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## **WHEN WAIVERS FAIL: THE IMPACT OF IMPRECISE LANGUAGE AND RESULTING LIABILITY**

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*By Sean S. Carter & Barry W. Kwasniewski\**

### **A. INTRODUCTION**

On September 28, 2017, the Ontario Superior Court of Justice released its decision in *Anderson v Confederation College*.<sup>1</sup> The decision involved a summary judgment motion by the defendant, a registered charity and a college of applied arts and technology (the “College”), seeking an order to dismiss the claim by the plaintiff (“Anderson”) on the basis that Anderson had signed an “Informed Consent Form for Physical Activities” (the “Consent Form”) that barred his claim. In its decision, the court determined that the liability waiver wording in the Consent Form did not bar Anderson’s claim. This *Bulletin* reviews this decision, as well as the importance of properly drafted liability waivers and risk management practices for charities and not-for-profits.

### **B. BACKGROUND**

Anderson was an adult student at the College’s Police Foundations program (the “Program”) and on September 9, 2013, the first day of class, he signed a Consent Form containing the following “waiver”:<sup>2</sup>

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.

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<sup>1</sup> 2017 ONSC 5791.

<sup>2</sup> *Ibid* at paras 2-3.

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.

I agree to abide by and follow all rules and policies outlined by the College.

On March 25, 2014, while participating in the Program, Anderson was completing a race on the College's running track when he struck his head on the elbow of a folded basketball hoop standard protruding over the track.<sup>3</sup> He sued to recover monetary damages for his injuries.

Interestingly, the College had not been aware of or given approval for the Consent Form, which had been drafted by one of the instructors.<sup>4</sup> However, the College nevertheless sought to rely on the Consent Form, and argued that its intent was clear and unambiguous and therefore barred Anderson from suing the College for personal injuries suffered in the course of his participation in the Program.<sup>5</sup> The College also argued that excluding liability for negligence in a contract did not require the explicit use of the word "negligence" in the Consent Form.<sup>6</sup>

Anderson testified during his examination for discovery that when he was presented with the Consent Form, "the instructor at the time explained how [...] if we [were] to get injured during the physical defence part we couldn't sue."<sup>7</sup> Anderson argued that the "waiver" should not apply when the basketball hoop that caused his injuries was situated partially on the track, as this was not a risk normally associated with the Program, and that the Consent Form was only meant to bar claims against the College arising from health related risks.

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<sup>3</sup> *Ibid* at para 6.

<sup>4</sup> *Ibid* at para 4.

<sup>5</sup> *Ibid* at para 7.

<sup>6</sup> *Idem*.

<sup>7</sup> *Ibid* at para 5.

## C. ANALYSIS

It is important to note that the court's decision on the summary judgment motion deals only with the enforceability of the liability waiver in the Consent Form. If the College's motion was successful, the action would have been dismissed. As the College's motion was dismissed, Anderson's action is permitted to continue. The case may eventually proceed to trial on the merits, or it may possibly settle prior to trial. If the case proceeds to trial, Anderson will still be required to prove liability and damages.

With respect to the decision of the court, it followed the precedent established by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation and Highways)* ("*Tercon*"),<sup>8</sup> which set out a three-part test a plaintiff must meet in order to escape an exclusion clause as follows:

- i) whether, as a matter of interpretation of the intention of the parties, the exclusion clause applies to the circumstances established in evidence;
- ii) whether the exclusion clause was unconscionable at the time the contract was made; and
- iii) 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.

Applying the first step of the *Tercon* test to the facts of the case, the court relied on further precedent from the Supreme Court of Canada dealing with how the meaning of the words in an agreement can be drawn from different contextual factors.<sup>9</sup> It further relied on a principle of contractual interpretation, recognized in *Tercon*, that the different provisions in a contract should be "considered in harmony with the rest of the contract and in light of its purposes and commercial context".<sup>10</sup> In this regard, the court found that the "waiver" portion of the Consent Form could not be read in isolation, but as part of a whole, the relevant portions of which it underscored as follows:

[...] I understand that the activities, programs and classes offered by [the College], [the Program] may involve strenuous physical exertion. I acknowledge that injuries or other complications associated with exercise or other

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<sup>8</sup> 2010 SCC 4.

<sup>9</sup> *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 48.

<sup>10</sup> As referenced in *supra* note 1 at para 11.

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 [Program]. [...]

[...] I am aware of and willing to assume the risks associated with these activities. [...]

In this regard, the court found that Anderson’s testimony regarding the reasons why he was signing the Consent Form provided the relevant background to understand the meaning of the document and, therefore, the “waiver concerned the risk of harm from health related issues and physical activity such as self-defence”,<sup>11</sup> as opposed to other forms of liability such as that for defective premises under the *Occupiers’ Liability Act*,<sup>12</sup> as referenced by the court. Therefore, the court held that the waiver in the Consent Form did not apply to the specific circumstances causing the injury and the motion for summary judgment to dismiss Anderson’s claim was denied, with costs of the motion payable to Anderson in the amount of \$4,000.00.

#### **D. CONCLUSION: LIABILITY AND RISK MANAGEMENT LESSONS LEARNED**

The Anderson case is a pertinent reminder of the importance of charities and not-for-profits being diligent in assessing and limiting the liability risks in carrying out their programs and activities. The Consent Form relied upon by the College was not an effective liability shield for the reasons set out in the court’s decision.

There is no “one size fits all” approach to risk management and due diligence for charities or not-for-profits. The risk management tools that are used are common to many organizations (including, for example, appropriate training for employees and volunteers, properly drafted liability waivers and adequate liability insurance). As the Anderson decision demonstrates, liability waivers are relatively complex legal documents, and improperly drafted liability waivers that do not comply with the requirements imposed by our courts will be of little or no use in terms of effective risk management. This demonstrates the importance of how these risk management tools, like liability waivers, are prepared and why it is critical to carefully draft risk management tools that thoroughly address the unique particulars of the organization’s program and the associated liability risk of that activity or program. While a liability waiver can never eliminate all potential liability from an activity or program, a properly drafted waiver

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<sup>11</sup> *Supra* note 1 at para 14.

<sup>12</sup> RSO 1990, c O-2.

can be an effective risk management tool, particularly for adult programs, in reducing liability risk to a level acceptable to the charity or not-for-profit.<sup>13</sup>



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<sup>13</sup> For further information on liability waivers and a selection of instances where they have been considered by courts, see Barry W. Kwasniewski, “Liability Waiver Upheld by B.C. Court of Appeal”, *Charity Law Bulletin No. 284* (29 May 2012), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2012/chylb284.htm>>; Barry W. Kwasniewski, “Hockey Injury Lawsuit Dismissed”, *Charity & NFP Law Bulletin No. 375* (25 November 2015), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2015/chylb375.pdf>>; Barry W. Kwasniewski, “Court Upholds Rock Climbing Waiver”, *Charity & NFP Law Bulletin No. 391* (29 September 2016), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2016/chylb391.pdf>>; Barry W. Kwasniewski, “Electronic Liability Release Held Enforceable”, *Charity & NFP Law Bulletin No. 404* (25 May 2017), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb404.pdf>>.