



# Claim Case Studies & Legislation: Enforceability of Electronic Waivers

In a world where everything from shopping and banking to registration for recreational events and programs can be done online, the enforceability of electronic waivers is a concern for any organization.

The following case demonstrates that when administered properly an electronic waiver can be just as enforceable as a paper one.

## ***Quilichini and Wilson's Greenhouse & Garden v. Velocity Raceway Ltd.***

The Plaintiff in this case was a participant at a go-kart racing track that was operated by the Defendant. When the Plaintiff attended the go-kart track he provided his personal information, paid a fee and proceeded to a kiosk where he clicked "I agree" to accept the terms of an electronic waiver and release of liability. The main issue to be decided was whether or not the waiver and release was binding.

The relevant legislation in Saskatchewan, where this case was decided, is the *Electronic Information and Documents Act*, 2000, SS 2000, E-7.22. This Act provides that contracts may be in electronic form and that the action of touching or clicking an icon on a computer screen can be used to

express acceptance of an offer. It also states that "a contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation."

The Trial Judge made the following observations when giving his decision that the electronic waiver was enforceable:

1. The Defendant took reasonable measures to ensure that customers received notice of the waiver.
2. The Defendant's kiosk system was designed to ensure the waiver was presented to customers who were required to indicate acceptance before participating.
3. The activity was of a nature where it was normal for participants to expect to have to sign a waiver and release.
4. The Plaintiff would have understood that if he did not sign the release, he would not be permitted to participate. He had the freedom to choose.
5. The Plaintiff had full opportunity to read the waiver.
6. There was nothing obscure in the presentation of the waiver and release or the choice whether to accept or not.<sup>1</sup>

<sup>1</sup> *Quilichini v. Wilson's Greenhouse & Garden Centre Ltd.* 2017 CarswellSask 32, 2017 SKQB 10, [2017] 8 W.W.R. 375, 275 A.C.W.S. (3d) 764, 64 B.L.R. (5th) 222

Interestingly, the Trial Judge decided that, although the release did not make specific reference to the Defendant's negligence, the wording; "any and all claims" and "arising in any way from my participation in go-kart racing" was broad enough to include injury arising out of the negligence of the Defendant.

### ***Schnarr v. Blue Mountain Resort Limited***

In this British Columbia case, the Plaintiff purchased a ski lift ticket online that included an electronic waiver. While skiing at the Defendant's facility, the Plaintiff was injured and subsequently brought a claim against Blue Mountain. To date, the waiver has been enforced.

### **Legislation**

In Ontario, the *Electronic Commerce Act, 2000*, SO 2000, c 17 mandates that "a legal requirement that a document be signed is satisfied by an electronic signature." The other provinces have similar legislation which stipulates that an electronic signature on a document is not invalid or unenforceable only by reason of being in electronic form.

The Nova Scotia *Electronic Commerce Act* states: "A requirement under the law of the Province for the signature of a person is satisfied by an electronic signature."

Legislation in each of the provinces sets out the operative provision for the enforcement of electronic contracts. It is evident that if electronic contracts are valid and enforceable then so are limiting conditions, such as waivers and releases, agreed to electronically by the parties. The enforceability of an electronic waiver, like any waiver or contract, is not guaranteed and can still be challenged in Court.<sup>2</sup>

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<sup>2</sup> <http://www.beardwinter.com/content/uploads/Waivers-in-Recreational-and-Sporting-Activities-from-A-to-Z.pdf>