

DATE: October 18, 2010

REPORT TITLE: **FINANCIAL AID TO HELP DEFEND MINIMUM MAINTENANCE STANDARDS (MMS) IN THE SUPERIOR COURT OF JUSTICE**

FROM: Norma Trim, Chief Financial Officer and Commissioner of Corporate Services
 Patrick O'Connor, Regional Solicitor

RECOMMENDATION

That the Region of Peel contribute \$10,000.00 to assist Ontario Good Roads Association (OGRA) with their legal costs in defending Minimum Maintenance Standards (MMS) as set out in their letter to the Region of Peel dated June 16, 2010.

REPORT HIGHLIGHTS

- Each municipality is obliged to maintain its roads to a reasonable state of repair.
- Minimum Maintenance Standards detail what conditions are considered to be reasonable.
- A legal challenge has been made to MMS suggesting that the standards are beyond the Provincial power to enact in the manner that they have been because they include time limits within which disrepair is permitted in a regulation which may conflict with the test of reasonable state of repair found in the statute.
- Minimum Maintenance Standards are important in establishing a responsible balance between safety and cost.
- Staff recommend supporting OGRA in their intervention in the Silveira lawsuit in defense of MMS.

DISCUSSION

1. Background

Section 44 of the Municipal Act, provides that the municipality that has jurisdiction over a highway is obliged to keep it in a reasonable state of repair and is liable for all damages any person sustains because of default [44 (1), 44 (2)].

Exceptions (defences to court actions) to this general rule are set out in subsection (3) as follows:

- a) the municipality didn't know, or reasonably couldn't be expected to know of the state of the disrepair;
- b) it took reasonable steps to prevent the default from arising; or
- c) minimum standards established under (4) applied and were met [44 (3)].

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Under Section 44 (4), the Minister of Transportation [MTO], may make regulations [general or specific] establishing minimum maintenance standards (MMS) of care.

Since 2002, the Minister has passed regulations identifying minimum standards that include a timetable for meeting the standard; e.g. the minimum standard to treat an icy roadway is to deploy resources as soon as practicable after becoming aware the road is icy and to treat the roadway within the time set out in a table after becoming aware that the roadway is icy.

The requirement that municipalities keep highways in a reasonable state of repair under S.44. (1) may have been contradicted or modified by minimum standards established by regulation which may permit some disrepair for a certain period of time.

2. Discussion

The issue was first noted in a comment by Judge J. Howden in *Thornhill v. Shadid* [2008] O.J. No. 372 at paragraph 31 where he stated, "The issue of the legality of the MMS should be dealt with in a proceeding where the issue is squarely before the court and fully tested by evidence and argument. It will suffice to say at this point that it is an issue which appears to merit close scrutiny because of the use of a regulation to apparently dispense with the notion of constructive knowledge embedded in its enabling legislation and the jurisprudence surrounding it, and which may seriously dilute the content of the duty to keep highways in repair, to the prejudice of the public using those highways."

While the forgoing comment was unnecessary to Judge Howden's judgment, the issue has now been raised in *Silveira v. Vaughan (City)* (2010) ONSC 969 , and is squarely before the court in a separate application as a part of the *Silveira* litigation under Rule 14 challenging the validity of the MMS and naming as Respondents The Region of York and MTO. The possibility of Interveners was also contemplated in the process for proceeding under Rule 14.

This matter came before the Ontario Good Roads Association earlier this spring and the association intends to intervene and oppose the Motion to declare the MMS ultra vires and of no force and effect or should not be followed in the *Silveira* case. The OGRA is concerned that elimination of the MMS in *Silveira* could seriously impact municipalities. The OGRA fears that by eliminating or limiting the application of minimum maintenance standards as a defence, the result will be increased insurance premiums for municipalities.

OGRA has asked for contributions from its members to fund its intervention, however the Region of York has not contributed, taking the position that it already is funding the litigation because it is a Party to it. Also, the Region of Durham has indicated it is not able to assist in this matter and the Region of Halton has not decided whether to contribute or not. To date over 125 municipalities have contributed. Several other municipalities are considering contributing and may look to what the Region of Peel does to give them guidance.

The OGRA has retained Murray Davison, a very experienced and well regarded litigation lawyer who has specialized in these sorts of actions to intervene on their behalf. There can be little doubt that this experienced counsel will bring added value to their intervention.

As Council may be aware of, the Region of Peel is well represented at OGRA in so far as Damian Albanese is a Director.

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Our insurance company supports defending MMS and has defended City of Vaughan in this litigation. While the facts of this case are narrow, if a court were to find that minimum standards cannot include an element of time in the context of this legislation or that MMS could lead to an unreasonable result in certain circumstance, that finding could result in the substantially narrowing of the situations wherein MMS could be used as a defence.

Region of Peel's Risk Management staff have reviewed this issue. They conclude that MMS have reduced the number and have tempered the result in a number of cases commenced against the Region. They also are of the opinion that if the MMS defence is limited or its application substantially narrowed, insurance premiums will rise.

The Region's Legal Department has also reviewed this issue and confirms the position of Risk Management Staff. There are currently a number of defences open to the Region under MMS that incorporate the element of time;- for snow accumulation, ice accumulation, pot-holes, shoulder drop-offs, cracks in the roadway, debris, luminaries, signs, warning signs, traffic control signs, bridge deck spalls, roadway surface discontinuities and sidewalk surface discontinuities. MMS have established clear and fair standards for various roadway conditions that represent an appropriate balancing of cost and safety. Legal staff concurs with risk management staff that minimum maintenance standards are an important municipal defence and that every effort should be made to defend their application.

OGRA have suggested that member municipalities contribute \$0.10 per capita up to \$50,000.00 maximum. Thus the Region is being asked to contribute \$50,000.00. OGRA's letter of June 18, 2010 attached as Appendix I also stated that in these days of stretched budgets; "please feel free to contribute whatever you can towards the cause."

The outcome of this litigation is by no means certain and is dependant on whether the court views MMS as meeting the definition of "reasonable state of repair" under section 44 of the Municipal Act. In some situations, the MMS sets a higher standard than those provided for by the reasonable state of repair standard in the Municipal Act. For example, the Municipal Act allows lack of knowledge of the state of repair to be a valid defence whereas the MMS do not and provide for the meeting of certain MMS within a fixed time.

In the circumstances here, in our opinion the Region should contribute \$10,000.00 towards this litigation. Legal Staff are of the opinion that this contribution, together with similar contributions from other members, should be sufficient to fund the OGRA's intervention in this process. If as a result of appeals, the issue requires greater contributions, the Region may reconsider the matter at a later date.

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CONCLUSION

Minimum Maintenance Standards appropriately balance safety and cost and result in clear and fair standards of repair for many road conditions. Municipalities require MMS so as to control insurance costs. Assisting OGRA could assist in retaining these standards as a viable defence to many actions commenced against municipalities based on the conditions of repair of municipal roadways which could ultimately save taxpayers money because of lower insurance premiums. Support for the OGRA defence of MMS should be provided by the Region.



Norma Trim
Chief Financial Officer
and Commissioner of Corporate Services



Patrick O'Connor
Regional Solicitor

Approved for Submission:



D. Szwarc, Chief Administrative Officer

For further information regarding this report, please contact Doug Gates at extension 4382 or via email at doug.gates@peelregion.ca

Authored By: Doug Gates

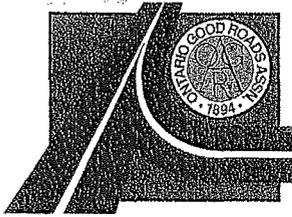
- c. Legislative Services
N. Trim, Chief Financial Officer and Commissioner of Corporate Services
Patrick O'Connor Regional Solicitor
Manager, Financial Support Unit (FSU) *BT*

Files: 21648

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APPENDIX I



Working for Municipalities

Regional Municipality of Peel
Office of the Regional Chair

JUN 18 2010

RECEIVED

ONTARIO
GOOD ROADS
ASSOCIATION

6355 KENNEDY ROAD, UNIT 2
MISSISSAUGA, ONTARIO L5T 2L5
TELEPHONE 905-795-2555
FAX 905-795-2660
www.ogra.org

June 16, 2010

Regional Municipality of Peel
10 Peel Centre Drive,
Brampton, ON L6T 4B9

Attention: Emil Kolb,
Chair

REFERRAL TO Corporate Services
RECOMMENDED
DIRECTION REQUIRED
RECEIPT RECOMMENDED

Dear Chair Kolb:

LEGISLATIVE SERVICES	
COPY TO:	FOR:
Chair	<input checked="" type="checkbox"/> Committee
CAO	<input checked="" type="checkbox"/>
Corporate Services	<input checked="" type="checkbox"/> Council
Public Works	<input checked="" type="checkbox"/>
Employee and Business Services	<input type="checkbox"/> File
Health Services	<input type="checkbox"/>
Human Services	<input type="checkbox"/>
Peel Living	<input type="checkbox"/>

As you know, the Minimum Maintenance Standards (MMS) were created to help Ontario municipalities manage their risk from legal action stemming from personal injury on municipal roads. Unfortunately, claims are repeatedly brought against road authorities for personal injury and property damage alleging inadequate maintenance of roads, signage or failing to provide proper winter deicing, sanding and/or plowing. The MMS have been very successful in defending against these claims. If the municipality can show that they were following the minimum level of maintenance set out in the regulations, plaintiffs are often discouraged from proceeding with their claims either by their lawyers or upon presentation of proof in discovery. Further, upon making it to the Courts, usually with a claim for catastrophic injury, the courts have been looking for the compliance with MMS with regards to municipal liability.

Recently an application was filed with the Superior Court of Justice to have the Minimum Maintenance Standards declared null and void. This application has been filed by individuals who have also filed suit against a municipality for a winter related accident. The municipality is attempting to defend the action, in part, by proving that they were in compliance with the Minimum Maintenance Standards.

The application to have an order declaring the MMS null and void, if successful, will have huge implications for all Ontario municipalities. Municipalities, who are exercising due diligence and maintaining their roads in good repair, or providing excellent winter maintenance, will no longer have a viable defence against spurious claims of liability. With no viable defence, claims that might otherwise be thrown out will continue onto expensive trials and old claims could possibly be re-filed. The courts may once again start awarding large settlements which will result in higher insurance premiums for municipalities. For this reason the Ontario Good Roads Association is filing notice with the court that we wish to oppose the application on behalf of our municipal members.

APPENDIX I

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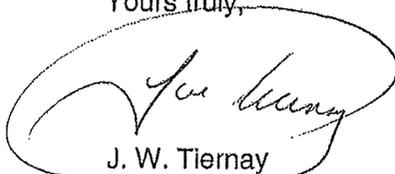
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OGRA does not have the financial resources to defend this application and any subsequent appeals, which potentially could go as high as the Supreme Court of Canada. We are therefore turning to you, our members, to ask you to consider contributing to a "**MMS Litigation Fund**". A small contribution to the fund will greatly assist OGRA in fighting this application on behalf of all our members.

We are suggesting that each municipality consider contributing 10¢ per-capita with the maximum contribution capped at \$50,000 and the minimum being \$1,000. We appreciate that municipal budgets are stretched; however a small contribution now could save significant money in the future. Please feel free to contribute whatever you can to the cause. Any funds not used will be refunded back to contributing municipalities on a pro-rated basis.

Thank you for your consideration of this request. If you have any questions or concerns please contact me.

Yours truly,



J. W. Tiernay
Executive Director