## Enforcement of Disclaimer Clauses

Limitation of liability (or disclaimer) clauses are common features in standard-form contracts in Canada. Common examples are the "hold harmless" clauses set out in parking lot tickets, ski lift tickets, car rental agreements, shipping contracts, and so on.

Traditionally, the courts have strived to make it relatively difficult for such clauses to be enforced. For example, it has long been held that a disclaimer clause will not protect a party in respect of its own negligence unless the clause expressly provides for this. Further, in the 1978 decision of ***Tilden v. Clendenning***, the Ontario CA held that in the case of standard-form "across-the-counter" contracts, the disclaimer clause could only be enforceable if the party seeking to enforce had taken reasonable steps to ensure that the terms of the clause were brought to be attention of the signer. In the ***Clendenning*** case, the contract at issue was a car rental agreement and the (unenforceable) disclaimer clause was found in small print on the back of the standard form agreement.

The ***Clendenning*** decision led to the routine practice of defence counsel effectively arguing that disclaimer clauses should *never* be enforceable, in any kind of contract. This raised the issues of whether the signer had any responsibility to read what s/he was signing, and what steps were required in order to demonstrate that the clauses were in fact brought to attention of the signer.

In 1991, the CA refined the test with ***Trigg v. MI Movers*** where the court held that the general rule is that a disclaimer clause in a standard-form contract will not enforceable unless it was brought home to the other party so prominently that s/he must have known and agreed to it. The CA further refined the law in ***Fraser Jewellers v. Dominion Electric*** from 1997, where it made clear that there is still a responsibility on the signing party to review the terms of a contract, and that it was by no means automatic that disclaimers would be unenforceable. In ***Fraser Jewellers***, the CA found that the contract was on one piece of paper and that the disclaimer was highlighted in bold block letters. The plaintiff was not rushed or pressured in any way into signing, and he had all the time he needed to read the contract and to consider its terms. In these circumstances, the disclaimer was enforceable.

Now we have the case of ***National Refrigeration & Air Conditioning v. Celadon Group*** (2016) ONCA 339. In this case, National Refrigeration (NR) hired Celadon (C) to ship products from Mexico to Ontario. The shipments were hijacked in Mexico and never recovered. NR submitted claims to C for roughly US$200,000 but C denied the claims, relying on disclaimer clauses contained in its Rules and Regulations and posted on C's website. The trial judge found that C could not rely on the disclaimers since it had not specifically notified NR of their terms. As it turns out, the parties had previously contracted for the shipment of goods and on those occasions, NR had been provided with an agreement containing the same disclaimers. However, the CA noted that those shipments had involved transportation from Canada to Mexico and not from Mexico to Canada as in the case at hand. Further, in communications between the parties when setting up the contract of carriage, there had been no mention made of any disclaimer clause. In the circumstances, the CA upheld the decision that the disclaimers were not enforceable since C had not properly brought them to NR's attention.

The upshot is that courts continue to view contractual disclaimers (especially in standard-form contracts) with suspicion. A party seeking to rely upon such a disclaimer needs to ensure that the clause is clear and broad in scope, and that it is featured prominently in the agreement.

R. Lester April 23, 2017