

The Evolution of Waivers in Ontario: The Schnarr and Woodhouse Appeals

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How did we get here?

- Two decisions emerging in 2017 that raised the possibility that waivers could be struck down by consumer protection law in Ontario
 1. *Schnarr v. Blue Mountain Resorts Limited*
 2. *Woodhouse v. Snow Valley Resorts, et al.*
- Interplay of two statutes
 - *Consumer Protection Act*
 - *Occupiers' Liability Act*

How did we get here?

Consumer Protection Act

- Section 7(1) of the Act states that parties **cannot waive** their substantive and procedural rights under the act
- Section 9(3) is one such right...
 - Supplier deemed to warrant that services supplied under a consumer agreement are of *a reasonably acceptable quality*
- However, section 93(2) exists...
 - Allows offending parts of a “consumer agreement” to be enforceable

How did we get here?

Occupiers Liability Act

- Section 3(1)
 - Occupiers of a premises owe a duty to take reasonable steps to ensure that individuals entering onto the premises are reasonably safe
- Section 3(3)
 - Occupiers are allowed to restrict, modify, or exclude the duty that is owed

How did we get here?

- In *Schnarr*, the motion judge ruled that those portions of the waiver that were contrary to the *CPA* were null and void; the remainder of the waiver would remain valid
- In *Woodhouse*, the motion judge also determined that the waiver was void but went one step further and argued it could be saved under section 93(2) of the *CPA*

The Appeals

- Appeals were commenced in both *Schnarr* and *Woodhouse*
- Numerous intervenors
 - Tourism Industry Association of Ontario
 - Conservation Halton, Credit Valley Conservation, and Toronto Region Conservation
 - Ontario Federation of Snowmobile Clubs and Ontario Cycling Association
 - Canadian Defence Lawyers
 - Ontario Trial Lawyers Association
 - Minister of Government and Consumer Services

The Arguments – The Ski Resorts

- The *CPA* was never intended to apply to ski resorts or sporting ventures
 - Was designed to primarily protect consumers against fraud, not designed to apply to risky sporting ventures
- If the *CPA* applies, then there is a clear conflict between the *CPA* and *OLA*
- In the face of conflict, the *OLA* should take precedence over the *CPA*

The Arguments – The Skiers

- The *CPA* applies to all consumer agreements; it does not matter what the nature or subject matter of the consumer agreement is
- There is no conflict between the *CPA* and the *OLA* with respect to waivers
- If there is conflict, the *CPA* ought to apply
- Section 93(2) of the *CPA* cannot serve to save offending provisions of a waiver

The Arguments – The Intervenor

- TIAO, the conservation authorities, and the sporting federations
 - Will harm accessibility
 - Will make accessing their services prohibitive from a cost standpoint
 - Will see a large contraction in the sport and recreational industry

The Arguments – The Intervenors

- The Minister of Government and Consumer Services
 - The primary function of the *CPA* is to preserve consumer rights
 - By allowing waivers to subvert the *CPA*, it will erode consumer rights
 - The *CPA* must bar waivers impacting on substantive or procedural rights contained in the *CPA*
 - Wait...doesn't the province use waivers?

The Arguments – The Intervenor

- Canadian Defence Lawyers
 - Massive impact on risk management practices in the province
 - Lack of certainty
 - Will impact not only insurers, but also insureds
 - Some boring legal arguments...
 - Courtroom efficiencies (or lack thereof)
 - Sudden influx of claims
 - Will harm access to justice

The Arguments – The Intervenors

- Ontario Trial Lawyers Association
 - Nothing wrong with the decisions
 - The *CPA* serves to void waivers
 - The *OLA*? Why look at that?

The Result?

- Conflict between the *OLA* and the *CPA*
 - One permits parties to waive or alter duties
 - The other specifically prohibits this
 - “Clear and unavoidable conflict” that creates “absurd results”
- The *OLA* is the applicable statute
 - The *CPA* was not intended to operate within the sphere of activities governed by the *OLA*
 - Accounts for “commercial flexibility” and encourages private landowners to open their lands for recreational purposes
- Section 93(2) of the *CPA* cannot save offending aspects of a consumer agreement that attempt to restrict one’s procedural or substantive rights
 - Offending aspects are void
 - If it is void, it is though it never existed
 - How can you save something that doesn’t exist?

Onwards and upwards...

- The plaintiffs applied for leave to appeal the decision of the Ontario Court of Appeal on their rulings with respect to statutory conflict
- In response, the defendants applied for leave to cross-appeal the decision of the Ontario Court of Appeal that section 93(2) of the *CPA* could not save the offending aspects of the waiver

Onwards and upwards...

- On February 7, 2019, the Supreme Court of Canada denied both the application seeking leave to appeal and the application seeking leave to cross-appeal

So, where are we now?

What does it all mean?

- After spilling much paper and ink...we are back to where we started with respect to waivers
- Waivers continue to be valid and enforceable in Ontario pursuant to the *Occupiers' Liability Act*
- If insureds were advised to alter waivers after the *Schnarr* and *Woodhouse* decisions were released in 2017, revisit them!



QUESTIONS?