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Wilderness Tourism Association of Yukon Position Paper - Compulsory Insurance Meeting with Transport Canada

Meeting of January 23, 2003, 1:00 P.M. at the High Country Inn, Whitehorse, Yukon

This position paper dated January 23, 2003 has been prepared by Charles McLaren, vice-president of the WTAY, subsequent to a meeting of interested parties held January 22, 2003. Minor updates subsequent to the meeting have been added as of January 29, 2003.

This paper has been prepared after a review of the "Recommendations on Regulations on Compulsory Passenger Insurance Pursuant to Marine Liability Act (Part 4, Section 39)" prepared by the Mariport Group Ltd, dated October 2002. Input from WTAY members and other interested parties was solicited prior to the preparation of this document, and considered in writing it. No legal advice has been available in the preparation of this position paper.

Readers should be aware that the deadline for submission of comments to Transport Canada is March 30, 2003. Transport Canada will proceed with draft regulations after that date.

General Commentary

The Mariport Report has taken into consideration much of the feedback provided by the adventure tourism industry. It is clear that the Report makes recommendations only, and the final regulations arising from the MLA will be subject to decisions by Transport Canada and Cabinet. It is essential that the adventure tourism industry make strong presentations at this time as to the aspects and recommendations contained in the Report.

Some general commentary regarding the Mariport Report is as follows:

- The Report paints a positive picture. When discussing consequences of the MLA or insurance requirements, a favourable future is forecast. The WTAY does not believe that either the courts or the insurance industry will necessarily view the situation in the same favourable light.
- This paper only considers major topics that are of immediate and overwhelming concern to the industry. There are a number of subtle points regarding paper burden, inspection authorities, and other elements that may prove damaging in the longer term. These elements are not addressed in this paper, but should be addressed in future.
- While the Report does reference the unique nature of the adventure tourism industry, few of the recommendations address that uniqueness by making special provisions or exemptions to insurance issues or MLA concerns. Adventure tourism is not 'shipping', but is not sufficiently differentiated from such.

- The MLA singles out water based adventure tourism and through the deletion of waivers and other factors, reduces the competitiveness of water activities versus other adventure tourism opportunities. This provides an unfair advantage for other sectors.
- In the Yukon, water based adventure is the primary form of adventure tourism in the summer, the season that dominates our tourism industry. If insurance providers find that provisions of the MLA, specifically the loss of waivers, create an increase in insurance premiums, this will devastate our industry. The vast majority of tourism operators are small businesses that are already struggling with increasing premiums that are difficult to support. If costs continue to increase, the water based tourism sector, and therefore the Yukon adventure tourism summer season, may collapse. The adventure tourism sector is conservatively valued at \$25 million in contributions to the Yukon economy.
- The difficulty of obtaining insurance, or affordable insurance, is discussed in the Report but the impact is downplayed. The entire MLA in our sector is meaningless if a large number of adventure tourism businesses sink in the next year or two due to premium increases resulting from the elimination of waivers or other effect of the Act.
- The adventure tourism industry is a significant and growing contributor to the Canadian economy. Some of that success has come about due to investment by governments through marketing and other programs, such as the CTC. To have the impact of the MLA negate that success is contrary to an established economic aim by several levels of government.
- The MLA and insurance issues can be resolved. To do so for our industry may require revisiting the MLA in the context of adventure tourism, and “fixing” it through amendments. This may be necessary to save an industry.
- Transport Canada has noted that water based adventure tourism was covered by previous shipping acts, and that the MLA is a continuation of a regulatory regime, with few changes. As such, Transport Canada has suggested that the adventure tourism reaction to the MLA is somewhat unjustified. WTAY suggests that Act provisions such as reverse onus and the deletion waivers are major differences. In essence, the rules have changed, and it won't be ‘business as usual’.
- There is a ‘Catch 22’ involved in the MLA as a whole. By the time the impact of this Act becomes apparent and justifies revisions to the MLA, it may be too late for many small operators, who will be out of business. It is important to actively consider ‘worst case’ scenarios, and for the industry and Transport Canada to act together to prevent or mitigate consequences.
- The MLA is not an abstract concept. We're talking about an impact on people's lives and livelihoods.

The following topics represent the major items that must be addressed at this time.

1.0 Exclude Adventure Tourism from the MLA

Page 13 notes that many representations were made to exclude adventure tourism from the MLA, but the commentary includes us in the MLA at this time. Mariport notes that having some vessels covered by the MLA while others are not, in the same waters, may be a legal issue.

Issue: Benefits of Exclusion

- Exclusion may resolve the problems of a broad scope Act that includes such a wide range of craft and waterways.
- Exclusion could separate passengers into risk averse versus risk accepting categories.
- Exclusion may permit operators to retain some current benefits such as waivers.
- Exclusion could lead to a particular set of definitions suiting the operating environment.
- Exclusion could specifically address the variety of adventure tourism activities through separate regulations if necessary.

- Exclusion would allow the Yukon Wilderness Tourism Licencing Act, to resume prominence on this issue. This was an appropriate Act developed jointly by industry and the Territorial government.

Position: WTAY recommends Transport Canada perform due diligence to investigate and prove some of the assumptions and recommendations contained in the Mariport Report. Investigations should be done prior to implementation of any regulations arising from the MLA that impact adventure tourism. If it can be proven that such regulations will not have significant economic or other hardship on our industry, WTAY is willing to try to work within the MLA. Some of the elements to be investigated include:

- The Mariport recommendation summary on page 3 should be implemented if safeguards can be put in place to protect adventure tourism from concerns noted here and elsewhere in this paper.
- That a mechanism be put in place to protect tourism from changes in the liability limit.
- That a review be done with the goal of re-introducing waivers for adventure tourism.
- That Transport Canada and industry work with insurers to mitigate costs (see 'Catch 22'). We strongly recommend that an insurance industry consultation take place over perhaps a three year period prior to insurance regulations being implemented.
- If the above review, or monitoring of industry, indicates that the MLA is financially harmful and creates an unacceptable impact, adventure tourism should be excluded from the Act.

It has been noted that different government departments focus solely on their own purview. It was through such a narrow viewpoint that adventure travel was included in the MLA without consulting with industry on possible impacts, resulting in the current situation. This issue is complex enough that a more holistic approach is necessary.

WTAY recognizes that one goal of government with the MLA was to achieve universality for all types of boats. However, the operating environment and risk accepting passenger type involved with adventure tourism makes such universality inapplicable in any meaningful way. The MLA truly does try to put 'watermelons and raisins' in the same basket.

WTAY also recognizes that trying to work within the MLA and seeking exclusion are two very different processes. Due partly to a lack of time and resources, WTAY hopes to work within the Act, and have reasonable changes made. Possibilities might include regulations that more specifically define 'ship', or other options.

2.0 Insurance Levels

The Report recommends the use of a tiered insurance scheme for adventure tourism. Boats with a capacity under 12 persons would carry \$1M liability, while those with a passenger capacity of 12 or more would carry \$2M liability insurance. These requirements might be phased in over 5 years, starting with the expected implementation of the Canada Shipping Act 2001 in 2005. This means full compliance would be required by 2010. A stated goal of Transport Canada with the MLA was that the insurance market should not be changed, and that current commercial insurance practices should be preserved as they were prior to the MLA.

Issue: Acceptability of Insurance Recommendation

- The Report correctly notes that higher levels of liability coverage are unobtainable.
- Although these values are in line with the insurance carried by many operators at this time, they also represent a current status quo only. The MLA responds to international conventions, and the 'per head' limits may change with little opportunity for input by our industry. A known stability in the insurance regulations liability 'cap' would be a benefit.

- A clear commitment and process for consultation should be stated by Transport Canada if changes in the liability limits are contemplated.
- The tier jump from \$1M to \$2M may hurt small tour boat operators who may have one boat holding perhaps 16 persons. The premium jump from \$1M to \$2M is significant.
- The limits noted above are recommended to apply to fleet operators (which almost all operators are), which the WTAY concurs with.
- The Report recommends TC undertake a detailed risk analysis for fleets prior to determining coverage requirements, or monitor with a view to amendment. WTAY recommends monitoring, as there is no history of problems endemic to fleets.

Position: WTAY generally supports the tiered insurance levels proposed, with some concerns. See page 16 for Mariports' logic, which WTAY mostly agrees with. Concerns include:

- The impact on the tour boat operator noted above should be reviewed and considered prior to implementation of regulations.
- The regulated insurance limits should be stable in the long term, and advance consultation take place prior to any change.

The current Yukon requirement under the Wilderness Tourism Licencing Act is \$1 million liability. Higher levels may be voluntarily carried by an operator.

3.0 Filters

The option of applying filters to uses to determine if operators/passengers are commercial, crew or pleasure use is noted in the report.

These filters would exclude a particular use from Part 4 of the MLA. See page 11, 48 and 49. Mariport is of the opinion if tiered insurance is established, filters are a moot point. However, insurance factors change continually, and it would be beneficial to have exclusions where the Act is clearly inappropriate.

Issue: Use of filters

- Filters would apply only to clearly non-commercial use or where the guide was not in charge of the boat.
- This would benefit canoes and kayaks, as the paddlers are clearly not under the control of a guide or operator. WTAY concurs with the recommendations on page 49 in this case.
- The Report (page 49) notes that rental operators may be excluded for 'bareboat' operations, provided that the operator provides a safety checklist. This is a provision for power craft, and WTAY supports this exemption.
- Non-powered rental craft are recommended for exemption, which WTAY supports. However, the suggested implementation of a safety checklist system and the reporting requirements are not seen as a safety measure and add paper burden. As there is no history of problems in this sector, WTAY does not support the checklist.
- Bulletin 14/2000 exempts rentals and some specific uses currently. Any craft or situation covered by 14/2000 should not be considered as included under the MLA.
- The courts will decide the appropriateness of the interpretation of filters or Bulletin 14/2000. It would be of benefit if industry and Transport Canada can agree on a clear starting point for the courts to work with.

Position: Support the use of filters for the use of craft where the owner or operator is clearly not in control of the situation in any way. This would include canoes, kayaks, fishing tubes, tubers, rental craft and others, where the user is unaccompanied by a representative of the owner. The

user or charterer would have control of the craft, possession of it, and have their own 'crew'. Why include an application that is clearly not appropriate under the MLA?

For uses to be filtered, Transport Canada and industry should come to a clear agreement as to where filters are applicable, in order to provide a baseline for future definitions by the courts.

For other uses, WTAY considers the suggestion of filters to be of limited protection, and the court interpretation may differ.

4.0 Insurance Providers

The Report makes good representation on the current availability and cost of insurance in our industry. The future of insurance availability under the MLA is unknown.

Issue: Availability of Insurance and Effect of the MLA

- The MLA comes at a time when the insurance industry is in chaos and is perhaps unprepared to deal with this additional issue.
- Adventure tourism is significant to the Canadian economy, but insignificant in terms of insurance premiums. Our industry will not be catered to by insurers.
- Adventure tourism has not 'chosen' the CGL market (page 11). It is the only one apparently open to us. Marine insurers are not interested, as noted on pages 26, and page 12, "aversion to "white knuckle rides" ".
- WTAY has tentatively investigated marine insurers. Initial responses included "we couldn't contemplate doing that" to "if your premium were \$40,000 we would approach the underwriter".
- Our industry deals with a small, and diminishing, number of insurers. The unknowns of the MLA will concern insurers, and the resulting effects are likely negative.
- Many insurance brokers in our market still seem unaware of the MLA, so no reaction by insurance companies can yet be gauged.
- The impact of the deletion of waivers is unknown, but is cited throughout the Report, page 5, 12, 30, etc. WTAY believes that insurers will react very negatively to this aspect of the Act, and 'back away' from insuring water based adventure tourism. WTAY does not believe that insurers will accept the liability cap as an even trade-off with the deletion of waivers.

Position: This issue is of great concern, as there are few insurance providers for adventure tourism, and the MLA may eliminate some of those that remain. WTAY recommends that intensive consultations be done with those insurance companies willing to write adventure tourism policies to determine their response prior to implementation of regulations.

5.0 Insurance Premiums

The Report makes note of radically increasing premiums prior to the introduction of the MLA. The impact of the MLA on costs has yet to be felt. As noted above, the intent of the Act was to be "insurance neutral", and not to materially affect commercial insurance practices or premiums.

Issue: Control of Premium Costs

- Premiums have been going up in response to factors other than industry history. As noted in the Report, water based adventure tourism is actually very safe.
- The MLA will probably increase premiums due to the unknowns involved. In several places, the Report notes that "the courts will decide" issues. Placing adventure tourism in a new situation where case law is yet to be developed may increase premiums as insurance companies allow an additional margin for uncertainty.

- Deletion of waivers will increase premiums. Waivers have a satisfactory history in this industry, and are a proven document. Deleting this defense is likely to create an immediate spike in premiums, and a long-term increase. The spike has not yet occurred as many brokers are still unaware of the MLA.
- Premiums are already reaching a point where operators are threatened with losing their business or curtailing activities (which decreases revenues, so the burden is two-fold). Further increases will be untenable for some or many.

Position: WTAY believes this to be the most immediate of the threats posed by the MLA or insurance regulations. There will be no easy solution. Some possibilities may include:

- A thorough review of economic impacts prior to regulatory implementation. Enacting legislation that decimates an industry is unconscionable.
- Introducing factors that mitigate costs. An example may be re-introducing waivers.
- Transport Canada should investigate the funded insurance proposal or other option to assist the industry.

In the long term (ten years+), it may be possible for the industry to create a cross-Canada pool, or group insurance. This may mitigate premiums. Given current resources, the industry cannot successfully pursue this option in the short term (now to ten years). As noted elsewhere, the industry may not survive the intervening period to reach the stage that some form of self-insurance is viable.

WTAY believes that the MLA will result in significant changes in insurance practices and premiums, which goes against the 'insurance neutral' intent of the Act.

6.0 Waivers

The Report notes in several places that the deletion of waivers will have an unknown and possibly detrimental impact on the adventure tourism industry.

Issue: Passengers Acceptance of Risk

- Adventure tourism is unlike other 'shipping'. Our guests expect, and pay for, some element of risk. See page 3, Mariport's definition of adventure tourism includes "contact by the participant with water is an anticipated usual component of the trip". This is unique in 'shipping'.
- Waivers acknowledge that our operating conditions are unique, and many factors are difficult to control in the wilderness and water settings that we operate in.
- The waiver serves to inform the guest and allows the guest to voluntarily assume risk, which is a reasonable proposition in adventure tourism.
- Waivers have a proven history in our industry, acknowledged by Mariport.
- WTAY believes that insurance companies will probably not accept the trade off of a liability cap, page 5 (see also the footnote). Given already increasing insurance premiums, the loss of waivers may cause insurance to be totally unaffordable or unavailable.
- Waivers are an aspect of adventure travel that is understood and accepted by guests, operators and insurers at this time. There is no need to change a proven process.

Position: WTAY strongly urges that modifications be made to allow the continued use of waivers. They are a reasonable and proven part of our industry, and we believe that the continued use of waivers is crucial to short and long term survival.

7.0 Reverse Onus

Page 13 of the Report deals with the reverse onus issue and accompanying definitions. Mariport is of the opinion that the existing body of 'shipping' law will exclude adventure travel from most impacts. However, the courts will decide.

Issue: Is Reverse Onus Reasonable in Adventure Tourism?

- The MLA assumes negligence on the part of the operator in some situations such as shipwreck, collision, etc.
- Mariport claims that the many years of precedent in the marine industry should create a situation that will not affect adventure tourism.
- Mariport claims that the definition of terms is clearly understood in the shipping industry, and most adventure situations would not be included under those definitions. WTAY does not believe that such definitions will be accepted by the courts, as adventure tourism is clearly not 'shipping'.
- The MLA creates a new situation for adventure tourism, and WTAY does not agree with the favourable interpretation assumed by Mariport. The impact of reverse onus is clearly unknown.
- The adventure tourism industry may be a test case for the courts to make new definitions for adventure tourism, given the assumed negligence.

Position: At the least, these terms should be defined in the adventure tourism context. Otherwise, our industry should be excluded from this provision. Assuming that typical "shipping" definitions will be applied to adventure tourism court cases is presumptuous, and leaves our already vulnerable industry open to opportunistic, and unforeseen, claims. We cannot afford this level of uncertainty in these times. WTAY strongly supports the recommendation that TC do a formal legal review, using a lawyer experienced in adventure tourism. This review should include consultation with the adventure tourism industry.

8.0 Unknowns

There are a number of unknowns that may impact adventure tourism as the result of the MLA, some of which are noted above. Others include possible changes in the limits of liability as a result of changes in international conventions. Inspection, enforcement, and Gatekeeper functions and paperwork may be too onerous for small businesses, and very difficult to feasibly implement. The MLA may require additional classes of boats to be registered.

The funding for such activities, and the cooperation of other government levels is uncertain. There are probably other issues that we have not yet understood from a layperson's review of the Act and proposed regulations.

Position: WTAY has not evaluated these unknowns, but recommends that they not be underestimated. The impact on businesses could be substantial, and more subtle than the current issues of major concern.

Transport Canada should acknowledge the situation of our industry, and dedicate a liaison to dealing with such issues on an ongoing basis. Adventure tourism should be consulted, warned, and helped where necessary to achieve mutually beneficial goals.

Footnote

Subsequent to the WTAY review of the Mariport report, we received an off-hand commentary from a local lawyer experienced in the adventure travel industry. His comments were to the effect that most personal injury claims in Canada are for amounts less than \$350,000, so insurance companies may not see the liability cap as a benefit. However, with waivers, a successful defence saves not only legal fees, but results in zero damages.

The extrapolations from this point of view are obvious, and not favourable to adventure tourism.