

The Future of Municipal Liability and Risk Management

Report from the Provincial-Municipal Technical Working Group

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Executive Summary

- In Spring 2022, AMO and Ontario formed a Technical Working Group (“Working Group”) to provide for an inter-governmental dialogue on municipal insurance costs, coverage, and liability issues, including joint and several liability. Through its discussions, the group brought together a series of experts from various sectors to help to identify gaps in data, discuss alternate liability models, and develop a list of practical short and long-term options to address municipal insurance challenges.
- This report summarizes the Working Group’s discussions of these topics and other topics of interest identified during the Working Group process.
- The Working Group examined the state of the municipal insurance market in Ontario. It heard from presenters that global macroeconomic conditions (e.g., investment returns, inflation), the growing volume and scale of claims, including those from extreme weather events (both local and international), and the ongoing impacts of the COVID-19 pandemic are all contributing to an ongoing hard insurance market. When pricing insurance, commercial insurers look to balance the effects of these factors with their business objectives.
- In addition to the effects of the hard market, municipalities are uniquely difficult to insure due to their size, scale and complexity. In an environment where many municipalities rely on the same insurance providers, the impact of individual municipal losses may be felt more keenly across the board.
- These market conditions may pose further challenges for municipalities as they seek to expand their operations and infrastructure. However, it also highlights the importance of strategic risk financing and rigorous municipal risk management.
- Establishing a new municipal sector reciprocal insurance exchange or some other risk pooling structure may be a promising option for responding to changing insurance market conditions and providing municipalities with longer-term premium stability.
- During these discussions on insurance pricing, the Working Group did not find evidence that joint and several liability has a direct correlation to determining insurance premiums. As far as anyone is aware, there has never been a 1% finding of liability under the joint and several liability rule. Nor did the Working Group find consolidated data from any sources that clearly identifies the impact of joint and several liability on municipal insurance premiums or on claims resolution.
- It remains unclear what types of claims against municipalities are the most important drivers of increases in insurance premiums and overall insurance costs. Many Working Group participants identified property claims as a key emerging source of increasing insurance costs, in particular Building Code claims and extreme weather losses.

- Nevertheless, road liability – particularly for catastrophic injuries – remains at the forefront of municipal concerns; such cases are often the focus of media coverage. Some Working Group participants felt that existing legislative liability defences in this area, such as the Minimum Maintenance Standards (MMS) regulation, provide limited protection to municipalities because they are narrowly interpreted by courts.
- Many participants felt that the reduction of certain auto insurance coverages, particularly the 2016 reduction of catastrophic impairment accident benefits from \$2 million to \$1 million, has increased the amount potentially payable by municipal defendants in road claims.
- The Working Group also explored concerns about the growing use of micromobility vehicles and other new vehicle types (e.g., e-bikes, e-scooters, large quadricycles) on municipal roads. These vehicle types are not directly addressed by the MMS, and most do not have insurance requirements or tailored insurance products.

Action Plan

The Working Group has identified the following as viable next steps:

1. Confirm the feasibility of a new municipal sector reciprocal insurance exchange or other alternative risk financing structure.
2. Ensure robust municipal involvement in the ongoing Minimum Maintenance Standards review.
3. Continue to collect joint and several liability (JSL) data through AMO Local Authority Services (AMO LAS) in order to further unpack the relationship between JSL and municipal insurance premiums before re-engaging on potential opportunities for legislative change.
4. Include municipal concerns about extreme weather resilience and building inspection liability in AMO's broader advocacy on the Building Code and the provincial housing strategy.
5. Increase awareness of the need for insurance or other compensation mechanisms for individuals injured while using micromobility devices and other new vehicle types (e.g., e-bikes, pedal pubs).

AMO is committed to continued work on this issue and will continue the intergovernmental dialogue through a semi-annual forum to identify emerging risks and monitor progress on the Action Plan. AMO will also continue to promote education and outreach to share the Working Group's learnings on municipal risk and liability, and to engage in ongoing work to support this important area of municipal concern.

Background

- Historically, municipal proposals to address rising insurance premiums have focused on the joint and several liability (JSL) rule in the *Negligence Act*.
- Under this rule, negligent defendants are responsible for the shortfall in damages of other negligent defendants who are uninsured or insolvent. Municipalities have asserted that this rule causes them to be added to tort claims as “deep-pocket” defendants and that the extra costs are factored into their insurance premiums.
- In 2014, the Ministry of the Attorney General (MAG) conducted a consultation on possible changes to the JSL rule. Following the consultation, a decision was made not to proceed with changes to the rule.
- In 2019, MAG led a further consultation on insurance and liability issues, including JSL. Over 400 municipalities were invited to participate. MAG received submissions from over 100 municipalities and seven organizations.
- AMO submitted a paper to the consultation, [*Towards a Reasonable Balance: Addressing Growing Municipal Liability and Insurance Costs*](#), which included several proposals for addressing municipal insurance cost issues.

Formation of the Working Group

- The current hard insurance market and the COVID-19 pandemic have renewed the focus on the cost and availability of municipal insurance and on claims against municipalities.
- In January 2022, the Attorney General, on behalf of the Province, invited AMO to form an officials-level Technical Working Group (the “Working Group”) to explore options for responding to AMO’s 2019 paper. The creation of the Working Group is consistent with one of the paper’s proposals.
- The Working Group consists of staff representatives from municipalities, AMO, and the Government of Ontario. A full list of Working Group member organizations is available in the [Appendix](#).
- The Working Group held its first meeting in March 2022. As of June 2023, the Working Group has met 15 times.
- In the invitation to form the Working Group, MAG expressed that it was open to discussing any and all options for addressing municipal insurance and liability cost issues.

- As part of its process, the Working Group spoke with a variety of stakeholders, including from the insurance, actuarial, risk management, legal, and road maintenance and safety sectors.

Municipal Insurance: How Does It Work?

Insurance Market Issues

Availability of Municipal Insurance Coverage

- Municipalities have repeatedly raised concerns about the limited number of participants in the municipal insurance market and the challenges this creates for insurance procurement and pricing. The recent consolidation of several major municipal insurance providers – in 2019, Intact Public Entities (IPE) acquired the Frank Cowan Company and The Guarantee Company of North America, while Marsh acquired JLT – has led to fewer participants in the municipal space.
- The market for specialty lines of coverage is also shrinking. For instance, IPE has exited the standalone insurance markets for non-profit housing and long-term care, although they continue to underwrite municipal insurance in this area. In addition, cyber coverage has been removed, reduced, or significantly increased in cost, if it is available.
- The Working Group heard that there were four major municipal insurance providers in Ontario: IPE, which is a Managing General Agent (MGA), and Marsh, Aon, and BFL, which are insurance brokers. Each provider works with their own set of insurance carriers (“insurers” or “markets”). Insurers control their own underwriting and claims management; MGAs have delegated authority to conduct these activities on their behalf. In contrast, brokers have delegated underwriting or claims management authority on behalf of insurers but may have exclusive agreements to work with specific insurers.
- Insurers spread their risk by sharing their books of business with “partner” markets in other jurisdictions to supplement existing coverage or to provide additional lines of coverage. One example of a key partner market is Lloyd’s of London, which oversees a marketplace of insurance syndicates with their own books of business. Other examples of (re)insurance partners include Munich Re, Liberty (Temple), and Swiss Re.
 - Insurers may have to consult partner markets when deciding how to proceed with significant claims. Similarly, changes to partner markets’ capacity can affect local insurers’ capacity (and consequently their pricing).
 - Insurance providers cannot access other providers’ partner markets due to exclusive agreements in certain jurisdictions, which may further limit competition.

- Insurance industry participants also suggested that the long-tail nature, scale, expense, and unpredictability of claims can deter insurance companies from entering the municipal market or from providing certain lines of coverage.
- It was observed that the traditional insurance business model is itself a form of “risk pooling”, as it involves the redistribution of purchasers’ risk across a larger portfolio. Most municipalities procure insurance from the same insurers, and many insurers buy reinsurance from the same providers. Thus, to some extent, costs for individual losses are borne by everyone in the market.

The Role of Insurance Market Cycles

- It was noted that the commercial insurance market is cyclical and that it responds to the pressures created by existing market conditions and profitability. Hard market conditions include more stringent underwriting, less capacity, higher deductibles, and higher premiums, as well as some insurers exiting areas of coverage. Soft market conditions include competitive pricing, higher market capacity, lower deductibles, greater risk appetite, and higher coverage limits with fewer conditions.
- Economic and environmental events elsewhere in the world (e.g., inflation; supply chain disruptions; severe weather events which cause significant losses) can have systemic effects on market capacity, pricing, and profitability. Many of these events are outside of municipal and provincial control but affect insurers’ books of business.
- Some of the existing alternative risk financing structures in Ontario were created during hard market cycles in the late 1980s and early 2000s:
 - The Ontario Municipal Insurance Exchange (OMEX), a municipal insurance reciprocal, was established in 1988.
 - Municipal insurance pools were established in Waterloo Region in 1998 and Durham Region in 2000.
 - Ontario has a self-funded insurance program, the General and Road Liability Protection Program (GRLPP), which manages and settles third-party general liability and road liability claims against the Province. The hard market in the early 2000s was one factor which led the Province to adopt the GRLPP.
- Commercial insurance market cycles are becoming prolonged. Hard and soft market cycles used to last about three to five years, but the most recent soft market lasted for over 10 years.
- The extended soft market prior to 2017 may have encouraged municipalities to regularly canvass the market for better pricing. OMEX cited this “highly competitive business environment” as one of the reasons it suspended underwriting as of January 1, 2017.

- Following a number of large losses in the mid-late 2010s, the current hard market developed to rectify this “historically low” pricing. Key global insurers began seeking targeted rate increases by lines of business, which resulted in fewer participants in the marketplace (i.e., lower market capacity).
- The COVID-19 pandemic caused further changes in exposure across many lines of coverage. For instance, cyber insurance moved quickly from a soft market to a very hard market in a relatively short period of time. This was caused in part by the massive shift to remote work during the pandemic and escalating cyber crime. In less than a decade, it went from an “add-on” coverage to a specialized, expensive coverage for a municipal insurance program, if it was available at all (see [Cyber Insurance Challenges](#)).
- Although there are signs that new insurance capacity is re-entering the global market, capacity in some lines of coverage remains low, especially for municipalities.

Insurance Pricing Issues

- Municipalities contend that insurance providers’ pricing methods contribute to higher premiums and deductibles.
- The practice of calculating premiums on a per-occurrence basis may result in a municipality with a larger risk exposure paying more for their insurance than desired. One proposed solution is an option for an annual aggregate limit on coverage. However, one presenter asserted that this approach would “cut off” insurance protection for catastrophic and unpredictable losses and is unlikely to result in significant cost savings to municipalities.
- Municipalities have also expressed concern about increasing deductibles for events such as fires, sewer backups, overland flooding, and wastewater flooding. Deductibles are typically calculated per loss location rather than per event, resulting in higher overall costs to municipalities for these types of losses.
- Some participants observed that to avoid increasing premiums, some municipalities have increased their deductibles to the point that they are self-insuring most claims.
- To this end, some presenters suggested that municipalities think carefully about whether they are insuring the right risks – for instance, to consider whether self-insurance or a higher deductible might be a preferable strategy for budgeting certain types of risks and mitigating insurance costs.
- One presenter from the insurance sector identified the following key components of premiums:
 - **Losses:** A large portion of a premium is calculated from average losses across the insurer’s portfolio and the line of business. Insurers target a loss ratio of

about 65% (i.e., for every \$100 in premiums collected, the insurer pays \$65 in claims).

- In the absence of expected losses (i.e., where policy limits are high) or where the lack of accurate data makes pricing difficult, insurers often describe a portion of the premium as the “cost of capital”, but it is unclear how this is calculated.

The remainder of the premium is generally derived from the following costs:

- **Reinsurance costs:** A portion of a loss (and its volatility) may be transferred to a reinsurer. Reinsurance terms and conditions can have a major impact on insurers.
 - **Business costs:** Operational costs / overhead of running the company.
 - **Sales and marketing costs:** Most insurers work with brokers, who are paid commissions for bringing in business. Insurers may also pay contingent commissions based on factors such as volume and profitability of broker placements, which reduces their overall profitability.
 - **Profit:** Traditional insurance companies will be seeking a return for investors. For the most part, this is not a large portion of premium costs.
- This presenter identified the following as key factors in pricing premiums:
 - **Loss data:** Since a significant portion of a premium is calculated from losses, there is a lot of uncertainty involved. Although individual losses are considered, the insurer’s portfolio losses tend to factor more into pricing. Different lines of business also have different levels of volatility over time. This can be challenging for insurers to model and predict and will never be completely accurate.
 - Auto (personal injury), general liability, and errors & omissions liability tend to be longer-tail lines of business which take longer to resolve and result in more volatility over time. Claims in shorter-tail lines of business such as auto (property damage), property, and cyber, though more quickly resolved, can create more volatility within an insurance year.
 - Losses are trended to inflation. Trends in the frequency and severity of losses will also affect actuarial loss projection.
 - Insurers may use their investment income to discount losses, which permits them to capitalize longer-tail lines of business.

- **Profit considerations:** What is considered a “reasonable” return on investment fundamentally depends on the volatility of claims and losses. An insurer’s overall business objectives (e.g., to increase or maintain profitability) may also influence decision-making in pricing.
 - Insurer data from the Office of the Superintendent of Financial Institutions suggests that net loss ratios for most lines of business for both domestic and foreign insurers have remained steady or decreased since COVID-19. The main exception is cyber liability insurance, which remains extremely volatile; however, foreign insurers make up 80% of this market in Canada. In short, most insurers seem to be trending towards greater profitability.
- **Reinsurance costs:** Costs may vary significantly from year to year. Following catastrophic events, market capacity may be limited, and reinsurance terms can be more difficult for insurers to negotiate.
- **Acquisition costs:** Broker commissions, sales and marketing expenses, and other fees for services also contribute to the cost of doing business.
- It was observed that using accurate risk exposure and loss data, as well as working from larger data sets, can assist actuarial models in quantifying volatility and contribute to more accurate pricing. Some participants observed that most of the relevant data is currently held by insurers.

Options for Supporting Sustainable Insurance Premiums

Alternative Insurance Structures

- The Working Group discussed several risk financing alternatives to traditional insurance.
- It was observed that municipalities should fully understand their risk profile and at minimum, conduct a feasibility study before progressing with any of these possible options.

Insurance Pools

- In a pool, municipalities retain a designated level of risk as a group and then purchase an insurance policy from a third-party insurance provider, also as a group, to sit above that level of risk. Risk is shared among pool members under a subscribers’ agreement and the pool is administered by its own operations team.
- There are two regional municipal insurance pools in Ontario. Both have been successful but have also continued to experience premium increases and other insurance cost issues.

- Pools rely on third parties for some professional services. It was observed that this may be more challenging for smaller or more remote communities with less direct access to these services. AMO Local Authority Services (AMO LAS) is examining this issue.

Insurance Reciprocals

- In a reciprocal, municipalities share risk and insurance costs among themselves under a subscribers' agreement. Although reciprocals are not formal legal entities, they are licensed and regulated by provincial insurance regulators.
- There are dozens of successful insurance reciprocals in Ontario and across Canada including municipal reciprocals in the Western provinces and the territories. An estimated 75,000 public entities in the United States buy one or more coverages from a reciprocal/pool.
- If municipalities are to revisit this option, they believe there are many lessons to be learned from the OMEX experience with regards to how the reciprocal is structured and operated.

Insurance Captives

- In a captive insurance model, a municipality would create an insurance company, as a formal legal entity, to insure itself. It is also possible to structure a "group" captive owned by multiple entities.
- It was asserted that an insurance captive structure could help a municipality increase control over their insurance program management and reduce the "frictional" costs of dealing with insurance providers.
- The captive model is still fairly new to Canada. Although there are insurance companies in Ontario which underwrite a single sector (e.g., LAWPRO for lawyers; Pro-Demnity for architects), there are currently no licensed municipal insurance captives in Canada and there is no specialized Ontario legislation for captive insurance companies. Captive setup and operating costs would also likely be high.

Risk Management Challenges

- The Working Group frequently raised risk management in discussions about other topics.
- Many presenters stressed the importance of treating risk management not simply as "another tick in a box" but as a key pillar of municipal financing. It was observed that day-to-day risk mitigation strategies, such as improving record-keeping training and practices, can be key to reducing municipal liability findings.
- Municipalities have stressed that limits on their staffing and financial resources make it difficult for them to achieve the risk management and mitigation standards seemingly

required by the courts. They noted that rising insurance premiums affect their risk management strategies and that the costs associated with high-quality risk management may lead to deficits in other municipal services.

- Municipalities benefit from trained risk management staff who can work to identify claims trends and suggest mitigation strategies to reduce overall insurance costs. This can be an additional challenge for smaller or more remote municipalities without specialized risk management staff, who may have to deal with risk management “off the side of their desk” or assign risk management responsibilities to other municipal staff.
- AMO LAS is undertaking projects on issues such as cyber liability, automated speed enforcement, and claims tracking to help municipalities manage their risk in these areas.
- As well, AMO LAS has created a new Program Manager, Municipal Risk Management to further build risk management capacity for Ontario municipalities. It has also established a Risk Management Working Group focused on municipal education and on producing content for the sector.

Insurance Procurement Challenges

- Municipalities have observed that annual insurance renewals and Requests for Proposals (RFPs) are becoming more challenging to manage. For instance, they are being asked far more questions and for more detailed information during RFPs, which can be a time-consuming process, and are getting fewer quotes.
- Insurance providers have observed that municipalities are uniquely challenging to insure because of their scale, size, and complexity. Municipalities provide an extensive range of services, have large property schedules, and operate unique vehicle fleets which require their own rate filings. As Ontario’s municipalities grow in size and operations, the corresponding increases in their asset values and infrastructure costs may further broaden their risk profile.
 - Municipalities’ tier status – and consequently the extent of their responsibilities – can affect the scope and costs of insurance coverage they may require. For instance, upper-tier municipalities responsible for transit, police services, and EMS are likely to have a broader risk profile, as these services are covered by specialty lines of insurance and can be high-volume sources of claims.
- Although frequent requests for quotes allow municipalities to look for lower insurance rates, insurance providers have expressed that they prefer working with municipalities who intend to build long-term relationships and can demonstrate that risk management is important to them.

- It was also suggested that insurance providers may be more willing to absorb the outlying losses of a municipality with whom they have a long-term relationship because they are familiar with the municipality's risk profile and can assist in mitigating other or future exposures.
- Similarly, some presenters observed that long-term commitment was important to the success of alternative risk financing structures like pools and reciprocals. A reciprocal/pool's financial position can be destabilized by subscribers who are frequently looking for insurance elsewhere.

Joint and Several Liability

- MAG presented to the Working Group on the history of the JSL rule in the *Negligence Act*. The rule has been largely unchanged since the Act was enacted in 1930 and has always maintained the core policy objective of victim compensation.
- Changes to the rule could place a greater burden on injured parties and result in costs being transferred to the public health care system. The principal alternative to the JSL rule is proportionate liability, in which each co-defendant held liable for causing the plaintiff's loss only pays for their proportionate share of that loss. Although it protects a person committing a tort from the risk of non-recovery from other co-defendants, the plaintiff bears the risk of not receiving full compensation for their injury.
- Historically, law commission reports in Canada and other common-law jurisdictions have supported the JSL rule as the fairest method of addressing shortfalls in damages.
- Most Canadian provinces continue to follow the JSL rule in full. Provinces with partial proportionate liability regimes – British Columbia, Nova Scotia, and Saskatchewan – continue to apply the JSL rule in cases where the plaintiff is not found to be at fault. Notably, BC and Saskatchewan both have generous no-fault auto insurance schemes with high accident benefit limits.
- In the 2019 MAG consultation, municipalities generally identified JSL as an “important factor” in rising insurance premiums. However, other potential cost drivers identified in the consultation, such as changing market conditions, the increasing value of municipal assets, and the growing scale of environmental claims, make it difficult to know whether JSL materially affects insurance premiums.
- Stakeholder views on JSL continue to evolve. It seems to be increasingly accepted that JSL is not the key factor in rising insurance premiums. However, there remains a widespread opinion among municipalities that JSL is an important factor and that it contributes to higher and more frequent settlements.
- Some municipal insurance providers have publicly stated that “a change in joint and several liability that favours municipalities will not absorb or offset the impacts of the

current hard market.”¹

- They assert that JSL is a factor in rising premiums but have expressed the view that changing the rule would not be a “silver bullet” and could create legal uncertainty as courts may look for other, potentially more costly ways to compensate victims.

The Role of JSL in Insurance Pricing

- There is no direct evidence that JSL causes increases in insurance premiums. Historically, it has been challenging to identify data which shows a clear causal relationship between JSL and insurance premiums.
- Some participants suggested that JSL’s impact is difficult to quantify because it introduces uncertainty into the claims administration process. For instance, “long-tail” claims may take several years to resolve, and the final apportionment of fault may be unpredictable. There is a strong view that insurance providers dislike such uncertainty and that it is factored into insurance pricing, as claims tend to have a greater impact on insurance premiums in the years immediately following a loss than in the years following a settlement (see [Insurance Pricing Issues](#)).
- It is unclear exactly how JSL is factored into insurance pricing. Prior requests for evidence have not generated any information about a “variable” or “factor” that directly links a municipality’s JSL experience to their annual premiums. It is unknown whether such a variable exists or whether information about it is confidential or proprietary.
- Notably, when asked by the Working Group, no participant indicated that they had seen or heard of such a variable or factor. One Working Group presenter with actuarial expertise suggested that there is no such “factor” for incorporating JSL into a pricing analysis, and that actuarial models simply account for JSL as part of insurance providers’ overall efforts to manage long-tail claims volatility.

Volume and Cost of JSL Claims

- There is a strong sense that most JSL claims stem from catastrophic injuries in road-related claims. However, it is unclear whether these catastrophic road cases drive overall costs and premiums, or whether the much higher number of less serious personal injury and/or property damage (e.g., potholes) cases, which usually do not involve JSL, have a larger impact on costs.
- It was widely agreed that the cost of catastrophic cases has increased dramatically. It was suggested that a case that might have resolved for \$6 million ten years ago would now resolve for \$12 million or more. While this would be characterized as “costs” from an insurance and liability perspective, participants acknowledged the overall public interest in medical and scientific advances contributing to longer life expectancies and a better quality of life for people who have suffered catastrophic injuries.

¹ Intact Public Entities, [Escalating Cost of Municipal Claims – 2022 Report](#).

- Building Code cases were also noted as a growing source of JSL claims, the cost of which has been exacerbated by the dramatic increase in real estate values and construction costs (see [Building Code Act](#)).
- No participant identified any case where a municipality faced JSL on the basis of being found 1% liable. Rather, participants indicated that the lowest percentage they had seen in the case law is around 15%.
- In an attempt to address the lack of data on this issue, the Working Group formed a JSL data sub-committee with representatives from MAG, the Province's Risk Management & Insurance Services Branch, AMO LAS, two municipalities, and the Insurance Bureau of Canada.
- The sub-committee has examined where and how to collect data which could demonstrate a relationship between JSL and insurance premiums. This includes looking for data types which could show correlation, if not causation.
- The sub-committee's feedback will be incorporated into an upcoming municipal claims data study administered by AMO LAS. The study is intended to get a better sense of the claims types that are the key sources of JSL claims and related costs, which may inform future municipal proposals for addressing JSL concerns.²
- The study may also serve as a first step towards helping municipalities manage and extract their own claims data, which will assist them in identifying below-deductible costs such as adjustment and legal fees, i.e., their total cost of managing risk.
- AMO LAS has partnered with ClearRisk, a risk and claims management software system, which will assist in this important data collection and study. Aggregate data from across the platform will provide critical data to help guide and support any future municipal risk management programs.

Municipal Legislative Protections

- Municipalities believe the scope of the liability protections and defences available to them in legislation has been significantly narrowed through case law.
- In particular, municipalities have raised concerns about the interpretation of:
 - *Municipal Acts*.44 – road liability standards (highway maintenance; sidewalk claims; notice periods for claims); and

² This work is intended to address Recommendation #6 of AMO's 2019 paper, "Compel the insurance industry to supply all necessary financial evidence including premiums, claims and deductible limit changes which support [...] arguments as to the fiscal impact of joint and several liability."

- *Municipal Act* s.450 – bar on negligence actions against municipalities for policy decisions. Specifically, the effects of the *Nelson v. Marchi* Supreme Court case on the distinction between “policy” decisions, which are protected by the legislation, and “operational” decisions, which are not protected.
- In *Marchi*, the plaintiff was injured while trying to cross a roadside snowbank created by municipal snowplows. The Supreme Court set out a four-factor analysis for deciding whether a government decision is policy or operational. In this case, it held that the municipality’s decision about how to clear the road did not constitute a “core policy decision” subject to legislative immunity.
 - One legal sector participant suggested that *Marchi* is unlikely to affect road liability claims in Ontario because s.44 establishes a statutory duty of care for municipal road repair (*Marchi* took place in British Columbia, where this duty only exists at common law). However, they observed that *Marchi* could still apply to claims involving planning, zoning, bylaw enforcement, wastewater, infrastructure, and other areas where municipalities can make “core” policy decisions.
 - Some participants expressed concerns that the *Marchi* analysis will make it more difficult for municipalities to establish that a decision was policy rather than operational. They observed that municipalities’ day-to-day operational decisions – and their potential insurance and liability cost consequences – often result from policy decisions made by elected officials, including other levels of government.
- Some participants have suggested amending the *Municipal Act* to make these defences stricter or enacting new legislation to limit municipal liability. However, as any statutory change would likely still include some element of judicial flexibility or exercising judgment (e.g., to find whether the municipality was “reasonable” or “suffered prejudice”), municipalities could continue to face legal costs and liability risk if found to be at fault. Some participants offered the view that any judicial discretion would be exercised to ensure full compensation for injured plaintiffs.
- The Ministry of Municipal Affairs and Housing provided an overview to the Working Group of key municipal legislation and takeaways from recent case law.

Building Code Act

- The *Building Code Act* and the Ontario Building Code under the Act set out a legislative framework for municipal building inspections. The purpose of the inspection scheme is to protect public health and safety. Municipalities may enact their own by-laws creating policies for Code compliance.

Building Inspection Concerns

- Municipal, insurance, and legal sector participants have identified Building Code claims (e.g., allegedly negligent municipal inspections) as an emerging source of high-value claims. They note that investigation, defence, and settlement costs for these claims are higher than for most other types of cases. Participants expressed particular concern about high-value properties in smaller rural municipalities (e.g., in cottage country) and urban in-fill projects.
- Municipalities can end up as the only defendant in building inspection claims because other potential defendants (e.g., architects, builders, contractors, and the homeowners who hired them) are often un(der)insured, no longer exist, or cannot be found by the time the claim arises. Addressing this concern in a systematic manner would likely require a review of the professional / business insurance requirements for these other potential defendants.
- Open building permits are another area of concern. Some participants have noted that the ultimate limitation period under the *Limitations Act* (15 years) is generally helpful in defending against Building Code claims. However, the ultimate limitation period only became fully effective in 2019 and it is unclear how it applies to claims involving open permits older than 15 years (e.g., where a municipality does not have any records of a permit being closed).
 - In this context, several participants voiced concerns about the [*Breen v. Lake of Bays*](#) Court of Appeal case. In *Breen*, the Township of Lake of Bays was found negligent for serious Building Code deficiencies in the plaintiffs' cottage which were only discovered several years after its purchase.
 - The cottage builder had not formally requested a final inspection as required under municipal by-laws at the time (and later under the Code). Nonetheless, the Court of Appeal found that the Township owed a duty of reasonable care in building inspection because it had enacted building standards by-laws, issued a building permit, and conducted earlier inspections of the building site. It held that the Township breached this duty by treating the project as closed without a final inspection.
 - Participants viewed this ruling as creating a municipal obligation to inspect properties regardless of notice requirements under the Code. They observed that municipalities may not have the operational capacity to proactively follow up on every building permit they issue, particularly older or incomplete permits with missing records.

Climate Change Concerns

- Participants across all sectors have also observed that the rising frequency of extreme weather events (e.g., floods, wildfires, windstorms) has contributed to an increasing number and scale of property losses.
- Extreme weather events can be a major source of losses for insurers as they involve many properties and can cost millions of dollars in damage. Supply chain issues and contractor shortages can delay repairs and further inflate losses.
- Insurance industry participants have cited recent climate events, both local (e.g., the May 2022 derecho in Ontario) and international (e.g., Hurricane Ian in the United States) as factors contributing to increases in insurance premiums and reinsurance costs.
 - One insurance provider observed that eight of the ten costliest Canadian natural disasters for insurance payouts occurred in the last decade, with the costs of these payouts ranging from \$600 million to \$4 billion. It was suggested that mitigating these extreme weather risks should be a priority for municipalities.
- A few participants suggested that updates to the Building Code could help to build greater climate resilience. Participants have also identified some potential shorter-term policy solutions, such as helping municipalities to update flood plain mapping.
- AMO is canvassing these concerns with municipalities and intends to address them in its broader advocacy on provincial planning and development issues.

Minimum Maintenance Standards

- The Minimum Maintenance Standards (MMS) regulation under s.44(4) of the *Municipal Act* was enacted in 2003 in response to municipal calls for greater liability protections for highway maintenance. The regulation is administered by the Ministry of Transportation (MTO).
- The MMS are intended to provide a statutory defence against liability for road repair where municipalities meet the prescribed standards (*Municipal Act*, s.44(3)(c)). They are intended to be “outcomes-based” standards and to provide municipalities with the flexibility to achieve the prescribed end results.
- There are mixed views on the MMS. Some participants found them useful in disposing of claims at an early stage. However, although they are intended to be “outcomes-based” standards, many municipal participants feel that the case law effectively requires a “standard of perfection” in road maintenance and record-keeping.

- Participants raised concerns about whether the MMS sufficiently address sidewalk liability issues. It was also observed that the MMS do not directly account for micromobility devices and other new vehicle types (e.g., e-bikes, scooters) which may have different road requirements than traditional motor vehicles. To date, MTO's micromobility pilot projects in municipalities have not produced sufficient data to support changes to the MMS on this front (see [Road Safety](#)).
- The MMS are reviewed every five years by a Task Force of representatives from MTO, Good Roads, municipalities, and the insurance and legal sectors. The latest review began in spring 2023.
- Working Group participants are supportive of the MMS review as an opportunity to address these concerns. The Task Force is aware that municipal liability concerns may be a key consideration in this iteration of the review.

Road Safety

- Good Roads presented to the Working Group on their recent research. They expressed the view that improving road design would reduce the volume and severity of road accidents, thereby reducing overall claims costs. They observed that municipalities have considerable agency to repair roads, and that the long-term cost of such repairs is likely to be lower than the long-term cost of paying for personal injury claims.
- Municipalities generally agree that this may be part of the solution. They have raised concerns about the resources required to undertake this project in conjunction with existing road maintenance – Good Roads estimates that Ontario has a municipal road infrastructure deficit of almost \$39 billion.
- The Ministry of Transportation presented to the Working Group about their automated speed enforcement initiatives and micromobility pilot projects. The pilot projects are being used to collect data and to evaluate the safe integration of new vehicle types onto Ontario's roads, including with pedestrians and other modes of transportation, as well as the need for unique operating or licensing requirements. In spring 2023, MTO published a proposal to consolidate five of its existing pilot projects under one regulation and to explore the introduction of an urban mobility vehicle pilot.³ AMO submitted comments to the proposal which noted that the potential for additional risk and liability under these pilot programs could cause some hesitation among municipalities to pass by-laws to lawfully operate micromobility vehicles.
- Participants raised the concern that many of the municipal micromobility pilots (e.g., cargo e-bikes, golf carts, pedal pubs) do not have insurance requirements. It is unclear whether these vehicle types are covered by existing insurance products.

³ [Transforming the way MTO pilots new micromobility vehicles on-road \(ontariocanada.com\)](#).

- Some participants suggested that this was one reason for limited uptake in the pilot programs. Some municipalities have seen success in offering their own municipal programs for new vehicle types, which are operated by a third party, and which include an insurance requirement.
- Similarly, participants raised concerns about other “emerging” insurance and liability risks stemming from the growth in potentially uninsured road users, such as accidents on multi-use roads and paths, cyclist-pedestrian collisions, and bike courier accidents. It was noted that such accidents are often a source of media coverage.
- AMO will continue to identify opportunities to engage with the Province and the insurance industry on options for addressing these concerns.

Auto Insurance Coverage

- Auto insurance is the only type of insurance in Ontario that is mandatory and where the product (coverage type and minimum) is regulated. Although insurance rates are not set by any specific entity, insurers must file their proposed rates with the Financial Services Regulatory Authority of Ontario (FSRA) for review and approval.
- The current statutory minimum for third-party liability (TPL) coverage is \$200,000 and the default limit on catastrophic impairment no-fault accident benefits is \$1 million. There is a widely held view that these thresholds are out of date.
- However, in practice, most insurers offer at least \$1-2 million in TPL coverage and most drivers carry at least \$1 million in coverage.
- Working Group participants were generally of the view that increasing the statutory minimum for TPL coverage was not a priority. Even with a \$2 million minimum, municipalities would still face significant exposure in catastrophic injury cases.
- Participants were also aware that increasing TPL coverage would likely increase auto insurance premiums for Ontario drivers.
 - Some participants have speculated that if TPL coverage increases, the value of damages claims and court awards may simply increase as well.
 - One participant questioned whether the savings to municipalities on their general third-party liability policies would be outweighed by their increased auto insurance premiums for municipal fleets.
 - Another participant noted that at the macro-level, increasing the mandatory TPL minimum was probably more expensive than continuing with the status quo.

- Prior to 2016, victims could access up to \$2 million in catastrophic impairment accident benefits (\$1 million for medical and rehabilitation expenses + \$1 million for attendant care). Some participants suggested that the reduction and merger of these amounts into a single \$1 million benefit effectively halved the available benefits, thus increasing the amount potentially payable by municipal defendants in road claims.
- In the 2019 Ontario Budget, the Province announced it was considering returning the default limit on catastrophic impairment benefits to \$2 million.
- There was a view that as between increasing TPL coverage minimums and returning the catastrophic accident benefits limit to \$2 million, the latter option would be more likely to benefit municipalities. The Working Group did not have any information regarding the relative cost of these options for drivers.
- The Ministry of Finance (MOF) provided an overview of the auto insurance sector in Ontario to the Working Group, and spoke about their work on implementing initiatives from the 2019 *Putting Drivers First Blueprint* which aim to combat auto insurance fraud, to improve consumer choice, and to enhance market fairness.
- In the 2023 Ontario Budget, the Province stated that it intended to propose changes that would provide consumers with more auto insurance options over time. The Province has also enhanced FSRA's powers to investigate insurance fraud and requested that it review territorial rating issues.

Other Working Group Topics of Discussion

Cyber Insurance Challenges

- Municipalities have expressed concerns about the difficulty of obtaining cyber insurance coverage and its high costs. Some municipalities report that insurers have rigorous underwriting requirements to obtain coverage, such as proof that the municipality has certain security standards in place.
- Insurance industry participants have flagged cyber liability as a key emerging area of losses. Cyber risk is extremely volatile and there is not much reliable claims data, as the cyber insurance market is still relatively young.
- There are few insurance providers in this space; municipal insurance providers often outsource this coverage to specialized providers. Many providers exited the cyber market following increased losses during the COVID-19 pandemic.
- It was suggested that cyber providers are cautious to underwrite public sector entities like municipalities due to the scale and complexity of potential claims.

- Some insurance industry participants have expressed the view that the cyber insurance market is stabilizing and that price increases are moderating. However, coverage remains restricted and expensive for municipalities.
- AMO LAS has created a technical working group to investigate risk financing options for municipalities, with a focus on cyber coverage, given the difficulties municipalities are facing with this specific coverage.

Establishing a Catastrophic Loss Fund

- It was suggested that if the Province is concerned about compensating victims for catastrophic losses, it should do so through a provincial fund rather than through the application of liability policy to all defendants.
- The Working Group is not aware of such a fund elsewhere in Canada. Saskatchewan and BC, two of the three provinces without full JSL, appear to largely fund catastrophic loss recovery through a no-fault auto insurance system with high benefit limits.
- Currently, Ontario's Motor Vehicle Accident Claims Fund only provides the statutory minimum coverage for claims arising from uninsured or unidentified motorists.
- There is no evidence of what impact a catastrophic loss fund would have on insurance premiums. This proposal is based on the assumption that catastrophic bodily injuries are a key source of municipal insurance claims costs. However, anecdotal evidence to date from the Working Group suggests a wide range of other claim types (e.g., sidewalk slip-and-falls, property losses, building inspections) could also contribute significantly to municipal losses. The municipal claims data study proposed by AMO LAS will canvass this issue and would need to finish this analysis before the catastrophic fund proposal is considered further.
- As well, other key policy questions regarding this proposal remain unaddressed, such as the scope of damages compensated through the fund (i.e., whether it would simply cover medical expenses or would also cover other types of losses, e.g., loss of income) and how the fund would be financed. If this option is considered further, the Ministry of Health would have to be engaged.

Litigation Challenges

- Working Group participants have suggested that Canadian society is becoming more litigious, and that the current socio-economic climate has led to more and higher-value lawsuits.
- Municipal defence lawyers who spoke with the Working Group reported seeing an increase in self-represented litigants, vexatious claims, and "duty to defend" actions between municipalities and insurers.

- Some municipalities are encountering more claims which take place outside their jurisdiction, but which name them as a defendant anyway, e.g., claims for accidents on provincial highways.
- Municipalities have also expressed concerns about being included in class actions related to the COVID-19 pandemic response or for cyber-attacks resulting in the loss or theft of information.
- Some participants asserted that the uncertainty created by the litigation process incentivizes settlements in some claims, even where municipalities are not significantly at fault. They believe certain cost and evidentiary rules (or in some cases, the lack of rules and cost consequences) allow opposing counsel to create unnecessary delays and costs during litigation.
- The slow pace of litigation can further exacerbate the effects of long-tail claims, as municipalities must budget around them while awaiting a court decision.
- Similarly, some participants suggested that the uncertainty inherent in the JSL rule impacts their strategic claims management. Even if they think a municipality is in a strong position to defend against a claim, settling the claim may be preferable to going to trial and risking a JSL finding.
- Trial lawyers who spoke with the Working Group asserted that the practice of naming multiple defendants (including municipalities) in claims was a matter of due diligence, as they may not have all the facts at the start of a claim and may put their client at risk if they do not sue all potential defendants.
- Both the municipal defence lawyers and the trial lawyers stressed the importance of municipal risk management, in particular good recordkeeping, as a strategy to manage litigation costs and liability exposure (see [Risk Management Challenges](#)).

Liability Limitations for Contractors

- Municipalities have expressed concerns about liability limitation and indemnity clauses in vendor contracts. If a vendor is unable to obtain or refuses to provide sufficient insurance coverage, or if they refuse to accept municipal liability limitations, municipalities may have no choice but to accept the increased risk.
- In recent years, this has created difficulties for some municipalities in procuring road maintenance services, e.g., snowplow contractors. Another potential area of concern is the use of shared IT platforms, such as Microsoft Office, which expressly limit the software provider's liability.
- It was observed that smaller or more remote municipalities may be particularly vulnerable to this issue as they may have fewer procurement options.

- Provincial risk management and insurance staff noted that the Province had faced this issue as well. It has addressed this issue by covering all winter maintenance claims on provincial roads under the General and Road Liability Protection Program.

Caps on Economic Loss Awards

- Recommendation #3 of AMO's 2019 paper proposed implementing legislative caps on damages awards for economic loss claims. However, Working Group participants have not identified the general topic of damages for economic loss as a key driver of costs or claims.
- Rather, the Working Group has focused on specific types of claims for economic loss that may benefit from reform (e.g., Building Code cases).

Appendix: Working Group Participants

- **Municipalities:** AMO has nominated about 15 staff participants from municipal governments across Ontario with expertise in finance, risk management, and insurance. The City of Toronto was also invited to the Working Group.
- **Association of Municipalities of Ontario:** AMO and AMO LAS have designated representatives on the Working Group.
- **Government of Ontario:** Staff from the Ministry of the Attorney General (MAG), the Ministry of Municipal Affairs and Housing, and the Ministry of Finance are designated members of the Working Group. MAG is coordinating the Working Group on behalf of the Province.
- **Other participants:** Representatives from the Province’s Risk Management & Insurance Services Branch, the Ministry of Transportation, and industry stakeholders such as the Insurance Bureau of Canada are being invited to participate as required, depending on the particular options being discussed.

Association of Municipalities of Ontario / Local Authority Services	<ul style="list-style-type: none"> • AMO Policy Centre • AMO LAS, Municipal Risk Management Program 	
Municipalities	<ul style="list-style-type: none"> • Belleville • Black River-Matheson • Centre Hastings • Durham Region • Halton Region • North Bay 	<ul style="list-style-type: none"> • Red Lake • Greater Sudbury • Thunder Bay • Waterloo Region • York Region • City of Toronto
Government of Ontario	<ul style="list-style-type: none"> • Ministry of the Attorney General, Policy Division • Ministry of Municipal Affairs and Housing, Intergovernmental Relations and Partnerships Branch • Ministry of Finance, Financial Institutions Policy Branch 	
Ad-hoc Participants	<ul style="list-style-type: none"> • Ministry of Finance, Auto Insurance Policy Branch • Ministry of Public and Business Service Delivery, Risk Management & Insurance Services Branch • Insurance Bureau of Canada 	

