SBG-Skill Based Games Inc. v. Ontario (Registrar, Alcohol and Gaming Commission)

Ontario Judgments

Ontario Superior Court of Justice

S.S. Nakatsuru J.

Heard: July 17, 2025.

Judgment: August 28, 2025.

Court File No.: CV-08-00359918

[2025] O.J. No. 3765 | 2025 ONSC 4938

Between SBG-Skill Based Games Inc., Applicant, and Registrar, Alcohol and Gaming Commission of Ontario, Respondent

(39 paras.)

Counsel

Scott C. Hutchinson, Brandon Chung, for the Applicant.

Ananthan Sinnadurai, Michael J. Sims, for the Respondent.

S.S. NAKATSURU J.

A. OVERVIEW

1 In 2019, the Court of Appeal for Ontario decided that a previous version of "GotSkill", an electronic terminal game licensed in Canada by SBG-Skill Based Games Inc., was a game of mixed chance and skill for the purposes of s. 197(1) of the *Criminal Code* R.S.C. 1985, c. C-46. The Court of Appeal came to that conclusion because the game's operation included a systematic resort to chance: players were induced to wager, even when they were guaranteed to lose, in the hopes of uncovering prizes of value in future rounds of the game: ***Play for Fun*** *Studios Inc. v. Ontario (Alcohol and Gaming Commission of Ontario)*, 2019 ONCA 648, 56 C.R. (7th) 465 [***Play for Fun***], at para. 26.

2 Since then, the applicant has changed GotSkill in the hopes that it is now a game of skill only so that it can continue distributing and offering it to 180 mainly licensed establishments in Ontario.

3 But to do that, GotSkill cannot fall within s. 43(1) of *Licensing* O. Reg. 746/21 passed under the *Liquor Licence and Control Act 2019*, S.O. 2019, c. 15 Sch. 22, which prohibits the holders of liquor licences from allowing unlawful gambling on licensed premises. The parties agree that if the modified version of GotSkill still constitutes a game of mixed chance and skill as described by s. 197(1) of the *Criminal Code*, it cannot be operated at licensed establishments.

4 The Registrar of the Alcohol and Gaming Commission of Ontario ("AGCO") concluded that the modified GotSkill remains such a game and issued a bulletin requiring liquor licence holders to remove it from licensed premises.

5 This Rule 14 application raises a single question: whether GotSkill remains a game of mixed chance and skill despite the changes.

6 I find that it does. There remains a systematic resort to chance in how the game incentivizes the players to spend money in the hopes of uncovering a valuable round in the future.

B. BACKGROUND

1. The Game as it was Before the *Play For Fun* Decision

7 It is useful to summarize the operation of GotSkill before the changes were made. I can do no better than duplicate what the Court of Appeal did in adopting the original application judge's description of the game. Justice Schreck wrote in ***Play For Fun*** *Studios Inc. v. Registrar of Alcohol, Gaming and Racing*, *2018 ONSC 5190*, at paras. 5 to 16:

> A. How GotSkill Works
>
> (i) Introduction
>
> GotSkill consists of a terminal with a touch screen. A person wishing to ***play*** GotSkill must purchase game tokens, which are provided electronically on a card which the player can swipe on the terminal. When the card is swiped, the game's terms and conditions appear on the screen. The player must accept these in order to ***play***. At the commencement of the game, the player is asked to choose one of a number of different "themes", which are cosmetic and which have no impact on how the game is ***played***.
>
> ...
>
> (ii) The "Potential Next Win" and the "Amusement Phase"
>
> Once a theme is chosen, the terminal displays the "potential next win", which represents the amount the player can win if she chooses to place a wager. Whether or not the player wins will depend on her ability to complete the "skill task" described below. Of note, the value of the potential next win is pre-determined and the player is aware of it before deciding whether or not to ***play***.
>
> If the player chooses to ***play***, he or she must decide how many credits to wager. The amount of the wager depends on the value of the "base entry", which will be between eight and 25 credits, and the "entry level", which is a number by which the base entry is multiplied. Each theme has a fixed base entry which may vary between themes. The player is able to increase or decrease the entry level and thereby choose how much to wager. Thus, before deciding whether or not to ***play***, the player is aware of the potential next win and has chosen how much she wishes to wager.
>
> After the player has determined how much to wager, the game proceeds through an "amusement phase" which consists of various onscreen animations resembling a slot machine. This has no impact on the outcome of the game.
>
> (iii) Where the Potential Next Win is Greater than Zero -- The "Skill Task"
>
> If the potential next win is greater than zero, the player is given an opportunity to perform the "skill task". This consists of a cursor moving back and forth at a constant speed across an area with 21 bars. Each bar is assigned a percentage value of between 55% and 110%. Once the player presses the "stop button", the cursor stops moving. The challenge is to stop the cursor as close to the middle of the area as possible. The closer the cursor is to the middle when it stops, the greater the percentage. The outcome depends entirely on the player's hand-eye coordination. Once the game is complete, the player's "actual win" is the product of the percentage value and the amount wagered.

There does not appear to be any dispute that this aspect of the game is dependent solely on skill and not chance.

(iv) Where the Potential Next Win is Zero

If the potential next win is zero, then the player can choose whether to continue ***playing***. If she does, then she must wager the minimum number of credits. Doing so will result in the amusement phase, but the player will not be provided with any opportunity to complete the skill task and will necessarily lose the amount she has wagered. The player will then be presented with a new potential next win.

B. How the Game is Programmed to Work

The value of the potential next win is pre-determined. The values come from "tickets" which the game selects from a list of 1,000 tickets contained in a "file". Files are arranged in groups of 1,000, which are known as "pools". Each theme on each terminal has its own set of pools.

The first ticket is randomly selected by the game the first time it is ***played***. Thereafter, the tickets are selected in the sequence in which they appear in the file. When one player finishes ***playing***, the next player's potential next win will be based on the next ticket in the sequence. The sequences of the tickets is initially randomly generated, but steps are taken to avoid there being too many zero-value tickets in a row.

Players do not have access to the tickets. As a result, while a player knows the potential next win for the round she is about to ***play***, she does not know what the potential next win will be for the following round [or] any after that.

C. Possible Outcomes over Multiple ***Plays***

Files are designed in such a way that if a player were to ***play*** all 1,000 tickets and score 100% on the Skill Task every time, she would receive an overall pay out of 94% of the amount wagered. A player who scores 110% each time will win more than she wagers. As described in the affidavit of the applicant's Chief Executive Officer, "[i] f the player consistently obtains 110% on the Skill Task then they can 'beat' the game and receive a profit." The respondent did not challenge this evidence.

2. The *Play For Fun* Decision

8 Justice Schreck determined that GotSkill was a game of skill. This was overturned by the Court of Appeal.

9 Essentially, Juriansz J.A. reasoned that Justice Schreck found that chance was present in GotSkill when he found that the incentive in continuing to ***play*** was to gain an opportunity to win a greater prize which might or might not be available, depending on chance. According to Juriansz J.A., this should have led to the conclusion that there was a systematic resort to chance in GotSkill. The proper analysis had to consider the ordinary player engaging in multiple rounds of the game. The application judge erred by overemphasizing the fact that highly skilled players could beat the game and that chance was not the dominant element of the game. The presence of any chance element, regardless of its dominance, was sufficient to classify GotSkill as a game of mixed chance and skill.

3. GotSkill's Modifications

10 Since 2019, the game was changed to try and meet the concerns raised in ***Play for Fun***.

11 Three modifications have been made to the game:

(1) The number of potential next wins the player can view has been increased. Prior to 2019, only one such next win was viewable. In the present version, before paying any money to ***play***, a player can choose to see the next five potential wins for any theme and entry level they select. They can view this if they push a small blue button on the screen labelled "Next Wins/Menu". To see all five of the potential next wins, the player must scroll through the five screens for that theme and entry level. For all themes and entry levels, a total of 1,300 tickets could potentially be viewed.

(2). The terms and conditions of the game which comes up prior to game ***play*** have been updated to reference the ability to see the next five potential wins. Players must acknowledge and accept the terms and conditions before they are able to ***play*** the game.

(3). The option now exists to perform the skill bar task on zero-value tickets. Previously, if a player had a zero-value ticket, the skill bar task would not appear, and the game would progress to the next ticket.

C. ANALYSIS

12 The determination of this application is driven by the answer to the question "whether there is a 'systematic resort to chance'" in the "normal course of ***play*** of an 'ordinary player' of the game": ***Play for Fun***, at para. 25.

13 A systematic resort to chance is distinguishable from the unpredictability in the game that may defeat skill: *Ross, Banks and Dyson v. The Queen*, [1968] S.C.R. 786, at p. 791; *R. v. Riesberry*, 2015 SCC 65, [2015] 3 S.C.R. 1167, at para. 14. Moreover, a systematic resort to chance must be part of or built into the game itself: ***Play for Fun***, at para. 7.

14 As well, the normal course of ***play*** of an "ordinary player" likely to ***play*** the game must be the perspective that is considered. In the context of GotSkill, this is "the player who ***plays*** multiple times", not simply someone who picks up the game for the first time and is trying to learn how to ***play*** it: ***Play for Fun***, at para. 19, citing *R. v. Balance Group International Trading Ltd*. (2002), 162 C.C.C. (3d) 126 (Ont. C.A.), at para. 1.

15 With these principles in mind, I turn now to the facts presented in the case at bar.

16 Of the modifications, I find only the first one to be of any true substance. Practically speaking, the fact that a player must acknowledge the detailed terms and conditions of the game neither performs much of an educative function nor does it have significance in determining whether GotSkill is a game of mixed skill and chance. As well, an option to be able to ***play*** a zero-value ticket, whether for practice or fun, as the applicant contends, has no probative weight on the singular question I must decide.

17 I find that GotSkill remains a game of mixed chance and skill for the following reasons.

18 In this version, the ordinary player still chooses to spend money for the opportunity to get something of greater value as they continue to ***play*** rounds of GotSkill. Whether they get that opportunity depends upon systematic chance. The incentive in ***playing*** continues to be to gain this opportunity to win greater prizes, which depends on the systematic resort to chance. While the player now has more information about the potential future prizes as they ***play***, this does not fundamentally change the inherent nature of the game.

19 The design of GotSkill still builds in uncertainty. Beyond the five next potential wins, future prizes remain hidden. This induces players to wager on successive rounds with the hopes of revealing a significant prize. The size of that prize, though pre-set, varies. From the ordinary player's perspective, it depends upon chance.

20 This systematic resort to chance is illustrated by the fact that the player cannot view potential future wins beyond the next five. If they could view all potential future prizes in a simple, practical, and realistic way such that the ordinary player would resort to it, the uncertainty is eliminated and the incentive to keep ***playing*** will not depend on chance. Furthermore, the variability of the future prizes still supports this conclusion. One could imagine a game where the size of the prize remains the same on any future ticket thus removing any hidden opportunity to win big or bigger, thus eliminating the incentive based on chance to continue ***playing***. Such a version of GotSkill would be a game of skill only.

21 The applicant submits that a perfect or complete knowledge of every available future prize is not required. While I do not completely disagree with that position, nonetheless, in this version of the game, a systematic resort to chance remains. A systematic resort to chance can exist if a player must ***play*** a round, regardless of the prize, to

discover the prize in a future round. This attribute of a game of chance or mixed chance and skill has been recognized in the authorities for some time: *R. v. O'Meara* *(1915), 25 C.C.C. 16* (Ont. C.A.), at pp. 19-20; *R. v. Arnold* *(1927), 48 C.C.C. 101* (Ont. C.A.), at p. 104; *R. v. Richards* *(1931), 57 C.C.C. 208* (B.C.C.A.), at p. 210.

22 Moreover, the evidence led at the application also supports my conclusion.

23 As noted, the applicant submitted that a player could see the next five prizes available to them at any current entry level and within their current theme before committing any credits to wager. If they do not like the prizes presented, they can choose another entry level or a different theme and view available prizes there. If they do not like what they see as they investigate, they can choose not to ***play*** the game. Thus, the applicant argues that the uncertainty is eliminated or eliminated to the point where it becomes *de minimis*.

24 I do not find this persuasive. The evidence does not support that this is how the ordinary player ***plays*** the game.

25 Based on the applicant's experience to date with the game, in 2024, players in Ontario ***played*** approximately 27 minutes on average and spent $15-25 in credits per session. Players ***play*** an average of 122.8 rounds of the game per player session. A significant number of players do not use the "Next Wins/Menu" button at all.

26 From this data, the ready inference is that GotSkill players continue to ***play*** multiple rounds of the game at a time, and many do not view the next five potential next wins. Said differently, the ordinary player does not go through the deliberate calculations that the applicant suggests would result in this being a game of skill and strategy and that would therefore remove the element of chance. Of course, the question before the court cannot be determined based upon ignorant, unskillful or heedless players of GotSkill. However, the data supports the conclusion that the ordinary player still ***plays*** incentivized by future significant wins that might be uncovered by continuing to put money into the game.

27 As well, the fact that a player has the option to view 1300 different prizes in total by going to different entry levels or themes does not alter my view. As the respondent points out, in the previous iteration of GotSkill, the player could also move from theme to theme and entry level to entry level to see if there is a potential win they would prefer or like to ***play*** for, a total of 115 potential next win previews. Alternatively, they could choose not to continue and claim any balance on their account. However, this option technically available to the players, ***played*** no role in either the Superior Court or Court of Appeal's decision. Further, from a purely logical viewpoint, an ordinary player would not view all or even a substantial amount of the 1300 various permutations. Merely envisioning an ordinary player whose purpose is entertainment or reward in ***playing*** GotSkill, going through the lengthy and complicated behavior of changing themes and levels, clicking the "Next Wins/Menu" button numerous times, taking note of, or memorizing the available prizes, and analyzing which level or entry is the best to ***play***, answers the question of the probability of this realistically happening. It just would not.

28 I also observe that the very design of GotSkill's wagering system and prize amounts encourages the ***playing*** of GotSkill in quick successive multiple rounds with the hopes of winning big at some future session. This includes the relatively low value of the wagers, the brevity of each round ***played***, and the sequencing of potential prizes to avoid extended runs of zero value prizes that might discourage extended ***play***.

29 The following evidence supports this intention on the part of the designers of the game.

30 The value of each potential next win is pre-determined: it is the number associated with a "ticket" drawn in sequence from a list of 1,000 tickets in a spreadsheet, called a "file". Files are arranged in groups of 1,000, called a "pool". Each theme on a terminal has its own set of pools.

31 In the "representative file" of 1,000 tickets adduced by the applicant on this application, the available winnings range from $0 to $14.85. Fernando Di Carlo, an executive officer and shareholder of the applicant, provided evidence that the files were designed to avoid large runs (generally greater than 10) of zero-value tickets "to increase player satisfaction and GotSkill's playability."

32 Of the representative file produced by the applicant, a large majority of the tickets have zero or very little value. For example, 67.4% had $0 prize value. A further 26% had a prize value of under $1.00. Only .4% of the tickets had a value over $5.00. Files are designed so that if a player were to pay to ***play*** all 1,000 tickets, and scored 100% on the skill task, they would still lose approximately 6% of their money.

33 To wager in a game, the player must select a "base entry" (the minimum bet) and an entry level. Each theme has different base entries and entry levels. The lowest base entry in any of the themes is 20 credits and thus the minimum wager is $0.20. A GotSkill player betting the bare minimum, 20 cents, will lose money in almost 80% of the rounds they ***play***.

34 All told, I find that it is a reasonable inference that the game is designed to induce players to lose money, round after round, in the hopes of eventually uncovering a valuable ticket.

35 A final comment on the evidence. Just prior to releasing their bulletin, the AGCO commissioned and received a "BMM Forensic Evaluation Report" dated April 18, 2023, which concluded that GotSkill is a game of mixed chance and skill. This report and opinion were objected to by the applicant. In coming to my conclusion, I have ignored this report.

Conclusion

36 GotSkill remains a game of mixed chance and skill for the purposes of s. 197(1) because it continues to involve a systematic resort to chance in its operation. The game continues to hide the potential next wins available in future rounds, inducing its players to pay money to reveal each potential next win incrementally in the hopes of eventually discovering one of value.

37 While the extent of the uncertainty in GotSkill has been reduced in the modified game, it has not been eliminated. It is ingrained in the game.

38 Colloquially speaking, the bait may be different, but the lure of a big or bigger win based upon luck is still used.

D. Disposition

39 The application is dismissed. The parties have agreed no costs should be awarded regardless of outcome.

S.S. NAKATSURU J.

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