

Type of Decision									
Meeting Date	Friday, September 7, 2012				Report Date	Tuesday, August-28-12			
Decision Required		Yes	X	No	Priority	X	High		Low
Direction Only		Information Only		x	Type of Meeting	X	Open		Closed

REPORT TITLE									
Clerk's Report on OGRA Personal Liability Session – For Information Only 07/09/12/801-A									

The following is a point form summary of the OGRA (Ontario Good Roads Association) Minimum Maintenance Standards (MMS) webinar I participated in on Wednesday, August 29, 2012.

OGRA - Due to recent court decisions dismissing (or interpreting in ways differently than intended) pertinent sections of the MMS OGRA is working with the province to attempt to improve on the regulations to assist municipalities in creating and meeting standards to protect against liability on road issues. OGRA has been working to update old and create new guidelines to adopt for improvements for MMS as a result of the Giuliani case.

Lawyer – Murray Davison – Municipal Liability for Roads

- Liability for roads is a legal duty in Ontario under the Municipal Act creating a statutory duty – Section 44 and the courts have created common law. Historically, judicial decisions have determined that the municipality is not an insurer of last resort and does not have an obligation to ensure that roads are in a state of perfect repair 100% of the time. Examples...
- Belling V, Hamilton – “The municipality is not required to keep roads in perfect repair and is not required to insure the safety of persons using it...” There is no guarantee to everyone who uses roads.
- McCready v County of Brant – municipalities and road authorities are not insurers of the safety of the travelling public” “roads must be kept in such a reasonable state of repair to allow those using ordinary care to pass to and fro upon it in safety. If this has been reached the requirement of the law is satisfied – reasonable motorist, exercising care.
- Partridge – Sask – “ exercising ordinary care”
- Oakville v Cranston – The duty of the municipality is to maintain in a state of repair that can be obtained by the exercise of due diligence – lawfully and reasonable
- Deering v Scugog – old case law reviewed- done well – standard of care is not perfection, further it is neither determinative nor is it sufficient that it could have been made safer.... Cues that should be reasonably obvious to the ordinary driver – road authorities are not insurers for all losses incurred on the roadways under their jurisdiction...
- In each individual case a judge has to decide based on the specifics– has there been reasonably good care in situations where ordinary drivers using ordinary care were to travel – we are not insurers of their safe travel.

- What is a reasonable state of repair? Depends on all surrounding circumstances. Location, volume of use, financial means of the municipality could be considered. Reasonableness, ordinary users.
- However, the courts can interpret these same conditions so that they favour accident victims. Up to 2000 cases assessing millions in damages to municipalities. In turn produced lobbying of provincial government resulting in s. 44 and MMS. Fall of 2002 MMS updated again and amended in 2010 – have now been upheld by court of appeal in Giuliani.
- S. 44 pretty clear and regulation is clear. In spite of that the courts have taken aim at the concept of providing legislative protections for the municipality. Judges don't like to be told what to do through legislation and regulation. Hence the courts are blowing the MMS completely out of the water and disregarding it.
- Plaintiff's lawyers launching an attack on MMS.
- Giuliani applied for leave to appeal to the Supreme Court but the case has been turned down as Ontario is the only province with MMS and Supreme Court cases must have national implications or importance.

Charles Painter - Giuliani and MMS

- Court of appeal decision
- Sections 4 and 5 of MMS are useless as a defence to municipality as the law stands today
- Where we are now – back to old common law – **emphasis on excellent record keeping, being able to prove that you have done everything within your power to protect the public**
- **Train staff, forecast monitoring, respond to weather**
- 44.1 – where judge and plaintiff like it – codification of common law regarding standard that we will all be held up to - to maintain highways, gray area. Were efforts reasonable or not? MMS were created to make them black and white. They have now been defeated.
- Judges view municipalities as safety net for insuring travellers during injury or loss.
- Current courts have ignored the Supreme Court decision where it was determined that municipalities are not insurers of highways and are now treating us as one.
- In this case...Class 2 highways under MMS – snow fell at 4 am – accident at 7 a.m. – three hours – still snowing at time of accident. Only 2cm had fallen in total by time of accident – accepted facts.
- Argue section 4 should provide a defence – as there is a 5cm trigger depth.
- Giuliani – section 4.1 a – once exceeded table depth, deploy clearing equipment.
- Road was deemed to be at a state of repair as it had not reached the trigger depth – only 2 cm.
- S. 5 – the 2cm of snow was compacted and turned to ice. MMS – section referring to ice states “after becoming aware of the fact” response time is within 4 hours...
- No evidence as prior to the accident that the ice was there. No one could prove when it formed.

- Trial decision – Justice Murray – the regulation does not apply because they did not choose to deploy snow clearing equipment they used salt instead – they should have plowed – not just salted. Section 4 does not state how you have to clear the road – using salt is allowable – MMS are not prescriptive – municipality should be able to choose equipment and methods. Not according to Justice Murray.
- The justice states that the MMS can only apply when plowing, not salting.
- Section 5 of MMS deals with icy roadways – he goes on to state that it was not a case of freezing rain or ice pellets, or dangerous ice, it was a snow fall; so only plows should be used. Justice is inputting definitions in sections that are simply not there. There is no definition of how or why ice is formed. There is no definition of how the snow is removed – plow or salt.
- Court of appeal – section 4 only applies to reaching a trigger depth. MMS does not apply to prior to reaching the trigger depth. Can only use it once the trigger depth has been reached. Snow is allowed on the road – we cannot go around with a bucket.
- Court of appeal – must apply to the defaults. Failure to monitor weather and to prevent the roads from becoming icy – MMS does not provide rules for these.
- S 5 MMS – roadway had become icy, not before. – You should have known that the compacted snow will become icy and taken steps to clear it.
- The decision was based on the failure to prevent ice from being there in the first place – not how we reacted once we knew it was there.

There is significant work to do on the regulation to plug holes –The task force is working with province to update MMS to become more enforceable. – will present to the minister and hopefully have them adopted prior to the first snow fall.

- **GPS – if affordable and installed for road and sidewalk equipment is best evidence of where and when you were there as well as what was applied.**
- **Important to ensure that accurate logs are kept to document times that roads are plowed. – records or gps? Cost??**

Peter Foulds - A tale of Two Winter Collisions

- Mr. Foulds spoke of two cases with very similar circumstances. One case was dismissed; the other resulted in a \$1.9 million award against the municipality.
- Frank v Central Elgin 2010 and Mark v Guelph and Wellington County – 2012
- Frank v Central Elgin - Loss of control on icy road, rural municipality, morning commuter traffic high volume; plaintiff suffer serious injury, municipality had been engaged in maintenance prior to collision occurring
- Frank – dismissed entirely

- Mark – municipality. 100% at fault – \$1.9 million – is being appealed
- Why did courts deal with them differently?
- Frank - Driving to work – alone in vehicle - -3-4 northbound lane bare and wet, southbound had stretches of ice - driving in southbound lane – hit ice, lost control crossed centre line collided with vehicle
- Operations super had patrolled the road at 5:22 a.m. – when op super patrolled, there was no precipitation falling but some blowing snow – some bare , some covered – called for salt – high priority road – salt applied to both north and south between 6 and 7 a.m. – court accepted the operator’s evidence – applied pre wet salt at applied rate then went on to other roads on his route – also supported by records of salt quantities used and distance travelled and application rate – corroborated that both lanes had been salted – blowing snow delayed effectiveness of salt – more being deposited in south than north lane – judge found that icy conditions was caused by additional snow, not lack of reasonable steps to respond to winter conditions – upheld by court of appeal
- Marks case – southbound – lost control of pick up, crossed centre line – was ice covered. Suffered serious injury. Went through winter operations. Storm started previous day, through night, equipment was out during the night and the previous day was treating roads. There were no written winter maintenance policies other than MMS \there was not a dedicated patroller – was also the monitor – operator, experienced, applied sand/salt mixture between 12:30 and 1:30 – operator admitted that he was aware that freezing could occur on the road some time after he applied the sand/salt – as little as two hours after that. Recognized the risk, and need to apply again. Next treatment did not occur until 6:15 when the north bound lane only was done before moving to other routes before coming back to do the south lane. Accident occurred in the interim. Judge found that the sand/salt mixture created a brine which diluted and refroze – operator created a dangerous situation and failed to treat the southbound immediately after the northbound lane. Gap in time between first and second treatment. Records were not helpful to determine priority of roads based on traffic volume, lack of supervision and direction of night shift operators, no specific records of application.
- Op super patrolled and inspected the roads. Call out trucks promptly. Prioritize roads. Apply materials at approved rates by municipal guidelines but also by OGRA.

Guidelines

- 1. Patrol regularly during inclement weather.**
- 2. Prioritize roads by traffic volume.**
- 3. Written guidelines for operations including priorities and materials (sand/salt).**

4. Accurate and detailed records to document patrolling and operations.

GPS Tracking solutions for Road Maintenance Vehicles – Germain Proulx

- Most of this is beyond our needs and requirements.
- Spoke of monitors for equipment – sanders, salters, plows, etc. measuring the amount of material being applied electronically.
- HCM needs to keep better records but not likely electronic.