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**Indemnities and
Limitations of Liability
in Contracts**

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Overview

- Among the most common commercial clauses
- Underwent a sea-change in 2010 with the Supreme Court's *Tercon* decision
- Refresh / revisit the jurisprudence
- How predictable are commercial outcomes now that the new regime is firmly established?
- What effect do the 'old' rules of interpretation have today?

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Overview

- Limitation and waiver of liability clauses
- Indemnity clauses
- Sample clauses
- Skill-testing game!



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Limitation of Liability / Waiver / Exclusion of Liability Clauses

- Collectively referred to as “exclusion clauses”
- *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69
 - Eliminated the concept of fundamental breach
 - Introduced new test for enforceability of exclusion clauses
- Quick review of the test

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Tercon Test

- As a matter of ordinary contractual interpretation, does the exclusion clause apply to the circumstances established in the evidence?
- If so, was the exclusion clause unconscionable at the time the contract was made?
 - This branch deals with contract formation, not breach
- If not, should the Court decline to enforce the clause because of an overriding policy concern?
 - That policy concern is weighed against the very strong public interest in the enforceability of contracts

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Tercon Test

- Looking back, how have these three branches of the test been applied?
- What kinds of ‘unconscionability’ or ‘public policy’ arguments have actually been effective?
- Has the old presumption against reading in an exclusion for negligence, or gross negligence, survived in any form?

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***Tercon* Test: Unconscionable Exclusion Clauses**



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Tercon Test: Unconscionable Exclusion Clauses



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Tercon Test: Unconscionable Exclusion Clauses



I am aware that participating in Eco Activities involves many risks, dangers and hazards including but not limited to: hiking on rough and uneven terrain; changing weather conditions which may cause the tree top trails, suspension bridges, canopy walkways, and Skylines to be slippery; equipment failure; failure to properly adjust or fasten equipment; improper use of equipment; falls; slips and falls while snowshoeing; over-exertion; fear of heights; failure to remain within designated areas; impact or collision with trees, other participants or guides; negligence of other participants or guides; and NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING IN ECO ACTIVITIES. I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.

[Underline added]

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Tercon Test: Unconscionable Exclusion Clauses



RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of the RELEASEES agreeing to my participation in Eco Activities and permitting my use of their equipment, parking and other facilities, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:

1. **TO WAIVE ANY AND ALL CLAIMS** that I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Eco Activities, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE **OCCUPIERS LIABILITY ACT, R.S.B.C. 1996, C. 337** ON THE PART OF THE RELEASEES, AND FURTHER INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING IN THE ECO ACTIVITIES REFERRED TO ABOVE;

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***Tercon* Test: Exclusion Clauses Contrary to Public Policy**

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***Tercon* Test: Exclusion Clauses Contrary to Public Policy**



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***Tercon* Test: Exclusion Clauses Contrary to Public Policy**

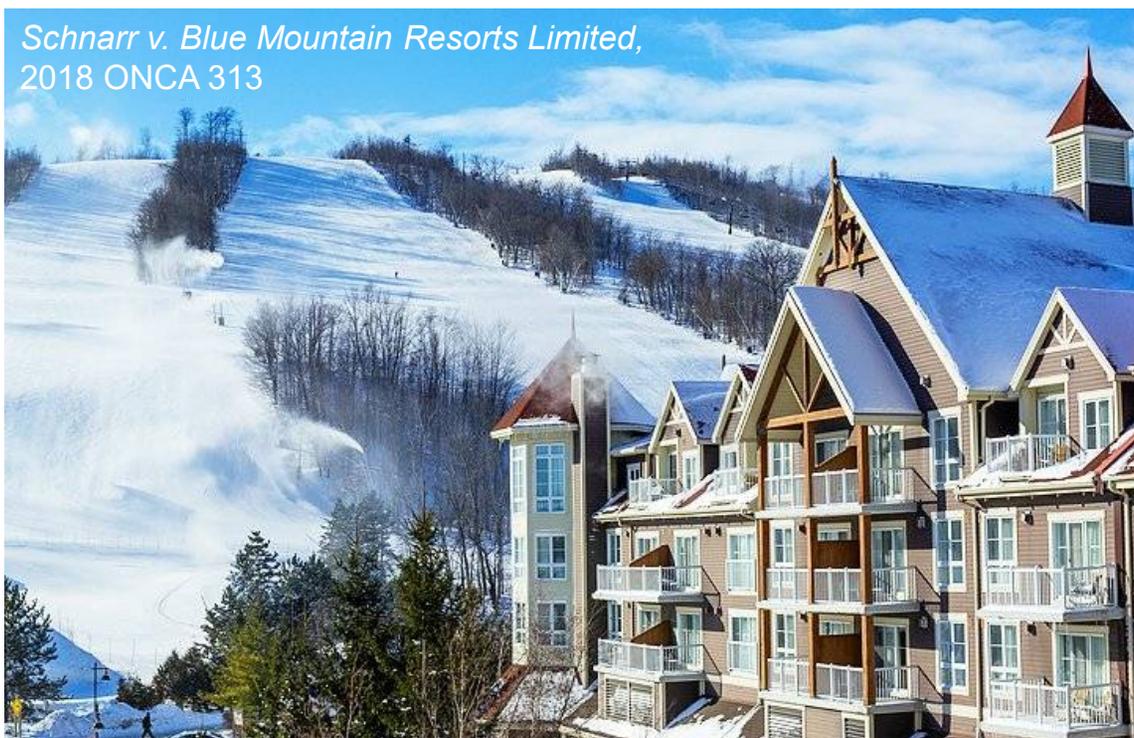


Niedermeyer v. Charlton, 2014 BCCA 165

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Tercon Test: Exclusion Clauses Contrary to Public Policy



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Contracting Out of Negligence

- *Tercon* test seems fairly straightforward – that's the whole idea
- Additional rules of interpretation used to apply when assessing the enforceability of clauses excluding liability for a party's own negligence
 - *Canada Steamship Lines v. R.*, [1952] AC 152



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Contracting Out of Negligence

- Express language will be given effect
 - Clear language required, but not necessarily a need for “magic words” like “negligence”
- In the absence of express language, is the language broad enough to exclude liability for negligence?
- If it is broad enough, is there another, “less fanciful” cause of action more likely to have been the intended exclusion?

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Contracting Out of Negligence

- Federal Court of Appeal found that *Tercon* is the law and the Canada Steamship is just an interpretive guide
 - *Pêcheries Guy Laflamme Inc. v. Capitaines propriétaires de la Gaspésie (A.C.P.G) Inc.*, 2015 FCA 78
- Exclusion clauses predating 2010 that rely on an presumption that negligence is still actionable may have to be more explicitly worded



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Contracting Out of “Gross Negligence”

- Jurisprudential language includes
 - “Very great negligence”
 - “Conscious wrongdoing”
 - “Very marked departure”
 - “Conscious indifference”
- “Character and duration of the neglect... including the comparative ease or difficulty of discharging it” will be weighed in assessing whether negligence is “gross”



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Contracting Out of “Gross Negligence”

- The law pertaining to the exclusion of negligence would have thought to have been fading in relevance but it does carry on as an interpretive aid
- AND – one more area where the distinction may be alive and well



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Indemnity Clauses

- Another very common, well-understood mainstay of commercial contracts
- Clauses making a party liable for damages for which it would normally not be liable
- A party assumes the other party's liability for its own, or third-party acts



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Indemnity Clauses

- An indemnity clause traditionally could not confer a right of indemnity for one's own negligence absent explicit language
 - *Consumer's Gas Co. v. Peterborough (City)*, [1981] 2 S.C.R. 613.
- Has that been weakened now that Canada Steamship has been subordinated to *Tercon*?



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Indemnity Clauses



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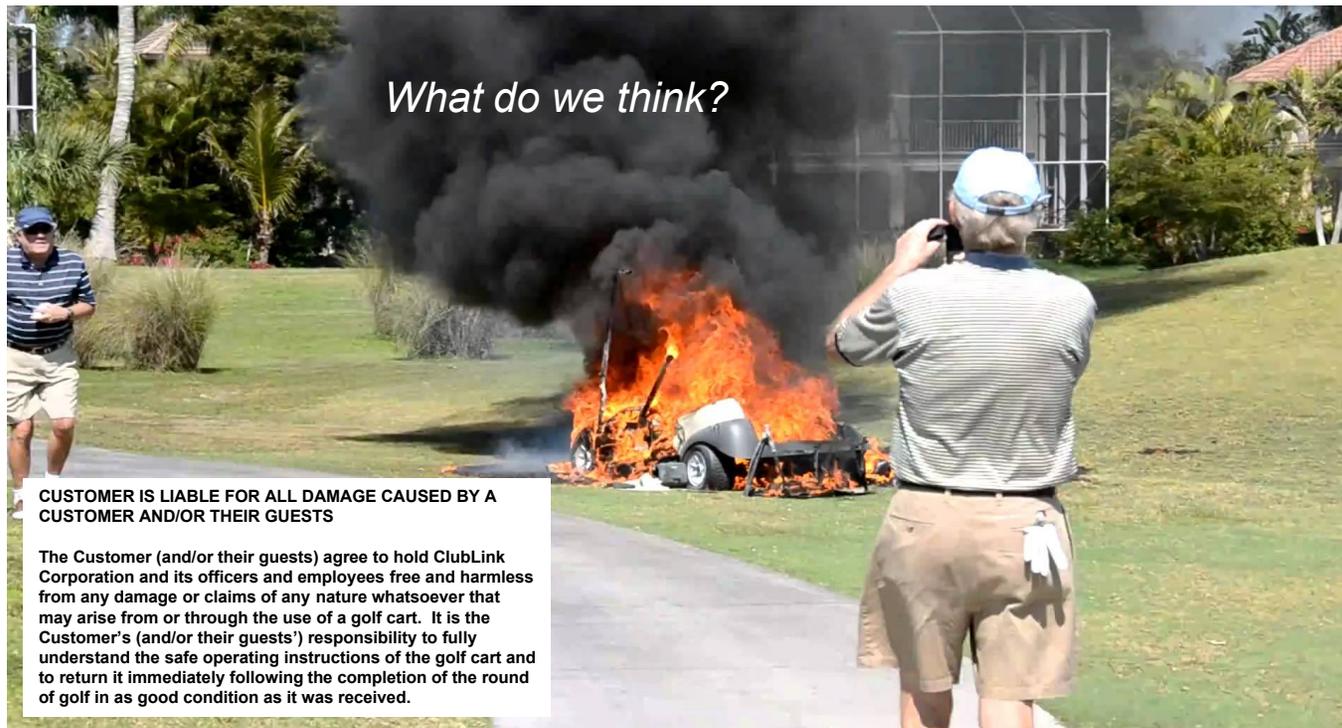
Indemnity Clauses



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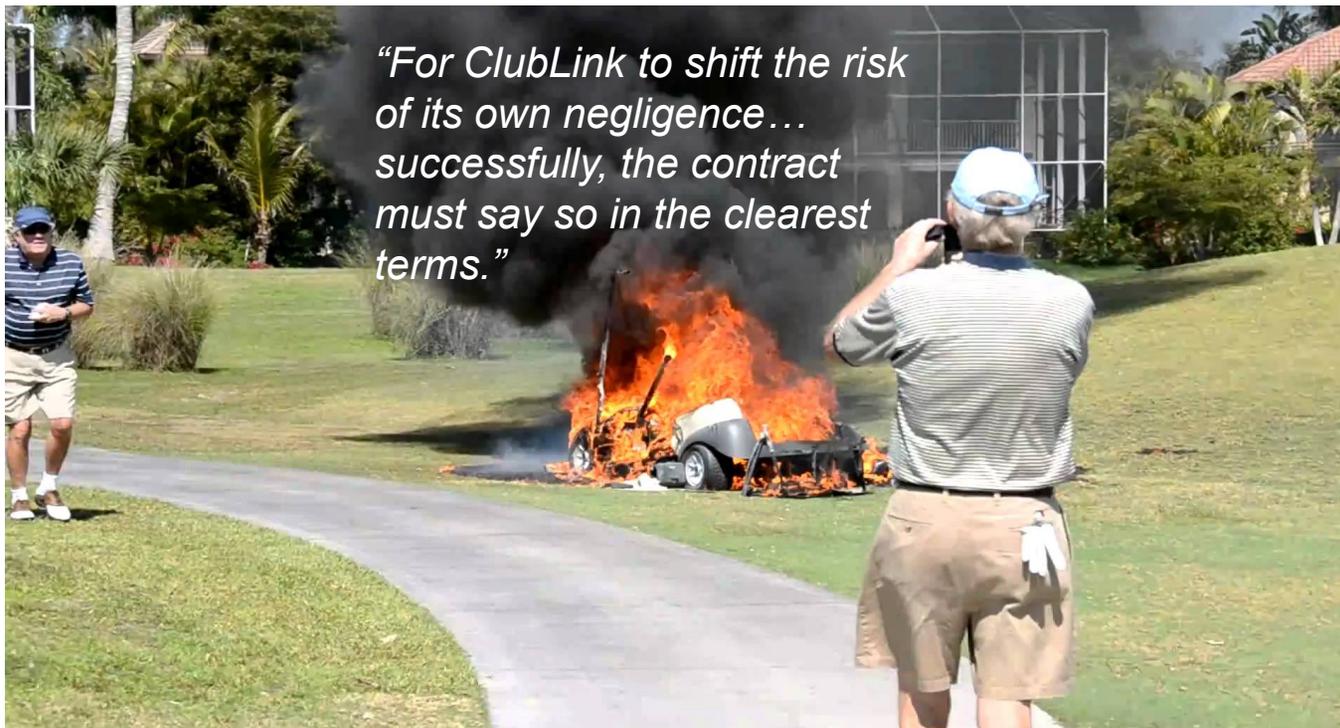
Indemnity Clauses



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Indemnity Clauses



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Sample Clauses

I understand that the activities, programs and classes offered by Confederation College, Police Foundations may involve strenuous physical exertion. I acknowledge that injuries or other complications associated with exercise or other physical activities may result from my participation. I will consult my physician if I am concerned about any of the risks to my health or well-being that may result from my participation in activities while in the Police Foundations. I acknowledge that it is my responsibility to follow instructions for any activity or use of equipment, and to seek help from staff if I have any questions.

In exchange for being presented the opportunity to participate in the activities, programs and classes offered by the Police Foundation I am aware of and willing to assume the risks associated with these activities. I knowingly and voluntarily agree to waive and release Confederation College and any and all of its trustees, officers, employees and agents from any and all claims of liability or demands for compensation as a result of injuries I may suffer or damages or losses I may incur as a result of my participation in any of the activities offered by the Police Foundations.

- Student in a police college program ran into a basketball pole during physical training
- Alleged it should not have been left in a position to hang down over the track at head height



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Sample Clauses

*I understand that the activities, programs and classes offered by Confederation College, Police Foundations may involve **strenuous physical exertion**. I acknowledge that **injuries or other complications associated with exercise or other physical activities** may result from my participation. **I will consult my physician if I am concerned** about any of the risks to my health or well-being that may result from my participation in activities while in the Police Foundations. I acknowledge that it is my responsibility to follow instructions for any activity or use of equipment, and to seek help from staff if I have any questions.*

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Anderson v. Confederation College, 2017 ONSC 5791



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Sample Clauses

[M.Y. Sundae Inc., Wesley Richards and Irene Richards] release DQC and its affiliates from any and all claims, demands, damages, actions, or causes of action, at law or equity, known or unknown, contingent or noncontingent, accrued or unaccrued, of whatever kind or nature, including, but not limited to, federal and provincial and antitrust actions or class actions, which it may now or hereafter have or claim to have against DQC or its affiliates; provided that DQC shall not be deemed in any way released from any obligations arising by virtue of this Cancellation.

- After multiple default notices, franchisor and franchisee execute “mutual cancellation and release” contracts
- After termination, franchisor sues for various damages and franchisee seeks to counterclaim for damages arising from termination

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- Imbalance in bargaining power between franchisor and franchisee not enough of a public policy issue to vitiate the release/exclusion of liability
- Franchisor successful at summary trial



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Dairy Queen Canada, Inc. v. M.Y. Sundae Inc., 2017 BCSC 358



Sample Clauses

10.3. Yangarra shall at all times assume all of the risk of and be solely liable for:

(a) any loss, damage to or destruction of [. . .]

(ii) Yangarra's equipment; and

(iii) the hole, reservoir or any underground formation . . .

regardless of the negligence or other fault of Precision or howsoever arising, and Yangarra shall defend and indemnify Precision from and against any and all actions, claims, losses, costs, damages and expenses resulting therefrom and specifically releases Precision from any claims Yangarra may otherwise make in regard thereto.

10.4 Yangarra shall at all times during a drilling program assume all of the risk of and be solely liable for the cost of repairing and re-drilling a lost or damaged hole;

[. . .]

10.13 For greater clarity, Precision and Yangarra acknowledge and agree that:

(a) the purpose of this Article X [ten] is to allocate contractually between Precision and Yangarra certain of the risks, responsibilities, and potential losses or liabilities associated with the operations and activities involved in drilling a well under a drilling program; and,

(b) such allocation shall prevail in the place and stead of any other allocation of risks, responsibilities, or potential losses or liabilities that might be made on the basis of the negligence or other fault of either party or howsoever arising or any other theory of legal liability and notwithstanding the breach or alleged breach by either party or any provision of the drilling program not included in this Article X [ten].

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- “Knock-for-knock” no-fault contract. Defendant’s employee improperly mixed drilling mud and certified it was in working order when he knew or ought to have known it was not



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- Drill bit became stuck, causing \$300,000 in equipment damage and the abandonment of the oil well (\$2 million to drill a new one)

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- Plaintiff Yangarra sued
- Precision was granted summary judgment on this point
- Appeal arguing 'public policy' was released two weeks ago

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- Genuine issue requiring a trial as to whether fraudulent conduct *after* the exclusion clause is agreed to can give rise to a 'public policy' exception

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**Precision Drilling Canada Limited Partnership v.
Yangarra Resources Ltd., 2017 ABCA 378**



Conclusion

- *Tercon* has strengthened exclusion and indemnity clauses significantly
- More predictability now that “fundamental breach” has been put to rest and the questions are only applicability, unconscionability at the time of contract formation and public policy
- But the applicability of these clauses to a set of facts still seem to involve a *Canada Steamship* analysis inclined to read out negligence absent express language
 - Even when the plain meaning of the words ought to satisfy *Tercon*
- Yet to see what ‘level’ of misconduct *after* the contract is formed is required to have an effect on enforceability from a ‘public policy’ standpoint – intentional, proven fraud is the threshold so far

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Questions?

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