

# The Future of Athlete Representation within Governance Structures of National Sport Organizations



**The Association of Canada's  
National Team Athletes**

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© November 20, 2020

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## Acknowledgements

AthletesCAN extends their sincere appreciation to the members of the Leadership Committee for their important contributions and guidance throughout the development of the Athlete Representation Project.

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We would like to sincerely thank those who contributed valuable insight in the development of the Athlete Representation Project at each phase outlined below.

### PHASE I

1. Canadian Athlete Representation Landscape Overview
2. Comprehensive Review of existing NSO bylaws
3. Identification of current models of athlete representation

### PHASE II

1. Athlete Representation Workshop & Panel hosted at the 2017 AthletesCAN Forum.

### PHASE III

1. NSO & Athlete Representative Consultation
2. Resource development
3. Final drafting phases of the position paper, “The Future of Athlete Representation in Canada”, including a comprehensive review of existing NSO bylaws and the identification of current models of athlete representation.

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## Executive Summary

The Athlete Representation Project (the “**Project**”) is the result of a 2017 AthletesCAN evaluation of athlete representation within governance structures of Canadian National Sport Organizations (“**NSOs**”). The purpose of the Project was to ensure and optimize the athlete voice within the NSO decision-making process.

The Project was motivated by the enactment of the *Canada Not-for-Profit Corporation Act*<sup>1</sup> (“**CNCA**”), which aimed to provide the not-for-profit sector with a modernized statutory framework. As a result of the *CNCA*, most NSOs were required to make significant amendments to their governance structures and bylaws. This ultimately changed long-established practices within the sport sector, including the way the athlete voice has been formalized within the NSO decision-making process.

The aim of this paper is to analyze the governance structures of Canadian NSOs and the current utilization of an athlete representation model. In studying current NSO bylaws and the governance structures of international sport organizations, the Project provides guiding principles for NSOs to ensure that the athlete voice is heard.

Section 1 of the paper sets out the landscape of athlete representation through literature on sport governance and an overview of *CNCA* implications on the traditional amateur sport model. In researching multiple international governance models, such as the United States and United Kingdom, comparisons can be drawn to the current sport governance model in Canada to further best practices in the implementation of an athlete representation model.

In Section 2 of this paper, NSO bylaws are examined to determine the extent to which Athlete Directors (“**ADs**”) and Athlete Representatives (“**ARs**”) are utilized in Canadian high-level sport. To further the discussion on the current landscape, this section also analyzes key concepts that were considered at the 2017 AthletesCAN Forum (“**Forum**”). Current ARs and NSO leaders collaborated on building the athlete representation model based on the benefits and potential concerns that arose, resulting in a series of guiding principles to be revisited in Section 3.

Section 3 of this paper looks at extensive interviews with ARs and sport leaders that corroborate the findings in the discussions held at Forum. The benefits of an athlete representation model are extensively examined, as well as the key reasons that NSOs rationalize the underrepresentation of athletes in their governance structures. This section is concluded with a look at examples of model NSO bylaw sections with respect to athlete representation, which differ based on the structure of the particular NSO.

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<sup>1</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23.



## Introduction

AthletesCAN, the association of Canada's National Team athletes, has a proud history of representing the collective voice of Canadian athletes to ensure an athlete-centered sport system. In 2017, AthletesCAN undertook a system wide evaluation of athlete representation within the governance structures of Canadian NSOs. This evaluation ultimately resulted in the Project.

The Project was designed to optimize the voice of Canadian National Team athletes in the NSO decision-making process. The Project was motivated by the enactment of the 2011 *CNCA*. The *CNCA* endeavoured to provide the not-for-profit sector with a modernized statutory framework, and as a result, most NSOs were required to make significant amendments to their governance structures and bylaws. These changes altered long-established practices, including the way the athlete voice has been formalized within NSO decision making.

In Phase I of the Project (2017), AthletesCAN, in collaboration with its Sport Solution Program, explored the implications of the enactment of the *CNCA* on athlete representation. The Sport Solution Program Managers examined 49 sets of then-current NSO bylaws. The findings were presented at the Forum's joint NSO/Athlete inaugural session on September 21, 2017, in Ottawa, Ontario. It was here where more than 100 ARs and sport leaders came together to determine a way forward.

The Forum initiated Phase II of the Project (2017-2018). Throughout this Phase, ongoing deliberations between NSOs and athletes occurred. Areas of concern were raised between the parties, as well as consensus decision making. This ultimately provided the framework and key content for the first draft of this paper.

Phase III, the final phase of the project (2019-2020), was focused on providing tangible tools to assist the sport community in moving forward with effective, inclusive, and broad-based athlete representation. To achieve this goal, structured interviews were performed to verify key issues and areas of learning. The issues and areas of learning identified lead to a collection of various resources intended to be used by both ARs and NSOs, in order to ultimately facilitate and improve athlete representation.

The information in this paper flows from research and system input completed over the course of the Project. The three main sections of the paper correlate directly to the three phases of the Project, namely:

- Phase I – (2017): Research on the Canadian athlete representation landscape with a focus on ADs;
- Phase II – (2017-2018): Findings and outcomes providing content for the draft position paper regarding the future of athlete representation within NSOs; and
- Phase III – (2019-2020): Creation of resources and best practices for use by ARs and NSOs to enable optimal athlete representation.



## Section 1: The State of Athlete Representation

Governance remains an ongoing challenge for most sport organizations. Most significantly, NSOs have sought to find the right balance to ensure that all members, however defined in the NSO's bylaws, have an appropriate opportunity for meaningful input into the decisionmaking processes that direct the organization's efforts and resources.

Athletes hold a unique position within NSOs. In essence, NSOs exist to serve the athletes and facilitate their aspirations; but in reality, athletes are often not considered to be members of an NSO. Although athletes can be charged small membership fees (and are often charged large competition fees), they have historically been excluded from formal governance structures, and in particular from boards of directors ("BODs").

### 1.1 Athlete Representation in Amateur Sport

The discussion of an athlete-centered approach to sport administration spans decades. However, the evolution of the sport landscape – including the modern challenges and understanding around governance, operations, and accountability – has made optimal athlete representation an ongoing challenge. More specifically, inclusion, training, support, and mentorship are often raised as issues on the organizational side, while athletes cite reluctance, lack of time, apathy, or uncertainty as a source of concern.

AthletesCAN has long advocated for maximum inclusion and voting rights of athletes. National Team athletes are direct recipients of the NSO's programs and services, with a vested interest in the efficient and successful operations of the NSO. Therefore, athletes should be involved in organizational decisionmaking.

However, finding the optimal level of athlete representation in NSO governance does not stop with formal democratic powers such as voting privileges. Rather it should be extended to looking for possibilities of robust and deliberate inclusion at the highest level of decisionmaking.

Kihl, Kikulis, and Thibault address how a truly athlete-centered approach to sport is created.<sup>2</sup> This analysis is done through the lens of an administrative and consultative power framework, which was advanced by philosopher and sociologist Jürgen Habermas in 1996. Habermas defines and distinguishes two types of power: "administratively employed power" and "consultative power." Administratively employed power is power which is utilized by those in an official capacity to enforce policy; while consultative generated power arises from public discussion and deliberation.<sup>3</sup> Kihl *et al* apply the relationship between administrative and consultative power as a:

[H]euristic (exploratory) device to assess various athlete-centered initiatives and discuss Canadian high performance sport policy and the aim of achieving an athlete-centered sport system where athletes as citizens are perceived as not only active participants on the playing field but also as co-creators of democratic sport governance and legitimate policy.<sup>4</sup>

The researchers argue that Habermas' power concept demonstrates that it is possible for athletes to effectively participate in both the deliberation and the decision-making processes in forming the policies that will ultimately affect them. While providing athletes with a vote is an aspect of democracy, as is with any democratic process

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<sup>2</sup> Lisa Kihl, Lisa Kikulis & Lucie Thibault, *A Deliberative Democratic Approach to Athlete Centred Sport: The Dynamics of Administrative and Communicative Power* (European Sport Management Quarterly, 2007), online: < <https://doi.org/10.1080/16184740701270287> > at p 2.

<sup>3</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg, Trans.). Cambridge, MA: The MIT Press, 1996.

<sup>4</sup> Lisa Kihl, Lisa Kikulis & Lucie Thibault, *A Deliberative Democratic Approach to Athlete Centred Sport: The Dynamics of Administrative and Communicative Power* (European Sport Management Quarterly, 2007), online: < <https://doi.org/10.1080/16184740701270287> > at p 2.



model, there must be opportunity for athletes to deliberate on policies. As such, the ultimate goal for the future of athlete representation lies in giving athletes the right to vote by having an AR on a BOD, while maintaining a collective group of athletes who participate in a deliberative process and provide an appropriate amount of input.

In their conclusion, Kihl *et al* ask key questions regarding the future of athlete representation:

1. *What is the capacity of athletes or athlete representatives to participate in the policy process?*
2. *What is the will of policy makers to change procedures and structures to reflect a deliberative democratic approach to athlete-centered sport?*<sup>5</sup>

Readers of this paper are encouraged to look at the issue of athlete representation through the lens of these questions.

## 1.2 Implications of the *Canada Not-for-Profit Corporations Act*

The *CNCA* came into force on October 17, 2011, replacing Part II of the *Canada Business Corporations Act*,<sup>6</sup> which had previously served as the governing legislation for federal not-for-profit corporations (“NFPs”). The *CNCA* sought to provide a modern and comprehensive governance regime for NFPs, which included all NSOs in Canada. All existing NFPs were given three (3) years to amend their bylaws to be compliant with the new legislation or risk being dissolved. This sweeping change to the not-for-profit sector had several implications for NSOs, as outlined below.

Historically, many NSOs have used an *ex officio* appointment for an AD position on their boards. The *CNCA* expressly disallowed *ex officio* directors, while limiting the number of directors permitted for appointment by a board to one (1) for every three (3) directors elected in any given year. A result of this limitation has been that NFPs have now largely focused on using their limited appointments for directors with specific skill sets, as opposed to seeking representation from among their constituents and stakeholders.<sup>7</sup>

Further, under the amendments made to the *CNCA*, NSOs have had to reconsider which stakeholders to admit as “members” since the title automatically carries voting rights.<sup>8</sup> Previously, it was common for NSOs to give multiple stakeholder groups, such as those representing special interests, the title of a non-voting member. However, because the *CNCA* now mandates that all members have the right to vote on certain fundamental matters, many NSOs have avoided including non-voting member classes in their new bylaws.

The combination of these requirements has made it difficult to directly involve athletes in NSO governance. Having largely been excluded from both voting and non-voting membership, the question becomes: Where does the athlete voice fit in? Many National Teams, including some NSOs themselves, have created Athletes’ Councils (“ACs”). ACs can serve the same function as a separate member category, but without member rights. In some cases, the Chair or Co-Chairs of these ACs attend board meetings as invited guests, where they can provide non-voting input on decisions that concern athletes. In other cases, some NSO bylaws establish an AD position. To be put in this position, the athlete must be nominated by the AC or athlete body and elected by athletes who are eligible voting members of their special interest group.

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<sup>5</sup> Lisa Kihl, Lisa Kikulis & Lucie Thibault, *A Deliberative Democratic Approach to Athlete Centred Sport: The Dynamics of Administrative and Communicative Power* (European Sport Management Quarterly, 2007), online: < <https://doi.org/10.1080/16184740701270287> > at p 25.

<sup>6</sup> *Canada Business Corporations Act*, RSC 1985, c 44.

<sup>7</sup> Shamiran Asahak *et al*, *Board of Directors: Assessing Their Functioning and Validation of a Multi-Dimensional Measure* (Frontiers of Psychology, 2018), online: < <https://doi.org/10.3389/fpsyg.2018.02425> > at p 2.

<sup>8</sup> *CNCA* at s.154(3).



In some cases, NSOs have found ways to include an unofficial, appointed AD, who either chairs an AC or represents athletes at the board level, but is elected by the general membership. This solution goes against the spirit of the *CNCA*, as the AD has not been elected by athletes to represent their interests. While this arrangement may appear to provide athlete representation, it is superficial in nature, and fails to fully serve and promote the inclusion of the athlete voice.

One way for an NSO to implement and mandate athlete representation on its BOD, while remaining *CNCA* compliant, is to create a separate membership class composed of National Team athletes.<sup>9</sup> This class has the right to elect an athlete to a director position on the organization's board. However, research demonstrates that few NSOs have experimented with this form of athlete membership, and many preclude athletes from forming their own voting-member category. Therefore, NSOs typically lean towards including athletes within their governance structure in other ways.

### 1.3 The International Landscape

In recognizing that debates about the correct model for effective athlete representation extend beyond the borders of Canada, this paper examines international approaches and strategies for the inclusion of the athlete voice within sport organization governance structures. Learning more about the approaches taken by other nations can serve to provide a better understanding for developing a stronger Canadian model.

In general, the international studies reiterate the findings of Phase I of the Project: the number of athletes involved within a sport organization's BOD is dictated by the organization itself. As a result, the level of athlete involvement varies among different sports. The United Kingdom (“**UK**”) however, has moved towards a singular model of sport governance, as demonstrated in the following case study.

#### 1.3.1 United Kingdom

In the UK, the five Sport Councils – Sport England, Sport Scotland, Sport Wales, Sport Northern Ireland, and UK Sport – recognize the status of National Governing Bodies (“**NGBs**”) (akin to NSOs), as private organizations that govern a particular sport through the consent of the sport itself.

##### 1.3.1.1 A Code for Sport Governance

As of April 2017, NGBs that seek funding from Sport England or UK Sport need to demonstrate compliance with *A Code for Sports Governance*<sup>10</sup> (the “**Code**”), which is intended to “stand as the model for balanced and exemplary governance in UK amateur sport.” The *Code* is guided by the five principles: governance structure, board representation, communication, standards and conduct, and policies and processes.<sup>11</sup>

The *Code* does not explicitly state that NGBs must have an AR(s) on their BODs or an AC. However, the *Code* does state that “organizations shall recruit and engage people with appropriate diversity, independence, skills, experience and knowledge to take effective decisions that further the organisation's goals.”<sup>12</sup> It can be inferred that, like the Skills/Competencies-Based model (see Appendix A) in Canada, value is placed on including directors with requisite background and knowledge, including athletic competition in that sport. Additionally, the *Code* provides guidance on how NGBs can engage their athletes and advises on the importance of an AR, union, and/or commission.

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<sup>9</sup> *CNCA* at s.154(4).

<sup>10</sup> UK Sport & Sport England, *A Code for Sport Governance* (April 2017) online: < [https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a\\_code\\_for\\_sports\\_governance.pdf](https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a_code_for_sports_governance.pdf) >.

<sup>11</sup> UK Sport & Sport England, *A Code for Sport Governance* (April 2017) at p 10, online: < [https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a\\_code\\_for\\_sports\\_governance.pdf](https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a_code_for_sports_governance.pdf) >.

<sup>12</sup> UK Sport & Sport England, *A Code for Sport Governance* (April 2017) at p 11, online: < [https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a\\_code\\_for\\_sports\\_governance.pdf](https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/a_code_for_sports_governance.pdf) >.



### 1.3.1.2 The British Athletes Commission

The British Athletes Commission (“**BAC**”) was established in 2004 as an independent membership association to represent the interests of athletes in UK elite performance sports. BAC’s members are comprised of athletes from a wide number of recognized sports, with the majority being part of the Olympic or Paralympic programs.

The BAC works with athletes in recognized NGBs to promote athlete representation in NGB governance, and to ensure the interests of athletes in elite performance sports are properly represented. Part of the BAC’s mandate is to create and manage an active network of ARs, who provide a link between the BAC and its members. In order to build this network, the BAC works with athletes, performance staff, and NGB executives and administrative staff to develop a sport-specific model of athlete representation.

It is important to note that, as ARs, the BAC is ordinarily engaged in an independent capacity from the governing boards of the NGBs. Nevertheless, this role provides athletes with an outlet to have their voices heard in the decisionmaking processes of their NGBs. This also provides NGBs with the opportunity to ensure more equitable representation of key stakeholders.

### 1.3.2 United States

In the United States (“**US**”), the majority of NGBs follow the governance structure of the United States Olympic & Paralympic Committee (the “**USOPC**”). Under this structure, there is a distinct and defined category for athlete members. As directed by the *Ted Stevens Olympic and Amateur Sports Act*<sup>13</sup> (the “**Ted Stevens Act**”), the USOPC bylaws require that ARs must comprise at least 20% of all of the following BODs: NGB boards, executive boards, and other government bodies’ boards.<sup>14</sup>

The USOPC further encourages athlete representation through the Athlete’s Advisory Council (“**AAC**”). The AAC is composed of, and elected by amateur athletes to ensure communication between the USOPC and currently active athletes. It serves as a source of opinion and advice to the USOPC BOD with regard to both current and contemplated policies. The AAC consists of:

- i. One (1) athlete from each of the 39 NGBs, elected by athletes having competed at the appropriate level in the sport governed by that NGB;
- ii. Two (2) athletes elected from among athletes competing in winter Paralympic sports, elected by athletes having competed at the appropriate level in the winter Paralympic sports;
- iii. Six (6) athletes elected from among athletes competing in summer Paralympic sports, elected by athletes having competed at the appropriate level in the summer Paralympic sports, and;
- iv. Six (6) athletes elected by the AAC to serve at-large on the AAC. This is referred to as the AAC Leadership Group.<sup>15</sup>

The *Ted Stevens Act* also dictates that ARs must equal 100% of the AAC and at least 20% of the voting power of the USOPC Board. In addition, ARs must equal at least 20% of the membership and voting power of all NGB committees, task forces, and other such groups operating under the authority of the board or Chief Executive Officer (“**CEO**”).<sup>16</sup>

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<sup>13</sup> *Ted Stevens Olympic and Amateur Sports Act* (1998), 36 USC c 2205.

<sup>14</sup> *Ibid* at s.22(a)(10).

<sup>15</sup> USOPC, *USOPC Bylaws* (January 2020) at Section 14.2, online: <<https://www.teamusa.org/Footer/Legal/Governance-Documents>>.

<sup>16</sup> *Ted Stevens Act* at s.4(b)(2)(B).



Many NGBs in the US have governance guidelines which mirror the USOPC bylaws. In fact, some US NGBs have boards whose members necessarily represent different genders, geographic regions, as well as athletic and non-athletic backgrounds.

### 1.3.3 Australia

In Australia, no singular sport governance model exists. Unlike the US and the UK, research suggests that the Australian Sports Commission does not have a uniform mandate, nor structure as it relates to ARs. Rather, the Australian Olympic Committee (“**AOC**”) governs athlete representation among its National Federations (“**NFs**”) and the AOC Athletes Commission (“**AOCAC**”). The AOCAC is currently comprised of 11 delegated athletes who represent various disciplines of sport, and has equitable gender representation. These delegated athletes then appoint a Chair who represents them on the AOC Executive. The *AOC Constitution* states that the Chair and Deputy Chair have voting rights in AOC matters at member meetings.<sup>17</sup> Although all voting positions have equal voting power, the athlete voice is not adequately represented, as there are far more NF representatives than ARs. Each member of the AOC Executive, the International Olympic Committee (“**IOC**”) representative from Australia, as well as a delegate from each NF have voting power, compared to only two (2) for ARs.<sup>18</sup> There are currently 86 NFs in Australia, but only NFs which represent sports included in the next Olympic program have voting power at any given time. The AOC Executive includes 13 members, one of which is the Chair of the AOCAC.

A study of selected NFs in Australia show that, while there are various desirable skills, individuals with sport-specific knowledge are needed on boards.<sup>19</sup> Although it is not a requirement, through the *National Federation Athletes’ Commission By-Law*, the AOC recommends that each NF has at least one AR on its board.<sup>20</sup> Notwithstanding, some sport organizations such as Ski & Snowboard (Snow Australia) and Taekwondo Australia include a representative from the “athletes commission” on their BOD. Of the sports considered in this analysis – athletics, basketball, ski and snowboard, cycling, rowing, gymnastics, and triathlon – most sport organizations had, at the time they were reviewed, at least one AR on the BOD. Within those organizations, some emphasized having ARs of equal abilities or gender, whereas others emphasized representation from different regions or experiences (e.g. active or retired athletes). It is therefore clear that, similar to NSOs in Canada, there is fluidity among organizations in deciding what athlete representation models work best for their particular sport.

### 1.3.4 Denmark

The Sports Confederation of Denmark (“**DIF**”) is the National Olympic Committee for the country. The DIF works in conjunction with Team Denmark to fund the Danish Athletes Commission (“**DAC**”). The DIF’s BOD has 12 members who are primarily appointed by member athletes, one (1) of which is an AR that is elected by the DAC. The 12 members are composed of:

- i. Five (5) athletes representing Olympic summer sports, at least one (1) of which must have represented Denmark in one (1) of the last three (3) Olympic Games;
- ii. One (1) athlete representing an Olympic winter sport;
- iii. One (1) athlete representing a Paralympic sport;
- iv. Three (3) athletes representing non-Olympic sports;

<sup>17</sup> AOC, *AOC Constitution* (4 May 2019) at clause 13(1), online: < <https://content.olympics.com.au/public/2019-09/AOC%20Constitution%202019.pdf> > .

<sup>18</sup> AOC, *AOC Constitution* (4 May 2019) at clause 7.5(3), online: < <https://content.olympics.com.au/public/2019-09/AOC%20Constitution%202019.pdf> > .

<sup>19</sup> Kat Ingram & Ian Boyle, *Sport Governance in Australia: Questions of Board Structure and Performance* (World Leisure Journal, 2018), online: < <https://doi.org/10.1080/16078055.2017.1340332> > at p 168.

<sup>20</sup> AOC, *National Federation Athletes’ Commission By-Law* (6 August 2015) at By-Law 6.1, online: < <https://content.olympics.com.au/public/2019-07/National%20Federation%20Athletes%27%20Commission%20By-Law.pdf> > .



- v. One (1) appointed member by Team Denmark; and
- vi. The Danish member of the IOC and European Olympic Committee's Athletes Commission (if applicable).

### 1.3.5 Norway

The Norwegian Olympic and Paralympic Committee and Confederation of Sports (“**NIF**”) governs the National Sport Federations (“**NSF**”) in Norway. The General Assembly has supreme authority and decision-making powers under the NIFs governing *Statute*. The General Assembly is a meeting that takes place every four years, where the delegation is represented by approximately 161 people made up of:

- i. The ten (10) members of the Executive Board of the NIF;
- ii. 75 delegates from NSFs;
- iii. 75 delegates from regional sport bodies; and
- iv. One (1) AR. The AR is selected according to the nomination rules of the Executive Board. Furthermore, the Executive Board does not have an AR.<sup>21</sup>

### 1.3.6 Germany

The German Sports Federation and the National Olympic Committee merged in 2006 to create the German Olympic Sports Confederation (“**DOSB**”). The DOSB is comprised of 62 NFs, 16 Regional Sport confederations, and 20 sport associations, all of which are independent governing bodies. The DOSB's Presidential Board consists of ten (10) members, which includes one (1) AR.

Among the 62 NFs, approximately half of their internal statutes currently require an AR on the board. There is incentive for NFs to have a dedicated AR position because the German Government evaluates NFs to decide on the amount of funding they will receive. One criterion evaluated is the integration of an AR position in the governance structure.

Founded in late 2017 by the members of the Athlete Commission of the DOSB, Athleten Deutschland e.V. is the independent representative body of German elite athletes. Its foundation came as a response to the unsatisfactory model of athlete representation permeating in Olympic and Paralympic sport and is characterized by the absence of athlete decisionmaking power. In addition, the Athlete Commission felt frequently overwhelmed by the workload and complexity of the issues it faced. As a result, they created their own organization which could represent them professionally and independently from the NFs. Structurally, Athleten Deutschland retains strong ties to the Athlete Commission. Currently, the elected chair and the deputy chair of the AC fill the positions of President and Vice-President. The other members of the Athlete Commission – except for one (1) person – also sit on the board of Athleten Deutschland. Athleten Deutschland is comprised of:

- i. Six (6) Olympic and non-Olympic athletes, elected by Olympic and non-Olympic athletes from NFs;
- ii. One (1) Paralympic athlete, elected by Paralympic athletes; and
- iii. One (1) international athlete spokesperson, elected by the NFs, and is a non-voting position.

The dual role of the representatives has helped Athleten Deutschland to gain a foothold in the German sporting system and to build ties with the relevant stakeholders.

The organization was built on the back of a strong leadership group, which despite considerable pressures from the DOSB, has persevered. Athleten Deutschland was also aided by a favourable climate in the media which has grown increasingly distrustful of the NFs. Further, athletes benefited from tensions between the

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<sup>21</sup> NIF, *Norwegian Olympic and Paralympic Committee and Confederation of Sports Statute* (2009), at s.3-2.



government (as the most significant funder of German sport) and the DOSB. Parliamentarians and officials within the Ministry of the Interior were sympathetic to the athletes' cause and especially their call for heightened transparency. Consequently, Athleten Deutschland is now financially supported by the Ministry of the Interior through an annual grant of 450,000 EUR.

## **Section 2: Athletes on Boards – Canadian Athlete Directors Landscape**

### **2.1 Model Identification**

In 2017, AthletesCAN undertook a review of all publicly available NSO bylaws in order to identify commonly used athlete representation models.

From the acquired NSO bylaws, pertinent information that included board size, board composition, member classes, ADs, ACs, and committees were extracted and consolidated. In order to build the summary of athlete representation models outlined below, analysis was specifically focused on whether an NSO had an AD position reserved on its BOD. If such a position existed, analysis was then focused on how this AD position operated in practice. From this analysis, six (6) primary models of athlete representation were identified and presented to accurately capture the state of athlete representation as it existed in Canada at the time of the study.

Though advantages and disadvantages for each athlete representation model are presented in this paper, AthletesCAN has refrained from ranking or endorsing a particular model. Rather, it is our position that the “ideal” athlete representation model should only be made with input from ARs and NSO leaders on a sport-specific basis. However, we have consulted with stakeholders across several sports to present a number of best practices to use when creating an athlete representation model for particular NSOs.

#### **2.1.1 NSO Athlete Representation Models Identified**

Of 58 NSOs in total, 49 sets of published bylaws were located online and analyzed.<sup>22</sup>

- 32 of 49 NSOs with published bylaws had an AD position on their board.
  - 5 NSOs had reserved an unspecified number of AD positions on their board;
  - 20 NSOs had reserved one (1) AD position on their board;
  - Six (6) NSOs had reserved two (2) AD positions on their board; and
  - One (1) NSO had reserved three (3) AD positions on their board.
- 17 of 49 NSOs with published bylaws did not have an AD position on their board.

The following six models were named and created to reflect similarities found among the 32 NSOs that had an AD position. To a varying extent, each model is based on shared practices:

1. The “Standard” Model
2. The Skills / Competencies-Based Model
3. Alumni Representation Model
4. Equal Gender Representation Model
5. Equal Sport Representation Model
6. Equal Abilities Representation Model

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<sup>22</sup> Some NSOs have adopted formal athlete representation models that are not enshrined in bylaws but are captured elsewhere, for example, in terms of reference.



See Appendix A for a detailed description of each model; an overview of the related nomination and election processes; the number of NSOs that have adopted each AR model presented; similarities between NSOs; and the advantages and disadvantages of each model.

## 2.2 Towards a Model of Best Practice

In September 2017, as part of Phase I of the Project, approximately 90 ARs and NSO leaders participated in a collaborative Athlete Representation Workshop (the “**Workshop**”) that was held at Forum.—The Workshop participants provided input and feedback based on their own experiences as ARs or NSO leaders overseeing athlete representation. The participants advised on existing challenges with current athlete representation models, and made recommendations to improve best practices towards athlete representation.

The following is a summary of the key considerations and guiding questions which emerged at the Workshop. Through extensive dialogue, four (4) main topics emerged, including: considerations for ADs, prominent concerns, areas of consensus, and ideas to consider when developing a model for best practices.

### 2.2.1 Considerations for Athlete Directors

#### a. Skill Rich vs. Skill Development

*Can the long-term skills which an athlete could develop in the AD position outweigh the importance of possessing such skills at the onset of the athlete’s appointment to the position? If so, what skills should be focused on in the selection and development process of the athlete in the AD position?*

In certain jurisdictions, sport organizations have attempted to adopt a board structure of equal representation, which values certain skills such as financial acumen among individual board members. The purpose of the AD position was to allow athlete stakeholders who had a desire to be involved in organizational governance, but lacked the necessary business skills which are often required to sit on a board. A position on a BOD certainly provides a valuable opportunity for the elected athlete to develop their business and leadership skills. However, concerns were raised as to how important it was to possess these skills at the onset of the athlete’s appointment to the board. In addition, concerns were raised as to which skills were the most important for the athlete to develop within their position as an AD.

#### b. Representative-based vs. Competency-based

*To what extent are ADs able to, or should, separate the opinions of the athlete constituency and make decisions in the best interests of the organization as a whole?*

The shift from a representative-based board to a competency-based board has subsequently altered the accountability of board members. It is no longer the case that an elected director is only accountable to the particular constituency which they were elected to represent. If an NSO has an AD on its BOD, there is an issue of whether the AD should approach the position from the perspective of their athlete constituency, or from the perspective of the NSO. The correct balance needs to be determined.

#### c. Conflict of Interest

*Can active athletes acting as ADs vote on issues that directly impact National Team athletes without a conflict of interest (“**COI**”) arising? If not, should retired athletes serve as ADs instead?*

COI is a legal concept defined in different contexts by statutes and the common law. A COI occurs when an individual acts in a role which is subject to simultaneous interests that are in direct conflict with each other. A COI can also occur when a person with decisionmaking authority could derive personal benefit, either pecuniary (financial) or non-pecuniary (non-financial), from decisions made in their role. A COI typically arises



when a personal interest of an individual affects their ability to make decisions in the best independent interests of the organization that they serve.

NSO's boards regularly vote on issues that directly affect National Team athletes. The question then arises whether having an active athlete on the board presents a COI in these situations. It has been suggested that National Team athletes and their respective NSOs would be better served by mandating that only retired athletes can serve as an AD.

A common concern was raised regarding whether an active athlete could make unbiased decisions as an AD. It was determined that there were three key ways in which an AD who is still competing could present bias:

- (a) Bias for themselves,
- (b) Bias for their own team, or
- (c) Bias for the athlete body as a whole.

These biases raise the question of whether an active athlete in the position of an AD is able to fairly evaluate policies, and determine what is best for the organization as a whole. While COI policies can be put in place to safeguard against such conflicts, further research is needed in order to determine how such policies may specifically impact an AD within a sport organization.

As a general note, there are often limited resources available to provide guidance on managing COI within the sport and not-for-profit sectors. Therefore, an additional goal of this project has been to improve the sector's understanding of COI, as addressed in Section 3.3 and Appendix C of this paper.

#### **d. Athletes' Council as Alternative to Athlete Director**

*Should other mechanisms beyond an AD position be put in place to give active athletes a voice? How can NSO membership structures facilitate these mechanisms? What potential benefits and/or disadvantages are there to these mechanisms?*

As an alternative to an individual AD, the role of an AC was examined. These discussions were aided by results from earlier research conducted by Sport Solution on existing AC terms of reference. It was recognized and affirmed that ACs provide an additional mechanism for athlete representation in sport that is both broad and inclusive. Additionally, it was determined that ACs could be a preferable mode to garner athlete input in the board's decisionmaking process. However, rather than being considered as a substitute for an AD, ACs should instead be considered as a supplementary mechanism to voice athlete concerns in sport organizations that possess the appropriate structures to facilitate them.

### **2.2.2 Prominent Concerns**

#### **a. Accurate and Inclusive Athlete Representation**

Accuracy and inclusivity among athlete representation were a main issue of concern discussed at the Workshop. More specific concerns included:

- Capturing the different issues faced by various sport disciplines within a single NSO;
- Capturing issues faced by multi-discipline athletes within a single NSO;
- The historic issue of boards being "old boys' networks; and
- The ineffective representation of Parasport interests.

#### **b. Lack of Vertical and Horizontal Communication**

There is ongoing concern that there is a lack of communication between athletes and their respective NSOs, as well as between the athletes themselves. For example, one Workshop participant noted that NSOs often



engage athletes on items only after they have been approved by the board, staff, or relevant committee. ARs should therefore work to bring greater transparency in regards to board and committee decisions. ARs can do so through the use of vertical and horizontal communication. Vertically, ARs can more effectively communicate on behalf of athletes to an NSO's board, staff, and/or other relevant committees. Horizontally, ARs can provide greater transparency to fellow athletes regarding NSO items, which must ideally be administratively supported by the NSO in order to be effective.

#### **c. Commitment Required by Athlete Representatives**

Workshop participants raised concerns regarding the commitment requirements of the AD role. More specifically, Workshop participants were concerned that depending on the level of time and focus the AD role required, it would inevitably take away from an active athletes' training. This would particularly be the case when NSOs have not implemented clear role expectations and guidelines, prior to the athlete assuming the AD role.

#### **d. Geographical and Financial Barriers**

When ARs reside in geographic locations which are a far distance from the location of board meetings, this can make attending, and therefore contributing to board meetings difficult. This can be made increasingly difficult when there are multiple ARs from different regions of the country, as well as when ARs are not given financial support from the NSO to perform their roles.

### **2.2.3 Areas of Consensus**

#### **a. Athlete Representatives Should be Elected**

In general, Workshop participants agreed that ARs sitting on a council, committee or NSO board should be elected and not appointed. The consensus was that elected representatives lend legitimacy to the role since they have the support of their peers. In turn, their peers will have greater confidence that their representative will prioritize and represent their interests.

#### **b. Mandatory Training**

Participants of the Workshop agreed that ARs should receive training prior to assuming their position on a board. This would ensure that athletes fully understand the responsibilities of their position, both in their portfolio and as a director at large. Training would also alleviate the concern regarding the experience and skills that the AR may lack.

In order to promote and ensure AR training, an "onboarding" system can be established. This system could also act as a bridging mechanism between incoming and outgoing representatives to pass on knowledge and promote understanding of what being an AR entails.

#### **c. Equal Representation**

The majority of Workshop participants preferred a system that ensures meaningful representation of athletes from each gender, physical ability, and each sport discipline within a given NSO.

#### **d. Effective Vertical and Horizontal Communication**

Effective athlete representation depends on both horizontal and vertical communication. The consensus from Workshop participants was that in order for effective communication to occur, an AR needs to be given the proper time and tools to touch base with all athletes belonging to the NSO. Additionally, where necessary and appropriate, ARs should have communication with NSO board members, staff, and other relevant committees.



#### **e. Voting Power**

In general, Workshop participants agreed that ADs should have voting power on their respective boards.

### **2.2.4 Ideas to Consider when Developing a Model of Best Practice**

Workshop participants agreed on several necessary aspects of a model of athlete representation. A sample of these are listed below in point form:

#### **a. Athletes' Council for Each NSO**

- Mandatory ACs for each NSO with ARs for all disciplines within the NSO;
- An AC comprised of provincial representatives. This AC would meet with the AR who sits on the BOD to ensure regional interests are considered.

#### **b. Horizontal and Vertical Communication**

- Better use of communication programs to allow athletes to connect more effectively. Although platforms such as Facebook could be used to connect with athletes, unless all athletes understand that communication will occur via Facebook and consent to its use, it will be less effective;
- Develop an online "Athlete Portal";
- In-person meetings should be used for large announcements such as team selection.
- ARs should create a regular (e.g. quarterly) newsletter to inform athletes of recent and pertinent information;
- Surveys should be conducted by ARs to gauge athlete opinions, as long as survey data is accurately and properly represented.

#### **c. Athlete Representative Training**

- Some athletes do not know where to start or become discouraged by the lack of engagement/response from others. An AR starter kit and an orientation manual should be created to engage athletes.

#### **d. Athlete Representative Qualifications**

- Retired athletes who wish to become an AR should only be eligible for the position if they have been retired for an established short period of time. This qualification would ensure that they are still in touch with current issues faced by active athletes.
- ARs should be comprised of equal and adequate gender representation, and all athletes should have the opportunity to vote for each AR.
- For ARs who sit on an NSO board, their term should be specified and subject to only one (1) renewal.

#### **e. Election of Athlete Reps**

- It may be advisable to allow more than one (1) AR on the BOD if the election results in a tie. This may be seen as evidence that more than one (1) candidate was a good representative of the athletes' interests.

## **Section 3: The Way Forward**

This section provides verification of Phase II's initial findings and outlines best practices, resources, checklists, and leading governance models for those involved with the implementation and improvement of athlete representation within NSOs.

### **3.1 Corroboration of Phase II Feedback: Athlete and NSO Leadership Interviews**

As previously mentioned, Phase III of the Project involved interviewing several sport leaders, from ARs to senior management to corroborate the findings of Phase II. These 2019 interviews also served to substantiate the recommendations made for best practices in regard to athlete involvement within NSO governance structures.



### **3.1.1 Prominent Concerns** (see section 2.2.2. for the Prominent Concerns from the 2017 AthletesCAN Forum)

Interviewees noted similar concerns to those who attended the 2017 AthletesCAN Forum. Similar concerns included the need for accurate and inclusive athlete representation through an AC, the need to improve vertical and horizontal communication, and the importance of having an AR with a current connection to the athletes within the NSO. Interviewees also raised the same concerns regarding barriers to achieving meaningful athlete representation within NSOs. This included the use of COI to exclude AR positions from NSO boards, issues with recruiting ARs who lack the preferred board member skills and qualifications, as well as geographical barriers which may prevent athletes from attending board meetings and performing their AR role.

Interviewees also raised concerns over the conceptualization of “athlete-centered sport administration” being considered an individual approach. Whether performed explicitly, or implicitly through mission/resource allocation, some interviewees felt this approach could have unintended consequences for athletes, including a sense of entitlement.

### **3.1.2 Areas of Consensus** (see section 2.2.3. for the Areas of Consensus from the 2017 AthletesCAN Forum)

Interviewees agreed with 2017 AthletesCAN Forum attendees on a number of issues. These issues included that ARs should be elected by their peers in order to be credible, ARs should receive training upon assuming their position on the board, and ARs should have voting power within their position. Interviewees also agreed that equal representation in regard to gender, ability, and each sport discipline was an important aspect to athlete representation.

Interviewees provided additional ideas to these areas of consensus. In terms of training for ARs, interviewees noted that a comprehensive resource guide should be provided to ARs in order to set job expectations, and provide them with a greater understanding of their role on the board. Additionally, in order to provide greater credibility to the AR role, NSOs should have a set of documented best governance practices with respect to athlete representation. Interviewees also noted that political will is essential to achieving athlete representation. Political will is defined as the firm intention or commitment on the part of a government to carry out a policy, especially one which is not immediately successful or popular. In the case of NSOs, NSOs should have political will to formalize an AR position in its bylaws and policies, as well as to incorporate the AD into its governance practices. If there is no political will from the NSO to make these changes, then the role of an AD/AR/AC will be reduced to mere “tokenism” and would provide ineffective athlete representation.

### **3.1.3 Ideas to Consider When Developing a Model of Best Practice** (see section 2.2.4. for the Ideas to Consider When Developing a Model of Best Practice from the 2017 AthletesCAN Forum)

Ideas from the 2017 AthletesCAN Forum were largely supported by the interviewees, and were also expanded upon.

In terms of the AC, interviewees stated that NSOs should create a space in their annual budget for an AC/AR, and also provide support to their provincial sport organization counterparts in creating an AR position within their organizations. Interviewees agreed with Forum attendees that athlete representation training was needed, and that there should be a standard BOD training as well as specific AR training in order for ARs to better understand their fiduciary duties.

Additionally, interviewees noted that once an AR begins their position, they should be given the opportunity to learn governance practices by observing other councils within the NSO. In terms of athlete representation qualifications, interviewees stated that bilingualism, as well as any previous governance or administrative experience should be considered an asset.

Interviewees also noted that when electing an AR, that NSOs who have established a nominations committee could oversee this matter. Interviewees also agreed with Forum attendees regarding the importance of vertical



communication. For example, interviewees noted that NSOs should share with the AD what issues they are deliberating at the board level and what options are available, in order for the AD to consult with the AC to gain their perspective on the issue, and garner that perspective into a solution. When the AD is able to guide the AC to be solution oriented, this not only helps the AD to facilitate open conversations, but also to make recommendations to the board that are presented in a way that is likely to be seriously considered.

### 3.2 Elements of Best Practice for Not-for-Profit Governance

Each NSO will have unique needs in their internal governance and decisionmaking processes. As such, any proposed recommendations or general guidelines need to take into consideration various organizational aspects, such as the size of the NSO and its board, the corporate and financial foundations of the organization, and the type and standing of the sport. Therefore, in order to tackle common challenges to athlete representation, customized solutions for each NSO will be needed.

Phase III of the Project involved an interview process to determine the current effectiveness of athlete representation practices. On-going challenges and efficacy gaps were identified, which helped to inform best practices and model bylaws for establishing and maintaining ADs.

General best governance practices are needed in order to ensure a strong foundation for effective athlete representation in any given NSO. In order to maximize transparency, each NFP should have extensive organizational policies, up-to-date bylaws, and a strategic plan that is reflective of the organization's values and mission.<sup>23</sup> Furthermore, boards need to plan ahead to ensure that the organization can facilitate a smooth transition between board members.<sup>24</sup> See Appendix B for further information on best governance practices.

### 3.3 Conflict of Interest

As presented in section 2.2.1(b), COI commonly hinders athlete representation by bringing into question athlete positions on NSO boards. Given the consequences of such exclusion, COI warrants further research and discussion.

A COI typically arises when a personal interest of an individual affects their ability to make decisions to the benefit of the organization that they serve.<sup>25</sup> A COI can also occur when a person with decisionmaking authority derives, or could derive personal benefit, either financially or non-financially, from decisions made in their role. Given that NSOs typically have stakeholders from diverse backgrounds with varying concerns, the potential for COI can occur within any NSO decision-making body or for any individual.

In any organization, a COI policy is an essential element to managing possible issues. These policies should be written, approved and annually reviewed. In addition, several supplemental practices and procedures are needed to ensure that these policies are effectively implemented. These procedures and practices can include mandating that board members sign an annual COI declaration form and declare any current private interests which may improperly influence the performance of their role.

A COI policy is typically written for all "representatives" of an organization. This includes directors, officers, staff, and contract personnel. In terms of NSOs, athletes have a unique relationship and status within these

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<sup>23</sup> Mark H. Moore, *Managing for Value: Organizational Strategy in For-Profit, Nonprofit, and Governmental Organizations* (Nonprofit and Voluntary Sector Quarterly, 2000), online: <<https://doi.org/10.1177/0899764000291S009>> at p 190.

<sup>24</sup> Alison Doherty, Katie Misener & Graham Cuskelly, *Toward a Multidimensional Framework of Capacity in Community Sport Clubs* (Nonprofit and Voluntary Sector Quarterly, 2014), online: <<https://doi.org/10.1177/0899764013509892>> at p 132S.

<sup>25</sup> Emma Sherry & David Shilbury, *Board Directors and Conflict of Interest: A Study of a Sport League* (European Sport Management Quarterly, 2009), online: <<https://doi.org/10.1080/16184740802461710>> at p 47.



organizations, and as such, can also be considered as “representatives”. This can be reasoned by the fact that athletes are required by their NSOs to sign athlete agreements. Since athletes can be considered representatives for their NSOs, COI policies and practices of the organization should therefore apply to them as other representatives but not be used as a reason for exclusion. This allows for the ability to manage conflicts that may exist, and for ADs to act as any other director on the board who place their duty and interest to the NSO first.

The Project involved significant research on COI, which has resulted in a position paper called, “Navigating Conflict of Interest in Canadian Sport.” This paper has been included in its entirety in Appendix C.

### **3.4 Model NSO Bylaws**

Currently, the majority of NSO athlete representation models includes one (1) AD position to their board of directors, held either by an elected member, voting AD, or a non-voting AR. However, this model does not achieve the target for athlete representation set by Sport Canada nearly two (2) decades ago.<sup>26</sup> NSOs often cite their unique organizational traits as reason not to implement a formal AR position into their governance structures. While this Project acknowledges that there is no “one size fits all” athlete representation model, AthletesCAN’s position is that this rationale should not be used to exclude athlete representation in NSOs altogether. As this section demonstrates, there are many forms of athlete representation best practice models which could be adopted to fit most NSOs.

This Project was designed to support AthletesCAN’s long-term goal of ensuring that every NSO has implemented an AR to their BOD by 2022, through use of best practice models. This section examines current leading athlete representation practices and models within high-performance sport organizations. Using evidenced based research, this section summarizes the necessary elements for effective athlete representation and establishes a model for developing athlete engagement and leadership. Each model presents the necessary elements needed for an inclusive and democratic approach to athlete representation. To assist athletes and NSOs with adopting an effective model of athlete representation, see Appendix D for a checklist of best practices created by AthletesCAN..

The intent of this section is not to dictate that NSOs adopt a particular model of athlete representation. Rather, the purpose is to challenge NSOs to consider the current state of athlete representation within their governance structures, and determine whether they can improve on that state by looking at best practices. Just as high-performance athletes strive for excellence, NSOs must aim to create and uphold their own ideal athlete representation model which optimizes the athlete voice in their decisionmaking processes.

#### **3.4.1 Deliberative Democratic Athlete Representation**

There are various mechanisms that can be used to provide athletes with the opportunity to participate in NSO governance. Opportunities can include allowing athletes to have direct access to senior leadership, allowing athletes to serve on committees and/or working groups, encouraging athletes to participate at general meetings, and the ideal form of athlete representation – a voting position on an NSO’s board.

In addition to the above listed forms of athlete representation, there are three (3) main formal athlete representation mechanisms that an NSO should consider, ideally in combination:

- (a) an AR(s);
- (b) an AC; and/or
- (c) an AD(s) with voting privileges.

The ideal athlete representation model would also include equity for gender and physical ability (e.g. one (1) male AR, one (1) female AR, one (1) able-bodied athlete, and (1) para-athlete). It would also take into account other

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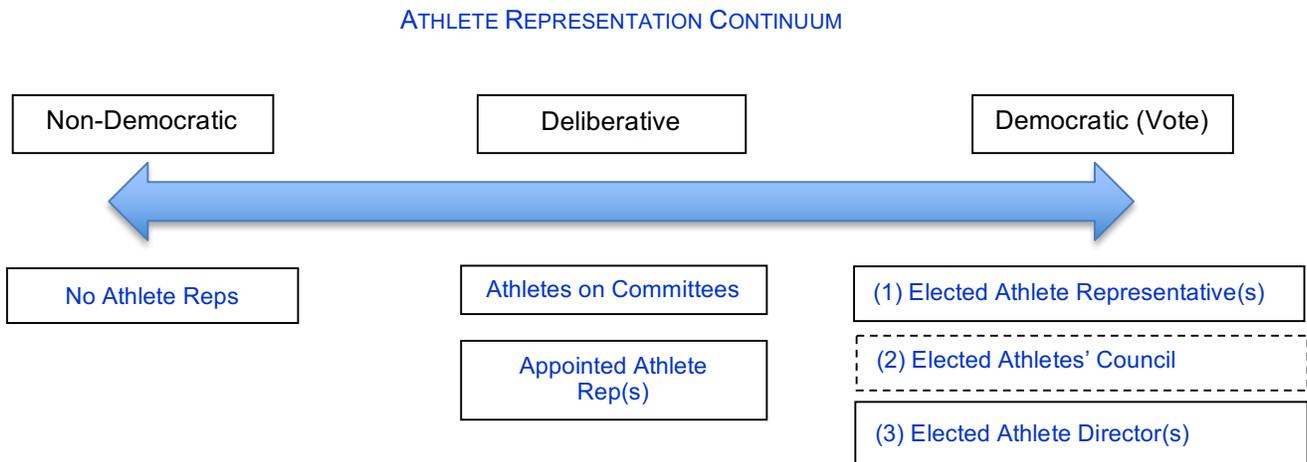
<sup>26</sup> Lucie Thibault & Kathy Babiak, *Organizational Changes in Canada's Sport System: Toward an Athlete-Centred Approach* (European Sport Management Quarterly, 2005), online at: < <https://doi.org/10.1080/1618474050018862> > at p 106.



specific characteristics of the sport, such as having an AR from each discipline for multi-discipline sports, and an AR from each team for multi-team sports.

The below Figure demonstrates how an athlete representation model may appear within an NSO, by using a scale of democracy.

Figure 1



### 3.4.2 CNCA Compliance

The *CNCA* requires that all directors be elected by an ordinary resolution. This requirement can often be satisfied by an NSO implementing a clause in its bylaws which mandates that an AC is responsible for nominating an AD to the board. An example of this kind of mandate is seen in section 5.6 of Canada Snowboard's bylaws which states:

The board of directors must include at least one (1) Athlete Director (National Team representative) nominated by the Athletes' Council as per the Corporation's policies and Athletes' Council terms of reference approved by the Board. The name of the nominated Athlete Director shall be included in the notice of the annual general meeting whenever the Athlete Director position is due for election, and such nominee may be elected by the Members as a director.<sup>27</sup>

### 3.4.3 Leading Examples: Bylaws and Structures

This section primarily focuses on leading NSO bylaws and structures which mandate athlete representation to their BOD. Leading organizations include: Athletics Canada, Canada Snowboard, Rugby Canada, and Wheelchair Basketball Canada.

<sup>27</sup> Canada Snowboard, *By-Law No 2* (March 2019) at by-law 5.6, online: < <https://www.canadasnowboard.ca/files/Bylaws.pdf> >.



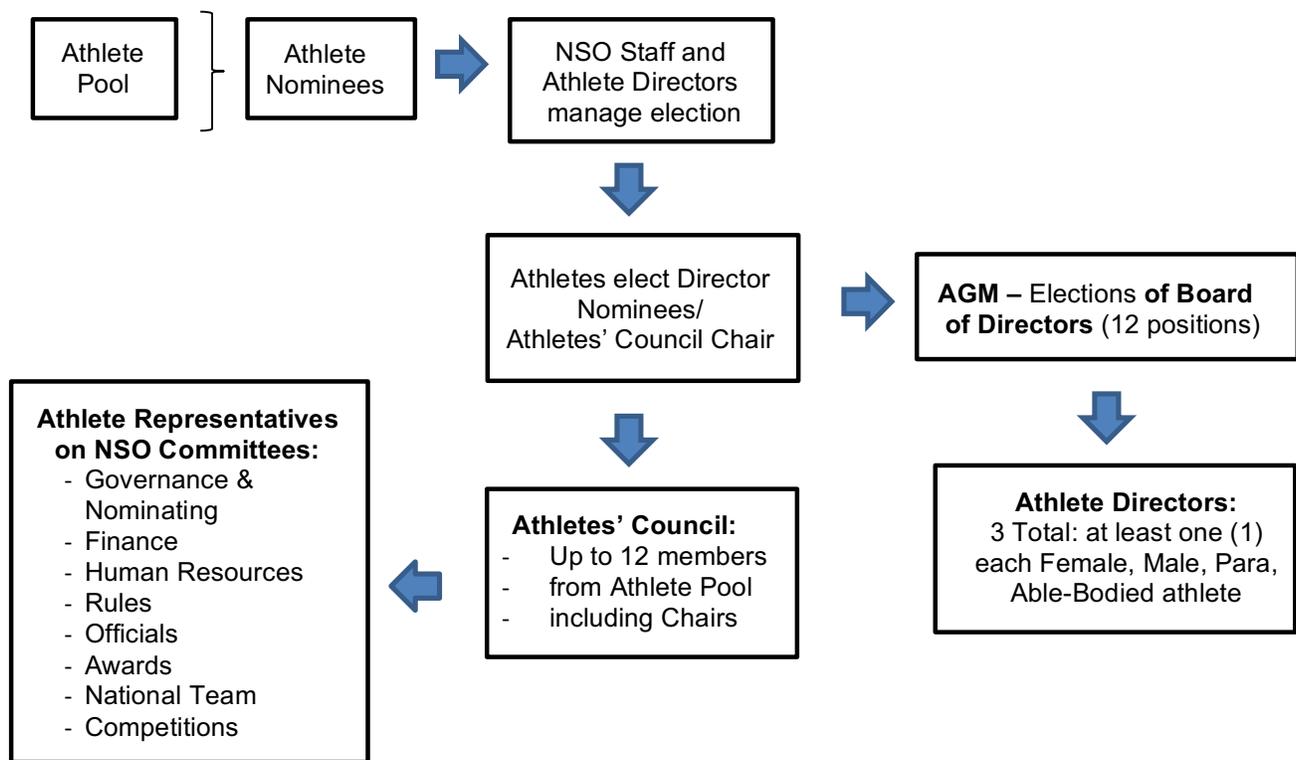
### 3.4.3.1 Athletics Canada (Individual Sport, Summer)

Athletics Canada’s bylaws mandate that three (3) ADs who are elected by their peers are to sit on its BOD. Among the ADs, a minimum of one (1) of each gender, as well as a minimum of one (1) para-athlete, and one (1) able-bodied athlete are to be represented.<sup>28</sup>

As board members, ADs have influence over the vision, mission, values, and strategic direction of the organization, as well as approval of policies and procedures.<sup>29</sup>

Figure 2

#### Simplified Organizational Chart Showing Athlete Directors in Athletics Canada



### 3.4.3.2 Canada Snowboard (Individual Sport, Winter)

Canada Snowboard has an AC which consists of a minimum of five (5) and a maximum of ten (10) athletes. If two (2) athletes are elected from each discipline, one (1) must be a current National Team member. The Chairperson elected to the AC will also occupy a seat on the Canada Snowboard BOD.

<sup>28</sup> Athletics Canada, *Rules and Bylaws* (May 2019), at Bylaw 5.1, online at < [https://athletics.ca/wp-content/uploads/2019/08/Rules-and-Bylaws-May-2019\\_ENG\\_Final.pdf](https://athletics.ca/wp-content/uploads/2019/08/Rules-and-Bylaws-May-2019_ENG_Final.pdf) >.

<sup>29</sup> Athletics Canada, *Rules and Bylaws* (May 2019), at Bylaw 5.14, online at < [https://athletics.ca/wp-content/uploads/2019/08/Rules-and-Bylaws-May-2019\\_ENG\\_Final.pdf](https://athletics.ca/wp-content/uploads/2019/08/Rules-and-Bylaws-May-2019_ENG_Final.pdf) >.

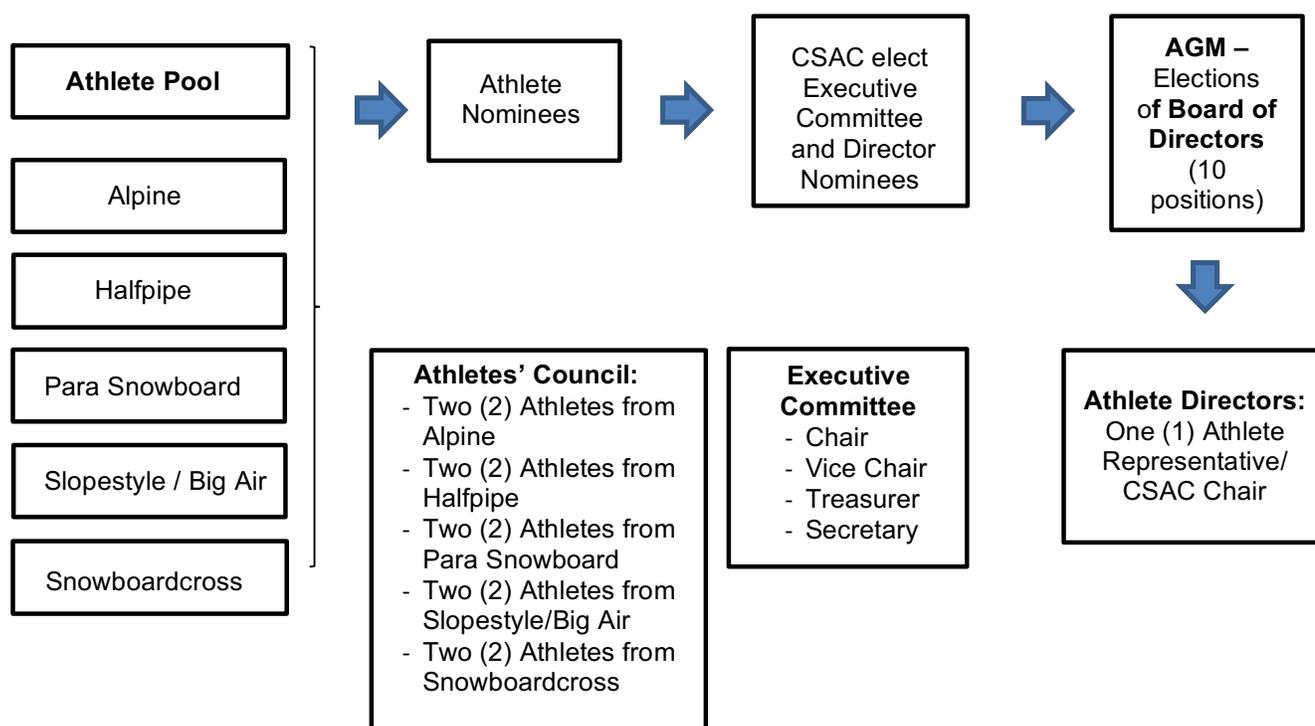


Canada Snowboard's bylaws mandate that at least one (1) AD is to sit on its board. The AD(s) is nominated by the AC in accordance with the AC's terms of reference. The athlete elected to be the AC's Chairperson then serves as the AD to the BOD. Athletes may be selected from the following disciplines: alpine, halfpipe, parasnowboard, slopestyle/big air, and snowboardcross.<sup>30</sup>

As the Chairperson and board member, the AD is responsible for voting on behalf of all athletes, and disseminating pertinent information from the board back to the members of the AC and the athletes.

Figure 3

### Simplified Organizational Chart Showing Athlete Directors in Canada Snowboard



### **3.4.3.3 Rugby Canada (Team Sport, Summer)**

Rugby Canada's BOD is comprised of seven (7) to nine (9) directors, two (2) of which must be "Player Directors" – one (1) male and one (1) female.<sup>31</sup>

Player Directors are elected every two (2) years from a pool of men's candidates and a pool of women's candidates. The men's pool is comprised of the Men's Fifteens and Sevens Teams, and the women's pool is comprised of the Women's Fifteens and Sevens Teams. Eligible athletes for the role of "Player Director"<sup>32</sup> are voted to the position

<sup>30</sup> Canada Snowboard, *By-Law No 2* (March 2019) at by-law 5.1, online at: < <https://www.canadasnowboard.ca/files/Bylaws.pdf> >.

<sup>31</sup> Canadian Rugby Union, *Bylaws* (April 2019) at Bylaw 4.1, online at: < [https://rugby.ca/uploads/Documents/Annual\\_Reports/RUGBY\\_CANADA\\_Amended\\_and\\_Restated\\_Bylaws\\_Apr2019.pdf](https://rugby.ca/uploads/Documents/Annual_Reports/RUGBY_CANADA_Amended_and_Restated_Bylaws_Apr2019.pdf) >.

<sup>32</sup> This refers to the equivalent of an AD.

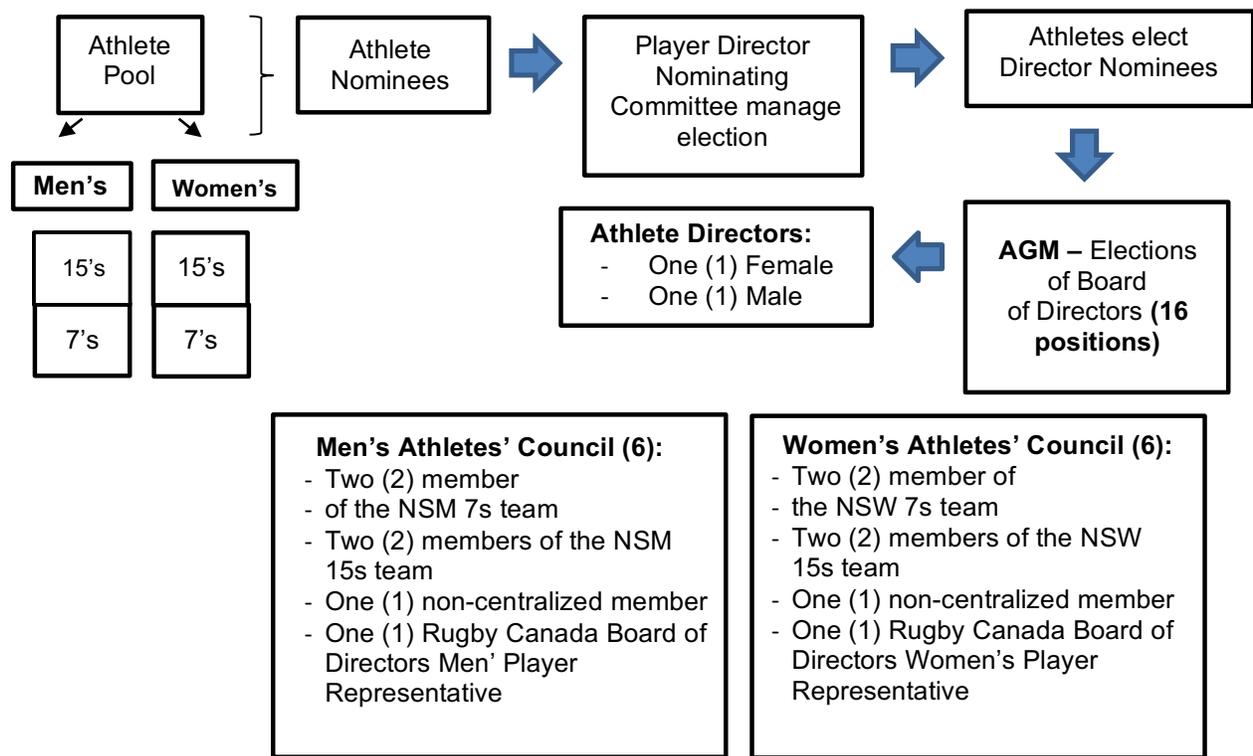


by their peers.<sup>33</sup> For example, a male athlete may vote for the nominee he supports for Male Player Director, and a female athlete may vote for the nominee she supports for Female Player Director. The male and female athletes who receive the most votes are then elected to their designated positions.

By acting as board members, Player Directors have influence over the management of Canadian Rugby Union (“Union”) activities and affairs. This includes decisions over the use of the Union’s name, and contracts which the Union may enter into.

Figure 4

**Simplified Organizational Chart Showing Athlete Directors in Rugby Canada**



**\*Note:** Rugby Canada Player’s Welfare Committee (14 members): One (1) CEO (Chairperson of Rugby Canada BOD; Ex Officio member); Two (2) current member NSW 7s team, as determined by program players; Two (2) current members of the NSW 15s team, as determined by program players; Two (2) current member NSM 7s team, as determined by program players; Two (2) current members of the NSM 15s team, as determined by program players; Two (2) current members of the RC board, specifically the elected Men’s and Women’s player representatives; One (1) member of the Rugby Canada Finance Committee, as determined by the CEO; Two (2) senior staff members, as determined by the CEO.

<sup>33</sup> Canadian Rugby Union, *Bylaws* (April 2019) at Bylaw 4.6, online at : < [https://rugby.ca/uploads/Documents/Annual\\_Reports/RUGBY\\_CANADA\\_Amended\\_and\\_Restated\\_Bylaws\\_Apr2019.pdf](https://rugby.ca/uploads/Documents/Annual_Reports/RUGBY_CANADA_Amended_and_Restated_Bylaws_Apr2019.pdf) >.

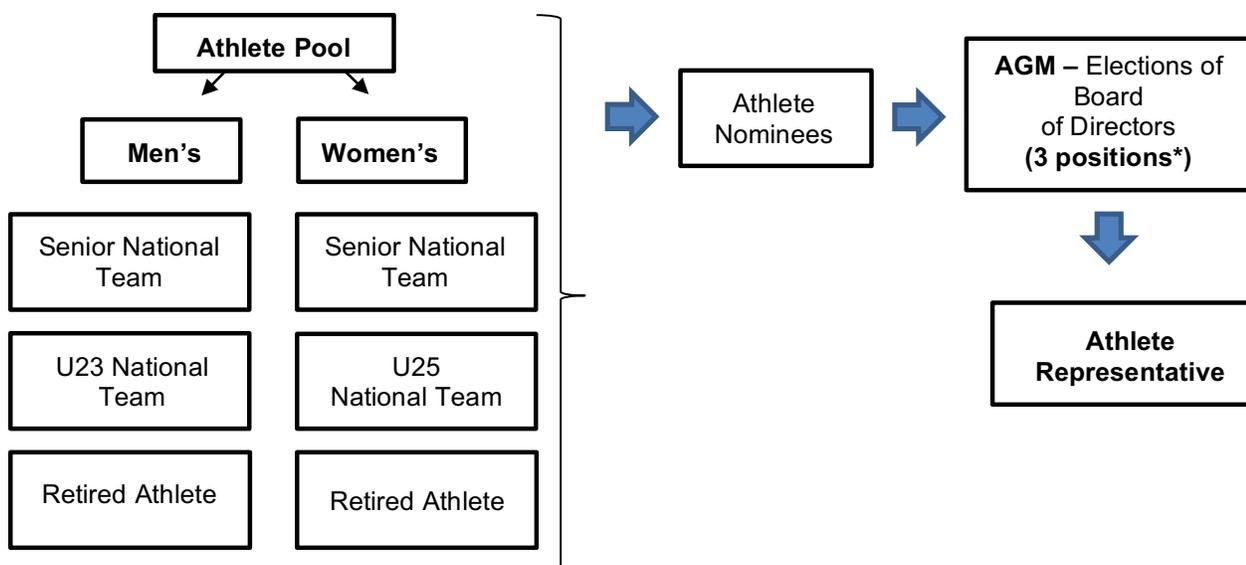


### 3.4.3.4 Wheelchair Basketball Canada (Team Sport, Summer)

Wheelchair Basketball Canada’s bylaws mandate that one (1) AR serve on its BOD. AR’s must be either current or retired national team athletes.<sup>34</sup> Ninety (90) days prior to the AR election at the Annual Meeting, Wheelchair Basketball Canada solicits nominations from current male and female national program athletes. Sixty (60) days prior to the Annual Meeting, the nominations are circulated to all national program athletes. National program athletes then submit their votes to Wheelchair Basketball Canada’s office thirty (30) days prior to the Annual Meeting. The nominee who receives the majority of votes from the national program athletes is elected to the AR position.<sup>35</sup> The elected AR holds their position for a two (2) year term, and until their successor has been selected, unless he or she resigns or is removed.

Figure 5

#### Simplified Organizational Chart Showing Athlete Directors in Wheelchair Basketball



**\*Note:** There are seven (7) directors; six (6) of which are elected positions. Elected directors are elected by staggered terms at each Annual Meeting as follows: a) Two (2) directors and the AR, b) Three (3) directors.

## Conclusion

The Project has sought to establish a framework to optimize the athlete voice within Canadian NSO governance structures. Through research into international examples; consultation with leading athletes and NSO administrators and management; and an accumulation of both industry and sport-governance specific best practices, a path towards equitable and meaningful athlete representation is closer to being identified.

The three (3) phases set out in this paper have aimed to lay the groundwork for promoting and engaging athlete representation within the Canadian sport industry, in a CNCA compliant manner. The conclusions and data drawn from this Project should be viewed as a step towards meaningful dialogue between athletes and NSOs.

<sup>34</sup> Wheelchair Basketball Canada, *Bylaws* (August 2019) at Bylaw 3.1(b), online at : < <https://www.wheelchairbasketball.ca/wp-content/uploads/2019/12/WBC-Bylaws-Final-August-2019.pdf> >.

<sup>35</sup> Wheelchair Basketball Canada, *Bylaws* (August 2019) at Bylaws 3.15-3.17, online at : < <https://www.wheelchairbasketball.ca/wp-content/uploads/2019/12/WBC-Bylaws-Final-August-2019.pdf> >.



Canadian athletes have a proud history of representing this country with honour, class, and overall success. NSOs in Canada work hard to provide the structures which contribute to our athletes' achievements. In order to best utilize these structures, it is paramount for athletes to both literally and figuratively have a seat at the table. In addition, by including the athlete voice in NSO decision making and governance, Canadian sport institutions will increase their level of effectiveness and transparency, while promoting democratic ideals. Acts of good faith, inclusivity, and a will for success are all virtues needed for promoting the voice of athletes within Canadian sport governance.



## APPENDIX A

### 2017 EXISTING NSO ATHLETE REPRESENTATION MODELS

The “Standard” Model	
<b>Description</b>	The Standard Model mandates that one (1) position on the board is to be held by an AR/AD. Some NSOs state that this position is to be held by either an active or retired member of an NSO’s National Team. Retired members may be subject to a specified retirement period to qualify for the position (e.g. retired for five (5) years or less). Other NSOs are not explicit in their bylaws that this position must be held by a current or former National Team athlete.
<b># of NSOs that have adopted model</b>	<b>Total: 18 (most prevalent)</b>  * Please note that one (1) NSO’s bylaws allowed for the possibility of more than one (1) AR/director. The bylaws state: “ <u>at least (1)</u> director shall be a ... athlete.”
<b>Nomination / Election Process</b>	There are three (3) types of nomination/election methods for the Standard Model: <ol style="list-style-type: none"> <li>1. Method #1: The AR/AD is nominated by the National Team/Athlete Section Members, followed by an election involving all active voting members.</li> <li>2. Method #2: The AR/AD is nominated by a nominations committee, followed by an election involving all active voting members.</li> <li>3. Method #3: The AR/AD is nominated and elected by Athlete Section Members.</li> </ol>
<b>Similarities between NSOs</b>	Sixteen (16) of eighteen (18) NSOs using this model were Olympic/Paralympic sports. Additionally, the NSOs using this model had smaller than average sized National Teams. This was most notable among those NSOs that adopted Method #2 of the nomination/election process as outlined above. NSOs using this model also tended to have an average number of members on their respective boards. An overwhelming majority of NSOs using this model tended not to have an AC/Committee.
<b>Pros</b>	The obvious benefit of this model is that, the interests and concerns of athletes are represented on the board of directors.
<b>Cons</b>	A potential drawback of this model is the manner in which the AR/AD is nominated and/or elected. Under this model it is possible that athletes could have a limited or even non-existent role when selecting the AR/AD. Using Method #2 as an example, this would be the case if little to no athletes were on the nominations committee and/or were active voting members.

The “Skills / Competencies-Based” Model	
<b>Description</b>	The Skills/Competencies-Based Model bylaws do not explicitly state that the board must have an AR/AD position. However, the bylaws mandate that directors must possess certain core competencies, one which includes “background & knowledge as an athlete.”
<b>NSOs that have adopted model</b>	<b>Total: 4</b>



<b>Nomination / Election Process</b>	The same nomination/election process is used by all NSOs that have adopted the Skills / Competencies-Based Model. All directors are nominated by a nominations committee, followed by an election involving all active voting members.
<b>Similarities between NSOs</b>	NSOs using this model tended to have larger sized National Teams. The size of these NSO's boards were also larger than average.
<b>Pros</b>	Since a background as an athlete is considered a core competency for any director, it is possible that multiple directors could possess such background. The more directors who have a background as an athlete, the greater appreciation the board as a whole can have for the athletes within the NSO that it serves.
<b>Cons</b>	There is still potential for no director with experience as an athlete to sit on the board, as directors do not need to possess every core competency.

<b>The "Alumni Representation" Model</b>	
<b>Description</b>	The Alumni Representation Model mandates that the AR/AD position can <u>only</u> be held by a <u>retired</u> member of the National Team.
<b>NSOs that have adopted model</b>	<b>Total: 3</b>
<b>Nomination / Election Process</b>	All three NSOs that adopted the Alumni Representation Model used a different nomination/election method: <ol style="list-style-type: none"> <li>1. Method #1: The AR/AD is nominated by the National Team Squad/Athlete Section Members, followed by an election involving all active voting members;</li> <li>2. Method #2: The AR/AD is nominated by a nominations committee, followed by an election involving all active voting members; and</li> <li>3. Method #3: The AR/AD is nominated and elected by Athlete Section Members.</li> </ol>
<b>Similarities between NSOs</b>	NSOs that have adopted this model tended to be situated at the bottom of the government funding lists. The board size of these NSOs were smaller than average. Additionally, NSOs using this model tended to have a National Team whose size was similar to other NSOs that have an AR/AD position on their board; in particular, those using the Standard Model.
<b>Pros</b>	A possible benefit of restricting the AR/AD position to a retired member of the National Team is that such an individual would be able to draw upon their experience as an athlete, while also having the ability to analyze board issues from a more removed position.
<b>Cons</b>	The three (3) NSOs that have adopted this model do not have a limit on how long an individual holding the AR/AD position can be retired from the National Team. Therefore, it is possible that someone who has long been retired from the National Team may not have an intimate knowledge of the issues and concerns facing current National Team athletes.



<b>The “Equal Gender Representation” Model</b>	
<b>Description</b>	NSOs that have adopted the Equal Gender Representation Model will have on their board one (1) AD from the men’s sport program, and one (1) AD from the women’s sport program.
<b>NSOs that have adopted model</b>	<b>Total: 5</b> *Please note that of these five (5) NSOs, one (1) has also adopted the Equal Abilities Representation Model.
<b>Nomination / Election Process</b>	All five (5) NSOs that adopted the Equal Gender Representation Model used a different nomination/election method: <ol style="list-style-type: none"> <li>1. Method #1: The ARs/ADs are nominated by the National Team Squad/Athlete Section Members, followed by an election involving all active voting members;</li> <li>2. Method #2: The ARs/ADs are nominated by a governance committee, followed by an election involving all active voting members;</li> <li>3. Method #3: The ARs/ADs are nominated by a nominations committee, followed by an election involving Athlete Section Members;</li> <li>4. Method #4: The ARs/ADs are nominated and elected by Athlete Section Members; and</li> <li>5. Method #5: The ARs/ADs are appointed by the board.</li> </ol>
<b>Similarities between NSOs</b>	NSOs that adopted this model tended to be situated at the top of the government funding list. Generally, these NSOs had a National Team that was twice the size of the average NSO, while the size of their boards was in general similar to the average NSO. However, these NSOs also tended to have an established AC. Two (2) of the NSOs have a board of directors which has discretion to appoint such councils as it deems appropriate.
<b>Pros</b>	The benefit of this model is that it ensures the interests of athletes from both the men’s and women’s sport programs are represented.
<b>Cons</b>	The nomination/election process may pose as a potential issue to this model. Using Method #5 as an example, ARs/ADs are appointed by the board, which leaves no role for the athletes of the NSO to play in the selection process. This not only limits athlete democracy, but leaves open the possibility that athletes who would otherwise not be interested in the position, be appointed to the role.

<b>The “Equal Sport Representation” Model</b>	
<b>Description</b>	NSOs that use the Equal Sport Representation Model have an AR/AD from each sport discipline sitting on their board. For example, if there are two (2) sport disciplines within the NSO, then there will be two (2) ARs/ADs on the board, representing each discipline.
<b>NSOs that have adopted model</b>	<b>Total: 1</b>
<b>Nomination / Election Process</b>	Under this model ARs/ADs are elected by National and National Development team members within their respective discipline.



<b>Similarities between NSOs</b>	N/A
<b>Pros</b>	By having an AR/AD who represents a specific discipline within a multi-discipline NSO, these ARs/ADs would be best able to speak to their athletes' unique needs and interests.
<b>Cons</b>	This model has limited applicability in that it is a niche model that cannot apply to many NSOs.

<b>The “Equal Abilities Representation” Model</b>	
<b>Description</b>	Under an Equal Representation Model, one (1) AR position is reserved for an athlete from the para-sport program.
<b>NSOs that have adopted model</b>	<b>Total: 1</b> *Please note that this NSO also adopts the Equal Gender Representation Model.
<b>Nomination / Election Process</b>	The para-AR position is appointed by the board.
<b>Similarities between NSOs</b>	N/A
<b>Pros</b>	The benefit of this model is that it ensures that the para-sport program's interests are represented.
<b>Cons</b>	The nomination/election process may pose as a potential issue to this model. Since ARs/ADs are appointed by the board, this leaves no role for the athletes of the NSO to play in the selection process. This not only limits athlete democracy, but leaves open the possibility that athletes who would otherwise not be interested in the position, be appointed to the role.



## APPENDIX B

### GOVERNANCE BEST PRACTICE CHECKLIST

#### 1. Defined Board Authority and Organization Mission

- Up-to-date and *CNCA* compliant bylaws
- Documented strategic plan
- Reminder of fiduciary duties during orientation to the BOD
- Overview of “type of board,” (e.g. operational/hands-on board, policy oversight board)

#### 2. Directors: Roles, Responsibilities, and Liabilities

- Set expectations with formal job descriptions
- Defined responsibilities
- COI management / defined mitigation processes
- Terms of reference for all committees
- Ongoing training
- Comprehension of the board and management’s authority and legitimacy (procedural vs. substantive)
- Basic board administration tools such as agenda templates, minutes format, portal or other platform to access records

#### 3. Board Recruitment

- Create a board / skills competencies matrix. Use this matrix to select candidates based on organizational needs
- Understand what skills are important to the organization
- AD is nominated by athletes, membership is ratified by the General Membership

#### 4. Board Development

- Comprehensive orientation / onboarding program
- Assigned staff liaisons
- Mentorship program
- Robust communication processes
- Annual and ongoing evaluation of board performance
- Basic financial literacy required by all directors
- Basic understanding of NFP governance, board rules and regulations by all directors

#### 5. Succession Planning

- Targeted recruitment and vetting of candidates
- Recruitment and vetting of board members led by a nomination committee
- List of skills competencies for board members utilized for targeted recruitment
- Complementary and comprehensive characteristics (knowledge, skills, and experience)

#### 6. Key Policies

- A comprehensive set of policies which has, at minimum: Code of Conduct (and Ethics) Policy, Discipline and Complaints Policy, Safe Sport (or equivalent such as Workplace Harassment and Violence Policy), Conflict of Interest Policy, and Risk Management Policy



## APPENDIX C

### NAVIGATING CONFLICT OF INTEREST IN CANADIAN SPORT

Josh Vander Vies<sup>36</sup>

The words “conflict of interest” carry great weight among the governing bodies of national and international sport organizations. The goal of this paper is to provide the reader with greater information on conflict of interest in sport organizations, in order to better recognize when it may or may not occur.

While resources tailored for Canadian sport have been crafted by skilled and experienced leaders discussing conflict of interest,<sup>37</sup> such documents are designed to bring attention and contemplation to a very complicated concept. By their nature, resources in this area often raise more questions than they answer. This paper frames the discussion by first engaging the difficult matter of identifying a conflict of interest. Second, it identifies the possible responses to conflict of interest, before concluding with brief recommendations on a path forward for Canadian sport.

#### What is a conflict of interest?

Conflict of interest is a subset of the broader legal concept of fiduciary duty. In summary, a fiduciary duty is formed when an individual or organization gives their trust and confidence in another person to act in their best interests. One way to breach a fiduciary duty is for a conflict of interest to arise. A common example of a conflict of interest of a director occurs when a public foundation is deciding whether to make a grant to a potential recipient organization, and that director also sits on the board of the potential recipient. The director is in a conflict of interest because their fiduciary duty to the potential recipient conflicts with their fiduciary duty to the public foundation. Fiduciary duty and conflict of interest come to Canadian sport by way of three main sources:

1. Directors and officers of corporations incorporated under the *Canada Not-for-profit Corporations Act* (“CNCA”) must act in the best interests of the corporation.<sup>38</sup> These directors and officers must also behave in a prescribed way when they have an interest in a matter being considered by the corporation.<sup>39</sup> Almost all National Sport Organizations (“NSOs”) and Multisport Organizations (“MSOs”) are incorporated under the CNCA as a current condition of receiving funding from Sport Canada.
2. The management or prohibition of conflicts of interest in many non-directors involved in NSOs and MSOs is enacted through conflict of interest policies or bylaws passed by most NSOs and MSOs.<sup>40</sup>

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<sup>36</sup> Thank you to Brittany Bates, Greg Cherniak and Tyler Matthews of the Sport Solution Clinic at Western Law for valuable feedback. Any errors are those of the author.

<sup>37</sup> For a leading resource, see Sport Dispute Resolution Centre of Canada, *Conflicts of Interest in Sports-Related Decision-Making*, online: <<http://www.crdsc-sdrcc.ca/eng/dispute-resource-publications>>.

<sup>38</sup> *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“CNCA”) at s. 148(1).

<sup>39</sup> CNCA at s. 141.

<sup>40</sup> The proliferation of such policies seems to have been caused, or at least reinforced, by a 2011 position paper authored by Sport Canada titled “Pursuing Effective Governance in Canada’s National Sport Community”. Sport Canada, *Advancing the Sport System*, online:<<https://www.canada.ca/en/canadian-heritage/services/role-sport-canada/advancing-sport-system.html>> The paper culminates in the importance of implementing a conflict of interest policy as a matter of good governance. Unfortunately, owing likely to the complex nature of the concept, beyond simply having a policy, the paper’s guidance is limited: “A conflict of interest policy should be in place and declarations of interest updated at least once a year and declared in relation to agenda items at each Board meeting.” Sport Canada, *Pursuing Effective Governance in Canada’s National Sport Community*, 2011, online: <<https://sportlaw.ca/wp-content/uploads/2011/11/SportCanadaGovernancePrinciplesEN.docx>>



3. An individual can owe a common law fiduciary duty to others not specifically set out in any legislation or policy. This could arise if there (1) has been a direct or indirect “undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary... (2) a defined person or class of persons vulnerable to a fiduciary’s control”<sup>41</sup> exists, and (3) the fiduciary has “a discretionary power to affect the [beneficiary’s] legal or practical interests.”<sup>42</sup>

A consensus among scholars is that fiduciary relationships are based on two main rules: the no-profit rule and no-conflict rule. The no-profit rule forbids a fiduciary from retaining any unauthorized benefit acquired by virtue of her fiduciary position. The no-conflict rule states that a fiduciary is not allowed to place herself in a position where her personal interest, or interest in another fiduciary capacity, conflicts or may conflict with her duty.<sup>43</sup>

The prohibition on having a conflict of interest is extremely strict and even applies in the case of having a potential conflict of interest. This is for the logical and compelling reason that “when a decision maker has an actual or potential interest in the outcome of her decision, her ability to evaluate the relevant considerations is impaired in ways that cannot be measured or corrected appropriately.”<sup>44</sup> The goal of fiduciary law is to protect beneficiaries from the decisions of fiduciaries without verifying the actions of the fiduciaries because of the extreme disincentives placed on fiduciaries.<sup>45</sup> For example, a lawyer has a fiduciary duty to their client and the client cannot necessarily scrutinize their lawyers work because it is technical and complex; the lawyer has been hired for this very reason. Shareholders, members or stakeholders cannot scrutinize every action of the directors elected to work on their behalf.

#### **Possible responses to a conflict of interest**

Generally, there are four acceptable reactions when a conflict of interest is determined to exist:

1. the conflict of interest is disclosed;
2. the person in a conflict of interest does not make the decision or vote on it;
3. the person in a conflict of interest refrains from influencing the decision; or
4. the conflict of interest is eliminated.

In theory, any one or combination of the above four reactions could be implemented. Interestingly, the CNCA only applies to directors and officers and only prescribes reactions 1 and 2 above. The provisions are lengthy, contain specific exceptions, and should be read carefully by anyone analyzing a specific CNCA conflict of interest scenario. In summary, a director or officer must immediately disclose to the corporation “the nature and extent of any interest that the director or officer has in a material contract or material transaction”<sup>46</sup> of the corporation and “shall not vote on any resolution to approve the contract or transaction”.<sup>47</sup> Especially important is that there is no mention of leaving the meeting, not participating in the discussion or not influencing the vote.

Conflict of interest can occur within any decision-making body of a sport organization, as these organizations typically have stakeholders from diverse backgrounds with varying concerns. Indeed, the Canadian Sport Policy

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<sup>41</sup> *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36.

<sup>42</sup> *Galambos v Perez*, 2009 SCC 48 at para 83. See also *Callan v Cooke*, 2012 BCSC 1589 at para 103 where the BCSC held that a minor hockey coach of a plaintiff “may have been in a fiduciary relationship with the plaintiff.” Relevant to emerging safe sport matters, the Supreme Court of Canada recognizes that the law aims to protect the vulnerable from many angles, using many doctrines, but “not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not”: *Galambos* at para 74.

<sup>43</sup> Valsan, Remus, “Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment” (2016) 62:1 McGill LJ 9.

<sup>44</sup> *Ibid*, 35.

<sup>45</sup> Rotman, Leonard, “Understanding Fiduciary Duties and Relationship Fiduciarity” (2017) 62:4 McGill LJ, at 1021-1022.

<sup>46</sup> CNCA at s. 141(1).

<sup>47</sup> *Ibid*, at s. 141(5).



recognizes stakeholder access to governance, human and financial resources as a policy objective of the Canadian sport system.<sup>48</sup> Sport organizations should therefore recognize that managing conflict of interest is not only difficult, but unavoidable. Canadian legal scholar Leonard Rotman stated the following when speaking of the difficulties of applying fiduciary law, even by lawyers and judges:

... Fiduciary law is often characterized as one of the least understood legal constructs in the very jurisdictions in which it enjoys widespread use...

... The unsophisticated and often-improper understanding of the fiduciary concept not only results in the misapplication of its principles, but also allows for the purposeful misuse of its principles to generate particular results.<sup>49</sup>

Despite the complexity, policy and bylaws are used in Canadian sport to implement further requirements beyond statutes and the common law. As an example, the Canadian Olympic Committee (“COC”), which is incorporated under the CNCA, has a policy in force that adds to the minimum requirements of the CNCA. The policy impacts not only directors and officers, but COC Participants, a term defined as “all persons engaged in any paid or volunteer capacity with the COC or otherwise under the jurisdiction of the COC”<sup>50</sup>, including an explicit list of positions encompassing virtually all activities of the organization. The policy goes on to discuss reactions to conflict of interest as follows:

A COC Participant is required to disclose to the COC Participant’s immediate supervisor, the CEO or the President any conflict, or potential conflict of interest as soon as the COC Participant becomes aware of it and must recuse him or herself from any related decisions.<sup>51</sup>

The COC is not alone. As non-exhaustive examples, Skate Canada,<sup>52</sup> Hockey Canada,<sup>53</sup> and Swimming Canada<sup>54</sup> have enacted a similar requirement for various combinations of all participants, directors, officers or committee members to carry out all of the first three responses – disclose a conflict of interest, not vote, and not influence the discussion. This can be compared to NSOs which implement the fourth option and flat-out prohibit conflict of interest. As non-exhaustive examples, Diving Canada policy requires all participants to not “knowingly place themselves in a situation that could give rise to a conflict between personal interests and the interests of Diving Canada. Freestyle Canada policy requires all participants to “[a]ct fairly, reasonably, justly, respectfully and without self-interest or conflict of interest”.<sup>56</sup> Some other NSOs and MSOs have no easily discoverable public mention of conflict of interest at all.

Consequently, a range of reactions to conflict of interest exists in Canadian sport. On one end of the spectrum, policy silence enacts the minimum requirements of the CNCA for directors and officers to disclose a conflict of interest and not vote on the matter. On the other end of the spectrum, policy or bylaws purport to prohibit virtually

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<sup>48</sup> *The Canadian Sport Policy 2012* (Inuvik: 27 June 2012) online: <https://sirc.ca/canadian-sport-policies/> at 12 and 13.

<sup>49</sup> Leonard, *supra* note 46 at 981 and 982.

<sup>50</sup> Canadian Olympic Committee, Policy Statement on Conduct, updated 14 October 2017, online: <<https://olympic.ca/canadian-olympic-committee/governance/policies/>> at s. [II].

<sup>51</sup> *Ibid* at s. [III]3(i).

<sup>52</sup> Skate Canada, “Conflict of Interest for Directors, Committee Members & Trustees Policy”, 4 March 2019, online: < <https://info.skatecanada.ca/index.php/en-ca/policies/96-conflict-of-interest-for-directors-committee-members-trustees-policy.html#h5-5-0-disclosure>>.

<sup>53</sup> Hockey Canada, Bylaws, May 2019, online: < <https://www.hockeycanada.ca/en-ca/corporate/about/downloads>> at bylaw 64.

<sup>54</sup> Swimming Canada, General By-laws 2019, 29 July 2019, online: < <https://www.swimming.ca/en/resources/board-governance/bylaws/>> at bylaw 7.1.

<sup>55</sup> Diving Canada, “Policy Relating to Conduct”, 22 January 2019, online: < <https://diving.ca/resources/>> at s. 3(b)(iii).

<sup>56</sup> Freestyle Canada, “Code of Conduct and Ethics”, online: < <https://www.freestylecanada.ski/en/corporate/policies/>> at s. 8(f),



every single individual that encounters an NSO or MSO from being in a conflict of interest at all. Between the two ends, are requirements for a variety of classes of individuals, from directors to officers to all participants, to disclose a conflict of interest, not vote on the matter, and in some cases not influence the discussion of a decision.

The question of conflict of interest within sport organizations can arise when athlete or coach director positions are included on a board of directors. It is often thought that because an athlete or coach is closely involved in the outcome of the board's decisions, this would impair their ability to act as directors. Similar issues exist within the not-for-profit sector, discussed generally as the circumstance of nominee directors, meaning:

... the director who has been elected or appointed to the board to represent the interests of a stakeholder in the corporation. These directors are actually expected to serve as representatives of the stakeholder and to promote its interests. If they are prevented from speaking and voting on the very issues that they are on the board to deal with, the interest of the stakeholder is muzzled. Yet they undoubtedly have a fiduciary duty to act in the best interest of the corporation.

...

Here is the dilemma: in addition to the duty of loyalty, the director has a duty of neutrality, since he or she cannot favour the interests of the corporation over those of the stakeholder, or vice versa. But if it is in the best interests of the corporation to favour its interests over that of the stakeholder, the director is paralyzed and would be in breach of his or her duty to the stakeholder under a separate contract or relationship.<sup>57</sup>

This issue is addressed in the COC policy discussed above as it pertains to COC – NSO/MSO dual loyalty. Analogies can be drawn to stakeholder – NSO/MSO dual loyalties. The COC policy understandably glosses over two additional requirements of a fiduciary duty especially difficult for a nominee director to navigate. Nominee directors must confront their duty to keep information of the corporation confidential from their stakeholders, while being legally compelled to not withhold any confidential information of the stakeholder from the corporation.<sup>58</sup> However, the COC policy sets out a reasonable understanding of high-performance governance in sport that can guide the system as it grapples with conflict of interest in an environment like sport that demands stakeholder governance:

... COC Directors shall not allow their loyalty to the COC to be compromised by their relationship to or involvement in another organization or corporation. It is acknowledged that there is representation of NSF [NSO/MSO] members on the board. The fact that a Director may owe a duty of loyalty to both a recognized NSF on whose board he or she serves, and to the COC, does not by itself create a conflict of interest. A Director may have in mind the interests of an NSF when considering a matter that is before the board, provided always that such Director has disclosed the relationship, keeps an open mind, and is left free to exercise and does exercise his or her own judgment, take a position, or cast a vote, solely with a view to the best interests of the COC. The same considerations apply with respect to IOC members in Canada who are required both by the Olympic Charter and COC General By-Law to be members of the COC Session and board.<sup>59</sup>

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<sup>57</sup> Goldfarb, Clifford “Dual Loyalties on Non-Profit Boards: Serving Two Masters” CBA-OBA National Symposium on Charity Law, 6 May 2011, online:

<[https://www.grllp.com/publications/Goldfarb\\_Dual\\_Loyalties\\_On\\_NonProfit\\_Boards\\_Final.pdf](https://www.grllp.com/publications/Goldfarb_Dual_Loyalties_On_NonProfit_Boards_Final.pdf)> pp 5 and 20.

<sup>58</sup> *Ibid*, p 21 - 22.

<sup>59</sup> COC, *supra* note 51 at [III]3(ii)(a).



### **Conclusion and the path forward**

Concerns about conflict of interest in sport are a part of the important ongoing discussion of good governance in sport organizations. Leading authority on the matter recognizes that good governance in sport flows from good governance in business and corporate governance and that ultimately good sport governance will require “an application of both “not-for-profit” organisations’ and corporate entities’ governance models.”<sup>60</sup> Conflict of interest should seek to benefit from such an application, and take advantage of the robust analysis of the matter by Canadian courts. A cogent snapshot of the approach is in the following portion of a decision by the British Columbia Court of Appeal’s citation with approval of a corporate governance authority:

A conflicted director cannot vote on the board resolution, although the director can participate in discussions concerning the contract and need not recuse himself or herself from such discussions. However it is good practice to allow unconflicted directors the opportunity to discuss the issue in the absence of the conflicted director.<sup>61</sup>

This mirrors the minimum requirements of the CNCA and could serve as an anchor for good governance, high-performance and integrity in Canadian sport. Many NSO and MSO policies go far beyond the minimum required reaction to conflict of interest. This does not maximize stakeholder participation in sport governance, it creates needless uncertainty and potential additional liability for individuals, NSOs and MSOs, but most importantly, it may further cloak a concept with more than enough obscurity already, while giving cover for deliberate and sophisticated conflicts of interest to run wild.

As Canadian sport grapples with adequate responses to conflict of interest and how to identify it, the approach should be incremental and measured. Above all else, sport must come to terms with the fact that, in the words of the Supreme Court of Canada, conflict of interest is an area of the law that does not have unconditional rules or textbook examples; contributing factors “must be addressed carefully in light of the entire context. There are no shortcuts.”<sup>62</sup>

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<sup>60</sup> Association of Summer Olympic International Federations Governance Task Force, *ASOIF Governance Task Force (GTF) Report*, November 2016, at p 2.

<sup>61</sup> *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para 95 citing with authority the Canadian Corporate Counsel Association’s *Ultimate Corporate Counsel Guide*, loose-leaf release 36 (LexisNexis, December 2015).

<sup>62</sup> *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 77.



## APPENDIX D

### CHECKLIST FOR EFFECTIVE ATHLETE REPRESENTATION

The following list represents the criteria needed to provide the optimal environment for effective athlete representation. Both the Athlete Representative (AR) and National Sport Organization (NSO) will benefit from these items being met and therefore should share responsibility in creating this atmosphere. The availability of some of these resources may vary among NSOs. AthletesCAN has a number of resources and templates to provide NSOs and ARs to further explain many of the items in this checklist and to help facilitate the process. These will be referenced at the end of this document.

To enable effective athlete representation:

- The ARs should be elected or selected by the athletes, not appointed by the organization.
- The AR position should be filled by a current active athlete or an athlete recently retired within two (2) to four (4) years.
- The NSO should seek to have athlete representation at all decision-making tables throughout the organization. Where fulfilling these roles would be too much for one (1) AR, the NSO should develop a mechanism to assist the main AR in this respect, such as forming an Athletes' Council or having a specific Athlete Director role to sit on the board and supported by additional ARs who would sit on the various committees and working groups.
- The AR role must be clearly defined by a job description and terms of reference, and communicated to all parties including NSO support staff and coaches.
- The NSO should have an approved staff member or volunteer appointed to educate the ARs and to act as an ongoing resource and liaison. Contact details of this liaison should be provided to the ARs.
- The NSO should provide opportunities for the ARs to be mentored and to further their leadership skills.
- The ARs should develop the support of their peers and the NSO. They should reach out to past ARs to learn about their successes, challenges and future outlooks.
- The NSO should have a thorough orientation program for all ARs which should provide the following:
  - The Athlete Representative Job Description and Terms of Reference.
  - The NSO's bylaws and policies.
  - An organizational chart showing reporting and supervision responsibilities and connections between all staff and volunteer positions within the NSO.
  - An overview of "who is who" and an outline of the responsibilities of various committees, working groups and governance levels within the organization. This should include contact information for current board members and chairs of the relevant committees and working groups.
  - A copy of recent and applicable committee and Board minutes and reports for the past two (2) to three (3) years to put current issues into context.
  - The Athlete Reports from the past two (2) to three (3) years.
  - A copy of the applicable Sport Development Model. This should outline the programs and opportunities that should be in place for athletes at different stages of their technical and competitive development.
  - The NSO's current strategic plan to learn what the strategic priorities, goals and objectives are for the organization.
  - The audited financial statements for the past two (2) to three (3) years, plus current fiscal year financial information including the budget.
  - A list of key dates on the NSO Calendar (ie. events, meetings, major decisions, deadlines, etc.) as well as key dates important to the relevant committees and working groups.
  - AthletesCAN leadership resources suite.
- The ARs are responsible for reviewing and understanding the documents provided to them but their NSO.
- The NSO should provide the opportunity for the ARs to speak to a number of people in the organization and within the board to help develop a historical and current perspective. The ARs should determine how



decisions are made, why particular decisions were made in the past, the current major issues and the plans for the future.

- The NSO should have a Conflict of Interest policy that is applicable to all staff, volunteers, and board and committee members.
- The ARs should create a Communication Plan and Schedule or adapt the previous ARs' Communication Plan to current needs. The communication plan should include ongoing, multi-directional communication between the ARs and athletes and between the ARs and the NSO.
- The NSO should provide a budget to facilitate effective communication and engagement between the ARs and the athletes, through mechanisms such as conference calls and face-to-face meetings, and to allow the ARs to fulfill their roles and responsibilities. This budget should be communicated to the ARs.
- The ARs and the NSO should collaboratively discuss the current issues/concerns and/or solutions effecting both the athletes and the NSO. At a minimum, this should include dialogue on these important topics:
  - Athlete Assistance Program – The ARs should be aware of the number of cards available and the nomination process the NSO uses for eligible athletes.
  - Athlete Agreements – The ARs should ensure they and all current athletes are up to date with and understand the implications of the content of the agreement. The ARs along with the NSO should review the Athlete Agreement annually and come to a consensus on any areas of concern or required change.
  - Team Selection Process and Policies – The ARs should be aware of how these processes and policies change, and who is responsible for setting criteria. In addition, they should determine what their role is in regard to team selection, which key stakeholders are involved in team selection, and how those stakeholders are being informed throughout the process.
  - Dispute Resolution – The NSO should inform the ARs about the channels for dispute resolution, including the appeals process, the key personnel for handling disputes, and other resources past ARs have used to solve disputed issues.
  - Coaching & Support Staff – The ARs should understand the selection process of coaching and supporting staff, as well as how events are assigned.
  - The ARs should also be aware of any other pertinent issues effecting the athletes.
- The NSO should ensure the ARs attend the AGM and all important meetings and cover the costs of attending. The NSO should also ensure the AGM or meeting is scheduled at a time that does not conflict with the ARs' training or competition schedule.
- The ARs are responsible for delivering an annual Athlete Report to the board of directors, staff and membership at the AGM. This report should take into consideration feedback from teammates, outline key opportunities to improve the sport delivery and a review of the prior year's recommendations.
- The ARs and NSO together should create a Succession Plan, or continually update the previous Succession Plan, to target and properly educate and prepare potential future ARs.

AthletesCAN has developed these Leadership Resources and tool for both ARs and NSOs to use for help in creating the optimal environment for effective athlete representation:

#### **Leadership Modules**

- Athlete Representative 101
- Athletes' Councils 101
- Athletes on Boards

#### **Athlete Representative**

- Athlete Representation – Getting Started
- Athlete Representative Job Description Template
- Athlete Representative Terms of Reference Template
- Athlete Representative Introductory Email Template
- Issue Identification Framework
- Athlete Report Information Document



- Athlete Report Template
- Succession Planning

#### **Athletes' Councils**

- Creating an Athletes' Council
- Athletes' Council Terms of Reference Template
- Athletes' Council Orientation Package
- Draft Email for Scheduling an Athletes' Council Meeting
- Meeting Agenda Template
- Robert's Rules 101
- How to Take Minutes at a Meeting

#### **Athlete Directors**

- The Case for Establishing an Athlete Director Position
- Role of the Athlete Director
- Annotated BOD Agenda Template
- Athlete Director Hacks
- Board of Directors 101



AthletesCAN, the association of Canada's National Team athletes, is the only fully independent and most inclusive athlete organization in the country and the first organization of its kind in the world. As the collective voice of Canadian National Team athletes, AthletesCAN ensures an athlete-centered sport system by developing athlete leaders who influence sport policy and, as role models, inspire a strong sport culture. For more information visit [www.athletescan.com](http://www.athletescan.com).



Sport Solution is committed to supporting an athlete-centered sport system and strives to achieve this objective by counselling and advocating on behalf of Canada's high performance athletes so their voices are well represented when resolving sport related issues that affect them.