

SAFE SPORT DURING COVID-19 – LIABILITY CONSIDERATIONS FOR CANADIAN SPORTING ORGANIZATIONS

21 July 2020

On March 11, 2020, the World Health Organization ("**WHO**") declared the novel coronavirus ("**COVID-19**") a global pandemic.^[i] By the end of March 2020, almost every recreational, amateur and professional training and sporting event was cancelled worldwide. In an unprecedented step, the Olympic and Paralympic Games were postponed to Summer 2021, and professional sports leagues were indefinitely suspended.^[ii] Now, over four months later, major efforts have and continue to be undertaken to facilitate the return of safe sport at all levels.

In Canada, the National COVID-19 Return to High Performance Sport Task Force (the "**Task Force**"), lead by Own the Podium CEO Anne Merklinger, has developed a series of resources to assist in the return to sport for all amateur sports, including recreational and community-based organizations. The COVID-19 Return to High Performance Sport Framework, which includes a COVID-19 Risk Assessment for Sport and a Club Risk Assessment and Mitigation Checklist Tool (the "**Framework**"), is the blueprint for assisting Canadians in returning to sport. The Framework is intended to act as the minimum standard and should be applied while considering the specific nature of the sport and the participants.

While Canada has progressively permitted return to sport, the return of competition is also moving forward. Some international sporting organizations have already begun to resume (e.g. NASCAR^[iii], UFC^[iv] and the English Premier League^[v]) and many more professional sports leagues are set to engage momentarily:

- Major League Baseball (MLB) is scheduled to return to play on July 23-24, 2020. However, due to concerns about the risks associated with the league's travel schedule, the Canadian federal government has refused to allow the Toronto Blue Jays to play in

Canada when the season re-opens.

- The National Basketball Association (NBA) is set to return on July 30, 2020, with all games played without spectators in Walt Disney World, Florida.
- The National Hockey League (NHL) is scheduled to return on August 1, 2020, with teams quarantining in Toronto and Edmonton and playing a unique playoff format without spectators.^[vi]

Meanwhile, the Task Force is also working on preparing a framework for return to competition. This framework will address issues applicable at both the domestic and international levels - acknowledging that each will present different risks and considerations.

Legal liability in the return to sport context

In developing the return to sport and return to competition frameworks, the Task Force has not only focused on protecting the health and safety of the athletes, but also the coaches, staff and the communities in which they live and train. The Task Force has grounded their work in the values and principles enunciated in the Canadian Sport Policy, which has been effective in Canada from 2012 to 2022.

Importantly, the safe return to sport involves assessing the exposures/potential exposures of participants, the location of the sporting event and the mitigation strategies that can be implemented to reduce risks. The key to reducing legal liability is to then implement the appropriate policies, procedures and guidelines to reduce risk of disease transmission.

While Canadian courts have not yet addressed claims against sporting organizations for injuries sustained as a result of disease transmission, there is case law to suggest potential grounds for such an action. Generally speaking, the operator of a sporting event or facility holds a duty to exercise reasonable care when organizing and supervising activities to prevent injury to participants. While Canadian law broadly recognizes that participants in sporting activities accept the ordinary and necessary risks that are incidental to the sport,^[vii] participants may nevertheless bring civil action against operators where they have acted negligently in the administration of sporting events or activities.

Accordingly, to minimize potential injury or harm to participants in the sporting context, Canadian courts have already recognized that a sporting operator's responsibilities may involve the following (which have particular significance in the context of COVID-19 disease transmission and infection control considerations):

1. Preventing crowding;
2. Using/implementing efficient supervisions and control;
3. Giving necessary instructions and warnings;
4. Selecting and fitting proper and suitable equipment; and
5. Taking reasonable precautions to see that conditions for an activity are not unduly hazardous.^[viii]

There is also potential exposure to sports organization under occupiers liability laws. For example, in Ontario, the Occupiers Liability Act requires an "occupier" to take reasonable care over the safety of persons entering its premises - a responsibility which applies to risks caused both by the condition of the premises and/or by the activities carried out on the premises.^[ix] A facility can have multiple "occupiers", such that it is possible that the owner, the tenant, the contractor could each be held liable for failure to keep people safe. As such, failure to take reasonable safety precautions to reduce the spread of COVID-19 transmission may therefore expose sporting organizations to liability from a broad spectrum of people who may enter the premises, including players, spectators, coaches, staff, and volunteers.^[x]

Mitigating and minimizing the legal risks associated with COVID-19

To some degree, Canadian law itself affords some protection for Canadian sporting organizations when initiating return to play plans. As indicated previously, the law of negligence in Canada already recognizes that participants in sporting activities voluntarily adopt some degree of inherent risk, which may serve as a complete defence to allegations of negligence in the COVID-19 context. The law of negligence also considers whether a participant's own actions have contributed to his or her own injuries (i.e. the concept of contributory negligence). However, the courts have yet to opine on these issues in the COVID-19 context and thus their applicability is largely speculative.

Further, in some cases, provinces/territories may seek to provide greater clarity about the scope of legal protection that should be afforded to sporting organizations in light of the unique challenges presented by the COVID-19 pandemic. For example, in a bid to promote the re-opening of sporting activities in British Columbia, on June 10, 2020, the province introduced a Ministerial Order aimed at protecting/absolving certain non-profit sporting organizations from damages arising directly or indirectly from COVID-19; these organizations will be protected as long as they abide by public health orders and provincial sport guidelines.^[xi] However, it remains to be seen whether other Canadian provinces and

territories will adopt similar strategies towards limiting legal liability exposure for other sporting organizations.

As such, in order to properly mitigate and minimize the legal risks associated with COVID-19 above, it is recommended that sporting organizations adopt a multi-pronged strategy, considering whether some (if not all) of the following will be beneficial for their purposes:

- **Infection Control Mechanisms and Precautions** - A key consideration for minimizing a sporting organization's legal liability in tort and under occupiers' liability legislation is evidence that the organization has adhered to available best practices and guidelines and took efforts to keep participants reasonably safe. In seeking to return to play, Canadian sporting organizations (from recreational to professional) should consider the Framework prepared by the Task Force and prepare their own policies, procedures and guidelines that take into consideration any available government directives. These policies, procedures and guidelines consider the organization's precise nuances and unique sporting context, and address applicable issues for coaches/trainers, players, parents, spectators, and volunteers.

To that end, some provinces have already released general guidance for sporting organizations to assist with the development of their return to play policies and protocols:

[Province of British Columbia](#)

[Province of Ontario](#)

[Province of Alberta](#)

- **Insurance** - While commercial insurance policies and traditional business interruption insurance do not usually offer coverage for business interruptions caused by a pandemic (such as COVID-19), sporting organizations should nevertheless consider expanding their insurance coverage options with their providers. Importantly, these decisions should be informed by the level of risk that their sporting activities present for disease transmission; particularly elevated risks may require some organizations to shut down operations quickly after attempting to return to play, or may even mandate that organizations refrain from returning to play altogether. In discussing available insurance coverage add-ons and options, organizations should ensure that any coverage they obtain is broad enough to cover possible civil litigation costs associated with allegations of negligence and/or occupier's liability.

- **Express Exclusion of Liability** - Sporting organizations can also seek to expressly limit or exclude their liability through the use of various tools/documents. Among the most common tools for doing so include the use of waivers, posted signage, and ticket warnings. While most sporting organizations already employ many of these tools, sporting organizations should take the time to review and revise the wording of these documents to ensure that they make specific reference to risks of disease transmission and exposure to COVID-19. It is important to recall, however, that exclusion of liability documents are not immune from challenge and may be interpreted strictly by Canadian courts. Notably, the issue of enforceability of waivers for minors remains largely unresolved in Canadian law.
- **Force Majeure Clauses** - Where sporting organizations are required to enter into new or revised contracts to facilitate return to play, these organizations should seek to incorporate broadly worded force majeure clauses that are drafted in their favour. Doing so will afford these organizations the flexibility to cancel or postpone sporting events where the risks of disease transmission become suddenly more elevated (e.g. in the case of additional waves of the disease amongst Canadian populations), thereby jeopardizing the organization's ability to mitigate health risks and associated legal liabilities without incurring additional liability for breach of contract.

Conclusion

Sports organizations can reduce their risk of liability by properly documenting the following key steps they have undertaken to ensure a safe return to sport for their participants (i.e. athletes, coaches, staff, volunteers, spectators):

- Evidence of the application of current government guidelines and directives;
- A thorough evaluation of their sporting activities, participants, location, equipment, facilities and the identification of associated risks;
- Documented policies, procedures, plans and other mitigation measures such as insurance, contracts, waivers and consents; and
- Ongoing reviews and evaluations of their risks and mitigation measures to ensure all remain current and effective.

Ultimately, when it comes to legal liability, the test is not whether your organization succeeded in preventing the spread of COVID-19, but rather whether you had a reasonable system in place and/or met the standard of care owed to those your organization had an obligation to protect.

[i] WHO, "[Archived: WHO Timeline - COVID-19](#)" WHO (27 April 2020), online.

[ii] Stephen Wade, "Tokyo Olympics rescheduled for July 23-Aug.8, 2021" [CBC Sports](#) (30 March 2020), online here.

[iii] Brad Norman, "[NASCAR announces revised May schedule as racing returns beginning at Darlington Raceway](#)" NASCAR.com (30 April 2020).

[iv] Kevin Clark, "[UFC Fights Are Back, but Sports Are Far From Returning to Normal](#)" The Ringer (8 May 2020), online.

[v] Geoff Lowe, "[Premier League returns: Everything you need to know as play resumes](#)" SportsNet (15 June 2020), online.

[vi] See Joshua Clipperton, "[NHL officially back as league, players ratify deal to return in Edmonton, Toronto](#)" CBC News (10 July 2020), online; R.J. Anderson, "[MLB announces 60-game season for 2020; Opening Day will be July 23 or 24](#)" MLB News (24 June 2020), online; NBA.com Staff, "[Everything you need to know about the 2019-20 NBA season restart](#)" NBA.com (10 July 2020), online.

[vii] This legal concept is generally referred to as *volenti non fit injuria*, or "voluntary assumption of risk" and serves as a defence to tort claims. Voluntary assumptions of risk can be implied or express (e.g. through the execution of a waiver), although the test for raising and recognizing this defence differs across Canadian jurisdictions. For example, in Ontario, in order to determine whether a plaintiff has impliedly consented to the risk in question, courts have historically focused on asking whether the defendant had a "deliberate intention to cause injury or a reckless disregard for the consequences of [its] actions in an uncontrolled and undisciplined manner." In recent years, however, Ontario courts have seen a shift towards adopting the test applied in British Columbia, where courts have traditionally focused on broadly asking what a "reasonable competitor" would have done or expected in similar circumstances. Of particular importance however, is the overall understanding that, while a player may implicitly or expressly consent to a certain degree of risk when participating in sporting activities, this consent is not unlimited and a "player does not accept the risk of injury from conduct that is malicious, out of the ordinary, or beyond the bounds of fair play." See *Dunn v. University of Ottawa* (1995), 1995 CarswellOnt 3170 (Ont. Ct. J. (Gen. Div.)) at para. 36; *Zapf v. Muckalt* (1996), 1996 CarswellBC 2596 (B.C.C.A.) at para. 16; *Casterton v. MacIsaac*, 2020 ONSC 190 at paras. 10-14.

[viii] See e.g. *Aldridge v. Van Patter* (1952), 1952 CarswellOnt 299 (WL)(Ont. H. Ct. J.); *Rudd v. Hamiota Feedlot Ltd.*, 2006 MBQB 22; *McAllister (Litigation Guardian of) v. Wal-Mart Canada Inc.* (1999), 1999 CarswellNB 89 (N.B. Q.B.); reversed in part on other grounds (2000), 2000 CarswellNB 302 (N.B. C.A.); *Forestieri v. Hernandez* 2015 BCSC 249; *Enslev v. Challenges Unlimited Inc.* (2007), 2007 CarswellOnt 6938 (Ont. S.C.J.); affirmed (2009), 2009 CarswellOnt 207 (Ont. C.A.); *Wawanesa Mutual Insurance Co. v. Thiessen*, 2009 SKQB 244.

[ix] Occupiers' Liability Act, R.S.O. 1990, c. O.2, ss. 3(1)-(2).

[x] *Hutchinson v. Stratford-Perth Family YMCA* (2004), 2004 CarswellOnt 6189 (Ont. Sup. Ct. J).

[xi] British Columbia, [Order of the Minister of Public Safety and Solicitor General - Emergency Program Act Ministerial Order No. M183](#), online.

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