Court File No. COA-24-0185

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*, RSO 1990, c. C.34, by Order in Council 210/2024 respecting permitting international play in an online provincial lottery scheme

REPLY FACTUM OF ATLANTIC LOTTERY CORPORATION INC., BRITISH COLUMBIA LOTTERY CORPORATION, LOTTERIES AND GAMING SASKATCHEWAN CORPORATION AND MANITOBA LIQUOR AND LOTTERIES CORPORATION

November 15, 2024

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PART I ~ INTRODUCTION

1. In service of the government's preferred policy outcome, the Attorney General of Ontario ("**Ontario**") in its opening factum advanced a sweeping—and legally unsound—argument that the words "in the province" in subsection 207(1)(a) of the *Criminal Code* merely require a lottery scheme to have a "real and substantial connection" to the province.[1] Not one of the three groups of interveners supporting Ontario endorses that argument. Instead, they attempt to rehabilitate Ontario's case by offering a menu of different interpretive paths that they say can still lead to Ontario's (and their) preferred result. But none of these alternatives ultimately fares any better.

2. To begin, NSUS Group Inc. and NSUS Limited (collectively, "**NSUS**") contend that Ontario can prevail even on the construction of "in the province" adopted in *Earth Future.*

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[1] Factum of the Attorney General of Ontario (October 11, 2024) ["**AGO Factum**"], para. 2.

But that approach runs headfirst into the statutory definition of "lottery scheme" in subsection 207(4).

3. Next, Flutter Entertainment PLC ("**Flutter**") urges the Court to depart from what Flutter apparently accepts is the plain meaning of subsection 207(1)(a) in favour of a "dynamic interpretation" driven by modern "technological advancements". But policy decisions of this nature are best left to Parliament, as another appellate court recently observed in a case involving strikingly similar statutory language and identical claims about the purported need to update that language to account for modern technology.

4. Finally, the Canadian Gaming Association ("**CGA**") stresses what it believes are Parliamentary goals in enacting subsection 207(1)(a). But in so doing, the CGA elevates abstract (and contested) statutory purposes ahead of the actual statutory provisions that Parliament enacted to achieve those purposes. What is more, the CGA argues that Ontario's beggar-thy-neighbour proposal will "ensure public protection"—even though Ontario's proposal would enrich private gaming companies that continue to thumb their noses at this nation's criminal law.

5. At the end of the day, there is no need to complicate what is a straightforward matter of statutory interpretation—and one settled by binding Supreme Court precedent at that. This Court should conclude that Parliament in subsection 207(1)(a) said what it meant and meant what it said, and accordingly the Court should answer the Reference question in the negative.

PART II ~ ARGUMENT

A. *Earth Future* Resolves This Reference

6. As the CLC members explained in their responding factum (at paras. 37-51), *Earth Future* resolved the key interpretive question in this Reference by holding that a lottery scheme conducted and managed from a province, but including players from outside that province, is not "in that province" for the purposes of subsection 207(1)(a). Flutter and the CGA seek to brush aside that holding by contending that *Earth Future* is factually distinguishable and, in Flutter's view, also of uncertain precedential force. Neither of these arguments should sway the Court.

(i) The Interveners' Attempts to Distinguish *Earth Future* Are Not Compelling

7. Flutter (at paras. 41-45) and the CGA (at paras. 27-31) each claim that *Earth Future* is "factually distinguishable". They fasten on the fact that Ontario proposes to distribute the conduct and management of various games through a bevy of international operators, while the Earth Future lottery was centrally managed. That is true enough. But it does not change the critical fact that each of the relevant games in which Ontario participates is not "a lottery scheme in that province"—it is a lottery scheme in Ontario ***and in every other jurisdiction in which Ontario's partner international websites are available***.[2] That fact brings this case squarely within the ratio of *Earth Future* and its prohibition on conducting a lottery scheme "in the global village".[3]

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2 *See also* Part II.B.i, *infra* (discussing NSUS's argument regarding multiple "lottery schemes").

3 *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, para. 10, *aff'd* 2003 SCC 10, Tab 3, CLC Book of Authorities ["**CLC BOA**"].

8. Flutter's observation (at para. 50) regarding the Supreme Court's subsequent citation of *Earth Future* illustrates the point. Justice Binnie's opinion in *SOCAN* noted that the Earth Future scheme "targeted on-line purchasers [who] resided elsewhere",[4] and so too here. The whole point of Ontario's proposed scheme is ***to include players who reside elsewhere***. The only distinction—and one without any meaningful difference—is that Ontario relies on the international affiliates of its domestic partners to achieve its global aspirations. The nature of the game remains international.

9. This Court should approach these attempts to factually distinguish *Earth Future* with caution. In asking whether a precedent is distinguishable, it is important, as the Chief Justice of Canada and three of his colleagues recently warned in concurring reasons, to remember that the nature of Supreme Court decisions "precludes an unduly narrow understanding of the law as [the Court] pronounce[s] it, confined to the facts of each individual case." Indeed, whether a case is "factually distinguishable" is "irrelevant" in circumstances where, as here, "the underlying question of law is identical". Were it otherwise, "[f]uture litigants could attempt to confine all [Supreme Court] precedents to their peculiar facts"—a result that would hollow out the Supreme Court's vital role in defining the law.[5]

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4 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, para. 41, Tab 15, CLC BOA.

5 *R. v. Kirkpatrick*, 2022 SCC 33, paras. 124, 128, 132, *per* Wagner CJC, Côté, Brown, and Rowe J.J., concurring [***Kirkpatrick***], Tab 16, CLC Reply Book of Authorities ["**CLC RBOA**"].

(ii) *Earth Future* Is Binding

10. Flutter also argues (at para. 46) that *Earth Future* has "uncertain precedential force" because it is a reference and because the Supreme Court's decision "substantially" adopted the reasons below. Both points are easily dispensed with.

11. Whatever theoretical points may be made about the precedential value of references, the bottom line—as Flutter in fact recognizes (at para. 47)—is that references "in practice are treated as judicial decisions and followed by other courts".[6] To illustrate, the Supreme Court in discussing the precedential force of its earlier decision in the *Prostitution Reference* explicitly noted that "a lower court is not entitled to ignore binding precedent", even though the *Prostitution Reference* was self-evidently a reference.[7]

12. Flutter also faults the Supreme Court for not providing lengthier reasons in *Earth Future*. But Flutter points to no authority in support of its remarkable claim that this Court may disregard *Earth Future* because the Supreme Court did not elaborate on why it agreed with the decision below. There is no such authority. Nor does Flutter explain why it is reasonable for this Court to begin with a premise of ignoring the well-reasoned opinion of the Court of Appeal in *Earth Future*, even though the Supreme Court made clear its substantial agreement with that opinion. In short, *Earth Future* is binding.

B. The Interveners' Statutory Interpretation Arguments Should Be Rejected

13. The CLC members previously explained (at paras. 53-59) why familiar tools of statutory interpretation, reinforced by legislative history, make plain that Parliament

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6 *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, para. 152, Tab 7, CLC RBOA.

7 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 44, Tab 1, CLC RBOA.

intended that any given province's lottery schemes may only operate "in that province" (save for the sole exception of interprovincial cooperation not applicable here). The many arguments offered by the interveners supporting Ontario seek to sidestep that result by ignoring key aspects of the statute's text and context, relying on interpretive tools that are inapposite or inappropriate, and elevating their own policy preferences over the law that Parliament actually enacted. These arguments should be rejected.

(i) Under Ontario's Proposal, the Ontario and International Players Are Playing in a Single 'Lottery Scheme'

14. NSUS posits (at paras. 2, 13) that the Court need not resolve the precise meaning of "in the province" because even on the "strict *Earth Future* interpretation" "the Ontario-based players and internationally-based players participate in the same virtual game through two legally distinct lottery schemes".[8] That is incorrect.

15. The term "lottery scheme" is defined in subsection 207(4) of the *Criminal Code* as:

> ***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 [certain enumerated games and technologies].[9]

16. That definition, as one senior Department of Justice official explained to a Senate committee during the 1985 amendment debates, "covers the waterfront. Virtually any type

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8 Of note, NSUS says (at para. 34) that one of the salutary aspects of its interpretation is that it permits "a single, consistent interpretation of 'in that province' … within the various exceptions under ss. 207(1) of the *Criminal Code*." Insofar as that goes, the CLC members agree. *See* CLC Members' Responding Factum (October 25, 2024), para. 44 ["**CLC Factum**"].

9 *Criminal Code*, R.S.C. 1985, c. C-46, s. 207(4) (emphasis added).

of gaming activity that you can think of can be brought within the rubric of the term 'lottery scheme' ".[10]

17. As the inclusion of granular terms like "game" and "device" convey, the definition of "lottery scheme" operates on a very specific level. It is not describing a high-level framework or regulatory regime (e.g., the iGaming Ontario model). Rather, it defines individual games and other forms of gambling (e.g., a specific "game" of poker, a "device" like a slot machine, or any other "means" of gambling, such as a fantasy sports league). Indeed, as NSUS accepts (at para. 8), "[o]nline casino and table games, including those offered in Ontario's iGaming regime, ***are lottery schemes under s. 207***" (emphasis added).

18. This specificity of the statutory definition is fatal to NSUS's argument. As Ontario's own evidence makes clear, the intermingling between Ontario and any international element under Ontario's proposal exists ***at the game level***. "Using poker as an example, a player in Ontario would be able to sit down at a virtual poker table and compete with players from around the world."[11] As the CGA acknowledges (at para. 25), it is because of this intermingling in a single game that "Ontarians could play against foreign players or win foreign money". And as a result, because the Ontario player and players from around the world would be playing ***in a single game*****,** they are part of ***a single "lottery scheme"*** for the purposes of subsection 207(1)(a). Likewise with a daily fantasy sports league where "an individual in Ontario could wager and participate in a daily fantasy sports

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[10] Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 33-1, No. 33 (12 December 1985), Record of the Attorney General of Ontario ["**AGO Record**"] Vol. 2, p. 637.

[11] Affidavit of George Sweny (May 31, 2024), para. 22, AGO Record Vol. 1, p. 365 ["**Sweny Affidavit**"].

league involving individuals from outside of Canada."[12] Yet again, the Ontario player and "international" players would be playing in a single league—and thus a single "lottery scheme" for the purposes of subsection 207(1)(a).

19. It is thus flatly wrong for NSUS to contend (at paras. 2, 13) that what Ontario proposes involves "the same virtual game through two legally distinct lottery schemes", one of which is a "foreign gaming scheme[ ]". The *Criminal Code* does not permit the splitting of the proverbial gaming atom in this way: under the statutory definition, a game is a lottery scheme. Indeed, Ontario's recognition of this fact is presumably why it argued that a lottery scheme need only have a "real and substantial connection" to Ontario rather than rely on the argument that NSUS advances.[13]

20. The fallacy of NSUS's position is reinforced by the text of subsection 207(1)(a) itself. That provision contemplates "***a lottery scheme*** in that province, ***or in that and the other province***" (emphasis added). It does ***not*** say "or ***lottery schemes*** in that and the other province". Thus, under subsection 207(1)(a), where a single game transcends one province's boundaries to another province, it remains a single "lottery scheme"—and not, as NSUS would have it, two "distinct" lottery schemes in different provinces. Once this is recognized, Ontario's proposal should be seen for what it is: numerous prohibited international and interprovincial lottery schemes. That result breaches subsection 207(1)(a).

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12 Sweny Affidavit, para. 22, AGO Record Vol. 1, p. 365.

13 Flutter and the CGA are not as explicit as NSUS, but their arguments appear to rest on the same fallacious approach to the meaning of "lottery scheme". *See, e.g.*, Flutter Factum (November 5, 2024), para. 42 ["**Flutter Factum**"]; CGA Factum (November 5, 2024), para. 12 ["**CGA Factum**"].

(ii) Statutory Context Shows that Parliament Did Not Intend for Provinces to Engage in Foreign Lotteries

21. The CGA contends (at para. 9) that an "important textual feature" of subsection 207(1)(a) is that it "demarcates interprovincial boundaries rather than international ones". Based on its observation that "[t]here is no mention at all of international boundaries" in subsection 207(1)(a), the CGA appears to infer that the incorporation of what Ontario has described (at para. 87) as "international elements" is not prohibited. This inference is misplaced for at least two reasons.

22. *First*, the CGA's argument ignores the "well established" precept that "a province has no legislative competence to legislate extraterritorially".[14] As a result, far from indicating Parliamentary acquiescence in the provinces' entangling their lottery schemes with "international elements", Parliament's silence on international boundaries in subsection 207(1)(a) merely reflects a "territorial restriction" that is "fundamental to our system of federalism".[15] Simply put, Parliament was silent because it is presumed that a province's authority ends at its borders.

23. *Second*, as noted in the CLC members' responding factum (at para. 55), Parliament in subsection 207(1)(a) ***did*** distinguish between international and interprovincial extraterritorial activities. In particular, when Parliament sought to bless international activity in subsection 207(1)(h), it used distinctive language that differed from the language it used to approve of certain interprovincial activities in subsections

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[14] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, para. 50 [***Unifund***], Tab 19, CLC RBOA.

[15] *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, para. 104, quoting *Unifund*, para. 51, Tab 17, CLC RBOA.

207(1)(a), (e), and (f). Having used express language to address the international context in a neighbouring provision, it would be passing strange to conclude, as the CGA ostensibly does, that Parliament's omission of international elements in subsection 207(1)(a) amounts to approval of international activities.

(iii) Reliance on 'Dynamic Interpretation' Is Inappropriate in This Context

24. For its part, Flutter also places significant emphasis (at paras. 21-36) on the principle of "dynamic interpretation", arguing that reliance on dynamic interpretation "has allowed legislative provisions to encompass technology that would not—or could not—have been in the drafters' minds". Whatever the merits of dynamic interpretation in some contexts, there are at least two reasons why the Court should decline Flutter's invitation to update subsection 207(1)(a) through judicial interpretation.

25. *First*, reliance on dynamic interpretation is particularly ill-suited in a case with significant policy ramifications, such as this one. The Federal Court of Appeal's recent decision in *Re Canadian Security Intelligence Service* illustrates the point.[16] There, the court was tasked with determining the meaning of a statutory provision that provided that a federal agency could assist with intelligence collection concerning foreign states and persons "within Canada". Much like Ontario and Flutter here, the Attorney General of Canada in *CSIS* argued that the court should "take account of technological change in assigning meaning to the phrase 'within Canada.'"[17] Justice Laskin, writing for a unanimous panel, agreed that "evolving social and material realities"—including "advances in technology"—sometimes "requires a dynamic approach" to statutory

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16 *Canadian Security Intelligence Services Act (CA) (Re)*, 2021 FCA 165 [***CSIS***], Tab 2, CLC RBOA.

17 *CSIS*, para. 57, Tab 2, CLC RBOA.

interpretation.[18] But he nonetheless rejected the Attorney General's invitation to update the meaning of "within Canada".

26. As Justice Laskin explained, "[i]t is not every interpretive exercise that calls for a dynamic approach." Particularly where "doing so would raise issues of policy more suited for legislative resolution" and where Parliament has shown an inclination to amend the statute, a court should refrain from dynamic interpretation and instead apply the statute as written. In *CSIS*, the court ultimately concluded that "given the plain meaning, purpose and context of the legislation, technological change could not provide a basis for interpreting 'within Canada' as the Attorney General proposed."[19]

27. This Court should follow that example. The extent to which Canadians should interact with foreign lottery schemes was a key element of the Parliamentary debates when the *Criminal Code* was first amended to permit provincial lotteries, as discussed in the CLC members' responding factum (at paras. 7-12). And though Flutter attempts to portray section 207 as a dusty provision for "an analog" age (at para. 32), Parliament amended section 207 as recently as 2021. So if Parliament sees fit to adopt Ontario's perspective in this Reference, it can again return to update the statute—without the need for any judicial assistance.

28. *Second*, reliance on dynamic interpretation is particularly inappropriate where it is constrained only by some connection to a broad statutory purpose. That is so because

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18 *CSIS*, para. 73, Tab 2, CLC RBOA, citing *R. v. 974649 Ontario Inc.*, 2001 SCC 81, para. 38, Tab 13, CLC RBOA.

19 *CSIS*, paras. 78-80, 82. Notably, the Federal Court of Appeal also rejected the Attorney General's attempt to equate the phrase "within Canada" with a "real and substantial connection" to Canada. *See CSIS* at para. 68, Tab 2, CLC RBOA.

"[o]nce a purpose has been defined broadly, it can fail to constrain interpretive distinction", meaning that "any sort of interpretive result can possibly be justified".[20] Yet as Justice Cromwell observed, "the broader purposes" of a complex legislative regime "are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme".[21]

29. That lesson is particularly important here. Both Flutter (at para. 28) and the CGA (at para. 14) emphasize Parliamentary statements concerning provincial autonomy and control. But they forget that at the same time Parliamentarians repeatedly expressed their understanding that provincial lotteries would be limited to "within provincial boundaries".[22] That Parliamentary understanding was also codified in the legislature's chosen text restricting a provincial government's activities "in that province".

30. Yet Flutter's and the CGA's approach essentially prizes whatever interpretive result provides greater latitude to provinces, to the point of negating Parliament's clear intent to cabin the provinces' autonomy to within their own borders. That is not statutory interpretation; it is statutory subversion. "As a majority of the Supreme Court noted in the

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20 Mark P. Mancini, *The Purpose Error in the Modern Approach to Statutory Interpretation*, (2022) 59:4 Alta LR, p. 919, Tab 20, CLC RBOA.

21 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 174, *per* Cromwell J., concurring, Tab 18, CLC RBOA.

22 House of Commons Standing Committee on Justice and Legal Affairs, 1st Session, 28th Parliament, 1968-1969 (11 March 1969), excerpts, AGO Record Vol. 2, p. 457; *see also* CLC Factum, para. 10 (collecting additional examples).

Supreme Court Reference, [courts] are concerned not only with Parliament's intention to address a particular mischief, *but its intention to do so a particular way*."[23]

31. In sum, whatever autonomy Parliament intended to provide to the provinces, it drew the line at provincial borders. Dynamic interpretation should not be used to evade that restriction.

(iv) The Principle of Strict Construction of Penal Statutes Is a Last Resort That Does Not Apply Here

32. Flutter argues (at para. 37) that the principle of "strict construction of penal statutes" should resolve any ambiguity in Ontario's favour. That principle has no application here.

33. *First*, it bears recalling that as then-Justice Dickson said in the now canonical formulation of the principle of strict construction of penal statutes: "If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication."[24] But if any party here is advocating for reasoning by implication, it is Flutter. As the CLC members have explained in their responding factum (at paras. 53-58), the most straightforward reading of the statute is that provincial governments have no authority to extend the operation of their lottery schemes to "international elements". That interpretation has been settled law for more than two decades in light of *Earth Future*.

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23 Michael Plaxton, *Sovereignty, Restraint and Guidance* (Toronto: Irwin Law, 2019) p. 106 (emphasis in original), Tab 21, CLC RBOA, citing *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, paras. 58-59, Tab 12, CLC RBOA.

24 *Marcotte v. Canada (Deputy Attorney General) et al.*, [1976] 1 S.C.R. 108, p. 115, Tab 5, CLC RBOA.

34. *Second*, then-Justice Dickson's concern about having notice of the basis for incarceration has no application here. This is a reference, not a prosecution, and whatever the result, NSUS, Flutter, and CGA members will have notice of the outcome.

35. *Third*, reliance on the principal of strict construction is unnecessary because ordinary tools of statutory interpretation resolve the question. As the Supreme Court has instructed, "[a] restrictive interpretation *may* be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation."[25] Thus, it is a "principle of last resort".[26] For all the reasons discussed here and in the CLC members' responding factum, however, this is not a case where "there are two or more plausible readings, each equally in accordance with the intentions of the statute".[27] There is only one plausible reading—and that is the one advanced by the CLC members. As a result, there is no work for the principle of strict construction to do.

C. The CLC Members' Evidence Is Uncontradicted and Relevant to the Reference Question

36. Finally, the private gambling operators supporting Ontario urge this Court to consider the Reference question and incorporated Schedule as "hypothetical facts and contours"[28] divorced from the reality of how Ontario's current scheme actually operates. Flutter and the CGA argue that the CLC's evidence is (i) unfounded, because they have not had a meaningful opportunity to respond to it and (ii) irrelevant, because this Court is

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25 *R. v. Jaw*, 2009 SCC 42, para. 38 [***Jaw***] (emphasis added), Tab 15, CLC RBOA.

26 *Jaw*, para. 38, Tab 15, CLC RBOA.

27 *R. v. Basque*, 2023 SCC 18, para. 74 (quotation omitted), Tab 14, CLC RBOA.

28 Flutter Factum, para. 6.

bound by the hypothetical facts posited by Ontario.[29] Neither argument holds water, particularly given the findings of Justice van Rensburg in her Endorsement granting the CLC leave to adduce the evidence. Importantly, however, this Court should answer the Reference question in the negative regardless of the CLC's evidence, for the reasons discussed above and in the CLC members' responding factum (at paras. 34-65). The CLC's evidence supports its arguments here, but its legal submissions are independently sufficient to answer the Reference question as the CLC members urge.

(i) The CLC Members' Evidence Is Uncontradicted

37. Flutter's statement (at para. 4) that it "has had no opportunity to meaningfully respond to" the CLC's evidence is false. In response to the CLC's motion for leave to adduce evidence, Ontario, Flutter, the CGA, and NSUS each opposed the evidence on the grounds that it would set off a "***cascade of events***" that would "***derail***" the Reference.[30] Flutter, the CGA, and NSUS argued that if the evidence were admitted (but not otherwise), they would require "enhanced participation rights" to "fully challenge" the CLC members' evidence, including the right to cross-examine affiants and the right to adduce responding evidence.[31] Justice van Rensburg accepted this. She granted the CLC leave to adduce evidence and at the same time granted Ontario, Flutter, the CGA,

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29 CGA Factum, para. 32; Flutter Factum, paras. 4, 6.

30 Written Submissions of the CGA on Motions for Leave to File Evidence (June 26, 2024), para. 32 ["**CGA Evidence Submissions**"] (emphasis added); Written Submissions of NSUS (June 26, 2024), para. 1 ["**NSUS Evidence Submissions**"]; Written Submissions of Flutter (June 26, 2024), para. 4 ["**Flutter Evidence Submissions**"].

31 Flutter Evidence Submissions, para. 11; CGA Evidence Submissions, para. 31; NSUS Evidence Submissions, para. 17.

and NSUS leave to cross-examine the CLC's affiants.[32] She also asked that counsel advise whether there would be any requests for leave to file responding evidence.

38. Yet after crying wolf about the CLC members' "scandalous" assertions,[33] ***none*** of Ontario, Flutter, the CGA or NSUS sought leave to file any responding evidence. And ***none*** of Ontario, Flutter, the CGA, or NSUS asked ***any*** cross-examination questions that challenged the veracity of the assertions advanced by the CLC.[34]

39. Indeed, Flutter's affiant himself confirmed many of the facts put forward by the CLC members, including that: (i) even before PokerStars registered with iGaming Ontario, it was generating revenue in Ontario;[35] (ii) PokerStars continues to generate revenue from British Columbia, Manitoba, Saskatchewan and the Atlantic Provinces—even though it is not authorized by any provincial government to do so—and indeed earns approximately 50% of its Canadian revenues from Canadians outside Ontario;[36] and (iii) when Canadians outside Ontario attempt to access the iGaming Ontario site PokerStars.ca, they are re-directed to the international site PokerStars.com.[37] If Ontario, Flutter, or the CGA wanted to disprove these assertions with respect to any other iGO Operator or its affiliate, they could have tried (although they would not have succeeded). And yet they

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32 *Reference re iGaming Ontario*, 2024 ONCA 569, paras. 24-25 [**Endorsement**], Tab 9, CLC RBOA.

33 CGA Evidence Submissions, para. 5.

34 Instead, the CGA argues (at para. 37) that Mr. Hill is not credible, given his earlier statements in 2022—before he bore witness to the consequences of iGaming Ontario—that Ontario's model was a "smart idea". But these statements do nothing to disprove Mr. Hill's later observations regarding the marked increase of illegal gambling in Canada after iGaming Ontario's launch.

35 Cross-Examination Transcript of George Sweny (September 6, 2024), Joint Brief of Transcripts ["**JBT**"] Tab 2, p. 368, qq. 253-254 ["**Sweny Transcript**"], CLC Factum, fn. 31.

36 Sweny Transcript, JBT Tab 2, p. 371, qq. 269-275, CLC Factum, fn. 41; Sweny Transcript, JBT Tab 2, p. 408, qq. 431-434, CLC Factum, fn. 44.

37 Sweny Transcript, JBT Tab 2, pp. 387-392, qq. 324-351, CLC Factum, fn. 46.

chose not to. The Court should thus accept the CLC's evidence and draw an adverse inference based on Ontario, Flutter, and the CGA's conduct.[38]

40. The CGA also argues that the illegality of the operators' conduct has not yet been established beyond a reasonable doubt.[39] But such a finding is unnecessary for the purposes of this Reference, where Ontario itself (as well as the CGA) have conceded that interprovincial play is illegal in the absence of an agreement between the provinces.[40] If this Court accepts the CLC's evidence that the proposed scheme would result in interprovincial play in the absence of an agreement, it follows that the scheme is unlawful.

(ii) The CLC Members' Evidence Is Relevant

41. Both Flutter (at para. 6) and the CGA (at para. 32) argue that the CLC's evidence is irrelevant because this Court must accept the "hypothetical facts and contours" proposed by Ontario in the Reference question and Schedule. But the CGA overstates the cases that it relies on (and, for its part, Flutter does not cite any).

42. In a constitutional reference, interveners may file their own factual materials, because constitutional challenges should not be determined in a factual vacuum.[41] That is why Justice Van Rensburg made just such an order.[42] Although the Reference concerns the *Criminal Code*, Ontario argues "[t]he intangible nature of online gaming

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38 *See* *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, para. 9, Tab 6, CLC RBOA; *Himel v. Molson*, 2015 ONCA 405, para. 4, Tab 3, CLC RBOA; *Kilback v. Canada*, 2023 FCA 96, paras. 61-62, Tab 4, CLC RBOA.

39 CGA Factum, para. 11.

40 Affidavit of Jesse Todres (May 31, 2024), AGO Record Vol. 1, p. 36, para. 32; CGA Factum, para. 10.

41 Endorsement, para. 12, Tab 9, CLC RBOA; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29, para. 17, Tab 8, CLC RBOA.

42 *See* Endorsement at para. 12, Tab 9, CLC RBOA.

requires that this Court's exercise of statutory interpretation be guided by a contextual and flexible analysis ***that is grounded in Canada's constitutional architecture***."[43] Ontario thus concedes that a contextual analysis is required in this Reference.

43. The CGA's cases concern attempts to expand the scope of a reference and are easily distinguished. In *Reference re Subsection 18.3(1) of the Federal Courts Act*, the Federal Court was considering an appeal by a private party to the reference from an order dismissing its motion to expand the scope of the reference questions to introduce a constitutional issue. The court agreed with the general principle that the discretion as to how reference questions are framed belongs exclusively to the entity bringing the reference.[44] In *Reference re Order in Council 321/96*, an intervener moved for directions regarding whether it could expand the scope of the reference question in its factum. The court held that the questions the intervener wished to raise did not flow logically from the reference question nor even the questions raised in other parties' factums. Thus, the court directed the intervener not to raise them.[45]

44. Here, by contrast, Justice van Rensburg explicitly ***rejected*** the argument that the CLC's evidence raised new and unrelated issues that would broaden the scope of the Reference. Justice van Rensburg also ***accepted*** that the purpose of the evidence was to respond directly to Ontario's own evidence about the operation of the scheme and the future operation of the proposed scheme.[46] She noted that the Reference question and

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43 AGO Factum, para. 82 (emphasis added).

44 *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 957, paras. 41-42, Tab 11, CLC RBOA.

45 *Reference re Order in Council 321/96*, 1997 ABCA 87, para. 8, Tab 10, CLC RBOA.

46 Endorsement, para. 14, Tab 9, CLC RBOA.

incorporated Schedule explain the proposed scheme in relation to the current scheme, and that an answer to the Reference question therefore presupposes an understanding of how the current scheme operates.[47]

45. Indeed, both Ontario and its supporting interveners rely on Ontario's significant evidence. Ontario did not simply rely on the Reference question and Schedule—it filed extensive evidence claiming (among other things) that under the proposed scheme, individuals outside of Ontario but within Canada would ***remain*** barred from iGO Sites and would be ***prevented*** from accessing affiliated international gambling websites.[48] The CGA argues that ***the only new aspect*** of the proposed scheme would be the involvement of players outside of Canada, because players outside of Ontario but within Canada would not be permitted to participate without an interprovincial agreement, just as the *Criminal Code* requires.[49] The CLC members' evidence directly refutes these submissions. The other parties had a chance to challenge that evidence, but chose not to. That choice speaks volumes.

PART III ~ CONCLUSION

46. For the reasons above and in the CLC members' responding factum, the CLC members respectfully submit that this Court should answer the Reference question "no".

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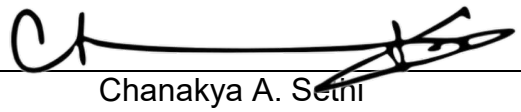
47 Endorsement, para. 12, Tab 9, CLC RBOA.

48 AGO Factum, para. 50 (emphasis added).

49 CGA Factum, para. 10.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November 2024.



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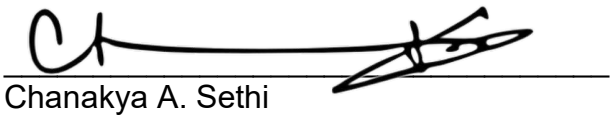
British Columbia Lottery Corporation,
Lotteries and Gaming Saskatchewan and
Manitoba Liquor and Lotteries
Corporation

CERTIFICATE REQUIRED BY RULE 4.06.1(2.1)

1. I am satisfied as to the authenticity of every authority listed in Schedule A.

November 15, 2024



Chanakya A. Sethi

Lawyer for the Interveners, Atlantic Lottery Corporation Inc., British Columbia Lottery Corporation, Lotteries and Gaming Saskatchewan and Manitoba Liquor and Lotteries Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

A. JURISPRUDENCE

1. *Canada (Attorney General) v. Bedford*, 2013 SCC 7
2. *Canadian Security Intelligence Services Act (CA) (Re)*, 2021 FCA 165
3. *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 (CanLII), *aff'd* 2003 SCC 10
4. *Himel v. Molson*, 2015 ONCA 405
5. *Kilback v. Canada*, 2023 FCA 96
6. *Marcotte v. Canada (Deputy Attorney General) et al.*, [1976] 1 S.C.R. 108
7. *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753
8. *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27
9. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29
10. *Reference re iGaming Ontario*, 2024 ONCA 569
11. *Reference re Order in Council 321/96*, 1997 ABCA 87
12. *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 957
13. *Reference re Supreme Court Act*, 2014 SCC 21
14. *R. v. 974649 Ontario Inc.*, 2001 SCC 81
15. *R. v. Basque*, 2023 SCC 18
16. *R. v. Jaw*, 2009 SCC 42
17. *R v. Kirkpatrick*, 2022 SCC 33
18. *Sharp v. Autorité des marchés financiers*, 2023 SCC 29
19. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6
20. *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40

B. SECONDARY MATERIALS

1. Mark P. Mancini, *The Purpose Error in the Modern Approach to Statutory Interpretation*, (2022) 59:4 Alta LR

2. Michael Plaxton, *Sovereignty, Restraint and Guidance* (Toronto: Irwin Law, 2019)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Criminal Code, **R.S.C. 1985, c. C-46, ss. 204(1), 206, 207(1)(a-f, h), 207(2), 207(4), 207.1**

Exemption

204 (1) Sections 201 and 202 do not apply to

(a) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

(b) a private bet between individuals not engaged in any way in the business of betting;

(c) bets made or records of bets made through the agency of a pari-mutuel system on running, trotting or pacing horse-races if

(i) the bets or records of bets are made on the race-course of an association in respect of races conducted at that race-course or another race-course in or out of Canada, and, in the case of a race conducted on a race-course situated outside Canada, the governing body that regulates the race has been certified as acceptable by the Minister of Agriculture and Agri-Food or a person designated by that Minister pursuant to subsection (8.1) and that Minister or person has permitted pari-mutuel betting in Canada on the race pursuant to that subsection, and

(ii) the provisions of this section and the regulations are complied with.

[…]

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, barters, 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.

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;

[…]

(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.

[…]

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.

[…]

Exemption — lottery scheme on an international cruise ship

207.1 (1) Despite any of the provisions of this Part relating to gaming and betting, it is lawful for the owner or operator of an international cruise ship, or their agent, to conduct, manage or operate and for any person to participate in a lottery scheme during a voyage on an international cruise ship when all of the following conditions are satisfied:

(a) all the people participating in the lottery scheme are located on the ship;

(b) the lottery scheme is not linked, by any means of communication, with any lottery scheme, betting, pool selling or pool system of betting located off the ship;

(c) the lottery scheme is not operated within five nautical miles of a Canadian port at which the ship calls or is scheduled to call; and

(d) the ship is registered

(i) in Canada and its entire voyage is scheduled to be outside Canada, or

(ii) anywhere, including Canada, and its voyage includes some scheduled voyaging within Canada and the voyage

(A) is of at least forty-eight hours duration and includes some voyaging in international waters and at least one non-Canadian port of call including the port at which the voyage begins or ends, and

(B) is not scheduled to disembark any passengers at a Canadian port who have embarked at another Canadian port, without calling on at least one non-Canadian port between the two Canadian ports.

* * *

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 File No. COA-24-0185

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF ATLANTIC LOTTERY CORPORATION INC., BRITISH COLUMBIA LOTTERY CORPORATION, LOTTERIES AND GAMING SASKATCHEWAN CORPORATION AND MANITOBA LIQUOR AND LOTTERIES CORPORATION

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