

Waivers Upheld in the Latest Court Challenge

The Ontario Court of Appeal released its decision on two waiver cases on March 28, 2018. Because the facts and the challenges made by the Plaintiffs were so similar, the Court released a joint decision.

Schnarr v. Blue Mountain

The Plaintiff Schnarr, was injured while skiing at Blue Mountain's facility. Although he had signed a waiver, the Plaintiff attempted to challenge the waiver on the grounds that, pursuant to the *Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A (CPA)*, a waiver of liability signed by a consumer is unenforceable if it restricts consumer rights that are protected by the *CPA*. In particular, the challenge referred to section 9(1) of the *CPA* that deems suppliers to have warranted their services to be of "reasonably acceptable quality". The Plaintiff further argued that this challenge applied to the entire waiver which he hoped would have the effect of voiding the waiver. The Judge felt that this interpretation would have the effect of eliminating the protections given to occupiers under the *Occupiers' Liability Act, R.S.O. 1990, c. O.2 (OLA)* which allows for a waiver of liability with regard to negligence claims.

The Defendant's position was that waivers have been an accepted method for occupiers to avoid liability pursuant to the *OLA* as long as reasonable efforts are made to bring the waiver to the attention of the participant.

Essentially, the Plaintiff wanted the Judge to allow the *CPA* to override the *OLA* and the Defendant wanted the Judge to decide that the *OLA* trumped the *CPA*. The Judge found that the two pieces of legislation treat waivers very differently and the conflict between the two arose when a consumer interacted with a supplier who was also an occupier.

The Superior Court Judge found that the wording of the waiver was so broad that it included breach of contract claims. This would include a breach of the warranty of reasonably acceptable quality of service deemed by the *CPA*. The Judge stated that this was a defect in the Defendant's waiver that required correction.

The decision of the Superior Court Judge was that the parts of the waiver that were defective could be separated out leaving the parts that related to the *OLA* intact. Essentially, it was left open to the Plaintiff to pursue a claim in breach of contract under the *CPA*.

Blue Mountain was not successful in using their waiver to have Schnarr's case dismissed.

Woodhouse v. Snow Valley Resorts

The Plaintiff Woodhouse was injured while using the tow rope at the Defendant's ski hill facility, Snow Valley Resort. The lift ticket included a release of liability. The Plaintiff had also executed a "Rental Agreement & Release of Liability" that contained a "Waiver of Claims".

The Plaintiff's position was that the *CPA* should operate to void the waiver entirely because it pertains to a consumer agreement. As a consumer, she was entitled to a statutory warranty that the services provided by Snow Valley would be of a reasonably acceptable quality.

The Defendant's position was that the *CPA* was not intended to apply to recreational or sporting activities.

The Superior Court Judge did not agree that the *CPA* was not intended to apply to the ski facility, and found that the *CPA*, in fact, did apply to this transaction and that the equipment rental agreement formed part of a consumer agreement. His decision was that the *CPA* did apply and could void the waiver and put the onus on the Defendant to prove that it would be inequitable if the Plaintiff were not bound by the waiver.

Snow Valley Resort's attempt to enforce their waiver and have Woodhouse's case dismissed was also unsuccessful.

Both of the above decisions were appealed.

Court of Appeal

The Court of Appeal reversed both decisions and found that the Plaintiffs were bound by the waivers they had signed.

The Appeal Judge found that when an occupier contracts with members of the public for the use of their premises in return for payment, although a consumer agreement is created, the provisions of the *CPA* do not apply.

He concluded that the *CPA* does not operate to void valid waivers executed under the *OLA* because the *OLA* was intended to be all encompassing legislation, at least in relation to the liability of occupiers to entrants on their premises flowing from the maintenance or care of the premises. Further, the *OLA* was intended to provide protection to occupiers who permit persons to come onto their lands for the purpose of recreational activities.

The final decision of the Appeal Judge was that the more specific provision in the *OLA* that permits waivers prevails over the general provisions in the *CPA* that prohibit waivers. The effect was that the waivers were enforceable and the Plaintiffs were bound by them.

Takeaways

- Where waivers are properly drafted and adequate notice of the waiver is given to the Participant, they will be enforced.
- Waivers that were enforced by the Court included the following:
 - Wording such as: “Please read carefully!”, “Assumption of Risks”, “Waiver of Claims”, “Indemnity Agreement”
 - **Bold** and CAPITALIZED wording of significant sections
 - Statements that made it clear that the Participant was giving up their right to sue
 - A yellow and red box containing: “Release of Liability Agreement”
 - Places for the Participant to initial beside particularly important sections

Waivers are important legal documents that can be used as a tool in Court to have a claim completely dismissed. It is critical that they are worded clearly. This is why we always recommend that waivers should be drafted by lawyers.

Check out the Intact Public Entities Centre of Excellence for Risk Management Considerations, Claim Case Studies and Articles related to waivers.