BLG Successfully Intervenes in Upholding Waivers in the Recreational Sporting Industry

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On March 28, 2018, the Ontario Court of Appeal released its decision in *Schnarr v Blue Mountain Resorts Limited,*2018 ONCA 313, on a novel question of law: do sections 7 and 9 of the *Consumer Protection Act*("CPA") vitiate or void an otherwise valid waiver of liability under s. 3 of the *Occupier's Liability Act* ("OLA")? One of the motion judges in the court below had invalidated the defendant's waiver with respect to the plaintiff's claim under the CPA but enforced the application of the waiver in regards to the plaintiff's claim under the OLA, as reported on in our previous bulletin.

In a unanimous ruling, the Court held that the CPA does not vitiate or void an otherwise valid waiver of liability under the OLA in circumstances where the waiver was part of the consumer agreement related to the use of the property. Thus, the waivers signed by the plaintiffs prior to using the skiing facilities at the defendant resorts were upheld.

The Court recognized that there was a clear and unavoidable conflict between the CPA and the OLA.Specifically, the CPA precludes any supplier from obtaining a waiver of liability. The OLA,on the other hand, permits an occupier to obtain a waiver of liability. Thus, what the OLA provides, the CPA takes away.

While there was no dispute that the plaintiffs were "consumers," the defendants were "suppliers," and the contracts entered into were "consumer agreements" for the purpose of the CPA,the Court concluded that there is nothing in the background to the passage of the CPA or in the provisions of the CPA itself that would suggest it was intended to regulate the duty of care explicitly stipulated by the OLA. Instead, the Court was satisfied that the OLA was intended to be an exhaustive scheme in relation to the liability of occupiers to entrants on their lands, especially for recreational activities. The Court clarified that even if an occupier engages with the public for use of the occupier's land in return for any payment, thus creating a consumer agreement, the CPA would not apply to such an agreement. This interpretation is consistent with the objective of avoiding any legislative absurdity.

The protection provided to occupiers by the OLA strengthens the recreational sporting industry by encouraging landowners to open up their lands to the public for recreational use. Through its decision, the Court of Appeal has effectively diminished any uncertainty surrounding the use of waivers in the recreational industry in Ontario. Thus,

occupiers may continue to use waivers without concern that they will be rendered void by the CPA.

By

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