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Chair

Mr. Merv Tweed

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• (1205)

[English]

The Chair (Mr. Merv Tweed (Brandon—Souris, CPC)): Good afternoon, everyone. Welcome to the meeting number 15 of the Standing Committee on Transport, Infrastructure and Communities.

Pursuant to the order of reference of Monday, March 30, 2009, the orders of the day are for a study of Bill C-7, an act to amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other acts.

Joining us today from the Canadian Maritime Law Association is Mr. Christopher Giaschi, vice-president on the west coast. And not in his chair, but we believe in the building and on his way, is Mr. Joe Kowalski, from Wilderness Tours.

Before I turn it over to Christopher, I would like to acknowledge to the committee and apologize a bit for the creation of some confusion about the time of this meeting. I appreciate the committee's patience in getting it organized.

Hon. Joseph Volpe (Eglinton—Lawrence, Lib.): This committee member is extremely happy with your efforts, Mr. Chairman, so don't apologize.

The Chair: Thank you.

Christopher, if you would, please start. Then if Joe is here, we'll go to him. If not, we'll start with the questions.

Mr. Christopher Giaschi (Vice-President, West Coast, Canadian Maritime Law Association): Thank you.

I am a maritime lawyer, and I am the west coast vice-president of the Canadian Maritime Law Association and the chair of the CMLA ad hoc committee, which was struck to look into and review the provisions of Bill C-7.

The Canadian Maritime Law Association was founded in 1951 and is made up of individual and constituent members. The individual members are predominantly maritime lawyers who practice throughout Canada. The constituent members are various companies and organizations from the marine industry in Canada. We take members from all facets of the marine industry. The CMLA is also Canada's representative to the Comité Maritime International, the international organization established in 1897 for the development of international maritime laws. The CMLA is not a lobby group for a particular interest. Rather, our mandate is to promote modern and effective maritime laws.

We established a committee to review Bill C-7. We have made two submissions prior to today for your review. I will not go through

everything in those two submissions, given the time constraints. There are two areas in the bill that I would like to deal with. The first is adventure tourism, specifically the new section 37.1 of the Marine Liability Act, the purpose of which is to exempt adventure tourism activities from the provisions of the act.

Section 37.1 sets out a list of criteria to be removed from the act. Our concern is that this list of criteria is not sufficiently stringent. We believe it would be easy for various operators to meet these requirements and to exempt themselves from the provisions of the Athens Convention and the carriage provisions of the Marine Liability Act. It's important to remember that those provisions were enacted to protect Canadian passengers. The provisions provide a give-and-take regime under which carriers are made liable, while being given a right to limit their liability. In exchange, they're not permitted to contract out of the liability requirements established by the act. This is very common in any kind of carriage situation. The Warsaw Convention has essentially the same kind of regime.

By exempting adventure tourism, we're effectively reverting back to the pre-MLA days, where operators could use tickets to exempt themselves from liability, no matter what the cause of it. There are lots of those ticket cases out there; some of them are quite egregious in their effects. Even if you're grossly negligent, if you have a vessel that is completely and utterly unseaworthy, you can still usually exempt yourself from liability by having an exemption clause in your ticket. That's what we were trying to avoid with the Marine Liability Act when we brought it in.

Now, with adventure tourism, we're taking out certain people. The rationale was that there are certain people who are thrill-seekers. They're agreeing to participate in a risky adventure and don't necessarily deserve the protections of the Athens Convention. We accept that premise. One of these activities would be whitewater rafting. But that's covered off with the removal of vessels paddled by oars. We don't need the adventure tourism reference to get rid of it.

We're concerned, however, that this 37.1 could be extended to many other types of activities that aren't really thrill-seeking. In my submissions, I've given you some examples. One is the *Maid of the Mist*, which many of you will be familiar with. There are actually five or six of them, and they sail daily. All kinds of people go on that vessel; they're not thrill-seekers. School children go on that vessel, as do elderly people and families. These are people who expect and deserve the protection of legislation. That type of activity may very well come under proposed section 37.1, as will the general regular kind of whale-watching. Again, you're talking about families who go out on these kinds of adventures.

If you look at the requirements of proposed paragraph 37.1(1)(a), you see that “it exposes participants to an aquatic environment”, which certainly the *Maid of the Mist* does. As well, proposed paragraph 37.1(1)(b) states that “it normally requires safety equipment and procedures beyond those normally used in the carriage of passengers”. They hand out those rainsuits, which is not normally done in carriage of passengers, so the *Maid of the Mist* meets proposed paragraph 37.1(1)(b).

Proposed paragraph 37.1(1)(c) states that “participants are exposed to a greater risk than passengers are normally exposed to”. They are exposed to very marginally greater risks, but that's all that's required; it's just “greater”. It doesn't say “significantly greater”.

Proposed paragraph 37.1(1)(d) states that “its risks have been presented to the participants and they have accepted in writing to be exposed to them”. Well, that happens every day. All you need to do is simply sign the ticket with the exclusion clause on the back and you're toast.

Then, in proposed paragraph 37.1(1)(e), there is any further condition that might be required.

Our point is that it's just way too broad and will extend to way too many activities that it should not be extended to.

We have provided some suggestions. First of all, we suggest that it shouldn't even be in there as an exception. Alternatively, at a minimum, we recommend that proposed paragraph 37.1(1)(c) be amended to require that participants be exposed to “significantly greater risks”, and also that in any event there be a requirement that adventure tourism operators exercise due diligence, to ensure they're providing seaworthy vessels and to ensure they're providing a competent crew and minimum safeguards, and that they be prohibited from the contracting out of these requirements, which should satisfy those sorts of operators. All we're asking for are some minimal requirements.

The second point I wanted to address concerns the maritime lien for ship suppliers. That's the subject of our supplementary submission. The main point here is that what's happened is that with the new lien we've sort of forgotten a basic requirement for suppliers for having a cause of action against a ship. It is that you had to have a contract with the owner or a person authorized by the owner. This new provision seems to do away with that requirement, which could, in certain circumstances, be quite unjust.

The example I would give you is that under an FOB sale contract, it's the shipper that retains the stevedores that load the ship. Of course, when I say shipper, I mean the person who is selling the goods, not the shipowner or the carrier. If he fails to pay his stevedores that he has contracted with, they would then have a lien against the ship under this provision, even though they never had any contract with the owner of the ship or anyone that had anything to do with the ship.

It's fundamentally unfair, I think, that this should be the case. Quite simply, what we're suggesting is that the provision be amended to simply require a contract with the vessel owner or a person authorized by the vessel owner, to make that clear and to sort of maintain the status quo.

We've also suggested a proposed subsection 139(3) to deal with the reality of chartering. Most ships are in fact chartered. What we're suggesting here is that there be a presumption that the charter has the authority of the vessel owner unless the person supplying the goods or services is given notice or is advised that they don't, because what often happens is that it could be a charter that retains the supplier, and the supplier doesn't know that. So all we're saying is that if a charter retains him, you're entitled to presume that you will have a lien unless you're specifically told ahead of time that the charter doesn't have the right to bind the owner, in which case you can then decide whether you want to supply the goods or not, knowing that you won't have a lien.

There are a few other minor issues with proposed section 139. We've given an amended version of proposed section 139 that we think complies with our concerns. There was a little issue with the limitation of liability problem that resulted from the drafting. I think it was quite unintentional, and based on some of the discussions I've had with Transport, I don't think it's an issue any longer so I won't go into that.

● (1210)

The only other thing we mentioned is a suggestion that we might include an express provision for stowaways and trespassers to make sure they're not covered by the act, because clearly the act was intended to cover passengers or people in the position of passengers, not stowaways or trespassers. It would be quite unfair, I think, to the owner to impose liability for stowaways and trespassers.

In any event, I think that's my time, so thank you very much, and I would like to say that, other than that and really just some minor provisions, we're very much supportive of Bill C-7.

Thank you.

The Chair: Thank you very much.

Mr. Volpe.

Hon. Joseph Volpe: Chairman, I want to allow Mr. Kania to take the first one, if you don't mind.

● (1215)

The Chair: Absolutely. Go ahead, for seven minutes.

Mr. Andrew Kania (Brampton West, Lib.): Thank you.

I'm not a member of this committee, so I'm not an expert in terms of this proposed new legislation, but in terms of the maritime lien in particular, I note that the Shipping Federation of Canada is opposed to the lien. They say specifically that they are opposed to it because federation members that are shipowners find it more difficult or more onerous to finance their ships when the holder of the ship's mortgage is trumped by other creditors such as ship suppliers.

Can you comment upon that particular issue?

Mr. Christopher Giaschi: The new lien provision won't apply to Canadian ships. It only applies to foreign ships. I don't know that the Canadian shipowners—

Mr. Andrew Kania: They have a proposal, though, as well, I believe, that they want it to apply to all ships.

Mr. Christopher Giaschi: I'm not a shipowner and I haven't had to finance a ship, so I'm not going to say whether they're right or wrong.

Mr. Andrew Kania: That's fine. So comment upon the proposal that applies to all ships, and you might as well comment at the same time about also extending it to pleasure vessels.

Mr. Christopher Giaschi: What I understand the provision is for is specifically to remedy a situation that has developed under Canadian law because of the way in which conflicts of laws are dealt with under Canadian maritime law. Not to get into that, but the problem has been predominantly with respect to foreign vessels, not exclusively but predominantly. The lien addresses that issue. It addresses and fixes the big problem that's been experienced by Canadian ship suppliers.

Canadian vessels are here. They stay here. The owners are here. You have other remedies to recover what you're owed. With a foreign ship supplier, all you've got is the ship, and if the ship goes, then you're left with an action in Panama or... You're really not left with any other remedies, so I suppose that would be the justification for it.

Mr. Andrew Kania: So you support restricting it to foreign vessels?

Mr. Christopher Giaschi: We do.

Mr. Andrew Kania: Okay, so let's discuss that last comment, in terms of the enforcement.

If a foreign vessel leaves Canada owing money here, we are then logically required to pursue in a foreign jurisdiction.

Mr. Christopher Giaschi: Correct.

Mr. Andrew Kania: And you'll agree with me that a judge, in whatever foreign jurisdiction it might be, may or may not accept jurisdiction for the subject matter.

Mr. Christopher Giaschi: If the ship is there, any judge will undoubtedly accept jurisdiction on the basis of the *in rem* presence of a ship within a jurisdiction.

Mr. Andrew Kania: But the laws vary, obviously, from country to country.

Mr. Christopher Giaschi: Not very much in terms of that aspect. But you're quite right, they do, so I'm not going to sit here and say I know the law of every country.

Mr. Andrew Kania: So it would be better to enforce this in Canada, if possible.

Mr. Christopher Giaschi: Absolutely, because your real problem is going to be not whether they will take jurisdiction over the ship; the real problem will be what their local conflicts of laws rule is and whether they will apply Canadian law as opposed to the law of the foreign country.

Mr. Andrew Kania: And you have to hire a lawyer in the foreign country and get some type of judgment, and then worry about enforcement—all of that.

Mr. Christopher Giaschi: Absolutely.

Mr. Andrew Kania: So it's better for Canadians if they can do it here.

Mr. Christopher Giaschi: Absolutely.

Mr. Andrew Kania: Let's discuss that. I am a lawyer, but I'm not an expert on the Federal Court rules. I have a proposal, which I've made, in terms of amending sections 139, 128, and 129, so you'd put more, call it substance, into the enforcement provisions. I'm going to take you through that so I can have your comments.

Specifically with respect to sections 128 and 129, if you look at the proposed legislation, it talks about a designated officer doing various things, including, essentially, making an order that the ship can't leave. So my suggestion, which I'd like you to comment on, is that we include section 139 and the maritime lien under these provisions so that a designated officer could restrict a ship from leaving.

The exact wording I have is about...but that's not the point, it's the theory behind it. We restrict the ship from leaving and then the designated officer makes known to the owners of the vessel, just as it is here in section 129, what's required in order to be released. And we can build in some provisions in terms of having to bring this before a judge for protections within a certain period of time. But in essence what we're doing here, before it's too late, is we're stopping the vessel from leaving, to be fair to the suppliers in Canada. Otherwise, you're having to sue; you have to go to court and you have to get a judgment, if you can find a judge. It could be a Friday, they may be leaving, there are no judges available, it costs money. This is faster, and I would suggest it could resolve most of the cases. But please comment.

• (1220)

Mr. Christopher Giaschi: I would absolutely hate that.

Mr. Andrew Kania: Tell me why.

Mr. Christopher Giaschi: If I get a call at 12:20 from a ship supplier who has a new lien, I can have that ship under arrest by four o'clock. It is not going anywhere. Then I've got absolute security for my client's claim, and nine times out of ten, I'll be paid by 10 the next morning.

Mr. Andrew Kania: You're saying now you could have it arrested?

Mr. Christopher Giaschi: Now I can have it arrested, but I don't have a lien, which is a problem. But now I can get it arrested.

Mr. Andrew Kania: How do you get it arrested?

Mr. Christopher Giaschi: How do I get it arrested? I file a statement of claim in the Federal Court, together with an affidavit to lead warrant, and it's very easy.

Mr. Andrew Kania: Right. So you hire a lawyer and get in front of a judge.

Mr. Christopher Giaschi: A small claim will cost you \$300.

Mr. Andrew Kania: Somebody has to hire a lawyer and get in front of a judge.

Mr. Christopher Giaschi: They do, but it'll be much faster than trying to get, with all due respect, government enforcement people. They're not going to get it done by four o'clock. And if it's after four o'clock, you're not even going to find anybody to do it.

Mr. Andrew Kania: So—

The Chair: Mr. Kania, you've run out of time.

I welcome Mr. Kowalski. I'm going to allow you to make your presentation, and then we can continue with the line of questioning. It'll perhaps open more of the dialogue.

Mr. Kowalski.

Mr. Joe Kowalski (Wilderness Tours): Thank you, Mr. Chair.

I'm the founder and president of Wilderness Tours, Canada's largest whitewater rafting company, based near Beachburg, Ontario, a 90-minute drive west of Ottawa. From starting with just a handful of enthusiasts in 1975, Wilderness Tours now guides 30,000 adventurers down the rapids of the Ottawa River every summer. In case you're not familiar with us, I will leave a couple of brochures here that hopefully will give you an idea of what whitewater rafting is, and maybe you'll want to take the trip with us this summer.

One thing that I should also point out in my introduction about myself, and that I didn't in this brief, is that in addition to being in the rafting business, I'm also in the jet boating business in Montreal and Niagara-on-the-Lake, so I'm very, very familiar with risk management as it pertains to whitewater rafting, jet boating, and activities that are sort of out of the norm.

I have been a pioneer in the whitewater rafting and kayaking industry in Canada since its beginning 35 years ago. I am a founding member of the Canada River Council, which is dedicated to safe, professional river running in Canada. I am also a founding member of the U.S. equivalent, America Outdoors, and hold the position of vice-president. I have personally guided Prime Ministers Trudeau and Chrétien down the Ottawa River.

I have been a strong advocate of excluding the whitewater rafting industry from the Marine Liability Act. The reason is simple: there is an element of risk in these activities our industry provides that cannot be eliminated. It is essential that we communicate this risk to our prospective clientele through a release waiver form.

The waiver is the cornerstone of our industry. It says in plain language that there is an inherent risk in the activities we provide and that those risks can be significant—even death. A signed waiver form is required of all participants. Our industry informs its potential clientele of the risks and the waiver form requirement in all our promotional literature.

I have here one of our primary promotional pieces. At the back, we always have a safety and liability clause, which reads:

While no experience is necessary, we insist you must be in good health and possess average swimming ability. Minimum age is 13 years and minimum weight is 41 kg...for High Adventure rafting. Minimum age is 7 years and minimum weight is 23 kg...for Gentle Family rafting. Although we spare no effort to ensure a safe experience, we can assume no responsibility for your safety or loss of personal equipment. In the activities we provide, an element of risk is inherent and beyond human control. A signed liability release is required of all participants and a parent/guardian release for minors (under 18). A copy of our release may be obtained in advance or downloaded from our website. We prefer [that] you complete the liability release form on line prior to arrival.

So our industry does inform its potential clientele of the risks and hazards and we do that through a waiver form. It's in all of our promotional literature. We also make our waiver available on our website for everybody to see prior to making a decision to go rafting. It is Wilderness Tours' policy to provide a full refund to anyone who has paid for the rafting trip and decides at the last minute that he or

she cannot sign the waiver form. The waiver form is also a requirement of the insurance companies that provide liability insurance to our industry. In fact, it is our insurer who writes the language for the waiver form.

One should not conclude from this brief that our industry and the activities we provide are dangerous. They are not. There is a risk, but the risk is very manageable. To use Wilderness Tours as an example, we have guided over a million rafters down the Ottawa River since our founding in 1975. We have never had a fatality due to drowning or associated with rafting. Our most serious injury tends to be a broken leg, which might happen every summer or every other summer.

● (1225)

In the winter we operate Mount Pakenham Ski Resort, just west of Ottawa. In the ski industry, a broken leg is rather commonplace and not regarded as a serious incident.

In conclusion, our industry provides the adventuring public with the safest and most professional experience possible. There is risk associated with our activities, and we communicate that risk in our promotional literature and in our waiver form. The waiver is the foundation of our industry and we cannot operate without it.

The whitewater rafting industry should be excluded in the Marine Liability Act.

I would be pleased to answer any questions regarding the whitewater rafting industry.

The Chair: Thank you very much.

Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Thank you, Chair.

Mr. Giaschi, when Transport Canada people appeared before this committee, they tabled a document you may had the opportunity to read.

They say negotiation with the industry and various parties affected by this piece of legislation began back in 2005. The document mentions this about the “maritime privilege,” “broad support from the industry; concerns in the legal community.” And it has this to say about adventure tourism, “broad support from the industry and users; concerns in the legal community.”

I am trying to understand both the position of the Canadian bar and your message today. Let me start with the maritime lien. If the industry is not worried, it means in theory that shipowners, who are aware of this bill, did not ask to be directly involved.

Personally, you would like to see a direct link between the owner and the service provider. I am wondering. Is this not another case where lawyers are just looking for a way to make a lot of money? With due respect, is it not the case? When I hear the industry agrees but the legal community has concerns, I would like to be reassured that you are doing this for the public good.

•(1230)

[English]

Mr. Christopher Giaschi: Yes, there were extensive consultations with industry. There weren't extensive consultations with the public generally, in the sense of the individuals who utilize these services, because you can't have that kind of consultation with your average, ordinary Canadian. They did go to industry, and industry is basically the adventure tourism operators, and of course they're going to favour it because it removes them from the act and it gives them limitation of liability. The consultation was with their marine underwriters, who of course are going to favour it because it reduces any claims they have to pay.

Our position, and the position of the Canadian Bar Association, is quite different. We don't have any interest, and believe it or not, I have more than enough work. I don't need to try to create more work through this kind of a process. But, effectively, I think someone has to speak up for all those people who go out and buy tickets and who really don't have a voice.

That's one of the things I think the Canadian Bar Association is doing, and it's one of the things, certainly, that we're doing. It's putting forth basically the argument for someone who wants to participate in whale-watching or go on the *Maid of the Mist*, but wants to do so under circumstances that ensure some degree of safety and some acceptance of responsibility on the part of the operator. That's why we have the position we do.

[Translation]

Mr. Mario Laframboise: But, Mr. Giaschi, we have heard the shipowners. If they are not asking to be directly involved as having a direct link between the privilege on the debt or the amount due and the shipowner, why would you want to add this? My question dealt mainly with shipowners. I can understand you jumped on what was the easiest.

As a matter of fact, even with adventure tourism, we are told that there is some support from the industry and users. In other words, even users have been consulted by Transport Canada.

As concerns the maritime lien, however, you said that shipowners should get some protection, but shipowners are the industry. They have been met. If they did not see fit to make this request, I do not understand why you are making it today on their behalf.

[English]

Mr. Christopher Giaschi: I have two points.

I wasn't talking about the lien aspect. My earlier comments were solely about the adventure tourism aspect. I don't know that users were or even can be approached, because the general public doesn't have an association.

With respect to the lien, I'm not sure I totally understand your question. Some of our constituent members certainly have an interest in various aspects of the lien issue. It pretty much balances out. Some are interested in not having a lien and others want a lien. Some want a wide lien; some want a very narrow lien. We certainly were consulted, as were some of our constituent members, who I believe have also spoken before this committee.

The bottom line is that we have recommended what we think is a fair solution to what was a problem, one that address both the concerns of the suppliers, to have some protection and some assurance of being paid, and the concerns of the shipowners, that they not be required to pay amounts that, with respect to contracts, they haven't entered into or authorized.

[Translation]

Mr. Mario Laframboise: I am not convinced, but I will turn to Mr. Kowalski.

Mr. Kowalski, you heard the legal community witness. Among other things, he would like to do away with the exemption for adventure tourism in this bill. Personally, I understand your point of view. I read your brief carefully.

The legislation has been changed. Since 2001, I think, you are required to have better insurance coverage. You are asking to go back to the legislation as it was before that. Am I right?

•(1235)

[English]

Mr. Joe Kowalski: There are two things. We've been in business since 1975, and liability insurance for our industry is very hard to come by. For us, everybody in the outdoor industry, in the adventure industry, whether it's on land or water, requires a waiver of release. We own a ski resort just west of Ottawa, and on the back of every ticket that is printed is our waiver and release. By purchasing that ticket—they don't sign it—in essence they agree to that waiver of release.

The Marine Liability Act would definitely hurt the adventure tourism industry. In our particular industry, people can get hurt through no negligence on the part of the operator. In fact, if there were not a little bit of risk associated with the trips that we offer, I don't think anyone would take our trips. If there were absolutely no risk, then it would be a ride at Canada's Wonderland or the Ottawa Ex. We provide a legitimate adventure experience, and we make sure that the adventuring public knows in advance that they have to accept some of that risk. In fact, that's why people do it.

The risk is very slight. We've taken over a million people rafting and we've never had a fatality associated with our rafting trips. That's not to say that it couldn't happen, but the likelihood is very small. I like to characterize our operations—and I do that to our clientele—as being 99.9% safe, but it's that 0.1% that makes people's adrenalin flow. That's why they want to do these activities.

The Chair: Mr. Bevington, please.

Mr. Dennis Bevington (Western Arctic, NDP): Thanks, Mr. Chair.

Thanks to the witnesses for being here today.

Mr. Giaschi, I hear what you're saying about this adventure tourism section. What you've described are very large vessels carrying multiple passengers. Would this bill be improved by limiting the passengers per vessel, which would be covered under adventure tourism? I can't see, once you have over a certain number of passengers, that you can even justify it to call it adventure tourism, because it's at a point where the numbers would suggest it cannot be adventure tourism. Therefore, if you're over 20 people—and I don't know what the largest rafts cover, and I've travelled on adventure tours, on rafts many times, and they're generally of a certain size. I don't think we're promoting rafts with 20 people on them, but perhaps we are.

Perhaps the liability should be at the number of passengers on board...or the provisions within the act. I'll just throw that to you.

Mr. Christopher Giaschi: I don't know that the number of people is the answer. I didn't mean by my examples to suggest that it was mostly large vessels I was talking about, because it's not just large vessels I'm talking about; it's vessels of all sizes. Frankly, I don't think it should matter whether you're on board a vessel that has 50 people or 20 people, or you're taking 7 people out. If you're operating a commercial operation where you're taking people out on the water, basically, as passengers, even though there may be some aspect to it that is a little different from your standard carriage of passengers regime, then you should be covered by the Athens Convention. You shouldn't be allowed to get out of the Athens Convention simply by complying with those little requirements that are—

• (1240)

Mr. Dennis Bevington: I guess my trouble with “significant risk” is, how would you ever determine that?

Mr. Christopher Giaschi: Well, those are the kinds of problems courts deal with. They will certainly have an easier time dealing with it than if it's not qualified at all. That's the problem.

Mr. Dennis Bevington: Mr. Kowalski, we're talking about competency of masters and crews for many of your endeavours. Are you familiar with the small vessel operator proficiency certificates? Do you use those in your business? Do you get that training?

Mr. Joe Kowalski: Not in our whitewater rafting business. In our jet boating business, the jet boats are very heavy, they hold 50 passengers, and those vessels require Transport Canada captains. With our rafting, the fellow in the back is what we call a river guide. Basically, what we do in our industry is we belong to the Canada River Council, and it's somewhat of a self-policing organization. It has its own rules and regulations, and we follow that for our river guides.

Mr. Dennis Bevington: It's my understanding, through talking with the fishing outfitters in the Northwest Territories, that the small vessel operator proficiency certificates, which are for small commercial vessels up to five tonnes, gross, are going to now be required to get these proficiency certificates. It's about 32 hours of training. So you have somebody who's running a Lund to transport people for fishing purposes, and my understanding is that they're being asked now, under regulation, to get proficiency certificates for all their staff.

Do you think that kind of procedure by the government is acceptable to the industry?

Mr. Joe Kowalski: Are you asking me? Not being a fisherman—

Mr. Dennis Bevington: Well, for small vessels, small boats....

Mr. Joe Kowalski: The critical point for us is the waiver of release.

For example, if I took a ferry ride in Vancouver over to Victoria, I would assume that there would be no risk, that I would just be a passenger, and that it would be 100% safe. If I were on a whitewater rafting trip that's going to be jostled.... The gentleman to my left gave the example of the *Maid of the Mist* in Niagara Falls, which I've been on many times, because we have a business down there. People are running back and forth across the deck, because they all want to get a better view of the falls when the boat moves around. There are no waivers required on that particular vessel that I can recall. But if I were the operator...yes, those people are subjecting themselves to a little bit more risk than a person on a passenger ferry because of that activity. I would think the same thing would apply to an active fisherman on a small vessel.

Mr. Dennis Bevington: Basically, you're not under any competency requirements from Transport Canada for the people who are conducting your tours.

Mr. Joe Kowalski: No. Transport Canada came out with regulations last year or the year before. They're minimal regulations, and our guide training in our industry far exceeds the Transport Canada requirements.

The Chair: We'll go to Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chair.

Thank you for your presentations today and for your attendance. I have to say, as a member of the CBA for about 10 years, I have really appreciated your input today.

I was one of those ambulance chasers. I did a lot of personal injury law, but I also did forestry liens, builders' liens, and personal property liens. I have to say that I think this particular improvement is an excellent improvement in the act, especially for the marine community in Canada that provides goods and services.

I will deal more specifically with proposed section 139.

I would also say that a lien, in essence, gives a bigger hammer for those judgments received in Canada. I think the judgments, first of all, quite practically, because the goods and services are given in Canada, have to be received in Canada. Then they can be enforced somewhere else in another country. A lien will give a judicial body in another country a better probability of success and also better court costs. That's really what it's all about. It's not about getting a judgment in another country.

I would like to talk about the adventure tourism part, because I am concerned about that. I come from a background of jet boaters. I have two jet boats, a Marathon 27-footer and a Harbercraft 1975 19-footer. I whitewater jet boat as well, so I understand your dilemma. You want to be able to keep your businesses open and at the same time make sure that you're not responsible for having a bad operation.

Mr. Giaschi, the law in Canada, as I understand it, already defines gross negligence as a term beyond negligence. Would it not be better to include in proposed section 37.1 a clause that actually says the operator and the owner are not exempted from any gross negligence? Would that not satisfy your suggestion of significantly greater risk?

•(1245)

Mr. Christopher Giaschi: That's another way of minimizing the impact of it. The concept of gross negligence is one that's more prevalent, I think, under civil law than under common law.

We would certainly prefer to see something like what we've suggested: a minimum requirement in terms of due diligence to make the vessel seaworthy and, similarly, due diligence to ensure that you have properly qualified crew. That is a phrase you find in various pieces of marine legislation. It's been judicially considered; we all know what it means and what's required.

Mr. Brian Jean: Are you suggesting the words "due diligence" in the clause? As a civil law lawyer, I saw "gross negligence" being used constantly, and I would suggest that if there were an incident, it would be through civil law that they would be seeking a remedy.

Mr. Christopher Giaschi: Well, no.

Mr. Brian Jean: That's why I'm asking.

Mr. Christopher Giaschi: Gross negligence isn't really dealt with very often under maritime law at all. It's reasonably well known what these other concepts we've put in there are and what they will mean. They will put some onus on the ship owner to ensure basic levels of safety, but on the other hand, they preserve the ability to avoid liability for those risks that truly are exceptional and are being assumed.

Mr. Brian Jean: I have read your letter. Did you propose an amendment for section 37.1?

Mr. Christopher Giaschi: Yes.

Mr. Brian Jean: Would it be possible...?

Mr. Christopher Giaschi: We're talking about adventure tourism. I suggested that adventure tourism operators should also be required to exercise due diligence to ensure the seaworthiness of their vessels at the beginning of the voyage and the competency of their masters and crews. But we didn't actually draft the provision.

Mr. Brian Jean: Would your organization be prepared to draft something along those lines?

Mr. Christopher Giaschi: Absolutely. We do it all the time.

Mr. Brian Jean: Mr. Kowalski, I wanted to let you know that my brother operated Clearwater Trail/Wilderness Tours in northern Alberta for over 20 years. I don't know if you're aware of him. I understand the problem you're faced with, but we want to make sure that the vessels and operators are of such a nature that we can exclude them under the Marine Liability Act and at the same time help you to stay in business.

I want to look at section 139, the lien itself. In paragraph 139(2) (a), it says the lien would operate only "in respect of goods, materials or services wherever supplied to a foreign vessel for its operation or maintenance". So it's operation and maintenance, not FOB shipping, that's going to be taking place. Further, it says, "out of a contract relating to the repair or equipping of a foreign vessel". So free

onboard shipments that would be sent to a shipper would not be included. Is there another example where it would possibly be used?

•(1250)

Mr. Christopher Giaschi: Loading goods on board the ship is part of the ship's operation, absolutely. The provision even goes on and specifically says, "without restricting the generality of the foregoing, stevedoring and lighterage".

Mr. Brian Jean: That was my next question.

Mr. Christopher Giaschi: Yes, that's what it is. It is stevedoring services that are being supplied to the ship—but under a contract with the shipper as opposed to the owner of the ship. It can be done either way. It usually depends on the nature of the sale agreement or the charter agreement.

Mr. Brian Jean: I think you're suggesting that we clarify it. I'm not a maritime lawyer, but I did practice for a few years. Under my reading, I think I'm correct. However, you'd be much more astute in this area. What we need to do is clarify things to make sure there's no misunderstanding at the judicial level. That's what you're actually saying, is it not?

Mr. Christopher Giaschi: That was our concern. When you read section 139, taken by itself, it doesn't address this contractual requirement at all. It may be thought of as not being required anymore.

Mr. Brian Jean: Could you draft a proposal to this committee in relation to that section, to clarify it?

Mr. Christopher Giaschi: That is what I did in the supplementary submissions on page 2.

Mr. Brian Jean: I apologize. I read it, but I get a lot of material on this.

Mr. Christopher Giaschi: I'm sure.

Mr. Brian Jean: I think those are all of my questions, unless I have more time.

The Chair: You're just out.

Mr. Volpe.

Hon. Joseph Volpe: Thank you, Mr. Kowalski and Mr. Giaschi.

On the issue of adventure tourism, we have now had at least two legal perspectives from those who are not members of the committee. Perhaps making some changes to what is already proposed is fair enough. But I'm wondering why you would still resist wording that provides additional coverage by virtue of minimum requirements and significant steps to be taken. Why would that bother you?

I'm at a loss to understand why someone like you, who has already proven to be a diligent operator, wouldn't want the same protection for others who are engaged in a similar business but who also take passive participants on whale-watching or other vessels that are not immediately involved in a risk-taking adventure.

Mr. Joe Kowalski: I can't speak about whale-watching. We don't operate those kinds of tours. I've never had the opportunity to go on one. To me, what defines adventure tourism is the amount of risk involved and the disposition of the participant to accept some of the risk.

Hon. Joseph Volpe: I haven't been on one of these things. I'm a rather risk-averse individual. I usually lead with my chin, but I'm wondering, do you give people a brief introduction? I don't want to say "seminar", because I don't want to be thought of as being sarcastic or facetious, but if I were to come to one of your operations, is the very first thing you'd do is provide me with an indication of the risk I'm about to engage in, the liabilities I'm assuming for myself and that I absolve you of? Do you do that?

Mr. Joe Kowalski: Yes. In fact, we don't even want anybody showing up at our doorstep without acknowledging that. Although we spare no effort to ensure a safe experience, we can assume no responsibility for your safety or loss of personal equipment. In the activity—

Hon. Joseph Volpe: Is that simply posted somewhere?

Mr. Joe Kowalski: It's on every single piece of literature that we provide. It's in all our promotional literature, it's in our administrative literature, it's on our website. The last thing we want is somebody coming to Wilderness Tours and.... Well, part of the registration process is signing the waiver.

In the old days we would occasionally, not too often, have to refund two or three people a summer who came up and.... Although we advertised the waiver form, there wasn't an opportunity for them to see it. They would read it, and it does say "death". It says horrible things on it because, although unlikely, sometimes those things can happen. But as a result of the availability of the Internet, we now post everything online. Everything that's in this document, and more, is online. Most people now, when they search out an adventure experience, go to the Internet. Every year we produce fewer and fewer of these brochures.

•(1255)

Hon. Joseph Volpe: Okay, thank you.

Mr. Giaschi, while I appreciated your presentation and the responses you've given everybody, I was a little bit surprised at your reaction to my colleague Mr. Kania's suggested amendment, which I took to be offered as an indication of providing greater certainty and greater assurance for the user.

Your response, to me—I hope I'm reflecting it accurately—was an indication that you thought that all the measures were already in place and that, from a practical point of view, you or another reasonably competent lawyer would be able to provide service immediately by, I guess, bringing the ship to arrest, etc. But why should that happen? Why wouldn't you accept that the law, in becoming much more precise, would offer a guarantee that the user doesn't have to resort to a lawyer?

I heard you say something about a \$300 price in order to get the thing going. Mr. Giaschi, I think lawyers probably charge less out in B.C. than they do in Toronto, but \$300 gets me a phone call, to which somebody will respond five days later for about two minutes. I don't mean to be sarcastic, but you get my drift.

I hear Mr. Jean saying it takes \$500 to get that call, but—

Mr. Christopher Giaschi: May I respond?

Hon. Joseph Volpe: Sorry, let me finish that thought.

Let's suppose that I'm a small shipper and I have a couple of thousand, \$5,000, worth of material on board this ship. Whether it will cost me \$300 or a couple of thousand dollars to get that back, I'll be inclined to turn around and bless myself and say, "I don't know whether I need this headache". But if the shipowner can be held liable by simply making his obligations clearer, would it be wrong for me, then, to seek that additional protection?

Mr. Christopher Giaschi: If I've understood correctly, what is effectively being asked is whether the legislation can be amended so as to allow the state to become involved in a civil dispute and to assist one of the parties to that civil dispute. I think that's basically what was being asked by way of including it in the enforcement provisions and detaining the ship.

I'm not aware of any legislation in which it ever happens that you include the enforcement authorities, whether they are the coast guard, the RCMP, or the local police. Usually if it's a civil dispute they back off and tell you to go deal with it. That's the first part. It's not the way it's done, and I'm not aware of it ever being done anywhere else.

The other part is simply based in part on my experience with bureaucracies, even efficient bureaucracies. It does sometimes take time to get things done. On the other hand, I know that I and my colleagues are very efficient on this kind of stuff. You might laugh at the \$300 and think it's unrealistic, but if you're talking about a \$5,000 supply of services, it is such a standard thing. It's basically just a matter of plugging a few numbers into a template that I already have. Maybe I was too quick to throw out \$300, but it's not much more than that on a smaller case. It can be done quickly.

That's really why I was opposed to it. I'm trying to imagine how it could be better for them. If there were other ways for them to do it, I'd be happy for them, because frankly, my colleagues and I don't want to be involved in \$5,000 cases or \$10,000 cases.

That's where my thinking was.

•(1300)

The Chair: Go ahead, Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: Mr. Kowalski, we were talking earlier about whale-watching excursions. I know this is not your industry.

However, it is important to know there are now excursions in inflatable rafts like the ones you are using in rafting, because some people want to get closer to the whales while respecting environmental legislation. So it is normal that your industry is not limited to rafting. There are also other types of business in the adventure tourism industry that wish the legislation would be less demanding.

Could you comment on your situation at this time? If the legislation is not amended the way you wish, what kind of future is there for you?

[*English*]

Mr. Joe Kowalski: If I understand correctly, if we lose our waivers, it's basically an industry killer.

To give you an example, in our 35-year history we have probably paid out \$3 million to \$4 million of liability premiums. Our insurers over that time period have paid out \$70,000 on our behalf. Even though we disagreed with those payments, they have the right to do so. Even then, even with that kind of ratio, liability insurance is extremely hard to place. In fact, there are only one or two insurers in Canada. It's just not worth it.

In our particular company, we have not had someone file a statement of claim against us for probably 15 years. I keep going back to our insurer and asking, how come we don't have a reduction, we have year after year of no claims? And the answer is, you could have one this year. Honestly, without the waiver form, the adventure industry is dead in Canada. It's just dead. You can't operate.

We're a small industry. Wilderness Tours is the largest adventure company in Canada. We're minuscule and we're the largest one. For the most part, these are all mom and pop operations. They're very small. Liability insurance is extremely difficult to place, extremely expensive, and it's the waiver that is our protection.

I have been probably to discoveries maybe three or four times in 35 years. In every one of those discoveries it is the waiver that has provided us and our insurer the protection, because you can't go skiing, you can't go rafting, you can't go kayaking...in all these things where you deal with nature there's an element of risk.

Even with whale-watching, I've never been on a vessel; I've seen it. To me, if I were operating whale-watching excursions, I most definitely would want to have a waiver of release signed because I would assume that we would want to get as close as possible to the whales without disturbing them. When they go up and down or whatever, you're going to experience more than you would on a normal.... On a normal passenger ferry going from point A to point B, to me there should be absolutely no risk, and that's not adventure tourism.

Anything where you want to get out there a little bit on the limb, and the clientele want that.... If our whitewater rafting was 100% safe, no one would take our trip. It's 99.9% safe, but it's the one-tenth of 1% that makes it a legitimate experience. I always tell people on our trips that I've been doing this for years and years, and what I love about it is that I don't know the outcome of the trip until it's over. For the clientele, it's the same thing. I think any time you introduce an element of risk in it, you need the waiver.

• (1305)

With our jet boating in Niagara Falls, we have coast guard, Transport Canada captains—everything on the thing—but we still require a waiver form, even though they sit, even though we never ever expect the raft to turn over or the jet boat to turn over. Because it's a whitewater trip, the jet boat is in rapids. We have the waiver primarily for backs and neck twists and things, because that's what people want to do. The biggest rapids on planet earth are below Niagara Falls, and people want to experience them.

The Chair: Thank you.

It sounds like your business is a little bit like ours. We never really know the outcome until it's over.

Voices: Oh, oh!

The Chair: Madam Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman, and through you, to our witnesses.

Mr. Kowalski, what measures do you take to ensure that your vessels are safe?

Mr. Joe Kowalski: Our vessels are safe. Right now, for the first time, our rafts are required to be registered with Transport Canada, even though we object to that. With that registration will come inspections.

The nature of our industry is that it's highly specialized, and for the most part, the inspectors who come—and we've never had anybody inspect our rafts—would really not know more about it than we do. We're not against inspection, but we do our own inspection. We inspect our fleet all the time; we inspect all the rafts that go out on the river every single day. They all have multiple air chambers. We've really never ever had an incident where a raft has lost air or a compartment. Sometimes that might happen after a run, and we have the ability to bring another raft to that location or to repair it on the spot.

There really is a danger of over-regulation.

Mrs. Cheryl Gallant: Do the umbrella outdoor adventure associations you belong to have standards for practices and vessel safety?

Mr. Joe Kowalski: Yes, every one we belong to has standards. They have their own internal ones.

Mrs. Cheryl Gallant: Internal ones.

Mr. Joe Kowalski: Yes.

Mrs. Cheryl Gallant: What about industry standards for the safety of your rafts?

Mr. Joe Kowalski: The safety of our rafts is the concern of the Canada River Council. Again, it's a non-governmental agency, an association of operators very much like the law association or the Canadian Medical Association. It's self-policing, self-regulating. And even though Transport Canada is now starting to regulate our industry, our standards exceed theirs—and they really have to.

Mrs. Cheryl Gallant: You mentioned that you're part of an American umbrella group. In your understanding of the way the United States government deals with the balancing of the inherent risk in rafting and the protection of passengers, can you describe how they go about dealing with this delicate balance?

• (1310)

Mr. Joe Kowalski: What happens, for example, in West Virginia, a big adventure tourism state, is that they have an assumption of risk statute in their state, where if people do these activities, the operator is not responsible unless there's gross negligence on their part.

In the United States, there's no umbrella organization as there is in Canada, because we have a much smaller industry. In the United States, some of the rafting companies operate on U.S. Forest Service land and require U.S. Forest Service directives. Some of them, such as the operators in the Grand Canyon, are in the national park system, so they follow national park guidelines. A lot of the states have their own guidelines, and some states don't have any.

Mrs. Cheryl Gallant: Okay. Thank you.

So there's quite an impetus for your industry to have high standards, because if a single accident occurs, it could impact the industry across the country.

Mr. Joe Kowalski: Absolutely, yes.

Mrs. Cheryl Gallant: We did see, just outside of here, the *Lady Duck*, which was inspected by Transport Canada inspectors, and still we had a tragedy. So when there is an inherent liability on the part of the company, there is quite an incentive to go forth and have the proper inspections.

If there is the allegation of negligence on the part of the rafting company, can the injured party sue, even though they've signed this waiver?

Mr. Joe Kowalski: I should have brought a copy of our waiver form, because our waiver form specifically refers to negligence. Our participants sign away their rights for our negligent behaviour. Back in the old days, before the Internet, when we didn't have a way of communicating the language of our waiver, occasionally some people would read that...because we specifically deal with negligence in the waiver form. The reason we do is that, as an operator...to me, there's really no definition of what negligence is, unless it's obvious gross negligence.

For example, if a guide is taking rafters down the rapids and the raft flips and somebody gets injured, obviously something went wrong, but was it guide error? Was it that the people weren't paddling hard enough? Was it just a rogue wave? What was it? But if this guide were high on alcohol or drugs, there would be no protection for us. That would be gross negligence.

Mrs. Cheryl Gallant: Lastly, can you describe the training your guides undergo before they're ever allowed to take a raft down either alone or with an assistant? How many guides do you have?

Mr. Joe Kowalski: Our guide training is a three-week process, and the people we hire and invite to guide training all come from a whitewater river adventure sports background. Those are the people we hire. Even with that, they go through a three-week training program. Interestingly enough, the first day of guide training is always very exciting for our new guides, because on day one of guide training we make them swim the rapids. We do that because our guides get very good, and for the most part, even if a raft goes up and people fall out, our guides usually stay in the raft because they know what to expect; they know how to sit in the raft properly. So to make sure our guides never ever lose sight of what it's like to be in the river, the first day of guide training is always swimming the river.

Mrs. Cheryl Gallant: And when a raft is going down the river, it's pretty much wilderness along that route in several areas. Should a raft overturn, and you have a number of people, say from one of the bigger rafts or even a small one, where it's a lot more fun throwing yourself from side to side, how do you retrieve the people? Even if they're strong swimmers—

• (1315)

Mr. Joe Kowalski: There's a certain protocol. At major rapids we accompany a lot of our trips with safety kayakers, who might kayak over and rescue someone. We set up guides on shore with throw lines. If a raft turns over or people fall out, we'll have another raft placed below. There are certain protocols we follow. We know people are going to fall out each and every day. We always prepare

for the worst. I'm an ex-Boy Scout and the motto is, "Be prepared", and we're prepared for every eventuality.

Mrs. Cheryl Gallant: Thank you.

The Chair: Thank you very much.

I think that completes our rounds. Are there any other short comments anyone has to make or wants to make? If not, I'll thank our guests for helping us out today and accommodating us with the timeframe. We appreciate your indulgence. Thank you very much.

For the information of the committee, we will meet again on Tuesday. We will have our last witness in the first hour. The second hour will be clause-by-clause, and if anybody has amendments to come forward, if you could, we would really appreciate your getting them in by late tomorrow, if possible.

Mr. Jean.

Mr. Brian Jean: Only if you're finished, Mr. Chair.

The Chair: Yes, I think that's good.

Mr. Dennis Bevington: Could I just ask the parliamentary secretary whether the government is planning to bring forward any amendments?

Mr. Brian Jean: That's exactly what I was going to bring to point.

During the testimony of both gentlemen today, I did ask the department if they could come out with some proposals to the committee that would reflect what we've heard, specifically in relation to the CBA, and also if they could clarify adventure tourism, adventure rafting.

I'm hoping to have that circulated by tomorrow. If you could contact your office possibly, we'll try to get it to each and every office by tomorrow. If we don't, then we will by Monday, but I think there are some. I think we need clarity especially in relation to section 139 and also to nail down exactly what adventure tourism is.

The Chair: To the department, if you could send those amendments through to Maxime, he'll distribute them in the package, because other amendments have come forward.

Mr. Bevington.

Mr. Dennis Bevington: Could the committee, through the process, see the government amendments before we go ahead with our amendments? Does the timeframe allow that?

The Chair: I'd ask you to submit them. If they're very similar, we'll present them both and let the committee decide which one they'd prefer.

Mr. Dennis Bevington: It's the government's bill. I'm willing to look at what they're proposing, and then if it's satisfactory we won't submit any.

The Chair: Mr. Jean.

Mr. Brian Jean: It'll be submitted to you, Mr. Chair. As soon as you want to circulate them, we're happy with them being circulated immediately. So if you can improve upon the amendments, by all means please provide that.

The Chair: I will see that they get distributed ASAP.

Mr. Dennis Bevington: Prior to the deadline for us to—

The Chair: Absolutely, and I know department officials are probably listening right now who would certainly endeavour to help us on our timeframe.

Mr. Bevington.

Mr. Dennis Bevington: A concern has been raised about the new regulations surrounding container cabotage. If the department is planning to move forward on these regulations.... I don't know if they're willing to share that with us now.

The Chair: Mr. Jean.

Mr. Brian Jean: I know what my schedule is for this afternoon, but don't ask me what's going on tomorrow.

The Chair: I think if you like, we could put that on our agenda for the next subcommittee. If we want to pursue it further—

Mr. Dennis Bevington: Okay, sure.

Mr. Brian Jean: Indeed, Mr. Chair, if he wants to write a letter to me, I'd be happy to pursue it with the department immediately.

The Chair: Wonderful. With that, I'll wish everyone a good weekend.

The meeting is adjourned.

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