

**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**

**AND IN THE MATTER OF AN APPLICATION by Flutter Entertainment plc to intervene in the said Reference**

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**MOTION RECORD FOR LEAVE TO INTERVENE OF THE  
PROPOSED INTERVENER, FLUTTER ENTERTAINMENT PLC**

**(Pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*)**

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April 8, 2024

Henein Hutchison Robitaille LLP  
235 King Street East  
Toronto, ON M5A 1J9

Scott C. Hutchison (LSO# 29912J)  
[shutchison@hhllp.ca](mailto:shutchison@hhllp.ca)

Kelsey Flanagan (LSO: 74127U)  
[kflanagan@hhllp.ca](mailto:kflanagan@hhllp.ca)

Brandon Chung (LSO# 83164E)  
[bchung@hhllp.ca](mailto:bchung@hhllp.ca)

**Counsel for the Proposed Intervener,  
Flutter Entertainment plc**

TO: **THE ATTORNEY GENERAL OF ONTARIO**  
Crown Law Office - Civil  
720 Bay Street, 8th Floor  
Toronto, ON M7A 2S9  
Tel.: (416) 908-7465

Josh Hunter (LSO# 49037M)  
[joshua.hunter@ontario.ca](mailto:joshua.hunter@ontario.ca)

Ananthan Sinnadurai (LSO# 60614G)  
[ananthan.sinnadurai@ontario.ca](mailto:ananthan.sinnadurai@ontario.ca)

Hera Evans (LSO# 66269Q)  
[hera.evans@ontario.ca](mailto:hera.evans@ontario.ca)

Jennifer Boyczuk (LSO# 70838L)  
[jennifer.boyczuk2@ontario.ca](mailto:jennifer.boyczuk2@ontario.ca)

**Counsel for the Attorney General of Ontario**

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**TAKE NOTICE** that the motion of the proposed intervener, Flutter Entertainment plc, pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure* to the Chief Justice, the Associate Chief Justice, or a judge designate will be heard on May 1, 2024, at 130 Queen Street West, Toronto, Ontario, M5H 2N5.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. An Order granting Flutter Entertainment PLC (“**Flutter**”) leave to intervene in this reference as a friend of the court, on the terms that Flutter:
  - a. Be permitted to file a factum of no more than 20 pages;
  - b. Be permitted to present oral argument at the hearing of the Reference, for no more than one hour;

- c. Not be granted costs, nor have costs awarded against it; and
- d. Such further or other order as this Honourable Court may deem appropriate.

**THE GROUNDS FOR THE MOTION ARE:**

1. By Order in Council 210/2024, the Lieutenant Governor-in-Council asks this Court whether online gaming and sports betting would remain lawful under s. 207(1)(a) of the *Criminal Code* if the players were permitted to participate in online games and betting with individuals who are present outside of Canada. As explained in the Reference instruments, online gaming and sports betting (“igaming”) in Ontario is currently regulated by the Alcohol and Gaming Commission of Ontario (“AGCO”) and conducted and managed by iGaming Ontario (“iGO”). At present, players in Ontario can only play or bet against the house (acting on behalf of iGO) or against other players who are located in Ontario. This Court is being asked to answer whether the Ontario’s igaming regime would remain lawful under the *Criminal Code* if the overall size of the potential gaming audience of the scheme, otherwise known as its liquidity, is expanded to include players located outside of Ontario. In other words, the Court must answer whether a peer-to-peer gaming model where Ontario players participate in open or shared liquidity games can be “conducted and managed” by the province of Ontario.
2. Flutter Entertainment plc (“Flutter”) seeks leave to intervene in the Reference as a friend of the Court. Flutter is the parent company for many of the world’s largest and most popular igaming and sports betting brands. Flutter has extensive experience in offering peer-to-peer online games in Canada and worldwide. Two of Flutter’s best-known entities, PokerStars and FanDuel, are market-leading operators both internationally and in Ontario, and both

are currently registered operators on behalf of iGO. Flutter has been instrumental in advocating for, advising on, and executing the implementation of multi-jurisdictional igaming regimes across the globe.

3. By virtue of its experience in the global gaming marketplace and its role as an operator on behalf of iGaming Ontario, Flutter has special expertise and experience that will assist the Court in dealing with the issues arising on the Reference. Flutter not only has factual expertise as a leader in the global and Canadian igaming markets, but also has legal and regulatory expertise because of the role it has taken in advancing regulatory regimes across the globe. Flutter also has a significant interest in the outcome of the litigation as its business interests could be significantly impacted by the outcome of the Reference. Flutter's perspective, as a private entity with experience operating igaming services involving open or shared liquidity, differs significantly from that of any other party to this Reference.
4. Flutter meets each of the disjunctive considerations for leave to appeal set out in *Reference re Greenhouse Pollution Pricing Act*, 2019 ONCA 29.

**I. Flutter has a Real, Substantial and Identifiable Interest in the Appeal**

5. Flutter's interest in this matter is real, substantial and identifiable. This reference deals squarely with Flutter's business interests. Flutter and its subsidiaries have provided peer-to-peer gaming and betting services, including igaming operations, for decades and are leaders in both Canada and internationally. The outcome of the reference will directly impact Flutter's business interests as an operator providing services to iGO. The outcome of the Reference will determine whether Flutter can, on behalf of iGO, open the pool of

available wagers to players in Ontario, which directly impacts both the desirability of Flutter's products and Flutter's profits.

## **II. Flutter has Special Expertise in the Subject Matter of the Appeal**

6. Flutter has extensive experience and expertise in peer-to-peer online gaming. Flutter is the parent company of over 10 major corporations that offer peer-to-peer games and other igaming.
7. As thoughtfully explained in the affidavit of George Sweny, Flutter works regularly with governments and regulatory authorities across the world to educate and explain the advantages resulting from proper regulation of the igaming industry, including ensuring safe and responsible protection for players and providing significant revenue opportunities for local governments.
8. Flutter's experience as an industry participant and in the regulation and application of different liquidity models will be of assistance in this Reference, which raises the question of whether Ontario's igaming regime can involve open or shared liquidity.

## **III. Flutter Brings an Important Perspective**

9. If granted leave to intervene, Flutter will argue that both the wording of s. 207(1)(a) and the purpose underlying it support an interpretation of the provision and the phrase "in that province" that is broad enough to accommodate an "open liquidity" model. Given its role as a leading private entity, both in Ontario and worldwide, and its experience in executing open and shared liquidity models in other jurisdictions, Flutter provides a unique and

important perspective based on special experience and expertise that is not otherwise available to the Court.

10. Specifically, Flutter proposes to make three submissions:
  1. First, specific principles of statutory interpretation favour the conclusion that an open or shared liquidity model falls within the confines of the requirement that the province conduct and manage any gaming scheme “in that province”. These principles include the principle of strict construction of penal statutes and dynamic interpretation and technological neutrality.
  2. Second, Ontario is not only permitted to regulate gaming pursuant to s. 207(1)(a), it is constitutionally entitled to do so. In accordance with the jurisprudence interpreting ss. 92(13) and (16), s. 207(1)(a) must allow Ontario to pass laws regulating any gambling that has a “real and substantial connection” to the province. A narrower scope would reduce Ontario’s constitutional authority in contravention of the principle of cooperative federalism.
  3. Third, this Court need not follow the interpretation of s. 207(1)(b) in *Reference re Earth Future Lottery (P.E.I.)*, 2002 PESCAD 8. That case concerned the interpretation of a different subsection than was at issue here. To the extent that the Supreme Court’s affirmation of *Earth Future Lottery* affects 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.
11. More detail on Flutter’s proposed submissions can be found in the attached factum.
12. If granted leave to intervene, Flutter will work with the parties and interveners to ensure that its submissions are useful and distinct. It will abide by the terms of any timetable, and will not cause delay or prejudice.
13. Flutter’s proposed intervention satisfies the requirements of Rule 13.02 of the *Rules of Civil Procedure* for intervention as a friend of the court.
14. Such other grounds as counsel may advise and this Honourable Court permits.

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



1. The Affidavit of George Sweny, sworn April 7, 2024;
2. The factum of the proposed intervener, Flutter;
3. The oral submissions of counsel; and
4. Such further and other materials as counsel may advise and this Honourable Court may permit.

**DATED** at the City of Toronto, this 8<sup>th</sup> day of April 2024.



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Scott Hutchison  
Kelsey Flanagan  
Brandon Chung

**Counsel for the Proposed Intervener,  
Flutter Entertainment plc**

**TO: THE ATTORNEY GENERAL OF ONTARIO**

Crown Law Office - Civil  
720 Bay Street, 8th Floor  
Toronto, ON M7A 2S9  
Tel.: (416) 908-7465

Josh Hunter (LSO# 49037M)  
[joshua.hunter@ontario.ca](mailto:joshua.hunter@ontario.ca)

Ananthan Sinnadurai (LSO# 60614G)  
[ananthan.sinnadurai@ontario.ca](mailto:ananthan.sinnadurai@ontario.ca)

Hera Evans (LSO# 66269Q)  
[hera.evans@ontario.ca](mailto:hera.evans@ontario.ca)

Jennifer Boyczuk (LSO# 70838L)  
[jennifer.boyczuk2@ontario.ca](mailto:jennifer.boyczuk2@ontario.ca)

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**HENEIN HUTCHISON ROBITAILLE LLP**

235 King Street East  
Toronto, Ontario M5A 1J9

Scott C. Hutchison (LSO# 29912J)

[shutchison@hhllp.ca](mailto:shutchison@hhllp.ca)

Kelsey Flanagan (LSO# 74127U)

[kflanagan@hhllp.ca](mailto:kflanagan@hhllp.ca)

Brandon Chung (LSO# 83164E)

[bchung@hhllp.ca](mailto:bchung@hhllp.ca)

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**AFFIDAVIT OF GEORGE SWENY**

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I, George Sweny, of the City of Toronto, in the Province of Ontario, hereby **MAKE OATH AND SAY** as follows:

1. I am the Vice-President, Regulatory Affairs of Flutter International, which is a division of Flutter Entertainment plc. I have held this role for over 9 years. Prior to that I worked in a number of senior positions with the Ontario Lottery and Gaming Corporation, British Columbia Lottery Corporation, and the Alcohol and Gaming Commission of Ontario. I sit on the boards of the Responsible Gambling Council and the National Council on Problem Gambling (Advisory Board), and I have previously served multiple terms on the board of the Canadian Gaming Association. As such, I have personal knowledge of the matters contained herein.

2. Flutter Entertainment plc seeks to intervene in the Reference set out in Order-in-Council 210/2024 respecting international play in an online provincial lottery scheme. As detailed below, Flutter is a global gaming enterprise with expertise in the practical and legal issues arising on the

Reference and has a direct interest in the outcome of the case.

**A. The Proposed Intervener, Flutter Entertainment plc**

3. The proposed intervener, Flutter Entertainment plc (“Flutter”) is a business corporation, incorporated pursuant to the laws of Ireland. As explained below, Flutter is the parent company for several of the world’s largest and most popular igaming and sports betting brands. Shares in Flutter are traded on the New York Stock Exchange and the London Stock Exchange. Flutter operates in many highly regulated jurisdictions, including in Ontario, where two of Flutter’s entities are already operators on behalf of iGaming Ontario. Flutter has also routinely been involved in advancing regulatory regimes in other markets, including in the United States and Europe.

4. Flutter was established in 2016 following a merger between Paddy Power plc (“Paddy Power”) and Betfair Group plc (“Betfair”), which were then the largest and most successful Irish and British sports betting and gaming companies, respectively. Paddy Power was established in 1988, and Betfair was founded in 2000. The merged company rebranded as Flutter in 2019. Since the merger, Flutter has expanded its global position by acquiring a number of other leading sports betting and gaming companies. It now operates a range of global brands including PokerStars, FanDuel, Betfair, SportsBet, Paddy Power, Sisal, Sky Betting & Gaming, Tombola, TVG, MaxBet, Jungle Games, and Adjarabet. Flutter has been traded on the London Stock Exchange since May 2019, and as of January 2024, has a secondary listing on the New York Stock Exchange. Flutter is headquartered in Dublin, Ireland and is organized across four divisions: United States, United Kingdom and Ireland (UK&I), Australia, and International. Flutter International operates in the Canadian market through its Pokerstars brand, whereas Flutter’s United States division

operates in Canada via its FanDuel brand (only on behalf of iGaming Ontario in the Province of Ontario).

5. In 2023, the various Flutter entities cumulatively had 12.3 million average monthly online players<sup>1</sup> and \$11.79 billion in group revenue (\$2.812 billion in the International division, \$4.484 billion in the United States, \$3.047 billion in the UK & Ireland, and \$1.447 billion in Australia).

6. Two of Flutter's best-known brands, PokerStars and FanDuel, are market-leading operators both internationally and in Ontario. Both are registered operators providing services on behalf of iGaming Ontario.

7. Of the various other Flutter brands, Betfair is one of the largest international online sports and betting operators and operates the world's largest betting exchange.<sup>2</sup> Sportsbet is the market leader in the Australian online wagering market. Paddy Power is Ireland's number one bookmaker and offers betting on an app and in retail outlets. Sisal is Italy's leading gaming operator. MaxBet is a leading sports betting and gaming operator in Serbia and the Balkans, while Junglee Games is a market leader in India.

## **B. Poker Stars**

8. PokerStars is an online poker cardroom. It is the largest real money online poker website in the world.

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<sup>1</sup> Average monthly online players include the players who are registered with the online betting platform and who have made deposits and placed bets each month. It does not include the players who are registered but do not play or bet in a month, the players who play or bet on "free to play" platforms that do not require registration, or the players who play or bet at any of Flutter's retail shops or other physical/non-online spaces.

<sup>2</sup> A betting exchange allows players to bet against each other (with bets being matched (without disclosing personal identifiers) via Betfair's bet matching software) rather than the bookmaker and thus permits customers to offer odds or request odds to and from fellow bettors.

9. PokerStars was launched in December 2001 by the corporation Rational Enterprises. Rational Enterprises was acquired by the Canadian company Amaya Inc., which subsequently changed its name to The Stars Group Inc (which traded on the TSX).

10. In October 2019, Flutter announced an agreement to acquire The Stars Group. The sale of The Stars Group to Flutter was completed in May 2020.

11. Since it was first launched in 2001, PokerStars has maintained its position as the largest online poker site in the world. Since its inception, more than 225 billion hands have been dealt and 1.85 billion tournaments have been hosted by PokerStars. An average of 850,000 hands of poker are currently dealt per hour on the PokerStars websites worldwide. As of 2023, there are a total of approximately 132 million registered players and there are 2.9 million active players across 140 countries.

12. PokerStars also owns and runs the most prestigious online series and live tournaments in the world, including the World Championship of Online Poker, the Spring Championship of Online Poker, the European Poker Tour, the North American Poker Tour, and the PokerStars Caribbean Adventure.

13. In addition to poker games, PokerStars offers approximately 3500 online casino games through PokerStars Casino and offers sports betting through PokerStars Sports.

**C. FanDuel**

14. FanDuel began as a daily fantasy pool website. It is America's largest online gaming operator, offering among other things betting on all major U.S. sports (through the FanDuel sportsbook). There are an estimated 18 million customers of FanDuel in the United States. FanDuel

is the official sportsbook partner of the NFL, NBA, WNBA, MLB, NHL, and PGA TOUR, and also offers bets on soccer, boxing, NASCAR, F1 Racing, UFC, and other sports. As of the end of January 2024, FanDuel is the number one online sports betting brand in the United States based on gross gaming revenue.<sup>3</sup>

15. FanDuel also operates FanDuel Racing, which is the leader in horse race wagering in the United States. FanDuel Faceoff is the company's skill-based gaming platform, where customers can match up against real opponents across hundreds of different games. FanDuel also continues to operate a separate product, Daily Fantasy Sports (DFS), which is one of the most popular places to play fantasy sports contests in the United States.

**D. Flutter and iGaming Ontario**

16. FanDuel and PokerStars have been operating in Ontario as registered operators on behalf of iGaming Ontario since April 2022 and June 2022, respectively. The versions of the games offered in Ontario on behalf of iGaming Ontario are limited to players physically in Ontario. The sites are “geofenced” such that the Ontario platforms can only legitimately be accessed by a person using an Ontario IP address. The versions of the sites offered in other jurisdictions are also “geofenced”, so that they are not available to Ontario located players. Furthermore, PokerStars' poker product in Ontario operates on a closed liquidity<sup>4</sup> basis, meaning that Ontario-based players

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<sup>3</sup> Gross gaming revenue is a metric that reflects the difference between the amount of money players wager minus the amount they win (the gross earnings of a company after winnings are paid out but before other expenses are deducted).

<sup>4</sup> Liquidity is the overall size of the potential gaming audience. Closed liquidity is when the pool of players is limited by jurisdiction. Closed liquidity can be contrasted with global liquidity and shared liquidity. Global liquidity has a pool without jurisdictional limits — players located in any jurisdiction in which the game is offered can join the pool. Shared liquidity is when a liquidity pool is opened to include multiple jurisdictions that enter an agreement with each other to share liquidity between those jurisdictions but does not include liquidity from jurisdictions that are not party to the agreement. Shared liquidity permits players in the jurisdictions with an agreement to compete with each other but not with players in other jurisdictions.

can only play against other Ontario-based players and not with players based outside of Ontario.

17. PokerStars began offering gaming products on behalf of iGaming Ontario as an operator in June 2022. As of March 2024, there are approximately 30,000 active PokerStars users each month in Ontario (who access PokerStars through an Ontario specific igaming portal). In the first quarter of 2024, PokerStars remitted \$3.6 million of gross gaming revenue to the province of Ontario (from which iGaming Ontario pays Flutter for the services provided).

18. Prior to April 2022, customers in Ontario could play online poker directly through PokerStars.com, which customers in other provinces can still do. PokerStars.com has shared liquidity with all other jurisdictions that access PokerStars.com. In the first quarter of 2022 (before iGaming Ontario was established and before PokerStars joined as an operator), there were approximately 34,000 active users of PokerStars in Ontario and PokerStars attracted \$5.8m in gross gaming revenue in Ontario.

19. FanDuel began operating on behalf of iGaming Ontario on April 4, 2022. Prior to that, FanDuel sports wagering was not an active participant in Ontario. FanDuel does not currently offer bets anywhere else in Canada besides Ontario. There are an estimated 150,000 users of FanDuel each month in Ontario. FanDuel has contributed approximately \$320 million in gross gaming revenue to the province since it began operating under iGaming Ontario in April 2022, which I believe represents close to 15% of the market.

**E. Poker and Global Liquidity**

20. Online poker is usually offered as a “peer-to-peer” game, meaning that players are playing against other players online (as opposed to playing against “the house”). As such, liquidity can



have a significant impact on the nature of the gaming experience for players. The larger the audience of potential participants, the wider and more lucrative the range of games and prizes that can be offered. While liquidity impacts other games, it is particularly significant in peer-to-peer games. The ability of gaming operators to allow iGaming Ontario customers to participate as part of the customer base in a larger gaming community, either through global liquidity or shared liquidity, has the potential to improve the gaming experience by expanding both the competition and the prizes available.

21. Flutter has significant global experience in offering peer-to-peer (and almost every other kind of igaming product) within international or multi-state shared liquidity models, including poker on PokerStars and other platforms. For example, PokerStars uses a shared liquidity model in Michigan and New Jersey. Delaware, West Virginia, and Nevada are also part of this US state consortium, but Flutter does not presently operate in those states. In this multi-state arrangement, each state has its own regulatory schemes and has entered a joint contract to share liquidity between all 5 states under the Multi-State Internet Gaming Agreement (“MSIGA”). Negotiations for other states in the United States of America to join the MSIGA are ongoing. PokerStars also operates in a shared liquidity model for France, Spain, and Portugal under a shared liquidity agreement where each country regulates gaming within its jurisdiction, but liquidity is shared between the 3 countries. Flutter had significant involvement in the negotiation and execution of these international agreements.

22. These regimes leverage shared liquidity as a key component of the game structure in these jurisdictions. The advantages of a shared liquidity pool include: (a) an enhanced and more attractive gaming experience for players (a key objective of the government of Ontario for the regulated iGaming model), including a broader range of offerings that players have come to expect

on other online platforms operating in larger markets; (b) a greater ability to exercise regulatory control over and provide protection to Ontario residents who would otherwise be drawn to unregulated platforms for the type of gaming experience they are seeking, and (c) materially increased revenue-generating potential for the Province, as demonstrated by other jurisdictions' experiences.

**F. Legal Expertise**

23. Flutter has routinely been involved in advancing regulatory regimes in other markets, including the United States and Europe.

24. Flutter works regularly with governments and regulatory authorities across the world to educate and explain the advantages resulting from proper regulation of the online gambling (igaming) industry, including ensuring safe and responsible protection for players and providing significant revenue opportunities for local governments.

25. By way of example, Flutter was one of several industry participants consulted by Ontario in relation to the current iGaming Ontario regime.

26. Flutter is currently actively engaged with similar officials in Alberta, British Columbia, and Quebec as those provinces consider the benefits and options of igaming regulation. Flutter is also engaged in providing advice to the Commonwealth of Pennsylvania, as it considers joining the MSIGA in the USA, which combines player liquidity for peer-to-peer games such as poker and daily fantasy sports.

27. And there are many other examples, currently underway, where Flutter is actively working with governments, either directly or via industry councils, including in Finland, Brazil, and

multiple state governments within the USA.

28. Flutter is also a contributing member of various industry councils across the globe. These gaming councils represent the leading operators and suppliers in gaming, sports betting, igaming and lottery industries, including Flutter, in jurisdictions all over the world. With the input of Flutter and other members, these councils have helped shape public policy and advocate for the safe expansion of gaming and igaming across the world. Flutter belongs to the following gaming councils:

Brazil	Instituto Brasileiro de Jogo Responsável (IBJR)
Canada	Canadian Gaming Association (CGA)
Denmark	Spillebranchen
European Union	European Gaming and Betting Association (EGBA)
Germany	Deutscher Online Casinoverband (DOCV)
	Deutsche Sportwettenverband (DSWV)
India	E-Gaming Federation
Italy	Associazione Gioco e Intrattenimento in Concessione (AGIC)
Finland	Rahapeliala Ry
France	Association Française Des Jeux En Ligne (AFJEL)
Portugal	Associação Portuguesa de Apostas e Jogos Online (APAJO)
Romania	Association of Remote Gambling Operators of Romania (AOJND)
Spain	Jdigital
	Asociación de Profesionales de las Relaciones Institucionales (APRI)
Sweden	Branschföreningen för Onlinespel (BOS)
United Kingdom	Betting & Gaming Council (BGC)

29. Based on its involvement in the iGaming Ontario regime and the global igaming marketplace, Flutter has a direct interest in, and is well placed to assist in determining, the issues raised on the Reference.

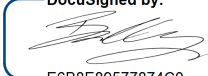
**G. Position on the Issues**

30. I understand that the legal position to be advanced by Flutter will be set out the factum to be filed on this motion to intervene. The position set out there is the position instructed by Flutter.

**H. Conclusion**

31. I make this affidavit in support of a variation of Flutter’s application for leave to intervene as a friend of the court for the purpose of rendering assistance to this Court, and for no other improper purpose.

SWORN remotely by George Sweny in )  
the City of Toronto, in the Province of )  
Ontario before me at the City of Toronto, )  
in the Province Ontario, this 7<sup>th</sup> day of )  
April 2024, in accordance with O. Reg )  
431/20, Administering Oath or )  
Declaration Remotely. )  
)  
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DocuSigned by:  
  
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A Commissioner etc.  
LSO# 83164E

DocuSigned by:  
*George Sweny*  
4263DDF5EF7346E...  
George Sweny

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE

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ON THE  
DAY OF  
2024

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**UPON THE APPLICATION** of the Proposed Intervener, Flutter Entertainment plc (“Flutter”), and upon reading the Notice of Motion for Leave to Intervene, the Affidavit of George Sweny, and Flutter’s factum, and upon hearing the submissions of counsel,

**IT IS ORDERED THAT:**

1. Flutter is granted leave to intervene in the above noted reference, which shall be heard from November 26 to 28, 2024, pursuant to the procedural order of Justice Van Rensberg;
2. Flutter is permitted to file a factum of no more than 20 pages;
3. Flutter is permitted to present oral argument at the hearing of the reference, for no more than one hour;
4. Flutter will adhere to the schedule set by the Court for the service and filing of its factum;
5. Flutter will not seek costs and no costs will be awarded against it.

Signed and entered in the records of this Court this \_\_\_\_\_ day of \_\_\_\_\_ 2024.

\_\_\_\_\_  
**Registrar of the Ontario Court of Appeal**

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**HENEIN HUTCHISON ROBITAILLE LLP**

235 King Street East  
Toronto, Ontario M5A 1J9

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[shutchison@hhllp.ca](mailto:shutchison@hhllp.ca)

Kelsey Flanagan (LSO# 74127U)  
[kflanagan@hhllp.ca](mailto:kflanagan@hhllp.ca)

Brandon Chung (LSO# 83164E)  
[bchung@hhllp.ca](mailto:bchung@hhllp.ca)

**Counsel for the Proposed Intervener,  
Flutter Entertainment plc**

**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**

**COA-24-CV-0185**

**AND IN THE MATTER OF AN APPLICATION by Flutter Entertainment plc to intervene in the said Reference**

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDINGS COMMENCED AT TORONTO

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**MOTION RECORD FOR LEAVE TO INTERVENE  
OF THE PROPOSED INTERVENER, FLUTTER  
ENTERTAINMENT PLC**

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**HENEIN HUTCHISON ROBITAILLE LLP**

235 King Street East  
Toronto, Ontario M5A 1J9

Scott C. Hutchison (LSO# 29912J)  
[shutchison@hhllp.ca](mailto:shutchison@hhllp.ca)

Kelsey Flanagan (LSO# 74127U)  
[kflanagan@hhllp.ca](mailto:kflanagan@hhllp.ca)

Brandon Chung (LSO# 83164E)  
[bchung@hhllp.ca](mailto:bchung@hhllp.ca)

**Counsel for the Proposed Intervener,  
Flutter Entertainment plc**