SCC File No.: 42141

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE 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.43, by Order-in-Council 210/2024 respecting permitting international play in an online provincial lottery scheme

B E T W E E N:

ATLANTIC LOTTERY CORPORATION, BRITISH COLUMBIA LOTTERY CORPORATION, AND MANITOBA LIQUOR AND LOTTERIES CORPORATION

APPELLANTS
(Interveners)

- and -

ATTORNEY GENERAL OF ONTARIO

RESPONDENT

- and -

CANADIAN GAMING ASSOCIATION, FLUTTER ENTERTAINMENT PLC, NSUS GROUP INC., NSUS LIMITED AND MOHAWK COUNCIL OF KAHNAWÀ:KE

INTERVENERS
(Interveners)

FACTUM OF THE INTERVENER
(FLUTTER ENTERTAINMENT PLC, INTERVENER/PROPOSED RESPONDENT)
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I — OVERVIEW AND FACTS

A. OVERVIEW

1. The Reference Question ought to be answered in the affirmative. The proper interpretation of "in that province" in s. 207(1)(a) of the *Criminal Code* permits a provincial scheme where users in Ontario can participate in gaming and betting with persons outside of Canada in circumstances as described in Order in Council 210/2024 and the accompanying Schedule.

2. The Reference Question was posed to the Court of Appeal for Ontario as follows: would Ontario's current model of online gaming and betting remain lawful if players in Ontario, subject to Ontario regulations, interacted with international players (and not players from elsewhere in Canada), who would be subject to regulation in their own jurisdictions and subject to any conditions agreed to with Ontario?[1] This question was posed because, by enabling interaction with international players, Ontario's proposed scheme will expand the available funds in games (also referred to as "liquidity), generate greater interest in the games offered in Ontario's regulated market, and increase revenue for the province.[2]

3. The majority of the Court of Appeal correctly answered the question in the affirmative. Using the modern, purposive principle of interpreting legislation, the majority correctly concluded that s. 207(1)(a) permits Ontario to conduct and manage a scheme that involves players outside of Canada as described in the Order in Council and Schedule.[3] The majority was right to reject a restrictive interpretation of s. 207(1)(a) and conclude that such an interpretation would undermine Parliament's purpose in enacting that provision.[4]

4. The Appellants — provincial lottery corporations that are notably unsupported by their respective Attorneys General — take the position to the contrary. This is an unusual position for these provincial agencies to take given that, if successful, provincial authority to act will be circumscribed and the Appellants' own ability to develop policy in their own provinces will be

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1 See OIC 2021/2024 and Schedule to OIC 210/2024 [Record of the Attorney General of Ontario ["**AGO Record**"], Vol. 1, at PDF pp. 10-11, 20-21].

2 See Affidavit of George Sweny, sworn May 31, 2024 ["**Sweny Affidavit**"], at paras. 16, 18, 29-34 [AGO Record, Vol. 1, at PDF pp. 372, 375-376].

3 See *Reference re iGaming Ontario*, 2025 ONCA 770 [**Reference**], at para. 2.

4 See Reference, at para 186.

constrained by federal legislation.

5. The Appellants' position rests on the argument that the endorsement in *Earth Future*[5] is determinative and the words "in that province" in s. 207(1)(a) require a restrictive geographic limitation. This Court can safely reject both arguments.

6. Flutter makes two submissions that support the Court of Appeal's opinion on the lawfulness of Ontario's proposed scheme. First, key principles of statutory interpretation — namely, dynamic interpretation and strict construction of penal statutes — favour the conclusion that the scheme is consistent with s. 207(1)(a). Second, the *Earth Future* endorsement does not decide this Reference. This is the case both because *Earth Future* is factually and legally distinguishable, and because its precedential force is attenuated by the nature of references and the specific wording of this Court's endorsement.

7. Flutter also contests the Appellants' submission that this Court is not required to assume that Ontario will exclude players from other provinces from its proposed scheme. Not only is this proposition not up for debate, but the Appellants' submissions also build in irrelevant and unjustified allegations of illegality by Flutter and others in the industry that no court has decided and to which Flutter has had no opportunity to meaningfully respond.

8. Ultimately, this Reference is not about the nuances of what Ontario's scheme will look like — it is about what the law permits Ontario to do. There are many ways in which technology could achieve the premises set out in the Reference Question and the Schedule. The legal opinion that the Lieutenant Governor sought is whether, accepting those premises, the law provides the flexibility Ontario seeks. The answer is "yes" — it does.

B. FACTS

9. The governing facts are set out in the Order in Council and its Schedule.[6] The Reference necessarily posed a hypothetical question to the Court of Appeal, and the hypothetical facts must be accepted in any opinion on the Reference. To do otherwise would be to answer a different question, which the Court of Appeal would not have had jurisdiction to do.[7]

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5 *Earth Future Lottery (P.E.I.) (Re)*, 2002 PESCAD 8 [***Earth Future***], aff'd 2003 SCC 10.
6 Order in Council 210/2024 and Schedule [AGO Record, Vol. 1, at PDF pp. 10-25].
7 See *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 8.

10. The Appellants' attempts to undermine the hypothetical set out in the Order in Council and Schedule — and effectively get the Court to answer a different question — must, therefore, be rejected. The Appellants' submissions go beyond just litigating irrelevant facts — the Appellants makes scandalous allegations about alleged past and anticipated future misconduct of various parties, including Flutter. For that reason, two elements of the Appellants' submissions require response.

(i) This Court must assume the facts in the Schedule

11. First, the Appellants submit this Court is "under no obligation to accept any assurances from Ontario regarding the exclusion of Canadians outside Ontario".[8] This is false. As noted by the majority deciding this Reference in the Court of Appeal, the Court must assume that persons in Canada, but outside of Ontario are excluded from the scheme given that the Schedule to the Order in Council specifically states such persons would not be permitted to participate in the proposed model.[9] Justice van Rensburg in dissent also adopted this assumption given the assertions made by the Attorney General about the proposed model.[10]

12. The fact that persons in Canada, but outside of Ontario would be excluded from the proposed scheme is unassailable in the context of a Reference based on the hypothetical question put forward by Ontario. The Court of Appeal was asked to answer, and did answer, the question assuming that any scheme is implemented in accordance with the terms outlined in the Order in Council and Schedule, including the exclusion of players in Canada outside of Ontario. Respectfully, this Court must do the same.

13. The Appellants also allege that Ontario has failed to explain how it would ensure other Canadians would be excluded from the sites that would share liquidity with Ontario-based users.[11] Again, the answer to the Reference must assume that Ontario can do so. The details of how players located in other provinces will be excluded, or how they will be prohibited from engaging with Ontario players through international websites, are neither relevant nor determinative.

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8 Factum of the Appellants, at para. 92.
9 Reference, at paras. 26, 110, 188-189; Schedule to OIC 210/2024 [AGO Record, Vol. 1, at PDF p. 20].
10 Reference, at para. 223, fn. 15.
11 Factum of the Appellants, at para. 91.

14. If necessary, the evidence on the Reference establishes that there are many ways this exclusion can be accomplished. George Sweny, a Vice-President of Regulatory Affairs at Flutter, details both the technological and contractual means available.[12] His evidence shows that Ontario and international jurisdictions could enter into agreements that would only permit international sites in those jurisdictions to be linked and would exclude players from other jurisdictions, including other Canadian provinces.[13] This "geofencing" (the technical measures taken to exclude persons based on location) is already done in Ontario[14] and there is no evidence that it does not effectively exclude other Canadian players from accessing iGaming Ontario ("**iGO**") sites . In sum, "virtually every aspect of a game offering," including the exclusion of Canadian players outside of Ontario, "could be customized to ensure that individuals in Ontario only participate in peer-to-peer games and betting which conform to Ontario's rules, whether legal, regulatory, or contractual."[15]

15. In any event, what matters is ***the fact*** that players elsewhere in Canada will be excluded, not ***how*** they will be excluded. This fact must be accepted to answer the Reference Question.

(ii) The Appellants' scandalous allegations are irrelevant to this Reference

16. Second, the Appellants place significant emphasis on their view that current iGO operators' affiliated international websites are operating illegally in other provinces. They specifically make scandalous accusations against Flutter.[16]

17. The Appellants' allegations are a red herring calculated to distract the Court. Ontario's current scheme must be assumed to be — and a Superior Court has determined that it is — lawful.[17] These scandalous allegations are simply not relevant to the narrow legal question before the Court. Providing an answer on the Reference does not require engagement with the Appellants' opinions. Indeed, neither the majority nor the dissent at the Court of Appeal engaged with the evidence or submissions of the Appellants on this point in their analyses.[18]

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12 Sweny Affidavit, at paras. 23-28 [AGO Record, Vol. 1, at PDF pp. 373-375].
13 See Sweny Affidavit, at paras. 17, 27 [AGO Record, Vol. 1, at PDF pp. 372, 374].
14 Sweny Affidavit, at para. 17 [AGO Record, Vol. 1, at PDF p. 372].
15 Sweny Affidavit, at para. 27 [AGO Record, Vol. 1, at PDF p. 374].
16 See, e.g., Factum of the Appellants, at paras. 30–34.
17 See Schedule to OIC 210/2024 [AGO Record, Vol. 1, at PDF p. 20]; Reference, at paras. 110, 188, 223, fn. 15; *Mohawk Council of Kahnawà:ke v. iGaming Ontario*, 2024 ONSC 2726 [***Mohawk***].
18 See Reference, at paras. 110, 188, 223, fn. 15.

PART II — POSITION WITH RESPECT TO QUESTION AT ISSUE

18. The Reference Question ought to be answered in the affirmative: legal online gaming and sports betting ***would remain lawful*** under the *Criminal Code* if users located in Ontario were permitted to participate in games and betting involving persons outside of Canada, as described in the Schedule to the Reference Question.

PART III —STATEMENT OF ARGUMENT

A. PRINCIPLES OF STATUTORY INTERPRETATION FAVOUR ONTARIO'S PROPOSED MODEL

19. Section 207(1)(a) of the *Criminal Code* permits the government of a province to conduct and manage a lottery scheme, as long as the scheme is "in that province". This is an exception to the general prohibition on gaming in s. 206 and Part IV of the *Code* generally. The answer to the Reference Question turns on the interpretation of "in that province" and whether, as a matter of law, Ontario's proposal to ***expand*** the online lottery scheme it ***already conducts and manages*** to include international players remains in the province.

20. The majority of the Court of Appeal correctly decided the issue: applying the modern principles of interpretation to "in that province", Ontario's proposed model is lawful.[19]

21. Parliament's intention in legislating s. 207 was to "decriminalize [gaming] in circumstances where regulations will minimize the potential for public harm"[20] and to "provide the provinces with substantial room to conduct and operate provincially-run lotteries as they [see] fit, in accordance with local attitudes".[21] Section 207(1)(a) specifically represents a Parliamentary recognition that gaming and its associated risks are better addressed through active control by provincial governments than by a complete criminal prohibition and the related risk of a entirely unregulated market.

22. Crucially, nothing in the language of s. 207(1)(a) prevents Ontario from implementing a system of gaming regulation that permits Ontario players to bet against international players. Such an interpretation must arise by implication, and only if this Court were to rewrite s. 207(1)(a) to

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19 See e.g. Reference, at paras. 135, 155, 161-165, 184-189.

20 *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.).

21 *Mohawk*, at para. 95, citing *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, *Great Canadian Casino Co. Ltd. v. Surrey (City of)* (1998), 53 B.C.L.R. (3d) 379, 1998 CanLII 2894 (S.C.).

mean that it is only lawful for the government of a province to conduct and manage a lottery scheme "[entirely] in that province". This is effectively the interpretation that the Appellants advance.[22]

23. But well-worn canons of interpretation militate against the Appellants' restrictive interpretation and favour the Court of Appeal's conclusion that the proposed scheme fits within the "in that province" requirement. Flutter's submissions focus on two of these principles: (i) dynamic interpretation and (ii) the strict construction of penal statutes.

(i) Dynamic interpretation invites consideration of technological advancements

(a) *Dynamic interpretation favours an affirmative answer*

24. The principle of dynamic interpretation recognizes statutes' potential to adapt to technological and commercial advancements, as well as the reality that Parliament can and does intend for meaning to evolve over time. What matters is not whether Parliament could have foreseen and considered a particular technology or set of circumstances — what matters is whether the intent behind the legislation captures the circumstances before the court.

25. This Court has long recognized that statutory terms are not limited to their meaning at the time the legislation is enacted. In *Perka v. The Queen*, for example, Dickson C.J.C confirmed that while statutes should generally be given the meaning at the time of enactment, all terms in all statutes should not always be confined to their original meanings and "[b]road statutory categories are often held to include things unknown when the statute was enacted".[23] Likewise, in *974649 Ontario Inc.*, McLachlin C.J.C. held that "[t]he intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day".[24]

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22 See Factum of the Appellants, at paras. 68-74.

23 *Perka v. The Queen*, [1984] 2 S.C.R. 232, p. 265 (emphasis added).

24 *R. v. 974649 Ontario Inc.*, 2001 SCC 81, at para. 38 (emphasis added). Provincial appellate courts have also repeatedly recognized that advancements in technology do not prohibit courts from giving effect to Parliament's legislative intent: See e.g. *Therrien v. Chief Electoral Officer of Québec*, 2022 QCCA 1070, at para. 67; *John v. Ballingal*, 2017 ONCA 579, at paras. 19-32; *Woods (Re)*, 2021 ONCA 190, at para. 44; *R. v. Walsh*, 2021 ONCA 43, at para. 63.

26. This common law principle of interpretation is codified in the *Interpretation Act*, which provides that "[t]he law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.".[25]

27. In *TELUS*, this Court affirmed that dynamic interpretation fits squarely within the modern approach and that the focus of interpretation must always remain on what Parliament intended.[26] The degree to which a provision is capable of applying to new technology "is an interpretive question like any other that must be answered by reading the text in context and consistent with the legislature's purpose."[27]

28. The principle of dynamic interpretation means that this Court should give effect to Parliament's intention to decriminalize gaming and give provinces the latitude to manage the potential for public harm — even in relation to technology and types of gaming that did not exist when s. 207(1)(a) was enacted.[28] As the majority in the Court of Appeal noted, using the modern principle to interpret s. 207(1)(a) is "consistent with a dynamic interpretation and thereby enables Parliament to achieve its goals without having to reopen the statute in response to changing circumstances and new technologies."[29] This principle permits this Court to adopt an interpretation of "in that province" that is sensitive to the technological reality of what Ontario proposes: a reality that did not exist when s. 207(1)(a) was enacted.

29. That reality is that Ontario will be in control of the entirety of the digital scheme it proposes and the technology exists to allow Ontario to execute its proposal, including the exclusion of any players elsewhere in Canada. The Schedule confirms that "iGaming Ontario will continue to conduct and manage the iGO Sites through its agents, the Operators"; only people in Ontario will be permitted to play on those sites; players from elsewhere in Canada will not be permitted to play; and Ontario will continue to legislate to the full extent necessary in respect of its own citizens.[30] While this scheme will interact with international schemes, through pooled liquidity and whatever

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25 *Interpretation Act*, R.S.C., 1985, c. I-21, s. 10 (emphasis added).
26 *Telus Communications Inc. v. Federation of Canadian Municipalities,* 2025 SCC 15, 2025 SCC 15 [***TELUS***], at para. 36.
27 *TELUS*, at para. 36.
28 *Mohawk*, at para. 95.
29 Reference, at para. 185 citing *TELUS*, at paras. 33-36.
30 Schedule to OIC 210/2024 [AGO Record, Vol. 1, at PDF pp. 20-22].

contractual or other arrangements make that possible, this does not change the legal reality that there is a single scheme that ***Ontario*** is conducting and managing. Ontario's scheme is one available to players in Ontario who connect with international players in circumstances where Ontario deems it appropriate. Players from other provinces will be excluded. Parliament's intention to ensure that Ontario manages the risk of gaming in its province will be secure.

30. Dynamic interpretation assists in rejecting any argument that this contemporary digital reality cannot fit into a provision drafted in an analog era. The technological truth is complex. For example, in *Equustek*, this Court recognized that the internet "has no borders — its natural habitat is global".[31] The reality is that it is difficult to locate the precise location of internet activity: it exists where the end user is experiencing it, where the company providing it is located, and where the data itself is located. In a sense, it is everywhere. The proper interpretation of "in that province" as it is used in s. 207(1)(a) can and must account for this.

31. An apt legal analogy is to cellphones connecting an international call. A person making a call on a cellphone in Ontario is subject to various federal and provincial regulations, including but not limited to: wireless rate setting under the *Telecommunications Act*, spectrum management under the *Radiocommunication Act*, privacy laws protecting personal information, and restrictions under *Highway Traffic Act* regulations.[32] The person on the other end of the call is subject to whatever regulations exist in their international jurisdiction. There is only one call connecting them, but this does not mean that Ontario or Canada is suddenly taking control of the international caller, nor does it change the reality that they are regulating the Ontario caller. Ontario proposes to develop a scheme that will protect Ontario players from the risks associated with gaming, in the manner it deems appropriate; international jurisdictions that Ontario engages with will be responsible for their own players. The evidence on the Reference demonstrates that Ontario can choose those jurisdictions carefully and reach agreements with them to confirm the precise terms upon which Ontario players will be allowed to engage with international players.[33] Section 207(1)(a) provides Ontario with the flexibility to do this.

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31 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at para. 41 (emphasis added).

32 *Telecommunications Act*, S.C. 1993, c. 38, s. 24; *Radiocommunication Act*, R.S.C., 1985, c. R-2, s. 5(1); *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; O. Reg 366/09.

33 See Sweny Affidavit, at para. 24 [AGO Record, Vol. 1, at PDF p. 375].

32. Ultimately, to decide whether the proposed scheme is "in [the] province" of Ontario, it is not necessary to decide whether the scheme wholly located in Ontario — what matters is whether Ontario is operating a scheme in accordance with Parliament's intention that Ontario protect its own citizens from the risks attendant to any scheme it conducts and manages. To do this, the scheme must be sufficiently connected to the province to ensure that it is "operat[ing] provincially-run lotteries as [it sees] fit, in accordance with local attitudes".[34] This requires that the province "exert a sufficient level of control to maintain its position as the 'operating mind' of the lottery".[35]

33. That is precisely what Ontario proposes to do. It will be in complete control of its own scheme, which is an extension of the judicially approved scheme already in place.

(b) *The Appellants' arguments against dynamic interpretation ought to be rejected*

34. The Appellants cite to this Court in *TELUS* in support of their proposed interpretation of s. 207(1)(a). Their arguments on this point can be rejected for three reasons.

35. First, the Appellants argue that *TELUS* suggests that courts must not engage in policy choices by doing through "'interpretation' what Parliament chose not to do by enactment."[36] That is not what is happening here. Concluding that the proposed scheme is lawful is not legislating from the bench. Parliament has already decided to entrust provinces with the power to make policy decisions about conducting and managing lottery schemes: the intention of s. 207(1)(a) is to provide the provinces with "substantial room" to conduct and manage lotteries as "they [see] fit, in accordance with local attitudes".[37] Nothing about expanding the scheme to include interactions with international players interferes with that intention or Parliament's policy decision to defer control over lottery schemes to the province.

36. Second, the Appellants' reliance on *TELUS* is misplaced due to a key distinguishing factor: the technology at issue in that case ***was known to Parliament at the time of enactment***. Dynamic interpretation was not available in *TELUS* because "antennas are not a new technology that was outside the contemplation of Parliament" when the legislation was drafted."[38] In other words, there

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34 *Mohawk,* at para. 95.
35 *Mohawk,* at para. 98.
36 Factum of the Appellants, at para. 81.
37 *Mohawk,* at para. 95.
38 *TELUS*, at para. 63.

were no "things unknown when the statute was enacted"[39] that suggested that the provision at issue in *TELUS* could evolve. That is not the case with respect to s. 207(1)(a). When the words "in that province" in s. 207(1)(a) was enacted — first in 1969 and then in 1985 — the international reach of online lottery schemes simply did not exist. Online gaming did not even exist. Parliament's intention to leave the development and regulation of lottery schemes in provincial hands must be interpreted with these developments in mind.

37. Third, relying on *TELUS*, the Appellants also argue that that invocation of "broad" statutory objectives" cannot trump statutory text and context that are otherwise clear."[40] In *TELUS*, the argument was that the interpretation of the "access regime" in s. 43 of the *Telecommunications Act* should be determined by the broad "Canadian telecommunications policy [objectives]" found in a different section. Those objectives were so broad — "the facilitation of the 'orderly development' of telecommunications" — that they could trump any interpretive exercise.[41] But that is not the case here. There is no need to resort to broad statutory objectives extraneous to s. 207(1)(a). The focus is Parliament's specific intention in enacting that section, which includes both decriminalization to minimize the potential for public harm and giving control to the provinces to conduct and manage.[42] That intention is revealed, not undermined, by the text and context of s. 207(1)(a).

38. The Appellants also cite to Federal Court of Appeal's decision in *Re CSIS* to suggest that dynamic interpretation is ill-suited where Parliament has "shown an inclination to amend the statute at issue", pointing out that Parliament amended s. 207(4)(b) of the *Criminal Code* in 2021.[43]

39. But the amendments in *Re CSIS* foreclosed dynamic interpretation for an obvious reason: the amendments specifically addressed the issue that a proposed dynamic interpretation was attempting to circumvent. In *Re CSIS*, the phrase "within Canada" in s. 16(1) of the *CSIS Act* was at issue. The Federal Court of Appeal declined to interpret that phrase using a dynamic approach because, in 2015, Parliament had seen fit to specifically add the words "within or outside Canada"

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39 *Perka v. The Queen*, [1984] 2 S.C.R. 232, p. 265.
40 Factum of the Appellants, at para. 81.
41 See e.g. *TELUS*, at para. 69.
42 *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.); *Mohawk*, at para. 95.
43 Factum of the Appellants, at paras. 84–85; *Canadian Security Intelligence Services Act (CA) (Re)*, 2021 FCA 165 ***[Re CSIS]***.

to multiple sections of the *CSIS Act* without touching s. 16.[44] In those circumstances, it was apparent that Parliament had made a deliberate choice not relax the territorial scope of s. 16.

40. No similarly deliberate choice about s. 207(1)(a) can be inferred from the 2021 amendments to s. 207(4)(b). Those amendments had nothing to do with the geographical scope of s. 207 at all. The 2021 amendments to s. 207(4)(b) dealt with single-event sports betting — they expanded the ***type*** of gaming available in Canada without touching on ***where*** that gaming might take place. Accordingly, those amendments reveal nothing about Parliament's intention in drafting "in the province" in s. 207(1)(a) and whether dynamic interpretation is available.

41. Ultimately, Parliament's intention to allow provinces to manage the risks of lottery schemes can accommodate the reality that modern online gaming no longer respects traditional borders. Today, the words "in that province" in s. 207(1)(a) must be interpreted in a manner that both gives effect to Parliament's intention and accounts for the ways in which technology has advanced. The internet has made online gaming possible, practical, and safe. Informed by the principle of dynamic interpretation, a purposive interpretation of s. 207(1)(a) can accommodate this reality.

(i) Strict construction of penal statutes resolves ambiguity in favour of Ontario's proposed model

42. If s. 207(1)(a) of the *Code* is afflicted with "real" ambiguity, in that the provision may be capable of more than one meaning,[45] the principle of strict construction of penal statues ought to be applied. This principle establishes that "enactments which take away the liberty of the subject should be clear and any ambiguity resolved in favour of the subject".[46] Applied here, the principle counsels against adopting the Appellants' interpretation, as doing so would effectively expand the scope of criminal liability set out in s. 206. More fundamentally, it would be unjust to criminalize conduct that the statutory scheme does not prohibit in clear and certain terms.[47]

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44 *Re CSIS*, at para. 11. See also *Protection of Canada from Terrorists Act*, S.C. 2015, c. 9 at ss. 3, 4, 8(1); *Anti-terrorism Act, 2015*, S.C. 2015, c. 20, s. 42.

45 *R. v. Basque*, 2023 SCC 18, at para. 74.

46 *R. v. D.L.W.*, 2016 SCC 22, at para. 50 (emphasis added); *R. v. Mansour*, [1979] 2 S.C.R. 916, at p. 927.

47 *Marcotte v. Deputy Attorney General (Canada) et al.*, [1976] 1 S.C.R. 108 at p. 115.

B. *EARTH FUTURE* DOES NOT DECIDE THIS REFERENCE

43. Much of the Appellant's position rests on its reliance on this Court's brief endorsement in *Earth Future*, a case about the interpretation of a different subsection: s. 207(1)(b).[48] That subsection makes it lawful for licensed charitable or religious organizations to conduct and manage a provincial lottery scheme. This Court dismissed the *Earth Future* appeal "substantially for the reasons of the Chief Justice of Prince Edward Island".[49] The Appellants argue that this one line decides this Reference.

44. Importantly, all five justices of the Court of Appeal disagreed with this position and concluded that *Earth Future* is not determinative.[50] They were right to do so, both because *Earth Future* is factually distinguishable and because it is not a traditional binding precedent.

(i) *Earth Future* is factually distinguishable

45. As noted by both the majority and the dissent on this Reference, *Earth Future* is not determinative because it dealt both with a lottery scheme that was materially different from the lottery scheme proposed by Ontario here and a different section of the *Criminal Code*.[51]

46. *Earth Future* concerned a charitable corporation that proposed to market a conventional, paper-based lottery ticket scheme globally via the internet, while operating it locally from P.E.I. The question was whether Earth Future's global scheme was properly "in that province" such that P.E.I. could validly issue a licence to it, pursuant to s. 207(1)(b). The P.E.I. Court of Appeal's answer was "no". Its reasons included that Earth Future's scheme was very much extra-provincial and "obviously intended the Earth Future Lottery will operate and carry on business in the worldwide market".[52] The Court held it was not permissible "to conduct a lottery in the global village from its place of business in the province".[53]

47. The key distinguishing feature between *Earth Future* and this case is that Ontario's scheme is not global in the same way. All five justices at the Court of Appeal on this Reference were

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48 *Earth Future*, 2002 PESCAD 8, aff'd 2003 SCC 10.
49 *Reference re Earth Future Lottery*, 2003 SCC 10.
50 Reference, at paras. 88-112, 195.
51 Reference, at paras. 98-111, 195.
52 *Earth Future*, at para. 10.
53 *Earth Future*, at para. 10.

correct in concluding that the scheme at issue in *Earth Future* is materially different from Ontario's proposed scheme.

48. Unlike in *Earth Future*, and as noted by the majority below, Ontario's proposal is "not designed to raise money from persons outside the province. Rather, it is to enable players in Ontario to engage in games with players outside of Canada."[54]

49. Unlike in *Earth Future*, Ontario's proposed model has no risks of invading other province's jurisdiction. Earth Future's paper-based lottery ticket scheme was overtly and principally directed at gaming participants outside P.E.I., despite there being no plausible technological means to prohibit Canadians outside of P.E.I. from playing, contrary to s. 207(1)(b) and clearly outside P.E.I.'s regulatory ambit. Ontario proposes to control games played by people physically located in the province, in accordance with the province's constitutional competence and the restrictions of the *Criminal Code*.

50. Unlike in *Earth Future*, Ontario does not propose to run a single game that international players play in and does not propose to interact with international players by advertising to them or making gaming available to them. All Ontario will be doing is continuing to conduct and manage online gaming offered by provincial operators overseen by iGO and regulated by the AGCO. Its scheme will simply interact with international schemes.[55]

51. Unlike in *Earth Future*, Ontario is not proposing to act extraterritorially *per se*. Ontario is clear that it will ***not*** conduct or manage international websites; it will ***not*** enlist operators of international websites as its agents. Instead, Ontario proposes to rely on the foreign jurisdictions for that.[56] In considering this reliance, it bears noting that the evidence is not that "pooled liquidity" means instant "global liquidity" — to the contrary, the contractual agreements establishing pooled liquidity described in the evidence on the Reference demonstrate that other jurisdictions have carefully curated the extraterritorial partners with whom they choose to engage.[57] There is every reason to believe that Ontario will do the same, with a view to the public interest.

52. All of this takes Ontario's proposed scheme outside the *ratio* of *Earth Future*. *Earth Future*

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54 Reference, at para. 111.
55 See Schedule to OIC 210/2024 [AGO Record, Vol. 1, at PDF p. 21].
56 Schedule to OIC 210/2024 [AGO Record, Vol. 1, at PDF p. 21].
57 See Sweny Affidavit, at para. 24 [AGO Record, Vol. 1, at PDF p. 374].

is distinguishable on the facts alone.

(ii) *Earth Future* is legally distinguishable

53. The difference between s. 207(1)(a) and s. 207(1)(b) also distinguishes *Earth Future* from this Reference. Through these sections, "Parliament has adopted a more restrictive approach to lottery schemes conducted and managed by a charitable organization than the approach to those conducted and managed by provincial governments".[58] The majority in the Court of Appeal decision below, accepted "that the difference in the entities covered by the two sections (the government of a province vs. a charitable or religious organization) arguably warrants a different interpretation of the term 'conduct and manage a lottery scheme in that province' in those provisions."[59] Justice van Rensburg agreed.[60] Accordingly, *Earth Future* does not easily apply here.

(iii) *Earth Future* is not a traditional binding precedent

54. While the Appellants argue that *Earth Future* is binding, the precedential force of that decision is not as straightforward as the Appellants present due to both the nature of references and the specific wording of this Court's endorsement.

55. A reference is "merely an advisory procedure" to the executive branch of government and thus is, "in principle, non-binding".[61] While references are "in practice treated as judicial decisions and followed by other courts",[62] that need not be the case here where the only analysis in *Earth Future* was conducted by a provincial court of appeal.

56. To the extent that the Appellants suggest this Court's endorsement makes the P.E.I. Court of Appeal's reasons binding, it must be noted that this Court did not endorse those reasons in their entirety or unambiguously.[63] Instead, this Court dismissed the appeal "substantially" for the

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[58] Patrick J. Monahan & A. Gerold Goldlist, "Roll Again: New Developments concerning Gaming", (1999) 42 Crim. L.Q. 182, at p. 191 [Book of Authorities ["**BOA**"], Tab 1].

[59] Reference, at para. 102.

[60] Reference, at para. 195.

[61] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 151, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 40.

[62] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 152.

[63] The Court did not, for example, dismiss the appeal "for the reasons" below. See, *e.g.*, *R. v. Ghotra*, 2021 SCC 12; *R. v. Langan*, 2020 SCC 33; *Callidus Capital Corp. v. Canada*, 2018

reasons of the P.E.I. Court of Appeal below without endorsing or rejecting any particular paragraphs or statements. It is, therefore, not clear which parts of the reference decision fall within the Supreme Court's endorsement.[64] Justice van Rensburg, who agreed with the majority on this point, put this point succinctly:

> I agree that, because the Supreme Court dismissed the appeal "substantially for the reasons" of the PEI Court but did not provide its own reasons**,** it would be wrong to interpret that court as having endorsed the broader statements made by the PEI Court about s. 207 that were not essential to its decision.[65]

57. Notably, since *Earth Future*, this Court has explained that the issue in that case was "whether sales of tickets from an Internet lottery in Prince Edward Island constituted gambling "in the province" when almost all of the targeted on-line purchasers resided elsewhere".[66] As explained above, this is the very feature that distinguishes this reference from *Earth Future.*

58. All of this destabilizes the Appellants' reliance on specific and non-essential paragraphs of the P.E.I. Court of Appeal's decision and leads to the conclusion that *Earth Future* is not determinative of the question at issue on this Reference.

PART IV — SUBMISSIONS REGARDING COSTS

59. Flutter does not seek costs and requests that no costs be awarded against it.

PART V — ORDER SOUGHT

60. Flutter respectfully requests order answering the Reference Question in the affirmative.

SCC 47. There are also appeals decided "substantially" for particular paragraphs of a specific judgment. See, *e.g.*, *International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence*, 2018 SCC 11, at para. 1).

64 See Alex Bogach, Jeremy Opolsky and Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251, at para. 33 (emphasis added) [**BOA**"], Tab 2].

65 Reference, at para. 195 (emphasis added). See also Reference at paras. 90, 91, 93.

66 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para. 41.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of March 2026.

Scott C. Hutchison
Brandon Chung
Kelsey Flanagan

Counsel for the Intervener,
Flutter Entertainment plc

PART VI — TABLE OF AUTHORITIES

CASES	
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