Office of the OMBUDSMAN

Report

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POTHOLES, FLOODS AND BROKEN BRANCHES: HOW THE CITY HANDLES YOUR CLAIMS

An Investigation into the Processing of
Third Party Liability Claims Under $10,000

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TORONTO

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1.0 Executive Summary

1. The Toronto Office of the Ombudsman, since it opened in 2009, has received a steady stream of complaints from residents about third party liability claims filed against the City. Overwhelmingly, these have been about "high volume, low value" under $10,000 claims about damage caused by potholes, sewer or water backups, and falling tree limbs.

2. Because of the number of complaints, the Ombudsman decided to investigate how the City, through its contracted adjuster, McLarens Canada (now called Granite Claims Solutions), processes these claims.

3. The Ombudsman balanced the City's need to manage risk and protect itself from financial liability with the City's own objectives of a fair resolution, transparency and timeliness in how it handles claims. Although by nature the process is adversarial, it is still necessary to treat claimants fairly. Is the administrative process fair? The investigation found it is not.

4. The investigation looked at a five-year period, which involved 12,449 claims and adjusting fees of more than $2,000,000. The City's external adjuster handles these claims according to the client service instructions for the City and a manual created by McLarens and approved by the City.

5. The Ombudsman investigation examined a number of the complaints it had received, in addition to a random sample of other claims, the City's policies and practices as well as those of other jurisdictions.

6. The Ombudsman investigation found that more than 90 per cent of these claims are denied. Claims are automatically denied at the outset, with a letter saying that there had been an investigation. There is no investigation. Information is not provided to claimants. Decisions are not supported by facts and are not explained to claimants. Adjusters routinely close files when claimants stop contacting them, which occurs when delays happen. No one tells the claimants when the files are closed.

7. The investigation identified significant delays in the process, especially with Transportation Services. There is a lack of consistency, efficiency and coordination in the process of producing reports.

8. The City provides insufficient and misleading information on its website. There is little information about negligence or third party liability claims or applicable criteria. The view is that such information would generate more complaints. Yet, other municipalities give the public realistic information, with no increase in claims and resulting in greater efficiency and less public frustration.

9. The Ombudsman recommended that the City

- adopt a service standard that requires a proper review of claims
- ensure reports are collected and reviewed
- see that decisions are considered thoughtfully and explained clearly
- stop providing misleading and incomplete information
- review the information it provides to the public, explaining third party liability and negligence and outlining the legal criteria necessary for determining claims for potholes, sewer back-ups and trees
- identify a time frame for the process
- review and improve the system for processing claims relating to contractors
- review the present systems for supplying reports to improve its efficiency.

10. In the City's response, the City Manager found the Ombudsman's investigation to be "balanced and thorough", agreed to implement all the recommendations, and proposed an action plan.

2.0 Introduction

11. From the opening of my office in April 2009, I have been receiving a steady stream of complaints from residents about insurance (third party liability) claims filed against the City. The complaints have been overwhelmingly about claims for property damage caused by potholes, sewer or water back-ups, and falling tree limbs. These "high volume, low value" under $10,000 claims constitute a major proportion of all claims received by the City.

12. Complaints were about how residents' claims were being handled by the City and its adjuster, McLarens Canada[1] (McLarens). Concerns include delay; difficulties in obtaining information from the adjusters; denials with little or no explanation; an overall lack of information about their claims and the process; and where a contractor is involved being asked to pursue the claim with the contractor.

13. My office has assisted in trying to resolve these complaints on an individual level without a formal investigation.

14. However, I began to identify a pattern in the complaints raised by the residents. As a result, I decided to initiate a systemic investigation into the City's claims administration process with respect to third party liability claims. I issued a notice of formal investigation to the City Manager on August 3, 2010. At its core, my investigation examined the question of fairness in the claims administration process.

15. On a preliminary matter of jurisdiction, I have the power to investigate McLarens even though it is a private company, as it is a "contracted service provider" pursuant to section 3-32A(2) of the Toronto Municipal Code Chapter 3.

16. My office interviewed adjusters, the vice president of municipal accounts at McLarens, employees, and managers in Insurance and Risk Management (IRM); Corporate Finance; Technical Services; Policy Planning, Finance & Administration; Transportation Services; Toronto Water; and Parks, Forestry and Recreation.

17. We reviewed claims processing policies and procedures of the City and McLarens.

18. We selected and reviewed on a random basis, claim files at McLarens and data from the City and McLarens. We conducted a legal review and research on practices in other jurisdictions, and we spoke to insurance

[1] In August 2011, McLarens Canada was renamed Granite Claims Solutions. McLarens will be used in this report.

and risk management staff from other municipalities. We retained and consulted with experts in insurance practices and statistical analysis.

3.0 Risk Management and Fairness

3.1 Protecting the City

19. Managing the activities of a city is a risky business. The municipality must identify the risks, assess their likelihood, prioritize to provide protection where most necessary, then minimize the possibility of damages as much as possible.

20. With respect to liability claims, the City has a comprehensive general liability policy with ACE INA Insurance. As this policy has a deductable of $5 million, the City is self insured for claims less than that amount. My office was informed that to date no claims have been made under the policy. In effect, therefore, all damages from liability claims are funded by the City.

21. To control costs, the City seeks first to minimize risks so it can reduce its insurance needs, then to minimize its pay out costs by defending itself properly - only resolving complaints which are justified and payable.

22. Since amalgamation, the City has contracted with an external insurance adjuster to handle claims, currently McLarens.

3.2 The Ombudsman Fairness Lens

23. This investigation does not deal with the issue of whether the City is legally liable in the claims filed by residents. Rather, it considers whether there is any administrative unfairness in the processing of those claims.

24. Fairness is about the process by which a decision is made. Information and policies about services should be accurate, clear, and understandable. Residents should be given proper notice of information that could affect them. Decisions should be timely and explained with clear and understandable reasons.

25. Poor customer service such as a failure to respond to an inquiry in a timely way, failure to provide information requested, or providing erroneous information can be considered unfair.

26. Fairness also concerns the nature of the decision itself, for example, whether policy was followed, or the decision was based on clear criteria and a proper consideration of relevant facts.

3.3 The City's Approach to Fairness and Claims Handling

27. We were told by IRM that the City draws a distinction between the processing of third party liability claims and the provision of regular City services such as processing a grant application or issuing a building permit. Liability claims are adversarial in nature as residents are making allegations against the City, the onus is on the claimant to prove their claim, and the City has the right to defend such claims.

28. While this might be so, it does not negate the need for fairness in the claims handling process. The City, as a public entity, must act in a fair and transparent manner, here specifically, in receiving, reviewing and deciding claims filed by residents. Indeed the City acknowledges this in its stated principles for insurance claims decision-making.

29. On May 6, 2005, the City issued a briefing note from Corporate Finance, "City Insurance Claims – Decision Making Philosophy", to provide insight into the rationale behind decision-making on insurance claims. It is included in the McLarens manual relied on by adjusters.

30. The briefing note stated the City's philosophy to claims management is that of "[a] fair resolution for a fair claim".

31. Key principles in claims management were identified as:

> Fairness, to both the claimant and the City, consistency, firmness, forward looking, efficiency and continuous evaluation are the keys …

32. The briefing note explained:

> Each individual claim is evaluated at an early stage for the purposes of determining exposure to liability and arriving at an appropriate assessment of damages. Adjusters … are to treat each claimant with fairness and at the same time be aware that the protection of the City's assets is also important.
> …
> … where it is appropriate to do so, claims are resolved with a view to negotiating a resolution that favours the legal and financial position of the City.
> …
> As a large, visible, public entity, the City risks becoming a deep pocket litigation target known as a payer of claims on an "economic" rather than a

> "principled" basis which can ultimately end up costing far more in the long run.

33. The City's website provides information on claims against the City in "Risk Management - Insurance Claims" which includes a statement that:

> The City's objective in responding to claims is to ensure:
> - Fairness
> - Transparency
> - Timeliness

34. The IRM supervisor informed my investigator that these principles were adopted from my office's publication "Defining Fairness"[2] and were added when the website was changed in March 2011.

35. On its face, it appears that the City's stated objective to ensure fairness for the claimant is in keeping with that of my office.

36. We examined the claims handling process to see whether this objective was being applied.

4.0 The Issues

37. High volume, low value claims are mainly handled as "desktop claims" which are those under $10,000. They are considered to be "nuisance claims" under the *City of Toronto Act* such as property damage caused by potholes, road construction, falling tree limbs, and sewer back-ups. Desktop claims are the focus of this investigation.[3]

38. My office reviewed the complaints we received over the course of time. We selected a dozen "core" complaints of third party claims made to McLarens.

39. The core cases fell into the following groups:

- 7 pothole / road construction
- 1 tree damage
- 3 water / sewage backup
- 1 "other" involving a snowplow damaging trees

[2] Defining Fairness: the Office of the Ombudsman and the City of Toronto Working Together, October 2010.

[3] Claims alleging bodily injury, property damage over $25,000, or which are being litigated are considered full handle claims. Specific investigation procedures are applied to these claims and they are not the subject of my investigation.

Two of the 12 claims involved private companies performing work on contract with the City.

40. We also looked at a broader sample of claims to see how similar claims were being handled. We wanted to see whether the complaints we had been receiving were typical of the way in which other claims were being handled.

41. We retained a statistical expert to generate a random sample of 50 desktop claims from the McLarens database. The expert looked at the raw data for all desktop claims received between January, 2005 and July, 2010 (12,899 cases). He excluded data with closing dates after July 31, 2010 (450 cases) resulting in a sample of 12,449.[4]

42. The expert performed a statistical review of the claims data with respect to the types of claims made and the rates of denial. The latter is discussed at paragraphs 150 to 153.

43. The top five types of desktop claims were:

- Potholes (3623)
- Sewer – City connection (2437)
- Tree - property damage (2064)
- Road construction (677)
- Contractor related (518)

44. This verified that the types of claims my office was most frequently receiving, namely potholes, sewer back-ups and trees, were in fact the three most common claims.

45. My office reviewed each of the 50 randomly selected claims in detail, examining the claim letter, the adjusters' memos to file and City reports.

46. The random sample of 50 files contained the following:

- 18 pothole / road construction
- 4 tree damage
- 11 sewer backup
- 17 other[5]

Seven of the 50 random sample cases involved City contractors.

[4] Our cut off was July 31, 2010 as my investigation began on August 3, 2010.
[5] For example, damage from a golf ball, a TTC accident, a parking ticket, objects left in the middle of a roadway, and a telecommunication company's wires cut due to City work.

47. My office noted and tracked the following types of files in which:

- Denials were issued automatically without an investigation.
- Inadequate information or reasons were given for a decision.
- Action was taken only after a claimant disputed the initial denial.
- The adjuster received new relevant evidence that could have changed the decision.
- The adjuster did not provide relevant information to the claimant when asked.
- Files were closed due to "lack of contact," without notifying the claimant.
- Claimants were required to pursue their claims against contractors.

48. We tracked the number of months it took the City to provide the reports requested by the adjusters. We counted how often the adjusters sent follow-up reminders to the City.

49. The chart that follows provides a general summary of the trends in the 62 cases my office reviewed.

Summary of Trends

Type of File	Cases
Automatic denial (overall)	20 / 62 (32%)
Automatic denial (potholes)	14 / 25 (56%)
Insufficient information / reasons to claimant	25 / 62 (40%)
Further action after claimant disputes	9 / 62 (15%)
No review of relevant information	7 / 62 (11%)
Refusal to provide information to claimant	3 / 62 (5%)
Average time for division to provide report	4.1 months range: 0.5-13 months
Average # of report requests to division	2.0 range: 0-11 months
File closed without notice to claimant	13 / 62 (21%)
Claims paid out	7 / 62 (11%)

50. Based on my review, this investigation focused on the following issues:

i. automatic denials;
ii. no investigations;
iii. failure to provide information, review new information or give reasons for decisions;
iv. delay in the City's response to requests for reports;

v. closure of files without notice to claimant;
vi. adequacy of the process when private contractors are involved.

5.0 McLarens Claims Handling Procedures

51. My office interviewed the Vice President of Municipal Accounts (VP), and four adjusters who were responsible for handling the claims we examined.

52. Claims are processed by McLarens in accordance with the Client Service Instructions (CSI) for the City of Toronto and the claims manual for the City of Toronto account (Manual).

53. The manual contains the CSI, claims handling procedures, template letters, forms, legal information, and other claims related information in general and specifically for pothole, sewer, and tree claims. The manual was jointly developed by the City and McLarens. It is available to all adjusters on the McLarens intranet.

54. A claim is submitted by letter to the City Clerk, by e-mail, mail or fax. The claim is then forwarded to McLarens for processing.

55. Desktop claims are processed by junior adjusters on probationary licenses. The number of adjusters varies depending on the volume of claims. Currently seven adjusters work on desktop handling claims.

56. The client service instruction in the manual sets out desktop handling procedures including:

- Review claim, if storm/weather related or pothole claim, forward denial letter to claimant and hold open for 60 days for further investigation, if required.
- Review claim, acknowledgement sent out the day a new assignment is received and a report ordered from relevant division/department.
- All denials on desktop handling files are reviewed with the Account Manager.
- Voice-mail cleared and all telephone calls returned daily.
- E-mails reviewed and returned within 24 hours.
- Inquiries to be answered the day they are received.

57. The contract price for handling each desktop claim is $195.00**.**

6.0 Legal Background to Third Party Liability Claims

6.1 Third Party Liability

58. The claims being made by residents and examined in this investigation are third party liability claims. The City is not the first party insurer.

59. Third party liability is different from "traditional" first party liability insurance because proof of loss is not enough. Instead, it is based on the principles of negligence. Damages will only be paid out when there is proof that the loss was a result of negligence.[6]

60. In the case of a municipal body, this means that the mere fact that a resident's car is damaged by a pot-hole or that a falling City tree caused damage is not independently sufficient to win a claim.

61. In order for third party liability claims to have the possibility of success, the facts must show that the City was negligent by either acting wrongly or by failing to act appropriately. The legal tests are the same for big or small claims:

    i. can the claimant prove the City had a duty of care to him which if neglected would cause damages?
    ii. can the claimant prove the defendant's actions were below how a reasonable person would have acted in similar circumstances?
    iii. can the claimant prove actual loss or real damages?
    iv. can the claimant prove the City's negligent conduct caused the actual loss or real damages?

62. Claimants were almost always under the misapprehension that the City was a first party insurer. This was the kind of insurance they were familiar with as home or car owners, which was confirmed by McLarens adjusters when describing their dealings with claimants. My investigation found that claimants consistently lacked knowledge and understanding about third party liability claims and the need to show the City's negligence.

6.2 Legal Information in Manual

63. The manual contains legal information relied on by McLarens adjusters in processing claims. They are set out as follows.

[6] For a backgrounder on municipal liability, see Appendix A.

6.2.1 Pothole Claims

64. Claims about potholes are guided by a number of legal principles set out in the manual. The law of negligence often applies, as does the *City of Toronto Act* and its regulations.

65. When advancing a negligence claim against the City, the plaintiff must establish that the City had knowledge of the pothole. The plaintiff can show this in one of two ways: proof that the City knew or ought to have known about the pothole that caused the damage or that the road was in poor condition in general and particularly prone to developing potholes.

66. McLarens and City lawyers rely on several resources when reviewing a claim or defending a lawsuit. Toronto maintenance management records can be used to show that no complaints were received about a particular pothole. The City's maintenance standards patrol logs can be used to show that patrols were conducted and no potholes were noted. Winter maintenance patrols are conducted on expressways and arterial roads from mid-October to mid-April, and the results can be used to show that the City both did not know, and could not have been expected to know, about a particular pothole.

67. Evidence of the City's policies on road patrols and road maintenance are also helpful to the City. An argument can be made that the City's allocation of resources for road maintenance and road inspection is a policy issue, and the court should defer to City Council on how resources are used.

68. The minimum maintenance standards are found in regulations of the *City of Toronto Act*. They set out the minimum standards of repair for highways under the City's jurisdiction, and establish the required frequency of road inspections, based on traffic volume and speed limits. If a maintenance problem is detected with respect to maintenance issues like snow or ice, potholes, debris, cracks or drop-offs, streetlights or the presence of signs, the regulation specifies how long the City has to repair the problem.

69. The wording of section 42 of the *City of Toronto Act* suggests that if the City meets the minimum maintenance standards, a plaintiff cannot file a negligence claim. Whether or not this is the case, the City uses its record of compliance with the minimum maintenance standards as part of its defence against pothole claims.

6.2.2 Sewer Back-ups and Water Main Breaks

70. The City has a duty to supply its residents with water and sewage utilities. It is responsible for the installation and maintenance of the water and sewage works on City property, while private property owners are responsible for the installations and maintenance of water and sewage systems on their own property.

71. When a claim is advanced against the City by an individual alleging that they sustained damages from a water or sewage system failure, the claim will be alleging that the City was negligent in either installing or maintaining the water or sewage system that failed.

72. When defending against a claim that the City failed to properly install a water or sewage system, the City will try to establish that it exercised the appropriate standard of care by installing the system in accordance with sound engineering practices at the time.

73. Claims that the City did not adequately maintain the system may include allegations that the City did not have in place appropriate preventative measures, or allegations that the City did not respond appropriately upon learning of a system breakdown.

74. It is the City's position that its exposure to liability generally arises where there are allegations that the City failed to respond promptly and effectively once it learned of a system breakdown or sewer back-up.

75. In those cases, the City examines how it first learned of the breakdown, how it responded, the information gathered about the cause of the breakdown, and the extent of damage caused as a result. The City uses this information to determine whether there is any liability on its part.

76. As part of its defense, the City is mindful that events beyond its control may have caused the water main break or sewer back-up. Possible causes for which the City is not responsible include severe weather storms, extreme fluctuations in temperature, restaurant owners improperly disposing grease in the sewer system, or contractors working on land near a water main.

6.2.3 Tree Claims

77. The City is responsible for the inspection and maintenance of about three million City owned trees. It has the authority to plant and care for trees on City streets, and to remove those that are dead, hazardous, or no longer viable.

78. When a City-owned tree or tree limb falls and causes property damage, the issue of negligence arises. The property owner wants to know if the City is liable, and whether the City will pay for the damage caused.

79. The City has a duty of care to an individual who suffers damage caused by a fallen tree or tree limb, and can be held liable if it knew or ought to have known that the tree posed a danger. Prior notice of a dangerous condition or visible signs of decay (e.g. fungus, dead branches, hollowed or decayed areas, or external openings in the trunk) may suggest that the tree posed a hazard.

80. If the evidence established that there were visible signs of decay at the time the tree or limb fell, the City must then show that it had a reasonable inspection and maintenance system in place. The City can do so by producing inspection and maintenance records. It can also refer to weather reports, tree break/injury reports, and expert opinions from arborists, to defend itself from a claim of negligence.

81. In determining whether a particular inspection and maintenance system is reasonable, the court may consider factors such as budgetary constraints, the availability of qualified personnel and equipment, and the high number of trees for which the City is responsible. The City will not be held liable if it acted reasonably in the circumstances.

7.0 Specific Claims Handling Procedures

7.1 Pothole Claims Handling Procedures

82. Claims for property damage caused by potholes are denied at the outset without any investigation, unless the claim letter provides “supporting” information or evidence. In the former situation, a denial letter is sent to the claimant, in the latter an acknowledgement letter and records are requested from Transportation Services (Transportation).

83. Adjusters informed my investigator that they follow the procedures set out in the manual which states:

> If the incident occurred on a main roadway we deny the claim upon receipt on the basis that the City met the standards set out in the Minimum Maintenance Standards… with respect to maintenance, patrolling and repair, including lighting and signage (or what ever the situation).
>
> If the notice letter is ambiguous and suggests that the roadway has been in disrepair for quite some time, or

> the photographs show quite a mess on the road, we send an acknowledgement letter and claim form. A report from Transportation is then requested.
>
> If the roadway is a side street (local) and is not patrolled, then we send out an acknowledgment letter and claim form and request a report from Transportation.

84. One adjuster stated that she denied not only claims related to major arterial roadways, but all roadways.

85. The VP said that if there is supporting evidence, a claim is not automatically denied. Such evidence could include a description of the size of the pothole, the amount of damage, and photographs of the pothole.

86. One adjuster said that circumstances which would result in an acknowledgement letter included reference in the claim letter to the pothole being there for weeks or months (depending on the type of roadway), or if there was supporting evidence such as photographs.

87. After a claim is denied, the file is closed after 60 days if there are no further enquiries from the claimant. The VP said that if a claimant calls with further information such as a pre-existing pothole or a continuing problem, or a photo showing damage, McLarens will investigate the claim.

88. She said that in such situations, the claimant would be told that the initial investigation and information from the City showed that the minimum standards were met; that based on the new information, a detailed report would be ordered from Transportation; and once the report is received they would reassess the claim.

89. We were informed by the VP that the City takes the position there is no liability if it has met the minimum maintenance standards for roadways. The denial letters are sent out on the assumption that these standards have been met. She said that McLarens was told by the City to adopt this approach for pothole claims.

90. The VP said that this assumption was based on an assurance from Transportation that the City was meeting its standards. McLarens had been instructed by the City to adopt this approach. She provided an e-mail sent to the adjusters on February 17, 2006 which stated that for road claims being denied,

> [IRM Supervisor] has instructed that the adjusters should deny the claims on the basis that the City has met the standards set out in the MMS with respect to maintenance, patrolling and repair …

91. The VP and an adjuster both stated that they used to acknowledge all claims and order reports on each file but this changed in 2009 when pothole claims increased with the bad weather causing a huge backlog of requests to the City. Claimants were upset about waiting a year for the reports.

92. The VP asserted that the workload of her staff would be too much if they requested reports on each pothole claim. They attempt to keep the City's costs down.

93. The IRM Supervisor informed my investigator that, in 2008, pothole claims went up 500% to 1,700, from the usual 200 to 300. This was due to weather and increased public awareness about making a claim. Transportation struggled with the demand and could not provide reports in a timely way. As a result, there was a problem with claims not being resolved and claimants not getting answers.

94. The IRM Supervisor said that Transportation confirmed it was in compliance with minimum maintenance standards. He said that the manager of road operations for Etobicoke (operations manager) provided this assurance. The IRM Supervisor said if Transportation were patrolling and repairing potholes in a timely way, that was a legal basis for denial and "then whether people like it or not that's a fair way to respond."

95. The IRM Supervisor said that on the basis of this assurance from Transportation, IRM directed the adjusters to deny pothole claims. Only if a claimant returned with supporting evidence, would the claim be reviewed and records requested. The IRM Supervisor said that he continues to be told by Transportation that it is meeting minimum maintenance standards.

96. Based on this "assurance", a template denial letter was sent to claimants which stated in part:

> Our investigation has revealed that pursuant to Section 44 of the *Toronto Act, 2006*, [sic] appropriate maintenance standards have been met by the City.

97. My investigator asked the Operations Manager whether he had provided IRM with such an assurance. He said he would never have given such a broad assurance. He has confirmed on a case by case basis that standards have been met but it was not possible to give an assurance for

every single case. He said Transportation's intent is to meet minimum maintenance standards but there are times that it does not. Further, he said that any assurances he gave would only be related to cases within the district in which he worked at the time, Toronto / East York.

98. The automatic denial approach seems to have been adopted, not for any reasons of fairness, but as a way to manage the volume of claims.

99. I find it highly troubling that the automatic denial process is premised on a blanket assurance, one that is so broad, it is impossible for Transportation to provide. It also appears that Transportation gave no such blanket assurance to IRM.

100. When asked what "investigation" McLarens conducted on the automatic denial claims, the VP said that there was no investigation, other than looking at the notice letter. She said the "investigation" refers to the claims process, specifically, receipt of the claim letter and form, and checking what the minimum maintenance standards are for that roadway, so this can be entered into the template denial letter.

101. It strikes me as untruthful to state that an investigation was done when there was none. It would be stating the obvious to say that this runs counter to any concept of fairness.

102. Further, denying a claim on the basis that the City had met the minimum maintenance standards, without an investigation and on a fictional assurance, is making a finding without a factual basis. This is also unfair.

103. The template letter was changed in 2010 and no longer refers to an "investigation" but instead says:

> The Toronto Transportation division confirms the Provincial MMS [minimum maintenance standards] are being met by the City.

My investigator was told that the letter was changed because the prior wording was "confusing".

104. While the current template denial letter no longer refers to an investigation, it remains problematic. It continues to give an assurance (now referred to as a "confirmation") from Transportation that the minimum standards are being met.

105. Further, denials are still being made without an investigation and in the absence of City records, that is, without any factual foundation.

106. In assessing claims, the adjuster must learn enough facts about a claim to understand if damages were caused by the City. Most claims do not provide sufficient information to address the relevant questions immediately. An informed assessment requires information about the City's side of the story. An adjuster who receives a claim is in need of more information from the claimant about why and how the City was negligent and relevant information from the City about the facts recorded concerning the problem in question.

107. In addition to finding that pothole claims were denied without a factual foundation, my investigation found that letters with misleading information were provided to claimants. If and when reports were ordered and received, claimants were not notified. Their requests for information were routinely denied.

108. The following cases are illustrative of these issues.

Mr. Z

In the winter of 2009, Mr. Z's spouse hit a pothole which caused approximately $100.00 damage to the car. He made a timely claim. The adjuster denied the claim the same day it was received, in a letter stating that "our investigation has revealed that... appropriate maintenance standards have been met by the City". Mr. Z asked to see copies of the information upon which the adjusters had relied. The adjuster refused and told Mr. Z to make a Freedom of Information (FOI) request to the City. Upon further enquiries from Mr. Z, the adjuster offered to secure "more detailed information" by following up with Transportation.

In fact, the adjuster had neither obtained nor attempted to obtain any information from the City. There was no investigation. The offer to obtain further information was inaccurate and misleading. The adjuster told my investigator they were advised that the City complies with minimum maintenance standards "95% of the time" and that it did not make economic sense to investigate every claim, as it would be a "pointless exercise."

Mr. Z contacted the adjuster regularly to ask if the reports had arrived. He was told that Transportation was very busy. After three months, the adjuster suggested that Mr. Z contact his City Councillor. After six months, Mr. Z made an FOI request for the reports and received them promptly. He contacted the adjuster to point out that the reports suggested that there was liability for negligence on the part of the City, as there were service requests for pothole repair on that street before and after his car was damaged.

The adjuster, who had still not received Transportation reports, asked Mr. Z to send a copy of the report he had received. Mr. Z was incredulous. The adjuster did not tell him that he did not have any reports. Instead, he explained his request was to permit him "to compare the report from Transportation to the report provided by FOI." He told Mr. Z that "he did not want to confuse the facts before we decide upon our final position." (The adjuster told my staff that he was following his supervisor's advice.) Mr. Z challenged the adjuster, asking if he actually had a copy of the report. The adjuster never replied.

The adjuster ultimately received the Transportation report. He did not contact Mr. Z. He acknowledged to my investigator some liability on the part of the City. The adjuster said that if Mr. Z called today on the claim "I would probably just settle [it]."

Ms Y

The adjuster sent Ms Y a letter acknowledging her pothole claim, stating that there would be an investigation. The adjuster requested a report from Transportation. It never arrived. The adjuster then noticed that Ms Y had mentioned in her letter that the pothole was fixed the morning after her claim. The adjuster decided that this was sufficient proof that minimum maintenance standards had been met, and sent a final denial letter. The adjuster did not investigate as promised.

Mr. X

Mr. X's claim for damages to his car from a pothole was automatically denied. The denial letter stated that this was based on the adjuster's investigation. Mr. X wrote and requested copies of the information the adjuster had relied upon. After two months without a response, he wrote again. The adjuster then wrote back to say that the claim had been "reassessed" and the denial of the claim would stand. In addition, the letter stated that Mr. X could only access the City records if he pursued a court action.

Contrary to the information provided to Mr. X, there had been no investigation and no City records were relied upon as none were requested.

Mr. X complained to the adjuster's supervisor. The supervisor's e-mail to Mr. X stated that their office had spoken with an employee who had worked at a dry-cleaner business adjacent to the alleged pothole and that this "six year" employee had stated that the road had always been

maintained in a reasonable manner by the City. The supervisor also referred to weather records showing fluctuating temperatures leading up to the date of the incident and provided an undated Google "Streetview" image of the location.

There was no record on the file of the adjuster's contact with the dry-cleaning employee. The supervisor said that this was the only damage reported to the City at or near the location before this date, but there is no record of these facts either. The adjuster did not know where the information would have come from.

109. Providing untrue or misleading information to claimants is wrong.

110. Failure to contact claimants as new information is received when claimants are led to believe that they will be contacted, is unfair.

111. The manual instructs adjusters that if a claimant requests a copy of the City report to say that they "do not release these reports, do not refer them to the Freedom of Information Office." Refusing to provide claimants with information when requested is unreasonable.

112. Information pertaining to a claimant, not third party information, is obtainable through a freedom of information request. If a claimant were ultimately able to access such information, refusing a request and requiring them to go through that process would be a waste of time and resources. It creates frustration for the claimant.

113. The express instruction not to inform claimants about the Freedom of Information process belies an attitude that is contrary to the City's stated principle of transparency. At the very least, claimants should be told what their options are for accessing information.

7.2 Sewer Back-up Claims Process

114. The adjusters begin their review of sewer back-up / water claims by checking Environment Canada's historical weather records for information about precipitation and storms. If there is a storm event, the claim will be automatically denied.

115. The denial letter to the claimant states that the claim is being denied because McLarens investigation indicates the City of Toronto acted in a reasonable manner and within their duty to maintain the sewer system.

116. The VP stated that the "investigation" is the adjuster's review of weather records.

117. By no measure does a review of weather records constitute an investigation. Claiming an investigation was done when there was none is misleading.

118. McLarens said that if the claimant calls with additional information, then the adjuster will request a report from Toronto Water.

119. If there has not been a storm event on the day in question, the adjuster will acknowledge the claim in writing and request City reports. Based on those reports, the adjuster will either issue a denial letter or settle the claim.

120. The manual states that if the loss claimed is the first notice of a problem, the claim should be denied. However, if there were prior requests and the City failed to inspect or maintain the sewers "in any way for several years", then the adjusters are to settle the claim.

121. Similarly, if the sewers were blocked due to tree roots on the City side of the property line, compensation may be paid. If the damage to sewer pipes is on the property owner's side, the City is not liable. In cases of blockage and water main breaks, the City is not liable unless the claimant can prove that City negligence caused the damage.

7.3 Tree Property Damage Claims

122. The adjusters check Environment Canada's historical weather records online. If there has been a storm or wind event, the claim is automatically denied. Forestry records on the tree are not reviewed. The template denial letter states that the City's liability depends on the condition of the tree; that the City is not liable if tree decay could not be determined by a visual inspection; and because of the weather conditions, the City could not be held liable.

123. The manual contains no information about what speed of wind or amount of precipitation would constitute a storm event, but one adjuster suggested that winds over 50 km an hour warrant a denial. She said that definitions for what quantity of rainfall or wind speeds would constitute a "storm" were set out in the manual. My investigator found no such definition.

124. Despite the automatic denial, the adjuster will request City reports in tree claims. However, the practice of requesting records may not be consistent as one adjuster informed us that records are not requested for storm-related damage, unless the claimant follows-up.

125. The VP also said that adjusters check the tree's condition in the summer on Google Maps, particularly if the claimant did not include photos. She

explained that the presence of leaves on a tree would mean it was healthy. No adjusters mentioned such a practice.

126. The automatic denial is done without a review of City records. There is no evidence at this point on the health of the tree. Weather records do not speak to the condition of a tree. Denying a claim in these circumstances and in the absence of an investigation, is making a finding without a proper factual foundation and is unreasonable.

127. The adjusters are not given clear direction as to what constitutes a storm. It is unfair where there is an absence of clear criteria for making such decisions.

128. If there is no storm event on the date of loss, an acknowledgement letter will be sent and the adjuster will request the forestry reports. The adjuster examines the records to determine the condition of the tree prior to the loss, and any requests for maintenance or inspection. If there is no decay, they will deny the claim.

129. The manual states that if there was outward indication of decay or the tree had been tagged for removal but it had taken over six months, then the adjuster gives consideration to the claim.

Mr. W

Mr. W's home was damaged when a City tree fell onto their deck after a storm. Contrary to the usual "automatic denial" procedure for storm damage, the adjuster told the claimant that she would be investigating. She requested a report from Forestry. But before receiving the report, she wrote a letter to the claimant denying the claim. The letter stated that the investigation "indicates that to all outward appearances the tree was healthy." It is clear that the adjuster had no information about the tree at that time. There had been no investigation.

About three months later, Forestry sent information about the tree to the adjuster. The brief e-mail only said that the tree was in a City ravine. It did not comment on the tree's health. The adjuster told my investigator that this was not sufficient information and that if the claimant had followed up again, the adjuster would have requested a damage report to see if there were outward signs of decay. The adjuster never contacted Mr. W and never made further enquiries.

130. Again, as with potholes and sewer back-ups, telling a claimant that a decision was made on the basis of an investigation when there was none, is untruthful.

131. Making a decision on the condition of a tree without any City records is making a finding on no factual foundation.

7.4 Common Issues

132. My investigation found many examples in addition to the ones highlighted above, of automatic denials of claims without supporting facts. This is unreasonable and contrary to the City's stated principles of fairness. The following is another example.

> ***Mr. V***
>
> *Mr. V wrote to the City that his downspout diverter had been improperly attached by the City, resulting in his basement flooding. A City inspector replaced the original downspout after telling Mr. V that the downspout diverter had not been attached properly. The claim was automatically denied. The letter stated that "the downspout disconnect was designed in accordance with good engineering practice, was approved by the Ontario Water Resources Commission and work was executed according to proposal."*
>
> *This was contrary to what Mr. V was told by the City inspector. The adjuster told my investigator that this was "template wording" used by a colleague who had a similar file, which she had cut and pasted into the letter. Although the language of the letter implied some investigation of the claim, the adjuster explained that the claim was denied as a matter of course, because the damage was on private property.*
>
> *The adjuster never contacted the inspector who had attended on site, even though the claimant had given the inspector's name and contact information.*
>
> *Although the claim was immediately denied, the adjuster requested a file from Toronto Water. The adjuster sent the request to the wrong section of the city and was re-directed to another city district. That district also claimed it was not the correct area as this was not a water issue. The adjuster did not pursue the request and never received a City report.*

133. My investigation found that denials would occur even when the report indicated that the City could be potentially liable for the damages, and in cases where the reports did not provide the necessary information upon which to base a decision. It appears that the receipt of a report would precipitate a denial, no matter what the report says.

134. We found a lack of reasons for the decisions made, either in adjusters' notes, or in decision letters. Often there would be no indication on file as to how a decision was reached. This made it difficult to discern if the adjusters had considered City reports, what weight or importance they had given the reports, and how these reports justified their decisions.

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135. For example, in the following case, evidence of potential liability appears to have been ignored, and the claim denied after a lengthy delay on the basis that the claimant did not contact the adjuster.[7]

Mr. U

Mr. U was riding his bike when he struck a pothole and was thrown from his bike, injuring himself and requiring minor medical attention. He sent photos of the pothole and documented his injury and treatment. He was told that his claim would be investigated. The adjuster attended on site, finding the pothole remained five months after the claim. A City report was requested. It took 13 months to send the report. When it arrived, it showed previous pothole complaints about the location in question. It raised questions about the City's failure to meet the minimum maintenance standards. However, the adjuster closed the file due to "lack of contact from Mr. U". He never told Mr. U about the information he had collected. He wrote to tell the claimant that his file would be closed due to lack of contact.

136. In a number of the cases, we found that City reports did not provide information requested by the adjusters, or reports were irrelevant or inconclusive. Nonetheless, adjusters denied the claims without any documented rationale. This was the situation in the following example.

Mr. and Ms T

The T family suffered $12,000 of damage to their basement after a sewer back-up. They alleged negligence on the part of the City. The adjuster requested Water and Transportation reports. The adjuster requested information including the cause of the backup, the time the City had been notified and attended, how the back-up was fixed, whether there was a history of back-ups and when the sewers were last inspected and cleaned.

There was a substantial delay by the City in responding to the adjuster's request. The first request was sent in March and the adjuster made almost a dozen follow-up requests. Finally, a Water report was sent, but it was for the wrong date. The correct report was not received

[7] This was one of our core cases but was not a desktop case because of the alleged personal injury. Nonetheless, it is a good example of how relevant evidence was disregarded.

until eight months after the first request. The Transportation report did not arrive until nine months after the initial request and it was not complete. There was no information on the cause of the sewer back-up but only a general statement that "during a rain event catchbasins may become covered with leaves, dirt and / or rubbish..." and that it had rained two days prior to the back-up. The Water report did not refer to the sewage blockage and how it was fixed.

The adjuster denied the claim. She was not able to explain how the denial was justified. She said she should have followed-up on the Water report prior to making a decision, as it lacked the necessary information. If the family approached her today, she said the case would be re-evaluated.

137. In the following case, a sewer back-up claim was denied even though the City report was incomplete.

Mr. S

Mr. S's basement was flooded with sewage in 2006. He made a claim to the City. The adjuster asked Water to provide a report about the cause of the back-up, when the City was notified and when the City attended on site, how the back-up was fixed, if there was a history of sewer back-ups on the street and how often the sewers in the area were flushed and inspected.

The City provided the adjuster with a letter that had partial information. There was no record of complaint for Mr. S's address for that day, but that there were complaints from four neighbours. It provided the cleaning and maintenance schedule but no information about whether the sewers on Mr. S's street had been cleaned and maintained within that schedule. It referred the adjuster to another claim, presumably that of a neighbour, to see the customer service requests forms and daily staff logs. It did not respond to the rest of the adjuster's questions. The adjuster did not seek additional information but denied the claim on the basis of the City's general timelines for cleaning and inspecting.

138. This was similar to the case of Mr. Z, discussed at paragraph 108, when the adjuster finally received a report from the City, it only included the road inspection schedule for the week after the claimant's damage. The adjuster did not request further information. There was no information on whether the City had met the minimum maintenance standards, but the denial of the claim was upheld.

139. In the following example, conflicting City reports were received but there was no indication of the reasons for the denial of the claim.

The R family

The R family made a claim for damage after their basement was flooded with sewage. The adjuster sent an acknowledgement letter stating that there would be an investigation. The adjuster requested a report from the City and received one within the month. It indicated that the flooding and sewage back-up had been caused by the City relieving a sewer main blockage on a nearby road that same day. The letter appeared to suggest that the City might be at fault. The adjuster also received information that the sewer had been cleaned and maintained in the past five years. The adjuster did not contact the family. Three months later, the adjuster closed the file without sending a decision letter to the family. There was no indication on file as to whether or how the two reports were considered by the adjuster to justify a denial, or why the family was not contacted.

140. Substantive fairness requires that decisions be based on an appropriate analysis of the issues and a proper factual foundation. This involves a review and consideration of all relevant information, whether adverse or supportive, as it relates to the issues. It is unreasonable to ignore relevant evidence, such as a report, in making a decision. It is also unreasonable to base a decision on incomplete or irrelevant evidence.

141. Reasons for why a particular decision was made must be articulated, especially when there is adverse or conflicting evidence. Failure to do so runs counter to the City's stated principle of transparency and fairness.

142. My investigation found other examples where files were closed on the basis that the claimant had not maintained contact and where no reports had been received by the City. This was the situation in 20% of the cases we reviewed.

Mr. Q

Mr. Q made a claim after an exposed maintenance cover caused about $1,000 of damage to his vehicle. The adjuster promptly requested a report from Transportation and consistently followed up with reminders. Eight months later, the City sent a report, but it was the wrong one - from Water rather than Transportation. The adjuster made a second request for the Transportation report. It never arrived. Meanwhile, the claimant regularly contacted the adjuster over a period of 9 months. Ultimately, the file was closed because Mr. Q stopped calling. Five months after his last call, the adjuster made a note: "no follow up from complainant since April 08, close file." Mr. Q was not notified. No

explanation was given for the failure to obtain the correct report or why Mr. Q was not contacted.

Mr. P

After receiving an automatic denial letter in response to his pothole claim, Mr. P disputed the denial. The adjuster offered to investigate and order reports from Transportation. There is no evidence that he did either. There was no record of a request made to the City for further information. The file was eventually closed without notifying Mr. P.

143. Informing claimants that there will be an investigation, reports will be requested, and then failing to do so, is either incompetence or deliberate misinformation.

144. It is unfair to close a file or make a decision before contacting the claimant, especially if a report has been received. This is neither adequate nor proper notice.

145. Claimants are not told that their files will be closed if they do not maintain contact with the adjuster. If an adjuster has said that they would be investigating or requesting a report, it is reasonable that a claimant would expect the adjuster to call when that is done.

146. Poor communication is poor customer service.

7.5 Reviews

147. The VP informed my investigator that if a claimant was dissatisfied with a refusal, the claimant could request a review of the decision from her. If the matter is very difficult and if a Councillor is involved, the VP discusses the file with IRM.

148. The review process is not in the manual and is not publicized. The IRM Supervisor said that they do not “advertise” the option of a review. Only one adjuster said she would refer dissatisfied claimants to the VP for review. Two said they would discuss the file with the VP but they would still provide the decision to the claimant. One said the decision was hers and there was no reconsideration process.

8.0 Denial Rates

149. IRM and McLarens do not have a system to track denial rates of desktop claims.

150. We reviewed data obtained from McLarens' database of 12,449 desktop claims between 2005 and July 2010. We found 11,595 (93%) denials.[8]

151. Denial rates for pothole claims were 95% (3430 of 3623). Pothole denials increased by over 16% in 2007 and have remained over 95% in recent years. The spike in pothole denials coincides with the direction from the City to McLarens to automatically deny pothole claims.

152. Denial rates for sewer back-up claims were 98% (2399 of 2437). Sewer back-up claims were denied at a fairly consistent rate each year, ranging between a low of 93% in 2006 and a high of 99% in 2005 and 2008.

153. Denial rates for tree property damage claims were 89% (1842 of 2064). They increased about 14% in 2007 and have remained over 93% in recent years.

154. Most high volume, low value claims are denied. This is hardly surprising given the procedural fairness issues uncovered by this investigation.

155. We found automatic denials without an investigation; denials based on no evidence; poor communication with claimants; and files closed without contacting the claimant.

156. The issue here is not whether claims should be paid out but rather that claims should be processed in keeping with procedural fairness requirements.

157. The adjuster's fee of $195.00 per desktop claim is a reality which must affect the handling of claims. This amount does not encourage substantial effort. The return on investment suggests that the adjusters are not paid to vigorously pursue reports about low dollar claims.

158. There is only so much service which can be given for the fee involved. The adage "you get what you pay for" seems to fit.

9.0 Delay by the City in Responding to Requests

159. Many of the files reviewed involved delay in receiving City reports. Some took as long as 13 months, while others, never arrived. Claimants waited many months and at times over a year just to hear whether their claim had been denied or would be paid out. Claimants were told by adjusters that the long wait was because the adjusters had not yet received the report from the City.

[8] See Appendix B: Denial Rates for Claims Made

160. Records and reports are necessary to determine whether the City was negligent and, therefore, liable for the damage claimed. As the desktop claims are, by definition, ones investigated from the adjusters' desks rather than on site, these reports often constitute the adjuster's entire review.

161. Adjusters told us that they experienced consistent delays in receiving City reports. They said it was the norm to follow up repeatedly.

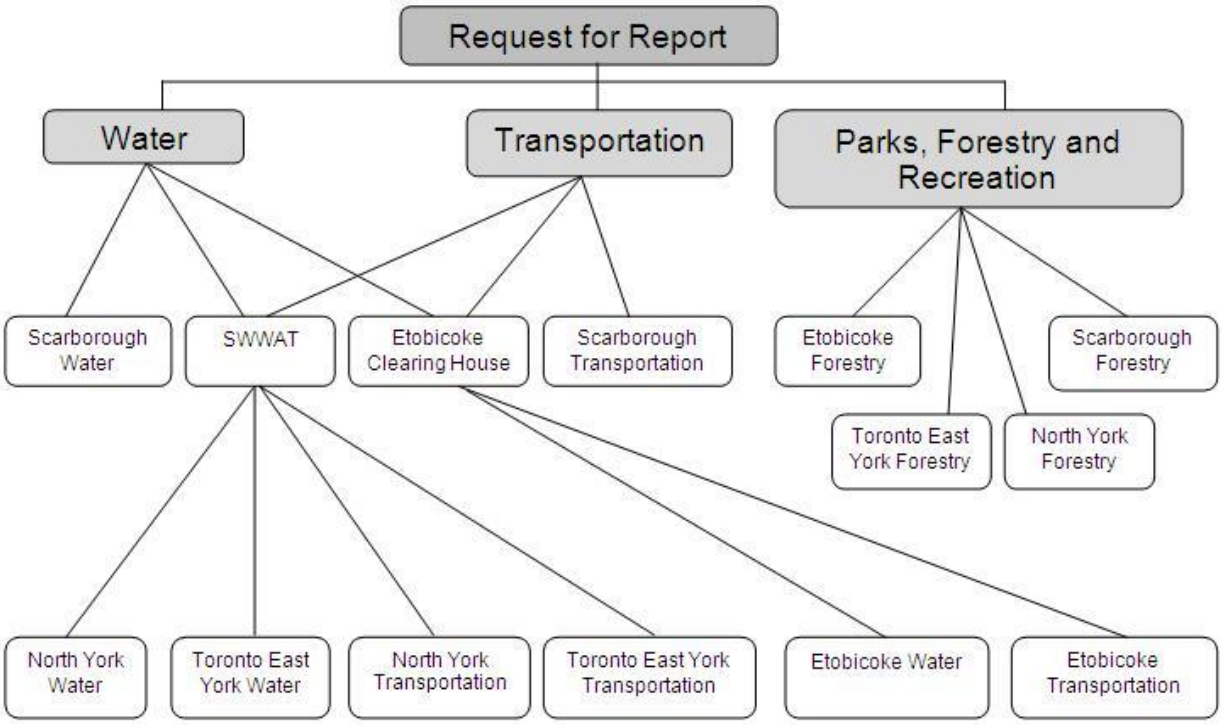
162. So consistent is the delay on the part of the City, that the adjusters have a protocol in place to send monthly reminders for outstanding requests. In cases of especially long delays (one adjuster suggested six months), adjusters notify their supervisor to escalate the issue.

9.1 Channelling of Requests

163. My investigation looked not only at the length of delays but also into the process by which requests were made and how the City responded.

164. The adjusters send a template letter requesting records. It includes standard questions such as the cause of the problem, when the City was notified, any prior complaints, and the City's response. Other questions are added as needed. The adjusters attach the claim letter and any other relevant information.

165. The request is sent by e-mail to a designated City contact. There is no central contact. Instead, adjusters have to determine the correct City division and district in which the damage occurred in order to determine the relevant contact. Some of those contacts will in turn pass the request to another contact person. The inquiry net can be quite broad.



166. For Water or Transportation reports:

    a. For Etobicoke claims, the request goes to an assistant who acts as a report-request clearing house, who then sends it to the contact in Water or Transportation.

    b. For North York District and Toronto / East York District claim requests go to Solid Waste, Water and Transportation (SWWAT), a team that acts as a clearing house and re-directs requests to the correct divisional contact.

    c. For Scarborough claim requests go to a dedicated Water and Transportation contact

167. SWWAT has operated since October 2009. It does not process Forestry claims, which are housed in a different part of the City. The administrative supervisor of SWWAT explained it was his goal to develop a centralized report request hub for all four districts and all claims-generating divisions, including Forestry.

168. SWWAT and each district within Water and Transportation keep records of adjuster requests. The type of data collected varies.

169. With requests for Forestry reports, the adjuster first determines the area of the City where the damage occurred, and contacts one of four Forestry contacts in Etobicoke, North York, Scarborough or Toronto / East York.

170. Forestry does not keep a database of report requests.

9.2 Transportation

171. Requests for information from Transportation arise from claims about potholes, road-cuts, raised maintenance covers and construction debris. Records relate to whether minimum maintenance standards were met in road inspections and service request responses.

172. Report preparation is not entirely computer-based. A field investigator will typically attend on site to evaluate, take photos and document the City's repair or the degree of hazard remaining. Field investigators have other duties such as clearing ice and snow, filling potholes, monitoring roads and repairing road hazards. Report production is given a lower priority than the road safety and maintenance tasks.

173. Each district in Transportation keeps a spreadsheet of the report requests they process. None tracked response times, although Toronto / East York tracked the number of requests completed per month, for the purpose of establishing staff resources required for the task. The districts provided data for 2010.

Report Requests Received in 2010

District	Number of Report Requests Received	Average Processing Times[9] (Range)	Number of Unresolved Requests[10]
North York	250	41 days (1-259 days)	9 (4%)
Scarborough	125	65 days (0-377 days)	11 (9%)
Toronto / East York Area 1	197	74 days (0-392 days)	51 (26%)
Toronto / East York Area 2	124	57 days (0-355 days)	17 (14%)
Etobicoke	179	162 days (23-421 days)	68 (38%)

[9] Including unresolved requests as of February 2011.
[10] As of February 2011.

174. North York was the best performer on response times, 41 days on average, compared to Etobicoke with an average of 162 days.

175. North York and Toronto / East York had the highest number of claims (250 and 321 respectively), with Etobicoke at 179 and Scarborough with the fewest at 125.

176. The four districts have different processes for creating and sending reports, but in every case they must be completed by field investigators after an on-site inspection.

- In North York, Toronto / East York, and Etobicoke, the road operations supervisor assigns the work to a field investigator and then checks the report before sending it.
- In Scarborough, a clerk initiates a chain of report requests to a road operations supervisor then a field investigator. The report then makes its way in reverse up that chain so the clerk ultimately sends the report.

177. City staff believed that the delays in sending reports are at least partially due to a lack of resources. Report requests are the lowest priority for field investigators charged with the more pressing tasks of maintaining road safety.

178. Some staff suggested that McLarens asked for irrelevant information that is onerous to collect. For example, a major arterial road might only require inspection records from two weeks prior to the incident to establish minimum maintenance standards. However, the adjusters might ask for three months of records. Another employee said that adjusters will ask the City to provide weather records which McLarens could easily access themselves.

9.3 Water

179. Requests for information from Water arise from claims about flooding and sewer back-up. Typically, these include a request for information on the cause of the back-up, when the City was notified, when it responded, how the problem was fixed, the history of previous complaints in that area, records of sewer maintenance and inspection for that sewer.

180. These reports are usually produced from databases without site visits.

181. Each district within Water keeps a spreadsheet of the report requests they process. These are not standardized, so the information and format vary

from district to district. The data were provided by Water districts for 2010 from which my investigator calculated the following.

Report Requests Received in 2010

District	Number of Report Requests Received	Average Processing Time[11] (Range)	Number of Unresolved Requests[12]
North York	130	26 days (0-114 days)	0 (0%)
Etobicoke	159	63 days (0-359 days)	12 (7%)
Toronto / East York	190	75 days (0-430 days)	13 (5%)
Scarborough	73	100 days (1-479 days)	28 (28%)

182. The differences in the time taken to respond to report requests appear to depend on the district processing the request. North York is the fastest with the least unresolved requests, and Scarborough the slowest with the most unresolved.

183. It is unclear whether SWWAT improves response times for North York and Toronto / East York requests.

184. We heard from staff that that they sometimes receive requests from SWWAT that should have been sent to other areas of the City.

185. The four districts use different processes for creating and sending reports. In North York and Toronto / East York, a single employee performs the work. In Etobicoke, the technologist receiving requests from the hub gives them to a clerk and then reviews the final report before sending it. In Scarborough, a support assistant conducts the work but must receive approval from one of five rotating supervisors before sending the report.

186. The report production function is almost a full-time task for some staff, and for others it is one of multiple duties. The North York employee responsible estimated this made up 80% of her work. The Scarborough staff said she devotes one day a week or 20% of her time.

[11] This includes unresolved requests.
[12] As of February 2011, when the data were received by my office

9.4 Forestry

187. The volume of requests for reports from Forestry is significantly lower as there are fewer claims. Adjusters informed my investigator that there are generally no major problems of delay and they usually receive these reports within a month.

9.5 Disparate Processes, Lack of Consistency and Resources

188. The data demonstrate lengthy delays in obtaining reports especially for Transportation requests.

189. There is no consistency in the process of producing reports. Different processes are used within the same division with no communication or coordination between the districts.

190. The system is neither efficient nor streamlined. This has resulted in a lack of coordination and misdirected inquiries.

191. It is unclear whether SWWAT provides any advantage as it simply acts as a clearing house, only sending the request on to the district, which is where the delays originate.

192. While the espoused purpose of SWWAT makes sense, in practice it seems to be no more efficient than other areas of the City that do not form part of its program.

193. Adjuster requests for information may be too broad and request too much information. IRM, McLarens, and the City's legal staff may need to discuss the scope of these requests to determine how much information is sufficient for the different types of claims.

194. There are no standards of timeliness. The City does not track how long report requests take to process.

195. I recognize that resources are obviously an issue.

196. The City's lack of timeliness was highlighted in the Auditor General's *Insurance and Risk Management Review*, February 22, 2010. He noted significant delays in staff responses to requests for reports.

197. The Auditor General found that response times were not tracked and measured and recommended that Corporate Finance establish a process to monitor response times and report results to divisions where there are significant delays. He also recommended that the City Manager take appropriate action if response times are not appropriately addressed.

198. IRM informed my investigator that they were in the early stages of implementing the Auditor General's recommendation. McLarens had been asked to develop a tracking process on its database.

199. IRM informed us that they were aware of the delays in sending reports, but other than SWWAT and the development of the tracking process, IRM identified no other efforts to address the delays.

10.0 Process where Contractors are Involved

200. Claims for damages may involve work done by a private company contracted by the City. It requires contractors to sign a hold harmless agreement, where the contractor agrees to reimburse or compensate the City for any damage incurred.[13]

201. Once an adjuster is informed by the City that a private contractor is involved, she will then send the claimant a letter explaining a contractor did the work, and that the City's contract requires the contractor to hold the City harmless for any damages, that is, indemnify the City. The letter "suggests" the claimant contact the contractor directly and provides the contact information. The letter states that the adjusters "can find no negligence against the City of Toronto." It states that if the contractor does not reply within two weeks, the claimant can call the adjuster again.

202. At the same time, the adjuster writes to the contractor, reminding them of their indemnity agreement with the City. The claimant and contractor are copied on each other's correspondence.

203. The adjuster will issue a second letter to the contractor if the claimant receives no response. The letter reiterates the legal responsibility and again warns that in the event of any legal action by the claimant, the City will seek repayment from the contractor. It requests that the contractor report this claim to their insurers if he has not already done so.

204. The manual also states that the matter can be escalated to involve the account manager or IRM if the contractor does not cooperate.

205. Often, residents are not aware that contractors were involved until many months after sending the claim. My investigator was told by adjusters about lengthy delays in claimants being notified of a contractor's involvement.

[13] See Appendix A for a discussion of legal principles on the liability of contractors.

206. We also found that claimants had difficulties contacting contractors. They would respond only after legal action was filed.

Ms O

In 2006, the trees in Ms O's front yard were damaged and later died as a result of City construction. The City replaced the trees but planted them in the middle of winter and they soon died. Ms O then replaced the trees herself. Two years later, the replacement trees were damaged by a snow plow. Frustrated that her trees had again been damaged, she made a claim to the City about both incidents, asking for payment for the two sets of front yard trees she had replaced.

She waited for an answer, following up regularly and seeking assistance from her City Councillor. Over a year later, the City informed the adjuster that the snowplow work was performed by a contractor. The adjuster immediately shared this information with Ms O and advised the contractor about the claim. Ms O was told that the City would compensate her for the first tree replacement, but that she would have to pursue the snowplow contractor for the second. The contractor refused to pay, saying she must show proof of the now long passed incident. Approaching the two year limitation period to make a civil claim, she had to commence legal action before the contractor paid her claim.

Mr. N

Mr. N drove over a road cut with protruding metal bars. He claimed damage to his car of $3,000. His claim was acknowledged in writing, but the adjuster did not return his calls. After he complained his file was re-assigned. Two months after receiving Mr. N's claim, the adjusters learned that a contractor had been responsible for this work. They told Mr. N to pursue the company. The City file showed that there were well-documented earlier complaints about the road cut and that the City had contacted the contractor about these complaints. The contractor refused to pay the claim. Mr. N contacted his city Councillor, hired a lawyer and started a civil action. Only then did the contractor pay out the claim, ten months after the damage.

207. IRM told my investigator that Technical Services was working on a way to obtain information about contractors faster. The Executive Director of Technical Services (ED) explained that as a stop-gap measure, where Technical Services is known to be involved on a project with a contractor, he is contacted by McLarens to locate and ensure that the correct project

manager provides the information to McLarens. There is no centralized database on contractors. Program files with contracts are kept in each of the district offices.

208. Technical Services does not have information on all contractors working for the City, but only on projects for which it is responsible.

209. Claimants expressed frustration with the process. In their view, because it is city work, regardless of who performed it, the City must be held responsible for any damage caused while performing the work. The layperson's view of City responsibility and the frustration of claimants are understandable, especially when they experience delays and problems with contacting the contractors.

210. While the hold harmless agreement requires the contractor to indemnify the City, it does not preclude the City from liability in any given case and from being named in a legal action. Depending on the facts, the City could still be found liable for damages.

211. The current process of leaving the claimant to pursue the contractor with minimal City involvement is not adequate.

212. Increased City intervention is required. In fact, we were told by the ED that there have been circumstances where the City has taken a more involved role by settling with the resident, holding back payment to the contractor and giving them notice that the City would seek reimbursement.

11.0 Information Available to the Public

11.1 City Website

213. The "Risk Management – Insurance Claims" section on the City's website provides information on the process for filing claims against the City for damages or injuries.

214. The website was revised substantially in March 2011. Prior to that, it contained minimal information such as how and where to file a claim. This was the website information available during the processing of the claims under review.

215. IRM informed us that it took the opportunity to change the website to add more information about the claims process, while it was incorporating the City's complaint handling protocol in the spring of 2011. IRM reviewed other municipal websites in Canada, including those of London and Mississauga and stated that it incorporated the best elements of both websites.

216. While this exemplifies responsible public service and the revised website is more comprehensive, its content and degree of accessibility require improvement.

217. The website says that the City is not always liable for damages; the onus lies with the claimant to prove their claim; and the City is not responsible unless there is evidence that it committed a negligent act or omission which resulted in injury or damage.

218. There is no explanation of what a negligent act or omission means or the criteria applied by the adjusters. The instructions about a claim letter do not mention “negligent act or omission.” Under “making a claim,” the process which the claimant is to follow, says that the claim should include details of the incident and a description of damage, injury or loss sustained.

219. Claimants, especially those not familiar with third party liability claims, would not include such matters when there is no stated requirement to do so. In our review of the cases, we found this to be the case. Without this information, it is not surprising that claims are rejected.

220. Some information on particular types of claims is contained in the “frequently asked questions” link. However, the information provided is brief. In addition, the link is not obvious and easily overlooked. Information from this link is omitted from the main website page, while information from all other topic links is provided.

221. The website information is misleading. It states that McLarens is an independent adjusting firm that will resolve claims in a “fair, transparent and timely manner.” There is no mention that claims will be automatically denied without an investigation.

222. Given their unfamiliarity with issues of third party liability, negligence, and the legal concepts applied by the City, claimants had difficulty understanding why their claims were denied. Adjusters said it was commonplace to explain these concepts after the denial. The lack of information would compound claimants' frustration.

223. In light of the situation, it is no wonder claimants become so frustrated.

224. The IRM Manager explained the long standing attitude of the City against disclosing information about claims. He said this was not in the City’s financial interest to do so because it did not want to encourage claims. It is the individual’s responsibility to insure themselves. The IRM Manager

said,

> We frankly thought that we should preserve our financial interest by not making this avenue of recourse available for the public, or not make it aware that it was available to them. They could figure it out themselves.

225. He said that IRM has now embraced the City's espoused culture of disclosure and transparency. He referred to the revised website. In his view they had done a "good job of explaining the claims process".

11.2 A Look at Other Municipalities

226. We reviewed the approach taken and information provided to the public by other municipalities. Two municipalities, also reviewed by the City, provide good examples of transparent and useful information.

227. The City of London, Ontario, provides website information on the claims process as well as supplementary print information. In addition to explaining that claims are only successful if the City can be shown to be legally liable for the damage caused, the website reviews the general scheme of third party liability claims, provides instructions on making a claim and explains what to do in the event of specific types of property damage.

228. The Risk Manager for London explained that it reduced their workload when they provided information about what is needed, as people understood that they had to call others first, such as their insurance company. She said their fear of increased claims with more information, was not borne out. She said they provide information to avoid public disappointment:

> If they think they are going to get something and then they don't, that is when people get upset.

229. The City of Mississauga, which handles claims in-house, has a website that includes information on how to make a claim, the claims handling process, and what a successful claim requires. For claims of vehicle damage, the website explains the road inspection program and minimum maintenance standards and that the City is not responsible for vehicle damage unless the inspections were deficient. Similarly, the website explains that for property damage caused by a City tree, the City is not liable if the tree had no obvious exterior signs of decay. It also deals with claims involving private contractors. It states that the City will forward the claim to the contractor and clarifies that the contractor must be found legally liable in order for the claim to be paid.

230. The website sets out examples of many different types of damage. For each, it provides general advice about what steps to take after the loss has been suffered and the conditions required in order for the City to be liable. The website provides timeline estimates for acknowledgement, investigation and final response.

231. The Acting Manager of the risk management office explained that cost savings and efficiency increase when more information is provided to the public:

> In the public sector, it's a transparency and efficiency issue. Otherwise it creates a bottleneck. The process occurs anyways, so why not make it easy?

232. He said that claims volume had not increased since Mississauga began providing claims information but that the process is quicker as claimants are “not as frustrated”.

11.3 An Expert's View

233. We consulted with an expert in the insurance industry who has extensive knowledge of and experience with third party insurance adjusting processes.

234. He told my investigator that there is a "culture of denial" in the industry. Adjusters always work in their clients’ interests, aware that if they pay out too many claims, the client may end their contract and retain another company.

235. Adjusters' caseloads are usually heavy with new claims being constantly received. This puts pressure on them to deny claims as quickly as possible.

236. He suggested that if the City's adjusters are being paid $195.00 per desktop claim, there is motivation to spend as little time as possible on each claim in order to maximize profits.

237. The expert said that most claimants give up after the initial denial and about 10% of claimants pursue their claims.

238. He disagreed that providing detailed information to the public about the claims process, third party liability, and negligence would increase the number of claims against the City. He said that providing more information would reduce the number of claims, as the public would understand how difficult it is to prove negligence and successfully make a claim.

239. The expert said that people whose claims are denied without long delays and who are given full information about why their claim was denied will be less angry and consequently claims would take up less of the adjusters' time.

12.0 Ombudsman Conclusions

240. Managing the City is a risky business. I am mindful that the ultimate purpose of risk management is to protect the City from financial liability. However, if that is the business reality, then the City must stop promising things on which it cannot deliver. There is no point in offering a fair investigatory procedure if the reality is that many complaints are denied at the outset.

241. The City holds out the promise of fairness in the resolution of claims. Its stated “objective in responding to claims is to ensure: fairness, transparency and timeliness.”

242. If fairness means a thoughtful consideration and a timely, informative response to a claim, the City process is not fair.

243. If fairness means that decisions are supported by facts and explained, then I found many decisions to be unfair.

244. If fairness means that claims are properly considered, I found instead a practice of denying claims outright, without consideration.

245. If fairness means telling the truth, I found an absence when claimants are told that their claims had been investigated.

246. If fairness requires following through on assurances to claimants, or telling claimants about developments in the file, the City failed to do so.

247. If a claimant has been told by an adjuster that the claim would be investigated and reports sought, then a fair process requires that the adjuster follows through and keeps the claimant informed.

248. A fair complaint handling procedure requires contact with the claimant on actions such as the receipt of reports or a determination to close the file. If the City were to maintain a practice of closing files in which the claimant has ceased contact, it should state this on its website so individuals will not lose their claims by waiting patiently for a response.

249. If fairness requires that assertions about an independent decision maker be accurate, then it is misleading to the general public to claim that the adjuster is “independent”. They work on behalf of the City.

250. In reality there is an attitude of denial. Adjusters turn claims down at every opportunity, almost all the time.

251. If transparent means that the manner in which the claims process is carried out is clear and obvious to all, then the current process is opaque.

252. Claimants should be told about the criteria used by adjusters to assess claims. If potential claimants know how their claim will be assessed, they can better determine if it seems legitimate and provide more complete information, if available. In turn, more information would enable the adjuster to do a proper review and render a fairer decision. Many claims require more information because claimants do not provide evidence about the alleged negligent acts of the City.

253. If one creates different expectations, the process may be more acceptable. Complaints from residents were about bad, slow or inappropriate service. These complaints can be best addressed by setting more reasonable expectations which more accurately represent what is possible.

254. If claims are going to be rejected automatically, claimants should be told. They should be informed of what evidence they must provide to demonstrate how the City was negligent. Clarifying the legal and evidentiary standards would give residents a more realistic basis on which to assess their own potential claim.

255. Contrary to being open and transparent, the adjusters provided as little or no information as possible.

256. If most pothole complaints are denied because the City normally maintains minimum maintenance standards, then this information should be given to claimants at the onset.

257. If timeliness means that a claim will be responded to within a reasonable period of time, then the City is untimely. Under no reasonable test could one say that claims were processed in a timely manner.

258. So long as delays persist, unfairness prevails.

259. The delays revealed by this investigation in the time it takes for the adjuster to receive relevant information from City officials is astonishing.

260. While there may be legitimate resource problems, until the City addresses the delays, it should tell claimants that it may take months to process their claims.

261. There is also the issue of efficiency.

262. For pothole, sewer back-up and tree claims that were denied in 2008 and 2009, the adjuster fees were just over $1,666,000. For pothole claims alone, the fees were over $525,000. Looking at it another way, this is the cost of a flawed process.

263. It should be noted that other human resources are also engaged. Whenever reports are requested, significant City resources are involved in generating and distributing reports.

264. The litany of concerns revealed by my investigation about the actions of the City and the adjusters are shocking examples of poor service.

13.0 Ombudsman Recommendations

265. Taking into account the evidence gathered in this investigation, I am making the following recommendations. They are in keeping with the City's stated principles of fairness, transparency and timeliness, while balancing the need to protect its financial interest.

(1) That if the City is going to continue the current process of denying claims automatically without an investigation, it inform the public, and stop providing claimants with misleading information.

(2) That if the City informs claimants that their claims will be considered, it sets a service standard which requires that:

i. a proper review takes place;
ii. claimants are not misled;
iii. where appropriate, reports are requested and reviewed;
iv. decisions are made on a proper consideration of the facts;
v. clear explanation for decisions are provided to the claimant;
vi. claimants are notified of relevant activity on their files and provided with information;
vii. files are not closed without notification to the claimant, especially if there is delay on the part of the City;
viii. review of the template letters sent to claimants to ensure that they are consistent with the above requirements.

(3) That the City provide my office with a copy of the service standard by January 31, 2012, and send the service standard to McLarens adjusters by March 1, 2012.

(4) That the City review the information it currently provides to the public to include in clear language:

i. an explanation of third party liability and negligence;
ii. the criteria used to determine the three most common types of claims (potholes, sewer back-ups and trees) including the City's position and information on minimum maintenance standards;
iii. the timeframe for a decision;
iv. the process where a contractor is involved.

(5) That the City provide my office with the revised information by January 31, 2012, and post the information on its website by March 1, 2012.

(6) That the City review the current system for requesting reports and establish service standards appropriate to the type of claim, with a view to achieving streamlining, coordination, standardization and efficiencies.

(7) That the City review the template request forms and the way that data on report requests are collected, stored and tracked.

(8) That the City provide my office with the results of the reviews in recommendations 6 and 7 by January 31, 2012.

(9) That the City review its process of handling claims involving contractors to ensure that claimants receive contractor information promptly; that the City has increased involvement in ensuring contractor response; and that claims against contractors are tracked.

(10) That the City provide my office with the results of the review by January 31, 2012.

14.0 The City's Response

266. Prior to finalizing my report, I notified the City of my tentative findings and recommendations and provided it with an opportunity to make representations.[14] The City found the investigation balanced and thorough and agreed to implement all my recommendations. A summary of the City's response is attached as Appendix C.

(Original signed)

_____

Fiona Crean
Ombudsman
October 17, 2011

[14] Pursuant to section 172(2) of the *City of Toronto Act, 2006*.

Appendix A: Legal Backgrounder to Municipal Liability

A. Municipal Liability and Negligence

1. General Principles

A civil lawsuit, or a civil action, is a legal proceeding that arises when there is a dispute between different parties about their rights and obligations. A lawsuit typically begins when one party (the "plaintiff") files an action in civil court against another (the "defendant").

A tort is a civil wrong, other than a breach of contract, which the law addresses by an award of damages.[15] There are several kinds of torts that can form the basis of the lawsuit. Two torts recognized by Canadian law are negligence and nuisance. A person who commits a tort is called a "tortfeasor".

The City of Toronto is a municipal corporation created by provincial statute. Like a private corporation, a municipal corporation has the capacity to sue and be sued. However, there are some special considerations that apply when a municipality is sued. Most provinces, including Ontario, have enacted statutory provisions limiting or negating a municipality's liability in certain situations for damages in tort. For example, there exists legislation barring nuisance claims from being brought against the City of Toronto for water or sewage leaks.[16] Therefore, it is very important to know whether any restrictions or bars exist before filing suit.

2. Negligence

The tort of negligence consists of four requirements, or elements, that must be proved by the plaintiff. These elements are no different when the City of Toronto is named as a defendant[17]:

i. *Duty of Care.* Establishing a duty of care is a two-step process. First, a plaintiff must show that the relationship between the parties was sufficiently close, so that the defendant could reasonably contemplate that his or her carelessness would cause damage to the plaintiff. In other words, was the defendant under an obligation to exercise reasonable care in favour of the plaintiff?[18] Second, the plaintiff must show that there are no considerations that would negate or limit the scope of the duty, the class of persons to whom it is owed, or the damages that arose. For example, in cases where a municipality is named as a defendant, the Court will take into consideration the nature of the action complained of. In cases where a policy decision made by the municipality

[15] John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 1; Allen Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (2011).
[16] *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A, ss 393(1).
[17] *Anns v London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.).
[18] Philip H. Osbourne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law Inc., 2007) at 65.

forms the basis of the negligence claim, there is no duty of care owed to the plaintiff.

ii. *Standard of Care and Breach of Duty.* Next, the Court will consider how a "reasonable person" would have acted when placed in the same situation as the defendant. Did the defendant's actions fall below that standard? If so, the defendant has breached his or her duty of care.

iii. *Damages.* The plaintiff must have suffered some damage or injury. Even if the plaintiff has proven the other elements, the claim is not actionable unless the plaintiff suffers an actual loss. Loss of income is a good example.

iv. *Proximate and Actual Cause.* The defendant's negligent conduct must have caused the plaintiff's damages. However, a defendant is not liable for every single consequence that arises from a breach of a duty of care. Some damages are so unexpected, or bizarre, or disproportionate to the magnitude of the fault, that it would be unfair to hold the defendant legally responsible for it.[19] This concept is known as "reasonable foreseeability".

Once the plaintiff has established these elements, the defendant may assert his or her defence.

B. Independent Contractors

1. General Principles

A municipality, like any corporation, may enter into contracts and employ independent contactors to perform certain duties. When it does so, the municipality is not vicariously liable for the torts committed by the independent contractor.[20] This means that – generally speaking – when a municipality hires an independent contractor to do work, the municipality is not responsible for the quality of work performed by the contractor, nor for any injuries or harm caused to a city resident.

The notion that an employer should not be vicariously liable for the actions of the independent contractor is based on an assumption that an employer lacks sufficient control over an independent contractor, and over the work he or she undertakes. Therefore, the contractor is best able to prevent any risks, and should absorb any losses incurred. [21]

Having said that, there exist many exceptions to this general rule, and liability may still be imposed on a municipality when it contracts work out. The three most

[19] *Ibid* at 91.
[20] Vicarious liability describes the imposition of responsibility on one person for the tort committed by another, even though the first person committed no wrong. For additional information, *see* Fleming, *supra* note 7 at 412. Note: This backgrounder does not include a discussion of the legal distinction between an employee, for whom a municipality may be held vicariously liable, and an independent contractor.
[21] Fleming, *supra* note 7 at 433.

relevant exceptions are discussed below. Given the breadth of these exceptions, a city resident can still pursue a claim against a municipality when it files a lawsuit alleging harm caused by the negligence of a contractor, irrespective of any hold-harmless or indemnification agreement between the municipality and the contractor.

(a) Direct Liability

First, a municipality remains responsible for its own actions, and for any negligence that results. For example, liability may be imposed on a contractor for doing inferior work. Liability may also be imposed on the municipality for hiring a contractor whom it knew was incompetent, or for failing to give the contractor proper instructions. [22] In these situations, both the independent contractor and the municipality may have acted negligently, and may be liable for the damages suffered by the plaintiff.[23]

(b) Non-Delegable Duties or Statutory Duties

A non-delegable duty is a duty that is assigned to a particular party, and cannot be delegated to another. In the case of a municipality, non-delegable duties may arise under statute.[24] The duty is assigned to the municipality, and even if the municipality hires an independent contractor to fulfill the obligation, the municipality will remain liable if the contractor does not perform the work or does inferior work.[25]

For example, a statute may create a duty on a municipality to maintain its highways. [26] If the municipality hires an independent contractor to complete all necessary road maintenance work, and the independent contractor fails to do so and a resident is harmed, the municipality remains liable for failing to satisfy its duty to maintain the highway.

(c) Ultra-hazardous Activities

Where the work is inherently dangerous or “ultra-hazardous”, the fact that the work was assigned to a contractor will not relieve an employer of liability if injury or damage occurs.[27] Because the duty was imposed on the employer to exercise special care, the duty is not discharged simply by entrusting the work to another.

Where a city employed a contractor to do work that required the use and storage of dynamite, and negligence by the contractor caused damage to a third party, the city was found liable for failing to fulfill its duty to take preventive precautions.[28]

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[22] *Green v. Fibreglass Ltd.*, [1958] 2 Q.B. 245; David G. Boghosian and J Murray Davison, *The Law of Municipal Liability in Canada*, loose-leaf (consulted on May 31, 2011), (LexisNexis Canada Inc. 1999), §2.221-2.225.
[23] For a discussion of joint and several liability amongst tortfeasors, please refer to Kate Zavitz’s memo.
[24] G.H.L. Fridman, *The Law of Torts in Canada,* 3rd ed. (Toronto: Carswell, 2010) at 289.
[25] *Ibid.*
[26] David G. Boghosian and J Murray Davison, *supra* note 18 at §2.217; *Mochinski v. Trendline Industries Ltd.*, [1997] 3 S.C.R. 1176; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.
[27] Fridman, *supra* note 20 at 291.
[28] *St. John (City) v. Donald*, [1926] S.C.R. 371.

Excavating trenches along a busy intersection is another example of inherently dangerous activity. Where the independent contractor failed to take appropriate precautions to prevent injury, the town was also found liable.[29]

2. Indemnification and Hold Harmless Agreements

A hold-harmless agreement is a contract where one party agrees to indemnify the other.[30] This means that one party agrees to reimburse or compensate the other for any loss, damage or liability incurred. It is a right of a party who is secondarily liable, to recover from the party who is primarily liable, reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.[31]

When a municipality enters into a contract with an independent contractor, those contracts may contain indemnity agreements or hold-harmless agreements benefiting the municipality. The purpose of these agreements is to determine which party will bear the loss, or expenses, if anything should happen. Depending on the wording of the contract, the hold-harmless clause may protect the municipality from any losses or damages that arise during the performance of the contract. An indemnity or hold-harmless agreement is a type of contract, and is governed by the laws of contracts.[32]

Having a hold-harmless agreement in place does not necessarily preclude the municipality from being named as a defendant in a lawsuit. The defendants named in a civil suit are determined by the plaintiff, based on the plaintiff's theory of his or her case. A plaintiff may elect to name both the independent contractor as well as the municipality as defendants in the lawsuit. For example, when a City of Toronto resident believes that road repairs or water repairs were negligently performed, he or she may name both the contractor and the municipality as defendants, and it is possible that a municipality is found liable.

Where there is a hold-harmless agreement in place and the municipality has been found liable, the court will determine whether the hold-harmless agreement can be relied upon by the municipality. The Court will consider the basis of the municipality's liability, and whether the municipality's negligence was the proximate cause of the plaintiff's (e.g., the resident's) damage.[33] Was the careless conduct by the municipality sufficiently related to the particular harm caused to the resident to justify liability, or is it too "far-fetched"?[34] The Courts have suggested that where the municipality simply failed to adequately supervise an independent contractor, or failed to detect or correct the contractor's mistakes, or approved a contractor's substandard work, the municipality will still be entitled to rely on the hold-harmless agreement.[35] Again, it is the plaintiff's theory of the case that governs the action initially, and it is the nature of the

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[29] *Canada, Attorney General of v. Biggar, Town of and Quilchini*, [1981] S.J. No. 1332 (D.C.).
[30] *Black's Law Dictionary*, 9th ed, *sub verto* "hold-harmless agreement"
[31] *Ibid*, *sub verto* "indemnity"
[32] This backgrounder does not discuss contract law issues, but note that the enforceability of a hold-harmless agreement, like any other contract, may be contested on various grounds (*e.g.*, duress, misrepresentation, undue influence, etc.).
[33] Boghosian and Davison, *supra* note 18.
[34] Linden and Feldthusen, *supra* note 7 at 362.
[35] Boghosian and Davison, *supra* note 18.

municipality’s liability that will determine whether the hold-harmless agreement is applied.

Appendix B: Denial Rates for Claims Made

Pothole Claims

Year	# denied
2005	63 / 83 (76%)
2006	225 / 279 (81%)
2007	287 / 296 (97%)
2008	1411 / 1461 (97%)
2009	1291 / 1346 (96%)
2010*	153 / 158 (97%)

Sewer Back-up Claims

Year	# denied
2005	1105 / 1110 (99%)
2006	171 / 183 (93%)
2007	157 / 161 (96%)
2008	440 / 445 (99%)
2009	456 / 464 (98%)
2010*	70 / 74 (95%)

Tree – Property Damage Claims

Year	# denied
2005	183 / 235 (78%)
2006	371 / 468 (79%)
2007	537 / 576 (93%)
2008	287 / 307 (94%)
2009	387 / 400 (97%)
2010*	77 78 (99%)

* Up to July 31, 2010

Appendix C: Summary of the City's Response

The City found the Ombudsman investigation to be "balanced and thorough" and "useful" to its ongoing efforts to provide fair, transparent and timely service on insurance claims. The City agreed to implement all the Ombudsman's recommendations.

The City proposed an action plan to address the issues identified in the report and implement its recommendations. The action plan includes measures to develop a service standard; instruct and monitor adjusters; improve the website information; improve claimant communications; create a liaison function within IRM to work with claimants; enhance the City's involvement in contractor claims; and remedy the untimely delivery of records.

The City also provided comments about its website, the process when contractors are involved, automatic denials of pothole claims, the assurance from Transportation Services about minimum maintenance standards, and the adjuster fee.

With respect to the process where contractors are involved, the City recognized the need for it to be more involved in light of the "role of the City as a public entity and the perception by claimants that contractors are working on behalf of the City". The City agreed that it had applied insurance industry standards to the detriment of good customer service.