

MEMO

Date: July 14, 2015

To: Tennessee Trent, Recreation Sites & Trails BC

From: Outdoor Recreation Council of BC

Subject: Liability issues affecting non-profit groups entering into partnership agreements for work on trails.

You have requested a statement from the Outdoor Recreation Council (ORC) regarding its position on the question of the liability exposure of groups which enter into partnership agreements with RSTBC.

Status prior to amendments to the partnership agreements of RSTBC and the volunteer agreements of BC Parks

As you are probably aware ORC played a part in the decision by BC Parks to reintroduce a volunteer program in 2013. Prior to that time ORC had no direct involvement with the Partnership Agreements in use by RSTBC nor did we have copies of the agreements in house.

ORC's introduction to the agreements

On May 2, 2013, I met with Bill Marshall and he informed me that BC Parks and RSTBC had jointly developed a program for use by the volunteer groups associated with the two agencies. Then on May 6 I received the following documents from Lori Halls, then the ADM for BC Parks, as follows:

- BC Parks Partnership Agreement
- Stewardship Partners Insurance program – General Liability Summary
- Volunteer safety Planning Guidelines
- Key safety Plan Components including Appendix A
- Schedule A, Agreement Area
- Schedule B, Services and Special provisions
- Schedule C, Insurance
- Schedule D (blank), Operational Standards
- Schedule E (blank) Provincial and Agreement Holder Structures
- Schedule F (blank) Annual Operating Plans
- Sample letter dated July 23, 2013, from Aon Reed Stenhouse with Program Certificate of Insurance
- Stewardship Partners Insurance program – General Liability Insurance Policy

I immediately distributed the entire package of documents to all ORC's member organizations. As I understood it the BC Parks Partnership Agreement listed above was identical to the revised agreement to be used by RSTBC.

Document review and complaints from member organizations

I reviewed these documents and in particular the Partnership Agreement in light of comments received from the Back Country Horsemen of BC and the Friends of Cypress Provincial Park. The latter were especially concerned about the unreasonable nature of Clause 4.01 which requires the Agreement Holder to indemnify the Province against any losses, etc., arising directly from the performance of services by the Agreement

Holder during the term of the agreement. See Appendix for complete original wording of section 4.01.

I also found this clause to be quite unreasonable for an organization providing volunteer services to the Province. I then spent the Fall of 2013 seeking a lawyer who would be prepared to act on our behalf to review the terms of the Partnership Agreement. I considered it necessary to have a legal opinion as to the reasonableness of the Agreement.

It is not easy to find a lawyer who does not do some work for the Province as a result of which they tend to be reluctant to challenge the Province on a matter of law. Eventually I was able to identify a practising lawyer who was prepared to take on the challenge, namely Shea Coulson, of Gudmundseth Mickelson. I met with him in January 2014, and decided to engage him for the task.

Review by Shea Coulson, ORC's legal counsel

Coulson completed his review of the documents, including the Partnership Agreement, by January 15, 2014, and he concluded that the approach taken by the Province was opposite to the traditional approach to volunteer organizations, in which the entity (or agency) receiving the benefit of the volunteer services would take out and pay the premium for an insurance company that would cover any claims, etc. arising from the volunteer work.

In the case of the Partnership Agreement, he found that the general liability insurance of \$2 million to be provided by the Province, when combined with the indemnity clause 4.01(a), contained in the Partnership Agreement, did not sufficiently protect volunteer organizations from liabilities arising from their performance of volunteer services under the Partnership Agreement. He pointed out that, although the Province was providing a general liability policy with a claim of \$2 million per incident, a claim by the Province pursuant to Clause 4.01(a), as it was then worded, might require the organization to pay more than \$2 million as well as the Province's legal costs.

Coulson also found that Clause 4.02(a) created ambiguity as to how Clause 4.01(a) would be interpreted, because it drew a distinction between the completed services and the performance of the volunteer services during the term of the agreement. He suggested there would be room to argue which of the two clauses might govern a particular situation. He said that type of ambiguity would not be desirable for an Agreement Holder and it would not benefit the Province because it might cause it to lose access to the insurance.

Coulson also recommended that prospective Agreement Holders review the terms of the insurance policy to be provided by the Province before entering any agreements to make sure they are aware of what is insured.

Coulson recommended that no groups sign the agreement with the wording as it then was. In fact we believe a number of organizations had already signed agreements by that time both for BC Parks and for RSTBC.

Principal recommendation by Shea Coulson

Coulson recommended that the lowest risk approach for the Agreement Holder would have been to completely delete Clause 4.01(a) and to amend the release in Clause

4.02(a) to cover the performance of the Services at all times, both during and after completion. If those changes were to be made he stressed that the insurance coverage would be needed to protect the Agreement Holder and it would be important for the Agreement Holder to ensure that the scope of the insurance was satisfactory.

As it happens the Province did not adopt this approach. Instead it decided to maintain the indemnity clause while adopting something similar to the alternate approach proposed by Coulson.

Coulson`s alternative approach

The alternative approach recommended by Coulson was to amend the indemnity clause (Clause 4.01(a)) so as to limit the indemnity to whatever coverage the insurance policy provides for the circumstances.

In addition he recommended that Clause 4.02(a) be amended to provide that the Province release its right of recourse against the Agreement Holder for all losses, claims, etc. that the Province might sustain arising directly or indirectly from the completed performance of the Services by the Agreement Holder or its employees, etc.

The Province`s proposed amendments

In response the Province made a minor amendment to Clause 4.01(a), by adding the words ``on-site`` in front of ``performance of the Services`` and made the principal amendment to Clause 4.02(a), which it substantially reworded (See Appendix for current wording). As a result of this amendment the amount of any indemnity for which the Agreement Holder might be liable is now limited to the total amount of collectable insurance from the policy provided by the Province as well as from any other policy carried by the Agreement Holder.

With that revised structure the Agreement Holder would still be obligated to make a claim against its insurance company and to be involved in any related litigation, the costs of which would be borne by the insurer. Coulson said it was understandable that the Province would want to have access to any insurance applicable.

Coulson`s comments on the Province`s proposed amendments

Coulson acknowledged that the amendments by the Province limited an Agreement Holder`s liability to the amount of collectable insurance, so that the Agreement Holder will no longer be at risk to indemnify the Province out of its own resources. The Agreement Holder would, however, still be required to make a claim and could potentially be involved with litigation, with costs to be borne by the insurers. He described this approach as ``at least logical``.

Coulson also acknowledged that the Province had addressed the question of the distinction between the completed services and the performance of the volunteer services during the term of the agreement by requiring indemnification only for the on-site performance and adding the words "during or following this Agreement" to the introduction to Clause 4.02.

Final ORC position

We are still not entirely clear about the significance of the words "on-site" in Clause 4.01(a). However ORC is satisfied with the reworded Clauses 4.01 and 4.02 and in our opinion there is no significant financial risk to any group which wishes to enter into a

Partnership Agreement with BC Parks or Recreation Sites and Trails BC provided the Agreement uses the amended wording for Clauses 4.01 and 4.02 as set out in the Appendix to this memo.

Jeremy McCall
Executive Director

APPENDIX

Wording of Clauses 4.01 and 4.02 of BC Parks Partnership Agreement Article IV – Indemnity and Waiver – Before and after amendments

Original wording - Before intervention by ORC

- 4.01 The Agreement holder will indemnify and save harmless the Province, its servants, employees and agents against all losses, claims, damages, actions, costs and expenses that the Province, its servants, employees and agents may sustain, incur, suffer or be put to arising:
- (a) directly from the performance of the Services during the term of this Agreement by the Agreement Holder, its employees, members, volunteers, and subcontractors,
 - (b) from breach of the obligations of this Agreement by the Agreement Holder, or
 - (c) the wilful misconduct, gross negligence or the bad faith actions of the Agreement Holder, its employees, members, volunteers and subcontractors,
- except to the extent that any such loss or claim is caused by or contributed to by the negligence of the Province.
- 4.02 The Province hereby releases and waives its rights of recourse against the Agreement Holder for all loss, claims, damages, actions, costs and expenses that the province may sustain, incur, suffer or be put to at any time arising:
- (a) from the completed performance of the Services; or
 - (b) damage to the property in the Agreement Area owned by the Province directly caused by the Agreement Holder, its employees, members, volunteers and subcontractors in the performance of the Services
- unless any such loss, claim, damage, action, costs or expenses are caused or contributed to by the gross negligence, bad faith actions or wilful misconduct of the Agreement Holder, its employees, members, volunteers and subcontractors, or if the Agreement Holder was in breach of its obligations under the his Agreement, including breach of section 4.03, or was caused by any activity by the Agreement Holder outside the scope of this Agreement.

Current wording i.e. after amendments negotiated by ORC (changes in bold type):

- 4.01 The Agreement holder will indemnify and save harmless the Province, its servants, employees and agents against all losses, claims, damages, actions,

costs and expenses that the Province, its servants, employees and agents may sustain, incur, suffer or be put to arising:

- (a) directly from the **on-site** performance of the Services during the term of this Agreement by the Agreement Holder, its employees, members, volunteers, and subcontractors,
- (b) from breach of the obligations of this Agreement by the Agreement Holder, or
- (c) the wilful misconduct, gross negligence or the bad faith actions of the Agreement Holder, its employees, members, volunteers and subcontractors,

except to the extent that any such loss or claim is caused by or contributed to by the negligence of the Province.

4.02 The Province hereby releases and waives its rights of recourse against the Agreement Holder for all **losses**, claims, damages, actions, costs and expenses that the Province may sustain, incur, suffer or be put to at any time **either during or following this Agreement**:

- (a) **for amounts exceeding the amount of collectable insurance available to the Agreement Holder with respect to indemnified matters covered by 4.01(a) above**; or
- (b) **respecting** damage to the property in the Agreement Area owned by the Province directly caused by the Agreement Holder, its employees, members, volunteers and subcontractors in the performance of the Services

unless any such loss, claim, damage, action, costs or expenses are caused or contributed to by the gross negligence, bad faith actions or wilful misconduct of the Agreement Holder, its employees, members, volunteers and subcontractors, or if the Agreement Holder was in breach of its obligations under this Agreement, including breach of section 4.03, or was caused by any activity by the Agreement Holder outside the scope of this Agreement.
