

COURT OF APPEAL FOR ONTARIO

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

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

**NOTICE OF MOTION 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*)

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 8th day of April 2024.



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PROCEEDINGS COMMENCED AT TORONTO

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ENTERTAINMENT PLC**

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