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Navigating eSports Law in Canada

Reflection on "Navigating eSports Law in Canada"

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This semester, I wrote a paper titled "Navigating eSports Law in Canada." The paper seeks to consolidate key legal issues affecting eSports players, creating a playbook that succinctly analyzes relevant Canadian case law. A particular effort was made to focus on the recruitment and employment of underaged players into professional leagues and teams. This summary is prepared for the *Regards et Jeux/ To Look and to Play* research project for Winter 2021.

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An eSports contract is akin to a contract to play professional sports. It is designed to enable a professional league or eSports team to recruit, manage, and endorse a specific player. As with most contracts, players themselves have unique obligations relevant to the work they are recruited for. In eSports, a player might be required to train a specific skill (i.e., shooting a virtual target in a video game) for multiple hours in a day.

In an effort to appeal to its largest demographic, eSports teams have begun recruiting a number of underage players into both long-term contracts and competition-centered agreements. In 2018, Singaporean Gavin 'Meracle' Jian Wen, was recruited onto a professional team for DOTA 2 at the age of 17. In the US, Sumail Hassan Syed, 16, became the youngest professional gamer to cross US$1 million in earnings. In 2019, *Team 33* signed an 8-year-old gamer, Joseph Deen.

At first glance, I found the ages of these players to be quite… shocking. Throughout this research project, I was curious about how teams could lawfully employ an 8-year-old to participate in intense competitions. And while provincial legislation (including BC *Employment Standards Regulation* and Ontario's *Protecting Child Performers Act, 2015*) explicitly provide for circumstances where a child performer can be lawfully employed, it is unclear whether eSports can be grandfathered into these legislative frameworks. Truth be told, focussing on provincial legislation proved to be a bit of a dead end; information is limited, and it is unclear what kinds of penalties are levied on organizations that do not follow employment guidelines. Select teams have attempted to address these obligations by attenuating the minor's working hours. Joseph Deen, the eight-year-old *Fortnite* star signed to Team 33, maintains a relaxed work schedule, officially kept to a maximum of 3 hours per day and up to 8 hours on weekends. Other activities, including YouTube/ Twitch streams, promoting merchandise on his store, and engaging with fans, are done "at-will," meaning Joseph Deen (and his parents) can dictate how many hours he spends on promoting his personal brand.

For this reflection, I will focus on one key issue of interest: a minor's ability to disaffirm a contract. Of the many issues that come up when choosing to hire an underaged performer or athlete, there is a rich doctrinal and judicial history related to contracting with minors. Under the common law, minors typically lack the legal capacity to enter into a binding contract for services. This is

ameliorated by having a parent or legal guardian sign on their behalf. Contracts for necessities (involving food, medicine, etc.) are always enforceable. But entertainment or service contracts are not contracts for necessities; minors, being the ones who provide the service, retain a right to void the contract at the unilateral election of the underage player.

In certain circumstances, the minor's right to void the contract can help escape an abusive contract. Consider the case of Owen "Smooya" Butterfield, a well-known eSports player who entered into a professional contract at 16. Just before his 18th birthday, Smooya built a modest following and sought to move teams. He found himself trapped to his current team due to an exorbitant $100,000 buyout clause for early termination of his contract, a value far removed from the real economic value he brought to his team. Smooya was able to successfully disaffirm the contract, arguing that the penalty clause was not beneficial to him because it unduly impeded his ability to develop skills and grow in his profession.

While this instance is a win for Smooya, a minor's ability to void a contract carries significant risk for a professional eSports team. It allows an underage player to walk away even after a significant investment has been made in them. In the US, section 6751 of California's *Family Code* has attempted to address this issue by allowing an employer (i.e., a professional eSports team) to petition a court, with the cooperation of the minor and their parent/ legal guardian, to have a contract confirmed by a court.

No such analog exists in Canada. Canadian courts have held that entertainment contracts may be held to be enforceable against a minor so long as the child receives an *advantage* from the transaction "equal to or in excess of any rights or interests which are being foregone." In *Tonelli,* a 17-year-old entered into a sports contract involving a junior hockey club known as the Toronto Marlboros. The contract required Tonelli to play exclusively with the Marlboros for three years; in addition, if the player left the club for the NHL, he would have to remit 20% of all gross earnings for the club for three years. Tonelli was later recruited by the Houston Aeros, a professional team in the World Hockey Association; Tonelli terminated his association with the Marlboros and the junior club sued him for breach of contract. On appeal, ONCA supported Tonelli, noting that the minor had no realistic option but to sign the agreement with the Marlboros. Justice Blair took note that the Marlboros' contract rendered "obvious economic disadvantages" for Tonelli, given that the salary paid to Tonelli in the minor leagues was "a pittance" to what he would earn as a professional player.

I found this example from *Tonelli* to be quite interesting. While eSports teams may have to deal with a risk of contract disaffirmation, it highlights how courts might assess whether a contract can be adequately enforced or not. As an added strategy, eSports teams have turned to using parental indemnity, where parents compensate the league/ team for any damages associated with the minor's actios, to recuperate their losses. Today, *Tonelli* continues to maintain a presence in Canadian courts; judges continue to focus their analyses on prospective metrics, including the minor's future earning potential, opportunity loss, and ability to capitalize on one's strength, make up a relevant part of the analysis in determining whether a minor's disaffirmation is valid.

What we have before us is a turning point. A niche field is now becoming more sophisticated. With its growth, observers have begun to criticize abusive practices. This paper identifies many of the legal risks associated with overbearing management contracts. Collectively, these concerns

call for change. Players, leagues, and teams must work together to better govern the industry, safeguarding its most vulnerable members. The question is: who will take the first step?

Annotated Bibliography

- **Bob Tarantino, "A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers" (2006) 29 Hastings Comm & Ent LJ 45.**
    - Quoting Tarantino, "In film and television production, the child performer's contract may itself be for a relatively small amount of remuneration - however, the potential losses to a producer who is unable to bind a child performer could be enormous: the entire production may be rendered unexploitable if, for example, the minor played a leading role … the "disaster" scenario for a producer would involve a minor who plays a significant role in a film attempting to disaffirm the contract. If successful, such effort would result in the producer being unable to exploit the production at all because the terms which granted the producer the right to make use of the image or voice of the minor would be void."
- ***Ceccol v Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA).**
    - In *Ceccol v Ontario Gymnastics Federation,* where a senior manager of a non-profit athletic organization was hired in 16 consecutive 1-year fixed term contracts. Even though her contract explicitly limited Ms. Ceccol's entitlement to basic guarantees under the *Employment Standards Act* ("ESA"), the Ontario Court of Appeal (ONCA) determined that Ms. Ceccol's was clearly in an employment contract. As such, Ms. Ceccol was entitled to reasonable notice based on her 16 years of service. As a result, damages paid out to Ms. Ceccol amounted to 16 months of unpaid salary (1 month for each year of service)- a significant amount of money. For eSports teams mistakenly taking advantage of an IC classification to pay low salaries and avoid employer obligations, these decisions serve as a warning that court-ordered payouts could cripple operations.
- ***Chaplin v Leslie Frewin Publishers,* [1966] 2 WLR 40 [UK].**
    - In *Chaplin v Leslie Frewin Publishers* (1966), the defendant, Charlie Chaplin's son (a minor at the time of contract), was refused an injunction to stop the publication of his father's biography. The son sought to sell and profit off of his father's memoirs via a ghost-written biography, but subsequently sought to stop production realizing the biography would portray him in a negative light. The Court of Appeal disagreed with the defendant, noting that the publishing agreement constituted a benefit for Chaplin's son by providing him with (i) a source of income, and (ii) "entry to an otherwise closed industry, coupled with the possibility of a reasonable amount of remuneration for services rendered or rights granted, is sufficient to render a contract enforceable." The Court of Appeal continued, acknowledging that *even if* the contract was voidable, the assignment of copyright and any related rights contained in the agreement were not revocable.
- **Michael Comartin et al, "Employing Minors in the Entertainment Industry: A Primer for Employers Doing Business in Canada" *Ogletree Deakins* (Feb 23, 2017), online: ogletree.com/insights/employing-minors-in-the-entertainment-industry-a-primer-for-employers-doing-business-in-canada/.**
    - In BC, minors under the age of 15 working in the recorded entertainment industry (such as in film, video, or television productions) are governed by an entirely separate set of rules from those that apply to other minors. These rules are set out in section 45.13–45.5 of the BC *Employment Standards Regulation*." Among other things, the rules note:

1. For children under the age of 12, a shift cannot last longer than 8 hours after the child reports to the work location. For children aged 12 to 14, a shift cannot last more than 10 hours.
2. Special rules apply to working on school days, and the hours at which employment may begin and must cease depend on whether the next day is a school day and/or whether school is in session.
3. Split shifts are prohibited, as are long lunch breaks (that might otherwise be used to create split shifts).
4. Time in front of a recording device is strictly regulated, and a specified break must be provided between recording sessions. The length of time and break depends on the child's age.
5. A child must have at least 48 consecutive hours free from work each week (or else be paid 1.5 times his or her regular rate of pay for any hours the child would otherwise have been free from work); 12 hours free between each shift of work; and 12 hours between the end of work and when the child is scheduled to attend school.
6. The child cannot work more than 5 days in a week (or 6 days, if the Director of Employment Standards approves in writing).

- ***No Doubt v Activision Publishing, Inc.*, 192 Cal App 4th 1018 (2011) [United States].**
  - In *No Doubt v. Activision,* members of the popular rock band "No Doubt" sued videogame publisher Activision for a near identical depiction of the group in its rock band simulation game, *Band Hero*. While Activision had licensed the rights to No Doubt's likeness, the US 9th Circuit of Appeal found that Activision's actions had gone far beyond its reasonable use of the license. The video game characters were "literal recreations of the band members… doing the same activity by which the band achieved and maintained its fame." For this reason, the in-game avatars, identical to the band members in real life, could not pass the US courts' "transformative use defense" which was developed by the California Supreme Court in *Comedy III Productions*, which allows artistic renditions or products creatively transformed into "something more than the celebrity's likeness" to be sold or marketed without being considered misappropriation of personality.
- ***Toronto Marlboros Major Junior "A" Hockey Club v Tonelli et al*, [1979] 23 OR (2d) 193.**
  - A 17-year-old entered into a sports contract involving a junior hockey club known as the Toronto Marlboros. The contract required Tonelli to play exclusively with the Marlboros for three years; in addition, if the player left the club for the NHL, he would have to remit 20% of all gross earnings for the club for three years. Tonelli was later recruited by the Houston Aeros, a professional team in the World Hockey Association; he terminated his association with the Marlboros and the junior club sued him for breach of contract. Both the trial and appeal courts concluded that the contract was not enforceable against Tonelli, on the basis that the Marlboros' contract did not provide a benefit to the minor. At trial, the contract was found to unevenly and heavily favour the Marlboros' interests, "noting that it allowed the Marlboros to terminate Tonelli at their discretion, but bound Tonelli for several years." At appeal, the ONCA affirmed the trial judge's assessment, acknowledging that Tonelli had no realistic option but to sign the agreement with the Marlboros. Refusing to sign the amateur contract would mean giving up a reasonable expectation of pursuing a career in a professional hockey league. In addition, Justice Blair took note that the Marlboros contract rendered "obvious economic disadvantages" for Tonelli, given that the

salary paid to Tonelli in the minor leagues was “a pittance” to what he would earn as a professional player. In addition, the requirement to pay 20% of his gross earnings for three years prevented Tonelli from capitalizing on his ability as a player.