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# Limiting Liability for COVID-19 Transmission

June 10, 2020



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OFFICIAL LEGAL SERVICES PARTNER  
PARTENAIRE OFFICIEL DE SERVICES JURIDIQUES

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## Welcome

We hope you are keeping well and safe.

Fasken is committed to providing legal insight into the new and changing issues which are arising.

Please visit our [Coronavirus \(COVID-19\) Knowledge Centre](#) and [The HR Space](#) for the latest legal information and updates.

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## ▼ Introduction

- With the nation slowly beginning to reopen, it's more important than ever to ensure you are protecting yourself not only in terms of personal health, but also from a legal standpoint.
- Sport organizations must be mindful of risks associated with COVID-19 and its transmission through sporting activity.
- This presentation briefly addresses strategies Canadian sports organizations can use to protect themselves from legal liability for transmission of COVID-19 through sporting activities.

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## ▼ Agenda

### The Plan for Today

1. Importance of an Overall Risk Mitigation Plan
2. Regular Attestations as to Good Health
3. Using Waivers to Limit Legal Liability:
  - a. Event Waiver
  - b. Facilities Waiver
  - c. Remote Activity Waiver
4. Communication with Insurer

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# Risk Mitigation

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## Risk Mitigation

### Importance of Risk Mitigation

- Several Provincial and Territorial governments have developed generalized guidance documents and risk mitigation plan templates for Organizations to adapt to their specific needs.
- At present, it is expected that all Organizations and businesses develop and implement policies and procedures to mitigate the transmission of COVID-19 prior to re-opening.

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## ▼ Risk Mitigation

### Precautionary measures could include:

1. Encouraging staff, athletes, and participants to remain up to date with developments related to COVID-19;
2. Designing a system in which facilities and equipment are regularly and thoroughly sanitized, inspected, and maintained;
3. Develop a general safety plan that addresses foreseeable dangers that could lead to liability;
4. Keep a written record of the safety plan along with a diary of steps taken to address safety concerns;

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## ▼ Risk Mitigation

### Precautionary measures could include:

5. Post visible and clear signs or pictures to inform participants of the inherent risks associated with attending the facility or event;
6. Educate and inform coaches, staff, volunteers, and administrators of the various ways liability can be incurred and train them never to admit liability.

**Waivers of liability and regular attestations can add another layer of protection from liability and augment an already developed risk mitigation plan.**

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# Regular Attestations

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## Regular Attestations

### Function of an Attestation

- The Daily Attestation does not waive any liability against the Organization.
- It strengthens the Organization's legal position in the event that a participant brings a legal action claiming they contracted COVID-19 at the Organization's facility event and that the organizer is at fault.

Completed Attestations should be used as required and kept on file by the organization or the facility.

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## ▼ Regular Attestations

### Content of an Attestation

- Requires the **participant** to confirm that they:
  - Do not knowingly have COVID-19;
  - Has not knowingly been exposed to COVID-19;
  - Has been following recommended public health guidelines; or
  - Have fully recovered from COVID-19 and have been declared have been as noncontagious by a doctor; and
  - Agree to continue observing recommended health precautions while participating at an event or while utilizing the Organization's facilities;
  - Agree to immediately depart from an event or facility should they experience the known symptoms of COVID-19.

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## ▼ Regular Attestations

### When to use an Attestation

- The Attestation is not a onetime use document.
- It should be completed by participants daily before utilizing the organization's facilities or as required prior to participation in an event.
- An Attestation is only one component of a robust risk mitigation plan and should be used in conjunction with a waiver of liability.

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# Waivers: What is a Waiver?

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## Waivers

### Generally

- 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 have traditionally been 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 should update their pre-existing waivers or adopt new waivers that address the specific risk of COVID-19 transmission through sanctioned training and events.

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## ▼ Waivers

### Important Aspects

- 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.
- Next, we will consider three specifically tailored template waivers concerning event attendance, facility use, and remote training.

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## ▼ Waivers: Event Waiver

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## ▼ Waivers – Event Waiver

### What is an Event Waiver?

- A unilateral 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.
  - Ex, 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.

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## ▼ Waivers – Event Waiver

### Three sections of an Event Waiver:

1. **Attestation:** This section requires each participant to provide an attestation that they are not infected with COVID-19 and have not recently been exposed to the risk of contracting COVID-19.
2. **Associated Risk:** The Event Waiver broadly captures all possible risks facing event participants, including the risk of contracting COVID-19. **Organizations should review this section of the waiver and add any particular risks associated with their particular event.**

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## ▼ Waivers – Event Waiver

### Three sections of an Event Waiver:

3. **Release from Liability:** This is the legally operative 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.

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## ▼ Waivers: Facilities Waiver

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## ▼ Waivers – Facilities Waiver

### What is a Facilities Waiver?

- A unilateral 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.
- Notably, it does not contain an attestation, therefore, should be used in conjunction with the Daily Attestation.
- This is intended as a onetime waiver that the organization will keep on file.

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## ▼ Waivers – Facilities Waiver

### Three sections of a Facilities Waiver:

1. **Description of the premises:** An organization should ensure that the language of this section appropriately describes their premises. **An organization might consider including the street address of the property.**

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## ▼ Waivers – Facilities Waiver

### Three sections of a Facilities Waiver:

2. **Description of the risks associated with attendance:** Different facilities such as a gymnasium, a bobsleigh track, a fitness centre, or a swimming pool each entail unique risks. **Organizations should review and modify this section of the waiver to address facility-specific risks that may be unique to the activities taking place at their particular premises.**

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## ▼ Waivers – Facilities Waiver

### Three sections of a Facilities Waiver:

3. **Release from Liability:** The Facilities Waiver contains an assumption of the risks and a release from liability. This is the legally operative 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.

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## Waivers: Remote Activity Waiver

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### Waivers – Remote Activity Waiver

#### What is a Remote Activity Waiver?

- A unilateral agreement, to be executed by an individual person (or guardian) for the benefit of the organization in cases where the participant is training remotely.
- Applies 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.
- This intended as a onetime waiver the organization keeps on file.

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## ▼ Waivers – Remote Activity Waiver

### Important Considerations

- The description of risks associated with remote activities will be highly organization dependent.
- The best and most enforceable waivers of liability contain detailed descriptions of the specific risk a participant may face.
- **Organizations are encouraged to discuss potential remote activities with their legal counsel to ensure that the organization is protected.**

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## ▼ Waivers – Remote Activity Waiver

### Important Considerations

- The Remote Activity Waiver 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.
- A combined Facility and Remote Activity Waiver is also available for convenience.

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# Communication with Insurer

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## Communication with Insurer

### The Insurer and the Insured

- 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.
- **The insurer** deals with claims in a fair and reasonable manner, and does not wrongfully deny claims or take unsupported positions.
- **The insured (the organization)** gives full and prompt disclosure both during the application phase, as well as when a claim is presented to the insurer.

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## ▼ Communication with Insurer

### Some ways to ensure proper communication:

1. Provide full disclosure of the event, facility, or participation risks during the application process;
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;
  - Are there specific exclusions in the policy?
  - Are there specific riders or amendments to the policy?

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## ▼ Communication with Insurer

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.

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## ▼ Communication with Insurer

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

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Questions?

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Biographies

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### Areas of Expertise

Insolvency & Restructuring | Human Rights | Commercial Litigation | Litigation and Dispute Resolution

### Education

2009, JD, with distinction, University of Saskatchewan

2003, BSc, McGill University

### Jurisdiction

Alberta, 2010

### Languages

Bengali | English

Arif is a commercial litigator in the Litigation and Dispute Resolution Group and a member of the Insolvency and Restructuring Group. He has appeared at all levels of court in both Alberta and Saskatchewan as well as at the Supreme Court of Canada. Arif has experience in international arbitration and before administrative boards, including the Sport Dispute Resolution Centre of Canada.

Arif has represented large multinational corporations, product manufacturers, insurers, entrepreneurs, professional athletes, national sports organizations, franchisees and franchisors. His commercial practice includes claims for breach of contract, breach of trust, breach of fiduciary duty, claims in fraud, product liability, franchise disputes and judicial review.

Arif's practice also encompasses injunction and urgent relief work in broad-ranging areas including labour and employment, privacy and technology, and national sports organizations.

In insolvency and restructuring proceedings, Arif has represented financial institutions, secured and unsecured creditors as well as private investors in various proceedings, including contested disputes concerning the validity and priority of security interests.

Arif joined Fasken Martineau after graduating from the College of Law at the University of Saskatchewan and is an alumnus of McGill University. He volunteers regularly at Diefenbaker High School in Calgary introducing students to advocacy. Arif advises victims of discrimination on a pro bono basis.

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## David Kitchen

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### Areas of Expertise

Litigation and Dispute Resolution | Commercial Litigation |  
Construction Litigation | Insurance

### Education

1999, LLB, University of Calgary

1993, BA, University of Victoria

### Jurisdiction

Alberta, 2000

### Language

English

David Kitchen practices primarily in the areas of insurance and general commercial litigation and also specializes in defending long term disability claims on behalf of a number of large disability insurers. During his 19 years of practice, David has appeared in Court numerous times, both at the Alberta Court of Appeal and the Alberta Court of Queen's Bench levels. He has run a number of trials in the Court of Queen's Bench, been involved in numerous Special Chamber's Applications and argued at the Court of Appeal on a wide range of legal issues. While maintaining his current practice, David has also begun to offer his services as a mediator.

Over the course of his career David has been involved in hundreds of mediations and Judicial Dispute Resolutions, both from the perspective of Plaintiff's counsel and Defence counsel. During this time he has been able to observe what works well in a mediation setting, and what strategies result in successful negotiations. While parties and their counsel tend to be "result oriented", sometimes it is the process of the negotiations that is most important; a fair and balanced process with the each party being engaged and heard.

David also brings the practicality of having appeared at all levels of court in Alberta to the mediation process. As noted above, he has participated in numerous Queen's Bench trials and has argued at the Court of Appeal on a wide variety of legal issues. As such, David has obtained immeasurable litigation experience and gained some sense of what a court may do if a certain matter were to come before it; not to mention having a clear understanding of the significant time and cost commitments of proceeding to trial.

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To further enhance his understanding of the mediation process, David recently completed the STARS program at the Straus Institute for Dispute Resolution through Pepperdine University, School of Law. This multi-day course, with some of the leading mediators in North America, has equipped David with additional practical tools, strategies and negotiation techniques to utilize as a mediator. This mediation training, along with David's litigation experience and balanced approach to problem solving will allow him to assist parties in negotiating a successful resolution of their lawsuits, regardless of the value or issues in dispute.

When not practicing law, David can typically be found on a bicycle, as he is an avid road cyclist, having started up a local cycling club called Velo Café Cycling with a number of fellow riders. David can also be found teaching spin, skiing, playing hockey and acting as chauffeur for his three children who compete in a number of different sports throughout Alberta.



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### Areas of Expertise

Government Relations and Strategy | Political Law | Election and Election Finance | Lobbyist Registration and Lobbying Law | Public Sector Conflict of Interest Law

### Education

2016, JD, University of Manitoba

2010, MBA, Finance, Wilfrid Laurier University

2008, BA, Political Studies, University of Manitoba

### Jurisdiction

Ontario, 2017

### Language

English

Dana advises clients on political law at the federal, provincial, and municipal levels of government. He also lobbies for clients at all levels of government, helping to navigate the legislative process and the government decision-making process more generally.

Prior to joining Fasken, Dana worked for Hansell LLP and the Canadian Coalition for Good Governance, and was seconded to the Ontario Securities Commission.

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