CITATION: Mohawk Council of Kahnawà:ke v. iGaming Ontario, 2024 ONSC 2726
COURT FILE NO.: CV-22-00690830-0000
DATE: 20240513

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Mohawk Council of Kahnawà:ke	)	
	)	*Renée Pelletier and Nick Kennedy*, for the
Applicant	)	Applicant
– and –	)	
	)	
iGaming Ontario and the Attorney General of Ontario	)	*Scott Hutchison*, *Kelsey Flanagan, and Brandon Chung*, for the Respondents
Respondents	)	iGaming Ontario
	)	
	)	*Josh Hunter, Ananthan Sinnadurai, Hera Evans and Jennifer Boyczuk*, for the respondent Attorney General of Ontario
	)	
	)	
	)	
	)	**HEARD: February 20 and 21, 2024**

L. BROWNSTONE J.

Introduction

[1] Gambling in Canada is recognised to have a double aspect – its regulation falls within both federal criminal law powers and provincial jurisdiction over property and civil rights in the province. Certain forms of gambling and lottery schemes are criminalised under the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Code*"). The *Code*, however, expressly exempts from criminalisation lottery schemes that are conducted and managed by provincial governments. In 2021, the government of Ontario established a regime for internet gambling (the "igaming scheme"). It created the respondent iGaming Ontario ("iGO"), a subsidiary of the Alcohol and Gaming Commission of Ontario ("AGCO"), with the express purpose of conducting and managing prescribed online lottery schemes in accordance with the *Code*.

[2] The applicant Mohawk Council of Kahnawà:ke (the "Council") asks the court to declare inoperative two legislative provisions that enable the igaming scheme. The Council argues that the provisions impermissibly allow private owners and operators of gaming websites to conduct and manage lottery schemes in the province, and the doctrine of paramountcy renders the igaming

scheme inoperative.[1] The Council takes the position that the igaming scheme is, in effect, a disguised licensing scheme that impermissibly outsources the conduct and management of internet gaming to private sector enterprises.

[3] The respondents the Attorney General of Ontario ("Ontario") and iGO challenge the applicant's standing to bring the application and the availability of declaratory relief. They also argue that Ontario conducts and manages the igaming scheme, that the matter can be resolved on the basis of statutory interpretation and does not raise a division of powers issue, and in any event, the impugned provisions respect the division of powers.

Issue One: Does the Council have standing to seek declaratory relief?

[4] In order to consider the standing argument, a review of the parties and the impugned legislative provisions is required. I will then consider the procedural issue that arose regarding the standing application, and then determine whether the Council has standing to bring this challenge.

The parties

[5] The Council provides governmental, administrative, and operational services to the Mohawks of Kahnawà:ke. Its territory is located in Québec. It has enacted the *Kahnawà:ke Gaming Law* and regulates, facilitates, and conducts land-based and online gaming through an assertion of its inherent right to self-determination in accordance with s. 35(1) of the *Constitution Act, 1982*.

[6] iGO was established in July 2021, following the Ontario government's release of a discussion paper setting out "the government's preliminary thinking on Ontario's iGaming model". Initially created by regulation under the *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c. 26, iGO was continued under O. Reg. 722/21, made under the *Alcohol and Gaming Commission of Ontario Act, 2019*, S.O. 2019, c. 15, Sched. 1 (the "*AGCO Act*"). iGO is a subsidiary of the AGCO, which is the regulator of gambling in Ontario.

[1] The Council, in its amended amended notice of application, sought an order declaring that the government does not "conduct and manage" the igaming scheme, an order quashing the igaming scheme as *ultra vires* Ontario, or an order declaring the igaming scheme inoperative to the extent it permits online lottery schemes that are not conducted and managed by the Ontario government. The respondent Ontario argued that only the relief of an order declaring the igaming scheme inoperative could possibly be sought – the first head of relief being a declaration of fact and the second one properly belonging in the Divisional Court. The application proceeded only in respect of the declaration that two provisions were inoperative to the extent they permit online lottery schemes that are not conducted and managed by the Ontario government.

Legislative overview and summary of applicant's position

[7] I will review the legislative history of gambling in Canada and undertake a more detailed review of the regime governing igaming in Ontario below. At this point, to ground the standing discussion, I set out a brief overview of the relevant provisions.

Legislation

[8] Subsection 206(1) of the *Code* is found in Part VII, which relates to disorderly houses, gaming, and betting. The provision criminalises certain activity involving lotteries and games of chance. However, s. 207(1) renders specific activities lawful despite any other provisions in Part VII. Paragraph 207(1)(a) states that 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.

[9] The parties agree that the igaming scheme falls within the definition of "lottery scheme" in s. 207(4) of the *Code*.

[10] The provincial legislation governing igaming comprises the *AGCO Act*, the *Gaming Control Act, 1992*, SO 1992, c. 24, and the regulations under both Acts.

[11] The *AGCO Act* and its regulations establish both the AGCO and iGO and set out their respective purposes, authority, and responsibility. Clause 6.1(1)(a) of the *AGCO Act* empowers the Lieutenant Governor in Council, by regulation, to establish or continue a corporation that is a subsidiary of the AGCO and that has its objects and duties conducting and managing prescribed online lottery schemes. It was under this authority that iGO was continued under O. Reg. 722/21. Further objects of iGO are set out in s. 4 of that regulation as follows:

> 1. To develop, undertake and organize prescribed online lottery schemes.
>
> 2. To promote responsible gaming with respect to prescribed online lottery schemes.
>
> 3. To conduct and manage prescribed online lottery schemes in accordance with the *Criminal Code* (Canada) and the *Gaming Control Act, 1992* and the regulations made under those Acts.

[12] The *Gaming Control Act* and its regulations establish the regulatory regime for lottery schemes in Ontario. That Act requires all suppliers of goods or services for lottery schemes to be registered with the AGCO. Registrants are required to comply with standards and requirements established by the ACGO: s. 3.8. The *Gaming Control Act* further requires iGO to ensure that lottery schemes, gaming sites for lottery schemes, and businesses related to gaming sites or lottery schemes are conducted, managed, and operated in accordance with rules of play and standards and

requirements that are either prescribed or established by the ACGO: s. 3.9. The ACGO has established standards for internet gaming.

The applicant's position

[13] The Council seeks relief in respect of two provisions. The first is the registration provision of the *Gaming Control Act*, s. 4(1.1), which provides:

> (1.1) Except as provided in this Act and the regulations, no person shall provide goods or services for a lottery scheme conducted and managed by the Ontario Lottery and Gaming Corporation or the lottery subsidiary or for any other business operated by, on behalf of, or under contract with the Corporation or the lottery subsidiary in conjunction with such a lottery scheme, unless,
>
> (a) the person is registered as a supplier; and
>
> (b) the person is providing those goods or services to the Corporation, the lottery subsidiary or a registered supplier.

[14] "Supplier" includes operators under s. 2 of O. Reg 78/12 made under the Act, and operator means a person who operates a gaming site: s. 1. The Council argues that it is impossible to comply with this provision and the *Code* because in order to provide goods and services to iGO, operators, who are private entities, have to conduct and manage the lottery schemes. Under the *Code*, only schemes conducted and managed by the province are exempted from criminalisation.

[15] The second provision the Council seeks to have declared inoperative on the same basis is s. 3 of O. Reg. 722/21 made under the *AGCO Act*, which provides that:

> 3. For the purposes of the Act and this Regulation, a lottery scheme offered through a gaming site that is an electronic channel operated by a supplier registered as an operator under the *Gaming Control Act, 1992* is prescribed as an online lottery scheme.

[16] As with respect to s. 4(1.1) above, the Council takes the position that it is impossible to comply with both s. 3 and s. 207(1)(a) of the *Code* because a private supplier operating a lottery scheme under this provision is actually managing and conducting the scheme. It would therefore not be in compliance with the *Code* provisions. Section 3 is therefore *ultra vires* the province on the basis of the paramountcy doctrine. There is both operational conflict and conflict of purpose with s. 207(1)(a).

Procedural issue regarding standing

[17] The Council commenced the application without addressing its standing to bring the proceeding. The issue of standing was first raised in Ontario's factum responding to the application. The Council complains that it had no notice that Ontario would object to its standing. Had Ontario put the Council on notice or brought a motion in respect of standing, it argues, it could have developed its record on the issue. It argued that it should have public interest standing.

Although it made a passing reference to "likely qualifying" for private interest standing, the matter was argued as one of public interest standing.

[18] Ontario submitted that it first heard that the Council was seeking public interest standing in the Council's oral submissions. It notes that the Council refers only to a single case in its factum in support of the availability of a declaration, and that is a private law case: *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363. Ontario argues that it was entitled to presume both that the Council was asserting private interest standing, and that the Council bears the burden of establishing that it has standing: *Bedford v. Canada*, 2010 ONSC 4264, 102 O.R. (3d) 321, at para. 46, aff'd 2013 SCC 72, [2013] 3 S.C.R. 1101. The applicant provided Ontario with cases regarding public interest standing only the evening before the hearing.

[19] Ontario argues that it is prejudiced by the Council's failure to raise its application for public interest standing earlier. Ontario outlined ways in which its approach to the evidence, among other things, would have changed had it known the Council was seeking public interest standing. Given the resulting prejudice to Ontario, it argues, the court should not engage with the Council's request. Ontario is concerned about the precedential value of litigants commencing applications, not identifying they are pursuing public interest standing, and Ontario losing the ability to contest the standing. Public bodies will have to pre-emptively litigate the issue of standing even when it is not specifically raised which, Ontario argues, would be neither economical nor fair. Ontario would have to engage proactively with a party to clarify the basis on which standing is sought, and this may result in preliminary motions. These are additional steps it says it should not have to take. Rather, as a respondent, it should be entitled to rely on the documentation it is provided and frame its litigation response and tactics accordingly.

[20] The manner in which the standing issue was raised was problematic. It is the Council's obligation to make its case for standing. Regardless of whether a respondent raises the issue, parties must always be prepared to justify their right to standing to the court. Rule 14 provides a procedural mechanism by which applications may be brought; it does not create substantive rights or independently confer standing. It does not create a mechanism by which a party may bring a private reference on a law it finds objectionable; a party must meet the test for either private or public interest standing. A party should turn its mind to the basis on which it asserts standing when it commences a proceeding and adduce whatever evidence it deems necessary to support its claim.

[21] That said, where it appears to the respondent that the basis for a party's claim to standing is unclear, the respondent may wish to clarify the matter before the eve of hearing. In this way, all litigants can play their part in ensuring the smooth progress of litigation and the propriety of issues put before the court. The opportunity to save scarce judicial resources, one of the purposes of the law on standing, is lost when the issue is not raised by the parties in advance of the hearing.

[22] In this case, Ontario acknowledges that given that the substance of the matter was fully argued before the court, its objection to standing is largely one of principle and precedent.

[23] Despite the unfortunate way the matter evolved, it was clear at the hearing that the Council was seeking public interest standing and that the respondents, particularly Ontario, opposed this request. I will therefore consider whether the Council should be granted public interest standing.

Does the Council have standing?

[24] The three-part test for public interest standing is well-settled: Does the case raise a serious justiciable issue? Does the party bringing the action have a genuine interest in the matter? Is the proposed claim or application a reasonable and effective means of bringing the case before the court? *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, 470 D.L.R. (4th) 289, at para. 28.

[25] In applying the test, courts must consider, weigh, and balance the purposes that militate in favour of limiting standing and those that justify granting it.

[26] There are three purposes of limiting standing, per *Disabilities*, at para. 29: efficiently allocating scarce judicial resources and screening out "busybody" litigants, ensuring those most directly affected by the issues are present to provide the courts with their points of view, and ensuring courts play their proper role in our democratic government.

[27] Two purposes justify granting standing – the principle of legality and ensuring access to the courts: *Disabilities*, at para. 30. These two principles are fundamental to the rule of law. They require that state action conforms to the law and that there are effective means to challenge that action's legality: *Disabilities*, at paras. 33-36.

[28] Because Ontario's arguments on justiciability are tied to the genuine interest requirement, I will deal with the first two parts of the test, those requiring a serious justiciable issue and a genuine interest in the matter, together.

1) Does the case raise a serious justiciable issue? 2) Does the Council have a genuine interest in the matter?

[29] To raise a serious justiciable issue, the litigation must raise an issue that is serious in that it is "far from frivolous", and justiciable in that it is appropriate for the courts to decide: *Disabilities*, at paras. 49-50. The requirement for a genuine interest in the litigation reflects the need to conserve scarce judicial resources and screen out busybodies. An applicant must show a real stake in the proceedings or an engagement with the issue raised: *Disabilities*, at para. 51. Given the content of the parties' arguments, I will review the respondents' positions on the issues before the applicant's.

<u>The respondents' position</u>

[30] Ontario argues both that the Council does not have a genuine interest in the matter and that the matter is not justiciable.

[31] It argues there is no direct evidence of the Council's particular genuine interest, which is required to ground public interest standing: *Campisi v. Ontario*, 2017 ONSC 2884, 382 C.R.R. (2d) 320, aff'd 2018 ONCA 869, 144 O.R. (3d) 638. While the Council has raised issues about igaming with the federal government and with the public, it has not indicated what its interest is. Ontario submits that to the degree Council has an interest, it can be discerned from the excerpts from a 2021 meeting of the Standing Senate Committee on Banking, Trade and Commerce. The

committee was considering amending the *Code* to permit sports betting. In that meeting, Indigenous governing bodies were seeking exemptions under the *Code* to permit them to conduct and manage lottery schemes. The Council testified that Ontario's proposed igaming scheme, which did not allow entities to work with Ontario's scheme if they provided services to entities that were unregulated, would have a prohibitive effect on the Council's ability to function in this sphere. Thus, the Council has a hidden economic interest in pursuing this litigation. Ontario argues that the Council is using this litigation to advance its own agenda, which was specifically warned against in *Disabilities* and in *Public Mobile Inc. v. Canada*, 2011 FCA 194, [2011] 3 F.C.R. 344.

[32] Ontario argues that the important facts for standing purposes are that the Council does not operate in Ontario; it does not "conduct and manage" a scheme under s. 207(1); and therefore, it neither has a genuine interest in the matter, nor does its evidence assist the court in determining what "conduct and manage" means.

[33] Ontario also argues that the matter is not justiciable because to determine the matter would interfere with prosecutorial discretion. That is, Ontario argues that the Council is asking this court to find that all operators of igaming platforms under the igaming scheme are committing criminal offences. Civil courts should not declare that someone is guilty of a criminal offence because to do so would interfere with the prosecutor's independent exercise of discretion to decide whether a prosecution should proceed. Police may lay charges, and the Attorney General may decide to proceed with them. These decisions are made independently without partisan considerations: *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R 372. A declaration of the nature the Council seeks in this case would be a pre-determination that a criminal offence has occurred. The judiciary, like other arms of government, is not to interfere with prosecutorial discretion. Further, such a declaration has the potential to affect operators, and they are not a party to this proceeding. They should have been provided notice of the proceeding and been given the opportunity to make submissions.

[34] iGO similarly argues that making a declaration in this case would either improperly interfere with prosecutorial discretion or be of no utility if the Attorney General were free to ignore it: *Bunker v. Veall*, 2023 ONCA 501, 168 O.R. (3d) 356, at paras. 14, 19-23. In either instance, declaratory relief is unavailable. *Bunker* concerned a request for declaration that a proposed payment would violate the *Code* because the payee had an alleged connection to a terrorist group. The Court of Appeal held that a declaration would have no utility, as it would not be binding on a prosecutor.

<u>The applicant's position</u>

[35] The Council argues that, as a question of legislative overreach, the matter is clearly justiciable. The Council likens the situation to the early public interest standing case *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, in which a private citizen challenged the *Official Languages Act* on a division of powers basis. The Supreme Court of Canada reversed the lower court decisions and granted Mr. Thorson standing, holding that a question of alleged excess of legislative power is a justiciable one. The court noted that in the absence of Mr. Thorson's litigation, the legislation could be immune from judicial review because no person was particularly aggrieved and governments had declined to raise the matter before the courts.

[36] The Council also relies on *Public Mobile*. There, even though the matter involved a commercial dispute and the court specifically adverted to the importance of preventing commercial rivals from "using judicial review as a tool for competitive warfare", the court granted the applicant standing in large part to ensure that the government action at issue was not immune from judicial review.

[37] The Council argues it has a genuine interest in the *Code* provisions relating to gambling in general. It testified before the House and the Senate at the only available opportunity – when the only substantive amendment to the provisions in a generation was made, removing the prohibition on single sports betting. Further, the Council has a genuine interest in the regulation and operation of gaming more generally. It has an "uncommon level of expertise", having operated and regulated gaming from its reserve for decades. It has demonstrated its interest by asking Canada's Attorney General and Minister of Justice to bring this very challenge. In addition, it attempted to have discussions with the Ontario government about the igaming scheme.

[38] The Council submits the prosecutorial discretion argument has the effect of shielding the legislation from judicial review. Like in any constitutional case, a declaration may have broad effects. With respect to notice to the operators, the Council points out that its challenge is to the legislative igaming scheme itself; the Council is not asking the court to determine what any individual operators are doing. With respect to the respondents' argument that declaratory relief is not available, the Council argues that declaratory relief is the norm in constitutional litigation.

3) Is the proposed application a reasonable way to bring the matter to court?

<u>The applicant's position</u>

[39] The Council argues that this application is an appropriate and effective means for the issue to be brought to court. It relies heavily on the principles of legality and access to justice. It notes that those who are providing the igaming services (those entities that it claims are conducting and managing the igaming scheme, and the respondents claim are merely operating it) have no incentive to bring the matter to court. They are profiting greatly from a potentially illegal scheme. It notes that although the Auditor General of Ontario raised questions about the legality of the igaming scheme in a December 2021 report entitled *Internet Gaming in Ontario*, in the intervening years no one has sought to challenge the igaming scheme.

<u>The respondent's position</u>

[40] Ontario argues that there are other ways the matter could be brought to court. A potential operator "might want to get clarity about the legality" of the igaming scheme in advance of participating in it. An existing operator may be dissatisfied in some way, leading it to sue and call into question the entire legality of the igaming scheme. Gamblers may challenge the legality of the scheme if they lose money. A brick-and-mortar casino may take issue with the scheme due to increased competition. An anti-gaming group could seek public interest standing to challenge the scheme. Ontario points to cases where some of these entities have launched challenges to other gaming laws: see for example *Tsuu T'ina Gaming Limited Partnership v. Alberta (Gaming, Liquor*

and Cannabis Commission), 2022 ABQB 162 and *Moreira et al v. Ontario Lottery and Gaming Corp. et al*, 2012 ONSC 2304 ("*Moreira ONSC*"), aff'd 2013 ONCA 121, 296 C.C.C. (3d) 245.

Conclusion – The Council has public interest standing

[41] While Ontario's examples of how the matter could be brought before the court are not impossible, I view them as unlikely. In particular, an existing operator who challenges the scheme on the basis that it is illegal puts itself in potential legal jeopardy by doing so. An operator who hopes to join the lucrative igaming scheme, which Ontario states is managed and conducted by the province, is unlikely to question its legality. There is no evidence before the court that the introduction of igaming has reduced profits for Ontario's brick-and-mortar casinos, and therefore no evidence that they would have any interest in mounting a challenge that has nothing to do with them. The summary dismissal of the *Moreira* case may give pause to any individual gambler who wishes to sue on the basis of gambling losses. This is so even acknowledging that the dismissal in that case turned largely on whether the claim of unjust enrichment could be made out, not on the illegality of the game at issue.

[42] Nor do I give credit to Ontario and iGO's arguments about interference with prosecutorial discretion. While I agree with them that this court ought not engage in an untethered interpretation of or declaration about the *Code*, the Council is not seeking a declaration that particular individuals or entities are engaging in illegal activity. It brings its challenge to a provincial scheme and seeks to have two provincially-enacted enabling provisions declared invalid. To give effect to Ontario and iGO's argument would put the igaming scheme beyond judicial scrutiny.

[43] In response to the court's concern that this argument would have the effect of shielding an enactment from review, Ontario submitted that police could investigate and seek to lay charges against operators even though they are operating in accordance with the igaming scheme because police are independent. Likewise, the Attorney General could decide to lay charges because it is independent in its prosecutorial functions. I find this a highly unlikely proposition. While it may notionally be possible, it is exceptionally difficult to imagine that possibility becoming a reality. This is particularly so given that in the contract between iGO and operators, iGO represents and warrants to the operators that "the execution, delivery and performance by iGaming Ontario of this Agreement … does not… violate any Applicable Law." I find that giving credit to this argument would place the issue beyond judicial review, even for those hypothetical challengers that Ontario suggests would be better placed than the Council to mount this litigation.

[44] I find that the Council has met the test for public interest standing. The Council has demonstrated sufficient interest and expertise in the matter to quell any disquietude about it being a "mere busybody". I accept that it is extremely unlikely that a challenge to the igaming scheme would otherwise be brought before the courts and note that none has been brought to date. The test for public interest standing does not require that one cannot imagine another theoretically possible way for the matter to be challenged; it requires scrutiny to determine that the proposed litigation is an appropriate and effective means of doing so. Finally, I find that, as a challenge based on legislative overreach, the issue is a justiciable one.

Issue two: Is the province conducting and managing the igaming scheme, as a matter of statutory interpretation?

[45] The two provisions the Council challenges are set out at paragraphs [13] and [15] above. The Council argues that compliance with both those provisions and the *Code* is impossible because the impugned provisions require private operators to "conduct and manage" the igaming scheme. The Council argues that while the provisions use the word "operate", that is an inaccurate and misleading term. The provisions in substance purport to permit private operators to conduct and manage the igaming scheme when only the province is permitted to do so under the *Code*. This is *ultra vires* the province because it directly contradicts the *Code.*

[46] The respondents argue that the proper exercise of statutory interpretation resolves the issue and that no concerns about division of powers arise.

[47] All parties agree that the heart of the matter lies in the proper interpretation of the phrase "conduct and manage". The approach to statutory interpretation is well-settled. The exercise "entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects": *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 21; *Bell ExpressVu Limited Partnership v. R.*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Buttersworth, 1983), at p. 87. In cases involving the interplay of federal and provincial legislation, the interpretative exercise is also governed by the principle of co-operative federalism: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 20-21.

[48] In order to determine the proper interpretation of the phrase "conduct and manage", I will i) review the legislative history of the *Code* provisions, ii) review the impugned provisions in their statutory context, iii) consider the ordinary and grammatical meaning of the terms used, iv) review the caselaw interpreting the provisions, and v) consider the application of the principles of co-operative federalism. I will review each of these aspects and provide my conclusions at the end.

i) Legislative history of the Code provisions

[49] The parties agree that the legislative history provides important information about the intention of the *Code* provisions.

[50] The history of gaming legislation is canvassed by P. Monahan (now Monahan J.A.) and G. Goldlist in their article "Roll Again: New Developments Concerning Gaming" (1999) 42 Crim. L. Q. 182, an article referred to by all parties. It is common ground that the first *Code* prohibition on gaming dates back to 1892. As societal attitudes toward gaming changed, the government concluded that gaming laws should be liberalised. The July 31, 1956 *Report of the Joint Committee of the Senate and House of Commons on Lotteries* recommended significant reform, which came in 1969 in the form of amendments to the *Code*. The amendments permitted the existence of lotteries conducted and managed by charitable or religious organisations under certain conditions, as well as lotteries conducted and managed by the federal or provincial governments. All parties agree that these amendments had the effect of liberalising gaming laws.

[51] Each party relies on comments made by then Justice Minister John Turner in introducing the *Code* amendments. The Council notes that Minister Turner explained that with the amendments, "provincial governments will be authorised to conduct what is commonly referred to as a state lottery." The Council points out that, throughout the debates, the matter was consistently framed as one of "state lotteries". Private lotteries were never contemplated by the amendments. In reading the excerpts relied on by the respondents, it is important to bear in mind, the Council argues, that the intended permission was always limited to "state lotteries", not to private competitive gaming or casino markets.

[52] The respondents point to Minister Turner's statement that the goal of the amendments was to "incorporate a fundamentally new approach in the sense that the amount and nature of gaming which will be permitted will depend to a considerable extent on the policy of the provincial authorities in issuing licenses" and to create a "local option within prescribed limits". The Minister noted that attitudes toward gambling varied in different parts of the country. Further, Minister Turner stated:

> [The amendment] withdraws the application of the criminal law and makes this a question of civil, public policy ... [I]t is, if one wishes to call it so, permissive legislation. It does establish a local option and it now becomes a question of public policy at the federal and provincial levels whether lottery schemes ought to be established … It means that the criminal law is withdrawn. It means that the government of a province would have to go before its legislature and get the approval of public opinion in the province. It would have to get the approval of the majority of the members, duly elected, of the provincial legislature. Only then, will a provincial lottery be established. All that this withdrawal of this type of lottery scheme from the criminal, the penal law means is that if a province is willing to face public opinion in the province and decides to introduce an enabling provision in the legislature of the province, then the provincial government takes upon itself before its own legislature the introduction of such legislation. Through the 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 attached to such scheme or a provincial matter."

[53] The 1969 amendments permitted both the federal and provincial governments to conduct and manage lotteries. What followed was a period of turmoil and litigation. The latter was resolved in 1985 by the provinces paying a significant amount to the federal government. In exchange, the federal government withdrew from the field of gaming and amended the *Code* to "remove the permission for the federal government to conduct lotteries and other forms of gaming": Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 33rd Parl, 1st Sess, No. 35 (December 16, 1985) at 12. The federal government was also to "refrain from re-entering the field of gaming and betting, and to ensure that the rights of the provinces in that area are not reduced or restricted."

[54] All parties rely on the legislative history to ground their arguments about the meaning of the term "conduct and manage". The Council states that the legislative history demonstrates that

Parliament always intended that lottery schemes be highly restricted, and the various amendments over time opened the door to licit gaming "just a crack". Taking into account that the amendments were introduced from a state of prohibition on gambling, it is clear that the intention was a restricted one, limited to permitting only public, state lotteries. "Conduct and manage" must therefore be construed in a manner holds the provinces to a high level of control.

[55] The respondents argue that the legislative history leads to an entirely different conclusion - namely, that the federal government intended to give the provinces extensive control over lottery schemes, leaving it up to the provinces to determine how best to implement these schemes in accordance with local mores. This intention would lead to a permissive reading of "conduct and manage". Parliament determined that provincial governments could be trusted to determine whether and how they wished to conduct and manage lotteries in a manner that kept out unregulated elements and maintained safety. The mechanism by which the provincial governments chose to do so was to be left entirely to them.

ii) The statutory context

A. The Ontario legislation and operating agreements

[56] Decades after the 1985 *Code* amendments, Canada saw the advent of internet gaming. The Ontario government established iGO to conduct and manage igaming in the province. As noted above, iGO is a subsidiary of the AGCO. At least part of the impetus for Ontario's creation of iGO was that online gaming was taking place in an unregulated manner, on internet platforms outside the province. The government determined that this gave rise to risks in the areas of consumer protection, responsible gambling, fraud, and money laundering. Nor did the government receive revenue or taxes from the gambling. Therefore, the government established iGO, with the result that online gaming through this regulated framework became available to the public on April 4, 2022.

[57] As set out above, the *Gaming Control Act* requires registered operators to abide by the AGCO's standards and requirements. These privately-owned operators enter into contractual relationships with iGO. The evidence indicates that the operators are established global entities that have been offering gaming products through the internet for some time. They have their own boards of directors and management teams. iGO argues that these operators act as iGO's agents in operating online games but that all material decisions about the games are made by, or reserved for, iGO. iGO submits that once an operator is approved by AGCO, iGO retains sole and absolute discretion about whether to enter into an operating agreement with it. The agreement is a non-negotiable standard-form agreement that, the respondents argue, clearly demonstrates that iGO conducts and manages the igaming scheme. The operating agreement is extensive. iGO submits that the agreement was drafted in a manner that reflects that iGO is conducting and managing the igaming scheme in accordance with its statutory authority; the operators (the term "Operator Group" in the agreement includes the operator) are just that, operators of the igaming scheme. For example, the agreement provides that:

> The Operator Group acknowledges and agrees that iGaming Ontario must conduct and manage all Eligible iGames in the Province of Ontario as required under

> paragraph 207(1)(a) of the Criminal Code. As between the Operator Group and iGaming Ontario, iGaming Ontario shall at all times have the sole authority to conduct and manage Eligible iGames in accordance with the Criminal Code and in accordance with Gaming Control Legislation. The respective rights and obligations of the parties hereunder will be interpreted in light of and subject to, and so as to not restrict or abrogate, iGaming Ontario's authority to conduct and manage Eligible iGames. In order to ensure compliance with the Criminal Code, in addition to any other limitations on the power and authority of the Operator Group specified in this Agreement, the Operator Group shall have no authority to take, and will not take, any action that is in any manner inconsistent with this Agreement or Applicable Law.

[58] The respondents point to the one-sided nature of the agreements and to the following contents of the agreements in support of their position that iGO is the conductor and manager of the igaming scheme:

a. iGO has control over which games are offered. It has a "Games Catalogue and Game Conditions Policy" that controls which games are eligible. It may direct operators to deliver certain types or categories of games and may prohibit, in its sole and absolute discretion, any type or categories of games.

b. Operators are required to accept bets on behalf of and as agents of iGO. They are required to keep funds collected from players in an account separate from all of their other operating accounts and to remit the entirety of collected funds to iGO. Once reconciled with the operator's report indicating total gross gaming revenue, iGO pays the operators their share, which is equal to 80 percent of the gross gaming revenue.

c. Gaming data is retained by the operators, but the use of the data is subject to iGO's "exclusive and unfettered" control rights. The data can only be used by operators in connection with the use of their website or with iGO's pre-approval.

d. There are prohibitions on subcontracting the acceptance of bets and payment of winnings, among other things, and limitations on other subcontracting abilities.

e. The operators are specified to be accepting bets and paying winnings as an agent of iGO, and only to persons physically present in Ontario.

f. iGO has the right to restrict advertising in its sole and absolute discretion, which may include restrictions on the audience, time, format, or nature and content of marketing and advertising materials.

g. iGO may increase the monitoring of operators in its sole and absolute discretion or suspend operators if certain events occur, and it may terminate the agreement on specified events of default by the operator.

h. iGO has oversight of customer care and dispute resolution.

[59] In addition, the agreement provides for the safe regulation of igaming, which was, according to the respondents, Parliament's main concern in enacting s. 207(1)(a) of the *Code* The agreement requires operators to obtain and maintain responsible gambling accreditation, implement centralised self-exclusion programs, dedicate a specified percentage of its gross gaming revenue to problem gambling prevention education messages and campaigns, and report on the latter to iGO.

[60] Operators are bound not just by the agreement, but by iGO's policies. These policies provide that operators may only run games that are pre-approved by iGO, that iGO is the entity that engages in dispute resolution between players and operators, and that operators' games must properly use iGO's branding, among other things. Operators are responsible for day-to-day compliance with the anti-money laundering and anti-terrorist financing standards, but iGO is the responsible entity for the purposes of the Financial Transactions and Reports Analysis Centre of Canada.

[61] The policies also include requirements related to responsible gambling, good governance, and game integrity and player awareness.

[62] The Council takes the position that in substance, this does not amount to a high degree of control being exercised by iGO. It is the operators who decide on the games to be offered and the operators who use the data gained from the betting for purposes of conducting the gambling. iGO retains theoretical, not actual, control.

B. The remainder of the Code provisions

[63] The provision at the heart of this matter is s. 207(1)(a) of the *Code*. However, the entirety of s. 207(1), and in particular, clauses (b) and (g), are important context. For ease of reference, I reproduce the entirety of s. 207(1) here:

> 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;

(g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and

(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.

[64] I note that 207(1)(g) above uses the phrase “conduct, management or operation” as distinct from “conduct and manage” in s. 207(1)(a). I also note that it is only in s. 207(1)(a) that the province must conduct and manage the scheme.

iii) The grammatical and ordinary meaning of "conduct and manage"

[65] All parties made submissions on the grammatical and ordinary meaning of "conduct and manage", including submissions on the French text "*mettre sur pied et exploiter*". All parties submit that the grammatical and ordinary meaning supports their interpretation.

[66] The applicant cites Bourgeois and Campbell, *The Law of Charitable and Casino Gaming*, 2nd ed., (LexisNexis Canada, 2018) at ch. 3, who note that dictionary definitions indicate "'conduct' means to manage, lead, have direction, carry on, regulate, do business. And 'manage' means to control and direct, to administer, to take charge; to conduct, to carry on concerns of a business or establishment; generally applied to affairs that are somewhat complicated and that involve skill and judgment. To complicate matters more, 'operate' means manage, work, control, put or keep in a functional state."

[67] The respondent iGO states that the ordinary meaning of both "conduct" and "manage" refers to "high-level oversight". It provides dictionary definitions of conduct as "to direct or take part in the operation of management of" and to "lead from a position of command". Dictionary definitions of "manage" include "to take charge of, control or direct" and "to exercise executive, administrative and supervisory direction of" and "to direct or carry on business or affairs". iGO uses the example of a conductor of an orchestra, which is a position of leadership. Ontario relies on similar definitions and argues that the absence of prescriptive definitions of these terms in the *Code* is notable and should be regarded as a deliberate choice to promote co-operative federalism by giving autonomy to the provinces.

[68] The parties also made submissions on the French language text of the *Code* "*mettre sur pied et exploiter*". iGO submits that manage and *exploiter* are rough equivalents, and *mettre sur pied* means to set up or establish, a meaning more akin to oversight than operation. The Council argues that iGO is not setting up anything; it is the operators who set up the lottery schemes. "*Exploiter*" means, the Council states, to operate a business.

iv) Caselaw interpreting "conduct and manage"

[69] The caselaw that considers s. 207 of the *Code* is instructive in several respects. It assists with discerning a) the purpose and intention of the gaming exemption provisions, b) the special considerations that may apply to charitable lotteries, c) the role that profit-sharing plays in the interpretation exercise, and d) the level of control required to fall within the "conduct and manage" requirement.

A. The purpose and intention of the gaming exemption provisions

[70] The provisions' purpose has been the subject of commentary by the Supreme Court of Canada as well as lower courts.

[71] In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, the Supreme Court of Canada considered the validity of Manitoba legislation that granted municipalities the power to hold binding plebiscites on the question of whether to permit video lottery terminals ("VLTs") within municipalities. In conducting its analysis, the Court at para. 35 referred to the

purpose of s. 207. It stated that s. 207(1)(a) "was first enacted in 1969 for the purpose of decriminalizing lotteries and allowing each province to determine whether it wished to establish a lottery scheme. Where no such scheme exists, the *Code* offences still apply. Parliament has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area."

[72] In *Reference re Earth Future Lottery (P.E.I.)*, 2002 PESCAD 8, 211 Nfld. & P.E.I.R. 311 (Appeal Division), aff'd 2003 SCC 10, [2003] 1 S.C.R. 123, the Lieutenant Governor in Council of Prince Edward Island referred to the Court of Appeal's questions regarding the lawfulness of the proposed Earth Future Lottery. The lottery was to be a charitable lottery conducted and managed under a license issued by the government. The lottery would be based in P.E.I. but was intended to be operated through the internet in order to access a global market. The Court held that such a scheme was not in conformity with s. 207(1)(b) of the *Criminal Code*, which requires lotteries to be operated *in* the province. Having a lottery with global reach operate *from* the province was not the same as having it operate *in* the province. Further, charitable lottery schemes are not permitted to be operated on or through a computer under s. 207(4)(c).

[73] While *Earth Future Lottery* is of limited assistance to this decision on the meaning of conduct and manage,[2] the applicant relies on the case in support of its contention that the Parliamentary purpose behind the provisions was to permit a very narrow exemption to the prohibition on gaming. It relies on the following statements of the P.E.I. court, at paras. 7 and 12:

> The [*Criminal Code*] provisions … clearly demonstrate that Parliament does not happily abide gaming activities of any sort in Canada. The little it tolerates, it does so grudgingly. Section 206 is prohibitive in nature, not regulatory. The purpose of Parliament in enacting it was generally outlaw gaming and lotteries, not just to ensure they would be run honestly.
>
> . . .
>
> Parliament's purpose in enacting s. 207 was to create a narrow exception to s. 206 legalizing certain provincially run or licensed lottery schemes.

[74] The respondents point to comments in *R. v. Andriopoulos*, [1993] O.J. No. 3427 (Ont. C.J.) about the purpose of the *Code* provisions. There, the accused were charged with gambling offences

---

[2] Indeed, Ontario has recently, by Order in Council 210/2024 under s. 8 of the *Courts of Justice Act*, RSO 1990, c. C.34. referred to the Court of Appeal for Ontario a question similar to that raised in *Earth Future* I asked counsel to convene on March 14, 2024, shortly after this case was argued, to address whether Ontario's then recently filed reference permitting international play in an online provincial lottery scheme (COA-24-CV-0185) has any effect on this case. Counsel all agreed, as do I, that given that the reference asks the Court of Appeal to assume that the current igaming regime is being conducted and managed *by the province*, and the only question before that court is whether international play can be considered to be *in the province*, the Reference and this case should proceed in parallel.

and brought applications in which they argued that the offences were *ultra vires* Parliament because the province had passed legislation permitting gambling. There was therefore no valid criminal law purpose in criminalising gambling. Justice Campbell dismissed the applications, stating, "Parliament permits gambling so long as its well-known criminal associations and side-effects are deterred by provincial regulation licensing, and management. Ontario permits the same thing": at para. 8. Justice Campbell further held the following, at paras. 12-13:

> There is a world of difference between licensed regulated gambling and gambling conducted without any legal control. There is a world of difference between regulated gambling under a government good-housekeeping seal of approval with a policeman watching over your shoulder, and unregulated gambling in some illicit hangout under conditions associated from the earliest times with criminal activity and criminal side effects.

[75] The Court of Appeal for Ontario dismissed the appeal in *Andriopoulos*, referring to the appellant's fallacy of "equating a lottery, licensed, conducted and managed by a province, to all forms of gaming and gambling … Section 207 defines the reach of the crime by stating that it does not extend to lotteries licensed under authority of the province on prescribed conditions. The clear intent is not to condone gaming but to decriminalize it in circumstances where regulations will minimize the potential for public harm": *R. v. Andriopoulos*, [1994] O.J. No. 2314 (Ont. C.A.), at paras. 4-5.

[76] Similarly in *Moreira*, discussed below, the Court of Appeal for Ontario noted that the legislative scheme was intended to ensure that gaming is conducted responsibly and in the public interest.

[77] The respondents argue that these cases clearly identify Parliament's intent to give the provinces authority to regulate, manage, and license gambling in a manner that protects public safety. The question of control is central to the analysis.

B. Special considerations affecting charitable lotteries

[78] The caselaw is equally instructive on the issue of the charitable exemption in s. 207(1)(b) and the different considerations that have been found to apply in that context. The 1956 *Joint Committee Report* identified a specific concern specific to the charitable exemption in s. 207(1)(b). It noted that charitable organisations are vulnerable to professional operators using the organisation for cover by agreeing to provide the necessary operating elements for a charitable scheme, which the organisation has no resources or expertise to supply, and then retaining most of the proceeds. Monahan and Goldlist suggest that this may require the courts to apply a more rigorous approach to s. 207(1)(b) than to s. 207(1)(a).

[79] The Manitoba case of *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1990), 76 D.L.R. (4th) 423 (Man. C.A.), aptly illustrates this concern. There, the Manitoba Court of Appeal considered the predecessor of s. 207(1)(b) in determining that Keystone had been operating an illegal lottery scheme. Keystone had sued the Lotteries Corporation on the basis that a change in government policy respecting the licensing and operation of bingo parlors had put

Keystone out of business. The Court held that because the business was illegal under the *Code*, Keystone was not entitled to relief.

[80] The lottery at issue there involved a group of charities who had, in accordance with a plan developed by Keystone, organised into one umbrella organisation. Keystone became the association's landlord. It provided the premises, bingo supplies, and personnel, and operated a concession. The association paid Keystone for rent, equipment, and supplies. The court found that Keystone was keeping a common gaming house and had engaged in activities prohibited under what is now s. 206(1) of the *Code*. The arrangement that placed Keystone as a landlord did not conceal that it was in fact Keystone, not the association of charitable organisations, who was conducting and managing the lottery. The court noted at para. 21 that Keystone "had a very real participation in the profits". The proceeds were not used for a charitable or religious object or purpose, as required under s. 207(1)(b) of the *Code*.

[81] Because counsel in *Keystone* conceded that Keystone conducted and managed the lottery scheme, the court did not engage in a lengthy discussion of the meaning of the words. However, it is clear from the facts that Keystone, the private entity, was the true operating mind behind the scheme – it provided everything: personnel, game cards, premises. Inversely, the charities provided nothing; they paid Keystone for rent, equipment, and supplies and gave Keystone a participation in the profits.

C. The significance of profit-sharing

[82] Several cases touch on profit-sharing as an indicium of whether a party is conducting and managing a lottery scheme. The Council relies on *Great Canadian Casino Company Ltd. v. Surrey (City of)* (1998), 53 B.C.L.R. (3d) 379 (S.C.), rev'd but not on this point 1999 BCCA 619, 71 B.C.L.R. (3d) 199. There, the province had recently announced a new policy that permitted the limited introduction of VLTs in certain facilities. The city of Surrey adopted a bylaw prohibiting VLTs in the city. The government then amended its policy and disallowed VLTs but allowed charitable casinos to have new games and slot machines. Surrey advised Great Canadian that its installation and operation of slot machines at its Surrey casino violated municipal zoning bylaws which prohibited arcades or video lottery gaming. It advised Great Canadian to cease using the premises as an arcade and to cease video lottery gaming. Great Canadian sought a declaration that the definition of video lottery gaming in the bylaw did not include slot machines.

[83] Under the scheme at issue in *Surrey*, British Columbia's provincial Lottery Corporation was authorised to conduct and manage slot machines in casinos. The city of Surrey, relying on *Keystone*, argued that the government had illegally delegated its "conduct and manage" function to a private operator. Great Canadian argued it was merely assisting the operation, as permitted. The court posed the question it had to answer this way, at para. 56: "[I]s the operation of slot machines at the Surrey Casino conducted and managed by the Lottery Corporation as an agent of the Provincial government or by the Casino itself?" The court considered the fact that the Lottery Corporation owned the machines, owned, supplied, and installed all equipment, centrally transmitted instructions to the slot machines, selected the games and controlled the payouts, controlled the locations of the machines, performed all technical assistance and maintenance, and conducted compliance audits. The casino's responsibilities were to deposit and withdraw money

to and from the machines, open and close the machines for servicing, deposit revenues, validate payouts, act as cashiers, and perform security, surveillance, and general janitorial services. The Casino received percentages of gambling proceeds, sums which the court described as "enormous".

[84] The court found that the arrangement amounted to a profit-sharing scheme which "comes dangerously close" to delegation. However, it noted that merely sharing in profits does not mean the casino engaged in control and management of the gaming. It concluded, and the Court of Appeal affirmed, that Great Canadian was not its own master, nor the operating mind of the lottery scheme. Rather, the Lottery Corporation managed and controlled the slot machine scheme, and therefore there was no unlawful delegation.

[85] In *Nanaimo Community Bingo Assn. v. B.C. (Attorney General of)* (1998), 52 B.C.L.R. (3d) 284 (S.C.) (appeal allowed in part on other grounds 2000 BCCA 166, 76 B.C.L.R. (3d) 32), the court focused on the profit-sharing arrangement. It held that charitable gaming revenues were diverted to the province's consolidated revenue fund, thus running afoul of s. 207(1)(b). It declined to consider the "conduct and manage" language under s. 207(1)(a), as it did not need to do so to determine the matter.

D. The level of control required

[86] In respect of the level of control required to fulfill the requirement that an entity "conducts and manages" a lottery scheme, the Council relies on *R. v. Gladue and Kirby* (1986), 30 C.C.C. (3d) 308 (Alb. P.C.). In that case, the Alberta Provincial Court found that the term "conduct" includes the physical operation of a scheme. There, Ms. Gladue was the cashier and Ms. Kirby the bingo caller for a bingo event held on a reserve. The event was held without a license from the provincial gaming commission. The court considered the meaning of "conduct" under the *Code* provisions in the context of what is required to conduct a bingo game. The court held that the roles of cashier and caller were essential to the conduct of bingo and found that "the term 'conduct' certainly includes the physical operation of the event": at para. 17. The respondents argue that this is not an authority for what it means to conduct a lottery scheme – it is relevant only to a bingo game.

[87] In contrast, iGO relies on *Moreira* for the proposition that "conduct and manage" does not require a granular level of control of the games or complete control over the operator of the games. There, high-stakes gamblers sued Ontario Lottery and Gaming Corporation, the AGCO, and the casino operators. They argued that the casinos had failed to have the AGCO approve a particular rule of their roulette game. Therefore, the game did not qualify for the *Code* exemption in s. 207(1)(a) and was illegal. The court dismissed their claim on a motion for summary judgment. The Superior Court found that even if the game was illegal, there had been no unjust enrichment because the effect of the impugned rule was to return the gamblers' wagers.

[88] The Court of Appeal was not persuaded that rule in issue required AGCO approval. The court held that a casino's obligation to provide the AGCO with a complete description of the rules of the game required it to describe "the rules by which the game is played and which ensure the

integrity and fairness of the game": at para. 67. The particular rule had no impact on the fairness or integrity of the game. The appeal was therefore dismissed.

[89] The respondents also rely on *R. v. Warwaruk*, 2002 MBCA 100, 169 C.C.C. (3d) 76, in which the Manitoba Court of Appeal overturned an accused's conviction for keeping a common gaming house after he assisted two First Nations to create VLT sites on their reserves. Manitoba had entered into "VLT Siteholder Agreements" with the First Nations. The accused received 45 percent of the revenues. The Court noted that "[t]he *Criminal Code* provisions and the provincial scheme do not stand separately. They are intertwined so as to create a comprehensive structure for the regulation, supervision and enforcement in a number of circumstances and for a variety of social, charitable and commercial purposes": at para. 18. It found that the government was conducting and managing the video lottery schemes with the designated site-holders as its agents. The accused could not be guilty of "being the 'keeper' of a business which is authorised under both federal and provincial legislation": at para. 48.

[90] I have set out the relevant caselaw in some detail above. I will refer to the cases, and the propositions I draw from them, in my conclusion section below.

v) Principles of co-operative federalism

[91] Gaming clearly has a double aspect: *R. v. Furtney*, [1991] 3 S.C.R. 89; *Siemens*. As noted above, in matters that involve the interpretation and interplay of federal and provincial legislation, the interpretative exercise is governed by the principle of co-operative federalism. Where a matter has a double aspect, the courts should interpret legislation in a manner that harmonises the agendas of the two levels of government: *Siemens*, at paras. 34-35. It is a well-established principle that courts will favour an interpretation that allows the concurrent operation of both laws where there is no genuine inconsistency: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 75. In addition, legislative provisions are presumed to be *intra vires* the level of government that enacted them: *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, 425 C.C.C. (3d) 277, at para. 79. Harmonious interpretation, where possible, is to be favoured over an interpretation that results in incompatibility: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 20-21.

[92] In finding that the legislation was *intra vires* the province, the Court in *Siemens* noted the double aspect of gaming. The court found that the pith and substance of the legislation fell within provincial authority under various heads of s. 92, including property and civil rights, licensing, and the maintenance of charitable institutions. Gaming legislation would be subject to parliamentary paramountcy only in the case of a clash between federal and provincial legislation.

[93] In the context of discussing the principles of co-operative federalism, it bears noting that the Attorney General for Canada, although duly served, did not appear on this application. The Council points out that there is no way of knowing why the federal government made the decision not to intervene. I note that "the court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity" *Murray-Hall*, at para. 82, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 19. I do not accept the Council's argument that this is wholly irrelevant in the case of a challenge based on paramountcy,

as opposed to a *Charter* challenge. I find that the absence of the Attorney General for Canada is not determinative but is a factor to consider.

Conclusion – the proper interpretation of "conduct and manage"

[94] I find that the grammatical and ordinary sense of the terms, including the French language terms, are not particularly helpful to the interpretive task at hand. There is sufficient breadth in the dictionary definitions that the words on their own do not shed any real light on the distinctions drawn by the parties – they mean to direct, but also to carry on the business. The terms used, including the term "operate" which is used in s. 207(1)(g) as distinct from "conduct and manage", contain a significant degree of overlap in their dictionary definitions. Determining the meaning of "conduct and manage" requires more attention to be paid to the other interpretive methods – the purpose of the provisions, their statutory context, the existing caselaw and the principles of co-operative federalism.

[95] I find that the legislative purpose for the *Code* provisions was to decriminalise gaming in instances where the provincial legislature exerted a sufficient degree of management and control to maintain public safety, fairness, and integrity in gaming. I do not agree with the Council's characterisation of these provisions as opening the door "just a crack". I note that the statement to this effect in *Earth Future* occurred within the context of a discussion about the intended geographical reach of the charitable scheme at issue. The statement does not, in my view, erase the clear legislative history that indicates that Parliament intended to provide the provinces with substantial room to conduct and operate provincially-run lotteries as they saw fit, in accordance with local attitudes: *Siemens*; *Surrey*. It trusted the provinces to do so in a responsible manner with overriding concern for public safety. Purely private gaming schemes were to continue to be subject to the *Code* provisions; public schemes under sufficient provincial control were not.

[96] The words of then Minister of Justice Turner and the subsequent statements of the courts, including the Supreme Court of Canada in *Siemens*, make it clear that Parliament intended to exclude gaming that had a sufficient level of provincial control from criminalisation. In leaving the details to the provincial legislature, Parliament intended provinces to be sensitive to local sentiment on the issue and respond accordingly. The province would minimise the potential for public harm (*Antonopoulos*) and ensure that gaming would be conducted responsibly and in the public interest (*Moreira*).

[97] I find that slightly different considerations apply when analysing schemes under s. 207(1)(b) as compared to s. 207(1)(a). Unlike a provincial government, a charity may be a vulnerable party and susceptible to manipulation, as was seen starkly in *Keystone*. The province is well-placed to protect its interest, insist on maintaining the role of conductor and manager, and ensure that appropriate safeguards for public protection are in place.

[98] In implementing its lottery scheme in accordance with s. 207(1)(a), the province is permitted to engage private entities in an operational capacity. The province must not, however, delegate to such entities the conduct and management of the scheme. In order to be conducting and managing a lottery scheme itself, the province must exert a sufficient level of control to maintain its position as the "operating mind" of the lottery. It must do so in a manner that protects

public safety and fosters responsible gaming. It must do more than distantly oversee or regulate the scheme; the province must exert direction and control over it. It need not be involved in granular operations, but it needs to be far more than a "hands-off" licensor.

[99] I agree with iGO that *Moreira* should be read as giving the operators some room to maneuver in executing their functions, and as holding that a granular level of control by the province through iGO is not required. Although the Council takes the position that *Moreira* is distinguishable as it dealt with the conduct and management of a bricks and mortar scheme, I do not understand the Council to be disagreeing with the proposition that iGO need not exercise a granular level of control. Rather, the Council argues that in the igaming scheme, the operators are in fact the "operating minds". It argues that the legislation impermissibly places private sector operators in the "conduct and manage" role. I disagree.

[100] I agree with the Council's argument that the court must look at the substance of the arrangement over its form. The Council argued that it is not surprising that the form would be carefully tailored to mirror the statutory language and give the appearance of abiding by its requirements. After all, the government had been warned by the Auditor General that iGO appeared, based in part on publicly released literature, to be delegating significant management and control responsibilities to private gaming operators. The Auditor General's report had expressed concern that "[w]hile certain details of Ontario's Internet gaming initiative have yet to be finalised, the *Internet Gaming Operator Application Guide* indicates that key decision-making power and business risk will rest with private operators."

[101] However, I conclude that the province has retained key decision-making power over the igaming scheme. I reject the Council's argument that the igaming operators are backdoor private contractors as was the case in *Keystone*. There, Keystone was in fact the operating mind of the gambling in question but had set up a scheme to make it appear that the charities were the ones who were conducting and managing the matter.

[102] I find the provincial igaming scheme here to be more like that in *Surrey*, where the operators are not "their own masters". They are not able to decide which games are eligible. They are restricted to using their data only in connection with the use of their website or with iGO's pre-approval. They are limited in their ability to subcontract. They are not free to determine their own advertising methods or materials. They may not freely manage issues of customer care or dispute resolution. They must adhere to requirements related to responsible gambling, good governance, game integrity, and player awareness.

[103] I do not accept the Council's argument that many of these controls are illusory or serve a different purpose (for example in the case of the data requirements, compliance with privacy legislation). The controls are detailed and extensive. They show that iGO retains ultimate decision-making authority on a breadth of issues central to the igaming scheme. It retains a high degree of control over the operators in a wide array of the igaming scheme's aspects. These are markers of who is in control of the igaming scheme, and who is its operating mind. That operating mind is iGO.

[104] These arrangements must be viewed in the context of internet gaming, a medium that was not foreseen at the time the legislative amendments were made and many of the cases arising under s. 207 were argued. The province must have latitude to determine the "nuts and bolts" of how it will participate in igaming. The Council concedes that the government is not required to hire in-house web designers and igaming experts. I agree that there is no reason the government should be required to hire its own personnel to implement its igaming scheme. It is free to determine that supplies, including software, should be purchased from external vendors. But that does not mean it has less control or direction over those vendors, or that it has ceded its "conduct and manage" role to them. I find that it has not.

[105] Profit-sharing may be an indicator of who is conducting and managing the scheme. The Council argues that the operators' participation in a large proportion of the profits indicates that they are doing more than the equivalent of emptying the change buckets in a physical casino. The operators' level of participation indicates they are contributing to the conduct and management of the igaming scheme. I find that profit-sharing is not a particularly useful indicator under s. 207(1)(a) of the *Code*. In *Bingo City Games Inc. et al v. B.C. Lottery Corp*. et al, 2005 BCSC 25, 85 L.C.R. 89, at para. 177, the court points out that that under s. 207(1)(a) there is no requirement or, indeed, reason for the court to consider where the proceeds of the lottery scheme end up. This is distinct from the s. 207(1)(b) requirement that charitable lotteries use the proceeds for charitable purposes. No such stipulation exists in respect of government-run lottery schemes. I agree. As conceded by the Council, the government is free to make a bad deal if it wants to.

[106] The interpretation that the province is properly conducting and managing the igaming scheme also gives effect to the important principles of co-operative federalism. The federal and provincial provisions at issue easily lend themselves to harmonious interpretation. Where there is "a situation of attempted federal-provincial co-operation", the court should carefully consider the two levels of governments' agreement to shared jurisdiction: *Siemens*, at para. 34.

[107] I conclude, as a matter of statutory interpretation, that Ontario, through iGO, is conducting and managing the igaming scheme.

Issue three: Does the doctrine of paramountcy apply?

[108] The issue of paramountcy arises where there is a conflict between provincial and federal legislation. The conflict may be operational, where compliance with both laws is impossible, or may exist in the form of frustration of purpose, where the provincial law thwarts the very purpose of the federal legislation: *Lemare Lake Logging*, at para. 17. The applicant argues that both conflicts arise in this case.

[109] Where, as here, legislative subject matter has a double aspect, the burden of proof resting on the party alleging operational conflict or conflict of purpose is high, and precision in analysing the operability is of central importance: *Murray-Hill*, at para. 85.

[110] The Council concedes that the enabling provisions are "likely valid" provincial legislation under s. 92 of the *Constitution Act* but argues that dual compliance with the two regimes is impossible. Therefore, there is operational conflict.

[111] An operational conflict arises when it is impossible to comply with both pieces of legislation. That is not the case here. I have found that the province is conducting and managing the igaming scheme. Therefore, the operators, in operating under and complying with the provincial legislation, are not in violation of the *Code* provisions. There is no conflict. Dual compliance is possible.

[112] The Council further argues that the enabling provisions frustrate Parliament's purpose because the province has permitted a scheme for licensing private lotteries when Parliament clearly intended that only "state lotteries" were exempt from criminalisation.

[113] I have also rejected this argument. I have found that Parliament's purpose was to decriminalise gaming in instances where the provincial legislature exerted a sufficient degree of management and control to maintain public safety, fairness, and integrity in gaming. The details of how to conduct and manage gaming was left to the provinces, to be determined taking into account local mores. Ontario has established such a system. It has not delegated its powers to private operators but has retained its position as operating mind of the igaming scheme. It has carefully constructed the igaming scheme to ensure safety, integrity, and fairness. There can be no frustration of purpose when the province has acted within its constitutional authority in a manner that is consistent with the exemption provided for in the *Code*.

[114] There is no operational conflict or frustration of purpose. The doctrine of paramountcy has no application.

Disposition

[115] The Council is granted public interest standing to challenge the impugned provisions. The application is dismissed.

Costs

[116] The Council indicated that it would be seeking costs of the application if it was successful. All parties have uploaded costs outlines. Should any party wish to make submissions on costs, they may make written submissions of no more than three pages. The respondents shall do so within seven days, the applicant seven days thereafter. There will be no reply submissions without leave. Submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

Lisa Brownstone

Digitally signed by Lisa Brownstone
Date: 2024.05.13 12:33:43 -04'00'

L. Brownstone J.

Released: May 13, 2024

CITATION: Mohawk Council of Kahnawà:ke v. iGaming Ontario, 2024 ONSC 2726
COURT FILE NO.: CV-22-00690830-0000
DATE: 20240513

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Mohawk Council of Kahnawà:ke
Applicant

– and –

iGaming Ontario and the Attorney General of Ontario
Respondents

REASONS FOR JUDGMENT

L. Brownstone J.

Released: May 13, 2024