**McCAGUE BORLACK LLP**

# Waiver of Liability vs. Public Policy – Which Takes Precedence?

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## INTRODUCTION

A waiver of liability is one of the most effective means that an occupier can employ to protect itself from liability arising from dangerous activities on its property. If properly implemented, a waiver can completely bar a claim brought by an injured party as against an occupier.[1]

Firstly, this paper will provide an overview of the law as it pertains to waivers. This paper will discuss the *Occupiers' Liability Act*[2] and the pertinent and relevant cases that set out the law surrounding waivers. This paper will investigate the test for determining the applicability and effectiveness of waivers, as decided in *Isildar v Rideau Diving Supply*[3]. Additionally, this paper will discuss the case of *Loychuk v Cougar Mountain Adventures Ltd.*[4] and the implications of the findings of the British Columbia Court of Appeal (the "BCCA") regarding the implementation of waivers.

Secondly, following the decision in *Cougar Mountain*, the BCCA assessed the application of liability waivers to injuries arising out of a motor vehicle accident in the case of *Niedermeyer v Charlton*[5]. In particular, the BCCA assessed the conflict between a waiver and public policy. This paper compares and contrasts the majority and dissenting decisions in *Niedermeyer* and the ability of public policy to negate the freedom to contract otherwise enforceable waivers.

Overall, this paper seeks to show that while waiver contracts can effectively protect an occupier from liability, public policy interests can negate the validity of a contract in certain circumstances.

## THE APPLICATION OF WAIVERS IN THE CONTEXT OF OCCUPIERS

### Statutory Authority for Waivers

The *Occupiers' Liability Act*[6] (the "OLA") provides statutory authority for occupiers to rely on waivers. After providing for the use of waivers, the OLA is largely silent on the steps required for effective implementation of same.

Case law has been instrumental in providing for the steps required to effectively implement a waiver. This is of particular importance to ensure protection from potential liability arising from activities that occur on an occupier's premises. As noted above, the steps were first spelled out

[1] *Crocker v. Sundance Northwest Resorts Ltd.*, [1998] 1 S.C.R. 1186 [*Crocker*].
[2] *Occupiers' Liability Act*, R.S.O. 1990, c. 0.2.
[3] (2008), 168 A.C.W.S. (3d) 444, 2008 CarswellOnt 3580 (W.L. Can.) (Ont. S.C.J.), [*Isildar*].
[4] 2011 B.C.S.C. 193, 81 B.L.R. (4th) 320 [*Cougar Mountain*].
[5] 2014 B.C.C.A. 165, 2014 CarswellBC 1136 [*Niedermeyer*].
[6] *Supra* note 2.

in *Isildar* and then affirmed in *Cougar Mountain,* first at the BCCA and then at the Supreme Court of Canada (the "SCC"). Those cases are discussed in more detail below.

## The *Isildar* Test[7]

In *Isildar*, the court enunciated a three stage analysis which must be applied in order to determine whether a signed waiver of liability is valid. The analysis requires a consideration of the following factors:

1. Is the release valid in the sense that the plaintiff knew what she/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 signatory?

2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant? That is, does the agreement contemplate the type of negligence that occurred and is it reasonable and clear?

3. Whether the waiver should not be enforced because it is unconscionable.

## The Effect of *Cougar Mountain*

In 2011, the British Columbia Court of Appeal released a decision which has significant implications for the law regarding the enforceability of liability waivers.

In that case, the Plaintiff, Ms. Loychuk, sustained injuries while partaking in a zip-line activity at Cougar Mountain in Whistler, British Columbia. The tour involved strapping a person into a harness, which would then be sent down a line, reaching speeds of up to 100 km an hour over a distance, on some lines, greater than 1,500 feet.[8]

Upon arrival at Cougar Mountain, Ms. Loychuk was provided with a release to fill out and sign. In both her affidavit and upon cross-examination, she stated that she understood that the release would prevent her from suing the zip-line company for certain mishaps, such as if she tripped and broke her leg. However, she claimed that she did not realize that the release gave Cougar Mountain immunity for injuries caused by the mistakes of their own employees.

In the body of the release, it was specifically stated, in either bold or capitalized letters, that anyone who signed the document thereby agreed to waive any and all claims with respect to any cause whatsoever, including negligence or a breach of any duty of care owed under the *Occupiers' Liability Act* in British Columbia.[9]

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[7] For further information regarding the application of these three factors, please see a paper prepared by McCague Borlack LLP titled, "Risky Business: Managing the Potential Liability of High Risk Sports Facilities" prepared by Jim Tomlinson. That paper can be found at the following URL: <http://mccagueborlack.com/uploads/articles/135/high-risk-sports-facilities.pdf?1363787956>.

[8] Supra note 4 at 3.

[9] *Occupiers' Liability Act*, R.S.B.C. 1997, c. 337.

Ms. Loychuk's group merged with another group mid-way through the tour. Ms. Loychuk was sent down a line but stopped before reaching the lower platform. Ms. Westgeest, who was unable to see Ms. Loychuk suspended on the line, was sent down by a guide. With no ability to stop herself, Ms. Westgeest collided with Ms. Loychuk, causing both women to sustain personal injuries. It was determined that miscommunication between the guides was the sole cause of the accident.[10]

At the trial level, the plaintiffs, Deanna Loychuk and Danielle Westgeest, sought damages for personal injuries sustained in a zip-lining accident. At the time of the accident, the plaintiffs were taking part in a tour offered by the defendant, Cougar Mountain Adventures Ltd. ("Cougar Mountain").

The BCCA had to consider an appeal brought by the plaintiffs after the trial judge dismissed their claims against Cougar Mountain on the basis that the plaintiffs had executed waivers of liability prior to participating in the zip-lining tour. The Court of Appeal ultimately upheld the trial judge's decision[11] and dismissed the plaintiffs' appeal.[12]

An application for leave to appeal to the Supreme Court of Canada was filed and denied.[13]

In line with the first step of the *Isildar* test, the Court of Appeal in *Cougar Mountain* held that not only were the plaintiffs given enough time to read the contents of the release, but Cougar Mountain took sufficient steps to bring the release to their attention.[14] At the second stage of the *Isildar* analysis, the Court of Appeal accepted that the scope of the release was sufficient. The wording of the Cougar Mountain release, with capitalized type face emphasizing its broad scope, combined with the plaintiffs' experience with similar waivers, seemed to have been sufficient to surpass this hurdle. At the third stage of the *Isildar* analysis, the Court of Appeal considered the issue of unconscionability.

The Court of Appeal upheld the trial judge's decision in dismissing the plaintiffs' claims against Cougar Mountain by rigidly applying the *Isildar* test used by Ontario courts. This is important for entities which operate extreme sporting activities, as the validity of an executed waiver of liability is of utmost importance to protect them from costly and time consuming litigation. The *Cougar Mountain* decision emphasized the importance of drafting releases which are clearly worded to preclude legal action, even in cases of negligence, and ensuring that the release is brought to the attention of the participant. The Court of Appeal reaffirmed that if a waiver is correctly written, presented to a participant, and duly executed by the participant, the courts will not hesitate to firmly enforce the terms of the release

## THE DEFENCE OF PUBLIC POLICY

Following *Cougar Mountain*, the British Columbia Court of Appeal assessed the application of liability waivers to injuries arising out of a motor vehicle accident in the case of *Niedermeyer*. In that case the court had to assess a waiver contract and the application of same when it conflicts with public policy**.**

[10] *Supra* note 4 at 11.
[11] *Loychuk v. Cougar Mountain Adventures Ltd.*, 2011 B.C.S.C. 193, 81 B.L.R. (4th) 320.
[12] *Supra* note 4.
[13] Loychuk v. Cougar Mountain Adventures Ltd.. [Application / Notice of Appeal], 2012 CarswellBC 1726 (WL Can) (S.C.C.).
[14] *Supra* note 4 at 18.

**Facts**

Niedermeyer was an Australian that had been teaching in Singapore for 20 years prior to the accident. She went to British Columbia with some of her students in order to attend an international conference in Victoria. She had never been to British Columbia prior to this trip and was unfamiliar with the provincial car insurance scheme there.

Niedermeyer received a proposal and itinerary for a post-conference tour to Whistler, B.C. that included a zip line tour operated in the valley between Whistler and Blackcomb on October 12, 2008 from an organization called Ziptrek. The itinerary indicated that the participants were required to have their "waiver form completed and ready" for a river trip, but made no mention of that requirement with respect to the zip line activities.

On October 12, 2008, Niedermeyer signed 7 waivers (one for herself and one for each student). Participants had to sign the release as a pre-condition to participating in any of the zip line activities. Ziptrek policy was that if a prospective customer refused to sign a release, that customer was not allowed to participate in any aspect of the activity.

Niedermeyer did not recall any discussion of the mode of transportation to the zip line site. Niedermeyer and her students were taken to a van in a car park and driven up the mountain. The first part of the road was paved and the second part of the road was a decommissioned gravel logging road maintained by Ziptrek. The entrance to the gravel road was restricted by a gate.

Niedermeyer and her students were travelling back from the zip line and returning to Whistler when the bus in which they were travelling went off the road, overturned, and fell down a hill. The accident occurred on the gravel part of the road. Niedermeyer suffered significant injuries in the accident. The respondents, Ziptrek, admitted that the injuries occurred as the result of the negligence of William Charlton, an employee of Ziptrek and the driver of the van. However, the respondents argued that despite their negligence, the claim was defeated by virtue of the release.

**The Release**

The release stated the following under the heading "Definitions":

> "In this Agreement, the term "Adventure Activities" shall include all activities, events or services provided, arranged, organized, conducted, sponsored or authorized by THE OPERATORS and shall include, but are not limited to use of ziplines, suspension bridges; climbing, rappelling; hiking; sightseeing: snow shoeing; travel to and from the tour areas; back country travel; orientation and instructional courses, seminars and sessions; and other such activities, events and services in any way connected with or related to those activities."

The release then stated the following under the heading "Assumption of Risk":

> "**I am aware that Adventure Activities involve many risks, dangers and hazards including but not limited to:** changing weather conditions; falling trees, limbs, and ice; falling from platforms, cables and bridges; shock, stress or other injury to the body; encounters with wildlife including bears and cougars;

equipment malfunction including breakage of cables, tethers, pulleys and harnesses; **collision with trees, vans, snow cats, snowmobiles, or other vehicles,** equipment or structures: collision with other participants or guides; me failure to remain within designated areas; becoming lost or separated from guides or other participants; negligence of other participants or guides: and NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF ADVENTURE ACTIVITIES. I am also aware that these risks, dangers and hazards referred to above exist on terrain that may be uncontrolled, unmarked and not inspected.

**I AM AWARE OF THE RISKS, DANGERS AND HAZARDS ASSOCIATED WITH ADVENTURE ACTIVITIES AND 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."**

## Decision at Summary Trial[15]

At summary trial, the court held that the waiver was a complete defence to the Plaintiff's claim. As a result, the trial judge dismissed the plaintiff's action.[16] In particular, the summary trial judge stated that Niedermeyer was "not entitled to recover damages due to the [respondents'] negligence because she surrendered that right when agreeing to the waiver and release of all claims as a condition of being permitted to use the defendants' zip line facility".

## Appeal to the British Columbia Court of Appeal

The Plaintiff appealed the case to a three person panel at the British Columbia Court of Appeal and raised the following four (4) issues:

a) that the summary trial judge erred in finding that the Release applied to injuries sustained due to the operation of Ziptrek's bus;
b) that the summary trial judge erred in finding that the Release was enforceable even though its contents were not brought to her attention;
c) that the summary trial judge erred in finding that the Release was not unconscionable; and,
d) that the summary trial judge erred in finding that the Release was not contrary to public policy.

The BCCA found that the summary trial judge's decision on the first three grounds of appeal were sound. They found that:

[15]A summary trial is a means for dispute resolution allowed in British Columbia by Rule 9–7 of the *Court Rules Act*, B.C. Reg. 168/2009 that allows for judges to make decisions on certain issues in chambers without holding a full trial.
[16]*Niedermeyer v. Charlton*, 2012 BCSC 1668.

a) The release did apply to the injuries sustained due to the operation of Ziptrek's bus;
b) The release was enforceable, even though the contents were not brought to her attention; and,
c) The release was not unconscionable.

The appeal was allowed on the final ground. The BCCA held that the release was contrary to public policy, despite the summary trial judge's finding to the contrary. While the majority of the judges allowed the appeal on this ground, Hinkson J.A. dissented. The reasoning of the majority and dissent are compared and contrasted below.

**Appeal ground 4 - The summary trial judge erred in finding that the Release was not contrary to public policy.**

The BCCA addressed a case called *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*[17], and in particular a statement made by Mr. Justice Binnie (as he then was), on dissent (agreed to on this aspect by the majority at para. 62) in which he said:

> If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

This ground of appeal pertains to the above noted statement of Mr. Justice Binnie. In particular, the question is whether the Court should refuse to enforce a valid exclusion clause because of the existence of an overriding public policy.

**Dissent – Hinkson J.A.**

In his dissent, Hinkson J.A. provided history for the concept of "public policy". He indicated that the foundations of the modern doctrine were not laid until the eighteenth century. He referenced to a case called *Richardson v. Mellish*[18] in which the plaintiff contracted with the defendant to have the Plaintiff resign command of a ship to the Defendant's nephew, on the condition that if the nephew died, the Plaintiff would regain command. The nephew died and the Defendant refused to reappoint the Plaintiff because the by-laws of the East India Company prohibited pecuniary sales of an office and an act of Parliament prohibited the sale of public offices. Burrough J. famously compared public policy to an unruly horse in saying that:

> If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; — it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.

[17] 2010 S.C.C. 4 (S.C.C.) at paras. 121-123 [*Tercon*].
[18] (1824), 130 E.R. 294 (Eng. C.P.), at 303 [*Richardson*].

While the decision of the court did not turn on the issue of public policy, note that Burrough J. concluded that command of the ship was not a public office and that the by-law was only concerned with pecuniary sales. Therefore, the court found for the Plaintiff.

Hinkson J.A. further referenced *Printing & Numerical Registering Co. v. Sampson*[19], a case in which the plaintiff purchased a patent from the defendant and the defendant agreed that any further discoveries of his that produced the same product would also belong to the plaintiff. The defendant argued that a contract by which an inventor agrees to sell what has not yet been invented is contrary to public policy. At p. 465 Jessel M.R. said:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. [Emphasis added.]

Therefore, Hinkson takes the position that the application of the doctrine of public policy has been heavily influenced by precedent. To confine the reach of the doctrine, categories of public policy developed to strike down contracts as contrary to certain fundamental values. The categories are:

- contracts injurious to the state;
- contracts injurious to the justice system;
- contracts involving immorality;
- contracts affecting marriage; and,
- contracts in restraint of trade.

Further, Hinkson J.A. states that the Court cannot refuse to enforce a contract because it is contrary to the nature of a statutory scheme or the interests of the public identified by the legislature in its enactments. He states that a court can only refuse to enforce a contract, or exclusion clause, in one of the following circumstances:

- Statutorily illegal;
- Illegal by common law; or,
- Contrary to one of the categories in the doctrine of public policy (as noted above).

Hinkson J.A. was of the opinion that jurisprudence since *Tercon* indicates that public policy has not broadened. In referencing *Cougar Mountain*[20], he states that:

[19] (1875), L.R. 19 Eq. 462 (Eng. Rolls Ct.) [*Sampson*].
[20] *Supra* note 4 at para. 44.

> "Releases such as the one in issue here have been in use for many years and have consistently been upheld by the courts. If, as the appellants submit, there are policy reasons why such releases should not be enforceable when an activity is totally within the control of an operator, then any change in the law is properly a matter for the Legislature."

Hinkson J.A. goes on to say that contracts may be unenforceable if the creation of that contract is prohibited by legislation. He makes reference to the case of *Proprio Direct Inc. v. Pigeon*[21], a case in which the *Real Estate Brokerage Act*[22] made the language of the compensation clause a mandatory requirement of a contract. This explicitly restricted the freedom of contract.

Hinkson J.A. concludes by taking the position that in *Niedermeyer,* the exclusion clause at issue was not prohibited by statute and therefore, not statutorily illegal. The *Insurance (Vehicle) Act*[23] (the "IVA") does provide for universal compulsory vehicle insurance, but it does not prohibit drivers and passengers from contracting out of the scheme between themselves. He states that the legislature had intended that the primary insurance policy could not be contracted out of then it would have to be expressly stated in the *IVA*.

**Majority – Garson J.A.**

Garson J.A., in referring to *Tercon,* stated that Binnie J. articulated the reason as to why public policy interests are not closed to judicial consideration when courts are asked to determine the enforceability of a contract. In *Tercon,* Binnie J. stated that he agreed with an assessment by Professor Waddams on the following statement:

> "[I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]
>
> While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief against enforcement. As Duff C.J. observed:
>
> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Re Millar Estate*[24])"

Garson J.A. indicates that the Court rejected the notion that the heads of public policy were closed to all but those well recognized in the jurisprudence: contracts in restraint of trade,

[21] 2008 S.C.C. 32 (S.C.C.) [*Pigeon*].
[22] R.S.Q. c. C-73.1.
[23] R.S.B.C. 1996, c. 231.
[24] [1938] S.C.R. 1, at p. 4 [*Re Millar*].

injurious to the justice system, injurious to the state, affecting marriage or immoral contacts.[25] Regardless, Garson J.A. notes that Binnie J. endorsed significant judicial restraint when invoking public policy as justification for interfering with a contract freely entered into by competent adults. In particular, Binnie J. said, "Freedom of contract will often, but not always, trump other societal values".[26]

Garson J.A. further indicates that due to the importance of "certainty and stability of contractual relations", Binnie J. recognized that the court would only use its residual power to decline to enforce a contract where harm to the public is "substantially incontestable".[27]

Garson J.A. notes that *Tercon* provides for a high threshold that a party must meet in order to defeat an otherwise valid exclusionary clause. However, Binnie J. clarified that the conduct resulting in a breach of contract "need not rise to the level of criminality or fraud to justify a finding of abuse".[28]

Garson J.A. makes reference to *Loychuk* in his assessment. In reference to that case, he indicates that the BCCA has focused on the public policy interest in disavowing the knowing or reckless misconduct of a party who endangers the public and then uses a limitation of liability clause as a shield. He further notes that nothing in *Tercon* limits the consideration of public policy to the conduct of the party relying on the exclusion clause. In *Tercon,* the court acknowledged that the nature of the contract or breach thereof, could give rise to a public policy interest with the power to override the freedom of contract.[29] *Tercon* indicates that if a plaintiff seeks to avoid the application of an exclusion clause, he/she must identify the public interest that he/she says outweighs the right of freedom to contract.

In writing for the majority, Garson J.A. concluded that Ms. Niedermeyer had identified an area of public policy that outweighed the freedom to contract. He indicated that in his opinion:

> "It is contrary to public policy to permit the owner and/or operator of a motor vehicle to contract out of liability for damages for personal injuries suffered in a motor vehicle accident in British Columbia. British Columbia has a statutory scheme of compulsory universal insurance coverage for damages for personal injury arising from motor vehicle accidents, as well as other types of insurance not pertinent to this discussion. In the face of the legislature's intention in enacting that statutory scheme, and for the reasons that follow, I believe it would be contrary to public policy to permit the respondents to enforce the release of liability for a claim that arose not from an injury that occurred in the course of the Ziptrek activity, but rather in the course of transportation to the site of that activity.
>
> …longstanding statutory scheme is a strong indication that there is a public policy interest engaged when motor vehicle accidents are at issue, but it is the interest

[25] Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1 at 18-28.
[26] *Supra* note 17 at para 117.
[27] *Supra* note 17 at para 117.
[28] *Supra* note 17 at para 118.
[29] *Supra* note 17 at para 117.

> the legislature was attempting to address in enacting the scheme that overrides freedom of contract in this case." [30]

**Therefore, the court allowed the appeal and found that the waiver contract was of no force due to the fact that it violated public policy. The Respondent filed an application to the SCC to appeal the decision of the BCCA. The SCC refused leave to appeal.[31]**

## CONCLUSION

A properly implemented waiver has the power to entirely deny a claim from an injured party as against an occupier. Therefore, it can be a very effective defensive weapon for recreational facilities that provide consumers with the ability to engage in inherently difficult activities.

This paper provided an overview of the law as it pertains to waivers. It discussed the *Occupiers' Liability Act* and the cases that further clarify this aspect of the law in Canada. This paper investigated the test for determining the applicability and effectiveness of waivers, as set out in *Isildar*. It then discussed the case of *Cougar Mountain* and the findings of the BCCA regarding the implementation of waivers.

The paper then assessed the application of liability waivers to injuries arising out of motor vehicle accidents through investigating the recent BCCA case of *Niedermeyer*. More specifically, the BCCA assessed the potential conflict between a waiver and public policy. This paper compared and contrasted the majority and dissenting decisions in *Niedermeyer* and the ability of public policy to negate the freedom to contract regarding the applicability of otherwise enforceable waivers. As discussed, the majority decision found that in certain circumstances, public policy considerations can override an otherwise valid waiver.

In conclusion, occupiers must contemplate public policy considerations given the fact that they may have the capacity to render a waiver of no force and effect in certain circumstances. Failure to give proper consideration to all potential aspects of public policy may lead to an otherwise valid waiver becoming unenforceable, and opens up an occupier to the exposure that would otherwise be barred by virtue of the waiver.

[30] *Supra* note 5at para 72 and 73.
[31] *Niedermeyer v. Charlton,* [Application / Notice of Appeal] 2014 CarswellBC 2220.