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Signed, but Safe?

Understanding the Limits and Value of Waivers in Local Government

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April 8, 2026

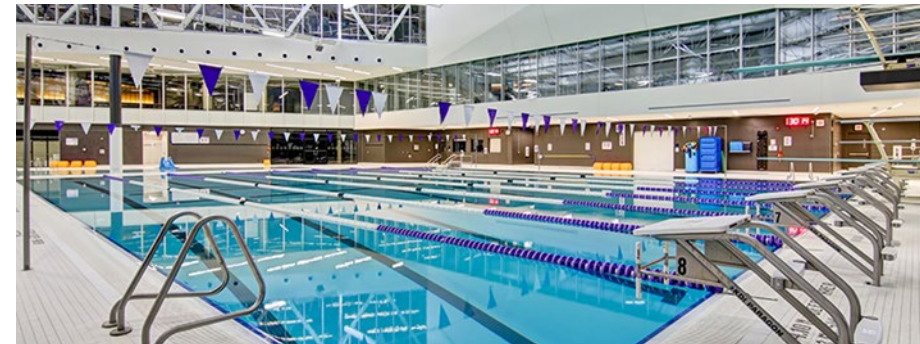


USE OF WAIVERS BY LOCAL GOVERNMENTS

- Waivers are increasingly used in municipal recreation programs, events, and public facility use.
- They serve as one tool in our risk management toolkit, along with signage, and supervision.
- When drafted and administered properly, a waiver can provide the local government with a complete defence.



A screenshot of a digital waiver form. The form includes fields for "Your Full Legal Name", "Your Date of Birth*", "Email Address*", and "Telephone*". There is a checkbox labeled "I am signing for multiple participants" and an "Optional: Create a password to save time and auto-fill your information on your next visit!" section with a "Password" field and a "Clear Signature" button. Below the form, there is a signature area with the text "Please sign below using your mouse." and a handwritten signature "John Zeng" in blue ink.



OCCUPIERS LIABILITY ACT **[RSBC 1996] CHAPTER 337**

- Premises, defined
- Who is an occupier?
- What is the occupier's duty of care?
- Section 4 – Modifying the duty of care.

THE WAIVER AGREEMENT

- Must be clearly written and easy to read
- Specifically name the parties it is meant to protect
- Include the specific activity, and the risks associated with that activity, and the kind of conduct that is intended to cover
- Clearly state that by agreeing to the terms of the waiver, you are waiving your right to sue

WAIVER ADMINISTRATION PROCESS

- Access to waiver wording (website)
- Opportunity to read and agree to the waiver prior to payment
- Train staff to administer the waiver in a consistent manner
- Challenges with waiver software and online registration

- Reasonable steps must be taken to draw the terms and conditions of the waiver to the attention of the participant.
- You have likely seen waivers with **BIG BOLD TEXT**, along with areas that are **highlighted in yellow and surrounded by a red box**. This not only draws attention to specific language in the waiver, but it should be an indication to anyone reading it that they should pay attention to this language as it is important.

ELECTRONIC TRANSACTIONS ACT

[SBC 2001] CHAPTER 10

- The ETA states that if there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.
- Definition of electronic signature: “[I]nformation in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record”.
- The legislation provides that contractual offer and acceptance may be done electronically.
15(1)(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or another matter.

CASELAW

- *Goodspeed v. Tyax Mountain Lake Resort* – 2005 BCSC
 - All terrain vehicle incident
 - “I didn’t read the waiver”
- *Loychuk v. Cougar Mountain Adventures* – 2012 BCCA
 - Zip line activity
 - Employee negligence
- *Apps v. Grouse Mountain* – 2020 BCCA
 - Snowboarding – terrain park
 - When does the exclusion of liability need to be brought to the customer’s attention?
- *Neidermeyer v. Charlton* – 2014 BCCA
 - Motor vehicle accident during transport to zip-line site
 - Waiver v. public policy

MINORS

- In British Columbia, someone under the age of 19 cannot waive their right to sue, even if a parent or guardian signs the waiver.
- As it relates to minors, claims must be defended on the merits, in other words, if the standard of care has been met, then you have a defence to the claim.
- Should a minor sign a waiver? Yes – the waiver highlights risks associated with activities and may assist in an argument for contributory negligence.

BEST PRACTICES

- Develop waivers tailored to specific events and have them reviewed by legal counsel.
- Waiver administration process.
- Website – ensure the waiver visible and available for download and review.
- Once the waiver is completed, email a copy to the participant.
- Ensure that money does not change hands until the waiver is agreed to.
- Ensure waivers are digitally retained and stored.
- Pair waivers with effective signage and participant orientation.
- Implement a retention policy for waiver records (electronic and paper).

QUESTIONS?

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