

An Un-waivering Defence: Effectiveness of Liability Waivers Affirmed by the Ontario Court of Appeal

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The Ontario Court of Appeal recently determined that the *Consumer Protection Act* (Ontario) (the CPA) does not invalidate waiver protections available to businesses under the *Occupiers' Liability Act* (Ontario) (the OLA), effectively affirming that the CPA cannot be used to vitiate an otherwise valid OLA waiver.¹ The Court of Appeal's decision is a significant endorsement of general liability waivers in the recreational liability context.

Background to the Cases and the Ontario Court of Appeal Decision

In two cases heard together, the plaintiffs received a favourable verdict at the Superior Court of Justice against two ski resorts for injuries sustained while skiing.

The OLA, with its longer history, contains specific provisions allowing occupiers to contract out of the duty of care requirement under the OLA, which duty requires occupiers to take reasonable care to ensure persons are reasonably safe when the occupier's premises. On the other hand, the CPA prohibits contracting out of the implied conditions and warranties that are applicable to the respective consumer transaction and negates any waiver of the application of the CPA. The overlapping scope of the two acts gave rise to a conflict in the case of liability waivers signed by customers at ski resorts. While the waivers were specifically permitted under the OLA, the CPA potentially operated to invalidate them on the basis that they were contained in a consumer contract.

In addressing this novel conflict between the Acts, the Superior Court either voided or partially read down the waivers at issue in both cases. These decisions caused great uncertainty for recreational facilities operators who commonly use general liability waivers to limit their litigation risk. As a result, the two appeals garnered considerable interest with six different parties intervening including Ontario's Ministry of Government and Consumer Services and the Tourism Industry Association of Ontario.

Taking a different approach from the lower court, the Court of Appeal concluded that the waivers should be upheld since the OLA was paramount and the OLA's specific provisions were intended to be an exhaustive scheme governing the liability of occupiers for persons on their premises. If the CPA was found to apply, its general provisions would undermine the intent of such legislative intent. As such, where an occupier has a waiver of liability under the OLA, the provisions of the CPA will not apply, effectively excluding transactions covered by the OLA from the application of the CPA.

Key Take-away Principles

The decision confirms the statutory right provided to businesses under the OLA, providing comfort in the reliance on liability waivers going forward, subject to any further development in case law or possible amendments to the CPA to address the conflict between the Acts (the Ministry of Government and Consumer Services was one of several interveners that appeared at the Court of Appeal and was favourable to the application of the CPA in the cases).

Suhuyini Abudulai is a partner in the Financial Services Group and the firm's resident expert on all matters pertaining to the Consumer Protection Act. She is the author of the Annotated Ontario Consumer Protection Act, an invaluable resource for all things related to Consumer Protection law in Ontario.

¹ *Schnarr v Blue Mountain Resorts Limited*, 2018 ONCA 313, <<http://canlii.ca/t/hr7bp>> ["Schnarr"]