TORONTO Member Motion

City Council

Notice of Motion

MM32.5	ACTION			Ward:All

Reforming Joint and Several Liability for Ontario Municipalities - by Councillor Paul Ainslie, seconded by Councillor Mark Grimes

**** Notice of this Motion has been given.***
**** This Motion is subject to referral to the Executive Committee. A two-thirds vote is required to waive referral.***

Recommendations

Councillor Paul Ainslie, seconded by Councillor Mark Grimes, recommends that:

1. City Council direct the City Manager to write to the Ontario Attorney General supporting the Ontario Good Roads Association request to have a working group convened – comprised of municipal, provincial and representatives in good standing with the Law Society of Upper Canada (e.g. Ontario Trial Lawyers Association) – to examine options for reforming joint and several liability as it applies to Ontario municipalities and to report back to the Attorney General in due course.

Summary

Joint and Several Liability as it is applied to municipalities in Ontario needs to be reformed. Currently, joint and several liability unfairly disadvantages municipalities by placing a burden of paying the majority of liability losses incurred by Ontario municipalities.

The Ontario Good Roads Association of which the City of Toronto has two appointees on its Board of Directors, held their annual Advocacy Day at Queen's Park on Wednesday, September 13, 2017.

One of the issues they met Members of Provincial Parliament with regards to is the reforming of joint and several liability for Ontario municipalities

In 2016, the Attorney General of Ontario, the Honourable Yasir Naqvi, stated that he understood the impact that joint and several liability has had on “increased insurance costs for municipalities”. The Attorney General then further stated “I am very sympathetic and our government is sympathetic to the challenge that municipalities are facing.” He further indicated a willingness to “look at other alternatives by which we can look at solutions to that problem”.

The Ontario Good Roads Association agrees.

In its current form, joint and several liability unfairly puts the burden of paying the majority of liability losses on Ontario municipalities. As a result municipalities continue to face increased premiums and self-retention levels that divert municipal funds from other essential municipal services and responsibilities.

To date, the only meaningful attempt to address the problems associated with joint and several liability was the creation of the Minimum Maintenance Standard - Ontario Regulation 239/02 Minimum Maintenance Standards For Municipal Highways. The Minimum Maintenance Standard has not been the ironclad solution that was hoped for when it was created. Since its inception, it has been under constant and direct attack from defendants trying to circumvent the protection that it affords municipalities.

As the lead organization responsible for updating the Minimum Maintenance Standard, Ontario Good Roads Association has earned unparalleled expertise and experience in trying to find the types of solutions to joint and several liability that the Attorney General alluded to last summer. In addition to the roadways already covered by the Minimum Maintenance Standard, during the recently completed five year review the standard was also expanded to include bike paths and sidewalks. The expert committee that led this review feels that there is little further room to move on this front.

Accident benefits in Ontario are the richest in the country, and indeed, amongst the richest in the world. Changes to Ontario's first party insurance benefits system seem to be placing increased reliance on third party tort insurance.

Any activity taking place in the public realm places risk on the municipalities. Knowing that they can be sued and found responsible for significant damages has caused a number of municipalities to curtail activities. Some examples include:

- Deering versus Scugog – The Township of Scugog was found 66.7 percent liable. The at-fault driver only carried a $1,000,000.00 auto insurance policy.
- Samur versus City of Hamilton – A young boy was hit by a car crossing the street. He was on his way to school and City's crossing guard had left.
- Repic versus City of Hamilton – A cyclist coming off a sidewalk was hit by a car. The City was found at fault because it had not posted a sign telling cyclists to dismount and walk across the ramp.
- Mortimer versus Cameron – An example of joint and several liability being applied to Building Inspection claims. A court awarded Mortimer $5,000,000.00 in damages and found the owner of the building 20 percent liable. The City of London was initially found 80 percent liable but this was reduced to 40 percent by the Ontario Court of Appeal. The building owner was determined to be 60 percent liable. The City ended up paying 80 percent of the overall claim.
- Goderich Inukshuks: The Town of Goderich demolished 150 inukshuks after having a $68,000.00 insurance claim filed after someone was injured leaning against one to take a picture. The town was notified by its insurance company that it would be fully liable for any future claims relating to the inukshuks.
- Orangeville Tobogganing Ban: Orangeville received significant media attention after it posted recently a large "No Tobogganing" sign on a hill specifically built for tobogganing. The ban on Murray's Mountain has been in place since the City bought the land from the school board 2009, but it's never been enforced. Its insurance company mandated the sign.

- Hamilton Tobogganing Lawsuit: A lawyer in Hamilton sued the City of Hamilton for $900,000.00 after he broke his back tobogganing down a steep slope at an estimated 31 kilometres per hour and hitting the "hidden hazard" of a snow-covered drainage ditch, sending him airborne. It was on city property where tobogganing is banned.
- County of Bruce Mountain Bike Trail: A 43-year-old experienced mountain biker, fell off one of the training obstacles on a trail and was left a quadriplegic. In the subsequent lawsuit, and the County was determined to be 100 percent responsible, even though it had been designed to the highest international standards and had warning signs detailing the risk.

The principles contained in joint and several liability have long been established as tenets of Canadian law. Ontario Good Roads Association therefore believes - as the Attorney General said - that there is room to reform joint and several liability while still maintaining it.

Building on the efforts of other reform initiatives in Canada, Ontario Good Roads Association believes that any reform of joint and several liability should take into account the following principles:

a. proportionate liability where a plaintiff is contributorily negligent;

b. proportionate liability where a defendant is a "peripheral wrongdoer" -- a defendant whose fault is limited and secondary when compared to that of other defendants; and

c. the proportionate reallocation of the uncollected share of a damages award attributed to an insolvent defendant.

A reform predicated on these principles will ensure that the benefits of joint and several liability are retained. It will also align such a reform with the other significant precedents where joint and several liability was amended.

Although joint and several liability has been reformed significantly in the United States – it was abolished completely in Alaska, Arizona, Kansas, Utah, Vermont, Oklahoma and Wyoming – Canadians have been more reluctant to undertake reform. Nonetheless, joint and several liability has already been amended a few times in Canada. These reforms include:

- The Saskatchewan Model: This modification of joint and several liability was adopted in Saskatchewan in 2004. Under the Saskatchewan model, where there is a shortfall due to one defendant being insolvent and the plaintiff's own negligence contributed to the harm, the shortfall is to be divided among the remaining defendants and the plaintiff in proportion to their fault. This model would apply to all types of defendants in all types of negligence claims.

- The Canada Business Corporation Act: Amendments were made in 2005 to this Act that provided every defendant and third party found responsible for a financial loss arising out of an error, omission or misstatement in financial information that is required under the Act or the regulations would be liable to the plaintiff only for the portion of the damages corresponding to the defendant's and third party's degree of responsibility. Allocation of responsibility among the parties is provided for in the

event one or more defendants/third parties are insolvent or unavailable. With these amendments the joint and several liability regime continues to apply to the Crown, charitable organizations, unsecured trade creditors and individual plaintiffs whose investment in the corporation is worth less than a prescribed amount.

Background Information (City Council)

Member Motion MM32.5