

Two Judicial Treatments of a Novel Question of Law: Invalidating an Occupiers Waiver Through the Application of Ontario's Consumer Protection Legislation

March 03, 2017

Two recently released Superior Court decisions offer distinct treatments of the same question and impact the longstanding jurisprudence on exculpatory waivers: Can s. 7(1) of the Consumer Protection Act 2000, S.O. 2000, c. 30, Sched. A (the "CPA") operate to nullify the application of the defendant occupier's release of liability contained in its waiver signed by the plaintiff?1

Both cases deal with similar facts. The defendants offer skiing facilities. Both plaintiffs signed a waiver with respect to the use of each of the defendant's premises. Both plaintiffs sustained an injury as a result of the use of those premises. The plaintiff in *Schnarr v Blue Mountain Resorts Limited* 2017 ONSC 114 ("Schnarr") was injured while skiing and the plaintiff in *Woodhouse v Snow Valley* 2017 ONSC 222 ("Woodhouse") sustained injuries while using the ski equipment.

The theory of liability advanced in each case was based in negligence under s. 3 of the Occupiers' Liability Act, R.S.O. 1990, c.O.2 (the "OLA") and contract under s.9(1) of the CPA with respect to failing to provide services of reasonable acceptable quality which is a statutory deemed warranty. The CPA also provides under s. 7(1) that the CPA substantive and procedural rights apply despite any waiver to the contrary. In both cases, the defendants sought to rely on a very broadly worded waiver as a shield from all liability, including liability under the CPA.

Both defendants drew on excerpts from the Official Report of Debates of the Ontario Legislative Assembly (Hansard) in support of the proposition that the legislation was implemented to protect consumers from fraudsters and scam artists but not ski operators. The defendant in *Woodhouse* used this Hansard reference to argue that the CPA did not apply to the circumstances of the case. Although the parties in *Schnarr* agreed that the CPA applied, the defendant made use of the same reference in asking the court to read down the CPA. The Courts did not find either of these arguments to be persuasive.

Notwithstanding the common view that the CPA applied to the waiver at issue, the Court in each case offered a different treatment of the novel question of law of whether the CPA invalidated the defendant's waiver. Ultimately, the Motions Judge in Schnarr **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**. In contrast, the Motions Judge in Woodhouse **did not rule on whether** the waiver was invalid as to do so, in the Judge's reasoning, would have required evidence, which was not available in the context of the motion before the court. **Although the Court in Woodhouse held that the offending provisions of the waiver** dealing with release from all liability were "presumptively void", the Court found that the offending provisions may be saved under s. 93(2) of the CPA which "invites the court to explore the inequities involved in allowing the consumer not to be bound by the waiver". **The Court in Woodhouse reasoned that absent definite language in the CPA legislation** specifically voiding all waivers with respect to the provision of quality services found in consumer agreements, the Court must consider the equities involved before finally **invalidating a waiver**. According to the Court in Woodhouse, the onus is on the defendant to show that it would be inequitable for the consumer not to be bound by the waiver and specifically those sections of the waiver which may be rendered **presumptively void under the CPA**. In contrast, the Court in Schnarr explained that previous cases considering the saving provision dealt with situations where the plaintiff did not pay despite obtaining the full benefits of the services or goods rendered. Based on this, **the Court in Schnarr found that the saving provision did not apply to the analysis** as the plaintiff, unlike in previous cases considering this provision, did not obtain a windfall.

Both decisions have been appealed. Until the Court of Appeal decides the issue, the **decision in Schnarr dictates that for an occupier that is also considered a "supplier"** under the CPA, the exculpatory waiver, no matter how expansive in scope, can only be used to disclaim liability under the OLA and not the CPA. This is especially concerning as the jurisprudence to-date offers little guidance into the meaning or the standard of care in relation to the deemed statutory warranty of providing services of "reasonable acceptable quality".

1 The novel question of law in Schnarr was decided on a Rule 21 motion for a judicial determination of a question of law and the same question in Woodhouse was considered in the context of a Rule 22 motion which is a special case motion requesting the court's opinion on a question of law.

By

[Robert L. Love, Edona C. Vila](#)

Expertise

[Insurance Claim Defence](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.