Cowan
Frank Cowan Company

News & Views

June 2010

A Call to Action

- The Challenge to the Minimum Maintenance Standards

The legality of the Minimum Maintenance Standards (MMS) is currently being challenged. An application has been filed with the Superior Court of Justice to declare MMS null and void. The hearing of this application will be held in the fall of 2010.

Ontario Good Roads Association (OGRA) is filing a notice with the Court opposing this application.

MMS were created to help municipalities defend legal actions alleging non repair of roads. These standards provide municipalites with not only a framework for road maintenance but also a third defence under Section 44 of the Ontario Municipal Act. It states:

"A municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

"c) at the time the cause of action arose, minimum standards established under section (4) applied to the highway or bridge and to the alleged default and those standards have been met."

The application filed with the Superior Court of Justice is seeking to remove this defence. If successful, not only will all motor vehicle accidents (MVA) going forward be impacted but also all open MVAs within the dates November 1, 2002 to March 6, 2010.

Recently, OGRA sent a letter to all their municipal members. They have asked for your assistance to help them fund this legal challenge.

Frank Cowan Company supports the OGRA initiative and urges all municipal members to do the same.

For your reference, we are enclosing a history of the MMS. If you have any questions, please don't hesitate to call your Account Manager at Frank Cowan Company.

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The History of Minimum Maintenance Standards

Prior to November 1, 2002

The Municipal Act, RSO 1990, Section 44. (1) places liability for road maintenance on the municipality that has jurisdiction over the road. This section is written as:

"Maintenance – The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge."

Defences to liability were set out in Section 44. (3) and written as follows:

"A municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

a) it did not know and could not have been expected to have known about the state of repair of the highway or bridge;

b) it took reasonable steps to prevent the default from arising.

Significance

If a municipality knew, or it was deemed, it ought to have known, a state of disrepair existed the municipality would be found liable in a motor vehicle accident (MVA). This was in accordance with common law principles that govern the law in Ontario.

November 1, 2002

In order to provide municipalities with some relief against liability, Minimum Maintenance Standards (MMS) were developed. On November 1, 2002, Regulation 239/02 was enacted. The regulation was amended by Regulation 23/2010.

MMS provided municipalities with a third defence against road liability claims. This defence is incorporated into the Municipal Act, RSO 1990, Section 44 (3) and is written as follows:

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met."

The Reason for the Legal Challenge Against MMS

In Thornhill vs. York, Justice Howden (2008) opined that MMS may not be enforceable as he was of the opinion that the Ontario Legislature did not have the authority to empower the Minister to create the regulation. The legal term applied is "ultra vires" which means "outside of the government's legislative realm". However, in the case of Thornhill vs. York, Justice Howden did not rule on this point as it was not before the Court.

MMS have protected municipalities from liability that would be applied under normal common law principles. Therefore motorists injured in MVAs must meet a higher level of proof of liability than in other situations that may cause injury. This is the main reason Justice Howden made his comments on the legality of MMS.

Since the release of the Thornhill judgement, Plaintiff Counsels have made threats of challenging MMS. Some have pled the fact that the MMS are ultra vires in Statements of Claim. However, none of these cases have come to trial, yet.

The Legal Challenge

In the case of Silveira vs. Vaughn, York et al., a motion was brought to remove the issue of MMS as being ultra vires from the trial and instead decide the issue by a separate motion. The sitting Judge, Justice Lauwers, granted the motion and the matter is to be heard in the fall of 2010.

This will bring some order to the hearing and interveners are allowed to make submissions.

What happens if the MMS are abolished?

Claimants involved in MVAs, who bring actions against the municipality, will have a much lower burden of proof. The municipality can no longer use the defence of having met the minimum standard of care. Claimants will not have to prove that the municipality knew about the state of disrepair. They will only have to prove the municipality **knew or ought to have known** of the disrepair.

This will serve to increase the number of judgments against municipalities and adversely impact the cost of claims and therefore the cost of insurance.

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