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

**NOTICE OF MOTION OF THE PROPOSED INTERVENERS,
NSUS GROUP INC. AND NSUS LIMITED
(*Motion for Leave to Intervene*)**

THE MOVING PARTIES, NSUS Group Inc. (“**NSUS Group**”) and NSUS Limited (together, “**NSUS**”) will make a motion to a Judge to be heard on May 1, 2024 at Osgoode Hall, 130 Queen St. West, Toronto.

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

THE MOTION IS FOR:

1. An Order granting NSUS leave to intervene in this Reference as a friend of the court pursuant to rules 13.02 and 13.03(2) of the *Rules of Civil Procedure* on the following terms:
 - (a) NSUS will be permitted to file a factum of 30 pages or such other length as the Court may deem appropriate;
 - (b) NSUS will be permitted to make oral submissions at the hearing of the Reference;
and
 - (c) There shall be no costs award made for or against NSUS on this motion or in the Reference.

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2. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

A. The Proposed Interveners

3. The proposed intervener NSUS Group is a Canadian corporation that owns and operates GGPoker, the world's largest online poker room. GGPoker is operated through a number of international subsidiaries, including subsidiaries incorporated in Malta, the Republic of Ireland, and the Isle of Man.
4. GGPoker has repeatedly been recognized as a leader in online poker, with the highest traffic in the global market. GGPoker offers a range of innovative online poker and casino games and unique features that enhance the gaming experience.
5. In Ontario, GGPoker is made available by the proposed intervener NSUS Limited, an Irish corporation that is wholly-owned by NSUS Group, under the brand GGPoker.ca ("**GGPoker Ontario**"). GGPoker Ontario is the largest online poker room in Ontario.
6. NSUS Limited is registered as an internet gaming operator with the Alcohol and Gaming Commission of Ontario ("**AGCO**"). NSUS Limited has also entered into an operating agreement with iGaming Ontario ("**iGO**").
7. GGPoker Ontario can be accessed through a desktop game client downloaded through GGPoker.ca, a Canadian website registered with the AGCO, or through mobile apps that can be downloaded from third-party app stores.

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8. As a registered operator, NSUS Limited is subject to the *Registrar's Standards for Internet Gaming* (the "**Standards**"), a comprehensive set of risk-based standards for internet gaming in Ontario. NSUS Limited must also provide 20% of its gross gaming revenue to iGO and pay the AGCO an annual license fee of \$100,000, along with recovery costs. The license fee is discounted against the recovery costs, which typically exceed \$100,000.

B. Regulated internet gaming in Ontario is restricted to a closed liquidity system

9. Under the Standards, registered operators are not permitted to provide internet gaming products to individuals physically located outside of Ontario.
10. Accordingly, NSUS Limited restricts access to GGPoker Ontario to eligible players who are physically located in Ontario.
11. As a result of this restriction, participation in liquidity pools for peer-to-peer games like online poker must be limited to players physically located in Ontario, in what is known as a "closed liquidity" system, as compared to an "open liquidity" system that would allow Ontarians to participate in games and liquidity pools with players in other jurisdictions.

C. Disadvantages of a closed liquidity system in Ontario

12. There are significant disadvantages to limiting Ontario's regulated market to a closed liquidity system that arise due to the disparity between the number of players available in Ontario compared to the number of players available around the world, and have a particularly acute impact on online poker.
13. In particular:

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- (a) A closed liquidity system seriously limits the range of experiences for cash games of online poker, in particular by making it difficult for Ontario players to find higher stakes games that are available in the international market;
- (b) A closed liquidity system also restricts the experiences in online poker tournaments, as fewer players result in a smaller potential prize pool and shorter tournament play than what is available in the international market;
- (c) As a result of the diminished online poker experience in Ontario, Ontario players are driven to the online poker products of unregulated black market operators who are not required to comply with the Standards, undermining the effectiveness of Ontario's regulatory regime;
- (d) Less play in the regulated market also results in lower revenues for the government and registered operators, who derive revenues in online poker from commissions based on the number of Ontario players participating; and
- (e) A closed liquidity system also hinders poker operators from efforts to detect collusion and fraud by making it easier for players to engage in "chip dumping", collusion and making it harder for operators to identify suspicious patterns of play.

D. The Reference will determine the legality of an open liquidity system in Ontario

14. Ontario now seeks to implement an open liquidity system that would permit players in Ontario to participate in regulated internet gaming involving players outside of Canada, as reflected in its Order in Council 210/2024 approved and ordered February 2, 2024.

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15. Ontario has referred to the Court of Appeal for Ontario the question: “Would legal online gaming and sports betting remain lawful under the *Criminal Code* if its users were permitted to participate in games and betting involving individuals outside of Canada as described in the attached Schedule? If not, to what extent?”
16. The Reference will determine the legality of an open liquidity system in Ontario.
17. Ontario’s proposal to permit open liquidity for internet gaming is set out in the Schedule to the Order in Council.

E. NSUS should be granted leave to intervene

1. NSUS Group has a substantial and identifiable interest in the subject matter of the Reference

18. NSUS has a substantial and identifiable interest in the Court’s resolution of this issue as the owner and operator of GGPoker, the world’s largest online poker room, as well as GGPoker Ontario, Ontario’s largest online poker room.
19. This interest will be significantly impacted by the Court’s decision in the Reference, which will determine the legality of an open liquidity system for peer-to-peer gaming in Ontario.
20. In particular, the Court’s decision as to whether Ontario’s proposed open liquidity system is permitted under the *Criminal Code* will impact NSUS in the following ways:
 - (a) The Court’s decision will affect the quality of the poker experience for players on GGPoker Ontario, which will impact NSUS’s ability to provide the best possible gaming products for Ontarians. As noted above, restrictions on open liquidity leads

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to fewer players, a less diverse offering of cash games, and smaller tournaments with smaller prize pools;

(b) The Court's decision will, in turn, impact NSUS's revenues from the Ontario market because it will impact NSUS' ability to draw new and returning players to its platform and defend its market share against unregulated black market operators;

(c) The Court's decision will also affect NSUS's ability to take effective steps against collusion and fraud, which could have a broader impact on NSUS's global reputation and operations; and

(d) The Court's decision will affect whether GGPoker Ontario can offer other games and features which are only economically viable with a sufficiently large liquidity pool.

21. Given that GGPoker Ontario is the largest poker room in Ontario, and poker is uniquely impacted by the liquidity model, the magnitude of these impacts on NSUS is distinct among regulated internet gaming operators in Ontario.

22. The Court's decision in this Reference will also be an important precedent for other provinces and territories seeking to regulate internet gaming, potentially impacting NSUS' offering in these other jurisdictions.

2. NSUS has a distinct and important perspective to offer the Court

23. NSUS has a distinct perspective from the Attorney General of Ontario and any other potential interveners which will assist the Court in resolving the issues in the Reference.

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24. NSUS's perspective is distinct from the Province of Ontario, which acts as the regulator through the AGCO and conducts and manages internet gaming in Ontario through iGO, whereas NSUS is the subject of regulatory oversight.
25. As a registered operator under Ontario's regime and in the international market, NSUS has first-hand knowledge of how online poker in Ontario and registered operators are impacted by a closed liquidity system, as well as market experience in what users expect from their online poker experience.
26. NSUS also has the practical understanding of how Ontario's proposal will function and can assist the Court with contextualizing those facts within the legal framework.
27. Given NSUS's dominance in the global online poker market and how uniquely impacted poker is by liquidity issues, NSUS's perspective is also distinct from other registered operators in Ontario and elsewhere. No other registered operators in Ontario have a comparable interest or expertise in how closed liquidity impacts online poker.

3. NSUS's intended submissions

28. If granted leave to intervene, NSUS intends to make the following submissions:
 - (a) An open liquidity system for peer-to-peer internet gaming, such as poker, will lead to more effective regulatory oversight of internet gaming in Ontario. An open liquidity system creates an opportunity to provide a higher quality experience for Ontarians, enabling registered operators to effectively compete with unregulated black market operators and drawing Ontarians away from the black market.

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- (b) Ontario is entitled to adopt an open liquidity system under s. 207(1)(a) of the *Criminal Code*, and in particular:
- (i) Section 207(1)(a) of the *Criminal Code* permits a province to “conduct and manage” gaming in that province, and in doing so carves out an exception to the general prohibition on gaming in Canada under s. 206 where it is done under the regulation of a provincial government;
 - (ii) The regulatory scheme for internet gaming in Ontario falls within this exception because all internet gaming in Ontario is done under the regulation of the provincial government;
 - (iii) Section 207(1)(a) does not limit the policy choices that provincial governments can adopt in how they conduct and manage gaming in their respective provinces, including the policy choice to adopt an open liquidity model; and
 - (iv) Permitting Ontario players to participate in open liquidity pools does not change the fact that all aspects of internet gaming in Ontario occur under the regulation of the provincial government, in accordance with s. 207(1)(a) of the *Criminal Code*; it simply changes the conditions that apply to internet gaming in Ontario.
- (c) The decision in *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8, aff’d 2003 SCC 10 is distinguishable. In particular, that case was about the extent to which a charity could conduct and manage a lottery outside of the province under s.

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207(1)(b). All elements of the lottery, including the international components, were to be conducted and managed by the charity. In contrast, in Ontario's proposal, the provincial government would only be conducting and managing internet gaming within the province, whereas gaming outside the province would be conducted and managed by private operators in various international jurisdictions. The only difference is that Ontario would be implementing a policy decision to permit its provincial gaming market to interact with the international market through open liquidity.

- (d) The adoption of an open liquidity system in Ontario is supported by the experience in international jurisdictions that have implemented regulatory frameworks for internet gaming, including the United Kingdom, Germany, Netherlands, Sweden, Denmark, Romania, the Czech Republic, Switzerland, Greece, Belgium, Lithuania, Latvia, Estonia, Bulgaria, and Malta.

4. NSUS's intervention will not unduly delay the proceeding or prejudice the parties

- 29. If granted leave to intervene, NSUS commits to the following in order to avoid any delay, injustice or prejudice to the parties:
 - (a) NSUS will abide by any schedule set by the Court and comply with any terms and conditions imposed on its intervention;
 - (b) NSUS will not file any additional evidence or unduly expand the issues;
 - (c) NSUS will not seek costs associated with the intervention; and

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- (d) NSUS will avoid duplicative submissions by working collaboratively with the parties and other interveners.
30. Rules 13.02, 13.03, 37, 39 and 61.16 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.
31. Section 8 of the *Courts of Justice Act*, RSO 1990, c C.43.
32. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED at the hearing of the motion:

33. Affidavit of Sarne Lightman affirmed April 8, 2024 with exhibits;
34. Such further and other material as this Honourable Court may permit.

April 8, 2024

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