

Online Fantasy Sports Leagues: A Canadian Legal Analysis
By Chad Finkelstein

Summer is upon us and as the seasons change, so too do the interests of sports fans. By the time you read this, the NBA and NHL playoffs will have come and gone, and Major League Baseball will be nearing its halfway mark, with a new NFL season directly on its heels.

The start of each sports season has a different meaning for some, though. Fans and non-fans alike take this opportunity to create and participate in fantasy leagues. A fantasy sports league is a game comprised of “owners” who build a team of real-life players to compete against other “owners” based on the statistics generated by those individual players throughout the season of a particular sport. Fantasy sports allow participants to trade and release players, just like in real life. Websites which offer fantasy sports leagues provide participants with the opportunity to set up a league for a fee, and award the winner at the end of the season with a cash prize.

At the time of this writing, Canadian legislators are debating whether to amend the *Criminal Code of Canada* to expand the range of sports betting options made available in Canadian casinos to include single-game betting (currently, only parlay betting is permitted). For those looking for more variety in their betting activities, fantasy sports offers a unique opportunity. Canadians are certainly free to enroll on American-operated websites to register and pay for their custom made fantasy sports teams and leagues. In fact, the United States specifically exempts fantasy sports from its internet gaming legislation. Pursuant to §5362 of the *Unlawful Internet Gambling Enforcement Act of 2006*, the definition of “bet or wager” specifically excludes “participation in any fantasy or simulation sports game...or contest”, subject to certain important conditions contained within that section.

As a side note, it is generally believed that this exemption for fantasy sports is a direct result of the lobbying efforts to U.S. Congress of the major sports organizations who felt that the ability to participate in this form of game-play encouraged people to follow the respective sports more closely.

The U.S. exemption on fantasy sports does not have any bearing, however, on the legality of online fantasy sports in Canada.

Section 202 of the *Criminal Code* provides for several offences which apply to fantasy sports leagues where the operators of such leagues require payment of a fee for entry or participation. Notably, it is an offence to: use or knowingly allow a place under your control to be used for the purpose of recording or registering bets; import, make, buy, sell, rent, lease, hire, keep, exhibit or employ in any place under your control any device for the purpose of recording or registering bets, or any machines or device for gambling or betting; have under your control any money or other property relating to a transaction that is an offence under the *Code*; record or register bets; or willfully and knowingly send or receive any message that conveys information relating to book-making, betting or wagering, or that is intended to assist in those activities.

In addition to those provisions of the *Code* which relate to betting, subsection 206(1)(f) states that it is an offence to dispose of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration (emphasis added). In Canada, case law has provided that in order to fall within the purview of this section, a game must involve all three of the elements of chance, payment and prize. Accordingly, games of pure skill absent any element of chance are exempt from the application of those chance and mixed skill and chance provisions of the *Code* which deal with the awarding or disposition of prizes. It is arguable whether fantasy sports constitute a game of pure skill or a game of mixed chance and skill. It has certainly been opined that fantasy sports are pre-dominantly skill-based given the emphasis on the participant's ability to effect transactions of players based on his/her reading and understanding of the sport in question.

However, the test in Canada is not one of pre-dominance, but rather involves a determination of whether playing the game involves a systemic and internally-generated resort to chance. In that context, certainly the unpredictability of player injuries, suspensions or the impact of a trade on any given team can be viewed as introducing elements of chance and randomness to the process of the fantasy game on bettors. Until legislators or courts provide for exemptions similar to those found in the U.S., operators of fantasy sports leagues who receive payment for entry should be wary of subsection 206(1)(f). It is also worth noting that an offence is made out under this subsection where the disposition of a prize is specifically in the form of goods, wares or merchandise and, therefore, oddly, may not be applicable where the prize awarded does not fall under those categories, such as with cash or services.

More alarming, however, is section 206(1)(e) of the *Code*, which prohibits any scheme whereby the winner becomes entitled to receive a larger sum of money by virtue of the fact that other people have paid to participate. Obviously, this is a major concern for paid fantasy sports leagues where the value of prizes is entirely dependant on the funds received from participants. The Supreme Court of Canada famously held that this section applies to pure "skill" contests, stating "*It may not be immoral but it is illegal.*" As such, unlike section 206(1)(f), eliminating the element of chance will not provide solace to those who argue that succeeding in a fantasy sports league is based entirely on one's "skill".

Of course, prudent prospective operators will realize that if the element of chance cannot be determinatively eliminated, or the payment of fees triggers 206(i)(e), then perhaps the creation of a viable free alternative method of entry may accomplish avoiding the element of payment and possibly allow for a valid online fantasy sports league.

Potential Canadian-based fantasy league operators may also wish to take special note of section 207(1)(h) of the *Code* which provides that "anything" may be printed or made in Canada which relates to gaming and betting that is to be used in a place where it is lawful to use such "thing". This section, combined with the U.S. exemption for fantasy

sports, may provide for some intriguing opportunities for certain innovators who wish to access the online fantasy marketplace.

Stay tuned, sports fans.

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