Hockey Canada Memo to Members – Facility Rental Agreements

To Whom It May Concern:

In the wake of the COVID-19 pandemic, many municipalities which operate arenas have updated their facility rental agreements to include additional protections. This occasionally includes the requirement that participants sign a waiver or release in favour of the municipality as a condition of use.

Hockey Canada has reviewed a number of these facility rental agreements and waivers to date, and wanted to provide a resource to its Members which highlights some of the problematic clauses we have seen in these contracts. The goal is to provide Members with the tools to identify troublesome clauses and put them in a position to suggest amendments which will be beneficial to their local associations and participants.

Waiver and Assumption of Risk

Not all facilities are requiring a waiver be signed by participants, but the vast majority of facility agreements we have seen so far do have a waiver component.

First, it is important to note that a facility cannot ask a minor hockey association to waive the rights of its participants. Any clause where the MHA is waiving claims on behalf of players or parents who use the ice rented by it would not hold up in court. This issue should be raised with any municipality or facility that inserts such a clause in the facility rental agreement.

The proper course of action for municipalities is to require that MHAs obtain waivers from each player or their legal guardian. The facility is within its rights to require this, and can require that a waiver be signed before the player uses the facility. Where a municipality has done so, it is important to make sure the waiver is not overly expansive in terms of the types of claims that are being released.

An example of a problematic clause we have seen is below:

1. I expressly acknowledge and agree that my attendance at the City Facility and my use of the City Facility may involve the risk of property damage and/or death and/or serious injury including the possibility of exposure to, and illness from, infectious and communicable diseases such as COVID-19.

2. I am fully aware of the inherent risks and hazards that result from my attendance at the City Facility and, through my use of such City Facility, I voluntarily,

knowingly, and freely assume all such risks including, but not limited to, risks resulting from my own actions or inactions, the actions or inactions of others (including but not limited to the Minor Hockey Association) or their staff and/or volunteers, falls, injuries, illnesses, infectious diseases including to COVID-19, death, and navigating any and all obstacles and any defects of the City Facility.

3. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE OF THE RELEASEES or others, and assume full responsibility for my participation.

4. I, for myself and on behalf of my heirs, assigns, personal representatives and next of kin, HEREBY RELEASE AND HOLD HARMLESS THE RELEASEES WITH RESPECT TO ANY AND ALL ILLNESS, DISABILITY, DEATH, or loss or damage to persons or property, WHETHER ARISING FROM THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, to the fullest extent permitted by law.

The main issues with the above are that: i) the release is global, in that the individual is being asked to release all claims and not just claims related to COVID-19; and ii) the release also covers injuries or losses relating directly to the negligence of the city. This would mean that, if a player could show that he contracted COVID-19 due to the obviously defective cleaning procedures of the city, the waiver would prevent them from suing the city.

We would suggest that the MHA push to amend the waiver as follows:

1. I expressly acknowledge and agree that my attendance at the City Facility and my use of the City Facilities may involve the risk of property damage and/or death and/or serious injury including the possibility of exposure to, and illness from, infectious and communicable diseases such as COVID-19.

2. I am fully aware of the inherent risks related to the contraction of COVID-19 and hazards that result from my attendance at the City Facility and, through my use of such City Facility, I voluntarily, knowingly, and freely assume all such risks including, but not limited to, risks resulting from my own actions or inactions, the actions or inactions of others (including but not limited to the Minor Hockey Association) or their staff and/or volunteers, falls, injuries, illnesses, infectious diseases including to COVID-19, death, and navigating any and all obstacles and any defects of the City Facility.

3. Notwithstanding the above, I understand that the City will take all reasonable steps to protect me from the above referenced risks.

4. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS RELATED TO THE CONTRACTION OF COVID-19, both known and unknown, EVEN IF UNLESS ARISING FROM THE NEGLIGENCE OF THE RELEASEES or others, and assume full responsibility for my participation.

5. I, for myself and on behalf of my heirs, assigns, personal representatives and next of kin, HEREBY RELEASE AND HOLD HARMLESS THE RELEASEES WITH RESPECT TO ANY AND ALL ILLNESS, DISABILITY, DEATH, or loss or damage related to my contraction of COVID-19 while at the City Facility to persons or property , WHETHER UNLESS ARISING FROM THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, to the fullest extent permitted by law.

In our view, the amended clause is far more reasonable in its scope. The new language is reflective of the fact that, prior to the COVID-19 pandemic, municipalities typically did not require that players sign a waiver before entering an arena. Facility owners are effectively trying to use COVID-19 as a pretense to gain protections for themselves that they did not previously enjoy. The proposed language negates those additional protections, and deals only with risks associated with contracting COVID-19. Further, the amendments ensure that claims related to the negligence of the municipality will not be waived. A requirement to waive losses arising due to negligence is quite onerous, and should be pushed back on by any renter.

Disclosure of Positive COVID-19 Test

Some waivers we have reviewed have included problematic clauses regarding what happens if a participant learns that they have contracted COVID-19 sometime after they were at an arena. Below is one example:

> Participants undertake to report back to the City any positive test results following the event and shall provide the City with any required permissions necessary to provide contact information to health organizations for contact tracing purposes and shall give the City permission to communicate any potential exposure to others involved in the event.

This clause should be struck in its entirety. It constitutes a severe infringement on an individual's privacy rights. The city is trying to get players to agree ahead of time to the sharing of their private medical information as a condition of allowing them to use its arena. Further, the clause appears to misunderstand how the contact tracing process works. The individual who tests positive has an obligation to work with health authorities to identify people they have been in contact with and places they have visited. The health authority will then contact those people/places to inform them of the potential exposure, without identifying the name of the individual who has contracted COVID-19. This is the proper process, and any clause attempting to subvert that is objectionable.

We would suggest replacing the clause with something like the below:

> The Renter shall inform the City if they become aware that a Participant tests positive for COVID-19 who has been at the City's facility within the prior 14 days of testing positive. For greater clarity, there shall be no obligation on the Renter to provide the name or any other identifying information regarding the Participant who has contracted COVID-19.

Hold Harmless Clauses

Every facility rental agreement will almost certainly contain a hold harmless clause. The purpose of these clauses, from the facility's perspective, is to ensure that it will not have to pay damages or legal fees related to any claim brought against it stemming from the renting party's use of the facility.

The difference between the hold harmless clause and a waiver is that the hold harmless clause requires the renter to defend and indemnify the municipality against claims brought by third parties relating to the use of the facility by the renter. A waiver is an individual releasing their own rights to sue the municipality.

An example of a hold harmless clause that we have seen is below:

> The Renter shall defend, indemnify, and hold harmless the Municipality and other Releasees against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable legal fees and disbursements, and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, arising out of or resulting from any claim related to the Renter's use of the facility.

These clauses are not ideal, but there is no reasonable hope of having them omitted from the agreement entirely. As is the case with waivers, the focus should be on reducing the scope of the application of the clause. Specifically, MHAs will want to ensure that there is at least a carve out for claims relating to the negligence of the facility owner. If presented with such a clause, we would propose that you suggest the following amendment:

> The Renter shall defend, indemnify, and hold harmless the Municipality and other Releasees against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable legal fees and disbursements, and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, arising out of or resulting from any claim related to the Renter's use of the facility, but only where the claim is related to the negligence or wrongful acts of the Renter. For greater certainty, this clause shall not apply to any claim arising out of the negligence or intentional acts of the Municipality or those for whom they are responsible at law.

This addition specifies that the duty to defend, indemnify, and hold harmless is limited to situations where the Renter is alleged to have done something wrong or omitted to do something it should have done. This is preferable to the open-ended duty set out in the original language.

Waiver of Subrogation Rights

Most facility rental agreements will require that the renter provide proof that the MHA is insured under a Commercial General Liability policy. That is a normal clause. However, we have seen a requirement that the policy contain a waiver of subrogation and recovery rights which the MHA's insurers may have against the Town and those for whom they are in law responsible. Any such clause should be struck from a facility rental agreement if at all possible.

Responsibility for Cleaning

A number of agreements we have seen have included a requirement on the renter to return the facilities in the same condition as they were in before the rental period. Interpreted broadly, this could suggest that the renter is taking on the responsibility to sanitize the facility after use, and thereby taking on some potential responsibility for the safety of the premises for future

users. MHAs will want to ensure that it is clarified that the municipality retains the obligation to sanitize the facilities to limit the potential for COVID-19 exposure to future groups, and that a requirement to return the facilities in the same condition is not meant to cover such sanitization.

Such a clause may look like the following:

> The Renter shall be responsible to return the Facilities in the same condition they were in before the Rental Period. For greater clarity, the Renter is not responsible to perform a thorough sanitization of the Facilities after its use. Such sanitization is the sole responsibility of the Town.

Charges for Cancellations Related to COVID-19

The vast majority of facility rental agreements allow for the municipality to keep a large portion of the fees paid for a rental in the event of a cancellation. While not ideal, this is a fairly standard clause. However, MHAs will want to make sure there are separate provisions in place if the cancellation relates to COVID-19. Some municipalities have included this in their amended agreements. Below is one example:

1.1 Special Terms: The following terms have been implemented to deal specifically with the COVID-19 pandemic.

1.1.1 Refund Terms:

a) If the Town is required to close the facility due to government order or directive related to COVID-19, or otherwise cannot accommodate the booking as a result of COVID-19, the Renter will receive a full credit for any affected Rental Period. In the event such disclosure occurs part way through a Rental Period, the Licensee will receive a pro-rated credit.

b) If the Renter is required to cancel a Rental Period due to COVID-19, and such cancellation falls within 30 days before the Rental Period, or during the Rental Period, the Renter will receive a credit for 75% of the Fees for the cancelled Rental Period, to be used for future bookings only. The remaining 25% of the Fees shall be non-refundable. All Fees applicable to any portion of the Rental Period prior to the cancellation shall be non-refundable.

While it is good that the Town in this instance included a special cancellation provision related to COVID-19, these provisions are still drafted in the Town's favour. It makes little sense why the cancellation should be treated differently whether initiated by the facility or by the renter. We would therefore propose the following amendments:

1.1 Special Terms: The following terms have been implemented to deal specifically with the COVID-19 Pandemic.

1.1.1 Refund Terms:

a) If the Town is required to close the facility due to government order or directive related to COVID-19, or otherwise cannot accommodate the booking as a result of COVID-19, the Renter will receive a full credit refund for any affected Rental Period. In the event such disclosure occurs part way through a Rental Period, the Licensee will receive a pro-rated credit refund.

b) If the Renter is required to cancel a Rental Period due to COVID-19, and such cancellation falls within 30 days before the Rental Period, or during the Rental Period, the Renter will receive a credit for 75% of full refund of the Fees for the cancelled Rental Period., to be used for future bookings only. The remaining 25% of the Fees shall be non-refundable. All Fees applicable to any portion of the Rental Period prior to the cancellation shall be non-refundable.

Depending on the circumstances, a credit may be just as useful to an MHA as a full refund. Therefore, it may be fine to leave it as a credit to be used for future bookings. However, the important part is that there should be no non-refundable aspect when a cancellation is brought on by COVID-19.

Safety Plans

Some municipalities have included the following language in their facility rental agreements:

> We cannot be certain that a person (of any age) will not contract COVID-19 at one of our Facilities and/or while participating in activities at those venues. Groups booking the Facilities will be required to develop a COVID-19 Safety Plan inclusive of associated policies and procedures that support the plan, have

it readily available for participants, and provide it to the Town should it be requested.

Clauses like this effectively place the burden on MHAs to develop plans on how the facilities will be used safely. It would obviously be preferable if the facilities themselves developed those plans and distributed them to its renters, but there is little to be done if a Town is not willing to do that. In this situation, the MHA can rely on return to play documents prepared by its Member and/or Hockey Canada, where applicable. Still, the MHA will need to accept the responsibility of addressing any gaps in these plans if a Town requires greater specifics as it relates to the use of their facilities.

Based on our review of facility rental agreements to date, there has not been a uniform approach taken by municipalities with respect to how much responsibility for safety protocols they delegate onto renters. Some facilities have dictated specific processes that must be followed by renters, which include things like taking the temperature of each participant before entry and keeping a logbook of each person in attendance during a rental session. Other agreements are silent on the specifics, but contain covenants that the renter will follow whatever safety protocols are put in place by the facility. In any event, it is the responsibility of the MHA renting the arena to ensure that it is complying with whatever is required by the facility. If it has issues with the protocols in place, it must address those with the municipality prior to signing the agreement.

Conclusion

The above represent only some of the potential new clauses which may be introduced by facilities as a result of the COVID-19 crisis. MHAs and other renters should read these agreements carefully to ensure that they are not agreeing to onerous clauses or waiving their legal rights unnecessarily. When reviewing these facility rental agreements, the important thing to ensure is that all new clauses are reasonable and only drafted to address the novel issues which are presented by COVID-19. It should not be used by municipalities as an opportunity to protect themselves from risks which existed before the pandemic.