263, at paras. 15-16.

27. These concerns are attenuated in the context of a Reference, in which the Court's role is consultative rather than adjudicatory, and in which there are no "immediate parties" with interests to prejudice. Furthermore, the CGA will meet any deadline established by the court for interveners' records and factums and does not anticipate prejudicing the interests of any prospective intervener.

D. Leave should be granted to file evidence

28. As described above, the CGA plans to make arguments based on, among other things, facts about the gaming industry, and about the importance of International Play to conduct and management of lotteries within Ontario. The CGA's perspective on these issues would be useful to the Court, and its submissions could be made most effectively with the assistance of affidavit evidence. Interveners cannot present their perspectives about such an issue unless they are permitted to file a record containing evidence.

29. Therefore, the CGA also seeks leave to file a record. This record would include the Affidavit of Paul Burns, sworn April 8, 2024, as filed on this motion, and an additional affidavit from Mr. Burns if useful to the Court, and assuming that leave is granted.

30. In the *Reference re Greenhouse Gas Pollution Pricing Act*, this Court permitted all interveners who wished to file records to do so. The Court noted that it sits as a court of

first instance in a reference. That reference involved a question with a constitutional dimension, as this one does; and in any event, involved an issue with the potential to impact broad interests, as this one does.

Reference *Reference re Greenhouse Gas Pollution Pricing Act* (Ont. C.A., 2019), at paras. 15-18.

PART III - ORDER REQUESTED

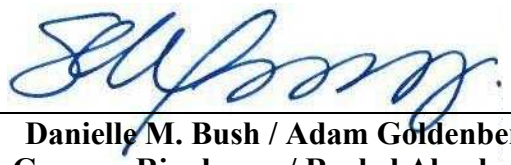
31. The CGA respectfully requests:

(a) an order granting it leave to intervene in this Reference, including the right to make written submissions not exceeding 30 pages and oral submissions not exceeding one hour.

(b) an order granting it leave to file a record in the Reference, which would include at least the Affidavit of Paul Burns, sworn April 8, 2024, as filed on this motion;

Estimated time for oral argument of the motion (not including reply): 20 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of April, 2024.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Baldwin v. Imperial Metals Corporation,* 2021 ONCA 114.

2. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.

3. *Canadian Federation of Students v. Ontario (Colleges and Universities),* 2020 ONCA 842.

4. *Foster v. West*, 2021 ONCA 263.

5. *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34.

6. *Issasi v. Rosenzweig*, 2011 ONCA 198.

7. *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.).

8. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.) (Chambers).

9. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29.

10. *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 173.

11. *House of Commons Debates, 28th Parliament, 1st Session : Vol. 7*, April 21, 1969.

12. Canada, Senate, *Standing Committee on Legal and Constitutional Affairs*, "Appendix LEG-31-C: Federal/Provincial Agreement" in Proceedings, 33rd Parl, 1st sess., vol. 2 (4 December 1985).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Leave to Intervene in Divisional Court or Court of Appeal

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2; O. Reg. 82/17, s. 16.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1; O. Reg. 82/17, s. 16.

COURTS OF JUSTICE ACT, R.R.O. 1990, c. C.43

References to Court of Appeal

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

Opinion of court

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

Submissions by Attorney General

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

Same

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

Notice

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

Appointment of counsel

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

Appeal

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

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

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(Motion for leave to intervene)

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