BY PETER CZEGLEDY

Social Network Gaming

A Canadian Perspective

Social network gaming, or "social gaming"[1], has become a force to be reckoned with. Over 173 million people are currently engaged in social gaming (far outstripping the 50 million people engaged in traditional online gaming)[2], and as electronic social networks increasingly permeate our culture and establish a dominant role in our pattern of socialization, this appears to be only the beginning of a larger cultural shift. With an observed historic growth rate as high as 100% per annum[3], social gaming is seen as a potential "game-changer", particularly in regards to its potential to disrupt the online gaming business model. Established traditional gaming businesses are therefore justifiably alarmed when they hear that 95% of industry experts surveyed either "very much" or "probably" believe that social network-based companies will be able to compete successfully against established gaming brands online within the next five to 10 years.[4]

However, recognizing the potential for change that social gaming might bring and actually harnessing that potential in an optimal fashion are two different things. The reality is that social gaming is still evolving, and many commentators—and even industry leaders—are uncertain of where its future may lie. This is true not only in relation to its essential business paradigm (monetization remains a critical issue), but also in connection with its legal basis. Unfortunately, limited understanding of the latter may often slow the proper development of the former. With Canadian jurisdictions generally shifting towards an acceptance of online gaming, albeit focused mostly on government-operated or controlled venues, a lack of clarity arguably poses significant legal risks as historic legal constraints are applied to the evolving social gaming business model.

DEFINING SOCIAL GAMING

The first and most obvious question is simply one of definition: What is social gaming? There is no single widely accepted definition, notwithstanding that there is a general understanding of its typical attributes.[5] Although not all of the attributes need be present, a majority of them include the following:

a. **Social Network/Browser-Based:** Social games are typically carried on large social networks accessed through the Web, operated by companies such as Facebook, Wooga, Social Point, Rovio, Friendster, Twitter, MySpace, Zynga, Playdom (Disney), Playfish (Electronic Arts), CrowdStar, Activision, Apple, Google and Ubisoft.
b. **Multiplayer:** There are multiple players playing any social game at one time, on a scale that stretches from 2 to hundreds or thousands.
c. **Awareness of Others:** Most social games allow a player to view the activity of and interact with other players.
d. **Casual gaming:** On average, social gaming involves casual and occasional activity rather than sustained and uninterrupted play.

Popular social games have included Farmville (players harvest crops and build a farm), Words With Friends (players play a Scrabble-type game), Mafia Wars (players recruit friends and build a criminal organization), Gardens of Time (players find hidden objects in historical scenes), and Plants vs. Zombies (players defend against the undead using plants and other means). Generally speaking, social games measure success in either non-monetary units, such as points or rankings, or utilize some form of virtual currency and prohibit the player from gaining real-world financial benefits through any redemption of attributes or conversion of achievement for money or anything of monetary value.

Conversely, online gaming assigns an actual monetary value to its wagers and winnings. Even when it involves settings or activities that are similar to traditional card games, social gaming is thought to be more focused upon a player's experience than his or her potential monetary gain, and is considered to fall outside the traditional online gaming space.[6]

THE LEGISLATIVE AND REGULATORY CONTEXT

If social gaming will influence online gaming to a significant extent, and if it is to be distinguished from it, it is useful to review the premise for regulation of online gaming in Canada. Historically, the oft-repeated and trite proposition of the law in Canada is that online gaming activity is criminal activity. This conclusion rests on the constitutional division of powers between Parliament and the provincial legislatures. This division of powers under s. 91 of the Constitution Act, 1867 defined criminal law as exclusively within the power of Parliament.[7] As a result, Parliament has exclusive power over gaming, betting, and wagering as a matter of criminal law.[8] Part VII – Disorderly Houses, Gaming and Betting provisions of the Criminal Code[9] , designates gaming as an illegal activity. There are specific provisions relating to betting houses (s. 201), betting and book-making (s.202), and lotteries and games of chance (s.206).[10] The broad scope of these provisions is qualified by a few statutory exceptions, the principal one being the delegation to the provinces of the ability to offer games of chance under their "control and [management]".[11]

The Canadian provinces chose different approaches to the opportunities that the Criminal Code offered, but all actively sought to establish and protect the bulk of gaming activity as a government business. This approach, while laudable from revenue, safety, and security and other perspectives, generally left Canada ill-equipped to react to the gaming industry as it increasingly moved online in the 1990s. As elsewhere in the world, such a vacuum was not left unfilled, and online gaming became a significant activity of Canadians which enforcement authorities had difficulty controlling. Faced with fiscal challenges, limited revenue tools, the permeability of electronic borders, and recognition that online gaming was here to stay, all the provinces have now re-examined their initial approach, with each planning, implementing, operating, or regulating some form of online gaming activity.

Social gaming in Canada has, however, so far largely avoided governmental control and is operated solely by private industry. I do not believe that any Canadian government has made a statement of its policy on social gaming or indicated an intention to be involved as an operator or regulator, but if such governments were to exercise jurisdiction under an analogous proposition as that employed in relation to online gaming, Section 206 of the Criminal Code might be where they would start.

THE CRIMINAL CODE AND THE COMMON LAW

In a summary fashion, there are three unifying elements that underlie illegal activity for purposes of the lottery and games of chance provisions under Section 206, namely that: (1) winning depends (at least in part) on chance, (2) participation requires payment, and (3) a prize is offered.[12] There is one additional implicit requirement: "gaming", as opposed to "betting", requires "playing a game, whether of chance or skill, for stakes

hazarded by players."[13] In other words, participation in the game is essential. If these elements are present in the typical social gaming context is open to question.

(a) Chance

Whether an activity involves chance or skill, or some measure of both, is relevant as certain provisions of Section 206 apply only to games of chance, while others apply to games of mixed skill and chance. Typically, the analysis is carried out in a situation-specific fashion, with the rules, manner of play and the physical and mental prowess required to arrive at a desired outcome to be reviewed. "Skill" has generally been defined as what is needed to make the participant "capable of accomplishing something with precision and certainty, cleverness and expertise."[14] Unlike some other jurisdictions, Canada does not hold to a "predominance test", as even a small element of chance will make any activity a game of mixed chance and skill.[15] Instead, Canadian jurisprudence has generally required that all elements of chance be eliminated before a game could be considered to be purely of skill.[16]

Given the make-up of social games, it is possible—but perhaps unlikely—that they would qualify under such a high bar as a game of pure skill. The Canadian Supreme Court has made it clear that for purposes of Section 206, it is prepared to ignore the "element of chance in every game, even those that are admittedly games of skill such as chess, tennis and golf."[17] to the extent that chance is manifested outside the basic rules of the game (i.e. All golfers recognize the importance of some measure of luck governing the outcome, regardless of their level of skill). Most social games involve play in virtual environments where chance variables are designed to be similar to or replicate real-world environments. On this argument, social games may not be games of "chance". On the other hand, when chance factors and random outcomes are programmed into the games to provide greater variability of game play, a court might find that an element of chance is present; a chance that would affect the ability of a player to "win … with precision and certainty."[18] As social games increasingly become more complex, it appears that chance is effectively hard-wired into the structure of such games in a manner that is analogous to the pre-set role of chance in online casino games. From this perspective, social games would more likely be seen as games of mixed skill and chance. Even if this were not the case, although the majority of the Criminal Code's gaming provisions include a reference to "a mode of chance", Paragraph 206(1)(e), excludes any reference to "chance", so that even if a gaming operator managed to remove every element of chance, it might still be engaged in an illegal activity[19].

(b) Payment

Payment for purposes of Section 206 chiefly equates to the payment of "a sum of money" or the giving of a "valuable security."[20] In the context of online gaming, payment is generally the money paid to the gaming operator at the time of the activity in exchange for the opportunity to participate. Where a participant is not required to pay to participate, but is given either virtual currency, virtual game play tokens or virtual gaming chips by the operator, the requirement of payment is absent.

Social games do not, however, always reflect such a clear distinction. Many games are indeed free to play. Others, however, have initial entry, membership or purchase fees. Typically, such fees, if they exist at all, are collected on a one-time basis, without a continuing cost to the player to continue participation, even if he or she participates later. Although such fees are normally small, and usually have no connection to the amount of play permitted, they are fees nevertheless, and while perhaps not readily characterized as bets or wagers of any kind, easily would qualify as a "sum of money".

Even though many social games have no entry fee, they often are designed to allow players to obtain certain attributes (e.g. buying a special virtual tool, weapon or device), play within particular scenarios (e.g. entering a unique game play level or environment) or otherwise participate in some augmented fashion in the game if some payment is made. Although these players constitute a very small minority of all players (typically less than 5%), they are a critical source of income for the operator and important to the operation of the game. Such purchases might qualify as the necessary payment of a "sum of money" even if entry fees did not apply.

(c) Prize

The third traditional element is that of a prize to be won as a consequence of the outcome of the gaming activity. A prize may be money, money's worth or stakes.[21] Some of the provisions of Section 206 broaden the ambit to include "property", "goods", "wares" or "merchandise". If the virtual points, status, currency, tokens or chips won from gaming cannot be used to obtain items of value, it is unlikely that the necessary element of the provision of a prize exists.

Most social games historically have omitted prizes of money or property of any kind. In fact, most social games try to avoid defined winning conditions, or any conclusive winner, as the operators generally count on players playing their games frequently and rely upon their desire to improve their position vis-à-vis the other players. Creating a final "winner" would then be self-defeating. Instead, systems of "levels", "quests", virtual goods acquisition or other ongoing challenges are the usual goals to be sought. This is not true in every case however - Scrabble-type games and other social games generally evocative of traditional board games normally do terminate with winners, but generally do not result in awards beyond recognition of winning status. Most social games which do reflect achievement or use a virtual currency, points or credits do not permit them to be redeemed for money or goods. As a consequence, social games would generally not be seen as creating prizes that would meet the requirements of Section 206.

THE LEGAL RISKS OF AN EVOLVING PARADIGM

Social games may fall within the broad ambit of the lottery and gaming provisions

of the Criminal Code, but some traditional elements appear to be lacking, at least at first glance. However, the diversity and complexity of social gaming networks and the increasing business and recognition paid to virtual property may change this, particularly as operators move to implement new business models. These trends may start to blur the lines between legitimately exempt gaming activities and those that may attract greater scrutiny under the Criminal Code.

The currently predominant social gaming business model is generally described as the "freemium" approach. Freemium is a hybrid word, combining free and premium, and reflecting a paradigm where the ability to participate in the activity is free, but the activity's premium features can be purchased at the participant's discretion. As noted earlier, this pattern, while involving only a small portion of players, is critical to the financial viability of the operators. It highlights the growing real world value placed on virtual elements in the social game. Such value has been recognized for some time among players, initially within the confines of the social game itself, and subsequently in the real world. Social game players now trade virtual characters, weapons, pets, real estate and other attributes at both remarkable rates and amounts.[22] Secondary markets, effected directly between players, have given rise to tertiary markets using third party facilitators that act as exchanges, taking a brokers fee from each sale. Social game operators, while initially against trading outside of the game itself, have grown to recognize the sizeable additional revenues that trading can make available, and have started to operate their own exchanges allowing such items to be purchased for real world money.

These developments may create risks that social gaming participants did not originally anticipate. The Japanese government recently became increasingly concerned about, and eventually regulated, a social game on just this basis.[23] Under the rules of the game, players were able to pay to take part in lotteries (called kompu gacha) within the virtual environment, where they could win cards that would enhance their in-game abilities. This activity would have likely been considered innocuous, since there was no ability to redeem the prize even though consideration had been paid. However, the government realized that a secondary market had developed whereby these enhancements were being sold for money. In effect, kompu gacha had become an unregulated lottery and the government declared it to be illegal.

As virtual property in social games increasingly is seen as equivalent to real world property, and becomes the subject of real world commerce,[24] it has become the subject of disputes between parties, and has led to tortious and criminal claims identical to those made in relation to tangible goods.[25] This transitioning role of virtual property will have consequences, including that virtual property, directly or indirectly, may more readily be found to constitute either "money", "money's worth", "property", "goods", "wares" or "merchandise" for purposes of the prize element of Section 206. The upshot may be that social games could more readily fall within the ambit of Section 206, creating a criminal liability risk for operators and a dilemma for Canadian governments and regulators.

CONCLUSION

Social gaming has been heralded as a revolutionary economic force in the gaming industry. The ongoing evolution of its business model and that of the virtual property created within such games however demonstrate the danger of over-reliance on a legal analysis that fails to take into account the complexity of social networks. Jurisdictions that ignore such changes will invariably find a mismatch of economic imperatives and legal constraints that will further no one's agenda. If Canada is to avoid a repeat of its experience in the online gaming industry, it would do well to pay greater attention to the evolution of social gaming and how to adapt and apply legal constructs to this growing area of industry. **CGL**

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1 The phrase "social gaming" is used interchangeably with the term "social network gaming" in this article. The author appreciates that the two can be considered distinct enterprises, with the former referring to traditional casino games played online on a play-for-free basis, but this is not the use implemented here – See Section 2, Defining Social Gaming.
2 Morgan Stanley Research. Social Gambling: Click Here to Play, Morgan Stanley Blue Paper. (Morgan Stanley: November 14, 2012) at 4.
3 Ibid, at 2.
4 American Gaming Association, The 10th Annual G2E Future Watch series: an insider look at new trends in gaming, "Online Gaming", Vol. 10, (Global Gaming Expo, 2012) at 12.
5 Nick O'Neill, What Exactly are Social Games? (Social Times, July 31, 2008).
6 See also Kevin Flood, Internet Gambling's Confused Definition of Social Gaming (Gameinlane, Inc., 25 June 2012) for a useful discussion on the current definition of social gaming at (http://kevinflood.blogspot.ca/2012/06/internet-gamblings-confused-definition.html).
7 (30 & 31 Vict.), c. 3 at s. 91¶27.
8 Johnson v. Alberta (Attorney General) (1954), 18 C.R. 173 (S.C.C.); R. v. DeWare (1954), [1954] S.C.R. 182 (S.C.C.).
9 R.S.C 1985, c. C-46, ss. 197-209, Criminal Code.
10 Of these provisions, Section 206 is the most relevant to this analysis.
11 Criminal Code, supra note 9 at ss. 207(1)(a) and 207(4).
12 R. v. Robinson (1917), 41 D.L.R. 46 (Sask. C.A.).
13 R. v. Gardiner (1971), 2 C.C.C. (2d) 463 (Alta.C.A.).
14 R. v. Robert Simpson (Regina) Ltd. (1958) 121 C.C.C. 39 (Sask.).
15 R. v. Ross (1968), 70 D.L.R. (2d) 606 (S.C.C.) at 617.
16 Gardiner, supra note 13.
17 Ross, supra note 15 at para. 12.
18 Robert Simpson, supra note 14 at para. 30.
19 For a review of Canadian law pertaining to games of skill and chance and the pertinent principles, see M.D. Lipton, M.C. Lazarus and K.J. Weber, Games of Skill and Chance in Canada, (2005),10 Gaming Law Review, Volume 6, Number 1.
20 The term "valuable security" refers broadly to shares, bonds, bills, documents of title, releases of payment, etc. – See Criminal Code (Canada) R.S.C 1985, c. C-46, s. 2.
21 R. v. Di Pietro (1986), [1986] 1 S.C.R. 250 (S.C.C.), per Lamer J. See also R. v. Roberts (1931), [1931] S.C.R. 417 (S.C.C.); R. v. Wilkes (1930), 66 O.L.R. 319 (Ont. C.A.)
22 Molly Stephens, "Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Creators" (2002) 80 Texas Law Review 1513
23 Osamu Inoue, Eiki Hayashi and Kazuyuki Okudaira, Nikkei Weekly, "Social gaming companies scramble to shore up new income streams" (Japan: Nikkei Weekly (Japan), June 25, 2012).
24 Susan Abramovich and David Cummings, "Virtual Property, Real Law: The Regulation of Property in Video Games", (2007) Canadian Journal of Law and Technology 73.
25 Maurice Dransfield, "Property Crimes in Virtual Worlds" (2010) Alberta Law Review.