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Uncertainty of Prize and "Chance"

Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing

Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing involved an electronic skill game, called GotSkill that has been offered on terminals located in many bars and other licensed establishments throughout Ontario for some years. The Alcohol and Gaming Commission of Ontario (AGCO) sought a declaration that the game constitutes unlawful gambling, such that the regulations under the Liquor License Act of Ontario prohibit licensees from having the game played on their premises. Play For Fun Studios Inc. had represented to the establishments that GotSkill was a game of skill alone, which was not unlawful under the Criminal Code.

An electronic game of skill is lawful under the Criminal Code, even where players pay money to play and stand to win a greater amount of money than was paid. This accords with the common law definition of gambling, pursuant to which consideration, prize and chance must all exist in order for the activity to constitute gambling, and a game of skill alone lacks the element of chance. By contrast, electronic games of chance or games of mixed chance and skill played for real-money stakes in an attempt to win prizes are not lawful, unless carried out by a Crown agent. If the outcomes of a game are determined to any degree by a "systemic resort to chance," it becomes a game of mixed chance and skill and is therefore unlawful gambling. A systemic resort to chance is differentiated by an "unpredictable that may occasionally defeat skill" — something that is not a built-in part of the game but which may

sometimes affect the outcome. Thus golf is a game of skill alone, despite the fact that an errant gust of wind during a game may affect the outcome — that gust of wind is not a systemic resort to chance. It does not matter that skill may be the dominant factor in determining the outcome of the game If any systemic resort to chance is also involved, it is unlawful gambling. This is the ratio of the 1968 Supreme Court of Canada decision of R. v. Ross.

The game presents players with a touchscreen terminal. At the start of the game, the potential next win is displayed on the screen, displaying the maximum amount of money a player can win by playing the next game. If a player decides to play, she must purchase game tokens. The player chooses a game theme from options provided, chooses the amount to wager, and plays.

The game is a simple hand-eye coordination reflex game. A cursor is travelling left to right and back again across the screen, with values ranging from the far left and right at 55 per cent to dead-centre in the screen, where it is 110 per cent. The player hits a button that stops the cursor when it is at the highest possible value. The AGCO acknowledged that this discrete task was in itself one of skill alone.

When the player is done each round, the next potential next win is displayed on the screen. The player does not know what this value will be until he plays the game before it. The amount of each potential next win is not determined randomly; it is predetermined. Each theme on each terminal is pre-programmed with a set of "pools." Each pool is composed of 1,000 tickets representing maximum win amounts, and these tickets come up in consecutive, pre-determined order.

The order of the tickets does not reset from player to player – when player one stops playing, player two picks up where players one left off in the order of tickets presented.

The judge on the initial application held that in determining whether there is an element of chance, it is the perspective of the player that must be considered. This meant that GotSkill had to be considered from the perspective of the player who plays multiple times, not from the perspective of a single play. Evidence showed that Ontario players played for approximately 25-30 minutes at a time when they first try the game. Neither the application judge nor the Court of Appeal accepted Play For Fun's argument that because a player knows what the maximum win amount is for each individual game, and can then decide to play or not to play. The courts agreed that the analysis must focus on how the typical player approaches the game.

The application judge nonetheless held the game to be one of skill alone, and therefore not a game to which the prohibitions in the Criminal Code applied. The Court of Appeal reversed that decision, on the basis that the application judge lost sight of the fact that the "predominance" test does not apply in Canada – his analysis strayed into seemingly finding that because skill was predominant over chance in determining the outcome of the game, the game was lawful.

Viewing the game from the perspective of the typical player, the application judge held that players spend their money "for the opportunity of being able to obtain something of greater value the next time. Whether or not [they have] that opportunity depends on chance." He also said "[the] incentive in continuing to play is in order to gain an opportunity to win a greater prize which may or may not be available, depending on chance." It is chance, because even though the tickets are not selected randomly, the fact is the player does not know the order of the potential wins that will be presented. From the player's perspective, the amount she can win from the next few plays is a matter

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of chance. The application judge accepted this, and once he accepted that it should have been the end of his analysis. Since there is no predominance test, once you acknowledge that the outcome is affected by an element of chance that is systemic to the game, what you have is an unlawful game of mixed chance and skill.

The Court of Appeal held that the applications judge had misapplied a line of cases that discuss the question of whether a player is "completely at the mercy of the machine." The evidence before the court was that a player who achieved the maximum score of 110 per cent on the skill test each and every time she played would always come out ahead, regardless of randomness of prize outcomes, if she played long enough. The applications judge applied this evidence to statements made by Supreme Court of Canada in 1960 in its decision in Topechka v. The Queen:

"…the law forbids a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results."

"To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element…"

As well, he referred to the decision of Court of Appeal for Ontario in 2002, R. v. Balance Group International Trading Ltd., which stated:

A game of mixed skill and chance exists where "the average player [cannot] exercise sufficient skill to compensate for the other elements of the game that [are] wholly beyond the power of the

player to influence".

When the application judge applied these cases to stand for the principle that GotSkill is a lawful "game of skill" because a very skilled player can "beat the machine," he was displacing the clear statement in the Ross case that the "dominant element" or "predominance" test is not the law in Canada. If a systemic resort to chance exists with respect to the outcome of the game, it is a game of mixed chance and skill and therefore unlawful. Neither Topechka nor the Balance Group case applies a predominance test, and neither of them displaces Ross as the controlling authority in Canada for the proposition that the predominance test has been rejected in Canada.

The conclusion we draw from this decision is that regardless of the skill involved in playing a game, if players pay money to play and are not aware of what the available prize will be each time they play, that unknown factor will represent an element of chance that will render the game "unlawful gambling." Games made available in Canada will need to be offered with this principle in mind. CGL

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