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June 10, 2026

# New Level Unlocked: Loot Box Class Action Survives Appeal

Video game “loot boxes” – digital mystery packages that generate random virtual items in exchange for real money – are a multi-billion-dollar business. But are they deceptive? Unconscionable? Illegal gambling? In *Electronic Arts Inc v Sutherland*, the British Columbia Court of Appeal weighed in on all three questions, dismissed both Electronic Arts’ (EA) appeal and Mr. Sutherland’s cross-appeal, and allowed a certified class action over the sale of loot boxes to proceed.

## Background

The representative plaintiff, Mark Sutherland, brought the underlying claim on behalf of a proposed class of BC residents who paid for loot boxes in 77 of EA’s online video games since 2008. The games span sports franchises such as Madden NFL and FIFA, multiplayer battle games such as Apex Legends, and simulation games such as SimCity BuildIt. In each, loot boxes generate virtual items (some functional, some purely cosmetic) whose specific contents are unknown to the user before purchase.

The core concern is straightforward: consumers pay real money for a chance at desirable virtual items, but the odds of obtaining those items may be vanishingly small, and EA allegedly either did not disclose or inadequately disclosed the true probabilities. The allegation is that EA structured these transactions to drive spending while obscuring the real likelihood that consumers would get what they paid for.

Mr. Sutherland’s claim focuses on loot boxes purchased directly or indirectly with real money. The specific items a loot box generates are determined by an algorithm that includes some element of randomness but is not purely random. For instance, certain games include “duplicate protection” or “pity timers” that adjust outcomes based on prior results. Before 2018, EA disclosed no probabilities related to loot box contents. Even after it began providing some probability disclosures, Mr. Sutherland argued these were insufficient for a purchaser to understand the actual odds of obtaining any given item.

## Cause of Action: Deceptive Acts or Practices

EA argued that the certification judge erred by finding the pleadings disclosed a cause of action for deceptive acts or practices under section 5 of the *Business Practices and Consumer Protection Act*

(BPCPA), absent any material facts supporting a “false understanding” of the transaction. The Court disagreed.

Justice Edelman, writing for a unanimous panel, held that the certification judge properly considered the overall context of the loot box transactions, not just EA’s disclosures in isolation. The key was the interplay between two salient features:

- EA promoted loot boxes as a way to improve game performance and enjoyment while structuring game mechanics to drive consumers toward purchasing them.
- EA set the probabilities of obtaining desired items so low that those items were “not realistically attainable” through the loot box mechanism.

Together, these facts supported the allegation that EA’s conduct, including its omissions, had the “capability, tendency or effect of deceiving or misleading” consumers.

### **Cause of Action: Unconscionable Acts or Practices**

EA also challenged the certification of the unconscionability claim under sections 8–9 of the BPCPA, arguing that the pleadings lacked material facts supporting an improvident (i.e., unfair) bargain. The Court upheld the certification judge’s application of the Supreme Court of Canada’s framework in *Uber Technologies Inc v Heller*.

The pleadings alleged a “cognitive asymmetry” between EA and its users: EA controlled both the game environment and the loot box algorithms, while consumers could not appreciate or understand the true terms and conditions of the transaction. The Court held that this inequality of bargaining power was properly pleaded as having led to an improvident bargain.

EA argued that the bargain could not have been improvident for all class members, as some obtained high-value items. The Court rejected this argument on two grounds:

- Improvidence is measured at the time the contract is formed, not by the outcome after the loot box is opened.
- A bargain that was improvident at formation does not become less so because a consumer happened to benefit in hindsight.

The question of whether a “lucky” consumer has suffered compensable loss is better addressed at the remedies stage.

### **Common Issues**

The Court upheld the certification of 11 common issues.

On the question of whether deception and unconscionability

could be assessed on a class-wide basis, the Court noted the broad definition of “deceptive act or practice” in the BPCPA, which permits class-wide analysis without reference to the subjective circumstances of individual class members.

On causation, EA argued that to obtain restoration for deceptive practices under the BPCPA, a plaintiff must demonstrate that the deceptive act caused the consumer to enter the transaction, and that this question of reliance would necessarily vary among individual class members. However, Mr. Sutherland advanced a different theory. He alleged that he and class members would not have suffered loss had EA:

- Fairly disclosed the true probabilities of loot box items
- Set reasonable odds for the most valuable items
- Not made such items functionally necessary yet nearly unattainable in gameplay

In other words, the loss resulted from the design and implementation of EA’s games themselves, not from any individual consumer’s subjective reliance on a particular misrepresentation. The Court endorsed this approach and held that subjective reliance is merely one way to prove causation.

### **The Cross-Appeal: Illegal Gaming Under the *Criminal Code***

On cross-appeal, Mr. Sutherland argued that the certification judge erred in striking his allegations that EA’s loot boxes constituted illegal gaming under Part VII of the *Criminal Code*, and that such illegality could serve as a basis for unconscionability under the BPCPA.

The Court dismissed the cross-appeal. In its analysis, the Court agreed that the relevant gaming provisions do not impose a blanket prohibition and are, at least in part, a regulated activity.

However, the Court left the door open: while *Criminal Code* gaming provisions cannot serve as a standalone legal basis for unconscionability, the policy concerns underpinning those provisions (concerns about exploitation, informational asymmetry, and social harms of gambling) may still inform the unconscionability analysis at trial.

### **Key Takeaways**

*If your product involves an element of chance, how you sell it matters as much as what you sell.*

The Court made clear that deception is not assessed by looking at a company’s disclosures in isolation. What matters is the full picture:

- How the product is marketed
- How the user experience is designed to drive purchasing
- Whether the true odds are meaningfully communicated

Companies that rely on randomized or algorithmically driven transactions should consider whether their promotional practices and probability disclosures, taken together, create a misleading impression.

*A good outcome for some customers does not shield the business model.*

EA argued that loot boxes could not be unconscionable because some consumers obtained high-value items. The Court rejected that logic, holding that fairness is measured at the moment the consumer pays, not by what they happen to receive.

*Algorithmically driven consumer transactions face growing scrutiny.*

The Court recognized that unconscionability claims under consumer protection legislation may extend beyond individual transactions and into systemic conduct. This is not limited to video games. Any business that uses algorithms to structure consumer-facing transactions should take note: where a company controls the mechanics of a transaction and the consumer cannot appreciate the true terms, the conditions for an unconscionability claim may be present.

Stay tuned for the next level.