

## CANADA

# One Cup of Coffee

## Gambling, Social Games and Virtual Currency in Canadian Law

By Michael D. Lipton and Jack Tadman



*“If you would know the value of money, go and try to borrow some.”*

—Benjamin Franklin,  
Poor Richard’s Almanack

In order for a game to be considered a gambling game for the purposes of the Canadian *Criminal Code* (the “Code”), that game must be a game of chance or mixed chance and skill<sup>2</sup> in which the participants have a chance to both win and lose money or money’s worth.

Social games are “structured activities which have contextual rules through which users can engage with one another. Social games must be multiplayer and have one or more of the following features: are turn-based, are based on social platforms for providing users with an identity and are casual.”<sup>3</sup>

Virtual goods are objects such as characters, items, currencies and tokens that exist inside online games and hangouts.<sup>4</sup> Virtual currency is currency used to buy virtual goods.

Social games invariably include virtual currency. Virtual currency can be purchased for real money and bought and sold for real money on the black market (albeit contrary to the social game’s terms of use).

If a social game, which is also a game of mixed chance and skill, is

structured in a way so that players have a chance to both win and lose virtual currency, is the game considered a gambling game?<sup>5</sup>

### Chances Are: When is a Prize not a Prize?

*“Winning and losing money or money’s worth must be a result, direct or indirect, of wagering or hazarding a stake prior to or during the game.”*

— Justice Lamer, *Di Pietro*

“Chance” for the purpose of the gaming and betting provisions of the code was summarized as follows: “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>

The requirement that participants have a chance to win and lose money or money’s worth was addressed in *Di Pietro*. In *Di Pietro*, the Supreme Court of Canada held that a cup of coffee, purchased at the end of the evening by the losers of a card game for the winners, was not sufficient to constitute “putting up a stake”. According to the Court, the players:

had merely, in a sense, found a convenient way for taking turns at who would purchase drinks which they would normally con-

sume as part of the evening’s amusement. The winners were not eligible to win any sort of prize, as the cups of coffee that were being consumed on the premises as part of the evening’s entertainment would not qualify as such. The fact that someone else might pay for the coffee was not, in my respectful view, an indication that the participants were winning money or money’s worth.<sup>6</sup>

### Rat Race: Real Costs of Virtual Goods

*“The real price of everything... is the toil and trouble of acquiring it.”*

— Adam Smith

The prevailing view with respect to social gaming sites that involve games of chance or games of mixed chance and skill is that as long as the prizes to be obtained are virtual, players are not able to win money or money’s worth. However, if the virtual currency has a monetary value, players may stand to both win and lose money or money’s worth.

Assuming that that the value of a good refers to the worth of that item as determined by the market, virtual currency has a real cash value. Virtual currency can be purchased, either law-

fully from the game operator or from a third party on the black market. Virtual currency can also be obtained through gameplay.

Buying and selling virtual goods emerged in the late 1990's when players from Massively Multiplayer Online Role Playing Games (MMORPGs) traded virtual items on eBay. As of 2009, the "gold farming" industry (selling virtual goods to third parties) was valued at more than US \$3 billion.<sup>7</sup>

In 2011, a British man was convicted of theft after stealing over 400 billion poker chips from the game Zynga Poker. Zynga valued the amount of the chips stolen at US \$12M. In this case, the court recognized virtual currency as legal property which can be protected by criminal laws in the United Kingdom.

If virtual currency is legal property, it follows that it must have some monetary value. If virtual currency has some monetary value, then there is a monetary value associated with winning and losing virtual currency.<sup>8</sup> For example, consider a social gaming site that offers free poker. Players at that site have a chance to both win and lose money's worth. The prize is more poker chips, which could potentially be sold on the black market. It should be noted that social gaming sites prohibit unauthorized resale of virtual currency; however, the practice of reselling virtual currency is widespread.

## One Cup of Coffee: When is the exchange of virtual currency a "stake"?

*As it appears to me, the object of our statute is not to prohibit the purchase of mints or other similar articles or to prohibit harmless amusement that costs nothing, or to prohibit playing for love, but rather to abolish the temptation and convenience which common gaming resorts afford to the inhabitants of the Commonwealth for injuring their fortunes by losing their money in gaming at such resort.*

—Justice Masten, *R. v. Wilkes*

In *Di Pietro*, the Supreme Court held that a cup of coffee bought by the losers of a card game (at the end of the evening) for the winners was insufficient to constitute a prize, despite the fact that a cup of coffee has a value attached to it.<sup>9</sup>

As part of its analysis, the Court looked at the spirit of the law:

People did not go to the *Di Pietro*'s to win drinks, but to play cards. Playing cards was not a means to an end, winning money or money's worth, but an end in itself. The whole evening of playing cards was more in the nature of amusement than in the nature of betting and gaming as defined by the common law and by the Criminal Code.<sup>10</sup>

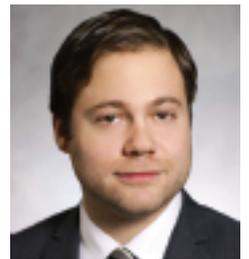
*Di Pietro* provides evidence that the Supreme Court favours a flexible, contextual approach to determinations of money or money's worth. The Supreme Court distinguishes between activities which are "in the nature of amusement" and activities which are in the nature of betting and gaming. Are social (gambling) games played for the sake of the game or to win money or money's worth?

Canadian courts have also held that a vending machine that charged five cents to dispense mints and occasionally dispensed a token in addition to the mint that could be redeemed for a "humorous legend"<sup>11</sup> and a pinball machine where the only prize was a free game did not constitute gaming for the purposes of the Code.<sup>12</sup>

Is obtaining virtual currency by playing a social game a harmless amusement? Does the use of virtual currency facilitate the playing of social games, or is the point of a social game to obtain virtual currency? Is the value of virtual currency insufficient to be considered a stake? Is it relevant that social gaming sites prohibit the resale of their virtual currency,



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meaning that virtual currency can only be bought from or sold to third parties contrary to a game's terms and conditions?

The interaction between virtual currency and social gaming has blurred the lines between gaming and gambling. Some countries, such as South Korea and China, have elected to regulate the sale of virtual goods (including currency). Regulating the sale of virtual currency implies that virtual currency has a monetary value. If virtual currency has a monetary value, and it is staked by a player in a game of chance or mixed chance and skill, that player could lose money or money's worth. If virtual currency is used as a prize, a player could win money or money's worth. Thus, social gaming which involves a game of chance or mixed chance and skill and uses virtual currency as consideration and as a prize would satisfy the Canadian test for gambling, namely that a game must be a game of chance or mixed chance and skill in which the participants have a chance to both win and lose money or money's worth. ♣

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<sup>2</sup> R.S.C. 1985, c. C-46.

<sup>3</sup> *Ibid.*, s. 197.

<sup>4</sup> *Di Pietro v. R.* [1986] 1 S.C.R. 250. [hereinafter *Di Pietro*].

<sup>5</sup> N. O'Neill, 'What exactly are social games?', 2008. Retrieved from <http://www.socialtimes.com/2008/07/socialgames/>

<sup>6</sup> V. Lehdonvirta, 'Virtual item sales as a revenue model: identifying attributes that drive purchase decisions', *Electronic Commerce Research*, 9, 1-2, 2009.

<sup>7</sup> *Supra* note 4 at para. 26.

<sup>8</sup> *R. v. Ross* [1968] S.C.R. 786, 4 C.R.N.S. 233, [hereinafter *Ross*].

<sup>9</sup> *Supra* note 4 at para 29.

<sup>10</sup> Dr. Vili Lehdonvirta & Dr. Mirko Ernkqvist, *The World's Bank Knowledge of the Virtual Economy*, Infodev: April 2011.

<sup>11</sup> There may be exceptions to this, one of which would be if a social gaming company would be able to design a game where it would be impossible for users to engage in virtual currency transactions with a 3<sup>rd</sup> party.

<sup>12</sup> *R. v. Wilkes*, [1930] O.J., No. 49.

<sup>13</sup> In Canada, a large Starbucks specialty coffee costs more than \$5.

<sup>14</sup> *Supra* note 4 at para 29.

<sup>15</sup> *Supra* note 13 at para 8.

<sup>16</sup> *R. v. Zippilli* (1980) 54 C.C.C. (2d) 481 (Ont. C.A.) [hereinafter *Zippilli*].