FUN AND GAMES: CURRENT LEGAL CHALLENGES IN THE VIDEO GAME INDUSTRY

UNIVERSITY OF TORONTO
FACULTY OF LAW

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The Future of Law Lab is a platform for students, academics, lawyers, and other professionals to participate in collaborative initiatives exploring how the law will evolve in the future. We will dive into the intersection of law, technology, innovation, and entrepreneurship, with programing dedicated to each of these streams. As a hub of interdisciplinary activity, we are dedicated to bringing together individuals from all backgrounds to examine the changing face of the legal profession.

About the Working Group
This report is written by Tony Chen, Rachel Chen, Brianna Grieff, Britney Han, Taylor Speyer, and Evan Squire under the supervision of Theodore Ngo, and Alessia Woolfe, upper-year student leaders of the group.

The Working Group's objective is to explore the pressing legal issues plaguing the esports industry as a result of the lack of regulations surrounding video games.

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Fun and Games: Current Legal Challenges in the Video Game Industry

By: Tony Chen, Rachel Chen, Brianna Grieff, Britney Han, Taylor Speyer and Evan Squire

Introduction

Video games are one of the world's most popular pastimes. They immediately captivated audiences' attention when the first commercial home video game, *Pong*, was released in 1975, and since then they have only increased in popularity.[1] Children and adults alike spend hours every day glued to their consoles, immersed in the worlds of their games' creators.

Despite their popularity, Canada has imposed relatively few regulations on the industry. This is surprising considering the vast amount of political and academic attention the pastime has received for its negative effects on players. The lack of regulations surrounding video games is only magnified with respect to the emergence of esports: video games played competitively for spectators. Throughout this paper we aim to explore the pressing legal issues plaguing the esports industry as a result of the lack of regulations surrounding video games.

First, we will begin by discussing the contractual disputes arising between competitive video gamers and the gaming organizations representing them. Then we will continue by discussing the anti-competition concerns related to the Mircosoft-Activision Blizzard merger. Lastly, we will explore the legal issues posed by loot boxes, a prevalent gameplay feature.

Contractual Disputes in the Esports Industry

As a relatively new addition to the online sports world, esports involve competitions between professional players of popular video games. Over the past few years, they have become exceedingly popular, with some tournaments attracting over a million concurrent viewers at a time.[2] These tournaments are highly competitive and range from single player first person shooter games to virtual versions of physical sports.[3] As an emerging, transnational field whose competitors and viewers are dominated by a young adult demographic, the esports world is rife with legal uncertainty, ignorance, and instability. The following sections will explore current legal controversies plaguing the esports industry as explored through its first major employment lawsuit.

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[1] Smithsonian, "Video Game History" online: <https://www.si.edu/spotlight/the-father-of-the-video -game-the-ralph-baer-prototypes-and-electronic-games/video-game-history/>.
[2] Marc Leroux-Para, "Esports Part 1: What are Esports?" (24 April 2020), online: <hir.harvard.edu/esports-part-1-what-are-esports/>.
[3] *Ibid.*

FaZe Clan v Turner Tenney

In 2020, the esports industry experienced its first major employment lawsuit.[4] This lawsuit arose between the *Fortnite* star, Turner "Tfue" Tenney and the esports organization FaZe Clan. Aside from being the first of its kind in the esports industry, this case was also significant because of the questions it posed about the relationships between gamers and their management.

The legal issues that arose in this contract dispute between Tenney and FaZe Clan were brought by Tenney who claimed FaZe Clan was guilty of a number of labour violations.[5] Tenney brought two actions against FaZe Clan. In the first action Tenney argued that the gamer agreement was void under California's Talent Agencies Act ("TAA"), and in the second action, Tenney argued that their Gamer Agreement was *void ab initio* on many other of California's state law grounds such as California's prohibition of non-compete clauses.[6] In return, FaZe Clan initiated a lawsuit against Tenney claiming action for Breach of Gamer Agreement.[7]

While the first claim that Tenney brought against FaZe was not adjudicated in the New York trial because of California's exclusive and non-waivable jurisdiction to adjudicate claims arising under the TAA; it is this claim that is most significant for preventing future contractual disputes between players and gaming organizations.

In the suit, Tenney claims that FaZe Clan is operating an unlicensed talent agency contrary to the TAA.[8] The TAA was enacted in California to regulate talent managers and companies functioning as talent agencies and ensure they were properly licensed by the Labor Commission.[9] The TAA defines a talent agency as "a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist or artists."[10]

From the terms of the contract Tenney signed with FaZe Clan, it seems as though the relationship fits the definition of what would be regulated by the TAA. Their agreement included clauses such that FaZe Clan was entitled to 80% of Tenney's income from brand deals or

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[4] Christina Settimi, "Fortnite Star Tfue Settles Dispute With FaZe Clan, Ending Esports' First Major Employment Lawsuit", *Forbes* (26 August 2020), online: <www.forbes.com/sites/christinasettimi/2020/08/26/fortnite-star-tfue-settles-dispute-with-faze-clan-ending-esports-first-major-employment-lawsuit/?sh=727c87d022d8>.

[5] Nicole Carpenter & Matthew Gault, "This 'Fortnite' Pro's Lawsuit Could Change How Streamers Do Business" (21 May 2019) online: <vice.com/en/article/evyb9m/this-fortnite- pros-lawsuit-could-change-how-streamers-do-business?utm_source=pocket_mylist>.

[6] *FAZE CLAN INC. v. Turner Tenney,* 467 F.Supp.3d 180 (S.D.N.Y. 2020) at 183-184 [*FAZE*].

[7] *Ibid.*

[8] Settimi, *supra* note 4.

[9] Edwin F McPherson, "The Talent Agencies Act: From Humble Beginnings to the Regulation of Attorneys – Has It Gone Too Far?" (2019) 18:2 Virginia Sports and Entertainment Law Journal.

[10] *Ibid.*

tournament earnings, 50% of Tenney's earnings from appearances, a non-compete clause that prohibited Tenney from playing professionally for 6-months if his contract was terminated, amongst other grossly oppressive terms.[11] Furthermore, according to the contract, FaZe Clan was entitled to Tenney's earnings regardless of whether the employment opportunity was procured by FaZe Clan or on Tenney's own accord.[12] By promising to procure Tenney employment explicitly or even implicitly through his association with the organization, FaZe Clan's activities do seem similar to those of a talent manager.

After a fifteen month contract dispute, Tenney and FaZe Clan reached an undisclosed settlement.[13] As a result, Tenney's TAA claims were never heard by a California court. Again, although not explicitly discussed in the New York case because of the TAA's jurisdictional requirement, the judge in New York did state that FaZe Clan's activities were potentially regulated by the TAA.[14] This is a significant development for the esports industry because there is now a possibility that an unregulated industry thriving on the naivete of its players is in fact subject to existing regulations.

Impact of FaZe Clan v Turner Tenney on the Esports Industry

As made evident in the *FaZe Clan v Turner Tenney* dispute, one of the major issues plaguing the esports industry is its lack of regulations. Since the industry is new, there are no regulations or oversight mechanisms to control the behaviours of both the competitors and organizations who sign them. Coupled with the fact that many of the esports competitors are young and unsophisticated in business matters, these competitors are susceptible to exploitation by the organizations they are signing contracts with.[15] For many of these professional video gamers, signing with these larger organizations such as FaZe Clan is nothing short of a dream.[16] As a result of their established fan bases and high income, these organizations guarantee these young competitors some pay for their work even if grossly unfair.[17] Nonetheless, in this esports industry, it is not uncommon for esports teams to split 80/20 with the organizations they are signed with, in favour of the organizations.[18] This results in distressing precedents being set in the industry that suggest unfavourable long-term outcomes for these players.

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[11] Blast, "'Fortnite' Gamer Tfue's Contract with FaZe Clan Finally Revealed!" (23 May 2019) online: <theblast.com/58865/esports-gamer-tfue-faze-clan-contract-revealed/>.
[12] *Ibid.*
[13] Settimi, *supra* note 4.
[14] *FAZE*, *supra* note 6 at 187.
[15] Carpenter & Gault, *supra* note 5.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

These issues were commented on by Bryce Blum, the founding partner of the world's first esports dedicated law firm, ESG Law. As of now, they represent some of esports' most valuable organizations. In his comments on the lawsuit between Tenney and FaZe Clan, Blum called the agreement between them an "outlier relative to the standard esports player contract."[19] While Blum says the lawsuit has not really changed the standard esports player contract, it has begun to impact the contracts between esports organizations and their content creators.[20] He states there has been a shift away from standard form contracts to bespoke contracts that are tailored towards the specific arrangements of each influencer.[21]

While tailoring contracts towards each influencer is a step in the right direction, it does not resolve the remaining issue: how to prevent young and trusting gamers from signing improvident bargains with these organizations? Tailored contracts do not prevent them from being improvident. In fact, it provides opportunity for these organizations to further take advantage of these young competitors and content creators by trapping them in contracts that are specifically tailored to disadvantage them by targeting their specific talents and value they produce. As such, in order to protect these young, vulnerable gamers, the implementation of regulations are a necessary next step to ensure the equitable development of this lucrative industry.

The Problem With Regulating Esports in Canada

As a result of Canada's gaming laws, it seems as though our path to developing esports regulations might take longer than other nations. In Canada, the development of esports regulations depends on whether they are categorised as "skill based" or "chance" games."[22] While skill based games are unregulated in Canada, games that include "any element of chance…[are] subject to regulations because it is quick to be categorized as 'gambling.'"[23] This is far more broad than the U.S.'s laws which state that as long as games are primarily ones of skill, elements of chance will not prevent them from being categorized as "skill-based."[24] As such, in the U.S., it is much easier for games to be exempt from gambling laws. "On a global scale, the lack of clear and uniform standards as to whether a game is one of skill or chance may continue to suppress commercial opportunity and limit market growth in esports."[25] This is even more problematic with regards to esports considering the fact that a large portion of professional gamers are not of legal age. In turn, this will affect the regulations that Canada is able to impose

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[19] Settimi, *supra* note 4.
[20] *Ibid.*
[21] *Ibid.*
[22] Jonathan Tong et al, "Leveling Up: Empowering Canadian Esports through Self-Regulation" (23 November 2023) online: <https://www.millerthomson.com/en/published-articles/levelling-up-empowering-canadian-esports-through-self-regulation/>.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*

on the esports industry because if Canada decides to classify certain video games as gambling, it will most likely drive these competitions either out of Canada or underground as a result of a large part of the industry being based on underage gamers. This will only have negative effects on Canadian esports players who will be forced to leave for other jurisdictions, which may or may not be regulated according to Canadian standards. Furthermore, even if esports were regulated according to gambling standards, that still would not fix the problem of gaming organizations trapping players in unfair contracts.

Overall, in many situations, video games are a combination of chance and skill. If every video game that has an element of chance is categorized as a "chance" game in Canada, it would make it impossible for underage athletes to compete in Canadian esports competitions. Not only would this discourage the development of a lucrative market in Canada, it may lead to an increase in disjointed regulations that further promote unfair practices between gaming organizations and their employees. As a result, regulating esports in Canada currently depends upon Canada's gambling laws. By treating esports as simply casino-type gambling games, Canada runs the risk of both alienating a lucrative market, or failing to create regulations that prevent the continuation of these grossly unfair organization-player relationships.

Possible Regulations on a Global Scale

Ignoring the gaming laws hurdle that esports will inevitably have to overcome, there are more practicable regulations Canada and the global market can impose on the esports industry to prevent these improvident gaming organization-player relationships that do not revolve around gaming itself. One of two possible regulations that could be implemented to protect esports players would be to require players under a certain age to retain counsel prior to signing these agreements. This would ensure that these players at least have the opportunity to fully understand contracts they are signing, and have someone to recognize disadvantageous clauses and advocate on their behalf. This would hopefully prevent players from getting trapped in grossly oppressive contracts, and possibly even deter gaming organizations from drafting them knowing that their contracts will be scrutinized by lawyers.

This model is not foreign to the sports and entertainment industries. Although not a regulation, it is a normal practice in the entertainment industry to have an entertainment lawyer read over each contract entered into by children. [26] Furthermore, organizations such as the Ontario Hockey League require players to retain counsel and have their contracts fully explained to them before signing. As a transnational industry that is not situated out of one city or even country, this regulation is more implementable than something like the TAA which would

[26] Denise Simon, "When Does a Young Performer Need an Entertainment Attorney?" (19 June 2019) online: <https://www.backstage.com/magazine/article/young-performer-need-entertainment-attorney-8323/#:~:text=Once%20you%20have%20a%20trusting,in%20all%20stages%20of%20production.]>.

require international cooperation. As such, whether making it possible through regulation or by norm that players retain counsel before signing with gaming organizations, at least a number of these grossly oppressive contracts could be avoided.

As a direct response to *Faze Clan Inc. v Turney Tenney,* a second regulation that could be implemented would be to include gamers as “artists” under the TAA. Having gamers included as “artists” under the TAA would be an ideal development for the new esports industry because it would mean an existing regulatory body would be able to oversee the organizations. This would provide some relief for the new industry so that they do not have to build their own. Of course, this would be more difficult for those gamers who simply game and do not label themselves as content creators.[27] Although, a case could be made that by gaming online or in tournaments streamed online, they are creating content for people to watch, and therefore could be considered artists. A regulatory body to oversee these organizations and hold them accountable for their actions, while the most ideal, may be more difficult to implement transnationally. Despite that, having the TAA regulate these organizations until the esports industry is able to produce their own regulatory body may provide some relief for these players and prevent at least a portion of the unfair bargains that are being entered into.

Competition Law and the Video Game Industry: Microsoft - Activision Blizzard

The video game industry thrives off of innovation and competition among leading competitors, especially in the growing business of subscription and cloud-based games. However, with the recent acquisition of Activision Blizzard (“Activision”) by Microsoft, the growing industry has been rife with antitrust concerns.[28]

The two key players are Activision Blizzard, a video game developer and publisher known for the games *Call of Duty, World of Warcraft, Diablo,* and *Overwatch*, and Microsoft, the owner of Xbox Game Pass and a cloud-based streaming service.[29] Currently, Microsoft is planning to acquire Activision Blizzard for $68.7 billion USD,[30] which represents the largest acquisition in video game history.[31] With the scale and scope of the acquisition, this merger has ignited antitrust concerns from the various jurisdictions, video game players, and game

[27] Content creators produce entertaining or educational material on social media platforms that cater to the interests of a target audience. The material can take many forms. Some examples are: blog posts, videos, photos, and podcasts.
[28] Molly Bohannon, “FTC Sues To Stop Microsoft’s Acquisition Of Activision Blizzard” (June 12, 2023), online: <https://www.forbes.com/sites/mollybohannon/2023/06/12/ftc-sues-to-stop-microsofts-acquisition-of-activision-blizzard/?sh=4f6659be5e02>.
[29] Claire Jackson, “Gamers Are Suing Microsoft To Thwart Its Merger With Activision” (December 20, 2022), online: <https://kotaku.com/microsoft-activision-merger-lawsuit-ftc-call-of-duty-1849917017>.
[30] Paige McKirahan, “An Expert Focus on What Current Antitrust Conflicts in Gaming Portend for Future Litigation” (December 19, 2022), online: <https://www.witlegal.com/insights/article/an-expert-focus-on-what-current-antitrust-conflicts-in-gaming-portend-for-future-litigation/>.
[31] Jackson, *supra* note 29.

developers implicated. Currently, Canada has made minimal statements about the merger, but using the concerns of various jurisdictions, video game players and game developers, and Canadian conception of antitrust law, it is possible to gain an idea of how Canada might address this merger and deal with future acquisitions.

Antitrust Concerns in Regulatory Bodies – a Multitude of Jurisdictions

The acquisition of Activision Blizzard by Microsoft has ignited regulatory concerns in various jurisdictions.[32] The following analysis will cover the response in the United States, the United Kingdom and European Union.

In the United States, the Federal Trade Commission (FTC) entered an administrative complaint due to the merger.[33] The FTC submitted the complaint due to the concern with the anti-competitive nature of the merger, or the ability for the merger to reduce competition from rival gaming companies, and the implication to the growing subscription and cloud-gaming business.[34] In a proactive move, the FTC entered a plea for a restraining order and a preliminary injunction.[35] These two actions would pause the acquisition of Activision Blizzard until a court can decide the issue of whether the merger of Activision Blizzard would constitute anti-competitive behaviour within the video-game industry.

Ultimately, the court ruled against the preliminary injunction, and said that the fears of anti-competitive behaviours had been quelled, stating, "record evidence points to more consumer access to Call of Duty and other Activision content ."[36] Even with the concerns of anti-competitive behaviour expressed by the Federal Trade Commission, the judicial branch of the United States was not convinced of the anti-competitive behaviour.[37]

The United Kingdom and European Union have had similar concerns as the United States. In both of these debates, regulatory bodies expressed concerns centred around the risk to competition in the cloud gaming market.[38] In the United Kingdom, the U.K. Competition and Markets Authority blocked the deal over concerns that it would "reduce competition," as making

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[32] *Ibid*.
[33] Federal Trade Commission, "Microsoft/Activision Blizzard, In the Matter of" (February 15, 2024), online: <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter>.
[34] *Ibid*.
[35] Sarah E. Needleman & Dave Michaels, "Microsoft Can Close Its $75 Billion Buy of Activision Blizzard, Judge Rules" (July 11, 2023), online: <https://www.wsj.com/articles/microsoft-activision-blizzard-deal-ftc-hearing-d42675f1>.
[36] *Ibid*.
[37] *Ibid*.
[38] Arjun Kharpal, "EU approves Microsoft's $69 billion acquisition of Activision Blizzard, clearing huge hurdle" (May 15, 2023), online: <https://www.cnbc.com/2023/05/15/microsoft-activision-deal-eu-approves-takeover-of-call-of-duty-maker.html#:~:text=The%20British%20regulator%20was%20concerned,a%20result%20of%20the%20acquisition>.

Activision's key games exclusive to Microsoft's cloud gaming platforms would be beneficial to Microsoft.[39] In contrast, the European Union has given the merger a green light, stating that Microsoft had fully addressed regulators' concerns over competition.[40]

Player and Game Developer Concerns

Similar to the concerns of regulatory bodies in various jurisdictions around the world, video gamers have also expressed concerns of the potentially monopolistic behaviour of Microsoft.[41] They fear that, due to the scale and scope of the combination of Microsoft and Activision Blizzard, competition will decrease in the game industry.[42] Currently, the concern surrounding a decrease in competition is twofold: the consumer and employment side. On the consumer side, the video-gamers express concern that the merger will make Microsoft dominate the gaming market, whereas on the employment side, players fear that there will be an increase in competition of video game companies' ability to hire and retain talent.[43]

Along with the video game players, Sony, the major competitor of Microsoft, has expressed concerns that the United States court addressed during the FTC motion.[44] Sony's concern focused on the fear that the Activision games, such as *Call of Duty*, would not be available on PlayStation and only available on Microsoft's subscription software, Xbox.[45] To quell the concerns, Microsoft offered Sony a 10-year deal to make Activision Call of Duty games available on PlayStation and categorized the concern as an attempt to make Xbox smaller.[46] Ultimately, Sony's concern was addressed during the regulatory proceedings in the United States, United Kingdom, and European Union, discussed in the prior section.

Canadian Stance – Future Implications

Even with the affirmative statements on the risk to competition in various jurisdictions and the expression of concern about anti-competitive behaviours from video game players and video game developers, Canada's regulatory body, the Canada Competition Bureau, has maintained a neutral stance, stating that it is monitoring the merger.[47] In contrast, the Department

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[39] *Ibid*.
[40] Bohannon, *supra* note 28.
[41] Jackson, *supra* note 29.
[42] *Ibid*.
[43] *Ibid*.
[44] Bohannon, *supra* note 28.
[45] Wesley Yin-Poole, "Sony Really Is Concerned About Microsoft's Xbox Strategy Following the Activision Blizzard Buyout" (December 19, 2023), online: <https://www.ign.com/articles/sony-really-is-concerned-about-microsofts-xbox-strategy-following-the-activision-blizzard-buyout>.
[46] Bohannon, *supra* note 28.
[47] Reuters, "Canada says Microsoft deal to buy Activision likely to lessen competition" (June 29, 2023), online: <https://www.reuters.com/technology/canada-tells-microsoft-that-activision-deal-is-likely-lessen-competition-court-2023-06-29/>.

of Justice has taken a more forceful stance of stating that the merger is likely to lead to less competition in gaming consoles and multigame subscription services.[48]

The difference between this stance might come from the difference between the United States and Canada's conception of competition law and the innovation market. For some background, antitrust law is focused on competition and collaboration between competitors that dominate the market, or collectively possess market power.[49] For competition, the focus is on how competition is essential for achieving efficiency of production and distribution.[50] In this case, the fear expressed in the previous two sections connects to the implication of how a large and dominant merger would affect the regulation of the market. This idea is reflected in Canada's *Competition Act*, which views competition as a means to achieve dynamic efficiencies in the economy.[51] Within this idea of competition, Canada does not recognize the influence of the innovation market on Canadian competition law.[52] The concept of the innovation market is recognized in the United States competition law authorities as a non-price factor of assessing competition.[53] In the United States conception, innovation is recognized as "vital to efficient production and distribution" and enhancing global competitiveness.[54] With the innovation market idea combined with the antitrust legislation, there ends up being an analysis into how the merger will affect the development of goods that do not exist at the moment.[55] Using these ideas, it could be valuable for Canadian competition law to adopt ideas of how a large merger, like the one between Microsoft and Activision Blizzard, could affect the future innovation of video games.

With Canada's current stance on the Microsoft and Activision Blizzard acquisition in mind and the leniency other regulatory bodies have had towards the merger, it is likely that future video game companies that try to merge will be able to have a successful merger if they fully address the immediate concerns of the market, such as accommodating other companies' concerns. As long as a regulatory body is satisfied that the merger does not constitute an agreement that prevents or lessens competition, they will likely give the green light in future acquisition cases.

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[48] *Ibid*.
[49] Calvin S. Goldman & John D. Bodrug, "Antitrust Law and Innovation--Limits on Joint Research &(and) Development and Inter-Company Communication in Canada" (1995) 21:21 Canada-United States Law Journal 127 at 128.
[50] *Ibid* at 127.
[51] *Ibid* at 128.
[52] *Ibid* at 132.
[53] *Ibid* at 130.
[54] *Ibid*.
[55] *Ibid* at 131.

Gaming or Gambling? Legal Analysis of Loot Boxes

The Age of Microtransactions

As the eSports and video game industry continues to expand, gaming developers and publishers jump at opportunities to earn revenue. In particular, microtransactions are a business model that has gained extraordinary prevalence within the last decade. Marketed as optional in-game purchases players can make within the game, microtransactions are not a new mechanism by any means, and are most commonly found in 'freemium' (free-to-play) and mobile games. However, one particular form of microtransaction has garnered both popularity and infamy: loot boxes.

Most modern gamers are familiar with the concept of loot boxes. Aside from the 'traditionally' familiar pay-to-win microtransactions where players can use real currency to level up faster or continue playing without cooldown, loot boxes have entered the fray as a rapidly contentious mechanism due to their highly dangerous and predatory nature. These virtual mystery boxes are typically purchased using real-world money and can be opened to reward the player with an array of randomized in-game items.[56] The types of items that can be obtained from loot boxes can vary from game to game, ranging from purely cosmetic skins to powerful upgrades.[57]

In the age of online gaming, loot boxes have become ubiquitous as a method of monetization for games of all genres, from skin cases in tactical first-person shooters like *Counter-Strike: Global Offensive* to card packs in sports games like *FIFA* and *NBA 2K*.[58] Loot boxes may be even more prevalent in mobile games—one study showed that almost 60% of the Top 100 games on both the Google Play and iPhone App Stores contained purchasable loot boxes.[59] Furthermore, children are becoming increasingly targeted by gaming companies looking to increase loot box sales: over 90% of games containing loot boxes were marketed as being for children aged 12 and up.[60]

[56] John Woodhouse, "Loot boxes in video games" (2023) 8498 House of Commons Library.
[57] *Ibid.*
[58] Mattha Busby, "Loot boxes increasingly common in video games despite addiction concerns", *The Guardian* (22 November 2019), online: <https://www.theguardian.com/games/2019/nov/22/loot-boxes-increasingly-common-invideo-games-despite-addiction-concerns>.
[59] David Zendle et al, "The prevalence of loot boxes in mobile and desktop games" (2020) 115:9 Addiction 1768.
[60] *Ibid;* Derek Saul, "'Exploits Kids For Profit': Multibillion-Dollar Loot Box Industry Under Fire As Campaigners Urge Regulators To Investigate FIFA Video Game Maker", *Forbes* (2 June 2022), online: < https://www.forbes.com/sites/dereksaul/2022/06/02/exploits-kids-for-profit-multibillion-dollar-loot-box-industryunder-fire-as-campaigners-urge-regulators-to-investigate-fifa-video-game-maker/?sh=5362c09c4671>.

Researchers have estimated that in 2018 alone, over $30 billion USD was spent on loot boxes.[61] However, the majority of players are not the ones spending ludicrous amounts of money buying loot boxes. Certain big spenders, who are colloquially referred to as "whales", may sink hundreds or even thousands of dollars into trying to obtain the rarest gear.[62] Despite making up less than 5% of players, money spent by these whales constitutes approximately 90% of loot box sales.[63]

Many gamers are keen to voice their disapproval of loot boxes, occasionally leading to consequences that are impossible for game companies to ignore. In 2017, EA's stock price fell 8.5%, representing a loss of over $3 billion USD, after consumer outrage over their overuse of loot boxes in *Star Wars Battlefront II*.[64] Certain lawsuits surrounding loot boxes have also gained particular notoriety. In 2019, following a Canadian class-action lawsuit, Epic Games, the publisher of *Fortnite* and *Rocket League*, pledged to discontinue the use of loot boxes in those games, stating that "players should know upfront what they are paying for when they make in-game purchases".[65] Nevertheless, loot boxes remain a prevalent source of income for countless video games.

Loot boxes have not only become hugely important to many companies in the gaming industry, but also a point of great contention. The potential psychological effects that loot boxes can have on high-spending "whales" have led many to characterize them as a form of gambling. It is essential to assess these potentially harmful consequences to obtain a clearer legal understanding of loot boxes. The remainder of this paper will examine the interconnectedness of loot boxes and gambling, beginning with an overview of the current state of litigation against loot boxes in Canada with a discussion of *Sutherland v. Electronic Arts*, followed by a close look at *Counter-Strike: Global Offensive*'s fuzzy relationship with online gambling. Finally, we will discuss how loot boxes are treated around the world.

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[61] Wen Li et al, "The Relationship of Loot Box Purchases to Problem Video Gaming and Problem Gambling" (2019) 97 Addictive Behaviors 27.

[62] Scott Van Voorhis, "The $15 Billion Question: Have Loot Boxes Turned Video Gaming into Gambling?" *Harvard Business School Working Knowledge* (21 April 2023), online: < https://hbswk.hbs.edu/item/the-15-billion-questionhave-loot-boxes-turned-video-gaming-into-gambling>.

[63] *Ibid.*

[64] Erik Kain, "EA Shares Plummet After 'Star Wars: Battlefront II' Loot Box Fiasco", *Forbes* (28 November 2017), online: < https://www.forbes.com/sites/erikkain/2017/11/28/ea-shares-plummet-after-star-wars-battlefront-ii-lootbox-fiasco/?sh=53ee94dd6f37>.

[65] Daniel Otis, "Epic Games pays out $2.7M in class-action over in-game 'loot box' purchases in Fortnite and Rocket League", *CTV News (*2 October 2023), online: < https://www.ctvnews.ca/business/epic-games-pays-out-27m-in-class-action-over-in-game-loot-box-purchases-in-fortnite-and-rocket-league-1.6583527>.

Loot Boxes and Gambling

Critics of loot boxes argue that their randomized nature makes opening them analogous to pulling the lever of an unregulated slot machine, albeit with the chance to win digital skins instead of cash. Psychological studies tend to support such a claim: gamers who spent money on loot boxes were found to be more likely to meet the criteria for problem gambling.[66] Most whales are not actually wealthy enough to spend thousands on inconsequential skins—rather, they are victims of a gambling addiction.

There has been increasing pressure to consider loot boxes as gambling in recent years, even leading to outright bans on certain types of loot boxes in Belgium and the Netherlands.[67] In spite of this, opening loot boxes is not considered gambling in Canada, and currently there are no existing Canadian legal regulations regarding loot boxes.[68]

What is the most effective remedy to curb the gambling-like effects caused by loot boxes? One possibility is an outright ban. A 2019 study of the Blizzard MOBA *Heroes of the Storm* found that the discontinuation of loot boxes resulted in a significant decrease in in-game spending among problem gamblers.[69] Another solution could be the implementation of spending limits on loot boxes, which may be a practicable way to regulate loot boxes without interfering with the enjoyment of casual players.[70] The enactment of any proposed measure, however, is predicated on the Canadian government's classification of loot boxes as a form of gambling.

Virtual Risks, Real Consequences: The EA Loot Box Lawsuit

To examine the complex legal landscape loot boxes inhabit between entertainment and gambling, we analyze case law to see how related disputes are resolved. Moreover, the various legal frameworks from different jurisdictions demonstrate how disparate intersections of gambling, consumer protection laws, and regulatory approaches may lead to vastly diverging outcomes.

While there are currently no legal regulations surrounding loot boxes in Canada, a recent class action lawsuit concerning loot boxes has been filed against *Electronic Arts Inc* (*EA*) in British Columbia.[71] The plaintiff, Mark Sutherland, brought a claim on behalf of all BC residents

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[66] David Zendle, "Video game loot boxes are linked to problem gambling: Results of a large-scale survey" (2018) 13:11 PLOS One e0206767.
[67] Corbin W Golding, "Pandora's Box: Litigation and Regulation of Videogame Loot Boxes" (2021) Saskatchewan Law Review, online: <https://canlii.ca/t/ts06>.
[68] *Ibid.*
[69] David Zendle, "Problem gamblers spend less money when loot boxes are removed from a game: a before and after study of *Heroes of the Storm*" (2019) 29:7 PeerJ e7700.
[70] *Ibid.*
[71] Golding, *supra* note 67; *Sutherland v Electronic Arts Inc*, 2023 BCSC 372 [*Sutherland*].

who purchased loot boxes from EA since 2008.[72] EA is a company that "develops, publishes, distributes and sells video games"[73] and their products. Sutherland pleaded that EA engaged in "deceptive and unconscionable acts or practices under s. 4-5 and s. 8-9 of the *Business Practices and Consumer Protection Act*" (*BPCPA*).[74]

The case is currently only in the beginning stages and has only gone through the certification stage to determine if the class action lawsuit is valid under the *Class Proceedings Act*.[75] In order to be certified, there must be a cause of action that is not doomed to fail.[76] The recent judgement, which occurred in March 2023, was to determine if there was such a cause of action in the class action lawsuit.[77]

Plaintiff's Claims

Central to Sutherland's claim is that the loot boxes are similar to gambling.[78] The "element of random chance" is significant to the appeal of loot boxes and is part of the game design's compulsion loop to keep gamers invested in a game.[79] These compulsion loops contribute to gaming addiction and are like gambling addiction because of the use of a "variable-rate reinforcement schedule", similar to how slot machines give out prizes.[80] Additionally, EA uses loot boxes as part of the advertising for their video games, highlighting the excitement of loot boxes and the potential advantages that can be gained from its contents.[81] However, the contents of the loot boxes are almost always less than what the cost is, except for the rare high value items.[82] Sutherland claims that EA conceals the odds of obtaining certain items from their loot boxes.[83] Furthermore, certain items are only available in the loot boxes and these rare high value items are needed to keep players competitive.[84] Since these items are rare, the only way to get them is to repeatedly purchase the loot boxes.[85] In some of EA's games, gameplay is not even possible without getting items from loot boxes.[86] Lastly, EA has failed to safeguard minors

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[72] *Ibid Sutherland* at para 4.
[73] *Ibid* at para 2.
[74] *Ibid* at para 5; *Business Protection and Consumer Protection Act*, SBC 2004, c 2, s 4-5 and 8-9 [*BPCPA*].
[75] *Ibid Sutherland* at para 23; *Class Proceedings Act,* RSBC 1996, c 50, s 4(1).
[76] *Ibid Sutherland* at para 28.
[77] *Ibid* at para 36.
[78] *Ibid* at para 13.
[79] *Ibid* at para 46.
[80] *Ibid.*
[81] *Ibid* at para 47.
[82] *Ibid* at para 52.
[83] *Ibid* at para 51.
[84] *Ibid* at para 50.
[85] *Ibid* at para 59.
[86] *Ibid* at para 50.

from purchasing loot boxes.[87] Sutherland claims that all these acts and practices are considered deceptive and unconscionable under the *BPCPA*.[88]

In determining whether there was a cause of action not doomed to fail, Judge Fleming analyzed the claims under the two sections of the *BPCPA* separately: deceptive acts and unconscionable acts.

Deceptive Acts

Section 4 of the *BPCPA* states that a deceptive act or practice is one that, "in relation to a consumer transaction, [...] has the capability, tendency or effect of deceiving or misleading a consumer or guarantor".[89] Judge Fleming highlights that a positive statement is not required, and "omission or nondisclosure of a material act is sufficient".[90] The omission, by failing to disclose (or inadequately disclosing), that EA structured loot boxes to be nearly impossible to obtain high value items is sufficient to constitute a misleading of consumers.[91] Furthermore, this is done while promoting the purchase of loot boxes to improve the enjoyment and performance of the games.[92] This causes consumers to continuously spend money "in a fruitless attempt to obtain those items".[93] Thus, it is not clear and obvious to fail on this claim as there are material facts necessary to constitute a deceptive act or practice.[94]

Unconscionable Acts

Section 8 of the *BPCPA* does not define an unconscionable act or practice, but in common law, unconscionability has two elements: an inequality of bargaining power and a resulting improvident bargain.[95] Sutherland claims that EA has engaged in unconscionable practices because offering and operating loot boxes constitutes unlawful gaming, breaching *Criminal Code*.[96] However, Judge Fleming, held that there is no case law that establishes breaching the *Criminal Code*, and more specifically, conduct that is unlawful gaming, will be unconscionable.[97] A breach of unlawful gaming offences "do not depend on an inequality of bargaining power, resulting improvidence or the considerations listed in S.8(3)".[98] Judge

[87] *Ibid* at para 56.
[88] *Ibid* at para 5.
[89] *BPCPA* s. 4(1), *supra* note 74.
[90] *Sutherland, supra* note 71 at para 74.
[91] *Ibid* at para 84.
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid* at para 85.
[95] *Ibid* at para 88.
[96] *Ibid* at para 96.
[97] *Ibid* at para 98.
[98] *Ibid* at para 105.

Fleming further went on to analyze if loot boxes were unlawful gaming if they were incorrect and if unlawful conduct does constitute unconscionable acts.[99] Judge Fleming held that loot boxes are not unlawful gaming as there is no element of wagering.[100] Section 197(1) of the *Criminal Code* defines unlawful gaming as involving a game and offering a bet or wagering.[101] While loot boxes are a game, they do not involve wagering, "the staking of, and the opportunity to win or lose "money or money's worth".[102] This is because the loot boxes cannot be resold through the defendant's in-house auctions for anything other than virtual currency.[103] Unlike a casino chip, virtual currency cannot be exchanged for real money.[104] Thus, there is no gaining or losing of real-world value things. While selling the loot box contents through third party marketplaces for real money could satisfy the element of wagering, this is "unrelated to the pleading that identifies the game as the loot box and the bet or wagering as the purchase and opening of a loot box".[105] The transaction that grounds the unlawful gaming claim is the initial purchasing and opening of a loot box.[106] There is no indication that consumers are buying the defendant's loot boxes for the purpose of selling it on third party marketplaces or even participating in these marketplaces.[107] Additionally, the defendants do not publish, promote, distribute, or sell loot boxes for any purpose related to these marketplaces.[108] Thus, Judge Fleming held that it is plain and obvious that the unlawful gaming allegations as a basis for the unconscionable acts claim is doomed to fail.[109]

However, Judge Fleming found that there were facts that could support an inequality of bargaining or power. This was based on the lack of knowledge consumers possess on the probability of obtaining items in the loot boxes arising from EA's lack of disclosure.[110]

Therefore, Judge Fleming held that there is a cause of action under S.4 of *BCPCA* not doomed to fail.[111] While the cause of action based on unlawful gaming is certain to fail, there may be facts that support a s. 8 claim.[112] Thus, Judge Fleming granted a leave for the plaintiff to amend their claim, leaving out the unlawful gaming allegations.[113]

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[99] *Ibid* at para 107.
[100] *Ibid* at para 123.
[101] *Criminal Code*, RSC 1985, c C-46, s 197(1).
[102] *Sutherland, supra* note 71 at para 115.
[103] *Ibid* at para 122.
[104] *Ibid* at para 120.
[105] *Ibid* at para 124.
[106] *Ibid.*
[107] *Ibid* at para 125.
[108] *Ibid.*
[109] *Ibid* at para 127.
[110] *Ibid* at para 145.
[111] *Ibid* at para 85.
[112] *Ibid* at para 127.
[113] *Ibid* at para 146.

Skin Deep: The Legal Battlefield of CS:GO

It is impossible to assess the relationship between loot boxes and the video game economy without touching upon Valve Corporation, the developer of major game franchises such as *Team Fortress, Dota,* and *Counter-Strike: Global Offensive (CS:GO).* In particular, with *CS:GO* being released more than a decade ago in 2012, one would expect the game to have subsided in popularity and player base. However, that is far from the case — in May 2023, *CS:GO* beat its all-time concurrent player record with more than 1.8 million people signing on.[114] With a single game raking in nearly $7 billion in revenue, it is little wonder that when a gambling scandal broke, it swiftly escalated into the video game industry's largest controversy, threatening to permanently alter the landscape of the professional scene.[115] The issue first gained immense traction in 2016, when two class action lawsuits were filed.

The concerns regarding loot boxes extend beyond the borders of the game itself. Once obtained, the items in *CS:GO*'s loot boxes carry real-world market value. Called "skins," loot box items in *CS:GO* are purely cosmetic. However, they can be sold in online marketplaces such as Steam and other third party sites, conducted through betting, casino-style games, and various other forms such as sportsbook platforms that bear striking similarity to traditional gambling.[116] Much like a lottery, the skins are collectively pooled and one randomly selected winner claims the entire pool. These skins can then be exchanged for cash on the Steam marketplace, for which Valve takes a 15% fee on each sale.[117]

The controversies surrounding Valve and their loot boxes trace back to a content creator known as "m0E", who was sponsored by the gambling site "CS:GO Diamonds".[118] After a falling out, he claimed the site had provided him with the outcomes of games in advance to better deliver entertainment. The accusation is not uncommon in the streamer industry, where creators play with "house money" provided to them by the sponsor and without telling viewers they are using items provided to them.[119]

The scandals intensified when YouTuber "HonortheCall" divulged that the creators, Trevor "TmarTn" Martin and Thomas "ProSyndicate" Cassell, had promoted "CS:GO Lotto", another gambling site, without disclosing they were in fact the owners of the site.[120] Following

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[114] Mike Stubbs, "'CS:GO' Breaks All-Time Player Record Again With 1.8 Million Players", online: <https://www.forbes.com/sites/mikestubbs/2023/05/06/csgo-breaks-all-time-player-record-again-with-18-million-players/?sh=5fa631575eef>.
[115] *Ibid.*
[116] Callum Leslie, "The CS:GO gambling scandal: Everything you need to know" (26 July 2016), online: <https://dotesports.com/counter-strike/news/csgo-gambling-scandal-explained-3545>.
[117] *McLeod v Valve Corporation*, 2016 WL 5792695 [*McLeod*].
[118] Steve Dent, "YouTubers avoid fine over Valve 'CS:GO' gambling scam" (8 September 2017), online: <https://www.engadget.com/2017-09-08-youtube-csgo-lotto-fcc-no-fine.html>.
[119] Leslie, *supra* note 116.
[120] *Ibid.*

these incidents, a slew of other content creators and streamers entered the fray and revealed numerous undisclosed ownerships of *CS:GO* third party gambling sites. A number of eSports teams such as FaZe Clan distanced themselves and withdrew support to avoid legal implications.[121] In particular, "TmarTn" and "ProSyndicate" became involved in two class action lawsuits, along with CSGOLotto and Valve. One of the suits was filed by a minor's mother, who alleged significant losses due to gambling. Another one targets Valve for allowing these third party gambling markets to proliferate without regulation.

In *McLeod v Valve Corporation,* the plaintiffs alleged that Valve was aware that rigged third-party sites were targeting teenage customers, and that Trevor Martin, the owner of CSGO Lotto, was actively promoting his site as a gambling service through his Youtube channel.[122] Further, they contended that Martin's failure to disclose his ownership of the platform meant that he rigged the results of games played on that platform.

In August 2016, the plaintiffs submitted an amended class action complaint that they argued was justified under *Federal Rule of Civil Procedure 23*, which includes individuals "who (1) purchased Skins and/or (2) are parents/guardians of a minor child who has purchased Skins."[123] In response, the defendants filed a motion to dismiss on the grounds of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim.

Under the *Federal Rule of Civil Procedure* 12(b)(6), a defendant may move for dismissal if the plaintiff fails to state a claim upon which relief can be granted. As such, the plaintiff must present facts that would allow a court to reasonably conclude that the defendant is liable for the alleged misconduct – mere conclusory allegations and unwarranted inferences will not be sufficient.[124] On the other hand, the Racketeer Influenced and Corrupt Organizations Act (*RICO*) standing was relied on by the defendants to challenge the plaintiffs' claims. They argued that the plaintiffs had not met the standing requirements, which requires plaintiffs to demonstrate injury to their business or property. The defendants asserted that the plaintiffs' disappointing gambling losses did not equate to injury to property under RICO. Furthermore, the court also held that mere nondisclosure on the part of Martin, without evidence of fraudulent conduct or misrepresentation, did not meet the threshold to support RICO standing.[125]

Plaintiffs' Arbitrations

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[121] *Ibid.*
[122] *Mcleod, supra* note 117.
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*

In June 2017, the plaintiffs submitted arbitration demands to the American Arbitration Association ("AAA").[126] The arbitrator ruled that the provisions under Valve's Steam Subscriber Agreement, each plaintiff required individual arbitration in their respective counties, consequently closing the consolidated arbitration. Two of the plaintiffs, Ms. Schoss and Ms. Galloway, submitted new arbitration demands on behalf of their minor children, E.B. and J.P.[127]

At Ms. Schoss's arbitration, Arbitrator Thomas Laffey dismissed the claims for several reasons. First, he found that E.B. had voluntarily engaged in gambling without any inducement by Valve. As such, the claim that Valve had engaged in unfair or deceptive acts with respect to skin gambling was dismissed.[128] Second, E.B. failed to establish Valve's responsibility for his gambling losses since he could not show that Valve was the "proprietor". Third, on the finding that Valve did not control the operation of the gambling activity or that Valve had a duty to prevent E.B. from gambling on third-party websites, Arbitrator Laffey held there was inadequate legal basis as well as failure to prove the existence of a duty.[129]

Similarly, Arbitrator Mark Schiff conducted an evidentiary hearing in Ms. Galloway's arbitration, where she brought the same Washington law claims as Ms. Schoss. Although he conceded that there was "evidence of unclean hands on both sides", he nevertheless found that, through his gambling on third-party sites, J.P. had wilfully engaged in conduct "he knew was improper".[130] As such, he ruled in favour of Valve, concluding that there was no demonstrated connection between Valve's website and the gambling sites. In certain Canadian provinces like Ontario, the minimum legal age requirement for participation in gambling activities is 19.[131] Online gambling operators use the KYC ("Know Your Customer") guideline as a safeguard to prevent minors from participating. The process involves collecting personal information such as birth dates through official documents like passports or driver's licences.[132] As much as online gambling platforms should implement preventive measures, parents are equally, if not more, responsible for educating their children about the risks of gambling and to restrict access to such sites when necessary.

Jurisdictional Issues

The contentious struggle surrounding loot boxes and gambling is inevitably mired in ambiguity as courts struggle to determine under which jurisdiction these issues fall. The legal

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[126] *G.G. v Valve Corporation,* 2020 WL 7385710 [*Valve*].
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] Gamble Ontario, "Underage Gambling: How to Protect Minors in Ontario", online: <https://www.gambleontario.ca/responsible-gambling/underage-gambling/>.
[132] *Ibid.*

chronicle of *G.G. v Valve Corp.* and *McLeod v Valve Corp.* narrates a convoluted procedural history, oscillating between federal and state courts.[133] While the complaint against Valve and the co-defendant third-party sites was initially filed as a class action lawsuit in Connecticut, the defendants managed to successfully argue that the case would be more appropriately dealt with by the federal court in its home state of Washington.[134]

Once in Washington, Valve sought arbitration while its co-defendants, Trevor Martin and "CSGOLotto" sought dismissal on grounds of subject matter jurisdiction.[135] Valve's strongest argument hinged on their Steam Subscriber Agreement, which states that in dealing with legal causes of actions, the issues must go to arbitration. However, the court agreed with Martin and CSGOLotto's argument that they lacked subject matter jurisdiction and extended the holding to all defendants, resulting in the dismissal of the case.[136] Undeterred, the plaintiffs refiled in Washington state court, this time solely against Valve.[137]

Despite being dismissed from federal court for jurisdictional reasons, Valve removed the case back to federal court, citing diversity jurisdiction. This action effectively reintroduced the same case back to federal jurisdiction that had previously already been dismissed. While Valve faced the burden of proving that the matter fell within federal court jurisdiction, as the core substance of the actions remained largely unchanged, it was unlikely for the claim to survive against a motion to dismiss. The hurdle for the plaintiffs was high – they had to prove that Valve was materially responsible for the "real world harm" suffered from gambling virtual goods.[138] Their biggest hurdle lies in the fact that selling the virtual items is a violation of Valve's own terms of service.[139] To warrant recovery, plaintiffs must demonstrate why their own chosen course of action, to sell their skins on a third-party site, in defiance of Valve's terms should merit compensation. Although they allege that Valve endorsed and supported these third-party platforms, establishing such a causal connection at trial is a formidable challenge.

Despite the minors' involvement in skin gambling, the courts upheld that Valve did not directly induce them to participate, as they had learned about it from peers and violated the Steam Subscriber Agreement by their own accord.[140] However, the parents persisted with an appeal. Since courts typically uphold arbitration decisions, the dispute between Valve and the

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[133] Ifrah Law, "Skin Gambling Plaintiffs Find Themselves Back Where They Started" (10 January 2017), online: <https://www.ifrahlaw.com/ifrah-on-igaming/skin-gambling-plaintiffs-find-themselves-back-where-they-started/>
[134] *Mcleod, supra* note 117.
[135] Ifrah Law, *supra* note 133.
[136] *Ibid.*
[137] *G.G. v Valve Corporation*, 2017 WL 1210220 [*Valve*].
[138] Ifrah Law, *supra* note 133.
[139] *Ibid.*
[140] Tyler Wilde, "Final claim in CS:GO skin gambling lawsuit dismissed because plaintiffs never actually used Steam" (13 January 2022), online: <https://www.pcgamer.com/final-claim-in-csgo-skin-gambling-lawsuit-dismissed-because-plaintiffs-never-actually-used-steam/>

minors was effectively dismissed. Attempts to reassert Valve's responsibility for third-party skin gambling were swiftly dismissed by the court, as arbitrators had already ruled on the matter, leaving the parents with few viable complaints to pursue further.[141]

Implications of Loot Box Lawsuits

These lawsuits call into question the legality and practices of gambling sites, throwing Valve under intense scrutiny. Some contend that rather than a byproduct of the feature, this gambling "culture" is used to fuel viewership. However, unlike conventional online gambling sites where they are heavily regulated under gambling laws or altogether prohibited (as is the case in the U.S.), the lack of classification of these marketplaces and platforms have allowed them to fly freely under the radar, operating without regulation or in accordance with existing laws.[142] In response, Valve issued cease and desist letters to 23 gambling sites, leading to shutdowns or impending closures for some. The streaming platform, Twitch, has also amended its rules, suspending channels that showcased content involving skin gambling.[143] It seems that Valve's default strategy when it comes to legal complaints such as these cases is to rely on their terms of service which mandates arbitration. In future cases similar to *McLeod*, it is very likely that Valve will simply file a motion to compel arbitration and resolve any disputes extrajudicially.

Despite the procedural complexities and jurisdictional challenges, the core substance of the actions remained largely unchanged. These cases surrounding EA, *CS:GO,* and Valve demonstrate the intricate intersection of virtual gaming economies, online gambling, and legal jurisdictional challenges. In fact, Valve's pivotal and pioneering role in facilitating a third-party marketplace for virtual "skins" and the consequent allegations regarding inadequate oversight and disclosure underscores broader questions about the responsibilities of gaming platforms in regulating online transactions. As these legal battles unfold, they highlight the need for comprehensive regulatory measures to address the challenges that emerge in the digital gaming landscape.

Jurisdictional Differences

As there are no regulations in Canada surrounding loot boxes, cases like *EA* could set a precedent in how future loot box cases are dealt with.[144] As the case proceeds, questions arise as to if there should be regulations such as limiting loot boxes from minors and mandatory publishing of the chances to obtain items. Certain areas around the world have begun to implement regulations regarding loot boxes.

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[141] *Valve, supra* note 137.
[142] Leslie, *supra* note 116.
[143] Dent, *supra* note 118.
[144] *Sutherland, supra* note 71.

The global nature of the gaming industry transcends geographical boundaries. Debates over legal and ethical issues surrounding the sale of loot boxes within video games is not one that is confined to Canadian borders. Many jurisdictions across the world are grappling with the issue and have begun working towards solutions, interpreting and addressing the issue with respect to their unique legal systems. To illustrate the international perspective on the debate, some legal perspectives from major jurisdictions across the globe are outlined below.

Japan

To put the Japanese response into perspective, it is important to address the pervasive role that loot box type mechanics have in Japanese video games as well as the society of the country. Japan is the birthplace of modern loot box mechanics. In 2004, Japanese mobile game manufacturers began to include "gachapon" mechanics in their games.[145] These mechanics, like the loot box systems used in video games, are based on the country's popular capsules that dispense random toys from an advertised selection. In the present, loot box mechanics in video games are relatively safe in Japan. However, there is a notable exception.

The success of gacha mechanics in the late 2000s and early 2010s led to the emergence of "kompu gacha", or complete gacha systems, where players could earn rare items as a reward for collecting numerous items of lesser rarity.[146] This provides an incentive for players to continuously buy loot boxes, as these items require favourable "pulls" to obtain. This practice led to the submission of numerous complaints to the Japanese Consumer Affairs Agency (CAA), due to the inherently predatory nature of the mechanic, as well as extensive media coverage surrounding both children and adults that had spent large amounts of sums while trying to acquire these rare items.[147]

In May 2012, the CAA acted against kompu gacha systems. This did not come through legislative actions. Instead, the CAA stated that kompu gacha systems fall under restrictions borne out of current consumer protection legislation, and they would begin to apply these laws to the systems in video games. The threat of legal action caused game developers within the country to pull these mechanics from their games.[148]

The relevant legislation for the purpose of the statement was Japan's *Premiums and Representation Act*. The CAA found that the items that are given to players through the kompu gacha system fall under the definition of "premiums" according to the act. For an item to be

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[145] Sebastian Schwiddessen, "Loot Boxes in Japan: Legal Analysis and Kompu Gacha Explained", 2018, s. IV, online: <https://www.lexology.com/library/detail.aspx?g=9207df10-a8a2-4f67-81c3-6a148a6100e2>.
[146] *Ibid* at s.IV(b).
[147] *Ibid* at s.IV(1)(b).
[148] *Ibid* at s.IV(1)(cc).

considered a premium, it essentially needs to be an economic gain that is given by an entrepreneur to another party as a means of inducing customers. The CAA found that kompu gacha items within games fall within this definition, and therefore are prohibited due to the *No. 5 Prize Notice of the Notification on Premium Offers by Lotteries or Prize Competition*, which prohibits the offering of a premium "by a lottery or prize competition [i.e. a prize] which uses a method which requires a person to present a specific combination of different types of cards showing two or more types of characters, pictures or symbols".[149]

Applying the contents of both the Premiums and Representation Act as well as the *No. 5 Prize Notice*, The CAA determined that kompu gacha falls under the scope of these laws. They are themselves an economic gain given out by the game companies; a point almost irrefutable when considering the secondary virtual item markets that had emerged. And they were to be given by presenting a certain combination of items, analogous to the card-specific terminology used in the No. 5 Prize Notice.[150] Other than this exception, there has been very little action against loot boxes in the country.

United States

In the United States, there has been a fair amount of litigation surrounding economic harm that has befallen a plaintiff through the purchase of loot boxes. In these cases, the US courts have generally sided with game developers and companies, and have continuously found that loot boxes are not a form of gambling. Furthermore, courts often find that using virtual money on loot boxes does not amount to any sort of economic loss or gain.

In *Taylor v Apple*, a class action lawsuit was brought against Apple to hold them liable for distributing games with loot box mechanics in their app store, which were alleged to be analogous to slot machine mechanics outlawed in the state of California.[151] On this point, the California district court found that loot boxes were not subject to gambling regulation legislation in the state and did not find any statutory basis for the prevention of their sale.[152]

In *Coffee v Google*, a similar conclusion was reached. The plaintiffs in this case brought a similar case to that seen in Taylor v Apple, suing tech giant Google for their role in distributing loot boxes through their play store.[153] Once again, loot boxes were not held to be illegal slot machines under California law, as loot box prizes are not considered things of value under California Gambling laws.[154]

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[149] *Ibid* at s.V(2)(b).
[150] *Ibid* at s.IV(2)(2)(bb).
[151] *Taylor v. Apple*, (2022), N.D. Cal 20-cv-03906-RS at para 1.
[152] *Ibid* at para 5.
[153] *Coffee v. Google LLC.*, 2022, N.D. Cal. 20-cv-03901-BLF at para 2.
[154] *Ibid* at para 19.

Both *Mason v. Machine Zone, Inc* and *Soto v. Sky Union, LLC* further demonstrate the stability of the loot box system in the US, as they both hold that both in-game currency as well as items obtained from a loot box have no real value if they cannot be cashed out outside of the game.[155]

Further litigation and congressional discussion surrounding loot boxes in the US is ongoing, but these cases set a strong precedent for how they are currently treated in the United States. Loot boxes are not considered a type of gambling.

United Kingdom

Currently, there is no relevant case law surrounding loot box mechanics within the United Kingdom. However, they have been subject to considerable scrutiny by the state. To this end, the UK's Gambling Commission has released a series of papers to provide guidance to developers looking to implement a loot box system into their games.

In Great Britain, gambling is defined under the *Gambling Act, 2005*, as "playing a game of chance for a prize".[156] The Gambling Commission oversees and enforces the act. When questioned about the applicability of gambling laws to in game loot boxes, the Gambling Commission stated:

"A key factor in deciding if that line has been crossed is whether in-game items acquired 'via a game of chance' can be considered money or money's worth. In practical terms this means that where in-game items obtained via loot boxes are confined for use within the game and cannot be cashed out it is unlikely to be caught as a licensable gambling activity. In those cases, our legal powers would not allow us to step in".[157]

This statement makes it definitive that loot boxes were not to be considered gambling within the jurisdiction. However, it does leave ambiguous the status of loot boxes in games where items obtained from loot boxes can be sold for real money, such as those in Valve's *CS2*.

In recent years, there has been much public support for UK law to be changed to bring loot box mechanics within the scope of gambling law. As was the UK government's position in April 2023, no legislative action is expected. The UK government takes the stance that editing the definition of gambling to include loot boxes could have "significant implementation

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[155] Sebastian Schwiddessen, "*Watch your loot boxes! – Recent developments and legal assessment in selected key jurisdictions from a gambling law perspective*", 2018, 1:1, IELR.
[156] *Gambling Act 2005*, s.6(1).
[157] Gambling Commission, "Loot boxes within video games" (24 November 2017), online: <https://www.gamblingcommission.gov.uk/news/article/loot-boxes-within-video-games>.

challenges and risks of unintended consequences". It would require "substantial changes" to the gambling tax system, would "dramatically increase" the scope and costs of running the Gambling Commission, and "could risk capturing other unintended aspects of video games or activities outside of video games with a random reward mechanism".[158]

Despite inaction and legal allowance, the UK government provides guidelines to companies looking to implement loot box systems that aid them in developing systems that enhance player protection.

European Union

Loot boxes have generally avoided regulation in many EU member states. However, this may be subject to change in the future. In January 2023, the European Parliament adopted a report calling for harmonized rules across all member states to achieve better player protection in the video game sector. Some member states have already taken steps to curb the prevalence of the monetization method.[159]

In 2018, the Belgian Gaming Commission issued a report asserting that all loot boxes bought with real-world currency should be classified as gambling, regardless of the target audience being minors or adults. The commission's stance was based on its conclusion that paid loot boxes in games like Overwatch, FIFA 18, and Counter-Strike: Global Offensive fulfilled the criteria of a game of chance, encompassing essential gambling elements (game, wager, chance, win/loss). Despite concerns about effectively enforcing a ban on loot boxes in the jurisdiction, numerous major companies opted to either eliminate loot boxes from the local versions of their games or refrained from releasing certain titles altogether.[160]

The Gaming authority for the Netherlands in 2018 took a similar approach. In the country, loot boxes whose prizes can be traded outside of the game are considered gambling, as the rewards from the game have a market value.[161]

Presently, betting on skins and marketplace websites remain pervasive, but the landscape may undergo significant changes in the future as such activities become more mainstream. The industry is expanding at dizzying rates and loot boxes form an increasingly prevalent part of a game publisher's revenue. In fact, big title companies alongside Valve have reported to earn more than half their revenue from microtransactions, with EA reporting a total revenue of $800

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[158] Woodhouse, *supra* note 56.
[159] Marcin Przybysz, "Loot box regulation in the EU – loading status" (28 June 2023), online: <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2023/june/28/loot-box-regulationin-the-eu-loading-status>.
[160] *Ibid.*
[161] *Ibid.*

million in 2017 and Activision Blizzard earning $4 billion during the same year. As such, government regulation seems likely to be implemented. However, it will be impossible to enact legislation prematurely without conducting enough research and studies to concretize and lend credence to the harmful impact of loot boxes.

The complexity of jurisdictional differences in legal and procedural frameworks governing loot boxes continue to challenge and shape the gaming industry. As shown in cases like *Sutherland v Electronic Arts Inc* and *McLeod v Valve Corporation,* courts continue to grapple with the boundaries regarding corporate liability for gambling that results from their game items. Despite procedural complexities, it is clear that the underlying issue must be mitigated: the proliferation of loot boxes and their potential to facilitate gambling-like behaviours poses significant risks to consumers, particularly minors. Possible solutions include age restriction to protect minors, mandating transparent disclosure of loot box probabilities, and regulating in-game economies to prevent exploitation. By addressing these concerns with appropriate disclaimers and prohibitions, video game companies and consumers can establish guidelines that prioritize transparency, responsible engagement, and consumer protection.

Conclusion

Throughout this paper, we have delved into the regulatory concerns regarding contracts, anti-competition laws, and loot boxes. Even though Canada has not taken a definite stance on many of the issues surrounding esports, this paper has discussed the current stance of different jurisdictions and has tried to predict how Canadian courts would settle similar matters. In order to take a preventative stance, the Canadian legislature could implement regulation for the video game industry. Future regulation could hopefully protect both consumers, affected by contract and loot box systems, and smaller video game companies, affected by monopolistic behaviours of larger video game companies. It seems evident that a firm Canadian stance on the issues discussed in this paper would be helpful for the future development and regulation of the Canadian video game industry.

Moving forward, it is imperative to consider regulations that address the challenges posed by the esports industry stifling its rapid expansion and innovation. Implementing measures such as requiring players to retain counsel before signing contracts and considering the inclusion of gamers under existing regulatory frameworks, like the Talent Agencies Act, could help avoid exploitative practices and promote a more sustainable ecosystem for esports professionals. While contractual disputes often deal with power imbalances between esports organizations and players, a similar predatory allure of loot boxes to young and inexperienced people poses ethical implications. Both issues highlight a burgeoning necessity for regulation and laws to be put in place for the protection of players' rights and interests.

Against the backdrop of these complex legal and ethical implications, the esports industry is undoubtedly undergoing a transformative period. The legal cases and considerations discussed in this paper demonstrate the urgency and need for regulation and transparency across esports organizations, video game companies, and players of all ages and kinds. Through potential solutions such as establishing consistent standards among jurisdictions and proactively addressing regulatory gaps and ethical concerns, the esports industry can evolve into a sustainable and transparent system that provides not only innovative entertainment, but fair protection to the interests and rights of all.

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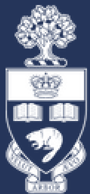

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