

Tithing to RNGesus – A New Testament

Introduction

Hello oh reader mine. Much has changed since we [last communicated](#).¹ The purpose of this blog is to get everyone caught up to speed with the newest developments in the world of Loot Boxes. We will be covering recent developments in legislatures around the world.

In Industry

Of particular note is the development that Microsoft, Nintendo and Sony have agreed to post the odds for loot boxes.² Examining the agreement through the points of contention I raised in my previous post, this is certainly a step in the right direction. This helps interested parties know exactly what they are signing up for; should they bother to look. Transparency in a process which jeopardises the health of the customer is typically hard to come from; why would they, the producer, want the consumer to know they are willingly snapping up a product that is harming them? This was not a step that was needed to be taken by Microsoft, Nintendo and Sony; they should be lauded for it. Of note is that Nintendo has stated not only future games must comply with this updated stance, but they will retroactively ensure current games will have disclosure of loot boxes via update.³

Yet, from another perspective, Microsoft, Nintendo and Sony's decision isn't terribly impressive. It arguably just brings them into line with other types of gambling. If a person is committed, they can easily sit down and figure out the odds available to them should they decide to gamble in a number of games. A lottery ticket (Lotto 6/49) is a perfect example of this, it has a set of rules that are known beforehand and a range of numbers which inform the probability of winning. Should a player be quick enough at the probability arithmetic, they stand to make a great deal of money off of it. The math involved isn't terribly complicated; it's covered in Manitoba as a mandatory part of the provincial high school curriculum.⁴ This is not to say that all games are known to consumers: slot machines (likely loot boxes' closest comparison) do not necessarily state their winning odds. Again, more information is preferable to less, so we'll take it.

However, there are some areas that are lacklustre. First of all, this does not address video games that are released on the computer, outside the reach of Microsoft, Nintendo and Sony.⁵ Furthermore, this does nothing to dissuade or prevent children from accessing the loot boxes. It does provide an opportunity for a responsible adult to discuss the potential effect with children. Yet

¹ Evan Podaima, "Tithing to RNGesus: An Analysis of Video Game Loot Boxes" (11 April 2019), online (blog): *Robson Crim* <http://docs.wixstatic.com/ugd/bab59a_0fd6a60807d7489d96c03e6d5747f569.pdf>

² Kris Holt, "Sony, Microsoft and Nintendo agree to disclose loot box odds" (7 August 2019), online: *Engadget* <<https://www.engadget.com/2019/08/07/sony-microsoft-nintendo-loot-box-odds/>>

³ Matt Wales, "Microsoft, Sony, Nintendo won't allow loot boxes on consoles unless publishers disclose drop rates" (7 August 2019), online: *Eurogamer* <<https://www.eurogamer.net/articles/2019-08-07-microsoft-sony-nintendo-wont-allow-loot-boxes-on-consoles-unless-publishers-disclose-drop-rates>>

⁴ Government of Manitoba, Manitoba Education and Advanced Learning, *Grades 9 to 12 Mathematics: Manitoba Curriculum Framework of Outcomes* (Manitoba: Department of Education, 2014) online: <https://www.edu.gov.mb.ca/k12/cur/math/framework_9-12/full_doc.pdf>

⁵ Holt, *supra* note 2.

even this has a limited effect, as humans have a reduced capacity to comprehend large numbers.⁶ A 1-in-1000 chance may appear to be negligibly different as 1-in-10000000; the actual impact of how large the numbers aren't fully impressed upon them.⁷ This makes it exceedingly difficult to explain how poor odds can be for certain items/winnings.

Cheesing the Boss – Finding Loopholes

Cheesing bosses is a favourite pass time of gamers - why fairly defeat the enemy when you can make him fall off a ledge they aren't supposed to go near or plummet through the map? Turns out this love of loopholes is a favourite pass time of video game producers as well. Thankfully Vic Hood of Techradar brings to light an interesting issue with previous attempts at regulation. Instead of selling loot boxes directly for cash to a consumer, companies started to sell virtual currency (like bitcoin but more useless; it only applies to the one game) in which you could then subsequently buy loot boxes. Put beautifully:

“The kicker being that by buying the currency, you got a free loot box. Essentially this meant that players aren't actually buying the loot boxes, but the currency instead – you just happen to get a loot box for free. The publishers also didn't have to share the drop rate for those loot boxes, because they weren't *technically* selling them, so no laws were being broken.”⁸

Alas, as mentioned in my previous post, my solution to the problem would need modification.⁹ To me, this means that any attempt at legislation would need to be thorough. Comprehensive drafting should include provisions which prohibit any form of direct purchase (i.e. direct charge to a credit card) or purchased virtual currency being used to in exchange for loot boxes. This should also be inclusive of free loot boxes that are attached to sales of other things (such as skins).

Keeping in mind, this would not alleviate the use of the RNG mechanic in part of the game, only that it prohibits “real” money from being able to access the mechanic.

Well, What about Atheism? (I.e. Why do we need RNG anyways?)

This is a great question. Even if tomorrow every last request of mine was granted and a comprehensive law was drafted, voted upon, assented and came into power over night, we would still have this issue of RNG in video games. Wasn't it good enough to progress so far through the dungeon or to find a skull hidden in some god-forsaken corner of an impossibly large map to hear quirky dialogue that had no impact on gameplay? Not anymore. But this requires some background.

The success of video games has skyrocketed over the last number of years. As mentioned previously, they are a huge industry, taking over from previous powerhouses of film and theatre. This profitability breeds competition; who doesn't want a slice of the action? The drive for profits from producers has created an environment where it is harder and harder to ensure a game stands

⁶ Kate Baggaley, “Why We Can't Grasp Very Large Numbers”, (23 October 2015), online: *BrainDecoder* <<http://behdad.org/mirror/www.braindecoder.com/happy-mole-day-large-numbers-in-the-brain-1418905338.html>>

⁷ *Ibid.*

⁸ Vic Hood, “Sony and Microsoft's loot box crackdown means big changes for 2020 games” (13 August 2019), online: *techradar* <<https://www.techradar.com/news/nintendo-sony-and-microsoft-crack-down-on-loot-boxes-what-it-means-for-you>>

⁹ Evan Podaima, *supra* note 1.

out. But, for a second, imagine if you could create a model where people lined up year after year to buy the same game, and spent money on it all the meanwhile? Sounds like paradise to a business owner, no? You get them coming AND going.

Video games take a long time to develop. Usually a number of years for AAA titles (full fat, big name console/computer games, not the app store candy crush variety). This is why you only see games such as any of the series Legend of Zelda, Horizon Zero Dawn or Titanfall come out every few years. Yet there are games in series such as FIFA or Call of Duty that come out each year. Like clockwork. This certainly sounds more popular. The question is how do you keep the customer there?

Single player games are much less likely to have loot boxes. Interestingly, they have seen a decline in their production over the last number of years. My understanding is that there is more risk involved in single player game's commercial viability. Loot boxes are predominately seen in games that have a multiplayer component.

Given that loot boxes are often used for items that have only cosmetic use, this is quite odd. At least, one would imagine that people would pay money for a competitive advantage. In spite of this, there was a deeper, more base level of human nature to tap into; the eternal, pointless struggle that is meaningless competition.

Regular, old, gamers became obsessed with attempting to gather these “skins” not just because they looked cool, but because they looked different and no one else seemingly had them. Using *Overwatch* as a readily available example¹⁰: in my opinion, often the objectively “cooler/more atheistically pleasing gear was not the rarest. Notwithstanding, you better believe I put that rarer skin on. An entire eco-system of cutthroat competition was coined because Justin had something that Tyler wanted. So, Tyler was ready to go out and spend so that he had something *even cooler, even harder to get*. Skill was no longer the sole way of “winning” a game.

Starting to put the pieces together yet? What I mean to say is that the industry wasn't always like this. It was a process. There was a realization in the industry that incorporating RNG into a game acted as a way to generate further, ongoing interest into a game. There is the old adage in business (and marketing) that you should sell the solution to the problem you help create. Years ago, no one would have batted an eye at a game that only had a stock character model of only red and blue teams for a video game, with no customization. This problem was created. To reiterate, they got you coming *and* going. And why would they change?

Current Perceptions of Slot Machines

Finally tying this back to criminal law, the Canadian Criminal Code (CCC) has provisions which specifically handle gambling related activities of a wide nature, found under section 201.¹¹ While under the definition of “lottery scheme” there is specific mention of means, contrivance or operation that is operated via computer or video device.¹² This may become useful as we move

¹⁰ As I am familiar with it.

¹¹ *Criminal Code*, RSC 1985, c C-46, s 201 (CCC).

¹² *Ibid*, s 207(4)(c).

forward. Of interest to us, oh reader mine, is under CCC section 206, which lists a wide array of the possible forms and mannerisms of gambling. Specifically, subsection (e) which states that an individual is guilty who:

conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;¹³

Thankfully, this is a wonderfully wide-reaching CCC provision. Working from top to bottom here, we can examine loot boxes.

The action of exchanging either money directly or an in-game currency used as proxy for real money, could be taken to be the “on payment of any sum of money”. Perhaps even more applicable using a broader construction is the notion of “giving of any valuable security”. The provision goes on to state that the original party who is putting up the sum of money will be owed by the operator or designate of the scheme something of value more than what they put in. Given that some loot box items are tradable in certain games, this could be the case.¹⁴

Otherwise, value could be ascribed on a community perceived basis – such as via a free market. Assuming that is true, the next part is of greater issue. The scheme and reward must be done by virtue of the fact that other persons have put money into the scheme (or pool). The applicability of loot boxes falls apart here. Specifically, the developer or publisher does not need a large amount of people to put out a viable loot box scheme/mechanic. As long as one person is willing to pay money to purchase a loot box, the publisher will profit. They are not pooling a large amount of funds in order to pay out prizes or rewards. The closest argument for this train of thought would be to say that the purchasers of the game broadly are helping to support the creation of the loot box mechanic by helping front the capital. This is akin to blaming people who ate at a casino’s restaurant for ‘perpetuating’ the gambling, whereas all they wanted was a Prime Rib buffet.

Additionally, the fact that a publisher can make a profit on only one person makes the comment regarding community perception of value an extremely difficult aspect. A community perception of value leaves a vacuum. There is a disproportionate amount of cost distributed between the amount of money paid to play versus the amount to introduce the mechanic. All the developer is doing is placing an item in an inventory at no cost to them (unlike a casino making an actual payout). This could cause a large shift in the in-game marketplace based on inflation for the item. Namely, other players and not the developer may be taking a value hit because their items are worth less now. It should come as no shock by now that in-game economies are surprisingly robust in certain contexts.¹⁵ This would truly be a headache to attempt to regulate, but would be possible.

¹³ *Ibid*, s 206(1)(e).

¹⁴ Such as in *Rocket League*.

¹⁵ Wikipedia, “Virtual Economy” (6 October 2019), online: <https://en.wikipedia.org/wiki/Virtual_economy#Recent_developments>

Provincial Legislation

Utilizing a bit of legal analysis here we can view a Canadian perspective on the closest game of chance to Loot boxes: Slot Machines. Under CCC section 207, the federal government grants the option for provincial legislatures, separately or jointly, to conduct and manage a lottery scheme (read gambling authority) within that province.¹⁶

Thankfully, we can turn our gaze west, to *The Slot Machine Act of Saskatchewan*.¹⁷ Knowing that the provinces now have authority to regulate such things, we can peer across the legislatures of this great nation to see how this one-armed bandit has been rounded up. The humble one-armed bandit is defined as thus:

2. Interpretation "slot machine"

In this Act "slot machine" means any automatically or mechanically, or automatically and mechanically, operated contrivance or device that upon or subsequently to the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disk, slug or other substance and upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or returns or purports to deliver or return to any person, either with or without any article of merchandise or any goods, any money, premium, prize, reward, token, counter, disk, slug, or any thing that is intended to be or capable of being exchanged for money or money's worth or that may be replayed or re-inserted in the contrivance or device to again set it in operation.

Working from top to bottom here, we can examine loot boxes. Loot boxes and the general structure of "video game" would certainly fall under the term "automatic". While a "device" is used to access the loot box and to house the loot, you are not necessarily plugging quarters into it, so that may not apply. However, "contrivance" can be taken to mean the use of skill to bring something about or create something.¹⁸ The use of skill in this circumstance could be the diligence of the producer and developer to create a program which permits them to bring forth this opportunity. Further, the loot box certainly creates something: it gives you some manner of in-game item that you did not previously have. This would also certainly fit the requirement of "bring something about".

The next part gets a bit tricky: insertion. There is certainly an inability to plug those aforementioned quarters into your PlayStation; I wouldn't suggest placing them into the disk drive. Notwithstanding, in the CCC under section 207(4)(c) a lottery scheme, which can be regulated by the provinces, can be considered to be operated on a computer or video device.¹⁹

Finally, we get to a point of introspection. If the definition of slot machine requires that some manner of currency is plugged into it, then slot machine legislation may not be the most applicable statute governing loot boxes operation. This could be another aspect of divergence which prevents true comparison.

¹⁶ CCC, *supra* note 11, s 207(1).

¹⁷ *The Slot Machine Act of Saskatchewan*, RSS 1978, c. S-50.

¹⁸ Lexico (Oxford) Online Dictionary, *sub verbo* "contrivance".

¹⁹ CCC, *supra* at note 11, s 207(4)(c)

Updates on Loot Box Legislation

Currently, there has been a bold attempt by American Senator Josh Hawley of Missouri to place restrictions on loot boxes in videogames targeted at children the aptly named “Protecting Children from Abusive Games Act”.²⁰ In the bill, Senator Hawley aims at eliminating loot boxes directed towards children.²¹ Jason Schreier of *Kotaku* interviews Senator Hawley, who is keen to put the spotlight on children.²² “Adults can for sure be exploited. I think that children—there are a couple of things as we know in a variety of contexts, whether it’s casinos proper or public health issues, we often look at kids and say they’re uniquely vulnerable.”²³ Unlike Canada, The bill must first pass through Congress, which has the power to legislate on matters that concern interstate commerce.²⁴

Where I may diverge in issue from Senator Hawley is on the inclusion of purely Pay-to-Win (PTW) Microtransactions. Schreier specifically questions Senator Hawley on his inclusion of the PTW mechanic, which is used to progress faster in a game. Schreier takes issue with that “And it is meant to induce obviously further playing, but also further spending of money. So it works in much the same way I think. The same arguments would apply.” I beg to differ. PTW mechanics do not necessarily use Variable-Ratio reinforcement to progress quicker in a game and therefore do not have the same psychological mechanic linking them to gambling (see previous blog for details).²⁵ Therefore, as irritating as they might be to other gamers, I do not believe they should be included explicitly in any particular loot-box focused bill.

A seemingly common complaint is that there are already parental controls in place to help minimize the impact of this problem for parents. The head of the Entertainment Software Association (an industry body) Stanley Pierre-Louis claimed “We look forward to sharing with the senator the tools and information the industry already provides that keeps the control of in-game spending in parents’ hands. Parents already have the ability to limit or prohibit in-game purchases with easy to use parental controls.”²⁶ This is certainly the case and is one more tool for a concerned parent. Notwithstanding, if, for example, a child is drinking under the age of 18, it does not mean that the law cannot be used to supplement parents’ disciplining behaviour and keep substances or activities out of reach for widely agreed upon topics in society. There is an even further point to be made; a parent may choose to let a teenager have a glass of wine at home with dinner, but there is enough evidence attached to the sentiment that children should not drink (and with good reason) as a broad norm within Canadian society and its laws. A store clerk or bartender being mandated under threat of monetary fine / discipline to ask for your identification card is one example of this. The current system has cracked open the keg for all. Yet, only a select few children whose parents are diligent are being asked for an ID card which states that their parents do not want them to drink. Further, the accountability aspect of parenting is important, but it also implies that parents know fully what is

²⁰ Charlie Hill, “US senator wants to legislate loot boxes in games targeted at children” (8 May 2019), online: *Polygon* <<https://www.polygon.com/2019/5/8/18537026/loot-box-bill-children-legislation-josh-hawley-senator>>

²¹ Jason Schreier, “U.S. Senator Says His Anti-Loot Box Bill Has The Video Game Industry Worried” (21 May 2019), online: *Kotaku* <<https://kotaku.com/u-s-senator-says-his-anti-loot-box-bill-has-the-video-1834905639>>

²² *Ibid.*

²³ *Ibid.*, Josh Hawley, as quoted in Jason Schreier.

²⁴ Congressional Research Service, “Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases” (27 March 2013), online: <<https://www.everycrsreport.com/reports/R43023.html>>

²⁵ Jason Schreier, *supra* note 21; Evan Podaima, *supra* at note 1.

²⁶ As quoted in Charlie Hill, “US senator wants to legislate loot boxes in games targeted at children” (8 May 2019), online: *Polygon* <<https://www.polygon.com/2019/5/8/18537026/loot-box-bill-children-legislation-josh-hawley-senator>>

occurring in the digital world.²⁷ I place little optimism in this regard as referenced in my previous blog.²⁸

In a critique of the bill, Toronto lawyer Alexandria Chun blogs that “there’s a point where the law just becomes paternalistic. I’m all for regulation and guidelines that encourage a better, safer society. But the law must operate without overly interfering with economic choice or removing responsibility from the citizens it’s meant to protect.”²⁹ I take issue with the latter caveat. In this case, the citizen in question is a child, one who we have already determined via provincial age of majority legislation in each Canadian province, is not responsible enough to gamble. By their very definition, the implication for their legal status is that children are inherently irresponsible. In my opinion, I am at peace with the idea that a law targeting children and that is concerned with their protection is paternalistic. Should a Canadian bill of similar ilk be proposed, the criminal law power possessed by parliament applies to matters of public morality and health.³⁰ Protecting children surely falls under either of those grounds.

Economic situations (as referenced by Alexandria Chun above) provide consideration into the feasibility. This is also referenced by Owen Good in his piece *Anti-loot box bill poses a real threat to sports video games*.³¹ The subtitle, quite fittingly, is “How else are those billion-dollar licenses paid?”³² EA’s FIFA and the estimated \$800 million from that franchise *alone* make it a sticking point for legislation.³³ The sheer amount of money brought in (“EA’s “live services” revenue, ...\$2.2 billion) will certainly involve lobbyists working diligently on behalf of the publishers to ensure the cash cow is kept healthy. The licenses needed to secure these rights are lucrative (\$1.1 billion over 7 years for the NBA).³⁴ As mentioned *supra*, the market and business model of video games has shifted. The model can be rolled back to how things were before.

In another comment, Stanley Pierre-Louis, stated that “Numerous countries, including Ireland, Germany, Sweden, Denmark, Australia, New Zealand, and the United Kingdom, determined that loot boxes do not constitute gambling.”³⁵ First, the criminal laws of one jurisdiction or state actor should not necessarily affect the likes of others. Societal influences and morals play a large part in shaping the actions people want to consider acceptable or heinous. Credit must be given to this perspective. People can wind up fleeing countries for safer havens due to laws perceived to be unfair. It is not to say that the opinions of the Germans or Danish are inherently unreasonable, nor that we shouldn’t take the opinions of other jurisdictions into contemplation, but that those viewpoints are not necessarily right for Americans or Canadians based on our culture and moral beliefs. Second, regarding the coalition between Microsoft, Nintendo, and Sony, the console makers themselves are realizing that there should be more transparency surrounding loot boxes. In my view,

²⁷ Alexandria Chun, “Loot Box Legislation... Just Stop Already” (7 June 2019), online (Blog): *Spark LLP* <<https://spark.law/video-game-law/loot-box-1/>>

²⁸ Evan Podaima, *supra* at note 1.

²⁹ Alexandria Chun, *supra* at note 27.

³⁰ *Re Margarine Reference*, [1950] UKPC 31, [1951] AC 179.

³¹ Owen Good, “Anti-loot box bill poses a real threat to sports video games” (1 June 2019), online (blog): *Polygon* <<https://www.polygon.com/2019/6/1/18648907/anti-loot-box-law-congress-josh-hawley-senate-nba-2k-fifa-ultimate-team>>

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ As quoted in Charlie Hill, *supra* note 26.

there should be further caution when the maker of a product issues a caveat. If the cook is warning you about something he made, shouldn't that be cause for concern?

Conclusion:

If the past few months have taught us anything, it is that the concern surrounding loot boxes will not disappear. The video game industry and business model has shifted in a way to encourage loot box mechanics. The legislation found in the CCC may not be inclusive of the loot boxes, nor the provincial legislation which utilizes the delegated power from parliament. Ultimately, the ability for Canadian parliament to legislate using the criminal law power on matters concerning public health and morality creates an opportunity for parliament to step in.³⁶ This matter is far from being completed.

³⁶ Should they so choose.