

This memo is a summary of a workshop delivered by the Outdoor Recreation Council offered to ORC members on Mar 16, 2012. It should not be relied upon or be considered legal advice.

To: SKABC Executive
From: Kallie Cunningham
Date: Originally presented in draft May 14, 2012;
Finalized for submission to SKABC for executive records Jan 20, 2014

Re: Outdoor Recreational Council Risk Management Workshop at BCIT on March 16, 2012

The slide handouts from this session accompany the official record of this report in a separate PDF.

The book "Legal Liability and Risk Management in Adventure Tourism" by Ross Cloutier has been purchased for the SKABC library. The author was the ORC event's main presenter and is one of the founders of the Thompson Rivers University Adventure Studies Department in Kamloops and an internationally recognized expert.

Although the book was published in 2000, Ross Cloutier assured me that the general concepts and laws and rules have not changed. The handouts provide some of the more recent cases. Retail value of the book was \$50. Participants were offered a significant discount.

We also learned that BC has legislation titled the *Electronic Transactions Act*. Unfortunately it was introduced in 2001 and is not discussed in the book. I have looked briefly at the legislation and it requires further reading to fully understand it. However, we understand that it DOES permit electronic signatures as long as there is a way to link the electronic signature/record to the member. A copy of legislation is attached as a separate document for the executive records.

Generally, the information we received confirmed my understanding of the laws and the risk management options we need to both consider, and balance, as we decide how to:

- manage our membership registration/waiver process,
- manage and communicate our policies and procedures to manage the risks we cannot ignore,
- ensure our volunteers are protected, and
- above all, ensure our members enjoy their participation in club activities.

A summary of key points from the day and my recommendations are set out below.

Insurance:

- 1) The club insurance policy was renewed effective April 1, 2012.
- 2) It is important to ensure a clear understanding about what the insurance covers. e.g. General Liability Insurance covers "mistakes" and negligence. It compensates plaintiffs for property damage and personal injury. This is our primary concern. Should the club be sued, our insurer will handle the claim and pay out/settle the claim, IF we have met the conditions of the policy. See below. Note: As at May 2012 the SKABC policy coverage is "\$2 million including Participant Coverage"
- 3) Directors and Officers (D&O) insurance is a discreet type of policy. It covers actual or alleged decisions ("wrongful acts") by directors as well as providing protection against a breach of "duty" by the directors and officers. It does not cover bodily injury and property damage. This latter liability is covered under the general liability insurance. D&O insurance is usually defined as "any actual or alleged act or omission, error, misstatement, or misleading statement, neglect or breach of duty by an insured. This protects our volunteer directors from the risk of liability for failing to carry out their duties as directors and officers which may be imposed by the law. As at May 2012, SKABC has \$1 million D&O Errors and Omissions coverage.

- 4) A variety of insurance coverages are available and it is important to understand what they include. As at May 2012 SKABC has:
 - a) \$250,000 Tenants Legal Liability
 - b) \$1,000 voluntary medical payments
 - c) \$2 million non-owned auto liability subject to \$500 deductible and a range of exclusions, including "abuse and liquor liability"
- 5) Insurers do not like surprises. Be sure to fully disclose all activities.

TAKE AWAY POINT FOR OUR CLUB:

The current insurance policy is offered and priced based on a review of club activities and policies found on the website.

- 6) Insurers rarely rely on "waivers" as a defence. There is too high a risk that they will be overturned unless perfectly structured and implemented. As a result, if a waiver is required, insurers may have requirements or may dictate the content.

TAKE AWAY POINT FOR OUR CLUB:

The protection offered by waivers depends on whether there is strict compliance with the law. The requirements to do this are beyond the standard that our club (and members) is willing or able to endorse. This reality is dealt with in two ways:

- a) *The insured complies with requirements of the insurer.*
- b) *If insurer does not require a waiver, the organization should review the purpose of the waiver. The waiver serves a purpose, but it should not be relied upon as a complete defence. Waivers may assist a defence. For example, repeated acceptance of a waiver by the same person over a number of years may support the defence.*

RECOMMENDATION:

The club should confirm in writing that insurer does not require a waiver. If a waiver is required, determine criteria for an electronic waiver.

Post report: Insurer confirmed that a waiver is not required. Email attached.

- 7) Claims can be brought in the jurisdiction where an accident occurred, the defendant resides or the plaintiff resides. Insurance is often limited to the jurisdiction of the activity or the defendant. If for example, an American started an action in Washington State, the defendant would need to hire a lawyer to argue that the case should be heard in BC. Then the insurers would start to assist with the defence.

CONCERN:

Our club has engaged instructors from the US. Members are also starting to discuss how to link up with Americans across the border with common trip interests.

RECOMMENDATIONS:

- a) *Ensure the SKABC waiver and release of liability clearly states the governing law [implemented with 2012 waiver]*
 - b) *Club Executive must be alert to the need to pay attention to inter-jurisdictional activities (members going into the US; US members joining activities in BC). Inquiries should be made before sanctioning any activity with a cross border component.*
- 8) Premiums depend on claims made. We live in a more litigious society. When something goes wrong, attitudes change. As noted, insurers do not depend on waivers to defend claims. Examples of claims paid out include:
- a) *Woman was carrying a kayak to water wearing holey sole clogs. She slipped on the wet incline to the water. She made a claim for her injury and the insurer paid out. It did not go to court.*
 - b) *A club did not update its member list. It allowed a former member to participate in an activity. There was an injury and the insurer had to pay out. Lesson: SKABC needs to ensure that trip participants are current members.*

Waivers and Release of Liability

- 9) While waivers are not often sufficient to provide a solid defence they do serve a purpose:
- a) *They are educational and offer opportunities to prompt discussion*
 - b) *They address jurisdictional issues as noted above*
 - c) *If signed every year, they offer some evidence of the participant's knowledge and consent*
 - d) *They can be a deterrent for plaintiffs who may not be confident of the ability to have it set aside.*
- 10) Parents cannot sign a waiver on behalf of their children. This amounts to signing away legal rights that they can pursue at age 19. Some organizations seek to have the parents sign an indemnity to the organization. This is not looked upon favourably by the courts.
- 11) BC Electronic Signature Act permits electronic signatures. A brief review of the legislation suggests that electronic signatures can be linked to the individual.

RECOMMENDATIONS:

- a) *Electronic waivers be implemented. [Implemented for membership year commencing Apr 1, 2012]. Our website supports this in the following ways:*
 - i) *The waiver can be viewed at any time from the public and member website*
 - ii) *When a member comes to the website, the waiver must be accepted before the member can enter the website.*
 - iii) *The acceptance is dated stamped and captured on our master member database*
 - iv) *A copy of the waiver is emailed to the member at the email address provided on their individual profile.*
 - v) *If the language of the document is changed, all members will be prompted to accept the new waiver (an explanation as to the changes should be provided)*

- vi) *Members should accept the waiver each year as part of the renewal process.*
- vii) *The membership chair and webmaster should ensure that the master member list is archived on the website for future reference, if ever needed.*
- b) *The Waiver and Release should be accompanied with an assumption of liability and member responsibility section (see below) [Implemented with April 1, 2012 membership year]*
- c) *SKABC policies about participation of minors should be reviewed and guidelines provided about when minors can participate, and what is required. E.g. Age, size, experience and skills already demonstrated, the nature of activity, the presence of parent, etc. SKABC may wish to have parents sign consent to participate that clearly sets out the risks. A document similar to the member waiver might be used, adapted to exclude the waiver and release.*

Assumption of Risks

- 12) There are some states in the US where signed assumptions of risk can be used in a defence. They are not a whole defence in Canada. However, as with waivers and releases they:
- a) Serve as an education tool
 - b) Can be used to set out the range and scope of injury and damage that can occur

RECOMMENDATION: *[implemented Apr 1, 2012]*

- a) *The Club's Waiver and Release should begin with an assumption of risks.*
- b) *The list of risks should be specific and as complete as possible/reasonable and address on and off water risks.*

Member Responsibility Statement

- 13) The workshop made it clear that each organization should consider what is appropriate for its circumstances. When discussions about risk and responsibility arise, many say "we all take on our own risks and responsibilities." The following recommendation was offered and accepted at the March 2012 SKABC executive meeting to ensure that new members in particular are made aware that they are "expected to assume responsibility for their own actions and decisions":

RECOMMENDATION:

The waiver and release form should include a Member Responsibilities statement that sets out the club's philosophy, noting what is offered to members, but also asking members to acknowledge there is a member responsibility to ensure they have the skills and equipment required to participate in events and to comply with the policies and procedures that are in place to minimize the risk of injury or damage and ensure the enjoyment of all.
