

# **Interim Report**

# **Hockey Canada Governance Review**

**The Honourable Thomas Cromwell, C.C.**

**30 September 2022**

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## **I. INTRODUCTION**

I was engaged on August 3, 2022 by Hockey Canada to conduct an independent and impartial review of its governance in accordance with the Terms of Reference that have been made public.<sup>1</sup> Today, I provide my interim report in English and French of my responses to the first two matters in the Terms of Reference as required by my engagement.

The timelines for the review and particularly for this interim report are challenging. However, the prompt and full cooperation of those I have called on for information and assistance and the dedication of the team assisting me have allowed me to prepare this interim report. I can also confirm that I am on track to complete my final report, as required by my engagement, by the end of October.

I gratefully acknowledge the cooperation that I have received from everyone at Hockey Canada and the many other groups and persons who have responded to my requests for information and assistance. The remarkable team at Borden Ladner Gervais LLP that is assisting me, led by Nadia Effendi and Victoria Prince and including Sylvie Lalonde, Melanie Laframboise, Paige Miltenburg, Sandrine Mainville, Mathieu Dompierre, Julie Peacock-Singh and Vincenza Carrera, has risen to the challenges posed by the scope of and timelines for this review and have allowed me to conduct it in a timely and thorough manner.

To give some sense of the scope of this undertaking, the review team and I have so far:

- Interviewed over 65 individuals resulting in over 40 meetings and many follow-up emails, including with current and former Members of Hockey Canada’s Board of Directors and committees, current and former Hockey Canada employees, representatives of the Members of Hockey Canada, representatives of hockey associations and leagues, representatives of comparator National Sport Organizations as well as the Canadian Olympic Committee, the auditors for Hockey Canada, representatives of Sport Canada, experts and other individuals with knowledge of the history of Hockey Canada, hockey generally, and/or sports governance;
- Made six formal requests for information to Hockey Canada and dozens of follow-up requests resulting in approximately 1,155 documents, including minutes of Hockey Canada Board of Directors and Committees meetings, officers meetings and Members meetings (such as annual and semi-annual general meetings and Member forum meetings) as well as financial statements and ledgers related to the National Equity Fund (“NEF”), all of which have been reviewed;
- Reviewed the governance of other comparator National Sport Organizations to determine best practices;
- Researched sport legal and policy framework and best practices regarding governance and reserve funds;

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<sup>1</sup> Hockey Canada Governance Review, “Terms of Reference” (4 August 2022) <<https://www.hockeycanada.ca/en-ca/news/thomas-cromwell-to-lead-hockey-canada-governance-review-corp-2022>>.

- Reviewed written submissions from Hockey Canada Members and other stakeholders; and
- Prepared this interim report.

This interim report describes Hockey Canada's purposes and operations, details the legal framework within which it must operate and then turns to a detailed analysis of the first two elements of my Terms of Reference.

Here is a brief summary of my interim conclusions and recommendations in relation to those two matters.

**A. Was Hockey Canada's use of the National Equity Fund to fund uninsured liabilities which were met by the Fund appropriate?**

Yes. The establishment of reserve funds to address the risk of uninsured and under-insured claims is not only sound, but the failure to do so would be a serious oversight. It is appropriate to use NEF funds to address potential uninsured and underinsured liabilities for Hockey Canada and/or any participant for whose benefit the reserve is maintained. I will not be commenting on particular cases given that my review, under the Terms of Reference, is not an assessment of Hockey Canada's response to any particular incident or issue.

*i. Is there appropriate oversight concerning payments out of the National Equity Fund?*

No. Hockey Canada has no written policy governing the NEF; however, its stated purpose is noted in the annual financial statement. Though the fund forms part of the risk management matrix, questions arise regarding what role the fund actually plays within that matrix. Indeed, some Members have criticized Hockey Canada's lack of oversight of the NEF, particularly regarding the absence of a publicly available policy governing the fund. Additionally, Hockey Canada has adopted an informal procedure for dealing with under and uninsured claims, which begins at the NEF. However, the procedure is not widely known by Members, nor has it received formal Board approval.

*ii. Is the use of the National Equity Fund sufficiently transparent within the organization and in reports to stakeholders?*

No. While Hockey Canada discloses the balance of the NEF and inter-fund transfers on its audited financial statements, Members do not receive adequate information regarding these funds and their use. Hockey Canada maintains that Members discuss and have opportunities to ask questions on the NEF and its funding of under and uninsured claims. However, these discussions have occurred in camera, and our review of the minutes from Member meetings at which settlements, inter-fund transfers and financial statements were discussed provide no clarity on the nature, scope and frequency of such discussions. It also appears that Members and Participants may not have been fully aware of the scope of claims the NEF would fund, namely claims linked to sexual misconduct beyond the named perpetrators specifically excluded from liability insurance coverage. Participants, whose registration fees are the primary source of funding for the NEF, have not been adequately informed about what proportions of fees go to fund under and uninsured claims.

**B. Are the organization's By-Laws concerning the constitution and operation of the Board of Directors in line with current best practices, appropriate or require amendments?**

The current By-laws are not significantly misaligned with the points of reference that I examined (i.e. Sports Canada's Governance Principles for Sport Organizations, the Canadian Sport Governance Code, Athletics Canada, Canada Basketball, Curling Canada, Canada Soccer). However, as set out below and discussed in detail in the body of this report, I recommend several changes.

- i. *Recognizing the Board's current composition, are there recommended changes to the organization's governance structure that would support and further enhance the diversity of the Board?*

See the recommendations under point "3" (below) in relation to the nominations process.

- ii. *Are current terms and term limits aligned with best practices?*

While the current terms and term limits are within the range of what is supported by best practices, I recommend:

- Amending the corporation's Articles to increase the maximum number of Directors from nine to thirteen;
- Increasing the Directors' terms to up to three years from two;
- Staggering Directors' terms so that only about one-third of the Board would be up for re-election in any year;
- Increasing the Directors' term limit to nine consecutive years from eight; and
- Increasing the term limit of the Board Chair to six consecutive years from four to align with the proposed three-year term for Directors.

- iii. *Does the nominating process need to be amended?*

Yes. I recommend:

- Amending the By-laws to provide that no more than 60% of the Directors are of the same gender, to bring Hockey Canada in line with the COC Canadian Sport Governance Code;
- Subject to my final report, updating or replacing the Nominating Committee Terms of Reference to revise the Nominating Committee's composition and how the members of that committee are appointed, and to better define its role and duties;
- Reviewing and, if required, updating the Board Matrix to ensure it reflects the skills, experience and diversity elements that are needed on the Hockey Canada Board;



- For each election cycle (including the 2022 election), that the Nominating Committee use the Board Matrix as a tool to support the call for nominations and to articulate clearly the specific skills and competencies being sought for the Board positions to be filled;
- Confirming and documenting the Members' undertaking to not put forward any nominations for director candidates for the 2022 election and allow all nominations for Directors and the Chair to be submitted through the Chair of the Nominating Committee process. The Nominating Committee can and should rely on its past practice of reviewing and vetting all nominations so received, and creating a short-list of External Candidates in the same way it did in accordance with the 2020 Call for Nominations. That vetting process should be done having regard to the Board Matrix. I recommend that this approach be implemented for the current election cycle;
- Subject to additional comments in my final report, I am currently of the view that, going forward, this practice should become the Nominating Committee's standard practice and that the committee's authority to short-list candidates (even those proposed by Members) and put forward a final list of nominees for inclusion on the election ballot should be expressly provided for in the Nominating Committee's Terms of Reference and in the By-laws;
- Revising and updating the current "Chair of the Board Terms of Reference" to ensure they reflect the current needs of Hockey Canada and include a list of qualities and minimum competencies required of the Chair;
- Amending and removing all language in the By-laws that states or suggests that all nominations of candidates proposed by the Members shall be included in the final ballot for the election of the Directors and the Chair; and
- Amending the By-laws to provide that the Board may appoint additional Directors within the legal limits imposed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23, rather than limiting the option to only one additional Director.

**C. Is the structure of the various standing committees and task teams, including their Terms of Reference/mandates and reporting mechanism to the Board, appropriate?**

Hockey Canada's approach to its standing committee structure generally aligns with best practices, subject to a few exceptions that I will consider further in my final report. I have not completed my study of the appropriateness of the standing committees' and task teams' terms of reference, which again, will be given more detailed consideration in my final report.

It is, of course, for Hockey Canada and its Members to decide how to proceed in light of this interim report. My review is ongoing and, as indicated above, I will deliver at the end of October my final report, which will address the remaining issues in the Terms of Reference of my engagement and include any additional recommendations/observations on the above two matters. Therefore, my governance recommendations will be best considered in the light of the entire suite of recommendations in my final report. However, I recommend that the organization move forward with the 2022 election of Directors and Chair of the Board in accordance with the nominating

process changes specifically described below at page 73, to which I understand Members have agreed and which I support. I further recommend that Hockey Canada and its Members receive my final report at the end of October before considering any further governance changes, including amendments to By-laws.

## II. HOCKEY CANADA BACKGROUND

### A. Introduction

Hockey Canada (formerly, Canadian Hockey Association and Canadian Amateur Hockey Association) is a not-for-profit corporation continued under and governed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“**CNCA**”). Hockey Canada is also a Registered Canadian Amateur Athletic Association (“**RCAAA**”), a designation under the *Income Tax Act*, RSC 1985, c 1 (5th Supp).<sup>2</sup>

Hockey Canada is the national, self-governing body for amateur hockey, including men, women, and men’s para hockey, across the country.<sup>3</sup> The not-for-profit corporation “oversees the management of programs in Canada from entry-level to high-performance teams and competitions, including world championships and the Olympic Winter Games.”<sup>4</sup> Hockey Canada also represents Canada internationally within the International Ice Hockey Federation (“**IIHF**”).<sup>5</sup>

Not-for-profit corporations like Hockey Canada have members, directors and officers. The various roles of these persons is discussed in more detail in Chapter IV. Hockey Canada has only one class of Members.<sup>6</sup> The Members of Hockey Canada are the different provincial, regional or territorial associations/federations who are “empowered to manage and foster amateur hockey within their geographic region and have the responsibility to represent their constituents.”<sup>7</sup> The Members of Hockey Canada are often referred to as “branches”. They are the following: BC Hockey, Hockey Alberta, Hockey Saskatchewan, Hockey Manitoba, Hockey Northwestern Ontario, Ontario Hockey Federation, Hockey Eastern Ontario, Hockey Québec, Hockey New Brunswick, Hockey PEI, Hockey Nova Scotia, Hockey Newfoundland and Labrador, and Hockey North.

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<sup>2</sup> Hockey Canada’s status as an RCAAA will be further explained in Chapter III.

<sup>3</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>; “Hockey Canada By-Laws, Regulations and History” (May 2022), s 2.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>4</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>.

<sup>5</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>; “Hockey Canada By-Laws, Regulations and History” (May 2022), s 2.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>6</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 9.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>7</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>; “Hockey Canada By-Laws, Regulations and History” (May 2022), s 2.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

Hockey Canada’s Board of Directors is composed of nine Directors, including the Chair of the Board, who are elected by the Members and up to one Director appointed by the elected Directors. Directors serve without remuneration.<sup>8</sup>

Finally, Hockey Canada’s Corporate Officers include the Chief Executive Officer (“CEO”), President and Chief Operating Officer (“COO”), Chief Financial Officer (“CFO”), and Chief Business Development Officer (“CBDO”). The by-laws also permit the CEO, with the approval of the Board, to appoint other Officers.<sup>9</sup>

## B. History

One can get a general sense of the evolution of Hockey Canada’s organization by looking at some key dates in its history.

<b>1914</b>	On December 4, 1914, the Canadian Amateur Hockey Association was “formed to oversee the amateur [hockey] game at the national level.” <sup>10</sup> From 1914 through to 1997, local hockey associations became Members of the national association. <sup>11</sup>
<b>1969</b>	In 1969, the Hockey Canada organization was created by the federal government following a recommendation made in the <i>Report of the Task Force on Sports for Canadians</i> . Its responsibility was to organize and develop Canada’s representation in international competition. <sup>12</sup>
<b>1981</b>	On May 1, 1981, an application to incorporate under the name Canadian Amateur Hockey Association was made under part 2 of the <i>Canada Corporations Act</i> . Letters Patent were accordingly issued. <sup>13</sup>
<b>1995</b>	On February 1, 1995, Supplementary Letters Patent were issued to the Canadian Amateur Hockey Association. This changed the organization’s name to Canadian Hockey Association. <sup>14</sup>

<sup>8</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 39.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>9</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 40.11, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>10</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022) at 177, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>; “Learn about the history of Hockey Canada” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/history](http://www.hockeycanada.ca/en-ca/corporate/history)>.

<sup>11</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022) at 180, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>12</sup> John Barnes, *Sports and The Law in Canada*, 2<sup>nd</sup> ed (Toronto and Vancouver: Butterworths Canada Ltd, 1987) at 34.

<sup>13</sup> Consumer and Corporate Affairs Canada, “Canadian Amateur Hockey Association Letters Patent” (1 May 1981).

<sup>14</sup> Industry Canada, “Canadian Amateur Hockey Association Supplementary Letters Patent” (1 February 1995).

<b>1998</b>	In 1998, the Canadian Amateur Hockey Association and Hockey Canada merged into one organization, “bringing every aspect of Canadian hockey under one umbrella.” <sup>15</sup>
<b>2014</b>	On June 10, 2014 and further to the coming into force of the <i>Canada Not-for-profit Corporations Act</i> , Hockey Canada was continued under that Act, by way of Articles of Continuance. <sup>16</sup>

### C. Mission, Vision and Values

Hockey Canada’s mission statement is to: “Lead, Develop and Promote Positive Hockey Experiences.”<sup>17</sup> Its vision is to be “World Sport Leaders”.<sup>18</sup> Hockey Canada’s values include “making hockey more than scoring goals and winning games.”<sup>19</sup> More specifically, Hockey Canada states that it believes:

- In a positive hockey experience for all participants, in a safe, sportsmanlike environment.
- In the development of life skills which will benefit participants throughout their lives.
- In the values of fair play and sportsmanship, including the development of respect for all people by all participants.
- In hockey opportunities for all people regardless of age, gender, colour, race, ethnic origin, religion, sexual orientation, or socio-economic status and in both official languages.
- In the importance for participants to develop dignity and self-esteem.
- To instill the values of honesty and integrity in participants at all times.
- In the promotion of teamwork, and the belief that what groups and society can achieve as a whole is greater than that which can be achieved by individuals.
- In the country of Canada, its tradition in the game of hockey, and the proud and successful representation of this tradition around the world.
- In the value of hard work, determination, the pursuit of excellence and success in all activities.

<sup>15</sup> “Learn about the history of Hockey Canada” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/history](http://www.hockeycanada.ca/en-ca/corporate/history)>.

<sup>16</sup> Industry Canada, “Hockey Canada Association Articles of Continuance” (10 June 2014).

<sup>17</sup> “Mandate & Mission – Who is Hockey Canada?” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/about/mandate-mission](http://www.hockeycanada.ca/en-ca/corporate/about/mandate-mission)>.

<sup>18</sup> “Mandate & Mission – Who is Hockey Canada?” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/about/mandate-mission](http://www.hockeycanada.ca/en-ca/corporate/about/mandate-mission)>.

<sup>19</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 8, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>

- In the benefits of personal and physical well-being.<sup>20</sup>

#### **D. Purposes**

Hockey Canada’s purposes have remained consistent throughout its history. Although Hockey Canada’s current purposes are formulated differently than the objects set out in the 1981 Letters Patent, the substance of the purposes has not changed significantly. As listed in Hockey Canada’s 2014 Articles of Continuance, and its 2022-2023 By-Laws, the purposes of Hockey Canada are to:

- (a) Regulate amateur hockey in Canada and establish uniform playing rules;
- (b) Promote the sport of amateur hockey in Canada, on a nationwide basis;
- (c) Oversee a structure of Branches (“**Members**”), Clubs, Associations, Leagues and Teams involved in amateur hockey;
- (d) Deliver a training program that brings promising athletes from the grassroots level to national and international levels through various qualifying competitions;
- (e) Manage national teams to participate in international competitions;
- (f) Stage and sanction regional, national, and international competitions and sanction local and Member competitions;
- (g) Act as Canadian representative on the IIHF Ice Hockey Federation;
- (h) Provide a training and certification program for coaches and officials, and provide training programs for other hockey development programs; and
- (i) Carry out fundraising activities and redistribute funds for local Clubs and Member organizations.<sup>21</sup>

#### **E. Main Operations and Business**

Hockey Canada’s operations essentially deal with all aspects of “organized hockey”.<sup>22</sup> Based on Hockey Canada’s mission, vision, values and purposes, its current by-laws, and its recent budget and annual reports, we understand Hockey Canada’s main operations and business lines to be composed of four categories: regulating amateur hockey in Canada, growing and developing the game, representing Canada on the world stage, and business development.

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<sup>20</sup> “Mandate & Mission – Who is Hockey Canada?” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/about/mandate-mission](http://www.hockeycanada.ca/en-ca/corporate/about/mandate-mission)>.

<sup>21</sup> Industry Canada, “Hockey Canada Association Articles of Continuance” (10 June 2014); “Hockey Canada By-Laws, Regulations and History” (May 2022), s 4.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>22</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>.

i. *Regulating amateur hockey in Canada*

Hockey Canada oversees hockey in Canada at all levels: it oversees a complex vertical and horizontal structure of Members, clubs, associations, leagues and teams, all involved in amateur hockey across the country.

Hockey Canada's role is to establish uniform playing rules and set standards for its Members and all stakeholders under its umbrella. Hockey Canada accomplishes this through the requirement in its by-laws that its Members must adhere to and observe Hockey Canada's by-laws, regulations, playing rules, policies and related decisions. Failure to do so could result in termination of membership.<sup>23</sup> Hockey Canada also requires its Members to conduct and control hockey within their own geographical region in the same manner.<sup>24</sup> In addition, all registered participants of Hockey Canada or any of its Members, which includes but is not limited to any players, coaches, trainers, clubs, teams, associations, leagues and parents, must also adhere to and observe the playing rules and standards set by Hockey Canada and Hockey Canada's Members.<sup>25</sup>

As discussed below, while Hockey Canada's By-laws clearly lay out its powers to regulate and enforce principles, standards and rules, some representatives of the Board and membership to whom we have spoken have indicated that enforcement often does not occur and that this is due, in part, to the practical difficulties associated with enforcement. It has been stated in some interviews that the Directors do not want to exert undue control, in part because it is the Members who elect them and also because the sanctions for non-compliance are limited and severe (e.g. suspension and expulsion). Some Members have expressed the view that Hockey Canada is just one layer in a complex structure, where each Member and association are their own entity, which makes it difficult for Hockey Canada to have a high degree of influence and control at every level. These issues are creating inconsistencies across the country in the way the game of hockey is delivered.

ii. *Growing and developing the game*

Hockey Canada coordinates a vast array of development programs, aimed at recruiting and retaining new players, shaping the next generation, and developing talent. Hockey Canada hopes to bring promising athletes from the grassroots level to national and international levels.

Hockey Canada offers programs, camps and resources in relation to kids and youth hockey, female hockey, men's para hockey, coaching, and officiating. It also offers mentorship, school and safety programs, as well as adult recreational hockey. More specifically, Hockey Canada coordinates players skills camps, player development and regional centres, the National Coach Certification Program, the Hockey Canada Officiating Program, the Hockey Canada Safety Program, Hockey

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<sup>23</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), ss 7.1, 9.2, 18.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>24</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 11.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>25</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), ss 14.1, 14.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.



University, Dreams Come True, Esso Fun Days and The First Shift, which all “serve as a catalyst for growing the game.”<sup>26</sup>

In addition, Hockey Canada organizes domestic championships, including the Allan Cup, the Centennial Cup, the Esso Cup, the Telus Cup and the National Women’s Under-18 Championship, as well as high performance championships and events, such as the World Junior A Challenge, the Para Hockey Cup, the Rivalry Series and the World Under-17 Hockey Challenge. When awarded by the IIHF, Hockey Canada also delivers the IIHF World Junior Championship, the IIHF Women’s World Championship and the IIHF U18 Women’s World Championship.

From what we have observed, some Members’ understanding of how the roles under the Hockey Canada umbrella are divided appears to differ from its legal mandate. According to them, Hockey Canada’s main focus and mandate remain on high performance athletes, while the Members focus on developing young players with the aim of the player reaching the next level and to instill a lifelong love of the game. We also heard from many of the individuals we interviewed that Hockey Canada needs to get more involved with grassroots hockey. There was also a recognition that Hockey Canada’s focus on high performance responds to external constraints (such as government funding requirements) and that high performance hockey is what funds grassroots hockey.

### *iii. Representing Canada on the world stage*

Hockey Canada is responsible for Canada’s national teams, competing at international levels. Hockey Canada organizes international competitions held in Canada and serves as the Canadian representative in the IIHF.

### *iv. Business development*

Through sponsorship and licensing partnerships, Hockey Canada promotes the sport of hockey in Canada and raises a significant amount of money to finance Hockey Canada’s operations. Some corporate brands sponsor Hockey Canada to gain the right to use some of Hockey Canada’s intellectual property. Through these sponsorship agreements, Hockey Canada receives a financial investment, while the corporate brands receive the benefit of having their product linked to hockey, a sport to which many Canadians have an emotional connection. In addition, Hockey Canada monetizes its intellectual property through licensing agreements. Some corporate brands receive the right to use Hockey Canada’s intellectual property on their products, sell these products to consumers, and then pay royalties to Hockey Canada. For example, a company produces replicas of official team jerseys, and other companies use Hockey Canada’s logo on mugs, hockey pucks, hockey nets, and so on.

Hockey Canada also raises money through its organization of various events and competitions, as well as through the sale of merchandise.

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<sup>26</sup> “Hockey Canada 2020-21 Annual Report” (last visited 21 August 2022) at 21, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>.



Hockey Canada's marketing efforts are also focused on recruitment and retention of players: campaigns are created with the aim of bringing kids into the game of hockey, as well as inspiring young players by creating the feeling that they are "part of something bigger."<sup>27</sup>

Hockey Canada operates hand-in-hand with the Hockey Canada Foundation, a registered charity, "to provide secure, sustainable, long-term funding to support the future development of the game."<sup>28</sup> This Review will not address the role or operation of the Hockey Canada Foundation.

For the year ending on June 30, 2021, Hockey Canada had total revenues of \$64.285 million dollars, with operating revenues of \$33.669 million. These operating revenues derive mainly from marketing (\$20.138 million), government grants (\$5.653 million) and revenue from national events and camps and national teams (\$3.4 million). Hockey Canada receives \$23.80 per player from its Members: \$3 is a registration fee which is allocated exclusively to Hockey Canada's general operations (programming, facilities and staff) and \$20.80 is an insurance fee which we discuss further below. As a result of the pandemic, the registration fee was reduced to \$1.50 during the 2020-2021 season and to \$0 during the 2021-2022 season.

Hockey Canada operates a number of segregated funds, including the National Equity Fund, the Health and Benefit Trust and the various Pillar funds. The total value of these funds as of June 30, 2021 was \$109.819 million. We will discuss this in more detail later.

Hockey Canada has offices in Calgary, Toronto and Ottawa and employs approximately 120 full-time equivalent employees.

## **F. The Organization of Hockey in Canada**

As will be discussed in Chapter III, the regulation of sport and physical activity falls under the shared jurisdiction of the federal and provincial governments. The federal jurisdiction generally concerns matters of national and international affairs, such as national and international level sport. The provinces and territories have exclusive jurisdiction within their territory over significant aspects of sport, and each of them has the power to adopt its own policies and programs as it sees fit, as long as it does not infringe on the exclusive jurisdiction of the federal government.<sup>29</sup>

This means that, in addition to Hockey Canada's regulation at the national level, hockey is also regulated by Provincial/Territorial Sport Organizations ("P/TSOs"). These P/TSOs are self-governing, non-for-profit organizations that are recognized by their provincial/territorial governments as the governing body for their sport in the province. For example, the Government of Ontario, through the Ministry of Tourism, Culture and Sport, recognizes the following P/TSOs for hockey: Ontario Hockey Federation ("OHF"), Hockey Eastern Ontario ("HEO"), Hockey Northwestern Ontario ("HNO") and Ontario Women's Hockey Association ("OWHA"). The first three P/TSOs are Members of Hockey Canada, while OWHA is one of OHF's seven members.

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<sup>27</sup> Interview of Brian Cairo (August 30, 2022); Interview of Dana Gladstone (September 7, 2022).

<sup>28</sup> "Hockey Canada 2020-21 Annual Report" (last visited 21 August 2022) at 26, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>.

<sup>29</sup> Lucie Thibault & Jean Harvey, *Sport Policy in Canada* (University of Ottawa Press, 2013) at 46.

In addition to Hockey Canada and the 13 P/TSOs (or Members), thousands of Minor Hockey Associations (“**MHA**”) have been created from coast to coast.<sup>30</sup> These associations are composed of various teams, which teams are themselves composed of players, coaches, and support staff. Hockey in Canada is also divided into various levels, including Junior hockey, Minor hockey and Senior hockey. Junior Hockey is itself divided into four tiers: Major Junior, which is governed by the Canadian Hockey League (“**CHL**”), Junior A, Junior B and Junior C. Minor hockey is divided into age categories, going from U7 to U21.

The following statistics highlight the number of stakeholders involved under the Hockey Canada umbrella.<sup>31</sup> For the 2020-2021 season, there were 1,645 MHAs across the country (which include Minor Hockey Associations, Female Hockey Associations, and Para Hockey organizations), for a total of 413,891 players. For the same year, for all the other categories that are not considered “associations” from an organization standpoint (e.g. Major Junior, Junior A, Senior Hockey, etc.) there were 1,217 teams and clubs for a total of 105,354 players. In addition, there are thousands of other participants, including coaches, trainers, officials and other volunteers.

This myriad of organizations, associations, leagues, teams, and participants, of varying sizes, with different resources and in different regions, results in a variety of ways of operating, but it also means that the responsibility for developing the sport of hockey in accordance with good governance principles lies with multiple parties. Moreover, a lack of clarity around organizational structure and authority can result in uncertainty.

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<sup>30</sup> “Hockey Canada 2020-21 Annual Report” (last visited 25 August 2022) at 19, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>.

<sup>31</sup> These statistics were provided by Hockey Canada on August 31, 2022 and were generated by the Hockey Canada registration platform. It was however mentioned that “the quality of HCR data is not yet perfect and there are inconsistencies with data provided by [the] Members across Canada”. It should also be mentioned that these statistics were affected by the COVID-19 pandemic, and that while the number of MHAs has not changed materially, the number of participants was higher for the 2018-2019 season.

### **III. HOCKEY CANADA’S REGULATORY FRAMEWORK**

There is a legal framework that applies to Hockey Canada because it is a not-for-profit corporation as well as a Registered Canadian Amateur Athletic Association (“RCAAA”). The first section of this Chapter will briefly outline this legal framework (A), which is also discussed in more detail in Chapter IV. In addition, there is a legal and policy framework that applies to Hockey Canada because it is a national sports organization (“NSO”) that receives government funding, which is detailed in the second section of this Chapter (B).

#### **A. The legal framework from a governance perspective**

##### *i. Introduction*

The key elements of the legal framework for Hockey Canada governance are found in federal legislation, in the corporation’s articles, in its by-laws and in legal principles developed by the courts over the years. We will provide a brief overview of these key elements of the legal framework for governance.

##### *ii. Registered Canadian Amateur Athletic Association under the Income Tax Act*

Hockey Canada is an RCAAA. An RCAAA is a “Canadian amateur athletic association” that has applied to the Canadian Revenue Agency for registration, has been registered and whose registration has not been revoked.<sup>32</sup> Under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), a “Canadian amateur athletic association” is defined as an association that:

- (a) was created under any law in force in Canada,
- (b) is resident in Canada,
- (c) has no part of its income payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of the association unless the proprietor, member or shareholder was a club, society or association the primary purpose and primary function of which was the promotion of amateur athletics in Canada,
- (d) has the promotion of amateur athletics in Canada on a nation-wide basis as its exclusive purpose and exclusive function, and
- (e) devotes all of its resources to that purpose and function.<sup>33</sup>

Under paragraph 149(1)(g) of the *Income Tax Act*, an RCAAA is exempt from income tax under Part I. RCAAAs can also issue official donation receipts for income tax purposes for gifts they receive from corporations or individuals.

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<sup>32</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 248(1) “registered Canadian amateur athletic association”.

<sup>33</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149.1(1) “Canadian athletic amateur association”.

While an RCAAA is effectively treated the same as a registered charity from a tax perspective, it remains a not-for-profit corporation from a corporate perspective.

iii. *Not-for-profit corporation under the Canada Not-for-profit Corporations Act*

The *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“CNCA”) provides the foundation of the legal framework for Hockey Canada’s governance. Among other things it establishes key duties for directors. The CNCA provides that directors are to “manage or supervise the management of the activities and affairs” of the corporation.<sup>34</sup> The CNCA also sets out the duties and rights of members. All of these duties and rights are discussed further in Chapter IV.

Hockey Canada is also a soliciting corporation within the meaning of the CNCA. In brief, a corporation is designated as a soliciting corporation when it has received more than \$10,000 in income from public sources in a single financial year.<sup>35</sup> Since soliciting corporations receive public funds, they must meet additional CNCA requirements to ensure sufficient transparency and accountability for that income, such as complying with specific requirements for public accountants and financial review, and sending financial statements and the report of the public accountant to the Director appointed by the Minister of Innovation, Science and Industry in accordance with the CNCA.<sup>36</sup>

**B. Specific legal and policy framework for National Sport Organizations**

i. *Introduction*

Since Hockey Canada is the NSO for the sport of hockey, it has to abide by certain requirements to be recognized as such. NSOs – sometimes referred to as National Sport Federations (“NSFs”) – are the national governing bodies for certain sports in Canada. These organizations serve many important functions, including:

- “governing all aspects of a sport within Canada;
- managing their high performance programs;
- selecting and managing their national teams;
- implementing national initiatives to develop and promote their sport;
- sanctioning national level competitions and tournaments;
- providing professional development for coaches and officials in their sport; and,
- proposing and supporting bids for international competitions in Canada.”<sup>37</sup>

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<sup>34</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 124.

<sup>35</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 2(5.1); [SOR/2011-223](#), s 16(d).

<sup>36</sup> See e.g. *Canada Not-for-profit Corporations Act*, SC 2009, c 23, ss 125, 170(1), 176(1), 179; “Requirements for soliciting corporations under the Canada Not-for-profit Corporations Act (NFP Act)” (last visited 13 September 2022), online: *Government of Canada* <<https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05011.html>>.

<sup>37</sup> “National Sport Organizations” (last visited 13 September 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/sport-organizations/national.html>>.

An NSO has no particular status unless it is recognized by Sport Canada<sup>38</sup> under a contribution agreement.<sup>39</sup> To be eligible to apply for such a contribution agreement, an organization must first meet certain criteria, such as being a federally or provincially incorporated not-for-profit organization and in good standing, and being affiliated with the International Federation (“IF”) for its sport and recognized by the IF as the governing body for the sport or discipline in Canada.<sup>40</sup> This means that Sport Canada will only enter into a contribution agreement with one NSO per sport. Details of funding under the contribution agreement with Hockey Canada are discussed below.

As Marianne Saroli and Patrice Brunet have said in their book, *Le Droit du Sport au Québec et au Canada*, as there is only one NSO per sport, it is particularly important that the by-laws provide for an open democratic process that allows for a smooth and transparent exchange of ideas and change of directors.<sup>41</sup> In addition, because of the exclusive role that the NSO has within its sport, it plays a significant role in the lives of the athletes, who will be impacted by the decisions the NSO makes. Good governance practices thus become especially important.<sup>42</sup>

## ii. Legislation

Although Canada is constituted as a confederation that divides law-making power between the provincial legislatures and the federal Parliament, the *Constitution Act, 1867*<sup>43</sup> does not specifically refer to sports. This has led each level of government to enact legislation reflective of its constitutional authority.<sup>44</sup> Primary responsibility for the development and participatory aspects of sport are governed by private and community agencies which fall under the jurisdiction of the provinces under sections 92 (property and civil rights) and 93 (education) of the *Constitution Act, 1867*.<sup>45</sup> Provincial legislation may fund sports programs and projects from the general tax base or through revenues generated from approved lotteries and similar gambling operations.<sup>46</sup> The federal Parliament may supplement this support, provided that it does not interfere with matters under

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<sup>38</sup> Sport Canada, a branch in the federal Department of Canadian Heritage (“PCH”), is the agency through which the Government of Canada is involved in high performance sport.

<sup>39</sup> Marianne Saroli & Patrice Brunet, *Le Droit du Sport au Québec et au Canada* (Montréal: Éditions Yvon Blais, 2018) at 30.

<sup>40</sup> “Sport Funding Framework” (last modified 14 July 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html>>.

<sup>41</sup> Marianne Saroli & Patrice Brunet, *Le Droit du Sport au Québec et au Canada* (Montréal: Éditions Yvon Blais, 2018) at 31.

<sup>42</sup> Marianne Saroli & Patrice Brunet, *Le Droit du Sport au Québec et au Canada* (Montréal: Éditions Yvon Blais, 2018) at 31.

<sup>43</sup> (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

<sup>44</sup> John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 24.

<sup>45</sup> John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 24.

<sup>46</sup> John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 30; see also *Ontario Lottery and Gaming Corporation Act, 1999*, SC 2003, c 2, ss 9-35 which provides dedicated allocations from lottery tickets to be applied by the province for sporting, cultural and charitable purposes.

provincial jurisdiction. More generally, whenever a matter has the potential to be of national or international interest, such as national sport programs, federal authorities may claim jurisdiction.<sup>47</sup>

The sporting objectives of the Government of Canada are declared in the *Physical Activity and Sport Act*, RSC 2003, c 2 (“**PASA**”). This legislation also established the Sport Dispute Resolution Centre of Canada (“**SDRCC**”), whose mission is to provide the Canadian sport community with information, expertise and assistance regarding the prevention and resolution of sports-related disputes. The purpose of PASA is “to modernize the legislative framework that supports [sports] programs and to give formal expression to general policies adopted in 2002.”<sup>48</sup>

The legislation also provides that the objectives of the Government of Canada’s policy regarding sport are:

- (a) to increase participation in the practice of sport and support the pursuit of excellence in sport; and
- (b) to build capacity in the Canadian sport system.<sup>49</sup>

The role of Sport Canada is based on these two objectives.<sup>50</sup>

### iii. *Applicable Policies*

This section outlines the various policies, codes and agreements that Hockey Canada must abide by as an NSO.

#### 1. The Canadian Sport Policy

The Government of Canada, through Sport Canada, created the Canadian Sport Policy, which was initially developed in 2002 (the “**CSP 2002**”), and renewed/expanded in 2012 (the “**CSP 2012**”). This CSP 2012 was officially endorsed by federal, provincial and territorial ministers responsible for sport, physical activity and recreation on June 27, 2012.<sup>51</sup> The CSP 2012 sets direction for the period of 2012-2022 and is presently set to be renewed in February 2023.<sup>52</sup>

As briefly mentioned above, because of the multi-level governance in sport, the CSP 2012 was designed to provide a framework for intergovernmental cooperation in sport in Canada.<sup>53</sup> More

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<sup>47</sup> John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 25, citing *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s. 91.

<sup>48</sup> John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 23.

<sup>49</sup> *Physical Activity and Sport Act*, RSC 2003, c 2, s 4(1); see also John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada, 2010) at 23.

<sup>50</sup> Interview with Sport Canada (September 15, 2022).

<sup>51</sup> “Canadian Sport Policy 2012” (27 June 2012), online (pdf): *Sport Information Resource Centre* <[https://sirc.ca/wp-content/uploads/files/content/docs/Document/csp2012\\_en.pdf](https://sirc.ca/wp-content/uploads/files/content/docs/Document/csp2012_en.pdf)>.

<sup>52</sup> “Canadian Sport Policy Renewal (2023-2033),” online: *Sport Information Resource Centre* <<https://sirc.ca/canadian-sport-policies/>>.

<sup>53</sup> Canada, Parliamentary Information and Research Service, *Sport Canada and the Public Policy Framework for Participation and Excellence in Sport*, Publication No 2020-12-E (23 January 2020) at 2.



specifically, the CSP 2012 is a “roadmap that gives general direction to the major stakeholders in the Canadian sport system while providing the necessary flexibility for governments and non-governmental organizations to fulfill their individual mandates and responsibilities”.<sup>54</sup>

The CSP 2012 has five overall goals (introduction to sport, recreational sport, competitive sport, high performance sport, and sport for development), each of which has different objectives. By way of example, for high performance sport and competitive sport, these objectives notably include:

- All participants in Canadian competitive sport adhere to a code of ethics and code of conduct; and
- Key stakeholders have the organizational capacity, i.e. governance, human and financial resources, to achieve system objectives.<sup>55</sup>

The monitoring of the organizations’ compliance with the objectives set out in the 2012 CSP is done through the conditions attached to funding from Sport Canada, as detailed below.

## 2. The Sport Funding and Accountability Framework

Sport Canada has established several funding programs as part of its mission.<sup>56</sup> One of these programs is the Sport Support Program (“SSP”), which “distributes funding to national sport organizations [such as Hockey Canada], national multisport service organizations [such as Own the Podium and the Canadian Olympic Committee], Canadian sport centres and other non-governmental organizations that provide direct services and programs for athletes, coaches and other sport participants.”<sup>57</sup>

The tool used to identify which organizations are eligible to receive Sport Canada contributions under the SSP is the Sport Funding and Accountability Framework (“SFAF”). The SFAF is used by the federal government to allocate funding to “organizations that have demonstrated through specific program objectives that they are contributing to the federal government’s policy priorities”.<sup>58</sup> In other words, it is through the SFAF that the federal government is able to steer organizations towards achieving its policy priorities, such as the ones established in the CSP 2012.

Prior to being considered for funding through the SSP, organizations must proceed through the SFAF process. As part of this process, NSOs are asked to develop a multi-year needs-based funding application according to the Contribution Guidelines for National Sport Organizations.<sup>59</sup>

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<sup>54</sup> Canada, Parliamentary Information and Research Service, *Sport Canada and the Public Policy Framework for Participation and Excellence in Sport*, Publication No 2020-12-E (23 January 2020) at 2.

<sup>55</sup> “Canadian Sport Policy 2012” (27 June 2012) at 11-13, online (pdf): *Sport Information Resource Centre* <[https://sirc.ca/wp-content/uploads/files/content/docs/Document/csp2012\\_en.pdf](https://sirc.ca/wp-content/uploads/files/content/docs/Document/csp2012_en.pdf)>.

<sup>56</sup> They are the Athlete Assistance Program, the Hosting Program and the Sport Support Program.

<sup>57</sup> Canada, Parliamentary Information and Research Service, *Sport Canada and the Public Policy Framework for Participation and Excellence in Sport*, Publication No 2020-12-E (23 January 2020) at 5.

<sup>58</sup> Lucie Thibault & Jean Harvey, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) at 109.

<sup>59</sup> “Sport Funding Framework” (last modified 14 July 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html>>.

Sport Canada then proceeds with the assessment of the data collected to ensure the funding model can be applied fairly and consistently across all eligible organizations. Different factors are used to differentiate organizations for the purposes of allocation funding, such as the complexity and scope of the sport. After completing this funding application and the assessment stage, organizations are provided with their assessment score, which determines their Reference-level.<sup>60</sup>

Before an NSO starts receiving funding from Sport Canada, it is required to sign a contribution agreement which defines the roles and responsibilities of each party. Once an NSO is able to receive funding, it remains accountable to Sport Canada and must abide to its standards on governance, safety in sport and other areas. This is supervised by Sport Canada through a monitoring process, which includes notably the Sport Canada Governance Report Card system.<sup>61</sup> We understand that this monitoring process is currently being modernized, with the intent of having a continuous, proactive and systematic approach to managing risk from a Sport Canada perspective.<sup>62</sup>

Pending these changes, it is interesting to note the conclusions in the article “*An Assessment of Sport Canada’s Sport Funding and Accountability Framework, 1995–2004*” referred to by the authors Lucie Thibault and Jean Harvey in their book, *Sport Policy in Canada*, where it was suggested that there were no consequences or penalties for not meeting accountability standards. As well, they found that, if NSOs did not meet the standards, Sport Canada would provide additional funding to assist them in achieving their goal.<sup>63</sup>

### 3. Contribution Agreement

The contribution agreement (or funding agreement) is the contract entered into between Sport Canada and the funded NSO that specifies the terms and conditions pursuant to which the NSO receives funding from the government of Canada, which terms and conditions are linked to the goals of the CSP 2012. The contribution agreements are used by Sport Canada to ensure that organizations are attuned to the expectations of society and the government of Canada.<sup>64</sup>

This agreement (which can include various amendments) also lays out the different sources of funding received by an NSO. In fact, the Reference-Level funding allocated through the SFAF is not the only source of funding an NSO can receive from the Government of Canada. Other sources of funding include the Enhanced Excellence and Next Gen funding (which are based on

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<sup>60</sup> “Sport Funding Framework” (last modified 14 July 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html>>.

<sup>61</sup> The Sport Canada’s Governance Report Card is a tool that Sport Canada developed to monitor how sport organizations contribute to key Sport Canada and Government of Canada priorities.

<sup>62</sup> “Sport Funding Framework” (last modified 14 July 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html>>.

<sup>63</sup> Lucie Thibault & Jean Harvey, *Sport Policy in Canada*, (Ottawa: University of Ottawa Press, 2013) at 114. The Review team is in the process of confirming this information with Sport Canada and expects to receive additional information on any enforcement mechanism they use. However, it does appear based on the preliminary information received that there are no other tools that can be used by Sport Canada other than conditions in the contribution agreements and the Sport Canada Report Card system.

<sup>64</sup> Interview with Sport Canada (September 15, 2022).



recommendations received from Own the Podium, as detailed below), the funding to support gender equity and safety in sport initiatives, the hosting of international tournaments, etc.

For the 2020-2021 season, Hockey Canada received the following funding from the Government of Canada:<sup>65</sup>

PCH Funding - Reference-Level	\$1,831,100
PCH Funding - Enhanced Excellence (Own the Podium)	\$1,911,000
PCH Funding - Next Generation Initiative (50%)	\$275,000
PCH-Funding - Gender Equity and Safety in Sport	\$143,000
PCH Funding - COVID-19 Emergency Support Fund	\$993,541
Canadian Heritage (Hosting Program) (IIHF Women's World Championship 2021)	\$500,000
Canadian Heritage (Hosting Program) (2021 IIHF Ice Hockey U20 World Championship)	\$200,000

It is understood that, although the level of funding received by each NSO differs according to a variety of factors (such as the number of participants in the sport), the core requirements in the contribution agreement are the same for all NSOs,<sup>66</sup> including:

- To include the *Universal Code of Conduct to Prevent and Address Maltreatment in Sport* ("UCCMS") into their organizational policies and procedures;
- To provide the individuals affiliated with the organization with access to an independent third party to address harassment and abuse allegations;
- To have discipline and appeal procedures in place that include access to an independent dispute resolution through the SDRCC (Sport Dispute Resolution Centre of Canada);
- To take measures conducive to creating a workplace free from harassment, abuse and discrimination; and
- To disclose any incident of harassment, abuse or discrimination that could compromise the programming's chances of success or the NSO's ability to carry out any of the terms and conditions of the agreement.

<sup>65</sup> See Hockey Canada, "Contribution Agreement and related amendments" (2020-2021).

<sup>66</sup> House of Commons, Standing Committee on Canadian Heritage, *Evidence*, 44-1, No 38 (20 June 2022) at 18:55 (Hon Pascale St-Onge); Interview with Sport Canada (September 15, 2022).

This last requirement, which has applied to every NSO since 2018,<sup>67</sup> has two purposes: first, to ensure that the NSO has established and enforces policies on maltreatment and, second, to verify that the complainants have access to an independent third party to review complaints and conduct investigations or that they are directed to the competent authorities.<sup>68</sup>

NSOs are also required to submit two types of reports during the term of their contribution agreement:

- **Interim reports** are submitted during the project and provide the results of the activities the NSO has undertaken for a specific period. In addition, they include a status report on the work to be accomplished and updated revenue and expense reports; and
- **A final report** is submitted at the end of the project and provides the results of the activities the NSO has undertaken for the duration of the project.<sup>69</sup>

According to recent announcements made by the Minister of Sport, Sport Canada will make changes to contribution agreements with organizations that will meet the new eligibility requirements of the SFAF by April 1, 2023. The goal of this modernization is to ensure that sport organizations receiving federal funding meet specific governance, accountability and safe sport standards.<sup>70</sup>

More specifically, during her appearance before the Canadian Heritage Standing Committee on June 20, 2022, the Minister of Sport mentioned that she intends to make sure that all sport organizations become signatories of the Office of the Sport Integrity Commissioner (“**OSIC**”), which is the new independent safe sport mechanism which is responsible for administering the UCCMS.<sup>71</sup>

If NSOs do not meet the requirements set out in the contribution agreement, Sport Canada may provide enhanced monitoring or, in certain circumstances, freeze the funding until the conditions imposed have been met.<sup>72</sup> Sport Canada has done so a number of times in the past, including for Hockey Canada in June 2022.

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<sup>67</sup> Janyce McGregor, “Hockey Canada clarifies incidents reported to Sport Canada after discrepancy at committee” (8 August 2022), online: *CBC News* <<https://www.cbc.ca/news/politics/hockey-canada-reported-incidents-discrepancy-1.6544543>>.

<sup>68</sup> House of Commons, Standing Committee on Canadian Heritage, *Evidence*, 44-1, No 38 (20 June 2022) at 18:20 (Hon Pascale St-Onge).

<sup>69</sup> “Application Guidelines – National Sport Organization” (last modified 12 July 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html>>; see also “Reporting Requirements” in Hockey Canada, “Contribution Agreement” (March 30, 2020) at Annex D.

<sup>70</sup> Canadian Heritage, News Release, “Government of Canada provides update and announces action on safe sport” (12 June 2022), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/news/2022/06/government-of-canada-provides-update-and-announces-action-on-safe-sport.html>>.

<sup>71</sup> House of Commons, Standing Committee on Canadian Heritage, *Evidence*, 44-1, No 38 (20 June 2022) at 18:35 (Hon Pascale St-Onge).

<sup>72</sup> Interview with Sport Canada, written responses received by Review team on September 16, 2022.

On June 16, 2022, Hockey Canada was advised by Sport Canada that the Department of Canadian Heritage would initiate a recipient compliance audit to confirm that no public funds were used in any part of the proceedings related to the alleged incident involving the 2018 Canadian men's junior hockey team, and more specifically, to the settlement paid. Sport Canada also mentioned that all funding decisions would be held until Hockey Canada discloses the recommendations of improvement provided by a third-party law firm hired to investigate the alleged incident in 2018. Furthermore, decisions for certain categories of funding related to the Men's National Team (which does not include the Reference-Level funding) would be held until the reception of the compliance audit results.<sup>73</sup>

Finally, on June 22, 2022, two days after Hockey Canada appeared before the Canadian Heritage Standing Committee, it was announced that the Minister of Sport decided to freeze all federal funding until the organization was able to meet two conditions: not only would Hockey Canada have to disclose the recommendations of improvement as mentioned above, they would also have to become signatories to the OSIC.<sup>74</sup>

#### 4. The Canadian Sport Governance Code

In 2019, the Canadian High Performance Sport Strategy identified the importance of a governance code for the sports system.<sup>75</sup> For this reason, the Canadian Olympic Committee (“COC”) convened a working group with the sport community to support and accelerate development of this fundamental part of the Canadian sport system.<sup>76</sup>

The Canadian Sport Governance Code (the “COC Code”) was introduced to the national community in November 2020 with consultation taking part through the first half of 2021. It is intended for all NSOs representing sports on the Olympic Program. Its purpose is to “improve organizational performance by encouraging NSOs to upgrade governance practices through the adoption of revisions to by-laws and other structural mechanisms.”<sup>77</sup> These governance best practices pertain notably to board composition (including athlete representation), independence of directors, proper orientation for board members, committees, risk management and transparency.

Section G of the COC Code (Implementation) provides that “to make this a success for the sport system, each NSO will be encouraged and supported if needed to make necessary changes to its

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<sup>73</sup> Letter from Vicky Walker (Director General, Sport Canada) to Tom Renney (Chief Executive Officer, Hockey Canada) (June 16, 2022).

<sup>74</sup> Rick Westhead, “Federal government freezing Hockey Canada’s funding” (22 June 2022), online: TSN <<https://www.tsn.ca/federal-government-freezing-hockey-canada-s-funding-1.1816169>>.

<sup>75</sup> “2019 Canadian High Performance Sport Strategy” (last modified 27 May 2019) at 18, online (pdf): *Government of Canada* <<https://www.canada.ca/content/dam/pch/documents/services/sport-policies-acts-regulations/HighPerSportStrat-eng.pdf>>.

<sup>76</sup> “Canadian Sport Governance Code” (1 September 2021), online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>77</sup> “Canadian Sport Governance Code” (1 September 2021), online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

by-laws and take such other steps as may be required so that the NSO is in compliance with the [COC Code] on or before December 31, 2022.”<sup>78</sup>

Despite this language, we have been advised by Hockey Canada and COC representatives that the COC Code is not intended to be mandatory, but is rather a guide concerning best governance practices for NSOs.<sup>79</sup> This clarification was communicated to the NSOs during two calls that the COC hosted in December 2020 and January 2021. However, the COC also advised the NSOs that they were encouraged to adopt it nonetheless, as compliance could eventually become mandatory.

Hockey Canada’s position regarding the implementation of the COC Code within their organization is that, while having some changes imposed on them may be convenient, they favoured a more organic approach in order to achieve the underlying objectives of the COC Code without being mandated by by-laws (for example, as it relates to equal gender representation on the Board). It also took issue with matters related to the election of the Chair of the Board as well as athlete representation on the Board. Further, Hockey Canada expressed that some other changes were just not well suited for their organization, such as making the financial statements and minutes of Member meetings available to the public. Although Hockey Canada has achieved considerable financial success over the years, Hockey Canada is concerned that being seen as an organization with “deep pockets” could create some negative implications. For example, this could have an effect on their bargaining power with respect to the settlement of lawsuits, and this could also influence the amount of money that sponsors would be willing to offer in the future. This is not to mention the fact that the media could use this information to depict a negative image of the organization. According to Hockey Canada, providing minutes of Member meetings to the general public potentially raises similar concerns. We do note however that three of the four Comparator Associations discussed further below in this report<sup>80</sup>, namely Canada Basketball, Curling Canada and Canada Soccer, publish their financial statements on their website. This is also true for the COC.

##### 5. The Universal Code of Conduct to Prevent and Address Maltreatment in Sport

The UCCMS, which was developed by the Canadian Centre for Ethics in Sport in consultation with Sport Canada in 2019, is “the core document that sets harmonized rules to be adopted by sport organizations that receive funding from the Government of Canada to advance a respectful sport culture that delivers quality, inclusive, accessible, welcoming and safe sport experiences”.<sup>81</sup> In fact, Sport Canada has made the inclusion of the UCCMS into organizational policies and procedures of federally funded sport organizations by April 1, 2021, a condition of funding.

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<sup>78</sup> “Canadian Sport Governance Code” (1 September 2021) at 9, section G.2, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>79</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 25-27 March 2021); see also Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 4 May 2021).

<sup>80</sup> As further discussed below, the Comparator Associations are the NSOs that were selected by Hockey Canada because they have a mandate and membership structure that are comparable to that of Hockey Canada.

<sup>81</sup> “The UCCMS,” online: *Office of the Sport Integrity Commissioner* <<https://sportintegritycommissioner.ca/uccms/>>.

In response to this, Hockey Canada has built the UCCMS into their own *Maltreatment, Bullying and Harassment Protection and Prevention Policy*, which took effect in October 15, 2020.

Following a review process led by the SDRCC, version 6.0 of the UCCMS was published by the SDRCC on May 31, 2022 and is effective no later than November 30, 2022.<sup>82</sup> It is the intention of Hockey Canada to adopt this new version of the UCCMS.<sup>83</sup>

The UCCMS applies to all *participants* as determined by the *adopting organization*.<sup>84</sup> The UCCMS defines “adopting organization” as an organization that has adopted the current version of the UCCMS, as amended.<sup>85</sup> As for “participants”, those can include, without limitation, athletes, coaches, officials, volunteers, administrators, directors, employees, trainers, parents/guardians, etc., according to the policies of the adopting organization.<sup>86</sup>

Much of the UCCMS is directed to protection of participants in a sport and does not deal with governance or requirements for sports organizations themselves. Section 5.5 of the UCCMS deals with sexual maltreatment by a participant, including sexual assault. There is also a duty for the participant to report the maltreatment (see s. 5.11). The UCCMS provides a variety of sanctions including apologies, warnings, education, probation, suspension, eligibility restrictions, permanent ineligibility, and other discretionary sanctions (see s. 7.2).

As for public disclosure, the UCCMS provides the following at section 8:

8.1 In order to uphold the purpose and principles of the UCCMS, a searchable database or registry of *Respondents* whose eligibility to participate in sport has in some way been restricted shall be maintained and shall be publicly available, subject to applicable laws. The database or registry shall include sufficient information to provide context to the applicable sanction pursuant to the provisions contained in the UCCMS. *Adopting Organizations* are responsible to collaborate with one or more organizations maintaining such a registry.

8.2 Further details of the results of a UCCMS enforcement process, for example a summary or redacted decision or summary or redacted investigation report, may also be publicized in a

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<sup>82</sup> “The UCCMS,” online: *Office of the Sport Integrity Commissioner* <<https://sportintegritycommissioner.ca/uccms>>.

<sup>83</sup> “Action Plan to Improve Canada’s Game,” online: *Hockey Canada* <<https://www.hockeycanada.ca/en-ca/corporate/about/action-plan>>.

<sup>84</sup> “Universal Code of Conduct to Prevent and Address Maltreatment in Sport, Version 2022 (6.0)” (31 May 2022) at s 4.1, online (pdf): *Office of the Sport Integrity Commissioner* <<https://sportintegritycommissioner.ca/files/UCCMS-v6.0-20220531.pdf>>.

<sup>85</sup> “Universal Code of Conduct to Prevent and Address Maltreatment in Sport, Version 2022 (6.0)” (31 May 2022) at Appendix I, online (pdf): *Office of the Sport Integrity Commissioner* <<https://sportintegritycommissioner.ca/files/UCCMS-v6.0-20220531.pdf>>.

<sup>86</sup> “Universal Code of Conduct to Prevent and Address Maltreatment in Sport, Version 2022 (6.0)” (31 May 2022) at Appendix I, online (pdf): *Office of the Sport Integrity Commissioner* <<https://sportintegritycommissioner.ca/files/UCCMS-v6.0-20220531.pdf>>.

manner consistent with the purpose and principles of the UCCMS, as well as applicable law.

*iv. Own the Podium*

Own the Podium (“**OTP**”) was originally created in 2010 to prepare Canadian athletes to reach medal finishes at the 2010 Olympic Winter Games in Vancouver. Its purpose is not to develop governance related policies, but rather to provide “the technical analysis required to determine Canadian podium targets for Olympic and Paralympic Games and for making investment recommendations for the allocation of excellence dollars provided by the national funding parties.”<sup>87</sup> In other words, OTP provides expert recommendations to Sport Canada<sup>88</sup> and other system funders, to support the needs of sport programs and athletes demonstrating podium potential at Olympic and Paralympic Games.<sup>89</sup>

The funding assessment is primarily focused on High Performance strategies. Each year, the NSOs are asked to provide submission documents according to OTP’s Review Submission Expectations. For example, the 2021 Winter Sport Review Submission Expectations required NSOs to provide, notably, a High Performance Plan, performance objectives for the 2022 Olympic Games, a medal prospects list for 2022, a podium gap assessment, and an outline of the 2026 High Performance Plan framework.

In 2020–2021, following a recommendation by OTP to Sport Canada, Hockey Canada received Enhanced Excellence and Next Generation Initiative support (\$1,911,000 and \$275,000 respectively) from the federal government to support its national team for the 2022 and 2026 Olympic and Paralympic Games. The terms and conditions of this funding are provided in Hockey Canada’s 2020–2021 contribution agreement and related amendments. For a better understanding of what these documents provide in terms of requirements, we refer the reader to the Contribution Agreement section above.

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<sup>87</sup> “Funding,” online: *Own the Podium* <<https://www.ownthepodium.org/en-CA/Funding>>.

<sup>88</sup> In the contribution agreements between NSOs and Sport Canada, the funding resulting from the OTP recommendation is called “Enhanced Excellence”.

<sup>89</sup> “Advancing the Sport System” (last modified 20 April 2021), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/role-sport-canada/advancing-sport-system.html>>.



#### IV. THE GOVERNANCE OF NOT FOR PROFIT CORPORATIONS

##### A. What is “Governance”?

The term “governance” has countless definitions. The word generally describes the practices and procedures used by the leaders of an organization to allocate authority and oversight responsibility for decision-making and operational activities.<sup>90</sup> A number of factors, such as the organization’s mission and purposes, applicable legislative and regulatory requirements, and industry-wide policies and standards, influence the organization’s governance practices and structure.

The board of directors of a not-for-profit corporation is ultimately and legally responsible for governing the corporation. The board’s duty to govern is described generally in the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“CNCA”) as the duty to “manage or supervise the management of the activities and affairs of a corporation.”<sup>91</sup> A board of directors who understands that duty (as well as the functions and responsibilities that flow from it) and ensures that the board and corporation have the tools and resources necessary to effectively carry it out, will usually be said to exercise good governance. “Good governance is also about achieving desired results in a manner consistent with organizational values and accepted social norms.”<sup>92</sup> In the context of a national sport community, those values and norms are intrinsically linked to the people who form that community. “Sport governance must meld the passion and dedication of volunteers into a focused governance team, operating with integrity and striving to enhance the experiences of the participants, and the performance and reputation of the sport.”<sup>93</sup>

##### B. A Framework for Good Governance

Although not-for-profit organizations are subject to different legislative and regulatory requirements that affect the manner in which they are governed, the general governance principles that apply from one sector to another are fundamentally the same. The paragraphs that follow discuss three key principles of a solid framework for good governance that the board of directors of every not-for-profit organization should ensure are entrenched in their governance practices and procedures. Those principles are the following:<sup>94</sup>

- (i) **Board’s role**: the organization clearly defines and communicates what the board’s role, duties and functions are as the governing body;<sup>95</sup>
- (ii) **Board quality**: the organization has a robust recruitment, nominations and elections process for director candidates that includes selection criteria based on skills, experience, diversity and qualities, and offers board orientation and continuing

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<sup>90</sup> C Sorokin et al, *Nonprofit Governance and Management*, 3rd ed (Chicago: American Bar Association, 2011).

<sup>91</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 124.

<sup>92</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 1.

<sup>93</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 1.

<sup>94</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 2-3.

<sup>95</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 2-3.

education programs to enhance the board's collective knowledge and effectiveness;<sup>96</sup> and

- (iii) **Board structure and processes**: the organization has well-established structures and processes that inform how the organization expects the board to conduct its work, including the role of officers, the role of committees, and processes for calling and holding meetings.<sup>97</sup>

*i. Principle 1 – Board Role, Duties and Functions*

The directors will not properly exercise their governance role and duties unless they know what the board's role is as the governing body of the organization and understand what their individual duties are as a director serving on the board. In addition, the directors must understand how their role differs from the role of the CEO and other management staff. These roles are explored within the paragraphs that follow.

1. Statutory duty to manage or supervise the management of the corporation and other statutory duties in general

Pursuant to section 124 of the CNCA, the directors of a not-for-profit corporation shall “manage or supervise the management of the activities and affairs” of the corporation. The term “activities” includes “any conduct of a corporation to further its purpose and any business carried on by a body corporate”, and affairs “means the relationships among a corporation, its affiliates and the directors, officers, shareholders or members of those bodies corporate.”<sup>98</sup>

The terms “manage or supervise” encompass “a broad spectrum of duties including: ensuring the organization adheres to and carries out the goals of the corporation; setting long-term objectives in accordance with these goals; ensuring financial stability; assessing the corporation's performance; establishing policies; and being the public face of the corporation.”<sup>99</sup> Other board duties under the CNCA include electing and appointing officers, approving financial statements, reporting to members by calling and holding annual meetings, and passing by-laws subject to approval of members.

Directors have the option to supervise the management, rather than manage on their own, because “many corporations are too large and intricate for directors to manage the day-to-day activities of the corporation.”<sup>100</sup> The extent directors will delegate often depends on the governance model they prefer and the specific organizational structure of the corporation. A board's authority to delegate is also limited by restrictions set out in the CNCA. For example, pursuant to subsection 138(2), a

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<sup>96</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 2-3.

<sup>97</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 2-3.

<sup>98</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 2(1).

<sup>99</sup> Burke-Robertson, Carter & Man, [\*Corporate and Practice Manual for Charities and Not-for-Profit Corporations\*](#), (Toronto: Thomson Reuters Canada, 2022) at § 9:10 (Proview).

<sup>100</sup> Donald J Bourgeois, [\*The Law of Charitable and Not-for-Profit Organizations\*](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 32.



director cannot delegate its power to: submit to the members any question or matter requiring the approval of members, fill a vacancy among the directors or in the office of public accountant or appoint additional directors, issue debt obligations, approve financial statements, adopt, amend or repeal by-laws, nor its power to establish contributions to be made, or dues to be paid, by members.

## 2. Board takes responsibility for its own governance

The board's underlying governance purpose is to "guide the corporation in meeting its objects."<sup>101</sup> The directors are therefore responsible for determining how they will govern and how they are going to manage/supervise the management of the not-for-profit corporation. In doing so, they must decide what is the appropriate governance model for their corporation with consideration of its purposes, goals, resources, stakeholders' needs, etc.

To properly establish and implement its governance model, directors should articulate the role and functions of the board, clarify the relationship between the board and management, establish policies and practices used to promote a quality board, define the structure and processes for how the board conducts its business, and establish a mechanism for evaluating effectiveness.<sup>102</sup>

There are many different governance styles that a board can adopt. For instance, a "working board" is one where the board often assists staff and work on the day-to-day activities of the organization; as such, there is not much distinction between staff and the board. This model is most common at the start-up stage of a not-for-profit corporation.<sup>103</sup> Another model is one where the directors function as a "policy board" and focus mainly on "broader issues that affect the organization's future success and sustainability",<sup>104</sup> while staff manages the operations. A policy board will determine the "goals of the organization (vision, mission and values), set broad policy directions and strategic plans,"<sup>105</sup> and monitor performance. This model is often referred to as a Carver policy governance model. Typically, for larger not-for-profit corporations, the policy governance model is preferred, since the model contemplates "highly developed policies and operating performance reporting with specialized and professional staff".<sup>106</sup> As a result, the board's focus is on "important issues in a way that least intrudes on the chief executive officer's role of managing the operations."<sup>107</sup>

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<sup>101</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 70.

<sup>102</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 70.

<sup>103</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 33.

<sup>104</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 33.

<sup>105</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 34.

<sup>106</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 34.

<sup>107</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 34.

### 3. Board responsibilities and functions

From the statutory duties described above flow a number of board responsibilities and functions. Although each board's responsibilities and functions may slightly vary in practice according to their preferred governance model, some responsibilities and functions form the core of the board's contribution to the management of the corporation. These are briefly described below.

#### ***Approving a strategic plan***

Every not-for-profit corporation has a different purpose, mission, vision and values. To achieve the corporation's purpose, the directors, officers and staff need to clearly understand what the corporation wishes to become and how it intends to get there.<sup>108</sup> This is why it is important for boards to develop and approve a strategic plan: "the foundation document that provides direction to the organization"<sup>109</sup> to reach specific goals within a specific time frame.<sup>110</sup>

#### ***Overseeing operational performance***

Directors must oversee operational performance as part of their fiduciary duty to the corporation. "Determining how the organization will measure its success is a key component of effective governance."<sup>111</sup> In order to govern while not becoming too involved in operations, a board should create an integrated overall performance reporting system.<sup>112</sup> This should be a "simple and clear performance reporting system to monitor overall organizational performance" and key performance areas, such as quality of services/outcomes, financial condition and performance, community engagement, organizational development, and so on.<sup>113</sup>

The performance reporting system should establish "measures and indicators that quantify the performance objectives as a basis for planning targets and monitoring actual results."<sup>114</sup> Based on the performance reporting system, staff provide regular performance reports to the board, which

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<sup>108</sup> Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 4.

<sup>109</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 38.

<sup>110</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 39; see also Business Roundtable, "Principles of Corporate Governance" (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>111</sup> Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 2.

<sup>112</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 47.

<sup>113</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 47-48.

<sup>114</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 47; see also Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 2.

allows the board to oversee how well the corporation is accomplishing its objectives and to determine areas that need attention.<sup>115</sup>

Although directors should not become experts in program effectiveness and quality, directors do need to be able to understand the complexities of the operations of the corporation to ensure proper evaluation.<sup>116</sup>

### *Overseeing financial assets and resources*

Another role of the board is to protect the sustained success of the not-for-profit corporation by ensuring the ongoing viability of the corporation, including the provision of funds and resources needed to carry out its mission, and protecting its assets from risks.<sup>117</sup> To accomplish this, directors should oversee the financial performance and viability of the not-for-profit corporation, ensure the resources and assets are available and effectively used, and oversee risk.<sup>118</sup>

In overseeing the corporation's financial assets and resources, the board should not become excessively involved in operational decision-making, but should take certain actions to fulfill its role. For instance, boards should approve operating and capital budgets, monitor financial performance, ensure the sufficiency and integrity of information,<sup>119</sup> and ensure that the financial management is undertaken according to generally accepted accounting principles.<sup>120</sup> Additionally, a board "should assure itself that insurance programs are adequate [...] and maintained at appropriate levels".<sup>121</sup> Finally, boards "should be satisfied that there is an effective policy framework for managing the procurement of goods and services," for managing contracts, and for managing investment programs.<sup>122</sup>

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<sup>115</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 47-48.

<sup>116</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 51.

<sup>117</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 53; see also Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 8.

<sup>118</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 53.

<sup>119</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 54-55; see also Business Roundtable, "Principles of Corporate Governance" (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>120</sup> Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 8.

<sup>121</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 55.

<sup>122</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 55-56.

In order to properly fulfill its role in overseeing financial assets and resources, directors should “obtain support from one or more committees”,<sup>123</sup> such as a Finance Committee. This also ensures an appropriate level of scrutiny.<sup>124</sup>

It is important to note that while many directors “do not have the expertise to provide meaningful oversight to the financial area [...] [e]ach [d]irector has a legal and moral responsibility to oversee the finances.”<sup>125</sup> Consequently, orientation for directors “should include training in financial literacy [...] and the] financial reporting should be done in a clear and simple manner.”<sup>126</sup>

### ***Establishing the organization’s tolerance for risk and supervising the risk management process***

Assessing and managing risk involves a broad view of risk, and incorporates organizational risks related to liabilities and losses, business viability risks, and reputational risks.<sup>127</sup> A board should be involved in “identifying and assessing potential risks, as well as determining how to respond to each risk.”<sup>128</sup> A board should also establish the corporation’s appetite or tolerance for risk.<sup>129</sup> A board should ensure that the organization is taking a number of steps to mitigate the effects of risks, for example by purchasing insurance, establishing contractual protections against contingencies and risks, and/or establishing contingency plans.<sup>130</sup> The board also “needs to assure itself that management has put in place the appropriate policies, processes and programs to prepare for, prevent, and protect the corporation from foreseeable and material risks.”<sup>131</sup>

Since “risks tend to relate to other disciplines, it may make sense for existing standing committees to address the pertinent aspects of risk within their other responsibilities.”<sup>132</sup> However, some boards may prefer to “establish a Risk Management Committee to work with management to identify and address the risks to the corporation broadly.”<sup>133</sup>

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<sup>123</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 56.

<sup>124</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 8.

<sup>125</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 8.

<sup>126</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 8.

<sup>127</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 57.

<sup>128</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 59.

<sup>129</sup> Business Roundtable, “Principles of Corporate Governance” (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>130</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 59.

<sup>131</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 59.

<sup>132</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 60.

<sup>133</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 61.

### ***Hiring and overseeing the performance of the CEO***

The CEO is the senior manager responsible to the board. The board is responsible for hiring and overseeing the performance of the CEO to “ensure there is effective leadership in place to manage the organization.”<sup>134</sup> To accomplish this, the board should clearly define the CEO’s role and the board’s expectations, oversee the CEO’s annual evaluation based on established criteria, and approve a succession plan for the CEO.<sup>135</sup> It is important for the board to develop and nurture “a productive working relationship with the CEO.”<sup>136</sup>

#### **4. Fiduciary and other duties of individual directors**

As described above, the board assumes certain collective roles. Directors should also be mindful of their individual duties and responsibilities that flow simply from being a director for any not-for-profit corporation. These are detailed below.

#### ***Fiduciary duty***

It is entrenched in common law principles that directors stand in a fiduciary relationship to the corporation they serve.<sup>137</sup> As such, directors are ultimately responsible for the operations of the corporation. As mentioned above, the directors’ primary duty is to manage or supervise the management of the activities and affairs of the corporation, which is now codified in most modern not-for-profit legislation, including the CNCA. A fiduciary duty implies that the fiduciary (in this instance, the director) must act with absolute loyalty toward the other party (in this instance, the corporation) in managing the latter’s affairs. That duty encompasses not only a wide range of board responsibilities and functions, but also a number of individual duties that the directors are required to abide by.

#### ***Standard of care***

Pursuant to paragraph 148(1)(b) of the CNCA, in exercising their powers and discharging their duties, a director shall “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” This standard of care is an objective one,<sup>138</sup> which results in the same exposure to liability for the same actions, despite different levels of knowledge and experience. If a director or officer does not meet the appropriate standard of care when exercising their legal duties, then they are exposed to personal liability. The diligence requirement

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<sup>134</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 61; see also Business Roundtable, “Principles of Corporate Governance” (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>135</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 61; see also Business Roundtable, “Principles of Corporate Governance” (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>136</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 6.

<sup>137</sup> *Canadian Aero Service Ltd. v. O’Malley*, [1974] S.C.R. 592; *London Humane Society (Re)*, 2010 ONSC 5775.

<sup>138</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 9:3 (Proview).



of directors requires them to take the time to be “familiar with all aspects of the corporation’s operations through attending board meetings and reviewing the minutes of missed board meetings.”<sup>139</sup>

On a related note, the business judgment rule was developed in the context of for-profit corporations, but it has been applied in the context of not-for-profit corporations.<sup>140</sup> “The business judgment rule has developed as a type of lens by which the applicable standard of care will be examined by courts”.<sup>141</sup> In brief, “the business judgment rule states that a director will not be held liable for mistakes made after an honest and good faith evaluation of the decision.”<sup>142</sup> A director’s evaluation may include reliance on financial statements of the corporation or a report of a person whose profession lends credibility to a statement made by that person.<sup>143</sup> The Supreme Court of Canada commented as follows: “Directors may find themselves in a situation where it is impossible to please all stakeholders. [...] There is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.”<sup>144</sup>

### ***Duty to avoid conflicts of interest***

The general legal duty to avoid conflicts of interest is reflected in the statute’s provisions setting a high bar for directors with respect to avoidance of and disclosure of conflicts of interest. Directors are required to avoid situations where their private interests conflict with those of the corporation,<sup>145</sup> except where the corporation has knowledge of this conflict of interest and has provided their consent to allow this conflict of interest, pursuant to section 141 of the CNCA.<sup>146</sup>

### ***Duty to act honestly and in good faith***

Directors must act in good faith at all times.<sup>147</sup> To ensure honest dealings with the corporation, “a director must disclose to the corporation the entire truth in his or her dealings as a director.”<sup>148</sup> The

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<sup>139</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:15 (Proview).

<sup>140</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:9 (Proview); *Goertz v Condominium Plan No. 98SA12401*, 2018 SKCA 41 at paras 57, 58; *Ottawa Humane Society v Ontario Society for the Prevention of Cruelty to Animals*, 2017 ONSC 5409 at paras 6, 37–39.

<sup>141</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:9 (Proview).

<sup>142</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:9 (Proview).

<sup>143</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 149(1).

<sup>144</sup> [BCE Inc v 1976 Debentureholders](#), 2008 SCC 69 at paras 83–84.

<sup>145</sup> *London Humane Society (Re)*, 2010 ONSC 5775 at para 20.

<sup>146</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:10 (Proview).

<sup>147</sup> *London Humane Society (Re)*, 2010 ONSC 5775 at para 18.

<sup>148</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 9:13 (Proview).

duty to act in good faith also “requires that the directors consider the best interests of the corporation as a whole rather than allowing one sectional interest of the corporation to prevail over others”<sup>149</sup>, “and, in doing so, must take into account all relevant factors.”<sup>150</sup>

### ***Duty to act in the best interests of the corporation***

The “best interests in a not-for-profit corporation are linked to the mission, vision, values and accountabilities of the corporation. Therefore, acting in the best interests of a mission-based not-for-profit corporation, means fulfilling the mission, moving towards the vision, adhering to core values, and discharging accountabilities.”<sup>151</sup>

Although the members elect the directors of a not-for-profit organization, the directors must act primarily in the best interests of the corporation as a whole. The organization exists for its purposes, mission and vision and occasionally that may mean that “the best interests of the corporation will not always be consistent with the best interests of the members.”<sup>152</sup> Similarly, the interests of the members may also differ from the interests of other stakeholders and the public. As an example, there may be circumstances where a corporation requires that additional funds be collected from members in order to pursue the corporation’s purpose. Evidently, members may not wish to pay additional membership fees to the corporation because this reduces their own financial resources. “The challenge for the board is to resolve conflicts in a manner that reflects the best interests of the corporation and at the same time maintains the support of the [stakeholders]”, which must be done in a way that “each party can be said to have been fairly treated. [...] A decision on how to achieve this balance is made on a case-by-case basis as current circumstances and exigencies require but should always be done in the best interests of the organization over the longer term.”<sup>153</sup>

Case law confirms that in considering what is in the best interests of the corporation, directors may (and should) “look to the interests of, inter alia, shareholders, employees, creditors, consumers,

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<sup>149</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 9:13 (Proview).

<sup>150</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 91.

<sup>151</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 10.

<sup>152</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 10; see also Peter Dey & Sarah Kaplan, “360° Governance: Where are the Directors in a World in Crisis?” (2021) at 30, online (pdf): [Rotman School of Management University of Toronto](https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report) <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>.

<sup>153</sup> Peter Dey & Sarah Kaplan, “360° Governance: Where are the Directors in a World in Crisis?” (2021) at 30, online (pdf): [Rotman School of Management University of Toronto](https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report) <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>; see also *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 84.

governments and the environment to inform their decisions.”<sup>154</sup> Fostering healthy and trustworthy relationships with stakeholders is arguably in the best interests of a corporation.<sup>155</sup>

That said, directors do have “a responsibility to ensure that the corporation fulfills its [...] purposes and, in this regard, [have] a responsibility to ensure that the membership does not impose its own priorities over the stated purposes of the corporation or restrict the provision of services to a narrow segment of the community served by the corporation.”<sup>156</sup>

### ***Duty of confidentiality***

The general rule of confidentiality means “all matters and discussions in a boardroom are confidential.”<sup>157</sup> Some not-for-profit corporations, primarily those that are publicly funded, operate in an open and transparent manner. In this case, directors “must respect the confidentiality of matters that are not, or will not be, disclosed to the public.”<sup>158</sup>

### ***Duty of obedience and solidarity***

Under subsection 148(2) of the CNCA, a director has a duty to comply with all applicable acts and regulations, and the corporation’s governing documents such as articles and by-laws. A director must also assist in implementing valid corporate decisions.<sup>159</sup> Furthermore, subsection 148(3) of the CNCA states that directors of not-for-profit corporations must verify the lawfulness of the articles and the purpose of the corporation.

The duty of obedience also includes the duty of solidarity. A director “who is opposed to a decision of the Corporation that has been validly taken has a duty to respect and adhere to that decision.”<sup>160</sup> Directors who speak publicly against a decision validly taken by the board are, in effect, violating their fiduciary duty to the corporation.

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<sup>154</sup> *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 40; also cited in *Pruner v Ottawa Hunt and Golf Club, Limited*, 2014 ONSC 6272 at para 40.

<sup>155</sup> See e.g. Peter Dey & Sarah Kaplan, “360° Governance: Where are the Directors in a World in Crisis?” (2021) at 11, online (pdf): *Rotman School of Management University of Toronto* <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>.

<sup>156</sup> *The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v Canadian Hearing Society*, 2018 ONSC 5445 at para 34.

<sup>157</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 91.

<sup>158</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 91.

<sup>159</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 9:16 (Proview).

<sup>160</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 92.



5. Directors may rely on information provided by management, professionals and others

As mentioned above, the standard of care applicable to the actions of directors is one of reasonable diligence. A director will be considered to have acted with reasonable diligence if they rely on “financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation” or “a report of a person whose profession lends credibility to a statement made by that person.”<sup>161</sup> The reliance on these resources must be done in good faith.<sup>162</sup> In other words, directors “are entitled to assume that those on whom they rely, particularly officers and senior management, have performed their duties honestly.”<sup>163</sup>

6. The respective roles of the board and management

Normally, a board will delegate the “day-to-day supervision of the affairs of the organization” to the CEO and staff, although the board must always “ensure that delegated acts are properly fulfilled.”<sup>164</sup> Regardless of how a board chooses to govern, a board should ensure that it “draw[s] the line between the board’s role and management’s role”<sup>165</sup> by way of written statements. The board and management should both have clear knowledge of their role, as well as the governance structures and processes in place.<sup>166</sup> The “line between governance and managing operations” will often be blurred, especially because “[d]irectors do need to question and probe operational matters to some degree”<sup>167</sup> in fulfilling their oversight obligations. Directors should “be diligent to avoid giving operational advice in areas where they have no expertise.”<sup>168</sup> Nevertheless, some flexibility and judgment is appropriate.<sup>169</sup>

Most importantly, the chair and CEO “need to work closely to maintain an effective differentiation between the roles of management and the board.”<sup>170</sup>

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<sup>161</sup> [Canada Not-for-profit Corporations Act](#), SC 2009, c 23, s 149(1).

<sup>162</sup> [Canada Not-for-profit Corporations Act](#), SC 2009, c 23, s 149(2).

<sup>163</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at at 93.

<sup>164</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 34.

<sup>165</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 34.

<sup>166</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 70.

<sup>167</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 35.

<sup>168</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 35.

<sup>169</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 35.

<sup>170</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2<sup>nd</sup> ed (September 2013) at 36.

## 7. The respective roles of the board and members

Members may play a more limited role<sup>171</sup> than directors and officers within a not-for-profit corporation, but their role is nevertheless meaningful and powerful.<sup>172</sup> For example, subsections 128(3) and 130(1) of the CNCA provide that members elect and may remove the directors of a not-for-profit corporation. Pursuant to subsection 197(1), members approve any fundamental change to the corporation. Similarly, section 152 provides that members are responsible for confirming, amending or rejecting any proposal by directors to make, amend, or repeal any by-law that regulates the activities or affairs of the corporation. Members are also entitled to receive the annual financial statements pursuant to subsection 172(1) of the CNCA and appoint the public accountant pursuant to subsection 181(1).

Although members have important duties, they “do not have a formal consultative function or authority in relation to proposed policies of the corporation. Any consultative role depends entirely on a discretionary decision of the board of directors of the corporation to invite such consultation.”<sup>173</sup>

Members also have important rights. Pursuant to subsection 162(1) of the CNCA, members are entitled to notice of, and to attend, the annual meeting. Section 163 also allows for a member who is eligible to vote at an annual meeting of members to make a proposal. Members may also, pursuant to subsection 152(6), propose to make, amend or repeal a by-law.

Members have significant rights to information. Members have rights to copies of financial statements under sections 172 and 175 of the CNCA and to access the statements under subsection 174(2) for examination purposes. Additionally, section 22 sets out provisions for access to the corporate records by a member, a member’s personal representative and a creditor of the corporation.

More generally, practitioners in the field of not-for-profit corporations have commented that “one of the most fundamental rights of members is their right to rely on the integrity of the by-laws and charter or articles of the corporation and to expect that the corporation and its directors will similarly respect the requirements of those documents.”<sup>174</sup> This stems from the fact that the relationship between the directors of a not-for-profit corporation and its members is “contractual in nature.”<sup>175</sup> The contractual relationship is established and governed by the corporation’s

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<sup>171</sup> [\*The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v Canadian Hearing Society\*](#), 2018 ONSC 5445 at para 34: “the role of a member of a not-for-profit corporation is limited to approving the annual financial statements and the auditor”.

<sup>172</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 10.

<sup>173</sup> [\*The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v Canadian Hearing Society\*](#), 2018 ONSC 5445 at para 35.

<sup>174</sup> Burke-Robertson, Carter & Man, [\*Corporate and Practice Manual for Charities and Not-for-Profit Corporations\*](#) (Toronto: Thomson Reuters Canada, 2022) at § 7:16 (Proview).

<sup>175</sup> Donald J Bourgeois, [\*The Law of Charitable and Not-for-Profit Organizations\*](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 232; [\*Senez v Montreal Real Estate Board\*](#), [1980] SCJ No 89, [1980] 2 SCR 555 at 566.

constating documents.<sup>176</sup> As such, the terms of the contract will vary from one corporation to another. At a minimum, the contractual relationship between the corporation and the members places an obligation on directors and members to “comply with the terms of the contract,”<sup>177</sup> in other words, to comply with all incorporation documents and by-laws.<sup>178</sup>

ii. *Principle 2 – Board Quality*

1. Board size

The appropriate size for a board of directors depends on a number of factors, such as the amount of work to be done, which varies according to the projects in progress and issues facing the organization. Similarly, the need to have directors who possess specific skills and expertise can also affect the number of directors required. The CNCA requires that a corporation have at least one director, while soliciting corporations (such as Hockey Canada) must have a minimum of three, at least two of whom are not officers or employees of the corporation or its affiliates.<sup>179</sup> However, the board should be sufficiently large to enable the directors to get the work done well, but not so large that meaningful discussion becomes difficult.<sup>180</sup>

While organizations must determine the board size that best suits their particular needs, the effectiveness of a board is not a function of its size. Much more crucial to board success are the dedication and skill of its individual members.<sup>181</sup>

2. Board composition – skills, experience, diversity (equity seeking groups) and personal qualities

Directors have both a duty to manage the organization and a duty to operate it by ensuring that it has activities that carry out its objects.<sup>182</sup> Inherently, one of the critical functions of the board of directors is to ensure that it works in an effective and efficient manner while recognizing and accounting for different backgrounds, cultural and personal experiences, interests and personalities.<sup>183</sup>

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<sup>176</sup> Donald J Bourgeois, [The Law of Charitable and Not-for-Profit Organizations](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 234.

<sup>177</sup> Donald J Bourgeois, [The Law of Charitable and Not-for-Profit Organizations](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 251.

<sup>178</sup> [Canada Not-for-profit Corporations Act](#), SC 2009, c 23, s 148(2).

<sup>179</sup> [Canada Not-for-profit Corporations Act](#), SC 2009, c 23, s 125.

<sup>180</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 118.

<sup>181</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#), (Toronto: Thomson Reuters Canada, 2022) at § 8:13 (Proview).

<sup>182</sup> Donald J Bourgeois, [The Law of Charitable and Not-for-Profit Organizations](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 163.

<sup>183</sup> Donald J Bourgeois, [The Law of Charitable and Not-for-Profit Organizations](#), 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 163.

Certain fundamental skills, such as financial literacy, legal and governance experience, are vital to a board of directors.<sup>184</sup> Other skills may become relevant, or even required, depending on the particular situation unique to each entity.

Specialized skills are not the only way boards can acquire desired or required qualities; experience and knowledge in which the board requires assistance or performs a governance role are equally important.<sup>185</sup>

Further, boards should comprise individuals who possess qualities desirable from board members. At a minimum, a director's fiduciary duties require them to show integrity, loyalty, honesty and good faith.<sup>186</sup> Still, other qualities may also be desirable for an efficient and effective board of directors; these may include:

- The ability to work in a team;
- A commitment to the workload required;
- The absence of apparent conflicts;
- Leadership potential; and
- The ability to think strategically and communicate effectively.<sup>187</sup>

In the recent past, much emphasis has been placed on ensuring the board reflects the diversity of the community it serves, including demographic, cultural, linguistic, economic, geographic, gender, and ethnic factors.<sup>188</sup> Research “often shows that more diversity on boards brings value to firms by increasing the diversity of experience and improving board monitoring.”<sup>189</sup> Moreover, it is beneficial for a board to consider both social and professional diversity, which can involve looking beyond the typical CEO or CFO pool for board candidates.<sup>190</sup> Equally important to the notion of diversity is cognitive diversity, which refers to the differences in individuals’ “knowledge, views and perspectives, as well as in how they approach problems and perceive

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<sup>184</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 137.

<sup>185</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 137.

<sup>186</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 137.

<sup>187</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 137.

<sup>188</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 137.

<sup>189</sup> Peter Dey & Sarah Kaplan, “360° Governance: Where are the Directors in a World in Crisis?” (2021) at 35, online (pdf): *Rotman School of Management University of Toronto* <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>.

<sup>190</sup> Stephanie J Creary, et al, “When and Why Diversity Improves Your Board’s Performance” (27 March 2019), online: *Harvard Business Review* <<https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance>>.

process and interpret information”.<sup>191</sup> Yet, diversity alone is no guarantee of board success; board culture is the key factor that can compliment diversity to help the board meet its objectives.<sup>192</sup>

### 3. Recruitment, nominations and election processes

Board success begins with its recruitment and nominations. These processes are the means by which the organization identifies individuals that can best complement the required skills, qualities and traits of its leading figures. Indeed, recruitment, nomination and election best practices for directors should be consistent with recruiting a skilled, independent and qualified board.<sup>193</sup>

Every organization must determine the method to appoint or elect its directors. Typically, members will elect new directors at the annual general meeting, and incumbent directors retire at the meeting where the election takes place.<sup>194</sup> Yet, the particular processes by which directors are appointed can vary greatly. It is therefore important to remain vigilant of the rules in the incorporating legislation to ensure that the desired method of election and/or appointment of directors complies with statutory rules.<sup>195</sup> For example, the CNCA requires that members elect directors by ordinary resolution.<sup>196</sup> Additionally, an organization’s articles may permit its directors to appoint one or more additional directors until the close of the next annual general meeting, so long as the total number of directors so appointed does not exceed one third of the number of directors elected at the previous annual general meeting.<sup>197</sup> Moreover, a director cannot hold office unless they were present at the meeting when the election or appointment took place and did not refuse the position, or they consented to hold office as director in writing before the election or within the prescribed time or has acted as director since the election or appointment.<sup>198</sup>

Whatever the electoral or appointment process the organization chooses for its board members, it should outline the process clearly in its by-laws and board policies. The court may order a new

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<sup>191</sup> Jared Landaw, “Maximizing the Benefits of Board Diversity: Lessons Learned From Activist Investing” (2020): online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/>>.

<sup>192</sup> Stephanie J Creary, et al, “When and Why Diversity Improves Your Board’s Performance” (27 March 2019), online: *Harvard Business Review* <<https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance>>; Jared Landaw, “Maximizing the Benefits of Board Diversity: Lessons Learned From Activist Investing” (2020): online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/>>.

<sup>193</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 140.

<sup>194</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 8:16 (Proview).

<sup>195</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 8:16 (Proview).

<sup>196</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(3).

<sup>197</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(8).

<sup>198</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(9).

election of the directors where the election process is not followed. This new election would proceed unless it was shown that doing so would cause irreparable harm.<sup>199</sup>

Given the importance of skills and qualities of a board, best practices for board recruitment require that the board play an appropriate role in its succession and the director recruitment process.<sup>200</sup> The board must understand its responsibility in assuring the quality of board succession, and should establish a committee to oversee the process on its behalf.<sup>201</sup> Moreover, establishing eligibility criteria and developing a matrix of skills/experience/diversity with reference to board needs and stakeholder accountability should remain a priority. To do so, key steps would include maintaining an inventory of current board members' skills and experience, surveying current members' intentions with respect to term renewals, and considering board and individual director evaluation results.<sup>202</sup>

Other steps may include: determining an appropriate recruitment strategy and considering a variety of means to identify board candidates; requiring prospective candidates to complete an application form; conducting personal background and criminal reference checks; ensuring candidates know what is expected of a director; ensuring that only board-recommended candidates are presented at the annual general meeting for election (subject to members' statutory rights); disclosing candidate information to members in advance of the annual meeting; and disclosing the recruitment, nomination and election process to members.<sup>203</sup>

Organizations should also ensure that the minimum statutory qualifications for directors set out in the applicable legislation are met.<sup>204</sup> Under the CNCA, directors must be individuals who are not less than 18 years of age, have not been found unable to manage their property or declared incapable by a court in Canada or in another country, and are not undischarged bankrupts.<sup>205</sup>

#### 4. Director term, renewal and limits

The CNCA provides that a director may hold office for a term of not more than four years,<sup>206</sup> but it does not prescribe any limit on the number of terms that a director may serve, either consecutively or otherwise. Nevertheless, an organization's By-laws and policies should include

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<sup>199</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 8:16 (Proview); see e.g. *Bose v. Bangiya Parishad Toronto*, 2019 ONSC 5625 (Ont Div Ct).

<sup>200</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 140-141.

<sup>201</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 141.

<sup>202</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 141.

<sup>203</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 141.

<sup>204</sup> Burke-Robertson, Carter & Man, [Corporate and Practice Manual for Charities and Not-for-Profit Corporations](#) (Toronto: Thomson Reuters Canada, 2022) at § 8:8 (Proview).

<sup>205</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 126(1).

<sup>206</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(3); *Canada Not-for-profit Corporations Regulations* SOR/2011-223, s 28(1).



Board renewal strategies, such as limits on the number of terms that a Director can serve on the Board, which ensures that fresh perspectives and different ideas are considered and debated.<sup>207</sup> At the same time, the organization must plan carefully and stagger the directors' terms to ensure that the term of all the directors will not all end at the same time. Such a practice, along with other continuity strategies are vital to sustaining organizational memory and stability.<sup>208</sup>

## 5. Board education

The quality of a board depends in part on the orientation processes in place for new directors as well as ongoing education for the full board.<sup>209</sup> Directors must not only know the affairs of the organization they serve; they must also know the board's governance processes and their individual rights, duties and obligations as board members.<sup>210</sup> Boards must conduct mandatory orientation sessions and provide their directors with access to continuous education, which may include encouraging directors to attend education programs relevant to their roles.<sup>211</sup> Attendance and participation in education sessions should form part of director evaluations and consideration with respect to term renewal.

## 6. Board evaluation

Evaluations form an important part of continuous maintenance and improvement of the governance process, and as such, should be undertaken at a point in the board's year at which the information distilled from the evaluation may be acted upon.<sup>212</sup> Boards should first determine which areas would be subject to evaluation, such as individual director performance, collective board performance, chair performance and committee evaluations. In doing so, it should consider the purpose of the evaluation, who completes the evaluation, whether the process is anonymous, how results will be shared and what processes exist to ensure the results can be acted upon.<sup>213</sup>

### iii. *Principle 3 – Board Structure and Processes*

#### 1. Board leadership/Officers

The officers of a not-for-profit corporation form its leadership. The CNCA gives directors broad power “to designate the officers of the corporation, appoint officers, specify duties and delegate to

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<sup>207</sup> Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 10.

<sup>208</sup> Sport Canada, *Pursuing Effective Governance in Canada's National Sport Organizations* (November 2011) at 10.

<sup>209</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 142.

<sup>210</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 142.

<sup>211</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 142.

<sup>212</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 144.

<sup>213</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 3d ed (September 2013) at 144.



them powers to manage the activities and affairs of the corporation” (with certain exceptions).<sup>214</sup> In order to ensure effective board leadership, a board should put in place a “process for determining board officer recruitment and selection, terms of office and succession planning.”<sup>215</sup>

It is also important to ensure a separation between the role of the CEO and the role of the chair of the board.<sup>216</sup> The board’s chair is responsible for the board’s governance, represents the board within the organization and is the public spokesperson for the board.<sup>217</sup> The chair’s role and the qualities required of the board chair should be clearly described, and their term renewals should not be automatic.<sup>218</sup>

## 2. Board Committees

Board committees are typically established to provide assistance to the board and to help the board “in the fulfillment of its governance role”. In other words, “committees support and supplement the board, but do not supplant the work of the board.” Committees are particularly helpful because they allow for “greater discussion and more in-depth analysis than would be allowed during a board meeting.”<sup>219</sup>

With the exception of audit committees,<sup>220</sup> the CNCA does not set out any requirements with respect to committees. Accordingly, the number of committees, their terms of reference and their mandates depend on the discretion of the board.<sup>221</sup> However, there are some exceptions to the duties that the board can delegate to a committee. For instance, a board cannot ask a committee to submit to the members any question or matter requiring the approval of the members, to approve financial statements, nor to adopt, amend or repeal by-laws.<sup>222</sup>

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<sup>214</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 156.

<sup>215</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 156.

<sup>216</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 157.

<sup>217</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 158.

<sup>218</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 157.

<sup>219</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 161; see also Business Roundtable, “Principles of Corporate Governance” (8 September 2016), online: *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>>.

<sup>220</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 194.

<sup>221</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 160.

<sup>222</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 160.

### 3. Board Meeting Processes and Procedures

The “frequency of [board] meetings, process to establish agendas, order in which matters are dealt with on agendas, availability of supporting materials, quality of minutes, conduct of the meeting by the board chair and processes for open and *in camera* meetings” are all elements that can promote effective governance.<sup>223</sup> Accordingly, they should all be clearly established and understood. Additional elements that contribute to an effective meeting, and thus the discharge of the board’s governance role, include the board’s clear understanding of its governance role and appropriate behaviour in the boardroom.<sup>224</sup>

Leading Canadian and American authorities have suggested that the average number of meetings held by volunteer not-for-profit boards will range from seven to ten meetings a year.<sup>225</sup>

#### C. Relationships and Accountabilities

##### i. *Sources of accountability and transparency*

While the CNCA does not expressly use the terms “accountable” and “transparent”, when considering generally the legislation and commentary on not-for-profit corporations, it is apparent that a not-for-profit corporation should strive to attain a high degree of transparency and accountability to its members and other stakeholders. In fact, when Minister Ablonczy introduced the CNCA to the House of Commons at second reading, she explained that the CNCA “would ensure that federally incorporated not-for-profit enterprises are governed by an up-to-date legislative framework that is flexible enough to meet the needs of both small and large organizations while providing the accountability and transparency necessary to meet the expectations of the Canadian public.”<sup>226</sup> At the time, she recognized that the need for not-for-profit corporations to be transparent and financially accountable had increased “because they must establish and maintain a high level of public confidence in order to succeed.”<sup>227</sup> The Minister

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<sup>223</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 162.

<sup>224</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 162.

<sup>225</sup> Grace Bugg & Sue Dallhoff, “National Study of Board Governance Practices in the Non-Profit and Voluntary Sector in Canada” (2006) at 26, online (pdf): *Strategic Leverage Partners Inc., & Centre for Voluntary Sector Research and Development* <[http://www.strategicleveragepartners.com/bhg768kjmhgvyxxyzwq/National\\_Study\\_of\\_Board\\_Governance\\_Practices\\_in\\_the\\_Non-Profit\\_and\\_Voluntary\\_Sector\\_in\\_Canada.PDF](http://www.strategicleveragepartners.com/bhg768kjmhgvyxxyzwq/National_Study_of_Board_Governance_Practices_in_the_Non-Profit_and_Voluntary_Sector_in_Canada.PDF)>; “Leading with Intent: BoardSource Index of Nonprofit Board Practices” (2021) at 33, online (pdf): *BoardSource* <<https://leadingwithintent.org/wp-content/uploads/2021/06/2021-Leading-with-Intent-Report.pdf?hsCtaTracking=60281ff7-cadf-4b2f-b5a0-94ebff5a2c25%7C428c6485-37ba-40f0-a939-aeda82c02f38>>; Bohse & Associates Inc, “Bohse Tips: Board of Directors Series: Non-Profit Board Statistics” (2007) at 1, online (pdf): *Bhose & Associates Inc* <[http://bohse.com/images/file/Board\\_of\\_Director\\_Series/Non-Profit\\_Board\\_Statistics.pdf](http://bohse.com/images/file/Board_of_Director_Series/Non-Profit_Board_Statistics.pdf)>.

<sup>226</sup> “Bill C-4, An Act respecting not-for-profit corporations and certain other corporations”, 2nd reading, *House of Commons Debates*, 40-2, No 8 (4 February 2009) at 1810 (Hon Diane Ablonczy).

<sup>227</sup> “Bill C-4, An Act respecting not-for-profit corporations and certain other corporations”, 2<sup>nd</sup> reading, *House of Commons Debates*, 40-2, No 8 (4 February 2009) at 1815 (Hon Diane Ablonczy).

added that “Canadians expect that corporations that benefit from government grants or public generosity should be more transparent.”<sup>228</sup>

Traces of accountability and transparency within the CNCA include members’ right to approve any by-law changes, to elect directors, and to receive the annual financial statements. Fundamental changes cannot be made without member approval.<sup>229</sup> The CNCA also provides for oppression remedies<sup>230</sup> and derivative actions.<sup>231</sup> If directors were exempt from being accountable to members and were free to act as they see fit, these member rights would not exist. Similarly, the value of transparency is highlighted in the CNCA by members’ right to abundant information, such as copies of financial statements, access to the corporate records, and copies of the articles, by-laws and any amendments. As noted above in Chapter III, the CNCA also imposes additional requirements on soliciting corporations to ensure sufficient transparency and accountability for that income.<sup>232</sup>

Furthermore, members are responsible for appointing the public accountant. Section 180 of the CNCA prescribes the qualifications for a public accountant. In addition to these qualifications, the individual must be independent.<sup>233</sup> The public accountant also has many participation rights at meetings of members. Our legislators drafted the CNCA in that manner because it is “necessary to ensure that the public accountant has the ability to carry out his or her duties and to meet the requirements under the [CNCA] – all of which are essential for financial accountability and transparency that underlie governance in the 21<sup>st</sup> century.”<sup>234</sup>

Many leaders in the not-for-profit sector have acknowledged and commented on the importance of accountability and transparency of not-for-profit corporations. Authors have said that “[c]orporations may be accountable to a number of stakeholders depending on the purposes or objects of the corporation. Each stakeholder relationship has the potential to give rise to some measure of accountability on behalf of the corporation.”<sup>235</sup> In the 21<sup>st</sup> century, there have been

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<sup>228</sup> “Bill C-4, An Act respecting not-for-profit corporations and certain other corporations”, 2<sup>nd</sup> reading, [House of Commons Debates](#), 40-2, No 8 (4 February 2009) at 1815 (Hon Diane Ablonczy).

<sup>229</sup> The CNCA deals with Fundamental Changes in Part 13. Pursuant to section 197(1), Fundamental Changes include matters such as changing the name of the corporation, amending articles and by-laws, alternating the corporation’s activities, or changing its statement of purpose, changing conditions of membership, or the rights of any class or group of members, and changing the means of giving notice of a members’ meeting to voting members.

<sup>230</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 253(1).

<sup>231</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 251(1).

<sup>232</sup> See e.g. *Canada Not-for-profit Corporations Act*, SC 2009, c 23, ss 125, 170(1), 176(1), 179;

“Requirements for soliciting corporations under the Canada Not-for-profit Corporations Act (NFP Act)” (last modified 08 November 2012), online: *Government of Canada* <[www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05011.html](http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05011.html)>.

<sup>233</sup> Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 41.

<sup>234</sup> Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 41.

<sup>235</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 10; see also Keith Steel, *Management of Nonprofit and Charitable Organizations in Canada*, 4th ed (Toronto: LexisNexis Canada, 2018) at p 686, online: <<https://lexisdl.com/library/blgllp/title/6059949>>.

“[g]reater demands for accountability by governments, funders and the general public. Accountability is defined not only in terms of proper use of funds but in the effectiveness and efficiency of the organization and in meeting the needs of the community.”<sup>236</sup> In addition, mission and strategic planning (which involves the definition of the fundamental goals and strategy of the organization) is one of the most important tasks for a board “because it establishe[s] the basis for accountability – the basis on which to determine the appropriateness of the board’s actions”, performance and success.”<sup>237</sup> Among other principles, openness and accountability from directors is often perceived as one of the main principles in providing good governance and leadership.<sup>238</sup>

ii. *Importance of healthy relationships*

Relationships with members, stakeholders and the public are very important to the viability and the sustainability of a not-for-profit corporation. A board of directors should ensure that the corporation develops effective relationships so that it has support for its objectives.<sup>239</sup> Members, stakeholders and the public have “the potential to positively or negatively influence the corporation’s well-being.”<sup>240</sup> In fact, a not-for-profit’s risk management often includes stakeholder relations as they affect reputational risks.<sup>241</sup>

“In considering the quality of stakeholder relations, boards need to consider the concepts of accountability, transparency and engagement that provide a foundation for this function.”<sup>242</sup> An effective way of fostering healthy relationships is indeed to be accountable, transparent, open and engaged.

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<sup>236</sup> Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 152; see also Peter Dey & Sarah Kaplan, “360° Governance: Where are the Directors in a World in Crisis?” (2021) at 21, online (pdf): *Rotman School of Management University of Toronto* <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>; see also Keith Steel, *Management of Nonprofit and Charitable Organizations in Canada*, 4<sup>th</sup> ed (Toronto: LexisNexis Canada, 2018) at p 686, online: <<https://lexisdl.com/library/blgllp/title/6059949>>.

<sup>237</sup> Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 157; see also “Good Governance: A Code for the Voluntary and Community Sector” (October 2010) at 22, online (pdf): *Leading Governance* <https://leadinggovernance.com/wp-content/uploads/2020/08/Code-of-Governance-Full1.pdf>.

<sup>238</sup> Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5<sup>th</sup> ed (Toronto: LexisNexis Canada, 2016) at 162.

<sup>239</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2<sup>nd</sup> ed (September 2013) at 67.

<sup>240</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2<sup>nd</sup> ed (September 2013) at 67.

<sup>241</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2<sup>nd</sup> ed (September 2013) at 58.

<sup>242</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2<sup>nd</sup> ed (September 2013) at 67.

Good and successful relationships mean that members, stakeholders and/or the public “understand the goals of the corporation and appreciate the rationale the board used in making a contentious decision.”<sup>243</sup>

The board is responsible for maintaining and overseeing relationships with members, stakeholders and the public, in addition to ensuring proper accountability and transparency. To do so, boards should identify a list of actors relevant to the organization, examine why and for what purpose the corporation is relating with each actor, and define principles of how the organization should relate with them.<sup>244</sup> Some basic requirements for managing relations include developing a framework and a plan, using multiple tools.<sup>245</sup> In other words, a board “needs to approve an overall policy direction for discharging its accountability, engagement and communications efforts.”<sup>246</sup> The board should consider multiple ways of connecting with members, stakeholders and the public depending on the audience and the objective of the relationship.<sup>247</sup> Finally, a board should monitor the status of its relationships, perhaps through reports from staff.

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<sup>243</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 68.

<sup>244</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 68.

<sup>245</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 68.

<sup>246</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 68.

<sup>247</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 68.

## **V. GOVERNANCE IN THE WORLD OF SPORT AND HOCKEY CANADA**

### **A. Defining “best practices” for National Sport Organizations**

In accordance with the Terms of Reference, the general objective of this exercise is to review Hockey Canada’s governance structure, systems, personnel, and processes, “including the extent to which they meet contemporary best practices for national sport organizations of similar size in Canada.”<sup>248</sup> To inform our analysis of whether Hockey Canada’s governance, systems, personnel and processes meet contemporary best practices for national sport organization of similar size in Canada we compared Hockey Canada with:

- (i) Sport Canada’s Governance Principles for Sport Organizations;<sup>249</sup>
- (ii) the Canadian Sport Governance Code; and
- (iii) the governance structure of select comparable NSOs.

Although we have not compared Hockey Canada’s practices with those of not-for-profit organizations in general, our knowledge and experience of best practices in not-for-profit governance have informed our analysis. We will briefly describe these points of reference before turning to our analysis of how Hockey Canada compares with them.

In our final report, we will also consider Sport Canada’s Governance Report Card system as a source of best practices.

#### *i. Pursuing Effective Governance in Canada’s National Sport Community*

In 2011, Sport Canada published a resource entitled “Pursuing Effective Governance in Canada’s National Sport Organizations” (the “**2011 Governance Tool**”) intended for funded sport organizations.<sup>250</sup> The document sets out a number of principles and practical tips in relation to achieving “effective governance” in the national sport context.

The 2011 Governance Tool identifies five principles of effective governance, namely:

1. Commitment to Vision, Mission, Values and Guided by a Strategic Plan
2. Clarity of Roles and Responsibilities
3. Effective Financial Control
4. Focused on Human Resources
5. Transparent and Accountable for Outcomes and Results

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<sup>248</sup> Hockey Canada Governance Review, “Terms of Reference” (4 August 2022).

<sup>249</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011).

<sup>250</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011).



For each principle, the document includes definitions and ideas on how to implement them in the national sport context. Central to those governance principles is the expectation that directors will model the highest standards of ethical behaviour, acting honestly and in good faith, and in the best interests of their organization.<sup>251</sup>

ii. *The COC Canadian Sport Governance Code*

In November 2020, the Canadian Olympic Committee (“COC”) introduced the Canadian Sport Governance Code (the “COC Code”) to the Canadian sport community. It is intended for all NSOs representing sports on the Olympic Program.<sup>252</sup>

The COC Code’s purpose is to “improve organizational performance by encouraging NSOs to upgrade governance practices through the adoption of revisions to by-laws and other structural mechanisms”.<sup>253</sup> The “Purpose” section of the COC Code provides as follows:

[...] The Code articulates best practices to be met, thereby providing an objective standard that funding sources and other stakeholders can measure against. It is anticipated that various funders wishing to protect and maximize their investment in sport will expect that any NSO who seeks funding will be required to confirm it is in compliance with the Code.

The COC has also developed a number of supporting governance resources and templates (such as template by-law provisions, board mandate, diversity policy, board skills matrix, committee terms of reference, etc.) to accompany the COC Code and to assist NSOs with their initiatives to comply with the COC Code.<sup>254</sup> In addition, the COC published the *Good Governance Framework – A Guide for Implementing the Canadian Code of Governance* (the “Framework”) to supplement and support the implementation of the COC Code. The document provides commentary to enhance “understanding of good governance practices,” offers additional context to the COC Code’s provisions and is “intended to illustrate how implementation will lead to improved organization decision making.”<sup>255</sup>

Although compliance with the COC Code is not mandatory, the COC views it as a framework for governance best practices for NSOs and strongly encourages NSOs to adopt it as a model for their own organizations. During our discussions with representatives of the COC, they emphasized that the COC’s approach to the COC Code is intended to be collaborative and recognizes that full compliance with the COC Code may not be possible or desirable for all NSOs. They are also of

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<sup>251</sup> Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Organizations* (November 2011) at 2.

<sup>252</sup> “Canadian Sport Governance Code” (1 September 2021) at 1, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>253</sup> “Canadian Sport Governance Code” (1 September 2021), at 1, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>254</sup> Goodmans LLP, “Nominating Committee Terms of Reference” in *Canadian Sport Governance Code: Supporting Resources* (27 April 2021).

<sup>255</sup> “Good Governance Framework: A Guide for Implementing the Canadian Code of Governance” (23 September 2021) at 1, online (pdf): *Canadian Olympic Committee* <<https://nso.olympic.ca/wp-content/uploads/2021/10/Good-Governance-Framework-Sept-2021-1.pdf>>.



the view that the COC Code and supporting resources<sup>256</sup> that accompany it are “living” documents that will and should evolve over time and be adapted to the specific needs and organizational structure of each NSO. Two of the four comparable NSOs that we interviewed adapted their governance models to generally align with the COC Code. A representative of one of those associations that we interviewed indicated that they consider the COC Code to be mandatory.

*iii. Comparator Associations*

Hockey Canada identified the following comparator associations, consisting of four NSOs (the “**Comparator Associations**”) that promote and regulate an amateur sport in Canada on a nation-wide basis:

1. Athletics Canada Athlétisme Canada (“**Athletics Canada**”) – is the national governing body for track and field, para athletics, cross-country running and road running in Canada.
2. Canada Basketball (“**Canada Basketball**”) – is the national governing body for basketball in Canada.
3. Canadian Curling Association (“**Curling Canada**”) – is the national governing body for curling in Canada.
4. The Canadian Soccer Association Incorporated L’Association canadienne de soccer incorporée (“**Canada Soccer**”) - is the national governing body for soccer in Canada.

We understand that Hockey Canada selected the Comparator Associations because they have a mandate and membership structure that are comparable to that of Hockey Canada. For the purpose of our final report, we may consider additional NSOs as comparators.

We reviewed publicly available information regarding the history, mission, membership base and organizational and governance structure of each Comparator Association. We also reviewed the articles and by-laws, board and committee mandates, and policies and annual reports of the Comparator Associations to the extent such information was publicly available and/or provided to us by the Comparator Associations. In addition, we conducted interviews with representatives from the COC and the four Comparator Associations.

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<sup>256</sup> Goodmans LLP, “Nominating Committee Terms of Reference” in *Canadian Sport Governance Code: Supporting Resources* (27 April 2021).

**B. Assessment of Hockey Canada – Are Hockey Canada’s By-laws concerning the constitution and operation of the Board of Directors in line with current best practices?**

- i. *Composition of Hockey Canada’s current Board (skills, experience, and diversity) and observations about their alignment with best practices;*

1. Why Diversity Matters

The key functions of a board of directors are to articulate and ensure adherence to the vision, mission and values of the corporation, to approve a strategic plan, to oversee operational performance, to oversee financial assets and resources, to identify and manage risk, and to hire and provide appropriate oversight of the CEO. The board of directors must be comprised of a diverse group of individuals who collectively have the knowledge, skills, experience and capacity to allow it to carry out these key functions effectively. In addition to the required range of skills and expertise, the board ought to reflect the “demographic characteristics that exist across Canadian society including, but not limited to, sex, gender identity, race, ethnicity, sexual orientation, class, economic means, ability, age, official language of Canada spoken, religion and education.”<sup>257</sup> Several studies conclude that diversity on boards is associated with better decision-making and governance because “diversity - whether through representation of different strengths, consideration of different concerns, or questions based on varying life experiences - will counteract groupthink.”<sup>258</sup> Put another way, diversity in the boardroom enhances decision-making because the directors will deliberate from a range of perspectives, each with varying insight.<sup>259</sup>

Thus, having the right mix of people around the board table will enable the directors to accomplish their supervisory functions more effectively. To that end, an organization must recruit and select director candidates thoughtfully to ensure that the board’s composition is appropriate having regard to its current environment and anticipated circumstances.

The Articles and By-laws of Hockey Canada mandate some basic requirements in respect of the Board’s composition. The Articles provide that there shall be a minimum of five and a maximum of nine Directors on the Board.<sup>260</sup> The By-Laws stipulate that the Board is composed of nine Directors who are elected by the Members, of whom at least two must be male and two female, and up to one Director appointed by the elected Directors.<sup>261</sup> As at the date of this report, the Board was comprised of eight elected Directors. There was one vacancy for an elected Director position and no appointed Director was serving on the Board.

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<sup>257</sup> “Canadian Sport Governance Code” (1 September 2021) at 4, section B.5, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>258</sup> Yaron Nili, “Beyond the Numbers: Substantive Gender Diversity in Boardrooms” (2019) 94 Ind LJ 145 at 162-3.

<sup>259</sup> “Good Governance Framework: A Guide for Implementing the Canadian Code of Governance” (23 September 2021) at 3, online (pdf): *Canadian Olympic Committee* <<https://nso.olympic.ca/wp-content/uploads/2021/10/Good-Governance-Framework-Sept-2021-1.pdf>>.

<sup>260</sup> Industry Canada, “Hockey Canada Association Articles of Continuance” (10 June 2014).

<sup>261</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 26.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

## 2. Hockey Canada Board Size

For the purpose of assessing the composition of Hockey Canada's Board, we considered the Board's size. When compared to the size of the board at the Comparator Associations, Hockey Canada's Board falls within the ranges we observed and the best practices supported by the governance sources consulted for our Review. The number of Directors on the Board is fixed by the By-laws at the maximum number permitted by the Articles, nine elected Directors, but provides for the option of an additional Board-appointed Director. Hockey Canada has informed us that the Board has never exercised its right to appoint an additional Director. The limitation in the Articles means that Hockey Canada cannot have nine elected Directors plus an additional appointed Director on the Board. Any increase to the number of Directors above nine would require Members' approval of an amendment to the Articles.

We observed that one other Comparator Association, Athletics Canada, has a similar range of number of Directors as Hockey Canada with a minimum of seven and maximum of nine. Canada Basketball's range is between six and eleven, and the Curling Canada's is between eight and twelve. Canada Soccer has the largest board of all the Comparator Associations, with a fixed number of 14 directors. The COC Code states that "[b]oards should be functional in size with a minimum of five board members and a maximum of fifteen board members. It is expected that a typical board would have seven to eleven members."<sup>262</sup>

The board size for Hockey Canada generally aligns with the COC Code and the Comparator Associations, although we are of the view that, given the scope and complexity of Hockey Canada's mandate, the size of its Board should be closer to the upper end of the ranges stipulated in those points of reference. The addition of some positions on the Board would create the opportunity to include Directors with a greater range of skills, experience and background. In addition, given the heavy workload of the Board and the number of standing committees that support it, an increase in the number of Directors would allow the Board to allocate tasks and committee work among a larger group of people.

In light of these considerations, we recommend that Hockey Canada amend its Articles to increase the maximum number of Directors from nine to 13 (we do not think it is necessary to amend the minimum number of Directors). We are also of the view that the By-laws should not prescribe a fixed number of Directors, but rather they should be amended to provide that the Board will consist of a number of Directors between the minimum and maximum number of Directors specified in the Articles. If the Articles allow for a range of Directors, and the Members have delegated to the Board the authority to fix the number of Directors, the Board can then easily adjust the number within that range by ordinary resolution of the Directors, with no need for further Member approval. Such a feature is attractive since it provides the Board with more governance flexibility by allowing it to periodically adjust the size of the Board as needed.

Having a larger Board could also provide the Directors with greater opportunity to use their authority to appoint additional Directors by fixing the number of elected Directors at a number below the allowed maximum (e.g. 13 directors), therefore leaving room for a Board appointed

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<sup>262</sup> "Canadian Sport Governance Code" (1 September 2021) at 3, para 1, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

director. In that regard, we are of the view that Hockey Canada ought to amend its By-laws to provide that the Board may appoint additional Directors within the legal limits imposed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“CNCA”), rather than limiting that right to only one additional Director. The limits imposed by the CNCA are such that the number of appointed directors on the board (if any) cannot ever exceed one third of the number of directors elected at the previous annual meeting of members.

For example, in order for the Board to be able to appoint two Directors, a minimum of six Directors would need to be elected at the last annual meeting of Members. The practice of allowing Directors to appoint a limited number of Directors to fill a specific need or gap on the Board also aligns with the principle of the Board being responsible for its own governance (which we discussed earlier in our report) as it affords the Board an opportunity to participate in the Board’s formation in a meaningful way. While the removal of the limitation might not necessarily result in the Board being able to appoint more than one Director in any given year (as it will depend on the total number of Directors elected at the last annual meeting) we are of the view that maintaining a limit on appointing only one Director is unnecessarily restrictive since the CNCA has already built-in limitations that prevent the Board from misusing their right to appoint additional Directors and the limitation may fetter the Board’s ability to manage its own governance.

### 3. Hockey Canada Board Diversity

Our assessment of the Hockey Canada Board’s current composition also included an examination of the Directors’ skills, expertise, experience and other diversity elements. The presence of a suitable mix of skills, expertise and experience is vital to ensure that the Board as a collective is equipped to supervise the activities and affairs of the organization and carry out its strategic vision.<sup>263</sup> As mentioned above, diversity should include diversity of thought, as well as representation on the Board of demographic diversity characteristics such as gender, cultural, racial, sexual orientation, religion, disability and age.<sup>264</sup>

The COC Code provides some guidance for NSOs in respect of diversity standards: “Within an independent board staffed with directors who possess the necessary skills for the successful stewardship of the NSO and of whom not more than 60% of the directors are of the same gender, it is recognized that diverse perspectives, experiences and backgrounds provide for optimal board performance.”<sup>265</sup> The COC Code goes on to say that NSOs should develop a policy for diversity at the board level. Diversity is defined as “the broad range of demographic characteristics that exists across Canadian society including, but not limited to, sex, gender identity, race, ethnicity, sexual orientation, class, economic means, ability, age, official language of Canada spoken, religion and education.”<sup>266</sup>

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<sup>263</sup> Deloitte, “Diversity in the Boardroom, Practices and Perspectives” (2015) at 3, online: *Deloitte* <<https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/diversity-in-the-boardroom.html>>.

<sup>264</sup> Yaron Nili, “Beyond the Numbers: Substantive Gender Diversity in Boardrooms” (2019) 94 Ind LJ 145 at 162-3.

<sup>265</sup> “Canadian Sport Governance Code” (1 September 2021) at 4, section B.5, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>266</sup> “Canadian Sport Governance Code” (1 September 2021) at 4, section B.5, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

What follows is a summary of our observations on the current make-up of the Hockey Canada Board. Further to our review of the current Directors' biographies, our interviews with each of them, and the Hockey Canada Board Matrix, we note that the following skills, experience, and diversity characteristics found on the current Board include the following:

- two (or 25%) of the current Directors are female, and six (or 75%) are male; immediately prior to the resignation of the former Board Chair (when all nine Board positions were filled), two (or 22.2%) of the Directors were female and seven (or 77.8%) were male;
- seven (or 87.5%) of the eight Directors are White;
- the age of the current Directors falls within the following age groups:
  - 35-44: 3
  - 45-54: 0
  - 55-64: 2
  - 65-74: 3
  - 75+: 0
- five (62.5%) of the eight Directors are 55 years of age or over;
- none of the eight Directors is fluently bilingual in English and French, although one Director is fluent in Punjabi and Hindi
- one of the Directors identifies as a member of LGBTQ+ community
- one of the Directors is of South Asian descent (2nd generation Canadian)
- seven of the eight Directors have a significant hockey background, each serving in a variety of roles (including former players, coaches, referees, trainers, event volunteer, task team or committee members) and at various levels of hockey
- four of the eight Directors have served on the Board of Directors or as chair/president of a Hockey Canada Member Association or a hockey league
- three of the eight Directors have played hockey at the university level
- two of the eight Directors are lawyers
- two of the eight Directors have experience in municipal politics or employment experience within a municipality;
- one of the eight Directors is a former registered nurse

- two of the eight Directors have backgrounds in business and/or economics
- at least five of the eight Directors have not-for-profit volunteer experience (including board and governance experience)
- at least two of the Directors have employment or volunteer experience developing, executing and/or managing diversity, inclusion and/or multicultural initiatives

To further inform our assessment of the Board’s composition and diversity, we also reviewed a number of Hockey Canada’s governance documents, including the By-laws, the Policy on Equity, Diversity and Inclusion, and committee terms of reference. As previously mentioned, the Hockey Canada By-laws provide that the nine elected Directors shall include a minimum of two male and two female Directors. The By-laws also provide that the Nominating Committee is responsible for ensuring that the Board “is composed of qualified and skilled persons capable of, and committed to, providing effective governance leadership to Hockey Canada.”<sup>267</sup>

While the By-laws provide no other guidance or criteria in respect of board composition and diversity, Hockey Canada’s Equity, Diversity and Inclusion Policy provides that the Board shall have the following responsibilities in respect of the diversity of the Board:<sup>268</sup>

- The Board will strive for a governance structure that encourages and promotes full and equal participation by all individuals, including under-represented populations.
- The Board will encourage the removal of barriers to achieve balanced gender representation on its Board and on all committees.
- The Board will incorporate diversity and inclusion into their annual education/professional development plan.
- The Board recognizes that diverse perspectives linked in common purpose contribute to innovation and growth for Hockey Canada. Accordingly the Board of Directors will review the skills, expertise, experience, independence and background of the Directors to identify the skills and competencies that could be targeted during the nomination process.

Furthermore, the Terms of Reference for the Nominating Committee of Hockey Canada set out some additional considerations. For example, the duties to be performed by the Nominating Committee include the obligations to:<sup>269</sup>

- Promote a regional balance in the composition of the Board by recruiting candidates from different regions of the country.

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<sup>267</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 48.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>268</sup> Hockey Canada, “Equity, Diversity and Inclusion Policy” (approved by Board May 2019) at 1.

<sup>269</sup> “Nominations” in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 35, s 5.4.

- Promote diversity of the Board in relation to gender, age, language, ethnicity, professional backgrounds and personal experiences.
- Have regard to the specific and desired competencies required on the Board as a whole in soliciting nominations.

The Governance Committee of Hockey Canada also has diversity-related duties, namely to “make recommendations to the Board to assist the Nominating Committee in identifying ideal candidate profile(s), skills matrix and diversity needs.”<sup>270</sup> We note that there is some overlap between or duplication of the duties of the Governance Committee and Nominating Committee, which will be examined in more detail in our final report.

#### 4. Board Skills and Expertise Matrix

In accordance with the policies referred to above, the Nominating Committee has developed a Board skills-expertise matrix (the “**Matrix**”).<sup>271</sup> The Matrix serves as an inventory of the skills, expertise and characteristics that are desired on the Board. As such, the Matrix should enable the Nominating Committee to identify, for each Director of the Board, which of the below-listed skills, expertise and characteristics the Director possesses, as well as any gaps in respect of them. Those skills, expertise and characteristics are as follows:

<b>Board Skills-Expertise Matrix</b>	
Core Board Competencies	Functional Expertise
Enterprise Leadership	HR Transformation
Entrepreneurship	IT/Cyber/AI
Board Governance Experience	Government Relations
Financial Acumen	Legal/Regulatory
Government Relations	M&A/Integration
Industry/Sector Experience	Marketing/Sales
Strategic Growth/Value Creation Capability	Operations
Risk Identification, Assessment and Management	Manufacturing
Stakeholder Management	Sustainability
Behaviour Attributes	Other
Capacity to Challenge	Appointed by:
Collaboration	Gender (Female)
Communication	Tenure
Independent Judgement	Diversity – Ethnicity
Influencing Skills	Geography

<sup>270</sup> “Governance” in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 37, s 5.5.

<sup>271</sup> “Hockey Canada Board Matrix” provided by Michael Bruni, Chair of the Nominating Committee (18 August 2022).



Innovative/Conceptual Thinking	Generation Representation <40
Integrity	Generation Representation >80
Organizational Commitment	Aging related illness
Willingness to Act	

In addition to the Matrix, Hockey Canada maintains a separate document (also referred to by Hockey Canada as a “Board matrix”), which sets out in the form of a chart more detailed information in respect of the Directors’ specific skills, competencies and diversity. We were informed by Hockey Canada’s General Counsel that such information is provided to Hockey Canada by the Directors themselves. The version of the document we reviewed was dated August 4, 2022 (the “**Matrix Supplement**”).<sup>272</sup>

We note that the use of a matrix by Hockey Canada’s Nominating Committee is a practice that aligns with best practices, including the COC Code, which provides that each “NSO must maintain a skills matrix and board membership shall be competency-based ensuring that the board members possess as many of the skills necessary for optimal board functioning as possible.”<sup>273</sup> All of the Comparator Associations also have a skills Matrix.

When the Matrix is compared to the matrix characteristics set out in the COC Code, we observe some minor differences. The COC Code expects that for most NSOs, a matrix’s skills would be “financial, governance, legal and sports” and for larger NSOs, the skills might also include “marketing, digital, HR, fundraising, sponsorship and international relations.”<sup>274</sup> We note that from these, very few are not included in the Hockey Canada Matrix: digital (although the Matrix does list IT/Cyber/AI), sponsorship (but see Marketing/Sales) and international relations. We also note that the Matrix Supplement sets out the language competencies for each Director and includes a space where the diversity elements that the Director possesses are described.

Although the 2022 Matrix does not have a regional breakdown for the desired geographical representation of Directors, the Board has, until the resignation of the former Board Chair, included representation from the Maritimes, Québec, Ontario and the Western provinces since the By-laws were amended in 2014 to remove mandatory geographic representation on the Board.<sup>275</sup> This aligns with the Nominating Committee’s duty to “Promote a regional balance in the composition of the Board by recruiting candidates from different regions of the country.”<sup>276</sup>

To further inform our assessment of Hockey Canada’s current Board composition, we took a closer look at certain characteristics that are emphasized in the COC Code as best practice, such as gender

<sup>272</sup> “Hockey Canada Board Matrix” (last updated 4 August 2022).

<sup>273</sup> “Canadian Sport Governance Code” (1 September 2021) at 5, section B.7, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>274</sup> “Canadian Sport Governance Code” (1 September 2021) at 5, section B.7, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>275</sup> Sean Kelly, “Email to Victoria Prince” (13 September 2022, 5:35 PM).

<sup>276</sup> “Nominations” in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 35, s 5.4.

identity and athlete representation. Approaches to these characteristics vary among the Comparator Associations.

## 5. Gender Identity

The Hockey Canada By-laws provide that the nine elected Directors shall include a minimum of two male and two female Directors, meaning that no gender may represent more than 77.8% or less than 22.2% of Directors. We note that two other Comparator Associations have director gender requirements set out in their By-laws. Curling Canada's By-laws provide "advancement for gender balance for women and men on the Board of Governors, while ensuring the prevailing criterion for election is eligibility, ability and professional performance," no gender may represent more than 60% or less than 40% of governors.<sup>277</sup> Canada Soccer's By-laws state that not more than 60% of the Directors shall be of the same gender,<sup>278</sup> meaning that with a board of 14 directors, no more than 8 of them can be of the same gender. Athletics Canada's By-laws provide that its board shall include "three Athlete Directors, a minimum of one of each gender."<sup>279</sup> Athletics Canada's Diversity, Equity and Inclusion policy goes on to say that it "will work toward achieving gender parity on its Board of Directors"<sup>280</sup> and that "the athlete group who nominates the three Athlete Directors [must] nominate at least one athlete from each gender identity and at least one athlete who is a para-athlete."<sup>281</sup>

While Canada Basketball does not have director gender requirements in its By-laws, it does have an organizational policy relating to diversity, equity and inclusion that contains aspirational statements regarding diversity objectives for its board. Notably, each of Canada Basketball's policy and Athletics Canada's policy provides that the NSO "will encourage balanced representation by Under-Represented Groups on its [Board] and on all committees."<sup>282</sup> Each of them uses the same definition of "Under-Represented Group": "Under-Represented Groups include women, children in low income families, Indigenous people, seniors, people with disabilities, newcomers to Canada, and members of the LGBTQ2 community." As mentioned earlier in this section of our report, the COC Code also provides some guidance for NSOs in respect of gender representation on the board. Pursuant to the COC Code, not more than 60% of the directors can be of the same gender.<sup>283</sup>

When compared to the COC Code and the NSO Comparator Associations that have gender requirements in their By-laws (i.e. Curling Canada and Canada Soccer), Hockey Canada's

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<sup>277</sup> Curling Canada, "By-laws of Canadian Curling Association" (5 December 2018) at Part VIII, s 3.

<sup>278</sup> Canada Soccer, "By-laws of the Canadian Soccer Association Incorporated" (2022), s 6.02(v).

<sup>279</sup> Athletics Canada, "Athletics Canada Bylaws" (2021), s 5.1(d).

<sup>280</sup> "Diversity, Equity and Inclusion Policy" (July 2020) at s 6, online (pdf): *Athletics Canada* <[Athletics-Canada-Diversity-Equity-and-Inclusion-Policy-July-2020.pdf](#)>.

<sup>281</sup> "Diversity, Equity and Inclusion Policy" (July 2020) at s 7, online (pdf): *Athletics Canada* <[Athletics-Canada-Diversity-Equity-and-Inclusion-Policy-July-2020.pdf](#)>.

<sup>282</sup> Canada Basketball, "Equity and Inclusion Policy" at s 4, online (pdf): <[https://assets.website-files.com/5d24fc966ad064837947a33b/5e25e16b0482df7fb643b522\\_Equity%20and%20Inclusion%20Policy.pdf](https://assets.website-files.com/5d24fc966ad064837947a33b/5e25e16b0482df7fb643b522_Equity%20and%20Inclusion%20Policy.pdf)>; "Diversity, Equity and Inclusion Policy" (July 2020) at s 5, online (pdf): *Athletics Canada* <[Athletics-Canada-Diversity-Equity-and-Inclusion-Policy-July-2020.pdf](#)>.

<sup>283</sup> "Canadian Sport Governance Code" (1 September 2021) at 4, section B.5, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

minimum thresholds for representation of all genders are the lowest. Although Hockey Canada's Equity, Diversity and Inclusion Policy provides that the "Board will encourage the removal of barriers to achieve balanced gender representation on its Board,"<sup>284</sup> the current Board's composition has a noticeable disproportion of men to women Directors. In our view, Hockey Canada should take a more proactive approach to achieving balanced gender representation on its Board. To that end, we recommend that Hockey Canada amend its By-laws to increase its gender representation thresholds and to provide that no more than 60% of the Directors will be of the same gender, as per the COC Code.

## 6. Athlete Representatives

The COC is of the view that it "is fundamental for athletes to have meaningful representation in the governance structure of the NSO and for athlete voices to be heard."<sup>285</sup> While the COC Code provides that each NSO should determine how it can best achieve that objective, athlete representation among the directors is "strongly encouraged" and each NSO must establish a process that allows the athlete representative to be selected with significant input from that sport's athletes.<sup>286</sup> The term "athlete" is defined as "a person currently on a national team or competing at the international level or a person who is retired and was a member of a national team or competed at the international level, not more than eight years previously."<sup>287</sup>

Hockey Canada's By-laws have no express requirements for athlete representation on the Board, although the Matrix and the Matrix Supplement lists "Industry/Sector Experience" and "player" experience, respectively, as one of the types of experience tracked. We note that three of the current Directors of Hockey Canada are former hockey players who have competed at the university level, albeit more than eight years ago. There are no current Directors who are either currently on or were formally on a national team or other team competing at the international level. When compared to the Comparator Associations, at least two of them have national team athlete representation on their board entrenched in their By-laws. Canada Soccer's By-laws provide that its board shall include "one (1) former Athlete (member of one of the National Teams; e.g., Senior, Youth, Para, Beach and/or Futsal)."<sup>288</sup> Athletics Canada's By-laws state that its board shall include three "Athlete Directors," who will consist of at least "one para-athlete and one able-bodied athlete who are a member of and nominated by the group of athletes who are 18 years of age or older and who have been nominated or selected by [Athletics Canada] to a National Team in any discipline in the previous four years."<sup>289</sup>

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<sup>284</sup> Hockey Canada, "Equity, Diversity and Inclusion Policy" (approved by Board May 2019) at 1.

<sup>285</sup> "Canadian Sport Governance Code" (1 September 2021) at 4, section B.6, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>286</sup> "Canadian Sport Governance Code" (1 September 2021) at 4, section B.6, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>287</sup> "Canadian Sport Governance Code" (1 September 2021) at 4, section B.6, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>288</sup> Canada Soccer, "By-laws of the Canadian Soccer Association Incorporated" (2022), s 6.02(iv).

<sup>289</sup> Athletics Canada, "Athletics Canada Bylaws" (2021), s 5.1(d).

ii. *Term and term limits of Hockey Canada's Directors and observations about their alignment with best practices;*

1. Director Terms

1.1 Elected Directors

As part of our review, we have been asked if the current terms and term limits of the Hockey Canada Directors align with best practices. The elected Directors of Hockey Canada serve on the Board for a term of two years.<sup>290</sup> The term commences on the date of the Director's election and ends at the second annual meeting of members that follows. As Hockey Canada holds an election of Directors only in even numbered years,<sup>291</sup> the term of all the elected Directors expire at the same time and are not staggered.

The CNCA and the *Canada Not-for-Profit Corporations Regulations*, SOR/2011-223 set a limit of four years for any one term for an elected director.<sup>292</sup> The CNCA does not require that a corporation hold an election of directors annually, but rather "at each annual meeting at which an election of directors is required."<sup>293</sup>

Hockey Canada's current Director term of two years is compliant with law and generally consistent with the practices of the Comparator Associations. For example, both Athletics Canada and Canada Basketball prescribe a two-year term for their elected directors. Pursuant to their respective By-laws, the elected directors of Curling Canada serve for a term of four years<sup>294</sup> and the directors of Canada Soccer for a term of three years.<sup>295</sup> In addition, the COC Code provides that a single term for a director of an NSO should be "not longer than four years."<sup>296</sup>

With respect to standards in the broader not-for-profit sector, a 2021 study conducted by BoardSource (the leading organization focused on strengthening and supporting non-profit board leadership) found 54% of American non-profit boards have both prescribed term lengths and term limits.<sup>297</sup> The most common board member term structure was a three-year term, with a two-term

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<sup>290</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 30.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>291</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 28.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>292</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(3); *Canada Not-for-Profit Corporations Regulations*, SOR/2011-223, s 28(1).

<sup>293</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(3).

<sup>294</sup> Curling Canada, "By-laws of Canadian Curling Association" (5 December 2018) at Part VIII, s 2(b).

<sup>295</sup> Canada Soccer, "By-laws of the Canadian Soccer Association Incorporated" (2022), s 6.03(A)(i).

<sup>296</sup> "Canadian Sport Governance Code" (1 September 2021) at 5, section B.10, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>297</sup> "Leading with Intent: BoardSource Index of Nonprofit Board Practices" (2021) at 33, online (pdf): *BoardSource* <<https://leadingwithintent.org/wp-content/uploads/2021/06/2021-Leading-with-Intent-Report.pdf?hsCtaTracking=60281ff7-cadf-4b2f-b5a0-94ebff5a2c25%7C428c6485-37ba-40f0-a939-aeda82c02f38>>.

maximum.<sup>298</sup> In Canada, an older study from 2006 found that three to four years was the most common term length for boards in the not-for-profit and voluntary sector.<sup>299</sup> Additionally, 48% of respondents allowed board members to serve one to two consecutive terms, whereas 47% allowed three or more consecutive terms. Only 5% of respondents did not allow consecutive terms.

While the current two-year term for Directors complies with the CNCA and the COC Code, and is generally consistent with the practices of the Comparator Associations, it is our view that Hockey Canada would be better served by increasing the length of the Director term to up to three years. The complexity of the Hockey Canada organization imposes a steep learning curve on its Directors, particularly those coming from backgrounds outside the sport of hockey. As such, there is a risk that by the time their two-year term expires, the Directors have only recently been able to “get up to speed” in the activities and affairs of the organization. Increasing the single term length by one year would ensure that Directors can familiarize themselves with the nuances of Hockey Canada sufficiently, thereby fostering strategic leadership and enabling Directors to have a more significant impact on the organization’s short- and long-term goals. A term length of up to three years, coupled with the introduction of staggered terms (discussed below), also provides greater opportunity for Board renewal and succession planning.

## 1.2 Staggered terms for elected Directors

As mentioned above, the terms of the Hockey Canada Directors are not staggered and the term of each Director expires at the same time. Although the law does not require that the terms of directors be staggered, many organizations use overlapping or rotating terms to avoid having all directors retire at the same time and to ensure that there is a balance of new and experienced directors on the board. In that regard, the CNCA provides that “[i]t is not necessary that all directors elected at a meeting of members hold office for the same term.”<sup>300</sup>

We note that at least three of the four Comparator Associations expressly provide for staggered terms in their By-laws. In accordance with its by-laws, three directors of the Canada Basketball board are elected in even numbered years and three are elected in odd numbered years.<sup>301</sup> Meanwhile, each of the by-laws of Athletics Canada<sup>302</sup> and Curling Canada<sup>303</sup> provides for a similar rotation process, whereby a minimum number of directors must be elected in even numbered years and in odd numbered years. Although Soccer Canada’s by-laws do not expressly provide for staggered terms, their elections process is structured in such a way that four directors (excluding

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<sup>298</sup> “Leading with Intent: BoardSource Index of Nonprofit Board Practices” (2021) at 33, online (pdf): *BoardSource* <<https://leadingwithintent.org/wp-content/uploads/2021/06/2021-Leading-with-Intent-Report.pdf?hsCtaTracking=60281ff7-cadf-4b2f-b5a0-94ebff5a2c25%7C428c6485-37ba-40f0-a939-aeda82c02f38>>.

<sup>299</sup> Grace Bugg & Sue Dallhoff, “National Study of Board Governance Practices in the Non-Profit and Voluntary Sector in Canada” (2006) at 26, online (pdf): *Strategic Leverage Partners Inc., & Centre for Voluntary Sector Research and Development* <[http://www.strategicleveragepartners.com/bhg768kjmhgvcvxxzqwq/National\\_Study\\_of\\_Board\\_Governance\\_Practices\\_in\\_the\\_Non-Profit\\_and\\_Voluntary\\_Sector\\_in\\_Canada.PDF](http://www.strategicleveragepartners.com/bhg768kjmhgvcvxxzqwq/National_Study_of_Board_Governance_Practices_in_the_Non-Profit_and_Voluntary_Sector_in_Canada.PDF)>

<sup>300</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(4).

<sup>301</sup> Canada Basketball, “Bylaw #1 Canada Basketball” (25 May 2014), s 3.11.

<sup>302</sup> Athletics Canada, “Athletics Canada Bylaws” (2021), s 5.5.

<sup>303</sup> Curling Canada, “By-laws of Canadian Curling Association” (5 December 2018), s 4 and “Temporary Bylaw Amendment” appended thereto.



the Vice-President and President) are up for election every year. In addition, the election of the Vice-President and President (each of whom serve a four year term) is also staggered so that every two years either the Vice-President or President is also up for election.

During our interviews with Hockey Canada representatives, one individual stated that the organization holds an election of Directors only every second year because of the significant amount of time and resources needed to organize and plan it. One of the Member representatives we interviewed expressed the view that there would only be a complete turnover of the Hockey Canada Board if that is what the Members wanted. Respectfully, the risk of a complete turnover of the Board exists independently of what the Hockey Canada Members may want. In any given election year, the two-year term of all of the Hockey Canada Directors naturally expires. While some or all of those Directors may be eligible for re-election, there is never any guarantee that any or all of the eligible Directors will want to run for a subsequent term. Accordingly, we are of the view that the preferred approach is to implement a nominations and elections process that contemplates the election of some Directors at every annual meeting of Members. That not only reduces the risk of having all or an important number of the Directors leave the Board at the same time, but also ensures that there is a combination of new and longer-serving Directors on the Board.

Considering our recommendation above that the term length of an elected Director should be increased to up to three years, we also recommend that the terms be staggered so that only about one third (1/3) of the elected Director positions on the Board of Hockey Canada would be up for election every year. This arrangement would ensure a measure of continuity within the Board for up to three years. In addition, the staggering of Director terms promotes the preservation of institutional knowledge because the knowledge and skills of outgoing Directors are continually being transferred or imparted to new members who are joining the Board on an annual basis.

### 1.3 Appointed Directors

The Board of Hockey Canada may also include up to one Director appointed by the elected Directors of Hockey Canada.<sup>304</sup> The term of an appointed Director commences on the date of such appointment and expires immediately upon the close of the next annual meeting of Members.<sup>305</sup> The CNCA allows such a practice and prescribes that any Directors so appointed “shall hold office for a term expiring not later than the close of the next annual meeting of members.”<sup>306</sup> The CNCA also provides that “the total number of directors so appointed may not exceed one third of the number of directors elected at the previous annual meeting of members.”<sup>307</sup>

We note that the term of Hockey Canada’s appointed Director (if one is appointed) is for up to one year and expires at the close of the next annual meeting of members, which is compliant with the CNCA. Accordingly there is no need to change or revise that practice.

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<sup>304</sup> Industry Canada, “Hockey Canada Association Articles of Continuance” (10 June 2014) at Sched B; “Hockey Canada By-Laws, Regulations and History” (May 2022), s 26.1(b), online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>305</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 30.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>306</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(8).

<sup>307</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 128(8).

We also point out that, pursuant to the CNCA, the Board of Hockey Canada would only be permitted to exercise its right to appoint an additional Director in those years where an election was held. As mentioned above, the CNCA provides that the total number of appointed directors cannot exceed one third of the number of directors elected at the previous annual meeting of members. Accordingly, if no Directors were elected at the previous annual meeting of members (i.e. at an annual meeting held in an odd numbered year), then the Board would not be allowed to appoint any Director during that year. We note that if our recommendation above to implement overlapping or staggered terms for elected Directors is accepted, the likelihood of the Board not being able to appoint a Director would be reduced if not eliminated as there would probably be at least three Directors up for election at every annual meeting of members.

## 2. Term Limits.

The law does not mandate a maximum number of consecutive single terms for directors, but term limits are considered useful by many organizations. They are a gentle yet effective way of ensuring people retire from the board on a regular basis. Term limits also assist with a perception of fairness and independence. If a group of directors has been serving the board for a prolonged period, there might be a perception or concern that those directors lack independence<sup>308</sup> and have become too aligned with management. Term limits generate renewal and provide opportunity for new individuals to share fresh ideas with existing directors and management.

Hockey Canada's By-laws state that an elected Director may, if the Director continues to meet the eligibility criteria, be re-elected for up to four consecutive two-year terms (i.e. eight years).<sup>309</sup> A Director who has served eight consecutive years on the Board is not eligible for re-election to the Board until at least two consecutive years have lapsed since that Director's last term served.<sup>310</sup>

The By-laws do not prescribe a limit on the number of terms that an appointed Director can serve.

No individual may serve more than two consecutive two year terms as Chair of the Board.<sup>311</sup>

### 2.1 Elected Directors

Hockey Canada's rule that limits an elected Director to serving no more than eight consecutive years on the Board is generally consistent with the Comparator Associations. Athletics Canada imposes on its elected directors a limit of eight years,<sup>312</sup> Curling Canada prescribes a limit of ten

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<sup>308</sup> Peter Dey & Sarah Kaplan, "360° Governance: Where are the Directors in a World in Crisis?" (2021) at 31, online (pdf): *Rotman School of Management University of Toronto* <<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>.

<sup>309</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 30.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>310</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 30.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>311</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 31.6, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>312</sup> Athletics Canada, "Athletics Canada Bylaws" (2021), s 5.1(c).



years (which need not be consecutive),<sup>313</sup> while Canada Soccer imposes a nine year maximum.<sup>314</sup> It is not clear if the term limits set out in the By-laws of Athletic Canada and Canada Soccer apply to years served consecutively, or to a total number of years served on the board. Hockey Canada's eight-year limit also aligns with the practice mandated by the COC Code. In that regard, the COC Code provides that each director "shall be subject to a term limit. Absent compelling reasons to the contrary as determined by the board's nominating committee, that term limit should be a maximum of nine years (comprised of multiple terms each not longer than four years)."<sup>315</sup> The COC Code does allow a sitting board chair to serve one additional term for a maximum twelve year term limit, provided that such individual not hold the position of chair of the board for more than six years.<sup>316</sup>

Although the eight-year limit for elected Directors is generally consistent with the practices of the Comparator Associations and the COC Code, we are of the view that the limit should be amended to better align with our recommendation to move to three-year terms for the Directors. If that recommendation is adopted by Hockey Canada without amending the eight-year limit, then a Director re-elected to serve a third term, would not be allowed to complete it and would need to resign in their eighth year of consecutive service. Accordingly, we also recommend that the number of consecutive years that a Director may serve on the Board be increased from eight years to nine years (e.g. three consecutive terms of three years). The slight increase in the maximum number of consecutive years served provides the Hockey Canada Directors with a little more time to educate themselves about the organization and make meaningful contributions to Hockey Canada's long-term goals and strategic objectives. Allowing Directors to serve for up to nine years also ensures greater continuity on the Board, while still avoiding overly long terms, which can "produce directors who are 'stale' and who are no longer able to generate the same degree of commitment and interest in the corporation."<sup>317</sup>

## 2.2 Board Chair

The Chair of Hockey Canada may serve as Chair for no more than four consecutive years (i.e. two consecutive terms of two years).<sup>318</sup> The By-laws do not contemplate an exception to this rule. It is not clear if the time served as Chair counts towards the eight-year limit that applies to elected Directors; that should be clarified. The practice of imposing limits on the number of years a person can serve as chair of a board is common for the same reasons director term limits are considered a good practice – they provide opportunity for fresh insights, and enhance board dynamics.<sup>319</sup> Each

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<sup>313</sup> Curling Canada, "By-laws of Canadian Curling Association" (5 December 2018), s 2(b)(ii).

<sup>314</sup> Canada Soccer, "By-laws of the Canadian Soccer Association Incorporated" (2022), s 6.03(A)(ii).

<sup>315</sup> "Canadian Sport Governance Code" (1 September 2021) at 5, section B.10, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>316</sup> "Canadian Sport Governance Code" (1 September 2021) at 5, section B.10, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>317</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 7C.6 (Proview).

<sup>318</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 31.6, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>319</sup> Peter Dey & Sarah Kaplan, "360° Governance: Where are the Directors in a World in Crisis?" (2021) at 33, online (pdf): *Rotman School of Management University of Toronto*

of Athletics Canada and Canada Soccer prescribes a limit on the number of years a person may occupy the office of chair/president, namely six<sup>320</sup> and eight<sup>321</sup> years respectively. In addition, the COC Code provides that a board chair “may not hold the position of chair of the board for longer than six years.”<sup>322</sup>

Considering that the maximum number of years an elected Director of Hockey Canada may serve on the Board is eight years, the four-year limit on occupying the office of Chair is, in our view, reasonable in the circumstances and generally aligned with the standard prescribed by the COC Code.

Although the four-year limit for the Board Chair is generally consistent with the practices of the Comparator Associations and the COC Code, and for the same reasons expressed above in respect of the limit of consecutive terms that may be served by an elected Director, we are of the view that the Board Chair limit should be amended to better align with our recommendation to move to three-year terms for the Directors. If that recommendation is adopted by Hockey Canada without amending the maximum number of terms for the Chair, then a Chair who is re-elected to serve a second term, would not be allowed to complete it and would need to resign in their fourth year of consecutive service. Accordingly, we also recommend that the number of consecutive years that the Board Chair may serve in that office be increased from four years to six years (i.e. two consecutive terms of three years).

iii. *Hockey Canada’s nominating process and observations about their alignment with best practices?*

1. The Nominating Process

We have been asked to consider whether Hockey Canada’s nominating process needs to be amended. To answer this question, we looked at Hockey Canada’s By-laws and Nominating Committee Terms of Reference. We also heard from a number of Hockey Canada Representatives who are familiar with the nominating process, including Hockey Canada’s General Counsel and the Chair of the Nominating Committee. In accordance with the By-laws, the election of Directors is held at each annual meeting in even numbered years.<sup>323</sup> The election of Directors includes the election of the Board Chair.<sup>324</sup>

Hockey Canada informed us that the nominating process followed in 2020 reflected a renewed approach by the Nominating Committee, who wanted to set out the nominations path and process

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<<https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>>.

<sup>320</sup> Athletics Canada, “Athletics Canada Bylaws” (2021), s 5.1(a).

<sup>321</sup> Canada Soccer, “By-laws of the Canadian Soccer Association Incorporated” (2022), 6.03(A)(iv).

<sup>322</sup> “Canadian Sport Governance Code” (1 September 2021) at 5, section B.10(i), online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>323</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 28.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>324</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

more clearly. In 2020, the nominating process for the election of Directors, which was led by the Nominating Committee, was carried out as follows:

1. Approximately five months<sup>325</sup> prior to the commencement of the annual meeting of Members, Hockey Canada notified Members, through a call for nominations, that Members may put forward nominations during the nominations period (the “**Call for Nominations**”). Hockey Canada also reached out to the broader public to seek candidates for the election of the Chair and Directors. The Call for nominations was published or posted on Hockey Canada’s social media platforms and website, on LinkedIn and through other postings with groups such as the Sport Information Resource Centre and the Institute of Corporate Directors.
2. The Call for Nominations included: (i) a brief description of Hockey Canada; (ii) the positions to be filled on the Board; (iii) a statement indicating that Hockey Canada “is seeking a diverse group of individuals to serve; bringing a variety of thoughts, knowledge and experiences is critical to the success of the organization”; (iv) a statement on who are “ideal candidates” for the Board; (v) the director eligibility criteria required by the CNCA and the Hockey Canada By-laws; (vi) a description of the nominations process, including key dates of the process; and (vii) a summary of the fiduciary duties of Directors.
3. Pursuant to the By-laws, nominations for the position of elected Director could only be submitted by a Member or by the Chair of the Nominating Committee. No Member could submit a number of nominations that exceeded the number of Directors’ positions available for election.<sup>326</sup> There was no limit on the number of nominations that could be submitted by the Chair of the Nominating Committee.
4. Through the Call for Nominations, the Chair of the Nominating Committee invited individuals who were interested in being nominated by the Chair of the Nominating Committee (an “**External Candidate**”) to complete and file an application form, in the same way that an individual endorsed by a Member must complete and file one, except the External Candidate’s application need not be endorsed by a Member.
5. In accordance with the By-laws, all nominations for the position of elected Director had to be submitted to the Chair of the Nominating Committee, at least 60 days prior to the commencement of the annual meeting of Members, and had to include a resume of the candidate’s credentials, and a written statement by the candidate expressing a willingness to serve as a Director.<sup>327</sup>

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<sup>325</sup> Hockey Canada has indicated that in prior years since 2014, the call for nominations was issued sometime between the months of mid-June to early July. There are also no internal rules or policies prescribing when a call for nominations must be deployed.

<sup>326</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 27.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>327</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 27.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

6. Any individual nominated for the position of elected Director was eligible to stand for election as Chair of the Board.<sup>328</sup> Individuals who wished to run for the position of Chair of the Board had to, no later than 45 days prior to the annual meeting of Members at which the election will take place, instruct the Chair of the Nominating Committee to include that individual's name on the ballot for the position of Chair of the Board.<sup>329</sup>
7. The Nominating Committee reviewed all applications submitted by External Candidates and "may, depending on the volume of submissions, create a short-list of external candidates."<sup>330</sup> The Nominating Committee, in its deliberations with the Chair of the Nominating Committee, made reference to the Matrix and list of duties of Directors that accompanied the Call for Nominations to evaluate and select the External Candidates to be nominated by the Chair of the Nominating Committee.
8. The Nominating Committee met with the External Candidates being considered for a nomination and candidates nominated by the Members to review their applications and résumés.<sup>331</sup>
9. The Nominating Committee created a final list of nominees that included all of the nominations made by the Members, and the External Candidates nominated by the Chair of the Nominating Committee. Each nominee was asked to produce a short video.<sup>332</sup>
10. The Nominating Committee forwarded all nominations for the Director positions and the Chair of the Board position, along with the video and any supporting documentation to the Members at least 30 days prior to the annual meeting of Members.<sup>333</sup> We understand that some candidates offered to speak to Members and that Members' responses to these offers varied. In accordance with the By-laws, nominations from the floor at the annual meeting of Members were not permitted.<sup>334</sup>
11. The election of the Directors and Chair was carried out at the annual meeting in accordance with the By-laws, which provided (and still provide):

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<sup>328</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 31.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>329</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 31.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>330</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 2.

<sup>331</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 2.

<sup>332</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 2.

<sup>333</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), ss 27.2, 31.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>334</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 27.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

- a. The Directors and Chair of the Board are elected by the Hockey Canada Members at the annual meeting of Members.<sup>335</sup>
- b. The names of all of the nominees for elected Director positions shall appear on the ballot.<sup>336</sup> Each Member in attendance at the annual meeting of Members receives a number of ballots equal to the number of votes that the Member is entitled to cast.<sup>337</sup>
- c. The Chair candidate receiving the most votes shall be declared elected as Chair of the Board. If more than one Chair candidate receives the highest number of votes on the first ballot or any subsequent ballot, the candidates who receive less than the highest number of votes on the current ballot is removed from the ballot and voting will continue until one candidate is the sole recipient of the most votes.<sup>338</sup>
- d. Following the election of the Chair of the Board, all of the remaining nominees, including nominees who unsuccessfully ran for the position of Chair of the Board, shall be eligible to run for the vacant elected Board positions using the procedure generally described in the By-laws.<sup>339</sup>

As mentioned earlier in this report, the Articles and By-laws provide that the Board may appoint up to one Director.<sup>340</sup> Pursuant to the By-laws, the general process for appointing an additional Director is as follows:

1. The Board informs the Nominating Committee that it wishes to exercise its right to appoint a Director to the Board.
2. Within 30 days of receiving a request from the elected Directors, the Chair of the Nominating Committee forwards to the Board the names of individuals recommended by the Nominating Committee to fill any appointed positions.<sup>341</sup> That By-law requirement is supplemented by the Terms of Reference of the Nominating Committee which reiterate that the Nominating Committee is responsible for identifying and

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<sup>335</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), ss 28.1, 31.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>336</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 28.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>337</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 28.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>338</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.4, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>339</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>340</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 26.1(b), online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>341</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 29.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

recruiting qualified individuals to stand for appointment as Directors and for providing the Board with the names of such individuals to fill the appointed Director position.<sup>342</sup>

3. The elected Directors by Special Resolution,<sup>343</sup> may appoint a recommended candidate to serve as an appointed Director.<sup>344</sup>

There is no further guidance in the By-laws or other governance documents of Hockey Canada in respect of the nominating or appointment process of appointed Directors.

## 2. Observations on Nominating Process

Hockey Canada's Nominating Committee leads the nominating process for Directors. Hockey Canada's Nominating Committee is responsible for ensuring, on a continuing basis, that the Board is comprised of qualified and skilled persons capable of, and committed to, providing effective governance leadership to Hockey Canada.<sup>345</sup> The Nominating Committee Chair oversees elections of the Board Chair and other Board positions. The Nominating Committee Chair must ensure that candidate names appear on official ballots and oversees distribution and collection of ballots, counting of votes, announcing results and destroying ballots immediately thereafter.<sup>346</sup> However, the Nominating Committee Chair may delegate these responsibilities to a third party appointed by the Nominating Committee if the elections happen entirely online, by phone or telecommunications.<sup>347</sup>

Pursuant to its Terms of Reference, the Nominating Committee has a number of other responsibilities, including the following:

- Promoting diversity of the Board in relation to gender, age, language, ethnicity, professional backgrounds and personal experiences;
- Having regard to the specific and desired competencies required on the Board as a whole in soliciting nominations; and
- Carrying out its duties in a manner that encourages a long-term view of Hockey Canada's leadership needs, as well as Board succession planning.

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<sup>342</sup> "Nominations" in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 35, s 5.4.

<sup>343</sup> "Special Resolution" means "a resolution passed by a majority of not less than two-thirds (2/3) of the votes cast on that resolution:" see "Hockey Canada By-Laws, Regulations and History" (May 2022), s aa, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>344</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 29.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>345</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 48.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>346</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 48.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>347</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 48.4, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.



The language set out in the By-laws and Nominating Committee Terms of Reference suggests to the reader that the Nominating Committee carries out an important leadership role in forming the Board of Hockey Canada, in building a diverse Board whose composition is carefully considered in light of the organization's needs and strategic objectives, and engages in proactive succession planning for the Board. However, the current nomination process does not allow the Nominating Committee to fully carry out this role.

Moreover, there ought to be more effective use of the Matrix in the call for nominations. The 2020 Call for Nominations that we reviewed provides "Hockey Canada is seeking a diverse group of individuals to serve on the Board; bringing a variety of thoughts, knowledge and experiences to the Board is critical to our success."<sup>348</sup> It also includes a section entitled "Ideal Candidates" that describes a number of general qualities of Hockey Canada Directors, such as: "they have a strong passion for the game," "they have a genuine interest in contributing to the fulfillment of governance responsibilities using policy governance principles," "they should feel comfortable providing objective and independent points of view with sound judgement and a broad perspective," "they should be good communicators" and "they should be committed to the values and mission of Hockey Canada that inspire and enable all Canadians to enjoy the sport of hockey."<sup>349</sup> Although such qualities are personality traits that are desired in Directors, they are not, in our view, the only criteria that ought to be highlighted in a call for nominations for Directors and the Chair of the Board given the skills-expertise Matrix.

As mentioned above, the Hockey Canada Board skills-expertise Matrix serves as an inventory of current Directors' skills, expertise and characteristics and any gaps in respect of them. As such, the Matrix helps the Nominating Committee identify, for each Director of the Board, which of the listed skills, expertise and characteristics the Director possesses. However, the purpose of a board skills and diversity matrix is not only to provide a snapshot of what the current Board looks like, but also to assist the Nominating Committee in establishing the eligibility criteria for future directors based on a board's needs and stakeholder accountability.<sup>350</sup> In other words, the Matrix should form part of a broader framework that strives to establish a Board made up of individuals who collectively and individually have a diverse mix of skills, knowledge and experience to effectively govern and direct the organization.

Although the 2020 Call for Nominations does state that Hockey Canada is seeking "a diverse group of individuals to serve on the Board,"<sup>351</sup> it does not mention any of the specific skills, expertise or diversity criteria of the Matrix that are of particular interest to the Nominating Committee nor does it encourage individuals who possess some of those specific elements (which might be lacking on the then current Board) to apply for a position on the Board. In short, the Call for Nominations does not reflect that the Nominating Committee has considered (as it may well have) the specific and desired competencies required on the Board or the elements of diversity needed to address any gaps in the Board's current composition. Instead, the Call for Nominations casts a very broad net

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<sup>348</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 1.

<sup>349</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 2.

<sup>350</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 122.

<sup>351</sup> "Nominations for Election to the Hockey Canada Board of Directors" (2020) at 1.



among the Members of Hockey Canada and the general public, and does not draw attention to, or set as eligibility requirements any of the skills, expertise or diversity elements set out in the Matrix.

In accordance with the Hockey Canada By-laws,<sup>352</sup> “the Nominating Committee shall forward all nominations to the Members at least thirty (30) Days prior to the commencement of the Annual Meeting.” The By-laws also provides that “the names of all of the nominees for elected Directors’ positions shall appear on the ballot.”<sup>353</sup> Although the Call for Nominations provides that the Chair of the Nominating Committee may create a short-list of External Candidates that they want to include on the final list of nominees circulated to the Members,<sup>354</sup> the same practice is not followed for nominations made by the Members. Instead, Hockey Canada allows all of the nominees endorsed by the Members to be included on the final list of nominees that is circulated to the Members prior to the annual meeting of Members. That may be due in part to the language set out in the By-laws (quoted above) that stipulates that the Nominating Committee “shall forward all nominations” [emphasis added] to the Members and that “the names of all of the nominees [...] shall appear on the ballot” [emphasis added].

We understand that in some years, a call for nominations can generate a high number of candidacies therefore resulting in a ballot with a very long list of candidates. For example, the ballot for the 2020 election of Directors included 24 candidates, of which 15 were on automatically from the Members and 9 were from the Chair of the Nominating Committee. Five of those candidates were on the ballot for the position of Board Chair. The high number of candidates is in part a consequence of the biennial election system, which results in having nine Director positions become vacant or up for re-election at the same time. In addition, each Member is entitled to nominate a number of candidates that is equal to the number of Directors’ positions available for election.<sup>355</sup> All 13 Members could nominate up to 9 individuals, in which case the Nominating Committee would receive 117 Members’ nominations, all of which would need to be reviewed and considered for inclusion on the final list of nominees included on the election ballot.

We have heard from several persons interviewed that elections are held only every two years because of the amount of time, resources and planning required to carry out the nominations and elections process. It is likely that the past and most recent methods of director recruitment and nominations, which are not strongly supported or informed by any skills- or expertise-related criteria, are adding to the workload as the process tends to yield a high number of candidates, who might not have a suitable mix of competencies and experience to effectively carry out the Board’s functions and meet the specific needs of Hockey Canada.

Furthermore, the practice of allowing Members to nominate without a requirement to have regard to the Matrix and allowing all such nominated candidates to be included on the final election ballot is, in our view, problematic and could be a significant barrier to making progress on diversity

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<sup>352</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 27.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>353</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 28.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>354</sup> “Nominations for Election to the Hockey Canada Board of Directors” (2020) at 2.

<sup>355</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 27.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

objectives. Pursuant to its mandate, the Nominating Committee is “responsible for ensuring, on a continuing basis, that the Board of Directors is composed of qualified and skilled persons capable of, and committed to, providing effective governance leadership to Hockey Canada.”<sup>356</sup> However, that committee’s ability to carry out that mandate effectively and make nominating decisions that have a meaningful impact on the Board’s composition and diversity is limited because, ultimately, the Members have the right to elect the Directors and there is no requirement that all candidates on the ballot have been assessed according to the Matrix and may not have the particular skills, experience, competencies or other qualities that are needed on the Hockey Canada Board at that time.

### 3. Observations on Nomination and Election of Chair

The Chair of the Hockey Canada Board is elected by the Members,<sup>357</sup> who also have the authority to remove the Chair from office.<sup>358</sup> Although the default rule under the CNCA is that the officers of a corporation are appointed by the directors, the CNCA does allow the articles or the by-laws of the corporation to provide for a different manner of appointing officers.<sup>359</sup> The practice of having a chair of the board elected by the members, rather than by the directors, is common in organizations where member involvement is high,<sup>360</sup> such as an NSO. For example, the Chair of Athletics Canada is also elected by its members.<sup>361</sup> At Soccer Canada, the President (who carries out the functions of board chair), is elected at the annual meeting by the members as President-Elect, then subsequently appointed (or “ratified”) by the board as President at the first board meeting following that annual meeting of members.<sup>362</sup> However, the directors of each of Basketball Canada<sup>363</sup> and Curling Canada<sup>364</sup> elect their chair of the board on an annual basis. Similarly, the COC Code provides that the board chair of an NSO should be elected by the directors<sup>365</sup> and should be an independent director.<sup>366</sup>

Thus, Members electing the Board Chair is in line with most of the points of reference we have considered. However, there does not appear to be any defined eligibility qualifications or a well-defined process for selecting the Chair of Hockey Canada. In that regard, the By-laws provide that

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<sup>356</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 48.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>357</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>358</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 34.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>359</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 142.

<sup>360</sup> Burke-Robertson, Carter & Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Thomson Reuters Canada, 2022) at § 7D.3 (Proview).

<sup>361</sup> Athletics Canada, “Athletics Canada Bylaws” (2021), s 5.1(a).

<sup>362</sup> Canada Soccer, “By-laws of the Canadian Soccer Association Incorporated” (2022), ss 6.03(C)(vii), 8.01(i).

<sup>363</sup> Canada Basketball, “Bylaw #1 Canada Basketball” (25 May 2014), s 3.26.

<sup>364</sup> Curling Canada, “By-laws of Canadian Curling Association” (5 December 2018) at Part IX, section 2.

<sup>365</sup> “Canadian Sport Governance Code” (1 September 2021) at 5, section B.8, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

<sup>366</sup> “Canadian Sport Governance Code” (1 September 2021) at 5, section B.9, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

“any individual nominated for the position of elected Director in accordance with [the By-laws] is eligible to stand for election as Chair of the Board”<sup>367</sup> and that “any individual [so nominated] who wishes to run for the position of Chair of the Board shall [...] instruct the Chair of the Nominating Committee to include that individual’s name on the ballot for the position of Chair of the Board.”<sup>368</sup> Essentially, the By-laws allow anyone, regardless of their skills, experience or expertise to be nominated for the position of Board Chair and the By-laws are not supplemented by any other Board policies or terms of reference that would provide additional guidance in this respect.

The absence of such criteria and selection processes is concerning because the role of the chair is a critical one. To be effective, the chair of a board must have the necessary skills and qualities to provide leadership to the board and to the organization as a whole. In addition, the chair must have the ability to manage board meetings, and develop and maintain healthy relationships with other directors, committee chairs, management and stakeholder groups. Such skills and competencies are particularly important in an organization such as Hockey Canada that has a broad and multi-faceted mandate and complex organizational and operational structures.

#### 4. Preliminary Recommendations Regarding the Nominating Process

Considering our observations above, we are of the view that Hockey Canada ought to make a number of changes to its current Director nominating process with a view to enhancing diversity on the Hockey Canada Board. Some of our preliminary recommendations include:

1. As mentioned above, amend the By-laws to provide that no more than 60% of the Directors are of the same gender, as per the COC Code.
2. Review and, if required, update the Board Matrix to ensure it reflects the skills, experience and diversity elements that are needed on the Hockey Canada Board.
  - The implementation of this recommendation does not require a By-law amendment and can be put into effect immediately. Such an exercise falls within the existing duties of the Nominating Committee to ensure, on a continuing basis, that the Board is composed of qualified and skilled persons capable of, and committed to, providing effective governance leadership to Hockey Canada, as set out in its Terms of Reference and By-laws.<sup>369</sup>
  - The skills, experience and diversity elements ought to be reviewed having regard to Hockey Canada’s strategic direction and any specific requirements, initiatives or projects facing the organization in the next three to five years.<sup>370</sup>

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<sup>367</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>368</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 31.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>369</sup> “Hockey Canada By-Laws, Regulations and History” (May 2022), s 48.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>370</sup> This aligns with the Nominating Committee’s duty to “Carry out [its] duties in a manner that encourages a long-term view of Hockey Canada’s leadership need, as well as Board succession planning.”

- The Matrix should take into account regional representation of the Hockey Canada Members rather than just “geography.”<sup>371</sup>
  - The Matrix should be reviewed at least annually and otherwise periodically as the circumstances require, and revised as necessary.<sup>372</sup>
3. For each election cycle (including the 2022 election), that the Nominating Committee use the Board Matrix as a tool to support the call for nominations and to clearly articulate the specific skills and competencies being sought for the Board positions to be filled.<sup>373</sup>
- The implementation of this recommendation does not require a By-law amendment and can be put into effect for the next election cycle. This aligns with the Nominating Committee’s duty to “Have regard to the specific and desired competencies required on the Board as a whole in soliciting nominations.”<sup>374</sup>
  - The Nominating Committee should conduct an evaluation of the Board’s composition annually to “strengthen the board’s effectiveness, to assess the diversity in the boardroom, and to highlight gaps between the skills and background of existing Directors and their optimal mix.”<sup>375</sup> The results of that evaluation should be used to inform the next recruitment and nominating process leading up to the next election of Directors.
4. Confirm and document the Members’ undertaking not to put forward any nominations for Director and Board Chair candidates for the 2022 election. We understand that they have agreed to direct anyone whom they might want to nominate to apply through the Chair of the Nominating Committee process. As such, the Nominating Committee can rely on its past practice of reviewing and vetting all nominations so received, and creating a short-list of External Candidates in the same way it did in accordance with the 2020 Call for Nominations. That vetting process should be done having regard to the Board Matrix. We recommend that this approach be implemented for the current election cycle.
5. Subject to additional comments in our final report, revise and update the current “Chair of the Board Terms of Reference” to ensure they are current and reflect the current needs of Hockey Canada. In addition to the existing description of the Chair’s role set

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<sup>371</sup> This aligns with the Nominating Committee’s duty to “Promote a regional balance in the composition of the Board by recruiting candidates from different regions of the country.”

<sup>372</sup> Goodmans LLP, “Nominating Committee Terms of Reference” in *Canadian Sport Governance Code: Supporting Resources* (27 April 2021) at 65, s 1.1.

<sup>373</sup> This aligns with the Nominating Committee’s duty to “Have regard to the specific and desired competencies required on the Board as a whole in soliciting nominations.”

<sup>374</sup> “Nominations” in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 35.

<sup>375</sup> Deloitte, “Diversity in the Boardroom, Practices and Perspectives” (2015) at 13, online: *Deloitte* <[https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/diversity\\_in\\_the\\_boardroom.html](https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/diversity_in_the_boardroom.html)>.

out in those Terms of Reference, amend the “Chair of the Board Terms of Reference” to include a list of qualities and minimum competencies required of the Chair.

- Use the list of defined qualities and competencies to support the call for nominations for the position of Chair. It should also be used as the basis for vetting and selecting candidates who submit their candidacy for the role of Chair. Some qualities and competencies to consider include:<sup>376</sup>
  - a. Proven leadership skills;
  - b. Good strategic and facilitation skills; ability to influence and achieve consensus;
  - c. Ability to act impartially and without bias and display tact and diplomacy;
  - d. Effective communicator;
  - e. Political acuity;
  - f. Must have the time to continue the legacy of building strong relationships between the corporation and stakeholders;
  - g. Ability to establish trusted advisor relationships with the chief executive officer and other board members;
  - h. Governance and board-level experience;
  - i. Outstanding record of achievement in one or several areas of skills and experience used to select board members.
- 6. Amend and remove all language in the By-laws that states or suggests that all nominations of candidates proposed by the Members shall be included in the final ballot for the election of the Directors and the Board Chair.
- 7. Subject to our final report, update or replace the Nominating Committee Terms of Reference to revise its composition and how its members are appointed, and better define the role and duties of the Nominating Committee, particularly in respect of the process and rules for how individuals are nominated for the positions of Directors and Board Chair.
  - We expect to make additional recommendations in our final report due at the end of October.

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<sup>376</sup> Anne Corbett & James M Mackay, *Guide to Good Governance: Not-for-Profit and Charitable Organizations*, 2nd ed (September 2013) at 122.

- We are currently of the view, for example, that the Nominating Committee should review and vet all nominations received, including those from the Members, and ensure that all candidates meet the targeted Board Matrix criteria for nominees. Once vetted, the Nominating Committee should also have the authority to short-list candidates (even those proposed by Members) and put forward a final list of nominees for inclusion on the election ballot. That authority of the Nominating Committee should be expressly provided for in the Nominating Committee's Terms of Reference and in the By-laws.
  - We are also currently supportive of the approach whereby some members of the Nominating Committee are at arm's length from the Board, but will also be considering whether some Directors should also be on the committee, and whether Members ought to be asked to approve a revised nominations process for the members of the Nominating Committee and will be doing further work on whether this represents best practice.
  - We have also noted some duplication of or overlap between the duties of the Governance Committee and those of the Nominating Committee, which will be considered further in our final report.
8. Amend the By-laws to provide that the Board may appoint additional Directors within the legal limits imposed by the CNCA, rather than limiting the option to only one additional Director. That change would also align with the language in the Articles, which currently mirrors the CNCA rule.
- iv. *Hockey Canada's committee structure (standing committees and task teams), committee mandates/terms of reference and mechanisms for reporting to the Board, and observations about their alignment with best practices.*

Committees are formed to assist the Board in accomplishing its duties and responsibilities. Committees are a very important element of the governance process and "should be established with clearly agreed reporting procedures and a written scope of authority",<sup>377</sup> typically by way of Terms of Reference. To be most valuable, Terms of Reference should include detail pertaining to "the composition of the committee, the objectives, purpose and activities, the powers that have been delegated, any mandate to make recommendations to the board, the lifespan of the committee, and how the committee reports to the board."<sup>378</sup>

#### 1. Committee Structure

As per its By-Laws, Hockey Canada's committee structure is comprised of seven standing committees and a variety of task teams. A standing committee is permanent, while a task team is temporary.

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<sup>377</sup> Deloitte, "Board committees" (2014) at 1.

<sup>378</sup> Deloitte, "Board committees" (2014) at 1.



### *Standing committees*

Hockey Canada's seven standing committees are the following:

- Audit and Finance
- Female Hockey Policy
- Governance
- Human Resources
- Nominating
- Program Standards
- Risk Management<sup>379</sup>

All standing committees report to the Board. They must maintain minutes of their meetings and make those minutes available to the Board.<sup>380</sup>

### *Task teams*

The Chair of the Board (in consultation with the Board, the CEO, the President and Chief Operating Officer) may establish a Task Team to undertake a specific task or project to be completed within a defined period of time.<sup>381</sup> All Task Teams report to the Board. A Task Team is dissolved once it has accomplished its task or project.<sup>382</sup>

With the exception of the Nominating Committee, all Hockey Canada standing committees are chaired by a Director who is appointed by the Chair of the Board.<sup>383</sup> Each standing committee must be comprised of four to eight members, including the Committee Chair.<sup>384</sup> With the exception of the Nominating Committee, the Chair of the Board (in consultation with the Board) determines

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<sup>379</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>: note however that the Female Hockey Policy Committee is not referenced in the By-laws.

<sup>380</sup> "Standing Committees" in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 26.

<sup>381</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 51.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>382</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 51.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>383</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.2, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>384</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.



the composition of each standing committee.<sup>385</sup> There is also a staff resource person on each committee (non-voting).<sup>386</sup>

Standing committee members serve on a committee for a term of two years, but may be reappointed for subsequent terms.<sup>387</sup> However, committee members may be removed from their role as committee member, at any time, by the Board Chair.<sup>388</sup>

Each Task Team Chair is appointed by the Chair of the Board. Task Teams also include a Director, appointed by the Chair of the Board, who serves in a non-voting role to act as a liaison between the Task Team and the Board. Task Team members are appointed by the Chair of the Board. Each Task Team must be comprised of four to eight members, including the Task Team Chair, but not including the appointed Director. On an interim basis, Task Teams can include up to 14 members.<sup>389</sup>

Each standing committee has its own mandate and Terms of Reference, but all standing committees review policies for which they are responsible, as well as their Terms of Reference, at least every two years.<sup>390</sup> The Terms of Reference of standing committees are set out in policies established by the Board. Standing committees may propose changes to its Terms of Reference to the Board.<sup>391</sup> Those Terms of Reference will be considered in more detail in our final report.

Task teams also have their own mandates and Terms of Reference, which will be reviewed and examined in our final report.

## 2. Preliminary Observations

Hockey Canada's standing committees include board committees that a large not-for-profit organization would typically have, such as the Audit and Finance Committee, the Governance Committee, the Human Resources Committee, the Nominating Committee and the Risk Management Committee. Such committees are common and considered best practice since each of them carries out functions that are related to the core duties and responsibility of the directors. We note that the COC Code stipulates that a board of an NSO should have committees that focus on nominations, governance and ethics, audit and finance, compensation and human resources.<sup>392</sup>

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<sup>385</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>386</sup> "Standing Committees" in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 26.

<sup>387</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.4, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>388</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.8, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>389</sup> "Task Teams" in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 40.

<sup>390</sup> "Standing Committees" in *Hockey Canada Terms of Reference* (updated to 18 November 2021) at 26.

<sup>391</sup> "Hockey Canada By-Laws, Regulations and History" (May 2022), s 44.5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>392</sup> "Canadian Sport Governance Code" (1 September 2021) at 6, section C.1, online: *Canadian Olympic Committee – NSO Sharing Centre* <<https://nso.olympic.ca/canadian-sport-governance-code/>>.

Although Hockey Canada’s approach to its standing committee structure generally aligns with best practices, we did note a few exceptions that will be examined in greater detail in our final report. We have not yet completed our study of the appropriateness of the committees’ and task teams’ terms of reference, which will be given more detailed consideration in our final report.

**C. Conclusion and summary of recommendations in light of observations and best practices**

<b>Terms of Reference Question</b>	<b>Response</b>
2. Are the organization’s By-Laws concerning the constitution and operation of the Board of Directors in line with current best practices, appropriate or require amendments?	<ul style="list-style-type: none"> <li>- The current By-laws are not significantly misaligned with the points of reference that we examined (i.e. Sports Canada’s Governance Principles for Sport Organizations, the Canadian Sport Governance Code, Athletics Canada Athlétisme Canada, Canada Basketball, Curling Canada, Canada Soccer).</li> <li>- However, as set out above, we have several suggested changes.</li> </ul>
a. Recognizing the Board’s current composition, are there recommended changes to the organization’s governance structure that would support and further enhance the diversity of the Board?	<ul style="list-style-type: none"> <li>- Yes. See below under “c.” respecting the nominating process.</li> </ul>
b. Are current terms and term limits aligned with best practices?	<ul style="list-style-type: none"> <li>- There are no significant divergences from best practices, but the following measures would strengthen the Board’s capacity:</li> <li>- Amend the corporation’s Articles to increase the maximum number of Directors from nine to thirteen;</li> <li>- Increase the Directors’ terms to up to three years from two;</li> <li>- Stagger Directors’ terms so that only about one third of the Board would be up for re-election in any year;</li> <li>- Increase term limit to nine consecutive years from eight;</li> </ul>

Terms of Reference Question	Response
	<ul style="list-style-type: none"> <li>- Increase term limit of the Board Chair to six consecutive years from four to align with the new three year term for Directors.</li> </ul>
<p>c. Does the nominating process need to be amended?</p>	<ul style="list-style-type: none"> <li>- Yes.</li> <li>- Amend the By-laws to provide that no more than 60% of the Directors are of the same gender, to bring this aspect in line with the COC Canadian Sport Governance Code.</li> <li>- Review and, if required, update the Board Matrix to ensure it reflects the skills, experience and diversity elements that are needed on the Hockey Canada Board; this can be put into effect immediately and should be done annually.</li> <li>- For each election cycle (including the 2022 election), that the Nominating Committee use the Board Matrix as a tool to support the call for nominations and to articulate clearly the specific skills and competencies being sought for the Board positions to be filled.</li> <li>- Confirm and document the Members' undertaking not to put forward any nominations for Director and Board Chair candidates for the 2022 election and allow all nominations to be submitted through the Chair of the Nominating Committee process. The Nominating Committee can and should rely on its past practice of reviewing and vetting all nominations so received, and creating a short-list of External Candidates in the same way it did in accordance with the 2020 Call for Nominations. That vetting process should be done having regard to the Board Matrix. We recommend that this approach be implemented for the current election cycle.</li> <li>- Subject to additional comments in our final report, we are currently of the view that, going forward, this practice should become the Nominating Committee's standard practice and that the committee's authority to short-list candidates (even those proposed by Members) and put forward a final list of nominees for</li> </ul>

Terms of Reference Question	Response
	<p>inclusion on the election ballot should be expressly provided for in the Nominating Committee's Terms of Reference and in the By-laws.</p> <ul style="list-style-type: none"> <li>- Revise and update the current "Chair of the Board Terms of Reference" to ensure they are current and include a list of qualities and minimum competencies required of the Board Chair.</li> <li>- Amend and remove all language in the By-laws that states or suggests that all nominations of candidates proposed by the Members shall be included in the final ballot for the election of the Directors and the Board Chair.</li> <li>- Subject to our final report, update or replace the Nominating Committee Terms of Reference to revise its composition and how its members are appointed, and to better define the committee's role and duties.</li> <li>- Amend the By-laws to provide that the Board may appoint additional Directors within the legal limits imposed by the CNCA, rather than limiting the option to only one additional Director.</li> <li>- We expect to make additional recommendations in our final report due at the end of October.</li> </ul>
<p>d. Is the structure of the various standing committees and task teams, including their Terms of Reference/mandates and reporting mechanism to the Board, appropriate?</p>	<ul style="list-style-type: none"> <li>- Our preliminary work has identified that Hockey Canada's approach to its standing committee structure generally aligns with best practices, subject to a few exceptions, which we will consider further in our final report.</li> <li>- We have not completed our study of the appropriateness of the standing committees' and task teams' terms of reference, which again, will be given more detailed consideration in our final report.</li> </ul>

## **VI. WAS THE USE OF THE NATIONAL EQUITY FUND APPROPRIATE?**

Risk management is an important consideration for all organizations. One of the Board's core responsibilities is to ensure that risks are identified and that appropriate measures are put in place to address them.

Many not-for-profit corporations create reserve funds as a risk management tool to ensure they have sufficient resources to respond to risks, if and when they materialize. Hockey Canada's National Equity Fund ("NEF") must be understood and assessed in this context. The key questions for this review are whether the NEF was established properly, and whether Hockey Canada governs the maintenance and use of the Fund appropriately.

### **A. Development, Purposes and Funding of the National Equity Fund**

#### *i. Introduction*

The NEF has existed in some form since 1986,<sup>393</sup> but its purposes have evolved over time. For this review, its evolution is best divided into three phases – the self-insurance phase (1986–1995), the initial commercial insurance phase (1995–2016), and the current phase (2016–Present).

The NEF is now one element in an interlocking framework, which aims to ensure that Hockey Canada retains adequate resources to meet its potential liabilities and those of its Members, and Participants. The other elements are two distinct funds: the Participants Legacy Trust Fund (the "**Legacy Trust**") and the Insurance Rate Stabilization Fund ("**IRS Fund**") along with extensive insurance coverages.

For the purpose of this chapter, we have defined the following terms:

- **Members** are the provincial, regional or territorial associations/federations that manage and foster amateur hockey within their geographic regions and have the responsibility to represent their constituents.<sup>394</sup> The 13 Members of Hockey Canada currently are: British Columbia Hockey, Hockey Alberta, Hockey Saskatchewan, Hockey Manitoba, Hockey Northwestern Ontario, Ontario Hockey Federation, Hockey Eastern Ontario, Hockey Québec, Hockey New Brunswick, Hockey Nova Scotia, Hockey Prince Edward Island, Hockey Newfoundland and Labrador, and Hockey North. These Members have certain right and obligations under Hockey Canada's constating documents.
- **Participant** means all players, coaches, referees, assistant coaches, trainers, managers and volunteers of Hockey Canada and its Members, including local associations and teams.

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<sup>393</sup> Questions Answered by Glen McCurdie, former Vice President of Insurance and Risk at Hockey Canada (dated August 29, 2022); see also Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year".

<sup>394</sup> Hockey Canada 2020-21 Annual Report" (last visited 21 August 2022) at 5, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2020-21-annual-report-e.pdf>>; "Hockey Canada By-Laws, Regulations and History" (May 2022), s 2.3, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

ii. 1986–1995: *The Self-Insurance Phase*

In September 1986, Hockey Canada’s predecessor, the Canadian Amateur Hockey Association (“CAHA”), began operating the National Equity Fund Insurance Program (the “**Program**”).<sup>395</sup> This self-funded Program was created as an opportunity to reduce insurance costs and benefit from the CAHA’s size to spread out individual Members’ financial risk.<sup>396</sup> The partner organization, Canadian Hockey League (“CHL”), and several Members across Canada contributed to the Program throughout its existence, under which they were “beneficiaries.”<sup>397</sup> The Fédération québécoise de hockey sur glace (now Hockey Québec) only participated in the Program until August 31, 1993, and only certain teams in that federation participated between September 1, 1993 and August 31, 1995.<sup>398</sup> Hockey North (which currently holds jurisdiction of the Northwest Territories and Nunavut) was not a contributing Member.<sup>399</sup>

The Program was initially comprised of general liability coverage of \$2M from the CAHA Liability Fund (which we understand to be the NEF), bolstered with \$3M excess liability coverage with Segwick Tomenson Inc., which also provided comprehensive accident insurance coverage (for accidental injury or death while participating in sanctioned hockey activities).<sup>400</sup>

In 1988, Hockey Canada obtained a \$3M comprehensive general liability policy with the Co-operators General Insurance Company (the “**Co-operators**”), in addition to a \$3M excess policy from the Zurich Insurance Company. Hockey Canada advised that, in the same year, the CAHA contracted with the Co-operators to administer the Program, and paid them an annual premium (the “**Co-operators Agreement**”). Unfortunately, Hockey Canada has been unable to locate the original agreement with the Co-operators. The information provided indicates that the agreement

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<sup>395</sup> See Canada Hockey Association, “Trust Agreement” (1 June 1999); see also Canadian Amateur Hockey Association, “General Liability Fund and Excess Insurance Plus Comprehensive Accident Insurance Brochure” (1986-1987 Season).

<sup>396</sup> The Alexander Consulting Group, “Summary of Insurance” (31 May 1989) at s I.

<sup>397</sup> Hockey Canada, “History of the National Equity Fund” at 1.

<sup>398</sup> Canada Hockey Association, “Trust Agreement” (1 June 1999); Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022): Hockey Canada advised that certain teams within Hockey Quebec had provincial coverage and thus did not contribute from September 1, 1993 and August 31, 1995.

<sup>399</sup> The contributing members at the time included different organizations/associations than they are today. At the time when the self-insurance program was operating the following entities were considered contributing members: British Columbia Amateur Hockey Association, the Alberta Amateur Hockey Association (now Hockey Alberta), the Saskatchewan Amateur Hockey Association (now Saskatchewan Hockey), the Manitoba Amateur Hockey Association (now Hockey Manitoba), the Thunder Bay Amateur Hockey Association (now Hockey Northwestern Ontario), the Ontario Hockey Federation, the Ottawa and District Hockey Association (now Hockey Eastern Ontario), the Prince Edward Island Hockey Association (now Hockey PEI), the New Brunswick Amateur Hockey Association (now Hockey New Brunswick), the Nova Scotia Hockey Association (now Hockey Nova Scotia), the Newfoundland and Labrador Hockey Association (now Hockey Newfoundland and Labrador), the Federation Québécoise de Hockey sur Glace (now Hockey Quebec) and the Canadian Hockey League; see Canada Hockey Association, “Trust Agreement” (1 June 1999) at s 1; see also “Hockey Canada By-Laws, Regulations and History” (May 2022), s 9.1, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Corporate/About/Downloads/2022-23-bylaws-e.pdf>>.

<sup>400</sup> Canadian Amateur Hockey Association, “General Liability Fund and Excess Insurance Plus Comprehensive Accident Insurance Brochure” (1986-1987 Season) at 2-4; The Alexander Consulting Group, “Summary of Insurance” (31 May 1989) at 1-7.

has been in force since at least 1988.<sup>401</sup> Hockey Canada has advised that the agreement was renewed annually.

Under the Co-operators Agreement, a Claims Management Committee, which included representatives from the CAHA and the Co-operators, would administer claims.<sup>402</sup> However, the CAHA bore the responsibility of reporting, investigating, defending and settling all claims made under the Program.<sup>403</sup> The Co-operators Agreement also included an excess commercial liability policy. The policy existed to insure all Members and Participants for injuries, and provided the CAHA coverage of up to \$6M in the event a claim exceeded the NEF balance at a given time.<sup>404</sup> To the best of Hockey Canada's knowledge, the NEF had sufficient funding to respond to all claims and the excess policy was never invoked.<sup>405</sup> The Co-operators Agreement also required the CAHA to maintain an escrow trust fund. It is unclear if and how the escrow trust fund was used and if it was linked to the NEF or the settlement of claims.<sup>406</sup>

We have not been provided with any constituting documents for the NEF. The CAHA first reported the NEF in its audited financial statement for the 1987-1988 fiscal year.<sup>407</sup> The financial statement clearly advises that the CAHA was involved in defending legal actions resulting from accidents and injuries sustained by "participants in CAHA play."<sup>408</sup> The statement provides that the NEF balance was accumulated as a precaution against current and potential future claims against the CAHA, Members, and Participants.<sup>409</sup> In 1987, the NEF had a balance of \$445,117, which rose to \$981,435 in 1988.<sup>410</sup>

On September 1, 1988 the CAHA created the Health and Accident Fund to provide supplementary medical and dental coverage to Participants, which continues to operate today as the Health Benefit Trust Fund.<sup>411</sup>

The December 1989 Board of Directors meeting minutes document the first NEF-funded settlement, which involved a player in one of the leagues of the CHL who became paralyzed from

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<sup>401</sup> Canadian Amateur Hockey Association & Co-operators General Insurance Company, "Agreement" (1 September 1993), ss 3, 7: replacing the agreement between the parties dated September 1, 1988; see also Co-operators General Insurance Company Insurance Policy No. 1135073 (September 1, 1988).

<sup>402</sup> Canadian Amateur Hockey Association & Co-operators General Insurance Company, "Agreement" (1 September 1993), ss 3, 7: replacing the agreement between the parties dated September 1, 1988.

<sup>403</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>404</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>405</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>406</sup> Canadian Amateur Hockey Association & Co-operators General Insurance Company, "Agreement" (1 September 1993), ss 3, 7: replacing the agreement between the parties dated September 1, 1988.

<sup>407</sup> Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year".

<sup>408</sup> Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year" at 9.

<sup>409</sup> Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year" at 9.

<sup>410</sup> Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year" at 9.

<sup>411</sup> Canadian Amateur Hockey Association, "Audited Financial Statement 1987-88 fiscal year" at 9.



an injury sustained during a hockey game.<sup>412</sup> The minutes indicate that the terms and amount of the settlement were not disclosed due to confidentiality requirements.<sup>413</sup>

Hockey Canada has advised that the NEF originally operated as a vehicle to receive premiums from Participants to fund the Program.<sup>414</sup> We have been advised that Participants paid an annual fee of approximately \$11.50 – consisting of a \$1.50 membership fee and a \$10.00 self-insurance premium – to the CAHA through their Member.<sup>415</sup> The membership fee was deposited into the CAHA’s Operating Fund whereas the self-insurance premium made its way into the NEF and the Health and Benefit Trust Fund. The organization then used the NEF funds to pay the annual premium to the Co-operators as well as any claims made against the CAHA, its Members and all Participants.<sup>416</sup>

The Program continued to operate until 1995.

*iii. 1995–2016: The Initial Commercial Insurance Phase*

On February 1, 1995, Supplementary Letters Patent were issued to the CAHA, changing its name to the Canadian Hockey Association.<sup>417</sup> Concerned with the increase of serious spinal injuries in amateur hockey across Canada and the liability that could flow from them, the organization, on September 1, 1995, purchased commercial liability insurance policies instead of continuing the Program. These new policies provided a myriad of coverages including general liability, personal injury and medical expense coverage to the CAHA, its Members and all Participants.<sup>418</sup> As under the former Program, Participants paid an annual fee to the CAHA through the Members. A portion of this fee then remained and grew in the NEF and covered the insurance premiums for the commercial policies, any deductibles, and any uninsured or underinsured claims.<sup>419</sup>

In 1998, the Canadian Hockey Association merged with Hockey Canada bringing every aspect of Canadian Hockey, both amateur and international competition, under one umbrella known as Hockey Canada.<sup>420</sup>

1. Purchase of Sexual Misconduct Coverage

In 1998, largely in response to the abuse committed by Graham James, Hockey Canada expanded its commercial liability policy to provide sexual misconduct coverage for Hockey Canada, its

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<sup>412</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 1-3 December 1989) at 240.

<sup>413</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 1-3 December 1989) at 240.

<sup>414</sup> Interview of Glen McCurdie, former Vice President of Insurance and Risk at Hockey Canada (31 August 2022).

<sup>415</sup> All Participants paid the same insurance fee; however, referees paid a different membership fee that was dependent on the level of hockey they were working in.

<sup>416</sup> Interview of Glen McCurdie, former Vice President of Insurance and Risk at Hockey Canada (31 August 2022).

<sup>417</sup> Industry Canada, “Canadian Amateur Hockey Association Supplementary Letters Patent” (1 February 1995).

<sup>418</sup> Interview of Barry Lorenzetti, Advisor to Hockey Canada (24 August 2022) at BFL.

<sup>419</sup> Interview of Glen McCurdy, former Vice President of Insurance and Risk at Hockey Canada (24 August 2022).

<sup>420</sup> “Learn about the history of Hockey Canada” (last visited 21 August 2022), online: *Hockey Canada* <[www.hockeycanada.ca/en-ca/corporate/history](http://www.hockeycanada.ca/en-ca/corporate/history)>; for further information about the history of the CAHA and Hockey Canada please see Chapter 4 of this Report.

Members and its Participants.<sup>421</sup> As a condition of this coverage, known and suspected acts of past sexual misconduct were excluded from coverage, and the insurer required that Hockey Canada provide a list of all individuals suspected of having committed sexual misconduct during the self-insured period (i.e. 1986–1995).<sup>422</sup> Hockey Canada, working with its Members, compiled a list of known perpetrators it provided to the insurer; claims in relation to those known perpetrators were excluded from coverage under the new sexual misconduct insurance.<sup>423</sup> The current policy document states a retroactive coverage date of December 31, 1998. All incidents related to the known perpetrators are expressly excluded from coverage.<sup>424</sup> A risk remained that historic events might give rise to claims of various types that would not be statute barred. Concerns grew that further late-reported claims might be brought against Hockey Canada, its Members or Participants. In response, the NEF continued to accrue funds in reserve to cover any potential uninsured, historic claims.

## 2. The Participants Legacy Trust Fund

On June 1, 1999, Hockey Canada entered into a Trust Agreement to settle the Legacy Trust in order to respond to historic claims. The Legacy Trust provided that Hockey Canada could use funds on behalf of its Members and the CHL to respond to late reported claims for incidents occurring prior to September 1, 1995, in the event the NEF balance was insufficient.<sup>425</sup> Approximately \$7.1 million was transferred from the NEF to benefit the Members who had contributed to the former Program.<sup>426</sup> In other words, all Members and the CHL, except Hockey North, are beneficiaries of the Legacy Trust and receive an annual distribution, comprised of realized annual investment income, based on their respective contribution levels made to the NEF from 1986 to 1995.<sup>427</sup> Hockey Canada is not a beneficiary of the Legacy Trust. These annual distributions do not relate to funding potential or actual liabilities nor risk management. However, the Legacy Trust does permit trustees to transfer \$2.1 million per occurrence (with no aggregate limit) from the Legacy Trust to the NEF to pay late-reported claims relating to events that occurred from 1986 to 1995.<sup>428</sup> Hockey Canada itself does not receive any annual distributions from the Legacy Trust.

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<sup>421</sup> Sexual Misconduct was defined as any: (a) sexual or physical abuse or sexual or physical molestation of any person, including but not limited to, any sexual involvement, sexual conduct or sexual contact, regardless of consent, with a person who is a minor or who is legally incompetent; or (b) sexual exploitation, including but not limited to, the development of, or the attempt to develop, a sexual relationship, whether or not there is apparent consent from the individual.

<sup>422</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>423</sup> AIG Insurance Company of Canada, “Endorsement No 21: Sexual Misconduct Liability Endorsement” (effective 1 September 2020); Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>424</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>425</sup> Hockey Canada, “Financial Statements” (year end 30 June 2000) at note 9.

<sup>426</sup> Canada Hockey Association, “Trust Agreement” (1 June 1999).

<sup>427</sup> Canada Hockey Association, “Trust Agreement” (1 June 1999) was renewed to May 15, 2039. No modifications were made to the Trust Agreement except for the revision to the Division Date.

<sup>428</sup> Canada Hockey Association, “Trust Agreement” (1 June 1999) at Article V, s 5.1(e).

Schedule A to the Legacy Trust Agreement is a Tail Coverage Agreement, executed in May 1999, directing that all claims from the self-insured period (1986 to 1995) are to be paid by the NEF.<sup>429</sup> Hockey Canada has advised that the Legacy Trust operates to provide additional funding in the event the NEF has insufficient funding to respond to historic, uninsured claims on behalf of Members and the CHL. The Legacy Trust essentially acts as an excess policy, accessible once the NEF has been exhausted. Hockey Canada has advised that the only payments that have been made out of the Legacy Trust are the annual distributions paid to the beneficiaries and the legal fees associated with renewing the trust agreement to May 15, 2039.<sup>430</sup> The Legacy Trust has not funded any settlements.<sup>431</sup>

Hockey Canada has no formal policy governing the Legacy Trust, beyond the Trust Agreement. Notably, the Tail Coverage Agreement includes conditions requiring that Hockey Canada provide a certain amount of disclosure about the status of the NEF to Members, as discussed below.

### 3. Transfers to Pillar Funds

From 1999 to 2008, the NEF continued to operate as planned, receiving annual fees from Participants to fund insurance premiums, deductibles, and settle uninsured and underinsured claims. Hockey Canada also established several internally restricted funds known as the “Pillar Funds,” the most relevant of which for present purposes being the Insurance Rate Stabilization Fund (“**IRS Fund**”).<sup>432</sup>

The IRS Fund forms another part of Hockey Canada’s risk management matrix. Created and approved by the Board of Directors during the 2007–2008 fiscal year,<sup>433</sup> the IRS Fund acts as a buffer against future increases in insurance rates, as stated in Hockey Canada’s audited financial statements.<sup>434</sup> As discussed below, it is apparent that the IRS Fund is now also used as a reserve fund, which is not indicated on the financial statements. Hockey Canada has no formal policy governing the IRS Fund. Hockey Canada has authorized several inter-fund transfers from the NEF to the other Pillar Funds over the years, the vast majority of these going to the IRS fund.<sup>435</sup> These inter-fund transfers are approved by the Board of Directors and included in the audited financial statements Members receive prior to the Annual Meeting.

In September 2022, during our review, Hockey Canada’s Audit and Finance Committee approved a draft Pillars Policy which provides clarity on the purpose of the Pillar Funds and outlines the

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<sup>429</sup> Canadian Hockey Association, “Tail Coverage Agreement” (24 May 1999) at ss 1-2.

<sup>430</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022).

<sup>431</sup> Interview of Sam Ciccolini, Advisor to Risk Management Committee at Hockey Canada (24 August 2022).

<sup>432</sup> Hockey Canada, “Audited Financial Statement” (June 2007-2008) at 13; the other Pillar Funds are Growth Fund, Facilities Fund, Branch Support Fund, International Event Housing Support Fund, and Technology. Please consult the Audited Financial Statements for more information about the purposes of each of these funds.

<sup>433</sup> Hockey Canada, “Audited Financial Statement” (June 2007-2008) at 13.

<sup>434</sup> Hockey Canada, “Audited Financial Statement” (June 2007-2008) at 13.

<sup>435</sup> See Hockey Canada, “Audited Financial Statement” (June 2015-2016, June 2016-2017, 2017-2018, 2018-2019, 2019-2020).

authorization process for inter-fund transfers (this policy has yet to be approved by the Board). This draft policy clarifies that the IRS Fund may be used to support four purposes:

- to offset any significant increases in third party insurance premiums to mitigate increases in insurance fees Hockey Canada charges Members;
- to pay liability settlements for claims related to Hockey Canada’s uninsured period, including fiscal years 1986–87 to 1994–95;
- to support insurance-related Strategic Plan initiatives; and
- to cover start-up expenses related to a Hockey Canada self-insured insurance plan.

The draft policy provides that any payments from the IRS Fund would require Board approval following a recommendation from the Risk Management Committee. Additionally, any transfer or re-allocation of funds between Hockey Canada Operating Fund, Health Benefit Trust or NEF to the Pillar Funds, or between the Pillar Funds would require Board approval following a motion at a Director’s meeting. Finally, transfers of NEF year-end surplus, if applicable, to the IRS Fund would require a Board motion on an annual basis. The Board of Directors has not yet approved the draft policy.<sup>436</sup> However, we are advised by Hockey Canada that it does currently transfer NEF year-end surpluses, when they arise, to the IRS Fund with Board approval.

#### 4. Removal of Reserve Funds from Financial Statements and Surplus Transfers

In 2015, a substantial portion of the NEF consisted of designated reserve funds for possible uninsured or underinsured claims described by Hockey Canada as “general reserves for concussion and sexual abuse.”<sup>437</sup> On the advice of its auditors, Hockey Canada removed the presentation of the reserves from the 2015–2016 audited financial statements, which had been listed as liabilities in previous financial statements.<sup>438</sup> The auditors believed it was incorrect to list the reserves as liabilities since it was not possible to identify to whom specifically the liabilities would be payable or their amount. Effectively, this presentation change decreased reported liabilities on Hockey Canada’s balance sheet and increased the reported balance of the NEF by several million dollars.<sup>439</sup> In turn, Hockey Canada had to re-state the 2015 NEF opening balance to account for this increase, which it disclosed in note 16 of its 2015–2016 audited financial statement.<sup>440</sup> The auditors advised us that, in their view, Hockey Canada had overestimated its liabilities during that period.<sup>441</sup> When asked how they had estimated those liabilities, Hockey Canada informed us that they had relied on past claims but beyond that, it is not clear to us how these liabilities were estimated.

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<sup>436</sup> Hockey Canada, “Draft Pillars Policy” (2022).

<sup>437</sup> Hockey Canada, “History of the National Equity Fund” at 1.

<sup>438</sup> Interview of Tim Sothern, Representative at BDO (24 August 2022).

<sup>439</sup> Interview of Tim Sothern, Representative at BDO (24 August 2022); Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (24 August 2022); see also Hockey Canada, “Audited Financial Statement” (2015-2016).

<sup>440</sup> Hockey Canada, “Audited Financial Statement” (2015-2016) at 18.

<sup>441</sup> Interview of Tim Sothern, Representative at BDO (24 August 2022).

Hockey Canada became concerned that this change on the financial statements inflated the NEF balance artificially, which might signal a large pool of funds set aside for potential claimants and thus might increase the likelihood of additional claims.<sup>442</sup> Therefore, on November 17, 2016, the Board approved the transfer of \$10.25M in reserve funds from the NEF into the IRS Fund “for the purpose of providing financial support against potential future non-insured claims.”<sup>443</sup> In so doing, the Board expanded the scope of the IRS Fund to include a reserve sub-fund for uninsured claims. Indeed, the minutes from the Board meeting during which the transfer was approved note that the transfer was not intended to change the original purpose of the fund, but “simply add to its purpose.”<sup>444</sup> This expanded purpose was and is still not reflected in the audited financial statements, which show the IRS Fund as a fund to buffer insurance premiums.

The summary notes of the 2016 Annual Winter Congress (which took place on November 19, 2016) indicate that Members were “advised of Board approval of transfer of funds from Equity Fund to the [IRS Fund] for the purpose of providing financial support against potential future non-insured claims.”<sup>445</sup>

From 2016 to present, any surplus generated from investments in the NEF has been transferred to the IRS Fund.<sup>446</sup> These inter-fund transfers are approved by the Board and included in Hockey Canada’s audited financial statements. For example, during a November 16, 2017 meeting, the Board of Directors approved three inter-fund transfers: \$723,000 from the IRS Fund to the NEF (which Hockey Canada indicated was required to pay settlements relating to uninsured claims against Gordon Stuckless and Graham James), \$2,651,180 from the NEF back to the IRS Fund, and \$1,827,479 from the Growth Fund to the Operating Fund.<sup>447</sup> Neither the notes for the 2017 Annual Meeting (November 18, 2018) nor those for the 2017 Winter Congress (November 16–18, 2017) mention the transfers. However, the \$2,651,180 transfer to the IRS Fund and the \$1,827,479 transfer to the Operating Fund are noted on the 2017–2018 financial statements, and the \$723,000 transfer to the NEF is included in notes for the 2016–2017 fiscal year.<sup>448</sup>

*iv. 2016–Present: The Current Phase*

The NEF, the IRS Fund and the Legacy Trust continue to operate to date. Hockey Canada has advised that the IRS Fund contains two sub-funds: the reserve fund and the funds to buffer insurance premium increases. These sub-funds are not listed separately on the audited financial statements. Instead, only the total amount of funds contained in the IRS Fund is displayed, but Hockey Canada maintains that Members are aware of the two so-called sub-funds.<sup>449</sup> Hockey

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<sup>442</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022).

<sup>443</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 17 December 2016) at 4, item 5.4.

<sup>444</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 17 December 2016).

<sup>445</sup> Hockey Canada, Winter Congress, *Annual Meeting Summary* (held on 19 November 2016).

<sup>446</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (24 August 2022).

<sup>447</sup> Hockey Canada, Board of Directors, *Minutes of Meeting* (held on 16 November 2017) at 8.

<sup>448</sup> See Hockey Canada, “Audited Financial Statement” (2016-2017, 2017-2018).

<sup>449</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022).

Canada also advised that they maintain an internal document to track the balance of the sub-fund reserve; however, the specific balances are not routinely provided to the Members.<sup>450</sup>

Until December 2021, Hockey Canada's Vice-President of Risk and Risk Management managed the NEF. Since then, however, the responsibility for the management of the fund seems to have been in transition. We were initially told the CFO was involved in NEF management. Next, Hockey Canada informed us that the Director of Sport Safety played an important role in managing the fund. When asked about the subject, the Director of Sport Safety denied having such a role, and clarified that she was only involved in the NEF insofar as insurance had a certain level of interaction with the Safe Sport initiative. However, she was not involved in NEF management from an insurance perspective. After obtaining these responses, certain Hockey Canada executives again informed us that the Director of Sport Safety managed the fund, but with the assistance of legal counsel. Most recently, the CFO provided us with a chart according to which all matters involving insurance reserves, renewals and claims, as well as settlements expenses were handled by legal counsel. The chart also indicated that the Director of Sport Safety only touches on NEF matters insofar as they concern Safe Sport related expenses. It would appear that the Risk Management Committee and the Audit and Finance Committee also play a role. The Audit and Finance Committee consists of the CFO, other Hockey Canada staff and Members. Hockey Canada also has a Risk Management Committee, which includes several staff and Members. The Committees meet to discuss various financial risk management items, including ongoing lawsuits and claims against Hockey Canada, its Members and Participants.<sup>451</sup>

The Board has never formally approved a process for funding under and uninsured claims that exceed the balance available in the NEF, nor has it adopted any written policy to that effect (or regarding any of the NEF, the IRS Fund or the Legacy Trust, for that matter). However, we understand that Hockey Canada would address such claims first by transferring monies from the IRS Fund reserve sub-fund, and if necessary, use the remaining IRS Fund monies designated to buffer against insurance premium rate increases. For claims against Legacy Trust beneficiaries, we understand that Hockey Canada would transfer funds from the Legacy Trust, and if necessary, request further funding from the Members under the Tail Coverage Agreement before resorting to the IRS Fund buffer monies.

At present, the NEF is significantly depleted and projected to be in a deficit by 2023.<sup>452</sup> Going forward, Hockey Canada will need to make important decisions about how it will continue to manage its risks and retain sufficient funding in reserves to meet its potential liabilities.

#### 1. Funds Received and Funds Paid Out of the NEF

Currently, NEF funds accumulate from past surpluses, income on investments, and annual registration fees paid by Members (currently set at **\$23.80** per Participant).<sup>453</sup>

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<sup>450</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022).

<sup>451</sup> Interview of Glen McCurdie, former Vice President of Insurance and Risk at Hockey Canada (31 August 2022).

<sup>452</sup> Hockey Canada, "2022/2023 Budget Review PowerPoint" (April 2022).

<sup>453</sup> It is our understating that some Participants are charged further administration fees from their local association or Member.



The annual registration fee paid to Hockey Canada breaks down as follows:

<b>Fund</b>	<b>Fee description</b>	<b>Amount</b>
Operations fund	Registration/Operations Fee	\$3.00* <sup>454</sup>
NEF	Directors and Officers Insurance	\$2.00
	General Commercial Liability, including sexual misconduct coverage	\$8.90
	Safety and Administration	\$2.75
	<b>Total (NEF)</b>	<b>\$13.65</b>
Health and Benefit Trust Fund	Major Medical and Dental Coverage	\$2.00
	Accidental Death and Dismemberment	\$5.15
	<b>Total (Health and Benefit Trust Fund)</b>	<b>\$7.15</b>
<b>Total Insurance</b>		<b>\$20.80</b>
<b>Total (All Funds)</b>		<b>\$23.80</b>

The Members also charge an additional \$0.50 insurance and risk management fee, which they recover from each Participant.<sup>455</sup> Therefore, the total cost of insurance per Participant is \$21.30. This amount accords with the \$21.30 illustrated in the insurance fee section in Hockey Canada's information guide titled: "Safety Requires Teamwork & Safety for All Management and Insurance Fees."<sup>456</sup> This guide is publicly available on Hockey Canada's website and provided to Members for distribution to their Participants. In fact, we understand that a version of this guide has existed and has been distributed to Participants since 1987.<sup>457</sup>

Notably, deductibles or uninsured claims are not mentioned as a part of the annual registration fee nor are they mentioned in the guide provided to Participants.

The Risk Management Committee is responsible for determining the rate to charge Participants to cover insurance premiums. Hockey Canada wants to avoid increasing the premiums every year.

<sup>454</sup>Note: This fee was reduced to \$1.50 during the 2020/2021 season and \$0 during the 2021/2022 season because of the pandemic; Questions answered by Brian Cairo, Chief Financial Officer of Hockey Canada (26 August 2022).

<sup>455</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (24 August 2022).

<sup>456</sup> "Safety Requires Teamwork & Safety for All" (Revised 2021-2022) at 59, online (pdf): *Hockey Canada* <<https://cdn.hockeycanada.ca/hockey-canada/Hockey-Programs/Safety/Insurance/Downloads/2022/2021-22-safety-requires-teamwork-revised-e.pdf>>.

<sup>457</sup> The Alexander Consulting Group, "Summary of Insurance" (31 May 1989) at s II; Canadian Amateur Hockey Association, "General Liability Fund and Excess Insurance Plus Comprehensive Accident Insurance Brochure" (1986-1987 Season).



Therefore, the Risk Management Committee will charge Participants for the cost of the premiums set by the insurance company and an additional margin which is deposited into the NEF.<sup>458</sup>

The rates of insurance premiums charged to Participants remained the same from 2000 to 2017. In 2017 premiums increased as Hockey Canada decided to charge Participants for Directors and Officers Insurance where previously this expense was borne by Hockey Canada itself.<sup>459</sup>

Hockey Canada recently advised Members that the NEF is used to pay insurance premiums, deductibles, uninsured and underinsured claims, in addition to funding a wide range of safety, wellbeing and wellness initiatives, including player counselling and treatment.<sup>460</sup> Hockey Canada maintains it has a longstanding practice of reviewing the NEF's purposes with Members annually. Hockey Canada advised that it has offered counselling services to players affected by various incidents (including injury, sexual misconduct, and post-traumatic stress disorder) not linked to active claims. Hockey Canada advised that these services could, in some cases, resolve issues before formal claims were made and offer treatment to the affected player. These expenditures were not consistently recorded in the financial statements or general ledger.<sup>461</sup> Indeed, our review of the NEF general ledger from 2014 to present does not clearly indicate that the NEF funded counselling services or treatments for Participants. If such services were indeed provided to potential claimants and funded by the NEF, it is concerning that they were not recorded in a consistent manner. We also have no indication that Members would have been advised when such services were offered.

The following table sets out the proportion of the NEF used to cover various categories of expense from 2014 to 2022.

<b>Category of Expense</b>	<b>Description</b>	<b>Percentage of Total Expenditures paid out of NEF from 2014-2022</b>
1. Settlements for uninsured and underinsured claims	All settlements paid out of the NEF. This amount is inclusive of deductibles paid on insured claims.	<b>2-26%</b>
2. Salaries	Salaries paid to four to five of Hockey Canada employees responsible for the administration of the NEF, including the Senior Manager for Insurance Member Services, and the new Director of Sport Safety.	<b>3-6%</b>

<sup>458</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (13 September 2022).

<sup>459</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (13 September 2022).

<sup>460</sup> Brian Cairo, "Memo to Members: Message from Hockey Canada regarding National Equity Fund" (July 2022).

<sup>461</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (13 September 2022).

3. Insurance Policies	Premiums and brokerage fees paid to maintain Hockey Canada's commercial insurance policies.	<b>67-86%</b>
4. Grants	Donations to various organizations, telephone helplines, support for concussion research, and funding various initiatives	<b>1-8%</b>
5. Professional Services	General professional services, consultant fees, licence/service fees, and all legal fees, including lawyer fees from settlements, investigations, and non-settlement related legal matters (i.e. corporate matters).	<b>3-10%</b>
6. Travel/Accommodations /Meals	Expenses submitted by employees with respect to activities related to the administration of the fund, including the administration of insurance and claims	<b>0-1%</b>
7. Reserve Adjustment	An amount set aside within the NEF for potential liabilities, adjusted for actual settlement payouts.	<b>-14-14%*</b>
8. Investments, Banking, and Accounting	Interest and bank fees, investment management fees, foreign exchange gain/loss.	<b>0-1%</b>

\*Note: negative values represent adjustments to funds set aside within the NEF to pay settlements; where actual settlement payments were smaller than anticipated, the balance of the reserve is released within the NEF, thus showing as a “negative” expenditure.

From 2014 to 2022, the majority of the disbursements from the NEF are for insurance premiums (67% to 86%) so it is clear that the NEF does not operate purely as a reserve fund for uninsured or underinsured claims. Settlements for these uninsured and underinsured claims range from 2% to 26% of the total disbursements from the NEF. The reserve fund also pays the salaries of four to five Hockey Canada employees whose roles relate to or involve administering the NEF. However, these salaries represent a very small percentage (3% to 6%) of the expenses paid from the NEF in a given year.

From 1989 to 2022, the NEF covered 21 settlements for uninsured or underinsured claims.<sup>462</sup> 10 of the 21 settlements related to injuries and accidents in relation to which the claims exceeded

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<sup>462</sup> Documentation provided by Brian Cairo, Chief Financial Officer of Hockey Canada (2 September 2022).

available insurance coverage and included claims related to Ontario Human Rights Tribunal complaints.<sup>463</sup>

The remaining 11 claims relate to sexual misconduct matters. Nine were historic sexual misconduct claims involving three perpetrators: Graham James, Gordon Stuckless and Brian Shaw. As these claims stemmed from historic events that occurred prior to 1998 and involved perpetrators Hockey Canada had identified to its insurer, they were excluded from the sexual misconduct insurance. For some of these matters, no formal civil claim was issued. Instead, the injured parties made a complaint to Hockey Canada, which the latter investigated and ultimately settled before any civil claims were commenced.<sup>464</sup> The tenth claim, involving a historical sexual assault claim against a referee, was denied coverage by Hockey Canada's insurer because the insurer maintained that the perpetrator was known to Hockey Canada and should have been disclosed in the list of named perpetrators.

Hockey Canada settled the eleventh matter in May 2022, which concerned allegations of sexual misconduct made against players on the 2018 World Junior Team. Hockey Canada was a named Defendant in the action, along with the CHL and eight players not specifically named. We understand that Hockey Canada and its insurer continue to discuss the scope of the sexual misconduct insurance policy as it relates to its application for acts committed by players against a non-participant in an off-ice setting. With respect to the May 2022 case, there was concern that a significant amount of the claim would not be covered by insurance. Hockey Canada proceeded to discuss the case with their insurer who advised that Hockey Canada was permitted to settle the matter on its own.<sup>465</sup>

Some of the 21 settlements are subject to non-disclosure agreements. Accordingly, their terms and amounts remain confidential. While controversial more recently, the use of non-disclosure agreements or confidentiality clauses as part of a settlement agreement has been a common practice and can serve the interests of survivors who wish to retain anonymity. Other settlements are either not subject to confidentiality agreements at all, or only partially covered (e.g., not disclosing the amount).<sup>466</sup>

## **B. Key Observations on the NEF and Its Role Within the Risk Management Matrix**

Considering the above, we make the following observations in respect of the NEF and its role within the risk management matrix.

*Was Hockey Canada's use of the National Equity Fund to fund uninsured liabilities which were met by the Fund appropriate?*

Yes. The establishment of reserve funds to address the risk of uninsured and underinsured claims is not only sound, but the failure to do so would be a serious oversight. It is appropriate to use NEF

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<sup>463</sup> Interview of Glen McCurdie, former Vice President of Insurance and Risk of Hockey Canada (12 September 2022).

<sup>464</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (6 September 2022).

<sup>465</sup> AIG, "Email to BFL" (11 May 2022).

<sup>466</sup> Brian Cairo, "Email to Mathieu Dompierre" (14 September 2022, 4:26 PM).

funds to address potential uninsured and underinsured liabilities for Hockey Canada and/or any participant for whose benefit the reserve is maintained. We will not be commenting on particular cases given that this review, under the Terms of Reference, is not an assessment of Hockey Canada's response to any particular incident or issue. However, we note the absence of policies or procedures governing the purposes or functions of the NEF or the process for its use (though we were provided with a signing authority document for the fund). The same applies for the IRS Fund and the Legacy Trust. This is problematic because Members have no written documentation or source informing them how the three funds are managed and how they interrelate. Moreover, the lack of written policies or procedures in this regard signals that Members (and the Board itself) have no point of reference to guide their application in particular cases or against which to assess Board decisions regarding their use and management. In other words, there is no set standard, such as a published policy, and therefore Members have little information available to them to assess the appropriateness of the criteria considered by the Board when addressing claims. Some concern has been expressed that the Board's decisions are not recorded in the minutes of Board meetings. It may be that much of the consideration of claims must be kept confidential but final decisions should be recorded even though the minutes will not disclose the details. We will consider that aspect as we prepare our final report.

Second, there is a certain level of overlap among the three funds (particularly the NEF and the IRS Fund) which is a potential source of confusion. Both the NEF and the IRS Fund are used for purposes that are not fully disclosed in the financial statements. The NEF is not used solely to accumulate funds for uninsured and underinsured claims. Hockey Canada uses the NEF to collect monies for annual insurance premiums from Participants, pay those premiums, and transfer any surplus reserve funds to the IRS Fund from time to time. The latter two uses are not reflected in the description of the purpose of the NEF disclosed in the financial statements (although the inter-fund transfers are disclosed). Presently, the balance of the NEF is significantly depleted whereas the IRS Fund contains a comparatively large balance. For its part, the IRS Fund is described as a fund to ensure future insurance rate increases are buffered whereas in fact, it is also a significant reserve fund for uninsured and underinsured claims. As explained above, this sub-fund is not disclosed on Hockey Canada's financial statements. Hockey Canada advises that Members approved the initial transfer to the sub-fund and approved each subsequent transfer. Hockey Canada also maintains that Members have many opportunities to ask questions regarding the sub-fund (including during annual meetings and special presentations on the financial statements), though we note that the sub-fund balance is not explicitly disclosed unless requested.

We make similar observations concerning the Legacy Trust within the risk management matrix. The Legacy Trust Agreement says that it was established to respond to historic claims against its beneficiaries. The Tail Coverage Agreement (which preceded the IRS Fund) provides that Hockey Canada will use the NEF first for such claims. Now Hockey Canada has adopted an informal approach that would see claims run first through the NEF, then the reserve sub-fund in the IRS Fund, then to the Legacy Trust, and finally to the remaining funds in the IRS Fund. To our knowledge, the Legacy Trust was not designed with the IRS Fund in mind and no formal policy exists to govern how Hockey Canada is to respond to claims.

### C. Transparency of NEF to Membership, Players, and the Public

The second main issue is whether the purpose and use of the NEF has been sufficiently transparent. Hockey Canada has no specific policies prescribing disclosure of these matters.

#### *i. Disclosure Provided to Members*

The Tail Coverage Agreement, which we understand still applies, is the only documentation imposing specific disclosure requirements on Hockey Canada vis-à-vis Members, hockey associations, and leagues regarding the NEF.<sup>467</sup>

The Tail Coverage Agreement has three requirements, which we will consider in turn:

#### 1. Hockey Canada must update Members on the NEF at every Annual Meeting of Hockey Canada

With respect to the first requirement, Hockey Canada provides an update on the NEF at the Annual General Meeting, insofar as Members receive information regarding its financial status. However, this update does not always address ongoing uninsured claims or recent settlements paid out of the NEF.

Hockey Canada clearly marks and segregates the NEF on the annual financial statement. The notes to the financial statements also provide an explanation of the NEF's purposes.

Hockey Canada provides a copy of the annual audited financial statement to Members at least 21 days prior to the Annual Meeting. Hockey Canada also prepares and provides Members with a supplementary document which explains the content of the financial statements in plain language to help Members better understand the financial information contained in the statements. The supplement includes discussion of inter-fund transfers and provides Members with an overview of the balance of Operating Fund, Health Benefit Trust, and NEF from 2012 to present.<sup>468</sup> Members then approve the statements at the Annual Meeting. The audited financial statements provide a clear breakdown of the NEF's annual revenue and expenditures. The expenditures section includes a line item for "insurance claims." Hockey Canada's independent financial auditors advise that this line item accounts for the total funds paid out of the NEF annually to cover insurance deductibles and fund settlements for uninsured or underinsured claims.

The Annual Meeting minutes from 2014 to 2022 do not reveal that any discussions about the NEF took place during the Annual Meetings held during that period. Hockey Canada maintains that Members do in fact discuss the NEF as needed, and that these discussions – specifically in respect of under and uninsured claims – are held *in camera*. However, a number of Members interviewed noted that these topics were rarely discussed at length, and no Members interviewed could recall specifically what was discussed.

The CFO makes a presentation regarding inter-fund transfers from the NEF to other Pillar funds. However, the minutes provide scant information about the substance of such presentations and *in*

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<sup>467</sup> Canadian Hockey Association, "Tail Coverage Agreement" (24 May 1999) at s 2.

<sup>468</sup> Hockey Canada, "Supplement to the 2020-2021 Audited Financial Statements".

*camera* discussions. Further, Hockey Canada noted that its CFO offers Members semi-annual presentations approximately two weeks before to the Spring and Winter Congresses to discuss the budget (spring) and the draft financial statements (winter). Attendance at these presentations includes Member Presidents, Executive Directors and financial officers (where applicable), giving them the chance to ask questions about Hockey Canada's financials. No meeting minutes are taken.

2. Hockey Canada must report when new claims, settlements or judgements, or valuation of existing claims may result in changes to the NEF reserves exceeding \$500,000.00

As for this second requirement of the Tail Coverage Agreement, Hockey Canada has not adopted any disclosure procedure to report to Members when a claim, settlement or judgment exceeds \$500,000. Based on our review of the settlements paid out of the NEF, since 1999 (when the Tail Coverage Agreement was concluded), it appears that at least six matters met the threshold and thus required disclosure. Our review of Members' meeting summaries over that period indicates that Members did not receive formal notice of these matters. However, Hockey Canada has advised that all of these discussions would occur *in camera* and that they did not keep minutes of those *in camera* portions of the meetings.<sup>469</sup>

A review of Board of Director meeting minutes from 2014 onwards reveals that the Board discussed on occasion ongoing civil actions involving Hockey Canada, as well as insurance coverage options and updates, including discussions involving sexual misconduct coverage. The Board appears to have discussed the Legacy Trust; however, the discussions appear limited to conversations about renewing the Trust Agreement and extending the division date. Again, there appear to be discussions about settlements; however, the minutes provide minimal description and some of these conversations take place *in camera*, with no accompanying notes. Still, these discussions would not satisfy the disclosure requirement under the Tail Coverage Agreement, which requires providing formal notice to Agreement signatories, i.e., the Members.

3. Hockey Canada must update each Member immediately if ongoing claims require Members to pay additional amounts to the NEF to ensure adequate funding for claims, as actuarially valued from time to time.<sup>470</sup>

The third requirement imposed by the Tail Coverage Agreement has never been triggered because, as we understand, Hockey Canada has never requested further funds from the Members to respond to any uninsured claims.

## ii. *Member Perception*

Members have different perceptions of the degree of transparency related to the NEF, its function and use. Most concerning is the notion that in the view of some, but by no means all Members to whom we spoke, Hockey Canada may not have provided Members with sufficient details on inter-fund transfers, particularly in relation to the settlement of past and ongoing claims. Several Members interviewed confirmed that they knew the NEF existed, that its funding came from

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<sup>469</sup> Interview of Brian Cairo, Chief Financial Officer of Hockey Canada (13 September 2022).

<sup>470</sup> Canadian Hockey Association, "Tail Coverage Agreement" (24 May 1999) at s 2.

annual registration fees, and that it served to settle uninsured claims. Some explained that if Members ever had questions about the NEF they could always ask the Board of Directors or the Risk Management Committee. Others noted that if a Member did not know about the NEF, their own inattention to the information provided was to blame.

In contrast, some Members noted that Hockey Canada did not readily share information on the intent or the purpose of the NEF and its use, nor on incidents in relation to which the fund was engaged. Some Members noted that they knew the NEF served to respond to historic claims, but believed it would only extend to claims linked to the named perpetrators, as opposed to “protecting” predators going forward, as they put it. Indeed, these two groups of Members cite a lack of transparency on specific cases and payments from the NEF vis-à-vis stakeholders and a lack of oversight. These Members indicate that Hockey Canada could remedy the issue by providing more information on particular claim/settlement amounts and the NEF balance – even if this were done so annually – and if the use of the NEF, particularly in relation to claim settlement, were governed by a publicly available policy.

If little is disclosed about ongoing or potential claims, and how the risk management matrix would handle these claims, Members must then flag issues with the management of the NEF and other funds without being fully aware of the facts. Said differently, Members can only raise issues if they are able to identify them. Still, it is important to be sensitive to the privacy interests of survivors and those affected by sexual misconduct, particularly where non-disclosure agreements have been put in place. We recommend that Hockey Canada take steps to provide timely disclosure of publicly available information to its Members regarding ongoing and potential claims. Once a settlement is reached, we recommend that Hockey Canada disclose all publically available information (i.e., what was provided in the claim) while respecting the restrictions of any non-disclosure agreements in force. For example, where a non-disclosure agreement only precludes the disclosure of a settlement amount, Hockey Canada could inform its members of the nature of the claim, the fact that a settlement was reached and how/when the settlement would be funded.

### *iii. Disclosure Provided to Players and the Public*

Hockey Canada uses a portion of Participants’ annual registration fees (\$13.65 per Participant) to maintain the NEF. When participants register they are provided with a breakdown of the registration fees; however, this breakdown does not reveal the portion of the registration fees that are set aside to fund uninsured and underinsured claims.

Hockey Canada’s website has a section dedicated to Insurance Information and Resources. The website provides that each Participant pays an annual fee into the Hockey Canada Insurance Program, which covers liability insurance, accidental death and dismemberment, major medical and dental insurance, risk management and administration, directors and officer’s liability insurance and sexual misconduct liability insurance.<sup>471</sup> Notably, the website does not provide any information about the use of annual fees to fund uninsured and underinsured claims. Hockey Canada recently advised Members that \$13.65 of a Participant’s annual registration fee is

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<sup>471</sup> “Learn about Hockey Canada’s Insurance Program,” online: *Hockey Canada* <<https://hockeycanada.ca/en-ca/hockey-programs/safety/essentials/insurance>>.



deposited into the NEF to maintain insurance coverage.<sup>472</sup> However, Members were not informed about what proportion of the \$13.65 is used to fund uninsured and underinsured claims. It does not appear that Hockey Canada has directly advised Participants about the \$13.65 deposited into the NEF every year to pay premiums, deductibles, and to cover uninsured losses.

Hockey Canada's communication structure is hierarchical. Hockey Canada provides information to its Members who then disseminate it to associations, teams, and Participants, as the case may be. Because there is no direct communication channel to Participants, Hockey Canada must rely on Members who then rely on associations and teams to share important information with Participants. This increases the possibility of knowledge gaps between individual players across Canada. For example, not all Members include a breakdown of their annual fees on their websites.

#### **D. Best Practices for Risk Management and Reserve Funds**

Risk management includes the application of management policies, procedures and practices to identify, assess, manage, monitor and communicate risk.<sup>473</sup> Hockey Canada's insurance brokers and independent auditors have confirmed that it is in the best interest of the organization to maintain a fund for uninsured liabilities. They explained that the absence of a reserve fund, such as the NEF, would be a poor risk management strategy.<sup>474</sup> This view is not controversial, and is supported by the literature.<sup>475</sup>

Reserve funds allow charities and not-for-profit organizations to fund new strategic directions, plan for capital re-investment, respond to uninsured losses and reduce the impact of market-related and sector-specific risks.<sup>476</sup> Reserve funds can be "unrestricted," meaning that they do not have to be "restricted" for a particular use.<sup>477</sup> The NEF is an unrestricted reserve fund, unlike Hockey

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<sup>472</sup> Brian Cairo, "Memo to Members: Message from Hockey Canada regarding National Equity Fund" (July 2022).

<sup>473</sup> Hugh Lindsay FCA CIP, "20 Questions Directors of Non-Profit Organizations Should Ask About Risk" (2009) Chartered Accountants of Canada at 4.

<sup>474</sup> Interview of Masters Insurance Representative (24 August 2022); Interview of BDO Representative (24 August 2022); Interview of BFL (24 August 2022).

<sup>475</sup> For example, a 2020 article from the Non-profit and Voluntary Sector Quarterly canvassed empirical data from 600 not-for-profit organizations in the United States to demonstrate that organizations with more operating reserves were less likely to reduce operating hours, lose staff, or experience difficulty acquiring supplies or vendor services during the advent of the 2019 Covid-19 Pandemic; see Miare Kim & Dyana P Mason, "Are You Ready: Financial Management, Operating Reserves, and the Immediate Impact of COVID-19 on Nonprofits" (2020) 49:6 Non-profit and Voluntary Sector Quarterly 1191, online: <<https://journals.sagepub.com/doi/10.1177/0899764020964584>>; see also Hugh Lindsay FCA CIP, "20 Questions Directors of Non-Profit Organizations Should Ask About Risk" (2009) Chartered Accountants of Canada at 16: "An organization's capacity to take opportunities, respond to urgent needs and prevent disasters all require it to have the capacity to 'finance' risk. Not-for-profit organizations frequently have limited financial resources for funding new projects and recovering from unexpected setbacks. There are essentially two ways in which they can strengthen their financial position: maintaining financial reserves, and buying insurance."

<sup>476</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017).

<sup>477</sup> "Operating Reserves and Policy Examples," online: *Propel Nonprofits* <<https://www.propelnonprofits.org/resources/nonprofit-operating-reserves-policy-examples/>>.

Canada's Pillar Funds, which are internally restricted for specific uses.<sup>478</sup> However, while the funds in the NEF are not restricted *per se*, there should exist a policy and procedure stating the purpose of the NEF and prescribing its use to ensure it remains a viable reserve.<sup>479</sup>

Merely carving out and labelling a portion of an organization's net asset balance a "reserve" does not constitute a best practice reserve. Instead, an organization's reserve fund should be a distinct pool of net assets that an organization manages to achieve a specified set of objectives.<sup>480</sup>

Hockey Canada discloses the purpose, revenue and expenditures of the NEF in its annual financial statements. However, since Hockey Canada is accountable to multiple constituents, including its Members, Participants, Sport Canada, and the general public, it must ensure the accrual and use of NEF fund is transparent. Best practices include implementing formal, written policies surrounding reserve funds that clearly articulate the purpose of the reserve and its connection to the organization.<sup>481</sup> The reserve policy should clearly describe authorization for the use of the reserve fund and outline requirements for reporting and monitoring. Without a policy or procedure, an organization runs the risk of misusing funds and depleting the reserve gradually to the point that it is no longer available when needed.

A reserve policy can be contained within an organization's other financial policies or may stand alone. Having a written and approved policy can help to ensure that the Board of Directors of Hockey Canada as well as its Members and Participants understand the authority and operational guidelines which apply to the use of the fund.<sup>482</sup>

It is difficult to determine how much money an organization should accrue in a reserve fund. However, the accounting firm, Grant Thornton, recommends the following four steps to quantify the appropriate target for a reserve fund:

1. Build a baseline five-year financial forecast.
  - Whether the reserve is meant to mitigate against future financial consequences or accumulate assets to execute major projects, these goals have a "multi-year time horizon". "By developing a five-year forecast management can see financial trends that are not evident in annual budgets."<sup>483</sup>

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<sup>478</sup> For example the Technology Fund which is to be used to fund future technologies, or the International Event Housing Fund which is to be used to host Hockey Canada's international events (see Hockey Canada, "Audited Financial Statements").

<sup>479</sup> "Operating Reserves and Policy Examples," online: *Propel Nonprofits* <<https://www.propelnonprofits.org/resources/nonprofit-operating-reserves-policy-examples/>>.

<sup>480</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017).

<sup>481</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017); Hugh Lindsay FCA CIP, "20 Questions Directors of Non-Profit Organizations Should Ask About Risk" (2009) Chartered Accountants of Canada.

<sup>482</sup> "Operating Reserves and Policy Examples," online: *Propel Nonprofits* <<https://www.propelnonprofits.org/resources/nonprofit-operating-reserves-policy-examples/>>.

<sup>483</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017).

2. Conduct a detailed analysis of potential risks.
  - Management needs to identify, quantify, and assign likelihoods to potential downside performance within the organization's short-and-long-term financial plan.
3. Quantify the risks.
  - Once the risks are identified, this information can be synthesized, "by applying probability-weighted net present value adjusted averages of risk exposure across critical budget lines."<sup>484</sup>
4. Establish the target reserves and funding approach.
  - Once an organization knows the appropriate amount of funds that should be maintained in a reserve, management is now in a position to recommend the target reserve level to the Board of Directors and determine its approach to accumulate or set aside funds for the approved amount.<sup>485</sup>

While not all organizations have written reserve fund policies, examples abound. The Shooting Federation of Canada's ("SFC") Reserve Fund Policy<sup>486</sup> is an example of an operating reserve fund policy. It establishes that the fund serves "to provide continued funding of operations and to ensure financial stability." Its purpose is to define the reserve fund, the intention of maintaining the fund, and the methods under which the Fund is managed. The Policy quantifies the reserve requirement, falling between six months' (the minimum) and a year's (the maximum) worth of standard operating revenue needed to cover the previous year's expenses plus any contractual obligations. The quantum of the reserve is to be reviewed annually by the Board to ensure it is sufficient, and the funds are to come from unrestricted monies. The Policy further explains that the reserve can only maintain the total of funds that meet its reserve requirements, and that interest is to remain in the fund. Moreover, the Policy mandates that the reserve fund offer a meaningful contribution to strategic initiatives and that the monies should be managed to provide maximum long-term consistency and stability of return. It also requires that the SFC approve and review the parameters for managing the fund, that it provide the necessary oversight of the fund, and that it report annually to its members on the fund status and the value of the reserve requirement. Finally, the Policy states that Board approval is required for any transactions outside of the approved budget or reserve that affect the reserve fund.

Ontario Artistic Swimming ("OAS") includes a short policy on reserve funds within its Finance Policy.<sup>487</sup> It stipulates that the fund is meant to provide an internal source of funds for "situations such as an unanticipated loss in funding, delay in grant payment, or uninsured losses" – but not to replace a permanent loss of funds or to eliminate an ongoing budget gap. Additionally, it provides a minimum quantum of monies required in the fund, and provides that the Finance Committee

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<sup>484</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017).

<sup>485</sup> Grant Thornton, "Planning ahead: Improving financial health with reserves planning" (13 December 2017).

<sup>486</sup> Shooting Federation of Canada, "Policy and Procedures Manual" (11 September 2020) at 155-156.

<sup>487</sup> Ontario Artistic Swimming, "Finance Policy" (November 2021) at 3.

must review any reserve fund on an annual basis to ensure that its funds have been invested securely. Most notably, the Policy states that expenditures from the reserve fund must be approved by a two-thirds majority vote of the Board. The Executive Director must identify the need for access to the fund and confirm that the use of reserve funds is consistent with the purpose of the reserves, as set out in the Policy. The Executive Director must also examine the reason for the shortfall and the availability of other sources of funding. Finally, the Policy states that the annual budget should reflect the proposed contribution to the reserve fund and any anticipated projection of reserve fund use to cover expenses over and above identified revenues.

Another example comes from the Northern Ontario Curling Association (“**NOCA**”). The NOCA Operating Reserve Policy<sup>488</sup> provides that the Operating reserves provide an “internal source of funds for situations such as a sudden increase in expenses, one-time unbudgeted expenses, unanticipated loss in funding, or delay in grant payments or uninsured losses” and for “one-time, nonrecurring expenses that will build long-term capacity.” They are not intended to replace permanent losses of funds nor to replace an ongoing budget gap. Similar to the OAS Policy, the NOCA Policy prescribes the minimum balance of the fund in relation to the amount needed to maintain operations for a set period, and that the quantum is to be reviewed annually and adjusted to reflect current need. However, it also notes that the quantum, sourced from unrestricted monies, must be reported to the Finance Committee and the Board, and included in the regular financial reports. The Policy then lays out a three-step process to use the fund, comprised of 1) identifying the need for funds and assessing the appropriateness of using the reserve consistent with the Policy; 2) obtaining approval from the Board by providing a description of the analysis conducted in the previous step and a plan for replenishing the reserve; and 3) reporting and monitoring on the reserve, with the Finance Chair responsible for maintaining the balance of the fund, ensuring use complies with the Policy and reporting to the Board, and that the Executive Director must maintain records of use of funds and plans for replenishment.

These examples show how a written reserve fund policy – even a short one – can improve oversight of such a fund. Hockey Canada should establish such a policy, with a particular focus on where funds are collected, how they are and can be used, what types of approvals are needed to use the funds, and how Hockey Canada must report to the Board, Members, Participants, and the public when it uses the NEF. These restrictions will ensure that the NEF has a clear purpose, that its balance is representative of the quantum needed to serve that purpose, and that the funds are only used in ways that are consistent with that purpose.

## **E. Conclusion**

Over the course of its existence, the purpose of the NEF has changed. What began as a vehicle to fund the self-insurance Program has evolved to fund a broad range of safety, wellbeing, and wellness initiatives across Hockey Canada and its Members. It also serves as the primary asset to address under or uninsured claims. In recent years, a substantial portion of the NEF was transferred to the IRS Fund, which holds a “sub-fund” set aside for future under or uninsured claims. The NEF has funded 21 settlements linked to under and uninsured claims (11 of which relate to sexual misconduct) which represent between 2% and 26% of its total expenditures over the last eight

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<sup>488</sup> Northern Ontario Curling Association, “Operating Reserve Policy” (4 August 2016) in *Policy Directory* at 32-33.

years. Over that same period, between 67% and 86% of NEF expenditures covered insurance policies.

We turn to the questions posed to us in the Terms of Reference.

*Was Hockey Canada's use of the National Equity Fund to fund uninsured liabilities which were met by the Fund appropriate?*

Yes. The establishment of reserve funds to address the risk of uninsured and underinsured claims is not only sound, but the failure to do so would be a serious oversight. It is appropriate to use NEF funds to address potential uninsured and underinsured liabilities for Hockey Canada and/or any participant for whose benefit the reserve is maintained. We will not be commenting on particular cases given that this review, under the Terms of Reference, is not an assessment of Hockey Canada's response to any particular incident or issue.

*Is there appropriate oversight concerning payments out of the NEF?*

No. Hockey Canada has no written policy governing the NEF; however, its stated purpose is noted in the annual financial statement. Though the fund forms part of the risk management matrix, questions arise regarding what role the fund actually plays within that matrix. Indeed, some Members have criticized Hockey Canada's lack of oversight of the NEF, particularly regarding the absence of a publicly available policy governing the fund. Additionally, Hockey Canada has adopted an informal procedure for dealing with under and uninsured claims, which begins at the NEF. However, the procedure is not widely known by Members, nor has it received formal Board approval.

*Is the use of the National Equity Fund sufficiently transparent within the organization and in reports to stakeholders?*

No. While Hockey Canada discloses the balance of the NEF and inter-fund transfers on its audited financial statements, Members do not receive adequate information regarding these funds and their use. Hockey Canada maintains that Members discuss and have opportunities to ask questions on the NEF and its funding of under and uninsured claims. However, these discussions have occurred *in camera*, and our review of the minutes from Member meetings at which settlements, inter-fund transfers, and financial statements were discussed provide no clarity on the nature, scope and frequency of such discussions. It also appears that Members and Participants may not have been fully aware of the scope of claims the NEF would fund, namely claims linked to sexual misconduct beyond the named perpetrators. Participants, whose registration fees are the primary source of funding for the NEF, have not been adequately informed about what proportions of fees go to fund under and uninsured claims.

Like the NEF, the IRS Fund is not governed by any written policy. Its purpose stated on the annual financial statements no longer reflects its entire purpose. While the total balance of the fund is disclosed on the financial statements, it is unclear what proportion of the fund is reserved in the "sub-fund" for under and uninsured claims, and that balance is not disclosed to Members on the financial statements. In light of the fact that the NEF balance is largely depleted, it will be particularly important for Hockey Canada to codify how the IRS Fund is to interact with the NEF in respect of under and uninsured claims.