Frank Cowan Company

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Municipal Legislative Reform
Tort Exposures

Municipal Governments in Ontario have been challenged with staggering judgments and liability awards in both percentages and dollar amounts over the past five years. This has placed undue and unwarranted strain on already stretched municipal budgets. These burdens come in the form of increased insurance premiums and self-insured exposures. The result is a diversion of funds from key municipal services to the payment of premiums or losses. While Frank Cowan Company feels the time for change is now, any change will, in our view, have to meet the following criteria:

- *Equitable to all, especially injured parties*
- *Sustainable over time*
- *Bring stability to the municipal insurance environment*

Introduction

The purpose of this submission is to request that the Ontario Law Commission undertake a comprehensive review of municipal liability. Municipalities must provide residents with services such as roads, facilities, sidewalks, etc., yet they have no specific mechanisms available to help protect them from the application of Joint and Several liability which results in the deepest pocket funding claim settlements and judgments. This means that every road, facility, sidewalk, etc. must be kept in state of perfect condition, not only for reasonable use, but for every circumstance, which is an expansive duty of care.

Frank Cowan Company is a long-standing, Canadian Managing General Agent representing municipalities across the country, providing insurance and critical support through risk and claims management. However, this support is being challenged by the shocking judgments and awards rendered against Ontario municipalities particularly where municipalities have had to pay the majority of damages. They are paying more because the defendant(s) who caused or contributed to the loss or damage either have no insurance, insufficient insurance or have become insolvent.

Examples of unjust liability allotment have escalated recently. This trend has also been noted by The Association of Municipalities of Ontario (AMO). In the past two years Frank Cowan Company has paid out (for files that were resolved or closed) approximately 94 million dollars for settlements or judgments for large claims against municipalities, of which approximately 25% represents payments as a result of the application of Joint and Several liability. This percentage has been steadily increasing, making it problematic for municipalities to obtain reasonably priced insurance for their risks.

The insurance industry has a trend of alternating between soft markets characterized by stable premiums and low rates of return to hard markets represented by higher premiums and returns. We are in the 8th year of a soft market and it is inevitable that a market correction will occur. This correction coupled with the uncertainty of predicting future claims will result in a municipal insurance crisis. As a result of a similar insurance crisis in the United States, a number of reforms were implemented at both the state and federal level which included a change from Joint and Several Negligence to Comparative Negligence. In addition, a number of states implemented immunities and caps on awards as well.

Frank Cowan Company is imploring the Ontario Law Commission to investigate this issue before we experience another insurance crisis. We have also included a number of potential solutions which should be considered when undertaking this review.

History

Until the 1920's Municipal Governments had immunity from liability for tortious acts. That immunity was eventually weakened to allow tort liability in cases of misfeasance (doing something which is legal in an improper manner). Since then, municipal liability apportionment in the tort environment has deteriorated to a level where we are now experiencing a crisis situation.

Chief Justice Fitzpatrick, on behalf of the Supreme Court of Canada, in *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.) at 718 stated:

> *"A municipal corporation is not an insurer of travelers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety."*

The Court went on to say:

> *"Moreover, it is only common sense to distinguish between highways and byways. Precautions that might well be required to be taken on a much travelled main thoroughfare would often be quite uncalled for on an unimportant and little frequented side street. The city cannot be held liable because every street is not equally safe for all possible purposes of traffic."*

Furthermore, while this statement has been articulated in slightly different ways by various leading authorities, in *Housen v. Nikolaisen* (2002), 2 S.C.R. 235, the Supreme Court of Canada agreed that:

> *"The extent of the statutory obligation placed upon municipal corporations to keep and repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety."*

The statements noted above no longer apply as Canadian municipalities are now responsible for keeping roads safe for drivers who make mistakes, have minimal driver training or are not using reasonable care as referenced in the examples shown below.

Current Claims Climate:

Deering v. Scugog (2010) ONSC 5502

- Justice Howden found the Municipalities liable to the extent of 66 2/3%.
- This accident occurred on a boundary road with jurisdiction shared between the municipalities of Scugog and Oshawa. Both were sued, shared the liability and the payment.
- The plaintiff was a young, inexperienced driver with a G2 license.
- The driver alleges that on a dark night, while rushing to catch a movie with her sister and some friends, she approached a steep hill and perceived that the vehicle traveling towards her was on her side of the road. She took evasive action which caused her to lose control of her vehicle, strike a culvert and then flip over resulting in severe injuries to the driver and her sister.
- There wasn't a centerline painted because the road was old (i.e. not a new construction mandated to have road markings). A line was not required according to The Ontario Manual of Uniform Traffic Control, Book 11 2000. However, the Municipality planned on going above the minimum requirements by painting a centerline when resources became available.
- Appeals were unsuccessful. The driver's $1,000,000 automobile policy was insufficient to settle the claims made by the passengers.
- This case has cost the Municipalities, and therefore its taxpayers and their insurers, more than $20,000,000.
- If Joint and Several were not a factor, the cost would have been $16,000,000.
- If a reasonable assessment of 25% liability on the Municipalities had been made in a non-Joint and Several liability scenario, the cost would have been $6,000,000 to the Municipalities, taxpayers and their insurers.

Fordham v. Dutton-Dunwich,

- The Municipality was found liable to the extent of 50%.
- The plaintiff was a young, inexperienced driver with a G2 license. He was not using his seatbelt and had been drinking beer in the car.
- He drove through a clearly visible stop sign at the posted speed limit of 80 KPH on a rural gravel road.
- He lost control of his vehicle, hit a concrete culvert and sustained an unfortunate severe brain injury.

- The gravel road in question deviates very slightly at the intersection. A needs study concluded that the yield signs posted at the intersection one year prior to the accident were adequate for traffic control. The Municipality nevertheless upgraded the signage to stop signs as an extra precaution.
- This case, if not overturned on appeal, will cost the Municipality and therefore its taxpayers and Insurers more than $5,500,000 whereas years ago the award would have likely been negligible or at worst 25%.

Was this a reasonable driver exercising ordinary care? We say no. If municipalities are held liable in such cases one has to ask where the funding will be found. Certainly premiums and deductibles will have to increase, if municipal insurance even remains available.

The situation is simply not sustainable for municipalities or taxpayers. With these kinds of court decisions, insurance premiums will need to rise substantially from their already high positions. Worse, the limited number of markets willing to write municipal liability insurance may retreat from the market, leaving Ontario municipalities without insurance coverage. Change is required.

What is Driving Claims Costs Up?

Municipal insurance premiums are influenced by many factors. One of the most significant factors in the pricing of insurance is the long tail nature of municipal liability claims. An incident may occur in a given policy year, but the claim may not be presented until many years later and may take several more years to settle. Forecasting what courts may award a plaintiff in the future is very challenging and yet it impacts today's premiums.

As the cost of claims rise exponentially, insurance premiums have followed suit. Key drivers influencing the cost of rising claims are:

- **Damage awards are getting larger**
  A higher proportion of liability is being assigned to municipalities and total awards are escalating dramatically.
- **Future care costs are accelerating**
  Providing future health care is extremely costly.
- **Joint & Several liability**
  Municipalities are perceived as having deep pockets and therefore pay more than their fair share.
- **Cost of defending claims is increasing**
  Cases are becoming more complex and taking longer to resolve driving legal costs upward.
- **Class actions**
  Courts are certifying more class action suits.
- **Municipal claims inflation**
  Claims inflation is running at 6% to 8% annually.
- **More litigious society**
  There is a higher frequency of claims and more municipalities are being named in Court cases even if only remotely associated with the claim.

Market/Insurance Availability and Cost

The number of providers willing to insure municipalities from the risks of liability are few. Currently only 1.3% or 5 of 394 property and casualty providers are in this niche market.

In addition, more than five companies have entered the marketplace only to re-assess their appetite for the high risks associated with municipal insurance and then exit. These relatively short-lived participants cause market turbulence and uncertainty for municipalities, especially those that chose to place their insurance with these carriers. In order for the market to be sustainable, it requires stability.

The Association of Municipalities of Ontario (AMO) conducted a survey in 2011, in part to gather information on the cost of municipal insurance. Report statistics include:

- 135 of the 444 municipalities asked responded to the survey (representing 50% of the Ontario population).
- Insurance cost Ontario municipalities $155.2 million in 2011.
- Costs for deductibles were in excess of that. For example Toronto paid $14 million in defence costs alone.
  - This exceeds spending for each of the following:
    - Bridges and culverts
    - Conservation Authorities
    - Street lighting
    - Is similar to administering POA fines and courts

The cost of liability insurance has sky-rocketed by 22.2% from 2007 to 2011 with some municipalities reporting increases of up to 50%. In this same time period CPI inflation was 4% and total municipal expenditure growth was down from 6% to 2.5%.

The AMO report predicts that, unless change is made, insurance-related costs will increase further to $180 million by 2015, an additional 16%.

Municipalities are now paying up to $37.56 per capita for insurance costs. This equates to almost 7% of the average tax bill. And this amount will continue to accelerate.

Proposed Alternatives

We are investigating alternatives to the current Joint and Several framework. Potential solutions must meet the following criteria:

- Equitable to all, especially injured parties
- Sustainable over time
- Bring stability to the municipal insurance environment

1. Liability caps
   This alternative has been successfully implemented in Manitoba and Alberta. In the United States some states that have caps in place are: Florida, Massachusetts, Michigan and Illinois. This is true of the majority of states.

2. Immunities
   Full or partial immunities have been implemented in Florida, Michigan, California and many others.

3. A fund created by interested parties and administered by the Government (perhaps OHIP) to manage the health and care costs of severely injured individuals as a result of municipal negligence.

4. A change from Joint and Several to comparative or several liability. This has occurred in Michigan, Illinois, New York, New Jersey and others.

5. Mandating the use of structured settlements in all claims for future damages and tying the quantum to the reasonable premium cost of a structure to fund the reasonable future losses and expense of the claimant. This occurs in cases involving healthcare via Section 116.1 of the Courts of Justice Act, R.S.O 1990, CHAPTER C.43.

Adopting some or all of these solutions will have the added benefit of reducing legal costs which have been escalating for a number of years.

A Call to Action

We need to develop a common solution to avoid a municipal liability insurance crisis. The alternatives outlined above, if implemented, will achieve this objective.

We implore the Law Commission of Ontario to complete a study on this crisis and recommend change that will return the tort climate to one of foreseeability and stability.

Frank Cowan Company (representing 144 Ontario municipalities), The County of Brant, The Municipality of Chatham-Kent, The Region of Durham, The Municipality of Dutton/Dunwich, The City of Toronto, The Association of Municipalities of Ontario (AMO) and many others endorse this call to action and will offer assistance where required.