



Why waivers are still effective in Ontario's recreational sporting industry



On March 28, 2018, the Ontario Court of Appeal released its decision in the closely watched appeal in *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313. The case involved, for the first time, the judicial consideration as to whether sections 7 and 9 of the *Consumer Protection Act* ("CPA"), 2002 operate to void an otherwise valid liability waiver. Waivers are permitted under section 3 of the *Occupiers' Liability Act* ("OLA"). The Court of Appeal, in a strong and unanimous decision, held that waivers under the OLA are valid and that the provisions of the CPA do not apply to such waivers. This is good news for insurers underwriting sports and recreation businesses in Ontario. Still, it continues to be important for the recreation industry and insurers to ensure that waivers are drafted properly to cover all types of risk.

Background

The plaintiff, David Schnarr, was skiing at Blue Mountain, on March 26, 2011, when he allegedly encountered a broken ski pole on a ski trail. The plaintiff lost control when he struck the pole, veered into the woods and allegedly sustained an injury.

Before the ski season, the plaintiff had purchased a season pass on Blue Mountain's website. As part of the purchase process, the plaintiff was required to agree to the terms of an exculpatory liability waiver/release. On the strength of this release, as well as a general negligence defence, Blue Mountain denied liability.

Before the trial in January 2016, the plaintiff moved, on consent, to amend his Statement of Claim to plead and rely upon the provisions of the CPA. The plaintiff argued that section 9(1) of the CPA provided a warranty, which could not be waived because of the operation of section 7(1). Since Blue Mountain's waiver prevented claims for negligence, breach of contract and breach of statute, the plaintiff argued that the waiver was invalidated by the CPA.

Blue Mountain's trial counsel moved at the outset of the trial to strike the jury, arguing that the interplay between the CPA and the OLA complicated the issues on the trial making a jury trial unsuitable. On hearing the motion at trial, Justice Tzimas ordered the plaintiff to bring a **Rule 21** motion to determine whether the CPA prevented Blue Mountain from relying on its waiver as a defence to the plaintiff's claims.

The Rule 21 motion was argued over the course of three days. Blue Mountain asserted that there was no conflict between the OLA and the CPA. Blue Mountain argued that any breach of the CPA could be saved by section 93(2) of the CPA and, in the alternative, if there was the conflict between the CPA and the OLA that it had to be resolved in favour of the more specific legislation being the OLA.

Justice Tzimas released her decision on January 6, 2017, holding that section 7(1) of the CPA voided those parts of Blue Mountain's waiver that negated the procedural and substantive rights provided by the CPA. But, Justice Tzimas stopped short of negating the waiver as a whole, as was requested by the plaintiff, and held that the waiver was still effective against negligence claims. The result was that the Motion Court Judge read down the waiver to preserve the balance of the waiver that related to the OLA and negligence claims.

Blue Mountain concluded that the Motion Court Judge erred in her decision and effectively negated waivers. While it could still be used to defend claims in negligence and under the OLA, this decision permitted an end run on waivers and allowed identical claims framed under the CPA. Little consideration was given to the fact that waivers, which had been permissible for decades at common law and under the OLA, would no longer be effective in defending claims against occupiers.

The Appeal

Blue Mountain's appeal counsel focused the argument on the OLA as a complete code for occupiers, and highlighted the clear conflict between the OLA and the CPA. Blue Mountain's position was that the conflict should be resolved in favour of the OLA because of its specific application to occupiers, as opposed to the more general statute – the CPA. Blue Mountain also argued that inconsistencies would otherwise occur, namely the OLA that allowed waivers, but the CPA that made waivers illegal. As well, the CPA undercut the lower standard imposed on certain occupiers.

In its decision, the Court of Appeal took a very practical approach to the issues, which it outlined as (a) does the CPA conflict with the OLA and (b) if there is a conflict, how should the conflict be resolved. In beginning its analysis, the Court looked to the purpose and intent of each statute. The OLA was found to represent a complete and comprehensive code dealing with the liability of occupiers in Ontario. The CPA's principal concern was financial transactions and fraudsters. The Court found that the CPA was not intended to apply to areas already governed by regulatory regimes that provided adequate consumer protections. Nothing indicated to the Court of Appeal that the CPA was intended to regulate the duties governing occupiers.

Relying on the principles of statutory interpretation, the Court of Appeal found that there was "a clear and direct conflict between the OLA and the CPA. The OLA permits an occupier to obtain a waiver of liability. The CPA precludes a supplier from obtaining a waiver of liability. In other words, what the OLA permits, the CPA prohibits."

The Court found that the attempt by the plaintiffs to avoid the conflict on the basis that the "OLA deals with tort liability and the CPA deals with contractual liability [was] not only artificial, it [did] not reflect the fact that the duty of care originates from the statute itself, nor [did] it take into account that the statute allows for the modification of the duty and liability arising therefrom."

The Court Appeal applied the statutory interpretation principles of *ejusdem generis*, *expressio unius est exclusio alterius*, the exhaustiveness doctrine, *generalia specialibus non derogant* and the absurdity doctrine to address the conflict between the two statutes. Central to the Court's analysis was the OLA as a complete scheme intended to address the duties of occupiers, and the determination that the OLA dealt with the core issue, where the CPA had more general application. The Court also took into account the absurd result that would flow from the lower court's decision, namely, that the ruling defeated one of the fundamental purposes of the OLA.

The Court of Appeal concluded that sections 7 and 9 of the CPA did not operate to void an otherwise valid waiver made under the OLA. This decision restores the efficacy of waivers in Ontario.

Waiver Best Practices

1. The language in waivers must be drafted carefully to ensure that they cover all forms of potential risk, and all sources legal liability whether in negligence, contract or under a statute.
2. Waivers should be supported by appropriate signage drawing the attention of patrons to the contents of the waiver.
3. Ensure that there is clear evidence of the waiver and the signage, so that the resort's efforts to bring the waiver to the patron's attention can be proven in court.

Beard Winter LLP litigators and partners [John Olah](#) and [Robert Betts](#) acted as appeal counsel for Blue Mountain Resorts, while Robert Betts and associate [Roman Myndiuk](#) acted as trial counsel for Blue Mountain.

Beard Winter LLP would like to thank the [Tourism Industry Association of Ontario](#) for their support of the appeal case as well as the numerous interveners including, the [Ontario Snow Resorts Association](#), the [Ontario Federation of Snowmobile Clubs](#), the [Ontario Cycling Association](#), [Conservation Halton](#), [Credit Valley Conservation](#), and [Toronto Region Conservation](#) and the [Canadian Defence Lawyers](#).

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