

COVID-19, SPORT, AND WAIVER **LIMITING LEGAL LIABILITY IN THE “NEW NORMAL”**

Introduction

As Provincial and Territorial governments begin to put in place gradual re-opening plans and sport organizations are preparing to resume activities, the risk of COVID-19 and its transmission through sporting activity must be kept in mind.

This user guide briefly discusses the use of liability waivers to help protect Canadian sports organizations from legal liability for transmission of COVID-19 through sporting activities. However, it is important to remember that risk mitigation is still required, through the development and implementation of measures to protect the health and safety of participants from the risk of contracting COVID-19. Also required is good communication with your insurer.

The waivers are intended for use not only by athletes, but also by other participants such as directors, officers, members, committee members, volunteers, employees, interns, persons under contract, and all persons working with athletes, such as coaches, medical and paramedical personnel, representatives, and other support persons.

Good Practices for Risk Mitigation

Waivers of liability are just one component of a well-developed risk mitigation plan. A waiver of liability should be used in conjunction with the development and implementation of reasonable precautionary measures based on provincial health guidelines to protect the health and safety of participants from the risk of contracting COVID-19 or from injury otherwise. Some such precautionary measures could include:

1. Designing a system in which facilities and equipment are regularly and thoroughly sanitized, inspected, and maintained;
2. Develop a general safety plan that addresses foreseeable dangers that could lead to liability;
3. Keep a written record of the safety plan along with a diary of steps taken to address safety concerns;
4. Post visible and clear signs or pictures to inform participants of the inherent risks associated with the attending at the facility or event;
5. Educate and inform coaches, staff, volunteers, and administrators of the various ways liability can be incurred and train them never to admit liability.

Further advice and direction is available from your provincial health authority, the Sport Medicine Advisory Committee, etc. Links to provincial health guidelines and resources are found here:

Alberta	https://www.alberta.ca/biz-connect.aspx
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British Columbia	https://www.worksafebc.com/en/about-us/covid-19-updates/
Quebec	https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/gradual-resumption-activities-covid19-related-pause/
Ontario	https://www.ontario.ca/page/reopening-ontario-stages
Canadian Academy of Sport and Exercise Medicine	https://casem-acmse.org/news/advisory-on-covid-19-sport-medicine-april-1/

Waivers

A liability waiver is a legal document that a person may sign to acknowledge the risks involved in their participation in an activity. In sport, waivers are designed to protect the organizers of an activity from liability if an athlete or spectator gets injured.

As society transitions from lockdown to a “new normal”, Canadian sports organizations must update their pre-existing waivers or adopt new waivers that address the specific risk of COVID-19 transmission through sanctioned training and events.

In order to be enforceable in court, a waiver of liability must specifically contemplate the risks associated with the event or activity to which it pertains. A waiver that is too general may be found to be unenforceable and of no value to the organization seeking to rely on it.

Attached are three template waivers that your organization can adapt and use to protect itself from legal liability as its athletes and participants return to train and participate in sport. The key features of these waivers and the activities to which they pertain are described below.

1. Event Waiver – for use when organizing an event

The Event Waiver is drafted as a unilateral (one way) agreement, to be executed by an individual participant (or, in the case of a minor, their guardian) for the benefit of the organizer of a sporting event such as a bowling tournament, hockey game, a track & field meet, or a swimming competition. This is an event specific waiver and should be signed by the participant for each event. The Event Waiver contains three distinct sections.

First, an attestation that the person seeking to participate in the event is not infected with COVID-19 and has not recently been exposed to the risk of contracting COVID-19. Requiring each participant in an event to provide an attestation further strengthens the organizer’s legal position in the event that a participant brings a legal action against the organizer claiming they contracted COVID-19 at the event and that the organizer is at fault.

Second, the Event Waiver seeks to broadly capture all risks associated with a particular sporting event with as much detail as to each risk as possible. Ideally, the Event Waiver articulates all possible risks facing event participants, including the risk of contracting COVID-19. The more

particularly the waiver describes a risk that causes harm to a participant; the more likely the waiver of liability will be enforceable in court.

Third, the Event Waiver contains an assumption of the risks and a release from liability. This is the section of the Event Waiver in which the participant legally agrees to give up any right to sue the event organizer should the participant suffer any harm in connection with the risks described.

2. Facilities Waiver – for use when individuals utilize an organization’s facilities

Similar to the Event Waiver, the Facilities Waiver is drafted as a unilateral (one-way) agreement, to be executed by an individual person (or, in the case of a minor, their guardian) for the benefit of the organization that hosts athletes or participants on their premises. The Facilities Waiver contains three distinct sections. Notably, it does not contain an attestation, therefore, should be used in conjunction with the Daily Attestation described below. This is intended as a onetime waiver that the organization will keep on file.

First, the Facilities Waiver contains a description of the premises at which the participant will be attending.

Second, the Facilities Waiver contains a description of the risks associated with attendance at a typical sports training facility and the potential harms an attendee may suffer as a result of those risks.

Third, and like all waivers, the Facilities Waiver contains an assumption of the risks and a release from liability.

3. Remote Activity Waiver – for use when participants train remotely as required by the organization

Like the Event Waiver and the Facilities Waiver, the Remote Activity Waiver is drafted as a unilateral (one way) agreement, to be executed by an individual person (or, in the case of a minor, their guardian) for the benefit of the organization in cases where the participant is training remotely. This intended as a onetime waiver that the organization will keep on file.

The Remote Activity Waiver is designed to apply to activities undertaken by athletes and others as a result of their membership or affiliation with the organization, but that do not take place at the organization’s facilities or at a particular event. Such activities might include dry-land training, cycling, etc.

The description of risks associated with remote activities will be highly organization dependent. It must be remembered that the best and most enforceable waivers of liability contain detailed descriptions of the specific risk a participant may face when participating in a particular activity.

The Remote Activity Waiver also does not contain an attestation. The organization may consider whether it is also appropriate to use the Remote Activity Waiver in conjunction with the

Daily Attestation described below. The Daily Attestation should be used alongside the Remote Activity Waiver, where the remote activity requires two or more participants to train together. A combined Facility and Remote Activity Waiver is also available for convenience.

4. Daily Attestation – for daily use to confirm the COVID-19 free status of participants and compliance with government and organization directions in respect of COVID-19

The Daily Attestation does not waive any liability against the organization. It should be used along with one of the waivers above as appropriate. The Daily Attestation instead requires the participant to confirm that they do not knowingly have COVID-19 or its symptoms, has not knowingly been exposed to COVID-19 during the last 14 days (the incubation period), or frequented areas or individuals at a higher risk of exposing one to the virus. The Daily Attestation is not a onetime use document, but should be completed by participants before participating at an event or utilizing the organization’s facilities. Completed Daily Attestations should be kept on file by the organization or the facility.

The Daily Attestation requires the participant to confirm that they have been following recommended guidelines, including physical distancing, and agree to do so while participating at the event or while utilizing the organization’s facilities. Importantly, the participant will also agree to immediately depart from an event or facility should they experience the known symptoms of COVID-19.

For participants that have had COVID-19, the Daily Attestation confirms that they have been cleared as noncontagious by provincial or local health authorities, and has provided written confirmation from a medical doctor of this to the organization.

Communicating with your Insurer

The relationship between the insurer and the insured is intended to be a good faith relationship, with that duty of good faith flowing in both directions. For the insurer that means it is to deal with claims in a fair and reasonable manner, and not wrongfully deny claims or take unsupported positions. For the organization (the insured), it means full and prompt disclosure both during the application phase, as well as when a claim is presented to the insurer.

In the vast majority of litigation between insurers and insured the conflict arises as a result of some element of miscommunication or misunderstanding between the parties. As such, clear communication with the insurer is critical. Some ways in which to ensure proper communication include:

1. Provide full disclosure of the event, facility, or participation risks during the application process. If uncertain inquire with the insurer.
2. Review the organization’s insurance policy or policies and know what is covered and not covered. Consider whether the coverage is appropriate to your organization’s risks.
 - a) Are there specific exclusions in the policy?
 - b) Are there specific riders or amendments to the policy?

3. Notify the insurer if there are substantive changes in procedures or in the circumstances from when the application was originally made. Advise the insurer of substantive changes. If the organization is uncertain as to what have been previously disclosed to the insurer, inquire with the insurer as to the existing coverage.
4. Promptly notify the insurer if a claim or potential claim arises. If the organization is uncertain as to whether a claim will arise, it is better to provide notice.
5. Provide as much information as possible in support of a claim.

In short, you want to provide the insurer with complete and accurate information in a timely manner, so as to avoid any resistance to claims that may be advanced due to some element of miscommunication or misunderstanding by either party.