Waivers in Recreational and Sporting Activities from A to Z*

I. Introduction

Contractual terms limiting a party's liability in a contract is a common feature in today's world. We see limiting conditions in a variety of commercial settings, ranging from the electronic commerce to recreational activities. Waivers have been upheld in a broad range of recreational activities ranging from skiing,[1] heli-skiing,[2] rental of equipment,[3] white water rafting,[4] snowmobiling,[5] ATV riding to scuba diving.[6]

In recreational activities the limiting conditions will often contain a number of different terms, including assumption of risk,[7] waiver, release and indemnity provisions. For the purposes of this paper, I have referred to such limiting conditions under the rubric of waiver. Each of these legal principles is conceptually different and must be considered separately.

The law relating to limiting conditions, imposed by one party on another in a contractual setting, is venerable and well established. In England this aspect of contractual law goes back almost 150 years. As far back as in 1877, Mellish L. J. ruled in *Parker v. The South Eastern Railway Company*,[8] that a party is bound by the terms on ticket if the party knew that there was writing on the ticket and if reasonable notice was given at the time of delivery of the ticket that the writing contained conditions.

Similarly in Canada, this law is also well entrenched since the decisions of the Supreme Court of Canada in *Grand Trunk Pacific Coast Steamship Company v. Simpson*[9] and *Union Steamships*

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[1] see for example *Cejvan v. Blue Mountain 2008* CarswellOnt 9269, (S.C.J.)
[2] Ochoa v. Canadian Mountain Holidays Inc. [1996] B.C.J. No. 2026 (S.C.)
[3] *Knowles v. Whistler Corp.*, [1991] B.C.J. No. 61 (S.C.)
[4] *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24 (C.A.) affirming (1981), 34 B.C.L.R. 62 (S.C.)
[5] *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589
[6] *Isildar v. Kanata Diving Supply* [2008] O.J. No.2406, 168 A.C.W.S. (3d) 44, 2008 CanLII 29598 (Sup.Ct.)
[7] the scope of the *volenti* defence is now tightly conscribed in its scope, for a discussion of this development see the remarks of Court in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 1988 CanLII 45 (SCC) at para.32
[8] (1877), 2.C.P.D. 416 at 423; see as well *Hood v. Anchor Line*, [1918] A.C. 837 (a steamship passage ticket case) and *Fosbroke-Hobbes v. Airwork Ltd. and British-American Air Services, Ltd.*, [1937] 1 All E.R. 108 (an airplane charter case)
[9] (1922) 63 S.C.R. 361

Limited v. Barnes.[10] The issue in the *Union Steamships* case was simply whether the terms on the ticket had been reasonably brought to the attention of the plaintiff.[11]

Recently, in *Loychuk v. Cougar Mountain Adventures Ltd.* the British Columbia Court of Appeal affirmed that such limiting terms are not unconscionable and not contrary to public policy.[12] I will be discussing this issue in more detail below.

II. Written Waivers

The law on written waivers in Canada had its genesis in the Supreme Court of Canada's decision in *Dyck v. Manitoba Snowmobile Association*.[13] In the *Dyck* case the plaintiff sued to recover damages that arose out of an accident during a snowmobile race sanctioned by the respondent Association. The appellant collided with the respondent Wood, who signalled the end of the race by moving into the middle of the track and was seriously injured. Mr. Dyck, a member of the Association, whose rules he had read and which purported to release the Association from all liability for injuries suffered by entrants in races sanctioned by the Association. As well, the competition membership signed by Mr. Dyck also purported to release the Association and its employees. Finally, the entry form for the race that Mr. Dyck also signed set out an agreement to save harmless and indemnify the Association and its organizers, agents, officials and employees from all liability howsoever caused in connection with taking part in the race notwithstanding the Association's negligence.

The Supreme Court of Canada agreed with the reasons of the Manitoba Court of Appeal that the waiver clause in the entry form exonerated the Association from liability for the accident and that Wood was also absolved from any liability as the Association was acting as his agent when it obtained the waiver.[14] Just as important, the Court held that in the context of the case the waiver clause did "not appear unreasonable". The appellant knew or ought to have known that snowmobile racing is a dangerous sport and he voluntarily participated in it.[15]

[10] [1956] SCR 842
[11] ibid. at p.845
[12] 2012 BCCA 122 (CanLII) at para. 40 and 44-46
[13] [1985] 1 SCR 589
[14] ibid. at para.6
[15] ibid. at para.9.

Another important decision is that of Chief Justice McLachlin in *Karroll v. Silver Star Mountain Resorts Ltd.*[16] As we will see below her reasoning has been followed in Ontario.

In *Karroll*, the plaintiff sustained serious injuries after colliding with another skier in a recreational ski race. The snow resort relied on the release that the plaintiff had signed prior to the race. Justice McLachlin (as she then was) held that the release provided a complete bar to the plaintiff's claim. In upholding the release, Justice McLachlin considered whether the circumstances of its signing were such that a reasonable person would not intend to agree with what he signed. Justice McLachlin held that the plaintiff was bound by the release due to the following factors:

(i) the Release was consistent with the purpose of the contract;

(ii) the Release was short and simple to read; and the signing of such a Release was a common feature of ski races.

Karroll was followed in a number of other cases namely, *Ochoa v. Canadian Mountain Holidays Inc.*,[17] *McNee v. North Island College Foundation*,[18] and *Mayer v. Big White Ski Resort Ltd.*[19] In *Mayer* the Court noted:

> I find as a fact that the corporate defendant did take reasonable steps to bring the Release to the attention of the plaintiff. The application form for the season pass expressly refers to the need to execute a Release before one may obtain his or her pass. The Season Pass Distribution Centre was set up to ensure, as happened in the case at bar, that applicants complete and sign the Release before they received their passes. Finally, the Release itself is designed to bring home to applicants that it is an important legal document; that it is a "Release of Liability and Waiver of Claims"; that by signing it a party waives "certain legal rights, including the right to sue".

The decision in *Karroll* was followed in *Goodspeed v. Tyax Mountain Lake Resorts Ltd.*[20] In *Goodspeed*, the plaintiff claimed damages for personal injuries sustained in an ATV accident. The plaintiff had signed a waiver agreement prior to the ATV tour, but he did not read the Agreement, and the terms of the Agreement were never explained to him. The court concluded

[16] [1993] B.C.J. No. 2266 (B.C.S.C.)
[17] [1996] B.C.J. No. 2026 (B.C.S.C.)
[18] [1998] B.C.J. No. 2452 (B.C.C.A.)
[19] [1998] B.C.J. No. 2155 (B.C.C.A.)
[20] [2005] B.C.J. No. 2515

that the waiver provided a complete defence to the plaintiff's claims, despite the fact that it had not been read, and the Court summarized the law as follows:

> Where a party has signed a waiver form, it is immaterial that he or she did not read it, except in three situations:
>
> 1. Where there has been *non est factum*.
> 2. Where there has been misrepresentation.
> 3. Where the defendant knows that the Plaintiff does not intend to be bound by the form, and therefore there is a duty to bring its terms to the plaintiff's attention.

The Court found that although the plaintiff did not read the waiver agreement, he knew what the document was and what the agreement was intended to accomplish. The plaintiff was aware of the nature of the waiver agreement, because:

> a) He skimmed the top line.
> b) The form was simple to read and easy to understand.
> c) He had signed waiver forms in the past.
> d) He knew that it was at least meant to discourage him from suing if something happened.

In *Blomberg v. Blackcomb*[21] the Court again rejected the argument that the plaintiff had not read the release for that reason he should be exempted from its operation:

> In my opinion the defendant took reasonable steps in the circumstances to bring notice of the waiver and its contents to the attention of the plaintiff. I think that this plaintiff was well aware that the document he was [sic] signed was a waiver of his legal rights to sue which he knew whether or not he actually read the document. With respect his stand that he did not read it because he had no eyeglasses or that he did not want to hold up others in line or did not understand the waiver is purely self-serving in my view. According to the witnesses above who assisted him in the applications for passes he made no mention of being unable to see the print or that he did not understand the document and both witnesses said that others took time to read it so there would be no problem in my view of holding people up if he took time to carefully read the document**.** In my view the plaintiff was well aware what the waiver was and chose not to examine it or was careless or unconcerned about the nature of the document.

[21] CanLII 191 (BC SC)

The British Columbia cases as to written waivers have been followed in several Ontario cases, most recently in *Isildar v. Kanata Diving Supply*,[22] which involved a fatality as a result of a diving incident. *Isildar* set out a three part test to determine the validity of a signed release of liability. At paragraph 634, Justice Roccamo held:

> 634 Based on case law as it has developed, a three staged analysis is required to determine whether a signed release of liability is valid. The analysis requires a consideration of the following:
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> 1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signatory?
>
> 2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
>
> 3. Whether the waiver should not be enforced because it is unconscionable?[23]

Using the analytical framework in *Karroll*, the Court upheld the waiver in *Isildar* and constituted a complete bar to the plaintiffs' claims. The Court was of the view that the waiver and release was not unfair or unreasonable to give effect to the contract and its provisions were not sufficiently divergent from community standards of commercial morality to render it unconscionable. Justice Roccamo also concluded that the *Family Law Act* claim fell with the main claim that was framed in contract and in tort. A similar result was reached in *Trimmeliti v. Blue Mountain Resorts Ltd.*[24] where the plaintiff's claim was dismissed on a summary judgment motion on the basis of the written waiver and release that he had signed.

On the other hand in *Crocker v. Sundance Northwest Resorts Ltd.*[25] the waiver clause that the plaintiff had signed was held not to be operative because the waiver provision in the entry form was not drawn to the plaintiff's attention, he had not read it and did not know of its existence. He thought he was simply signing an entry form. As a result Sundance could not rely on the waiver provision in the entry form. This decision is analogous to the decision of the Ontario Court of

[22] [2008] O.J. 2406
[23] *Isildar*, at para. 634
[24] 2015 ONSC 2301 at para.79-83
[25] opt.cit. at para. 34

Appeal in *Tilden Rent-A-Car Co. v. Clendenning*[26] where the limiting provision was in fine print on the back of the rental contract. There the court held the provision inoperative as well because reasonable measures had not been taken to draw the provision to the respondent's attention.

An outlier in these cases is *Cudmore Estate v. Deep Three Enterprises Ltd.*[27] This case involved the death of two divers during an ice dive. Both of the deceased signed a limitation of liability provision which purported to release the National Association of Scuba Diving Schools ("N.A.S.D.S."), its member schools or "any of its off [sic] officers, agents, servants or employees for any of said causes of action, whether … by the negligence of any of said persons…" The court concluded that the only defendant that could rely on the waiver was N.A.S.D.S. despite the wide wording of the release. Without citing any case law, the court also concluded that the defendants could not rely on the waiver, in particular, the defendant Flanagan could not avoid the consequences of his own negligence with respect to "any waiver given to N.A.S.D.S." The trial judge cited *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*[28] and the *Crocker* case without specifying what legal principles contained in those case that he relied upon. As this case pre-dates the decision of the Supreme Court of Canada in the *Tercon* case,[29] which is discussed in more detail below, and fails to analyze the numerous cases on written waivers, it is submitted that it should not be followed.[30]

Most well drafted waiver documents will generally have a warning on the top of the document cautioning the participant that he or she is waiving certain legal rights, among other things, the right to sue. Often these documents will also require the participant to initial the warning and as well the waiver provision itself. This assures the Court that the provision has been brought to the participant's attention.

III. Ticket Waivers

In *Union Steamships Limited v. Barnes*[31] the plaintiff boarded a ship operated by the defendant company in the early hours of the morning. He purchased this ticket once he got on board. The

[26] 18 OR (2d) 601; 83 DLR (3d) 400; 4 BLR 50; [1978] OJ No 3260 (QL); 1978 CanLII 1446 (ON CA)
[27] [1991] O.J. No. 1453 (Ont. Gen. Div.)
[28] (1988) 1 S.C.R. 1186
[29] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69
[30] see as well the remarks of G. Roccamo J. in *Isildar v. v. Kanata Diving Supply*, opt. cit. at para.689 commenting on the *Cudmore* case
[31] [1956] SCR 842, 1956 CanLII 63 (SCC)

ticket had a notice on it in red print indicating that it was subject to the conditions on the back. One of the conditions relieved the defendant from any liability for injury even if it arose from the defendant's negligence. The plaintiff admitted in cross examination that he knew that there was writing on the ticket but he had not read it or looked at back of the ticket because he was in a hurry to get his children to bed. The plaintiff was injured when he went through a door into a dark area and fell down a hatchway seriously injuring himself. The Supreme Court of Canada concluded that there had been a reasonable effort made to bring the terms of the contract to the plaintiff's attention. The burden was on the defendant to show it had done all it could reasonably be required to bring the limiting conditions to the plaintiff's attention.[32] As well, the plaintiff accepted the ticket without protest and proceeded with the trip and therefore he was estopped from denying the terms of the contract.[33] Rand J. in dissent held that it could not be said that reasonable notice of the extreme and unusual term of the ticket was given. Everything was hurried and the unusual terms in small letters on a small ticket should have been made known to the public.[34] This argument was specifically rejected by the majority and Locke J. held:[35]

> …the issue in the present matter is determined by the finding of fact that the endorsement on the face of the ticket printed in red ink and referring to the conditions endorsed on its reverse side ***constituted a reasonable attempt to bring to the passenger's attention the terms of the contract and I consider that his acceptance of the ticket without protest and embarking upon the voyage precludes him from reprobating its terms***, rely on upon the fact that he did not read it. (emphasis added)

In *McQuary v. Big White Ski Resort Ltd.*[36] the plaintiff ended up in a concrete drainage culvert and sustained a fractured pelvis along with other injuries. The ski resort relied on the ticket the plaintiff had purchased. The waiver/warning was contained on the ski lift pass, as well as on large signs posted in the area where the pass was purchased. At his examination for discovery the plaintiff admitted that that there was writing on the ticket and that the ticket contained standard conditions that he was skiing at his own risk.

The plaintiff argued that he had not read the waiver, and should therefore not be bound by its terms. Justice Blair rejected this argument and held that the plaintiff's failure to read the

[32] ibid. at p.855
[33] opt. cit. at p.856
[34] ibid. at p.845 per Locke J. Cartwright J. would have also dismissed the appeal on the grounds that there was no evidence that the plaintiff knew of the condition that he would bear the risk of injury.
[35] ibid. at p.856
[36] [1993] B.C. W.L.D. 2520 (B.C.S.C.)

conditions on the ticket was irrelevant. The defendant took reasonable steps to bring the exclusionary conditions to the plaintiff's attention by displaying the signs containing the exclusionary conditions prominently around the areas in which tickets were sold. The plaintiff was found to be aware that the ticket contained the terms and was therefore bound by those terms:[37]

> I find the plaintiff's failure to read the condition on the ticket irrelevant in the instant case. The plaintiff appears to have had the opportunity to read the ticket but did not take the time to do so.
>
> I further find on the facts before me that the defendant took reasonable steps to bring the exclusionary conditions to the plaintiff's attention, thereby complying with the provisions of the *Occupier's Liability Act.* The evidence is that the defendant posted signs containing the exclusionary conditions prominently around the areas in which the ski tickets were sold.
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> …
>
> The exclusion of liability conditions were there to be seen and read by the plaintiff, both on the signs around the ski resort and on the tickets he purchased and if they were not seen and read, it was a result of the plaintiff's own carelessness.
>
> The defendant succeeded in bringing the exclusion of liability conditions to the plaintiff's attention. It could not force him to read them."

The decision in *McQuary* was followed in *Dawe* v. *Cypress Bowl Recreations Ltd*.[38] In *Dawe*, the plaintiff was a university educated elementary school teacher. As in the *McQuary* case, the plaintiff argued that he had not read the terms of waiver on the lift pass he had purchased. The court found that the defendant took reasonable steps to bring the terms of the waiver to his attention and that it was not required to do more:[39]

> In my opinion, the Defendant did bring the exclusion of liability condition to the Plaintiff's attention. It can do no more, they cannot force the Plaintiff to read them.

In *Argiros v. Whistler & Blackcomb Mountain*[40] the plaintiff failed to read the waiver language set out on his ski lift pass which incorporated a venue agreement in the limiting conditions

[37] ibid. at p.7-8
[38] [1993] B.C.J. No. 2892 (B.C.S.C.)
[39] at pp.7-8
[40] [2002] O.J. No. 3916 (Ont. S.C.J.),

specifying that any litigation involving the ski area operator would be brought in British Columbia. The plaintiff sued in Ontario.

The plaintiff had purchase at least one lift ticket and possibly several vouchers each containing the terms of the waiver. The evidence also showed that there had been ten signs in the ticket sales area setting out the limiting conditions which the court described as garish. These factors led Justice A. Campbell of the Ontario Superior Court to find that "the only reasonable inference" was that the terms did, in fact, come to the plaintiff's attention. The plaintiff's assertions that the terms were not pointed out to him, that he had not read them, and that he would not have understood them if he had, were held to be irrelevant:[41]

> "In this case the signs are numerous, prominent, and garish. The colours, lay-out and form of the signs and the ticket and voucher warnings do everything possible to bring them to the attention of customers. The contract provisions are reasonably legible. They are as clear in their wording as such provisions usually are. The defendants took all reasonable steps to bring the contractual terms to the attention of the customer. On the facts of this case, they must have come to the plaintiff's attention.
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> …
>
> The test, however, is objective. ***Because the defendants took all reasonable steps to bring the contractual terms to the plaintiff's attention, and because their existence did come to his attention, they bind him whether he read them or not***." [emphasis added]

Although the reasons in *Argiros v. Whistler & Blackcomb Mountain* ultimately focused on the jurisdiction issue, that is whether the action could be brought in Ontario, the court's holding nonetheless supports the proposition that the defendant must only take reasonable measures to bring the condition it relies on to the plaintiff's attention. The defendant is not required to ensure that the plaintiff has read the waiver.

Templeton J. upheld similar wording of a release of liability in relation to a ticket waiver in *Cejvan v. Blue Mountain.*[42] Templeton J. held that the resort had taken all reasonable steps to bring the contractual terms as to the exclusion of liability and waiver to the plaintiff's attention.[43]

[41] ibid. at para. 18 and 20
[42] 2008 CarswellOnt 9269
[43] at para.63

The court concluded that the release of liability was a complete bar to the plaintiff's claim even though she found negligence on the part of Blue Mountain:[44]

> Even if I were wrong in this regard, it is my opinion on the basis of all of the facts set out above that liability for the conduct of the defendant is excluded by virtue of the condition that "The ticket holder assumes all risk of personal injury…resulting from any cause whatsoever including…negligence on the part of BMR and its employees."
>
> In my view, this condition which formed part of the contract between the plaintiff and the defendant excludes the defendant from liability with respect to the plaintiff's claim.

It should be emphasized that in Ontario such limiting provisions have two distinct legal underpinnings. First, the defence will argue that the terms limiting its liability are incorporated into the contract at the time the contract was formed. In simple contract law terms the ticket constitutes an offer by the tendering party and once the ticket is accepted without objection by the purchaser, he or she is bound by the contents.[45] In addition the defence may also argue that it was it was entitled to limit is liability under section 3(3) of the *Occupiers' Liability Act*[46] and that in fact did so.[47]

IV. Electronic Waivers

With the explosion of electronic commerce these limiting conditions are often built into a contract entered into by the parties on line. It is not difficult to imagine why this revolution in business activity has occurred, given the convenience that on line and now shopping from mobile devices provides to the consumer. From the vendor's perspective electronic databases provide easy and reliable storage and filing solutions, individual identities can be verified by tracking IP addresses, and of course, paperless solutions are good for the environment.

Given the relative infancy of electronic waivers, the courts will have to confront the issue whether such limiting conditions incorporated into the on line purchase transaction are as enforceable as the traditional printed waiver The answer seems to very clearly be yes –

[44] at para.74-75
[45] see the comments of Swift J. in *Nunan v. Southern Railway Company,* [1923] 2 K.B. 703 at 707 and adopted in *Thompson v. London Midland and Scottish Railway Company* [1930] 1 K.B.41 at 47 (C.A.) and cited with approval in *the Union Steamships v. Barnes*, opt. cit. at p.855
[46] R.S.O. 1990, Chapter O.2. Section 3(3) provides: "The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty."
[47] see for example the *McQuary* case, supra. where Justice Blair found that the resort had complied with s.4(1) of the British Columbia *Occupiers Liability Act*

electronic waivers are in essence no different from their print form predecessors. And as well, given that the purchaser must click to accept the waiver, the argument that the condition was not brought to the purchaser's attention has little merit.[48]

Although there are no reported decisions in Canada that have explicitly held that an electronic waiver in a recreational setting is equally enforceable as a printed waiver, reference some electronic transaction cases lead to this conclusion.

Going back to first principles, a waiver or release of liability, very simply, is a contract between parties. In the recent case of *Niedermeyer v. Charlton*,[49] the British Columbia Court of Appeal re-affirmed this principle and stated:

> In *Keefer Laundry Ltd v. Pellerin Minot Corp.*, 2009 BCCA 273 (B.C.C.A), this court affirmed the following statement from *Canadian Contractual Interpretation Law* at para 59:
>
> > A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases.[50]

As a result, if an electronic contract is no different in force or effect from a printed contract, then an electronic waiver is also no different from a printed one. In, *Rudder v. Microsoft Corp.*[51] the defendant Microsoft moved to stay the class proceedings law suit that had been brought against it arguing that the parties had agreed to the exclusive jurisdiction of the courts in the State of Washington. In resisting the stay motion, the plaintiffs argued that the electronic format only presented a portion of the agreement at one time and therefore the balance of the terms of the agreement were essentially fine print. Justice Winkler rejected this contention and noted:[52]

> As part of the sign-up routine, potential members of MSN were required to acknowledge their acceptance of the terms of the Member Agreement by clicking on an "I Agree" button presented on the computer screen at the same time as the terms of the Member Agreement were displayed.
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> …
>
> I have viewed the Member Agreement as it was presented to Rudder during the sign-up procedure. All of the terms of the Agreement are displayed in the same

[48] see for example the remarks of Winkler J. (as he then was) in *Rudder v. Microsoft Crop.* (1999) 2 CPR (4th) 474; 47 CCLT (2d) 168; 40 CPC (4th) 394; 1999 CanLII 14923 (Ont. S.C.) at para.14
[49] 2014 BCCA 165
[50] *Niedermeyer v. Charlton*, 2014 BCCA 165 at paragraph 15
[51] supra.
[52] at para.14-17

> format…Admittedly, the entire Agreement cannot be displayed at once on the computer screen, but this is not materially different from a multi-page written document which requires a party to turn the pages. Furthermore, the structure of the sign-up procedure is such that the potential member is presented with the terms of membership twice during the process and must signify acceptance each time. Each potential member is provided with the option of disagreeing which terminates the process.
>
> …
>
> It is plain and obvious that there is no factual foundation for the plaintiffs' assertion that any term of the Membership Agreement was analogous to "fine print" in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of the specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract nor its manner of presentation to the potential members is so aberrant as to lead to such anomalous result. To give effect to the plaintiff's argument would, rather than advancing the foal of "commercial certainty", to adopt the words of Huddart J.A. in *Sarabia,* would move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium.
>
> On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing.

As Professor McCamus has noted, the court was able, without apparent difficulty, to simply apply the normal rules of contract formation applicable to agreements in writing to an agreement created in an electronic format.[53]

The legal principle set out in *Rudder* was codified in Ontario with the enactment of the *Electronic Commerce Act, 2000* ("Act") which "recognizes the validity of documents formed by electronic communication and the validity of electronic signatures."[54] Similar legislation has been enacted in each Canadian province and territory.[55]

Section 19 of the Act sets out the operative provision for enforcement of electronic contracts and provides:

> 19(1) An offer, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed,
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> > (a) by means of electronic information or an electronic document; or

[53] McCamus, John D. *The Law of Contracts [2nd Edition]*. Toronto, ON: Irwin Law, 2012. Page 82.
[54] Swan, Angela & Adamski, Jakub. *Canadian Contract Law [3rd edition]* Markham, ON: LexisNexis, 2012. Page 263.
[55] ibid.

(b) by an act that is intended to result in electronic communication, such as,

(i) touching or clicking on an appropriate icon or other place on a computer screen, or

(ii) speaking.

19(2) Subsection (1) applies unless the parties agree otherwise.

19(3) A contract is not invalid or unenforceable by reason only of being in electronic form.[56]

It is evident that if electronic contracts are valid and enforceable under s. 19(3), then so are limiting conditions, such as waivers and releases, agreed to electronically by the parties. The enforceability of an electronic waiver, like any waiver or contract, is not guaranteed and can still be challenged by the usual means.[57]

In short, the *Act* is quite clear and seems to provide a complete answer to the issue as to the validity of electronic waivers. There is no case law specifically on point. While electronic waivers were referred to in two recent court decisions, the fact that they were executed on line was not at issue in these cases and only mentioned by way of factual background.[58]

The judicial silence on the issue is a reflection of the era in which we live. With an estimated 83% of Canadian households having access to the Internet at home in 2012,[59] most Canadians are familiar with electronic communication. Many electronic user agreements can and often do include liability waivers or terms of use. With electronic commerce and electronic communications forming such a critical component in so many Canadians' lives, it will be difficult for a party to challenge an electronic waiver on that basis alone.

In view of the clear legislation as to electronic contracts, and releases and waivers by implication, as well as the limited case law, it would appear that the law has settled on this issue--an electronic waiver is still just a waiver and of equal force and effect as a printed one subject to normal proof issues. There have also been a number of decisions in the United States which

[56] *Electronic Commerce Act, 2000* S.O. 2000, c. 17, s. 19
[57] *See Tercon Contractors Ltd. v. British Columbia (Transportation and Highway), 2010 SCC 4, supra.*
[58] See *Kempf v .Nguyen* 2015 ONCA 114
[59] Statistics Canada. 2012, *Canadian Internet Use Survey*, Statistics Canada Survey no. 4432. Ottawa. http://www.statcan.gc.ca/daily-quotidien/131126/dq131126d-eng.pdf. March 9, 2015.

confirm the validity of online waivers,[60] and it is highly unlikely we will see a Canadian court strike down an electronic waiver due simply to its format.

V. Assessing the Validity of a Release

In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*[61] the Supreme Court of Canada held that the fundamental breach rule should be laid to rest. As well, the Court set out the proper analysis where a party seeks to escape the effect of an exclusion clause. The Court laid out the following three prong test:[62]

> The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[60] See *Stephenson v. Food Bank* for New York City 2008 NY Slip Op 52322(U) [21 Misc 3d 1132(A)]*; Hinely v. Florida Motorcycle Training Inc.*, 2011 Fla. App. LEXIS 6757; *Johnson v. Royal Carribean Cruises LTD*, 2011 U.S. Dist. LEXIS 21828; and *Waltz* v. *Life Time Fitness, Inc.* 2010 Minn. App. Unpub. LEXIX 741.
[61] [2010] 1 SCR 69
[62] per Binnie J. at para.121-123

1. Does the Waiver Agreement Cover the Alleged Negligence of the Defendant?

The first step in the inquiry is to examine the waiver agreement and determine whether the language of the agreement covers the alleged negligent act. The onus of proving the validity of the exclusion clause or the waiver is on the party asserting it.[63] As well the *contra proferentem* rule applies in these cases, that is, any ambiguity in the document will be resolved against the person who drafted the waiver.[64] Very clear language is required if a defendant wishes to absolve itself of its own negligence.[65] For example, a waiver seeking to cover negligent conduct must contain more than a mere waiver of liability. The waiver document must exclude negligence and address at least some context describing the kind of negligent acts that is intended to be excluded. The waiver should exclude the defendant's negligence and specify the key components of the recreational activity being excluded. For example, in a parachute jumping case, the release should address and exclude such key elements as the reasonable care in teaching the plaintiff how to jump safely, use of reasonable care to test the student and supervise the jump to ensure that the plaintiff was in the appropriate physical and mental shape to make the jump. Unless these key elements are set out in the release, the waiver will be deficient.[66]

Be sure that the exclusion covers the defendants seeking to shelter under the waiver. In some cases, the waiver may only cover the organizers of the event but not the participants. Or it may be unclear on this point.[67] Alternatively, if there is a claim in contract or under the *Occupiers' Liability Act*, does the waiver address such a breach?

2. Is the Waiver Unconscionable?

Very recently, the British Columbia Court of Appeal considered the issue of written release in recreational activities in *Loychuk v. Cougar Mountain.*[68] The *Loychuk* case involved serious injuries sustained by the plaintiffs in a zip lining accident and where the defendant admitted to being negligent. Nevertheless, both the British Columbia Supreme Court and the British Colombia Court of Appeal upheld the written release and dismissed the plaintiffs' claims once

[63] *Snucins v. Conquest Tours et al.* [1990] O.J. No. 1623 (Ont.Div.Ct.)
[64] *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.* [1993] 1 S.C.R. 252
[65] *Smith v. Horizon Aero Sorts Ltd.* (1981), 130 D.L.R. (3d) 91 (BCSC) at para.27
[66] ibid at p.107
[67] see for example *Kempf v. Nguyen* 2013 ONSC 1977 at paras. 108-110
[68] [2012] BCCA 122, Tab E-4

again reinforcing the now entrenched principle that written waivers are not unconscionable in the context of recreational activities. The Supreme Court of Canada dismissed the plaintiffs' leave to appeal with costs.[69]

After a careful review of the British Columbia case law and the Supreme Court of Canada's decision in *Dyck*, as well as the reports of several law reform commissions, the British Columbia Court of Appeal concluded that such releases in a sports or recreational setting are not unconscionable:[70]

> To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release of waiver as a condition of participating.
>
> …
>
> The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employee. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.

This case is the most recent and authoritative decision on this point and in view of almost 150 years of waiver law, it is submitted that this reasoning is correct.

3. Should the Waiver Provision be Negated Due to Public Policy?

This issue was addressed by the Supreme Court of Canada in the *Dyck* case where the Court stated in the context of a release in favour of the Manitoba Snowmobile Association in order to participate in a snow mobile race:[71]

> Nor does the relationship of Dyck and the Association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken

[69] 2012 CanLII 56135 (SCC)
[70] at para. 33 and 40
[71] supra. at para.10

> unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.

In the *Loychuk* case, the British Columbia Court of Appeal arrived at a similar conclusion and pointed out that releases such as the one before the court have been in use for many years and have been upheld by the British Columbia courts. If there were policy reasons for negating waivers then it was a matter for the Legislature.[72] The court went on to point out that in *Tercon*, Justice Binnie held that in the interest of commercial certainty and the stability of commercial relations, it would be rare to utilize the residual power of a court to decline enforcement. Justice Binnie's examples of cases in which exclusionary clauses would not be given effect involved food suppliers who knowingly or recklessly sold toxic products to the public. Another example was a situation where a company knowingly supplied defective resin to a customer who used it to make natural gas pipelines. Justice Binnie then stated:

> Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

As the Court in *Loychuk* noted, the common thread in these examples is that the party seeking to rely on the exclusion clause either knew or was reckless in providing a substandard product and thereby put the public in danger. Where a participant is injured in a recreational activity as a

[72] *Loychuk*, opt cit.44

result of the negligence of the operator, such an act does not rise to the high level of public policy set out in *Tercon.*[73]

VI. The Consumer Protection Act

It has argued in some quarters that provisions of the *Consumer Protection Act, 2002 ("CPA")*[74] negate waivers and releases in Ontario. The applicable provisions of the *CPA* are as follows:

> **No waiver of substantive and procedural rights**
>
> **7.** (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> **Quality of services**
>
> **9.** (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.
>
> **Quality of goods**
>
> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.

This argument advocates that a waiver or a release negates the warranty and the implied conditions and terms provided by the *CPA* and that this is prohibited by s.7(1). However, it is submitted that a waiver and a release are based on very different legal principles than warranties and conditions. A waiver in the recreational setting is the surrender of the right to claim or bring a law suit. A release also involves the participant giving up of the right to claim against the service provider. Technically, a waiver does not take away conditions and warranties, it eliminates the right to sue. In any event, it is submitted that the *CPA* was not intended to apply to the recreational and sporting field. It would take much clearer language to take away such an entrenched right, the right of an operator of a recreational or sporting facility to contract out. It is interesting to note that there have been no cases in Ontario that have considered this argument.

[73] ibid. at para.46
[74] S.O. 2002, Chapter 30

In *Loychuk* the Court found it unnecessary to consider whether the provisions of the *British Columbia Consumer Protection Act* applied to recreational sports activities and concluded that the provisions relied upon by the appellants did not lead to the invalidation of the release.[75] It should be noted that the provisions of the British Columbia statute are different from the provisions of the *CPA.*

VII. Infants and Waivers

The law in this area seems clear. A contract made with a minor is generally void or voidable depending on the nature of the contract. There is an exception to this rule, namely that a contract for goods and services that are of necessity is enforceable against a minor. Contracts for goods and services that are not necessary are enforceable by the minor but not against the minor. For this reason, contracts including waivers or releases for recreational and sporting activities are generally not considered to be necessary and therefore are not enforceable.[76]

In British Columbia, it has been held that the *Infants Act* does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort. The court concluded that the statute is a complete code and therefore parents and guardians cannot enter into binding contracts on behalf of infants except in accordance with the statute.[77]

Although a comparable statute does not exist in Ontario, our courts have reached a similar result. For example, in *Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited*[78] a release signed on behalf of an infant in relation to a motor vehicle accident was held to be void as it contained terms to the disadvantage of the minor. Lerner J. also arrived at a similar conclusion in *Miller v. Sinclair* where a wavier was raised in a claim against a riding stable.[79] The Manitoba courts arrived at a similar result in *Swanson Estate v. Hanneson.*[80]

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[75] supra. at para.49
[76] *Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited*, [1950] O.R. 504-511 (S.C); see also the Law Reform Commission of Manitoba, *Waivers of Liability for Sporting and Recreational Injuries* (Report #120, January 2009); see also John Barnes, *Sports and the Law in Canada* (3rd ed. Butterworths) and as well the B.C. Law Reform Commission has expressed the same view, cited in *Wong (Litigation Guardian of) v. Lok's Martial Arts Centre Inc.,* 2009 BCSC 1385 at para.40
[77] *Wong (Litigation Guardian of) v. Lok's Martial Arts Centre Inc.*, supra. at para.49, 60-61
[78] supra.
[79] [1980] O.J. No.209, 15 C.C.L.T. 57 (H.C.) at para.20; see as well *Crawford v. Ferris,* [1953] O.W.N. 713 (H.C.)
[80] [1972] 26 D.L.R. (3d) 201 (Man.Q.B.) aff'd (1973) 42 D.L.R. (3d) 688 (Man.C.A.)

However, this law arises from a different age and needs to be re-examined in today's modern society where young individuals are much more sophisticated and participate in a wide range adult activities at an early age ranging from driving cars to scuba diving and flying airplanes. These young individuals often wish to engage in highly risky activities, such as playing hockey and football at elite levels, racing cars, or participating in downhill ski racing-- all of these activities are inherently dangerous. There is argument to be made that in a narrow band of cases, involving high level athletes over a certain age, who wish to participate in high level and inherently dangerous sporting activities, a release signed by both the minor and the parent should be enforceable.[81] In these cases it would be necessary for the organizer to show that the dangers involved in the sport were properly brought to the attention of the participant and the parent.

VIII. Summary Judgment Motions and Waivers

In the past, attempts to have a plaintiff's claim dismissed on the basis of a waiver defence have often failed.[82] However, with the advent of the Supreme Court's decision in *Hryniak v. Mauldin*[83] and the introduction of a "more robust approach"[84] this situation is likely to change. With the new and expanded powers that the court has under Rule 20 and with a clear signal from the Supreme Court that a cultural shift is required away from the conventional trial setting to a more proportional procedure tailored to the needs of the case, it is hoped that waiver cases will generally be resolved at the summary judgment motion stage rather than the defendant being forced into a lengthy and costly trial to determine the waiver issue.[85] The decision in *Trimmeliti v. Blue Mountain Resorts Limited*[86] may signal such a shift. In the *Trimmeliti* case, the plaintiff's action was dismissed on a summary judgment motion based not only on the written waiver that the plaintiff had signed but as well on the merits of the case. Dunphy J. concluded that there was nothing unreasonable or unlawful about excluding liability for the ski accident that the plaintiff

[81] Malamud and Karyan "Contractual Waivers for Minors In Sports-Related Activities" (1991-1992) 2 Marquette Sports L.J. 151; Doyice J. Cotten & Sarah J. Young, in "Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools" (2007) 17 J. Legal Aspects Sport 53; Robert Nelson, "The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive their Children's Tort Liability Claims" (2001-2002) 36 U.S.F. L. Rev. 535.

[82] see for example *Brown v. Blue Mountain Resort Ltd.*, 2002 CanLII 7591 (ON SC) para.15-17 and *Borre v. St. Clair College of Applied Arts and Technology,* 2011 ONSC 1971. See also *Pascoe v. Ball Hockey Ontario,* 2005 CanLII 3375 (ON SC) at para.27

[83] 2014 SCC 7

[84] see the remarks of *Perrell J. in Fiddler v. Vasilakos* 2014 ONSC 5774 at para.20

[85] *Hryniak v. Mauldin*, opt. cit. at para.2-5. But despite this mandate, courts still at times are reluctant to dispose of the waiver issue at by was of a summary judgment motion, see *Clarke v. Alaska Canopy Adventures LLC*, 2014 ONSC 6816 at para.26. The motion court judge held that further evidence was required as to the specific circumstances of the plaintiff's signing the waiver agreement.

[86] 2015 ONSC 2301

had incurred, namely running into a visible ribbon closing off a run, and that there was no basis for arguing unconsionability on the fact of the case. As the motion judge pointed out:[87]

> If the plaintiff chose to sign the form and ignore the consequences, that was a decision freely made by the plaintiff. The plaintiff was not free unilaterally to contract out of the waiver that he knew or ought to have known was a condition of his access to the resort.

IX Waivers and Jury Notices

One difficult issue prior to the recent decision of the Ontario Court of Appeal in *Kempf v. Nguyen*[88] was whether the waiver and release issues should be decided by the jury or the trial judge. In the *Kempf* case the trial judge struck the jury notice because she was of the view that there was a risk that the waiver, coupled with a *volenti* defence would confuse the jury. Epstein J.A. held that although it was the trial judge's duty to determine the applicable legal principles, including the ways in which the waiver might be relevant to liability, it was the trial judge's duty to instruct the jury with respect to both the waiver and the *volenti* defence that had been raised.[89] Justice Epstein was also of the view that it would have been preferable for the trial judge to reserve her decision on the motion to strike the jury notice until after the evidence had been completed or until a discrete problem arose and that the "wait and see" approach is generally to be preferred.[90]

X Conclusion

This area of the law, as so many other aspects of the judicial process, reflects the tension between different sets of values facing the courts. On one hand there is the need to ensure commercial certainty, the freedom to contract and to ensure the viability of certain outdoor recreational and sporting activities. On the other hand there is the need to protect seriously injured plaintiffs. The common law has developed a body of law that is designed to preserve the first set of values. However, as well the cases have created certain safeguards to ensure that injured plaintiffs are not barred from recovery by waivers in the appropriate cases.

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[87] at para.82
[88] 2015 ONCA 114 (CanLII)
[89] at para. 51-56, However, see the strong dissent of Laskin J.A. commencing at para.129
[90] ibid. at para.64

Two lessons emerge from these cases. First, waiver provisions must be carefully drawn and proper procedures need to implemented to ensure that the limiting conditions are brought to the participant's attention. Secondly, plaintiff's counsel, when facing a waiver document, must carefully examine the language of the document and the circumstances surrounding the formation of the contract which includes the waiver to ensure that the limiting condition was properly brought to the attention of the injured party. Counsel must also carefully scrutinize the evidence to determine whether one of the defences to the waiver doctrine such as *non est factum*, misrepresentation are present or whether the circumstances demonstrate that the plaintiff did not intend to be bound by the document.