S.C.C. 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 *Court 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

BETWEEN:

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

Appellants
(Interveners)

— and —

ATTORNEY GENERAL OF ONTARIO

Respondent
(Applicant)

— and —

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

Interveners
(Interveners)

— and —

ATTORNEY GENERAL OF ALBERTA

Intervener
(Rule 55)

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ALBERTA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I — OVERVIEW AND STATEMENT OF FACTS

1. This appeal concerns the proper approach to the interpretation of a federal statutory scheme that operates in a field of shared federal and provincial legislative jurisdiction.

2. In answering the reference question regarding Ontario's proposed online gaming scheme (iGaming Ontario), the Court of Appeal for Ontario held that iGaming Ontario would remain lawful under s. 207(1)(a) of the *Criminal Code*[1] if it permitted individuals outside of Canada to participate through international gaming sites available in their jurisdiction.[2]

3. The Attorney General of Alberta intervenes because this Court's interpretation of whether iGaming Ontario remains lawful under the *Criminal Code* could impact the validity and operation of Alberta's own online gaming statutory regime (iGaming Alberta), recently enacted under the *iGaming Alberta Act*.[3]

4. At its core, this appeal asks whether a proposed provincial law authorizing gaming will conflict with federal gaming prohibitions in the *Criminal Code*. Gaming is a constitutional subject matter that falls within the double aspect doctrine.[4] Accordingly, the modern approach to statutory interpretation requires that the scope of provincial authority to regulate gaming under s. 207(1)(a) of the *Criminal Code* be interpreted with reference to that constitutional context and established principles of constitutional interpretation.

5. When interpreting potentially conflicting federal and provincial legislation, this Court's jurisprudence on the double aspect and paramountcy doctrines requires a "restrained approach" to interpretation. Conflict is narrowly defined so that each order of government can act as freely as possible within its areas of sovereign legislative authority.[5]

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[1] *Criminal Code*, RSC 1985, c C-46, Part -1 at s 207(1)(a) [***Criminal Code***]
[2] *Reference re iGaming Ontario*, 2025 ONCA 770 [***Reference Decision***] at para 2.
[3] *IGaming Alberta Act*, SA 2025, c I-0.2.
[4] *R v Furtney*, [1991] 3 SCR 89, 1991 CanLII 30 [***Furtney***] at para 103; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 [***Siemens***] at para 22.
[5] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [***Orphan Well***] at para 66; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53 [***Lemare Lake***] at paras 21 and 27.

6. Absent very clear statutory language to the contrary, preference must be given to harmonious interpretations of federal and provincial legislation that avoid conflicts and permit the concurrent operation of valid federal and provincial laws.[6]

7. As an intervener, Alberta takes no position regarding the facts or on the ultimate outcome of the appeal.

PART II — ISSUES

8. On the statutory interpretation issues raised in this appeal, Alberta submits:

a. As the regulation of gaming and lotteries has a constitutional double aspect, established principles of constitutional interpretation are a contextual factor central to the interpretation of s. 207(1)(a) of the *Criminal Code*; and

b. The party alleging a conflict must establish either the impossibility of dual compliance or frustration of a federal purpose and, in doing so, bears a high burden.

PART III — ARGUMENT

A. Established principles of constitutional interpretation and federalism are relevant to the interpretation of s. 207(1)(a) of the *Criminal Code*

i. The modern principle of statutory interpretation accounts for constitutional context

9. The modern principle of statutory interpretation requires a consideration of the words of the Act, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[7]

10. As this Court recently held in *R v Nguyen*, a necessary and well-accepted feature of the modern approach of statutory interpretation allows for words that may appear clear on their face to have different meanings when viewed in their full context and in light of their purpose.[8]

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[6] *Orphan Well* at para 66.
[7] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para 21.
[8] *R v Nguyen*, 2026 SCC 10 at paras 79-82. See also *Riddle v ivari*, 2026 SCC 9 at para 56.

11. When a potential conflict arises between statutory schemes that operate in areas of shared federal and provincial constitutional legislative jurisdiction, such as gaming and lotteries, established principles of constitutional interpretation and constitutional doctrines, including the double aspect and paramountcy doctrines, are contextual factors relevant to the statutory interpretation exercise.[9]

12. The reference question at issue in this appeal asks, in essence, whether proposed changes to iGaming Ontario conflict with the federal gaming prohibitions in the *Criminal Code*. The question asks:

> 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?[10]

13. The reference question requires this Court to interpret s. 207(1)(a) of the *Criminal Code*. Section 207(1)(a) provides that notwithstanding the *Criminal Code's* general prohibitions against gaming and lotteries, it is lawful "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."

14. A "lottery scheme", for the purposes of s. 207(1)(a), is defined broadly to include, subject to certain exceptions, gaming and betting which are otherwise prohibited by the *Criminal Code*. Computer based lottery schemes are not excluded from the definition of lottery scheme for the purpose of s. 207(1)(a) and therefore provincial governments may conduct and manage computer-based gaming and betting pursuant to provincial legislation.[11]

15. Like the proposed changes to iGaming Ontario, iGaming Alberta relies upon the exception in s. 207(1)(a) to establish an iGaming scheme that does not prohibit individuals in foreign jurisdictions from participating in an Alberta iGaming site through pooled liquidity.

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[9] *Lemare Lake* at para 20.
[10] *Reference Decision* at para 1.
[11] *Criminal Code* at s 207(4); *Reference Decision* at para 11.

ii. The purpose of s. 207(1)(a) is to operationalize the constitutional double aspect of gaming and lotteries by encouraging provincial regulation

16. Parliament, through the enactment of s. 207(1)(a), intentionally designed a statutory scheme that affirms the constitutional double aspect of gaming and lotteries and encourages provincial legislatures to exercise their constitutional legislative authority to regulate them.[12] In other words, s. 207(1)(a) is not a narrow exception to the prohibitions of the *Criminal Code,* but a recognition of broad provincial authority to regulate gaming.

17. This Court has long recognized that the regulation of gaming and lotteries is subject to the double aspect doctrine. [13] The provincial legislatures have the authority to regulate gaming under several heads of power, including as a matter of property and civil rights and of a local or private nature under ss. 92(13) and 92(16) of the *Constitution Act, 1867*. At the same time, Parliament has the legislative authority to criminalize gaming under s. 91(27).

18. Historically, Parliament criminalized almost all gaming and lotteries through the *Criminal Code*, and the doctrine of paramountcy would render any inconsistent provincial laws inoperative.[14] However, in 1969, Parliament amended the *Criminal Code* and enacted s. 207(1)(a) "for the purpose of decriminalizing lotteries and allowing each province to determine whether it wished to establish a lottery scheme."[15]

19. As the Court of Appeal noted in its decision below, the 1969 amendments, combined with subsequent amendments expanding the legality of other types of gaming, were a "conscious shift" from federal criminal prohibition to provincially regulated oversight within the broad parameters of the *Criminal Code*.[16]

20. The "conscious shift" was encapsulated by then federal Minister of Justice, John Turner, in the following statement to Parliament regarding the 1969 amendments to the *Criminal Code's* lottery prohibitions:

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[12] *Siemens* at para 35.
[13] *Furtney* at para 103; *Siemens* at para 22.
[14] *Reference Decision* at para 175; *Siemens* at para 35.
[15] *Siemens* at para 35.
[16] *Reference Decision* at paras 175-183.

> Through its criminal law the federal government says: "That is your business. We are withdrawing from the field. We are giving you the option. You decide in terms of the opinion of your own people in the province whether you want a lottery scheme. If you do, the conditions that you attach to such scheme[s] are a provincial matter".[17] [Emphasis added.]

21. In other words, Parliament's purpose in enacting s. 207(1)(a) was to preserve a broad space for, and to encourage, provincial regulatory action, not narrowly confine it.

iii. Interpreting s. 207(1)(a) consistently with federalism principles accords with Parliament's purpose

22. In this appeal, the Appellants and Respondent appear to agree there is a problem with illegal online gambling in Canada but disagree regarding the appropriate means to combat that problem.[18] However, the federalism principle underlying the Constitution of Canada and s. 207(1)(a) does not require agreement on a single, uniform solution to address policy concerns. Rather, it recognizes that each order of government should, to the extent possible, be able to exercise its legislative authority in a manner responsive to its own policy priorities.[19]

23. In enacting s. 207(1)(a), Parliament recognized that opinions on gaming, betting and lotteries varied across the country and consciously chose to withdraw its previous uniform solution of criminalization so that the provinces could, within broad parameters, provide regulatory solutions tailored to their particular problems and policy goals.[20]

24. While Alberta takes no position on the illegal gambling debate in this appeal, it submits that applying constitutional and federalism principles to interpreting s. 207(1)(a) best preserves room for provincial governments across the country to craft policy and legislative responses appropriate to the problem of illegal gambling, and how it manifests within their respective jurisdictions.[21]

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[17] House of Commons Debates, 28-1, Vol. VII, (21 April 1969) at 7781, as cited in *Reference Decision* at para 179.
[18] Appellants' Factum at paras 19 - 24; Respondent's factum at paras 36 – 40.
[19] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [***Greenhouse Gas***] at para 49
[20] *Reference Decision* at para 183.
[21] *Reference re Securities Act*, 2011 SCC 66 at para 7.

B. The party alleging a conflict between federal and provincial legislation must discharge a high burden of proof

i. The courts take a "restrained approach" to interpretation where conflict is narrowly defined

25. When interpreting potentially overlapping federal and provincial statutes, "[i]t is presumed that Parliament intends its laws to co-exist with provincial laws". As a result, courts take a "restrained approach"[22] to interpretation such that the "fundamental rule of constitutional interpretation" is, where possible, to avoid interpretations that result in a conflict:

> [w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.[23]

26. Conflict is defined narrowly so that each order of government "may act as freely as possible within its respective sphere of constitutional authority."[24]

27. A narrow approach to conflict is essential to maintaining the balance of federalism. Without a narrow approach to conflict, the double aspect and paramountcy doctrine risk expanding the potential for "supervisory" federalism, given that in cases of conflicting valid laws, it is the provincial legislation that is rendered inoperative.

28. This Court has stressed that "care may be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis"[25] and that it is "beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power."[26] A broad approach to conflict risks imparting too broad a federal power, to the detriment of provincial powers.

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[22] *Lemare-Lake* at paras 21 and 27.
[23] *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10 [***Murray-Hall***] at para 85, quoting *Attorney General of Canada v Law Society of British Columbia,* [1982] 2 SCR 307, 1982 CanLII 29 at 356;
[24] *Orphan Wells* at para 66.
[25] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, at para 196.
[26] *Reference re Firearms Act (Can.)*, 2000 SCC 31, at para 48.

ii. Clear statutory language or evidence of a frustrated federal purpose is required to demonstrate a conflict

29. The burden of proof to demonstrate a conflict rests on the party alleging it. Given the restrained approach to interpretation and preference for interpretations that allow for harmonious, concurrent operation of federal and provincial laws, "[d]ischarging that burden is not an easy task, and the standard is always high."[27]

30. This Court has recognized two different forms of conflict: an operational conflict and the frustration of federal purpose.[28] An operational conflict arises where there is an actual conflict between the federal and provincial legislation such that compliance with both is impossible; "compliance with one is defiance of the other."[29] Frustration of federal purpose arises where complying with a provincial law would frustrate the purpose of the federal law.

31. Demonstrating either type of conflict is challenging and requires either clear statutory wording (i.e., it should not be implied that Parliament intends to undermine the operation of provincial legislation) or clear evidence of a frustrated federal purpose.

32. According to Chief Justice Wagner in *Murray-Hall*, where, as in this appeal, the legislative subject matter had a double aspect, it is essential that the courts exercise "the greatest possible precision in the analysis of operability…'to avoid eroding the importance attached to provincial autonomy'."[30] Given the importance of provincial autonomy, this Court has held that absent "very clear" statutory language to the contrary, courts should not assume Parliament intended to render provincial legislation inoperative.[31]

33. To prove that provincial legislation frustrates the purpose of federal legislation, the party seeking to establish the conflict must first establish the purpose of the federal legislation and then demonstrate that the provincial statute frustrates that purpose.

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[27] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 [***Moloney***] at para 27. See also, *Orphan Well* at para 66; *Murray-Hall* at para 85.
[28] *Orphan Well* at para 65.
[29] *Lemare-Lake* at para 18, quoting *Multiple Access Ltd. v McCutcheon*, [1982] 2 S.C.R. 161, 1982 CanLII 55 (SCC) at 191.
[30] *Murray-Hall* at para 85 quoting *Greenhouse Gas* at para 128.
[31] *Lemare Lake* at para 27.

34. The principles underlying federalism mean that "absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation."[32] Courts require clear proof of purpose, and a provincial prohibition of something that federal legislation permits, without more, is insufficient. [33]

35. In short, absent demonstrable inconsistency apparent in the wording of statute or evidence of purpose, courts will favour interpretations that preserves the operation of federal and provincial legislation.[34]

36. All together, the principles of constitutional interpretation drawn from this Court's jurisprudence establish that it is appropriate to follow a restrained approach to interpreting whether there is a conflict between s. 207(1)(a) of the *Criminal Code* and the proposed changes to iGaming Ontario. Absent a genuine inconsistency, this Court should favour an interpretation that allows for the concurrent operation of both laws.

PART IV - COSTS

37. Alberta does not seek costs and submits the ordinary rule that costs are not awarded against an intervenor should apply.

All of Which is respectfully submitted this 25th day of May, 2026

for:

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Counsel for the Intervener,
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[32] *Lemare Lake* at para 23.
[33] *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 68.
[34] *Moloney* at para 27.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Case Law:	**Para. Ref:**
Alberta (Attorney General) v Moloney, 2015 SCC 51	29, 35
Attorney General of Canada v Law Society of British Columbia, [1982] 2 SCR 307, 1982 CanLII 29	25
R v Furtney, [1991] 3 SCR 89, 1991 CanLII 30	4, 17
R v Nguyen, 2026 SCC 10	10
Multiple Access Ltd. v McCutcheon, [1982] 2 S.C.R. 161, 1982 CanLII 55 (SCC)	30
Murray-Hall v Quebec (Attorney General), 2023 SCC 10	25, 29, 32
Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5	5, 6, 26, 29, 30
Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39	34
Reference re Assisted Human Reproduction Act, 2010 SCC 61	28
Reference re Firearms Act (Can.), 2000 SCC 31	28
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	22
Reference re iGaming Ontario, 2025 ONCA 770	2, 12, 14, 18, 19, 20, 23
Reference re Securities Act, 2011 SCC 66	24
Riddle v ivari, 2026 SCC 9	10
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837	9
Saskatchewan (Attorney General) v Lemare Lake Logging Ltd., 2015 SCC 53	5, 11, 25, 30, 32, 34

Siemens v Manitoba (Attorney General), 2003 SCC 3	4, 16, 17, 18
Other Sources:	
House of Commons Debates, 28-1, Vol. VII, (21 April 1969)	20
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IGaming Alberta Act, SA 2025, c I-0.2	3