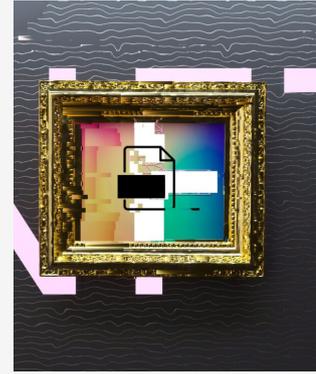


# When games become gambles – criminal law implications of ‘pay to earn’ NFT games

OCTOBER 20, 2022 6 MIN READ



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Online gaming is big business, and only growing in size.<sup>[1]</sup> An important aspect of this booming market are non-fungible tokens (NFTs), which permit users to buy, sell and trade ownership interests in in-game assets. The global marketplace for NFTs has enabled an evolution in gaming, from the traditional ‘pay to play’ model (you buy the game, you play) to ‘play to earn’ (you play the game, you earn an NFT, you sell the NFT) – most famously, helping rural villagers in the Philippines earn income from home during pandemic lockdowns. The game they played, called Axie Infinity, recently passed US\$4 billion in total trading volume.<sup>[2]</sup>

Making money from gaming may sound too good to be true – and in some cases, it is. Where ‘pay to play’ and ‘play to earn’ intersect to become ‘pay to earn’, the ‘game’ can become a ‘gamble’ for both the user and the operator.

## Games of chance generally prohibited under *Criminal Code*

In Canada, gaming and gambling are primarily regulated as criminal law matters under the federal *Criminal Code*.<sup>[3]</sup>

Generally, the *Criminal Code* prohibits games that are fundamentally premised on: (a) the payment of money (or money’s worth) by the user; and (b) the possibility that the user can earn money (or money’s worth) from playing. More particularly, section 206 of the *Criminal Code* prohibits, among other things, the following:

1. Games of chance – It is an offence to dispose of any good, ware or merchandise by any “game of chance or any game of mixed chance and skill” in which the user pays money or other valuable consideration in order to play.<sup>[4]</sup> While there is arguably an element of chance in every game, the reference to “game of chance” in the *Criminal Code* “contemplates not the unpredictables that may occasionally defeat skill but the systematic resort to chance involved in many games such as the throw of dice, the deal of cards.”<sup>[5]</sup>
2. Swapping-up – It is an offence to conduct any operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, shall become

entitled to receive a larger sum of money or amount of valuable security than the sum or amount paid or given.<sup>[6]</sup> (Notably, an element of chance is not required with respect to this prohibition.) The term “valuable security” is defined as meaning, among other things, “a document of title to lands or goods wherever situated” and “a stamp or writing that secures or evidences title to or an interest in a chattel”.

Section 202 of the *Criminal Code*, relatedly, prohibits betting and pool selling.<sup>[7]</sup> Betting is not the subject of this article, but bears mentioning as we have observed instances of betting in the online gaming space (in particular as it relates to e-sports).

Importantly, the foregoing prohibitions will not apply where the user does not have to pay to play.<sup>[8]</sup> The case law also suggests that the prohibitions will not apply where the ‘prize’ to be won is of minimal value or merely incidental to the game (i.e., where the dominant purpose of the game is to have fun, rather than to earn money or money’s worth).<sup>[9]</sup> Nor will the prohibition on “games of chance” apply with respect to games of “pure skill”, although it should be noted that games of “pure skill” are rare.<sup>[10]</sup>

As to whether these prohibitions apply to pay to earn NFT games, the answer is (as is often the case): it depends. NFTs are not specifically described or defined in the *Criminal Code*, and the relevant provisions have not yet been interpreted by Canadian courts with respect to pay to earn NFT games. While the courts have recognized the need to “interpret legislation in a manner that reflects current day technological reality”,<sup>[11]</sup> suggesting that the prohibitions could apply to pay to earn NFT games, the application of Canadian criminal law requires that “prohibited conduct must be fixed and knowable in advance”.<sup>[12]</sup> Ultimately, the application of the prohibitions to pay to earn NFT games is an issue that will require judicial determination on a case-by-case basis.

## *Criminal Code* implications on pay to earn NFT games

As noted above, many online games that require payment to play (for example, the purchase of in-game tokens for cash) provide an opportunity for users to earn NFTs that can be traded and sold for money or money’s worth.

An interesting question may arise, in such cases, as to whether the NFT qualifies as a good, ware or merchandise (as it relates to the prohibition on games of chance), or as a “valuable security” (as it relates to the prohibition on swapping-up). This is uncharted territory. The mere fact that an NFT is non-fungible, for example, does not mean it is not a good, ware or merchandise; just like a unique baseball card or a diamond. And while an NFT is arguably different than a “document” or a “stamp or writing”, the very purpose of an NFT is to evidence title over (digital) assets (and as noted, courts have recognized the need to interpret legislation in a manner that reflects modern technological reality).<sup>[13]</sup>

Some pay to earn NFT games may not be captured by the *Criminal Code*, of course, for example games of pure skill (which are rare) that do not constitute ‘swapping-up’, or games where the ‘prize’ to be won is of minimal value (that do not constitute betting or pool selling). In many other instances that we have observed, however, we would expect that the above-noted *Criminal Code* provisions will apply. Purveyors of online games should ensure that due consideration is given to these prohibitions, ideally at the ideation stage.

For questions regarding these trends or any inquiries relating to Canada’s digital asset ecosystem, please contact the members of Osler’s [Digital Assets and Blockchain Group](#) and

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[1] Many commentators expect the global gaming industry to exceed a value of \$300 billion some time this decade.

[2] According to statistics published [online](#).

[3] Other statutes may also apply, which are beyond the scope of this post. For example, the federal *Competition Act* has provisions relating to promotional contests.

[4] *Criminal Code* at s. 206(f).

[5] *Ross, Banks and Dyson v. The Queen*, 1968 CanLII 21 (SCC), [1968] SCR 786.

[6] *Criminal Code* at s. 206(e).

[7] Section 204 of the *Criminal Code* explicitly provides that section 202 does not apply to “a private bet between individuals not engaged in any way in the business of betting”.

[8] (1982), 39 OR (2d) 314 (CA).

[9] For example, where the ‘prize’ was a free coffee paid for by the loser of the game: [1986] 1 SCR 250 at para. 29.

[10] For example, poker is typically described as a game of “mixed chance and skill”, notwithstanding that it is primarily a game of skill, as the initial distribution of cards is a matter of chance: [1967] 2 O.R. 420 (C.A.) at para. 11.

[11] Bearing in mind that courts may not adopt an interpretation that is contrary to the plain meaning, the underlying intent or purpose of the legislation. See *Canadian Security Intelligence Services Act (CA) (Re)*, 2020 FC 757 at para. 130.

[12] 2013 SCC 25 at para. 33, citing various authorities.

[13] This should not be read as a statement that NFTs are securities under securities law. See, further, CSA Staff Notice 46-308, Securities Law Implications for Offerings of Tokens.