STHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

Volume 52 **Fall 2018**

Does a Refusal to Purchase Amount to Oppression

"…the oppression remedy in s. 248 is not designed to relieve a minority shareholder from the limited liquidity attached to his or her shares or to provide a means of exiting the corporation, in the absence of any oppressive or unfair conduct."

This is a quote by Justice Conway from her decision in *Wilfred* v. *Dare*, which was upheld on appeal to the Divisional Court. This case involved three siblings, who through their respective holding companies, own the iconic Dare Foods.

In 1980, their father did an estate freeze in which he transferred his shares of the three Dare operating companies to a newly created holding company, Serad. The 420 common shares of Serad were then issued to the newly created Dare Family Trust. Siblings Bryan, Graham and Carolyn were beneficiaries of the Trust.

In an effort to keep the shares in the family, the various shareholder agreements signed by the siblings, initially as beneficiaries of the Trust and later as shareholders, included a right of first refusal. Therefore, if one of the siblings wished to sell their shares they had to first offer them to the other siblings before offering them to a third party. There were no other provisions in the shareholder agreements such as a shotgun buy-sell clause or a put right.

Both Bryan and Graham were involved in the day to day operations of Dare. Aside from being the owner of 140 shares, Carolyn had never been involved with or worked for the Dare companies.

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On several occasions over the years, she had attempted to sell her shares to her brothers but they had always refused believing that it was more important to invest in the company than in buying Carolyn's shares for the $55 million asking price.

When her financial situation became more precarious, Carolyn once again attempted to sell her shares to her brothers. They again refused, testifying that they were not interested in buying her shares – they did not have the money and did not want to burden the business or their children with debt to fund a buyout of Carolyn's shares. As a result, Carolyn brought an application to the court seeking relief pursuant to the oppression remedy laid out in the *Ontario Business Corporations Act*. Specifically, she sought a court-ordered sale of her shares to her brothers.

The remedies available to the court in a case where the complainant can establish that the corporation has acted in a manner that is "oppressive" or "unfairly prejudicial" or in "unfair disregard" toward the complainant, which can include a shareholder, are quite wide ranging. In addition to the above, the complainant must show that he or she has a "reasonable expectation" with respect to the behaviour of the corporation, its officers or directors.

Carolyn had not suggested that there had been any mismanagement of the corporation, improper dealing or any unfair conduct. Further, while Carolyn argued that her shares were unmarketable and had no value to a third party purchaser, she did not actually advance any independent evidence to support that claim. Carolyn also failed to demonstrate that she had a reasonable expectation that Graham and Bryan would purchase her shares in the family company.

Finally, the court considered Carolyn's financial situation, but concluded that it was not relevant since it was in no way attributable to the brothers.

In the end, the court dismissed her application finding that the brothers' refusal to purchase her shares did not in itself form a basis for an oppression remedy.

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Ski Resorts and Waivers

The days are crisper and the evenings are cooler. Fall has arrived and ski enthusiasts are counting down the days until they can hit the slopes. While the ski season brings outdoor fun and exercise, it also means the potential for injuries and raises the question of who might bear the responsibility for those injuries. Two recent cases, decided by the Ontario Court of Appeal, consider this issue.

The Facts
The facts of the two cases are relatively similar.

Case #1
Mr. S purchased a season ski pass for the Blue Mountain Resort. At the time he bought the pass he executed a *Release of Liability Agreement*, *Waiver of Claims* as well as an *Assumption of Risk and Indemnity Agreement*. The gist of these agreements was that if Mr. S was injured while skiing, Blue Mountain was not responsible and he had waived any claims against the ski resort.

Unfortunately, toward the end of that ski season, Mr. S. collided with a broken ski pole that was on the ski run. He lost control and injured himself when he hit a tree. Despite the waivers he had agreed to, Mr. S sued Blue Mountain.

Case #2
Mrs. W, her husband and grandson decided to go skiing for the day at the Snow Valley Ski Resort. Being a new skier, Mrs. W purchased the beginner ski package, which included a lift ticket, equipment rental and one lesson. The package included a Waiver of Claims and the lift ticket itself included a release of liability.

While using the tow rope, Mrs. W sustained injuries. Like Mr. S, she commenced legal action.

The Laws
Two different statutes were at play in these cases. The first was the *Occupier's Liability Act* and the second was the *Consumer Protection Act*.

Occupiers' Liability Act (OLA)
The intent of the *Occupiers' Liability Act*, which has been around since 1980, was to establish a single primary duty of care that an occupier would owe to persons entering upon their premises.

An occupier is a person who is in physical possession of premises, or a person who has responsibility for and control over the condition of premises, the activities carried on, or control over persons allowed to enter the premises.

The duty of care that an occupier owes to those entering the premises is to take such care as in all the circumstances is reasonable to see that those persons are reasonably safe while on the premises. However, the law does allow the occupier to restrict, modify or exclude their duty.

Part of the rationale behind this legislation, including the right of occupiers to modify their duty of care, was to encourage private landowners to voluntarily make their property available for recreational activities.

Consumer Protection Act (CPA)
The *Consumer Protection Act* came into force in 2002. The impetus behind this law was to modernize consumer law in Ontario by bringing consumer protections, which up until then were found in nine different statutes, under one umbrella piece of legislation.

Pursuant to this law, the substantive and procedural rights given under the Act apply despite any agreement or waiver to the contrary. The statute also states that a supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.

Application to our Facts
The parties in the two cases agreed that Mr. S and Mrs. W were consumers as defined in the CPA, that the ski resorts were occupiers as well suppliers and that the contracts between the resorts and their customers were consumer agreements. The result was that the court was faced with two applicable laws that seemingly cancelled each other out. Specifically, could the ski resorts waivers of liability, permitted under the OLA, be defeated by the CPA, which states that a consumer cannot waive his or her rights.

In coming to its decision, the court engaged in some extensive statutory interpretation (see box on page 3). The following were their conclusions.

The court found that although there was a class of occupiers (e.g. innkeepers) under the OLA that could have a higher standard of care assigned to them, ski hill operators were not part of that class.

The court found that, "…the OLA was intended to be an exhaustive scheme at least in relation to the liability of occupiers to entrants on their premises flowing from the maintenance or care of the premises." It went on to find that "the very purpose of this legislative scheme would be undermined if the CPA were allowed to subject occupiers to an obligation to warrant that their premises are of a "reasonably acceptable quality". Since this purported obligation under the CPA would undermine the very purpose of the OLA, "it is a factor that militates towards holding that the OLA supersedes the CPA."

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The court also considered the fact that the 2016 *Ontario Trails Act* amended the OLA to provide protection to occupiers who permitted their premises to be used by members of the public for recreational trails, including hiking, portaging, or snowmobiling. However, there was no mention of the CPA. The court saw this as evidence that the Legislature did not view the CPA as having any role to play in this area.

The appellate court concluded that the rights set out in the CPA were not meant to override the sections of the OLA limiting a ski resort's right to limit its liability. Mr. S and Mrs. W were bound by the waivers they had accepted.

Final Thoughts
While both these cases involved ski resorts, there are many different recreational businesses that use waivers to protect themselves. So have fun but be aware that if you or a family member is seriously injured while on these premises you may not be able to sue the owner or occupier. Having said that, it is always wise to consult a lawyer in a timely fashion to see if you have a case.

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Shareholder agreements are a valuable tool that permit shareholders to govern their rights and obligations and to make provision for various contingencies. They should not be overlooked or taken lightly. Our corporate lawyers can assist you with the drafting of a shareholder agreement and with the many other aspects of your business.

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Decision in Case #2
The court concluded that the evidence did not establish anything more than permissive use by both owners during the prescriptive period, i.e. the 20 years prior to 1996 when the two properties were registered in the Land Titles System. At best, the evidence showed that the owners of property A and property B permitted each other to cross the property line as they went to and from their parking spots. There was no evidence that the owners of either property did so as a matter of right. So while the erection of a fence by the Perrases may have been aggressive conduct, they were within their rights to do so.

The Lesson
Before you buy a property be sure you know what the property does and does not consist of. It may not always be obvious so it is important to get professional legal advice. Our firm works for both buyers and sellers, commercial and personal. We would be happy to assist you.

Statutory Interpretation

Statutory interpretation is one of the first things that students learn in law school. It is a process by which courts interpret and apply legislation. There is often some amount of interpretation that is necessary when a case involves statutory law.

Although words have a plain and straightforward meaning, there are times when the words of a statute have some ambiguity or vagueness which must be resolved by the judge.

There are various tools and methods of statutory interpretation including common canons of construction. For instance,

1. the plain meaning of the words at issue, or

2. where one reading of a statute would make one or more parts of the statute redundant whereas another reading would avoid the redundancy.

Another tool available is the legislative history and the intended purpose of the legislation.

In the ski resort cases, the plain meaning of the two relevant statutes led to a direct conflict between the two. In such cases, the court must interpret the statutes to know which should take precedence. The court will rely on such rules as the following:

1. where a class of things is modified by general wording that expands the class, the general wording is usually restricted to things of the same type as the listed items (ejusdem generis);

2. when one or more things of a class are expressly mentioned, others of the same class are excluded (expressio unius est exclusio alterius);

3. the exhaustiveness doctrine;

4. the provisions of a general statute must yield to those of a special one (generalia specialibus non derogant); and

5. the absurdity doctrine.

While it may sometimes seem like courts are arbitrarily favouring one party or position over the other, there are many long held tenets that they are bound by. While the above is a very brief look at one of those, we hope that it does shed some light on how a judicial decision may be arrived at.

A Good Neighbour

What you see is not always what you get and this is never more true than in neighbourhoods where houses are quite close together. The following cases illustrate this very situation.

Case #1
Carol owned property A and Cynthia owned property B. Carol's family had owned property A for decades. Cynthia had purchased property B from Mr. T who had owned it for 60 plus years.

The property line runs through a passageway between the houses, such that there is 1 foot from the north wall of property A to the property line with B. Mr. T had never objected to Carol's family using the passageway to clean the eaves troughs and for the occasional repair man.

Cynthia built a fence slightly inside her property line. Carol was not happy since she believed she had a prescriptive easement on that part of Carol's land. She applied to the court to have the fence removed.

Case #2
The Englishes owned property A and the Perrases owned property B. They each had a 7-foot wide driveway that abutted. This 14-foot strip of land allowed enough space for cars to pass on each side. Over the decades the various owners had crossed over each other's driveways. At one point there was an agreement recognizing that the strip of land was used to access the rear of both lots and that neither would block it.

A dispute arose between the neighbours when the Perrases built a fence down the centre of the driveways, just inside their property line. The Englishes, because of a retaining wall, could no longer get a car into their driveway. They believed they had a prescriptive easement over the Perrases driveway and applied to the court to have the fence taken down.

What is a Prescriptive Easement?
An easement is a right granted to a person to pass over or use the property of the grantor. A prescriptive easement, often referred to as squatters' rights, is a right that is automatically acquired over a long period of time if the following criteria can be proven.

1. The user must demonstrate that he used the land continuously, without interruption, in an open and peaceful way without objection by the owner;

2. The use must be as if the user is entitled to the use the property and that he is doing so without the use of violence, stealth or secrecy;

3. The user must show that the owner of the land has accepted this use. If the use is with the owner's permission or consent then there is no prescriptive right;

4. The user's behaviour must be "open" such that an ordinary owner of the land would have a reasonable opportunity of becoming aware of the use of the land.

In principle, prescriptive easements have been abolished with respect to properties registered in the Land Titles System. In the cases above the properties had been registered in the Land Titles System. Therefore, the parties claiming to have a prescriptive easement over their neighbour's property, had to prove "uninterrupted and unchallenged use" for the 20 year period prior to the properties being registered in the Land Titles System.

Decision in Case #1
The court found that the use of the passageway over the years by Carol's family did not demonstrate a lawful right to take an ownership interest in Mr. T, now Cynthia's, land. Rather, the evidence demonstrated that Carol's family and Mr. T were simply good neighbours and that Mr. T let them use his passageway when they needed it. The court further concluded that while Carol's family occasionally used the passageway, at no time did they manifest that they owned it nor did they manifest that they were using it as of right instead of with Mr. T's permission.

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