



The Corporation of the Town of Milton

Report To:	Council
From:	Glen Cowan, Chief Financial Officer/Treasurer
Date:	September 16, 2019
Report No:	CORS-051-19
Subject:	Joint and Several Liability
Recommendation:	THAT a copy of CORS-051-19, including the Town's Response presented in Appendix A, be submitted to the Attorney General of the Province of Ontario as part of the consultation process related to joint and several liability reform.

EXECUTIVE SUMMARY

- In July of 2019, the Attorney General for Ontario invited municipalities to make submissions as part of a consultation regarding Joint and Several Liability (JSL).
- JSL has been identified in the Town's previous advocacy to the Province, including the "Building a Complete Community" document as well as report [ES-004-19](#).
- Subject to Council approval, Appendix A to this report will be submitted in advance of the September 27, 2019 deadline and the Town will look to further participate through the second phase of this process in the fall of 2019.

REPORT

Background

In January of 2019 at the annual Rural Ontario Municipalities Association conference, the Province of Ontario announced consultations on reforming JSL. This was followed on July 12, 2019 with a correspondence from the Attorney General for the Province to the heads of municipal Councils. That letter outlined further details with respect to the consultation process, including the consideration of JSL, insurance costs and the "liability chill" affecting the delivery of everyday public services.

As a part of the first phase of engagement, municipalities have been requested to provide information that will be used to support an evidence-based approach to solving the current challenges. A technical group of municipal and provincial elected officials will also be established. The full correspondence from the Attorney General is attached as Appendix B. Feedback has been requested no later than September 27, 2019.



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Discussion

JSL and the resulting implications on municipalities was summarized by the Association of Municipalities of Ontario (AMO) in their 2010 report titled “The Case for Joint and Several Liability Reform in Ontario” as follows:

The joint and several provisions of the Negligence Act, indicate, “Where damages have been caused or contributed to by the fault or neglect of two or more persons ... and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering the loss or damage...”

Also known as the 1% rule, the joint and several provisions may oblige a defendant, which is only 1% at fault, to pay the plaintiff’s entire judgment particularly in cases where the other defendant is unable to meet a court ordered award. As “deep pocket” defendants with seemingly limitless public resources at their disposal through the power of taxation, municipalities have often become the targets of litigation when other defendants do not have the means to pay high damage awards.

Joint and several liability is problematic not only because of the disproportioned burden on municipalities that are awarded by courts. It is also the immeasurable impact of propelling municipalities to settle out of court to avoid protracted and expensive litigation for amounts that may be excessive, or certainly represent a greater percentage than their degree of fault.

Municipal concerns with respect to the *Negligence Act, 1990* have been previously identified by Milton Council and have formed a part of the Town’s advocacy to the Province. Reform to the laws related to joint and several liability formed part of the Town’s “Building a Complete Community” advocacy document that was first introduced via report ES-007-17 and later updated in May 2018. It was also noted more recently in the report ES-004-19 where the Town identified existing Provincial legislation that negatively impacted the Town’s ability to financially or operationally achieve the Town’s stated mandate.

¹ Source: Association of Municipalities of Ontario, “The Case for Joint and Several Liability Reform in Ontario (April 1, 2010)”, http://www.amo.on.ca/AMO-PDFs/Reports/2010/2010_Joint_and_Several_Liability_Reform.aspx?_zs=IXa2M1&_zl=531K1, accessed July 17, 2019.



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Appendix A to this report has been prepared in order to provide to the Attorney General some of the information that was requested through the consultation process. It notes that the Town employs three primary strategies with respect to risk financing, namely:

- Insurance coverage
- Appropriate contractual obligations placed on suppliers of goods and services
- Management of self-insurance retention and reserve fund to cover routine & low value loss costs

To date, and as noted in the Town's annual purchasing and risk activity reporting (most recent being report CORS-022-19), the Town has had a relatively good claims and settlement history and overall risk management culture. That said, the financial risk to the Town is magnified as a result of the existing JSL laws, and the annual cost of the Town's risk program (example - insurance premium) reflects this risk.

In order to gain some additional insight into the significance of the legislation to Milton, the Town requested input from our current insurance broker (Marsh) and PM Law (who have represented the Town on a number of files):

PM Law noted that JSL serves to help compensate tort victims, however it shifts the burden of unfairness onto municipalities like the Town of Milton, which is often named in lawsuits simply because it is a "deep pocket". This burden should be redistributed, or at least modified, to ensure municipal taxpayers are not unfairly saddled with being the ultimate insurer of personal injury claimants.

Marsh conducted a review with QBE (the Town's underwriter) to look at municipal client's liability claims over \$500,000. They noted that there were 42 losses over a 10 year period. Of the 42 claims, 24 had joint & several implications. The majority of the claims are still open, and unless the claims are settled in court and are of public record, the details cannot be disclosed.

Subject to Council's approval, the Town's input contained herein will be forwarded to the Attorney General's office for consideration, and the Town will continue to advocate for reform in relation to the *Negligence Act, 1990*.

Financial Impact

JSL laws, in their current form, create additional costs and financial risk to municipalities, including Milton. The Town has consistently advocated for changes to the related



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Appendix A - Town of Milton Submission for the Consultation Process

The Town of Milton appreciates the opportunity to provide feedback on the Attorney General's review of Joint and Several Liability (JSL) Reference #M-2019-3638. Reform to JSL has been part of the Town of Milton's advocacy efforts for a number of years. The submission below has been prepared in response to the Attorney General's letter to the heads of Councils in July 2019, and has involved consultation with the Town's insurers and external legal counsel.

Insurance Coverage and Premiums

In regards to the nature of coverage, the Town of Milton has a full suite of coverage, including liability insurance. Marsh (formerly JLT) is the Town's main insurer, with underwriting services from QBE. The Town maintains a \$50,000 deductible on its policies. This deductible limit is reviewed annually in order to make the most cost effectively decision in regards to the purchasing and administration of the various policies.

The Town has a Senior Risk Specialist that focuses on the management of the risk program, but also handles the under-deductible claims. Under certain circumstances the Town will also use an external adjuster to handle claims. Council is provided an update and summary of the risk management program on an annual basis.

The Town undertook a competitive request for proposal process for risk services and various insurance policies. The bid stipulated that that policy premiums were to be held firm for three years with adjustments being made for growth in assets. There was also focus on a corporate risk management strategy with the targeted outcomes of reducing claims and strengthening the Town's loss run report.

The Town meets annually with the underwriter to review the account and discuss on-going initiatives as well as the Town's risk strategy. The Town receives direct feedback on any risk the underwriter identifies in the portfolio. Also at this meeting the state of the market is discussed. As the markets changes the Town maintains a close watch on the premiums to determine the most effective strategy for renewal. The Town's policies and limits are arrived at with consideration for the market, the Town's loss run report, the Town's asset base and services, and the overall risk management program.

To the specific question as to how the base premiums are established for municipal accounts, the Attorney General would need to address this question directly with the insurance companies who are better positioned to respond relative to their municipal clients.



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Litigation Costs

Litigation costs can be high for road claims as these claims may involve catastrophic injuries and municipalities can become involved strictly due to JSL. Another area that JSL impacts the Town are related to frivolous claims that the Town is required to defend. Municipalities can also be impacted through settling claims for more than an appropriate share in order to avoid a judgement involving JSL at trial.

In regards to reducing defense costs, the Town takes a pro-active approach including seeking to be released from a claim where appropriate. This includes, but is not limited to, tendering the Town's defense where possible to insurers for the Town's contractors and the bringing of motions for a Summary Judgment in an effort to put an early end to frivolous claims.

Claims Costs

Claims costs are rising with large claims starting at several million dollars, plus special considerations. The Town's external legal counsel notes that the costs of future care and medical rehabilitation expense gets rolled into the tort claim if not paid for by accident benefits. So, each catastrophic motor vehicle accident case against a municipality that has arisen under the reduced Statutory Accident Benefits Schedule (SABS) catastrophic (CAT) benefits limits has resulted in higher claims exposure to the municipal defendant. What SABS does not cover, the Plaintiff lawyers simply add into their future care costs expert report in the tort proceedings.

The Town, as previously noted, has a deductible of \$50,000. In general, for the claims under \$50,000 the Town is the sole defendant. The Town manages these claims largely in-house and only notifies the insurer if the claim may breach the deductible.

Alternatives to the existing JSL model

JSL is beneficial for the plaintiffs as it provides a higher degree of certainty in collecting the dollars awarded in the judgement. There are several avenues that could be explored by the Attorney General's office to preserve protections to the plaintiff without shifting an unreasonable burden to municipalities. They include:

- i. Modifying JSL through the introduction of a cap to the degree to which any party's liability can vary from their assessed share through the judgment (i.e. "Multiplier Model")
- ii. Leave JSL as is, but introduce a clearly defined monetary cap upon Municipal payouts in certain JSL situations (thereby providing the insurance industry greater certainty on municipal risk in JSL situations)
- iii. Ensure that all parties have reasonable coverage for the associated risks (example - review of automobile driver insurance policy minimums)



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- iv. Establish a fund, or expand on an existing fund, that would be available to support plaintiffs in cases where defendants are not capable providing for their assessed share of damages. The existing Motor Vehicle Accident Claims Fund or Provincial Gas Tax funding may be worth further evaluating as part of this solution.

Ultimately if changes are made that require identification of an alternate financial remedy for catastrophically injured persons, the Ministry should consider the nature of the property tax system (on which municipal revenues are largely based) relative to income and sales based tax systems in determining the most appropriate framework.

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Our Reference #: M-2019-3638

JUL 1 2 2019

Dear Head of Council,

Further to the Premier's announcement at the 2019 ROMA conference, I am writing to invite you to participate in the government's consultations regarding joint and several liability, insurance costs, and the 'liability chill' affecting the delivery of everyday public services.

In order to make this consultation process as effective as possible, the government needs to hear directly from you about your municipality's experiences. It is impossible to canvass possible solutions without understanding the actual problems faced by municipalities.

This will be an evidence-led consultation and policy development process. The first phase of the process will involve collecting background technical information. I therefore ask that you have your municipal officials respond in writing to the general questions noted below. We will also be establishing a Technical Table of provincial and municipal elected officials, building on AMO's existing Working Group, to make sure that we are all on the same page around the issues and evidence that need to be addressed.

Given the importance of hearing your experiences, there is no predetermined format or questionnaire for this consultation. We don't want to inadvertently limit you. We would ask, though, that your officials consider and address three broad questions so that there is some comparability among the responses.

First, please describe the nature of the problem as you see it. What are the problems that you need addressed to benefit your municipality. Is it increasing premiums? Rising deductibles? Being unfairly named in lawsuits? Being held to unreasonably strict standards (e.g., regarding road design or maintenance)? Feeling that you cannot offer certain services because of the liability risk? A general sense of unfairness that municipal taxpayers pay more than their fair share (e.g., because individuals are under-insured or were behaving irresponsibly)? Please have your officials describe all the specific problems that are directly affecting your municipality.

Second, please indicate what evidence leads you to your view of the problem. Without limiting the types of evidence you may wish to discuss, I have attached to this letter a list of potentially relevant facts and evidence that your officials may wish to address.

Finally, given your view of the problem and the supporting evidence, what solutions do you propose? In formulating your proposals, please keep in mind the need to ensure that catastrophically injured persons are fairly compensated and that costs are not simply transferred to the publicly funded health care system.

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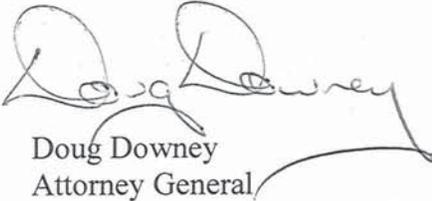
I will provide an update on the consultation process at AMO in August. I will also meet with interested delegations.

The second phase of the municipal consultation process will involve formal discussions in early Fall among elected officials about the evidence and the potential policy solutions. Once there is a provincial and municipal understanding on the key issues, the government will engage with other interested stakeholders.

The Ministry of the Attorney General has established a dedicated email address to receive the background technical information from your officials. Please have your officials respond by Friday, September 27, 2019 to magpolicy@ontario.ca. For further information, please have your officials reach out to MAG at the email address noted above.

Our goal must be meaningful and lasting reform. I encourage you to share your experiences on this important subject.

Sincerely,



Doug Downey
Attorney General

Attachment**Potentially Relevant Facts and Evidence**Nature of Insurance Coverage

- Does your municipality purchase liability insurance? If so, from what company?
- Do you use an insurance broker? If so, which company?
- Does your municipality self-insure against some or all liability risks? If so, please describe the program.

Premiums

- Municipal insurance premiums over time (both absolute dollars and percentage increases)
- Insurance premiums in other business lines over the same time period
- Typical ratio of premiums to claims payouts
- What triggers premium increases? Being named in a claim? Incurring defence costs? Paying on the claim?
- The secondary literature speaks of 'insurance cycles' or the market 'tightening' periodically such that premiums increase markedly in a relatively short period of time. Do you have any views on this topic?

Deductibles

- Amount
- Trigger for payment by municipality (being named, filing a defence?)
- Changes over time
- Comparison to changes in other business lines over time

Litigation Costs

- Amount
- Does joint and several liability ("JSL") impact costs?
- Changes over time
- Are municipal liability cases any more expensive to defend than other types of claims?
- Have any steps been taken, or are planned, to reduce defence costs?

Types of Claims

- Data regarding types of claims including road/auto, building inspections, other personal injury (e.g., tobogganing) – both volume and cost
- Number/ portion of cases that involve two or more defendants and thus raise JSL issues
- Changes over time

Settlement of Claims

- Data regarding JSL cases – and ideally the specific cases – where municipalities have settled for amounts disproportionate to their fault.
- Non-JSL cases where the municipality has paid amounts viewed as disproportionate to their level of fault (e.g., in the past some stakeholders have identified single vehicle collisions involving impaired drivers).

Adjudication of Claims

- Data regarding JSL cases – and ideally the specific cases – where municipalities have been required to pay amounts disproportionate to their degree of fault as determined by the court.
- Non-JSL cases where the municipality has been found liable and required to pay amounts viewed as disproportionate to their level of fault (e.g., in the past some stakeholders have identified single vehicle collisions involving impaired drivers).

Claim Costs

- Is the cost of individual claims raising, e.g. claims related to injuries in automobile accidents? If so, why?
- In 2016, the previous government reduced the cap for no fault catastrophic injury payments in automobile cases from \$2M to \$1M. Did that have any impact on municipal costs? If so, what savings are expected from the government's plan to increase the cap back to \$2M? Would a further increase to no fault benefits result in savings to municipalities?
- Are settlements ever for a sum less than or equal to the deductible?

Other

- How does JSL positively impact catastrophically injured plaintiffs? How would associated costs be distributed if JSL is abolished?
- What if any impact have road maintenance standards had on claims against municipalities?
- What types of everyday activities have been impacted by insurance costs and other liability risks? To what extent is JSL a factor in these situations? What steps have municipalities taken to mitigate these costs and risks?