

Court File No.: C63305

COURT OF APPEAL FOR ONTARIO

BETWEEN:

DAVID SCHNARR

Plaintiff/Respondent

- and -

BLUE MOUNTAIN RESORTS

Defendant/Appellant

Court File No.: C63351

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ELIZABETH WOODHOUSE

Plaintiff/Respondent

- and -

**SNOW VALLEY RESORTS (1987) LTD, AKA SKI SNOW VALLEY (BARRIE),
SNOW VALLEY BARRIE, SNOW VALLEY SKI RESORT, SNOW VALLEY
and 717350 ONTARIO LTD.**

Defendants/Appellants

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January 8, 2018

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Court of Appeal File No. C63305

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Court of Appeal File No. C63351

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PART I – NATURE OF THE APPEAL

1. These appeals focus on the relationship between the provisions of the *Occupiers' Liability Act LA*, R.S.O. 1990, c. O.2 (the "OLA") and the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A (the "CPA"). In particular, the paramount issue on these appeals is whether or not sections 7(1), 9(1), 9(3) of the CPA will serve to vitiate a waiver, in full or in part, that is otherwise permitted pursuant to sections 3(3) and 5(3) of the OLA.

PART II – THE FACTS

2. The Intervenor, Canadian Defence Lawyers ("CDL"), agrees with the facts in the Appellant's Statement of Facts and the Respondent's Statement of Facts in both cases to the extent that these Statements of Fact are the same.

PART III – LAW AND ARGUMENT

A. Standard of Review

3. CDL agrees with the position of the appellants and respondents to these appeals that the standard of care in these appeals is that of correctness.

B. Statutory Framework

i. The Occupiers' Liability Act and Exclusionary Clauses

4. For over 25 years, the *OLA* has been the governing statute that regulates the duty of care owed by an occupier of a premises to individuals entering onto their premises.

5. The *OLA* first came into force in 1989. From its inception, section 3(3) of the *OLA* permitted occupiers to contractually modify or exclude the duty that is otherwise owed to individuals entering onto the occupier's premises. Section 5(3) of the *OLA*, allows an occupier to contractually modify or exclude the duty owed by the occupier pursuant to the statute, as long as reasonable steps are taken to bring the modification or exclusion of the duty to the attention of the person to whom the duty is owed.

6. Case law has developed over time to interpret sections 3 and 5 of the *OLA*. These developments are best illustrated in the seminal case *Isildar v Kanata Diving Supply* ("*Isildar*"). *Isildar* provides a predictable and effective framework for actions involving exclusions or limitations of liability in waivers used in the sports and recreation context to ensure that the rights of both plaintiffs and defendants are balanced and proportional. The *Isildar* test outlined below provides a clear, fair, and equitable "gatekeeper" function that balances the ability of an occupier to contract out of the duty owed pursuant to the *OLA*, thereby allowing these occupiers to host a range of recreational and potentially risky activities on their properties without incurring unwarranted liability. This also serves to limit the prospect of abuse by ensuring that these same agreements are not unconscionable.

7. To determine the validity of waivers, the Ontario Superior Court of Justice developed the three-stage *Isildar* test:

1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signator?

2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
3. Whether the waiver should not be enforced because it is unconscionable?

***Isildar v Kanata Diving Supply*, [2008] OJ No 2406, 168 ACWS (3d) 444, at para 634.**

8. The overarching result of the *Isildar* test (and the case law applying the *Isildar* test) is that it provides an element of certainty to actions involving agreements that serve to exclude or limit liability, while also ensuring that these agreements are not abused by occupiers.

9. Since the inception of the *OLA*, case law interpreting the Act has done an admirable job of providing clear guidance to prospective litigants as to whether or not their potential action has a possibility of success prior to the delivery of pleadings.

10. The Supreme Court of Canada has ruled on numerous occasions that it would hold parties to the terms of their agreement to exclude liability, provided that the terms of the agreement are not deemed to be “unconscionable.”

***Syncrude Canada Ltd v Hunter Engineering Co*, [1989] 1 SCR 426, 57 DLR (4th) 321**

***Tercon Contractors Ltd v British Columbia (Minister of Transportation & Highways)*, [2010] 1 SCR 69, 1 SCR 69 (“*Tercon*”)**

11. The Supreme Court of Canada has also held that waivers should be upheld in circumstances involving inherently risky activities. The Court made it clear that there is no power imbalance where a person wishes to engage in an inherently risky activity that is controlled or operated by another.

***Dyck v Manitoba Snowmobile Association*, [1985] 1 SCR 589, 31 ACWS (2d) 185**

ii. The Consumer Protection Act

12. The *CPA* was enacted in its present form in 2002 and was designed to protect consumers from various abuses in the 21st century. As indicated by the debates in the Legislature at the time the *CPA* was enacted, one of the purposes for enacting the *CPA* was to provide stability to the marketplace for both consumers and businesses.

Ontario, Legislative Assembly, Official Review of Debates (Hansard), 37th Parl, 3rd Sess, No 49B (October 2002) at 2535 (Tim Hudak/Frank Klees)

13. Consistent with earlier iterations of similar statutes, the goal of the *CPA* was to restore the balance in the contractual relationship between suppliers and consumers while eliminating unfair and misleading practices.

Ramdath v George Brown College of Applied Arts and Technology, 2012 ONSC 6173, 113 OR (3d) 1531, at para 36; Aff'd Ramdath v George Brown College of Applied Arts and Technology, 2013 ONCA 468, 307 OAC 196

14. Section 7(1) of the *CPA* provides that the substantive or procedural rights conferred upon consumers via the *CPA* will apply despite any agreement or waiver to the contrary.

15. One such right conferred upon consumers is contained in section 9(1), which states suppliers are deemed to warrant that a service supplied pursuant to a consumer agreement will be of a “reasonably acceptable quality.”

16. The *CPA* was amended in 2004, two years after its initial inception, to include section 93(2) which states:

Court may order consumer bound

93 (2) ...a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would

be inequitable in the circumstances for the consumer not to be bound. 2004, c. 19, s. 7 (36). [Emphasis added]

17. The Explanatory Note accompanying the amendment stated the rationale for adding section 93(2):

Section 93 of the Act is amended to permit a court to make an exception to the rule that a consumer agreement that is not made in accordance with the Act or the regulations is not binding on the consumer, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

Explanatory Note, Ministry of Consumer Business Services Statute Law Amendment Act, 2004, Ontario, Legislative Assembly, 38th Parl, 1st Sess, Bill 70

18. The Explanatory Note indicates that the Court was provided with broad discretionary powers to determine if a consumer should be bound by reason of equity.

19. Accordingly, the Ontario Legislature added section 93(2) to allow Courts to uphold consumer agreements that may serve to limit or exclude rights that are otherwise made available to consumers. Readings section 93(2) broadly ensures that the *CPA* continues to balance the interests of consumers with the interests of suppliers by promoting a strong and stable business environment in Ontario. CDL respectfully submits that this Honourable Court should continue to encourage the long-term goals of the *CPA*: promoting fairness and balance for both consumers *and* suppliers in Ontario by applying section 93(2) broadly to uphold the waivers disputed in these appeals in their entirety.

20. The wording of section 93(2) is broad in its application and can serve to limit the substantive and procedural rights in section 9(1) of the Act. In determining whether it is appropriate to apply section 93(2) and limit the rights afforded to a consumer under the *CPA*, the Court must determine whether it would be inequitable in the circumstances for the consumer not

to be bound. In doing so, the court must take into account the nature of the non-compliance in regard to the consumer agreement. The more substantial the deviation from the legislative scheme, the more likely it will be that the court will find it would not be inequitable for the consumer not to be bound by the consumer agreement.

***Weller v Reliance Home Comfort Limited Partnership*, 2012 ONCA 360, 110 OR (3d)
743**

21. In *Woodhouse*, Justice McCarthy recognized the role that section 93(2) would play in the analysis, but declined to rule on the application of section 93(2), citing a lack of necessary evidence. It is clear in this matter that both the “consumer” and “supplier” acted in good faith when entering into the subject “consumer agreement,” which contained a validly drafted exclusionary clause. The ability of a consumer to then take advantage of a “statutory loophole” to avoid the operative provisions of the agreement clearly leads to an inequitable result for the supplier, who has acted in good faith throughout the transaction. In this instance, avoiding the consumer agreement with the supplier leads to an inequitable result and should trigger the saving provision outlined in section 93(2) of the *CPA*.

22. In *Loychuk v Cougar Mountain Adventures Ltd*, the British Columbia Court of Appeal determined that waivers formulated in the context of limiting an occupier’s liability are not inherently unconscionable. The Court held that waivers should only be struck down if the content of the waiver or the actions of the drafting party are “so reprehensible” that it would be contrary to the public interest to allow the waiver to be upheld. In arriving at this decision, the Court cited law from across Canada, including the decision of the Supreme Court of Canada in *Tercon*. Furthermore, Courts have continuously upheld waivers that limit the rights of individuals who choose to engage in inherently risky activities.

Loychuk v Cougar Mountain Adventures Ltd, 2012 BCCA 122, 212 ACWS (3d) 730

iii. Statutory Interpretation

23. CDL agrees with the appellants in *Schnarr* that when provisions of statutes are brought into conflict, the provisions of the more specific statute, in this instance the *OLA*, must prevail over those of the more general statute (the *CPA*). For this reason, CDL respectfully submits that, where there are situations of conflict between the *OLA* and the *CPA*, then the provisions of the *OLA* ought to apply, owing to its status as the more specific statute.

Vidéotron Ltée v Industries Microlec Produits Électronique Inc, [1992] 2 SCR 1065, 96 DLR (4th) 376 at p 14

R v Greenwood, [1992] OJ No 271, 56 OAC 321 at paras 16 to 17

C. Impact on the Judicial System and Civil Actions in Ontario

24. CDL respectfully submits that the *OLA* has been effectively dealing with cases similar to those that are the subject matter of these appeals for over 25 years. In addition, an extensive body of case law has developed to provide litigants with a predictable and consistent framework in which these claims are adjudicated.

25. If the *CPA* is permitted to intrude into the adjudication of claims involving limitations or exclusions of liability in the sports and recreation field, this will serve to dismantle the carefully drafted jurisprudence in this area and will have the effect of nullifying the effectiveness of waivers. Without the benefit of the jurisprudence currently in place, it will be difficult for defence lawyers to properly advise their clients in circumstances where waivers are involved.

26. The net effect of such a drastic change to the law governing waivers would serve to fundamentally alter risk management practices for defendants in Ontario and potentially across Canada.

27. In addition, the *OLA* currently serves to keep frivolous actions out of an already overburdened judicial system. Removing this “gatekeeper” function will lead to further delay and may impact current civil actions already pending in Ontario.

28. Given the foregoing, CDL respectfully submits that this Honourable Court should find that the *CPA* ought not to apply to suppliers who make use of waivers when providing sports and recreational services that are inherently risky. The sole statute that should govern these actions has always been, and should remain, the *OLA*. By applying the *OLA* alone, this Honourable Court will maintain a system that has proven to be consistent, efficient, and predictable, and will be acting in the interests of justice and serving to promote improved access to justice in Ontario.

29. CDL respectfully submits that this Honourable Court develop an analysis similar to that developed by the Ontario Superior Court of Justice in *Isildar* and apply this analysis to section 93(2) of the *CPA*. This will guard against plaintiffs “picking and choosing” the statute which will permit them the best result and will also prevent inconsistent results depending on the statute that a consumer pleads when they commence their action.

30. While “reading down” aspects of a waiver may appear to be an equitable approach at first blush, in reality, this will only serve to further complicate the adjudication of these matters. Accordingly, if this Honourable Court chooses to “read down” aspects of the waiver, then CDL requests that this Court provide clear and unequivocal guidance to the defence bar as to what is meant by providing a service that is of a “reasonably acceptable quality” in the context of

inherently risky activities. Without providing guidance on this point, there will be uncertainty regarding the effectiveness of waivers in the sports and recreation field as the unorthodox application of sections 7(1) and 9(1) of the CPA have not been previously considered by the Court in the context of inherently risky activities.

PART IV - ORDER REQUESTED

31. CDL respectfully requests that the orders of Justice Tzimas dated January 6, 2017 at Brampton, Ontario and of Justice McCarthy dated January 13, 2017 at Barrie, Ontario be set aside or varied as follows:

- a) A determination that sections 7(1) and 9(1) of the *CPA* do not apply to the waivers in these appeals.
- b) A determination that the provisions of the *OLA* solely govern the waivers in these appeals.
- c) In the alternative, a determination that section 93(2) of the *CPA* should serve to bind the parties to the waivers in these appeals despite any finding that the waivers violate the provisions of the *CPA*.
- d) In the alternative, that this Honourable Court provide guidance on what constitutes services of a “reasonably acceptable quality.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON January 8, 2018



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Dyck v Manitoba Snowmobile Association*, [1985] 1 SCR 589, 31 ACWS (2d) 185.
2. *Explanatory Note, Ministry of Consumer Business Services Statute Law Amendment Act, 2004, Ontario, Legislative Assembly*, 38th Parl, 1st Sess, Bill 70.
3. *Isildar v Kanata Diving Supply*, [2008] OJ No 2406, 168 ACWS (3d) 444 (Ont Sup Ct).
4. *Jamieson v Whistler Mountain Resort Limited Partnership*, 2017 BCSC 1001, 280 ACWS (3d) 295.
5. *Loychuk v Cougar Mountain Adventures Ltd.* 2012 BCCA 122, 212 ACWS (3d) 730.
6. *Ontario, Legislative Assembly, Official Review of Debates (Hansard)*, 37th Parl, 3rd Sess, No 49B (October 2002) at 2535 (Tim Hudak/Frank Klees).
7. *Ramdath v George Brown College of Applied Arts and Technology*, 2012 ONSC 6173, 113 OR (3d) 531; affirmed in *Ramdath v George Brown College of Applied Arts and Technology*, 2013 ONCA 468, 307 OAC 196.
8. *R v Greenwood*, [1992] 7 OR (3d) 1, 56 OAC 321 (Ont CA).
9. *Syncrude Canada Ltd v Hunter Engineering Co.*, [1989] 1 SCR 426, 57 DLR (4th) 321.
10. *Tercon v Contractors Ltd v British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, 1 SCR 69.
11. *Vidéotron Ltée v Industries Microlec Produits Électronique Inc*, [1992] 2 SCR 1065, 96 DLR (4th) 376; see also *Quebec (Attorney General) v Carrieres Ste Therese Ltee*, [1985] 1 SCR 831, 20 DLR (4th) 602; *Re Canada Labour Code*, [1992] 2 SCR 50, 91 DLR (4th) 449.
12. *Weller v Reliance Home Comfort Limited Partnership*, 2012 ONCA 360, 110 OR (3d) 743.
13. *Woodhouse v Snow Valley Resorts (1987) Ltd*, 2017 ONSC 222, 277 ACWS (3d) 744.

**SCHEDULE "B"
RELEVANT STATUTES**

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A

Sections 7(1), 9(1) and 93

NO WAIVER OF SUBSTANTIVE AND PROCEDURAL RIGHTS

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

QUALITY OF SERVICES

9 (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.

CONSUMER AGREEMENTS NOT BINDING

93 (1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.

COURT MAY ORDER CONSUMER BOUND

(2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

Occupiers' Liability Act, R.S.O. 1990, c. O.2

Sections 3 and 5

OCCUPIER'S DUTY

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.

Idem

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.