

11-APR-2024 S.I.

REGISTRAR / GREFFIER
COUR D'APPEL DE LONTARIO

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

NOTICE OF MOTION OF THE CANADIAN GAMING ASSOCIATION (for Leave to Intervene and Leave to File Evidence)

The Moving Party, the Canadian Gaming Association (the “CGA”) will make a Motion to
a Judge on May 1, 2024 at 10:00 a.m.

METHOD OF HEARING: The Motion is to be heard in person or by video conference,
as directed by the court, at Osgoode Hall, 130 Queen Street West, Toronto ON M5H 2N5.

THE MOTION IS FOR:

- (a) an order granting the CGA leave to intervene in the reference bearing Court File No. COA-24-CV-0185 (the “**Reference**”), including the right to make written submissions not exceeding 30 pages and oral submissions not exceeding one hour.
- (b) an order granting the CGA leave to file a record in the Reference.
- (c) such further and other relief as counsel may request and this Court may deem just.

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THE GROUNDS FOR THE MOTION ARE:

Overview

1. The Reference raises issues of fundamental importance to entities that operate online gaming in Ontario on behalf of the provincial government. It will determine whether, or to what extent, these operators will be permitted to offer online gaming in which individuals outside of Canada participate, as described in the Schedule attached to Order-in-Council 210/2024 (“**International Play**”). These operators thus have a direct interest in the Reference.
2. The members of the CGA represent entities that operate online gaming in Ontario. They have deep experience and practical knowledge of the gaming industry, and are therefore well positioned to assist the Court in deciding the question referred to it by the Lieutenant Governor in Council.
3. Specifically, the CGA will offer a frontline perspective on how online gaming works in Ontario: the platforms used and their functionality, the effect on the market from introducing International Play, and other matters that bear on the legal questions before the Court and the outcome of the Reference.
4. In brief, and as detailed below:
 - (a) The CGA would argue that the plain meaning of Section 207(1)(a) does not preclude International Play, and that if Ontario were not permitted to offer International Play, it would frustrate the objectives of the *Criminal Code* prohibition on gaming, and would frustrate Ontario’s goals of meaningfully regulating the market for gaming.

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(b) The CGA can also offer a useful overview of the gaming industry in Ontario. This perspective relates to an 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.

5. Granting the CGA leave to intervene and to file evidence would not prejudice any party, nor would it result in any meaningful repetition of the arguments advanced by the attorneys general participating in the Reference.

The CGA

6. The CGA is a not-for-profit corporation and a national trade association that works to advance the evolution of Canada's gaming industry. The CGA's mandate is to promote the economic value of gaming in Canada; to use research, innovation, and best practices to help the industry advance; and to create productive dialogue among stakeholders.

7. The membership and affiliate membership of the CGA includes Canada's leading gaming companies, their professional advisors, and organizations representing other industry participants and stakeholders.

8. The CGA engages in law reform activities at the provincial and federal levels. In doing so, it aims to shape public policy and expand access to gaming, by encouraging appropriate regulatory reform and modernization to meet the changing needs of Canada's gaming industry. The CGA's

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advocacy efforts are grounded in ongoing consultations with industry stakeholders to identify issues of common interest.

9. 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. These initiatives advance the CGA's advocacy priorities by promoting public awareness of the gaming sector and its economic impact on Canada. As well, the CGA's research is purposed to combat misinformation about gaming among legislators and the general public.

The CGA has a Direct Interest and Useful Expertise

10. The outcome of this Reference will have significant consequences on the gaming industry's operations and strategic planning. Unless the perspective of the gaming industry is adequately represented, the interests of industry stakeholders could be prejudiced.

11. The Reference would also benefit from the expertise and perspective of the CGA:

- (a) Due to its continuous involvement with law reform and advocacy in Canada, the CGA has an in-depth understanding of the regulatory reform and modernization that is required to meet the needs of Ontario's gaming industry. Further, as the primary source of information and expertise on gaming in Canada, the CGA has expertise in the economic impact of the gaming sector in Ontario.
- (b) The CGA's expertise will be useful in the determination of this Reference, which centers on International Play. The CGA can assist the Court in understanding the

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importance of International Play for achieving Ontario's regulatory and economic goals, within the framework of the *Criminal Code*.

Proposed Submissions

12. If granted leave to intervene, the CGA will argue that a lottery scheme involving International Play is compliant with the *Criminal Code*, and that Parliament intended for provinces – not the criminal law – to decide whether or not to permit International Play. More specifically, the CGA intends to make three main submissions:

- (a) **The plain meaning of section 207(1)(a) permits Ontario to regulate International Play.** In the internet age, the words “conducted and managed in” a province do not imply that all its subscribers or customers must be physically located in the province. Recent Canadian jurisprudence has recognized the need to interpret and adapt the law to account for the reality that internet activity often has no meaningful fixed geolocation or has many such locations at the same time. Interpretations of s. 207(1)(a) of the *Criminal Code* should similarly evolve to recognize the unavoidable reality that Canadians, and Ontarians, live in a networked, technologically-enabled world;
- (b) **Parliament's intent in passing Section 207(1)(a) was to “totally 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

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control lottery schemes within provincial boundaries, thereby frustrating the intention of Parliament; and

(c) **There is no evidence that Parliament was concerned about International Play.**

Parliament granted provincial governments control over lottery schemes via section 207(1)(a) because provincial governments were viewed as being accountable for the public interest within their provinces. The Ontario public has a valid interest in regulating participation of international players in lotteries within Ontario. Furthermore, the question of International Play affects the market for gaming *within* Ontario. Among other reasons, restricted offerings in the Ontario market would drive players away from iGaming Ontario and back to sites that are not under Ontario's regulatory umbrella;

Proposed Evidence

13. The CGA intends to rely on the Affidavit of Paul Burns, sworn April 8, 2024. This Affidavit sets out background on the CGA, including the CGA's advocacy experience. It sets out background on the gaming industry in Canada, the regulated iGaming regime, and the importance of International Play to the gaming market in Ontario.

Other Grounds

14. Rules 1.04, 13.01, 13.03, and 37.10 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194 and section 8(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

15. Such further and other grounds as counsel may advise.

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THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Affidavit of Paul Burns, sworn April 8, 2024; and
- (b) An anticipated further Affidavit of Paul Burns, to be sworn prior to the deadline for filing the CGA's record; and
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

Estimated time for oral argument of the Motion: 20 minutes

April 8, 2024

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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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