



Eastern Ontario Wardens' Caucus

www.eowc.org

Submission to the Ministry of the Attorney General
regarding Joint and Several Liability Consultations

September 27, 2019

The Eastern Ontario Wardens' Caucus (EOWC) Inc. is an incorporated not-for-profit organization comprised of the heads of Council of eleven (11) Counties and two (2) single-tier municipalities in Eastern Ontario. Its members include:

- County of Frontenac
- County of Haliburton
- County of Hastings
- City of Kawartha Lakes
- County of Lanark
- United Counties of Leeds and Grenville
- County of Lennox and Addington
- County of Northumberland
- County of Peterborough
- United Counties of Prescott and Russell
- County of Prince Edward
- County of Renfrew
- United Counties of Stormont, Dundas and Glengarry



The Honourable Doug Downey
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Background

The Eastern Ontario Wardens' Caucus (EOWC) works to support and advocate on behalf of the 750,000 taxpayers across rural Eastern Ontario, living within the 13 upper-tier and single-tier municipalities and 90 local municipalities in the region.

Upon careful review of the letter provided by the Ministry of the Attorney General as well as the questions posed to municipalities, the EOWC has addressed each section and provided comments, case examples, and information where applicable. The cases and information provided demonstrate a representative scope of the issues facing our member municipalities; however, they do not capture all of the problems associated with joint and several liability, facing our members.

The EOWC supports and commends the Province for reviewing joint and several liability, and it welcomes the opportunity to work in partnership, as well as providing further support and information, and participating in the future consultation phases.

Response

1) Nature of the Joint and Several Liability Problem across Eastern Ontario

Joint and several liability encourages plaintiffs to target “deep pocket” municipal defendants who are generally insured. The result of this is an exponential rise in insurance claims, a corresponding rise in the cost of insurance and, in some cases, the unavailability of insurance. This can effectively cripple risk-exposed defendants, such as municipalities across Eastern Ontario. The EOWC believes that it is unfair and unjust for municipalities to carry the financial burden and the lion’s share of a damage award when at minimal fault or responsibility, or assume fault for another party’s error (e.g. the 1% rule).

Broadly, negative impacts on member municipalities across Eastern Ontario include:

- A significant increase in municipal costs; large settlements are being awarded when catastrophic injuries occur and municipalities are left as the “deep pocket” defendants
- The complexity of municipal claims, which can take many years to settle and drive up litigation costs; each time a municipality is sued, they are required to pay all costs up to the deductible, and this amount can be as low as \$2,500 or as high as \$1 million

- In certain cases, if a municipality is found to be 1% liable, it could find itself in the unfortunate position of contributing additional funds for the purpose of making the injured party whole
- Municipal lawsuits have increased, and such lawsuits are increasing in claim value in addition to becoming more frivolous
- An increase in “liability chill” on the delivery of public services when trying to balance services and liability
- Lawyers know that municipalities have to pay claims, causing municipalities to be named on everything regardless of fault
- Counties, as upper-tier municipalities, have been severely impacted with increases as they are responsible for the arterial roads (higher vehicle use, higher vehicle speeds, more catastrophic injuries, etc.)
- Costs of insurance have exponentially increased beyond the inflation rate, or of the rate even close to municipal tax rate increases; it simply is not sustainable
- Cyber-liability claims have risen dramatically in the last three years and climbing
- A decrease in insurance companies’ ability to offer sustainable pricing while addressing municipalities’ concerns about retroactive assessments, given the low pricing-environment combined with the impact of joint and several liability on municipal claim settlements

➤ **Does joint and several liability impact costs?**

Yes, joint and several liability impacts costs. Municipalities are viewed as having “deep pockets.” If a municipality is found a minimum of 1% liable, it may be exposed to pay the full amount of damages awarded to the plaintiff, if there is no other available insurance or if the at-fault party does not carry sufficient limits. It is common for a municipality to be named in an action even though there is no apparent liability on the part of the municipality.

Furthermore, municipalities are often named in lawsuits in the hopes that there will be a finding of 1% liability, in order to access the additional liability limits held by the municipality. The defense of such actions is vigorous and can be lengthy and expensive. If the municipality is eventually released from the action, it is generally not until significant legal costs are incurred. This is typically on the condition that legal costs are waived or a nominal payment is made to avoid incurring further costs. Settlement of joint and several liability claims is often done out of court to avoid an adverse judgement and costs.

- **What types of everyday activities have been impacted by insurance costs and other liability risks? To what extent is joint and several liability a factor in these situations? What steps have municipalities taken to mitigate these costs and risks?**

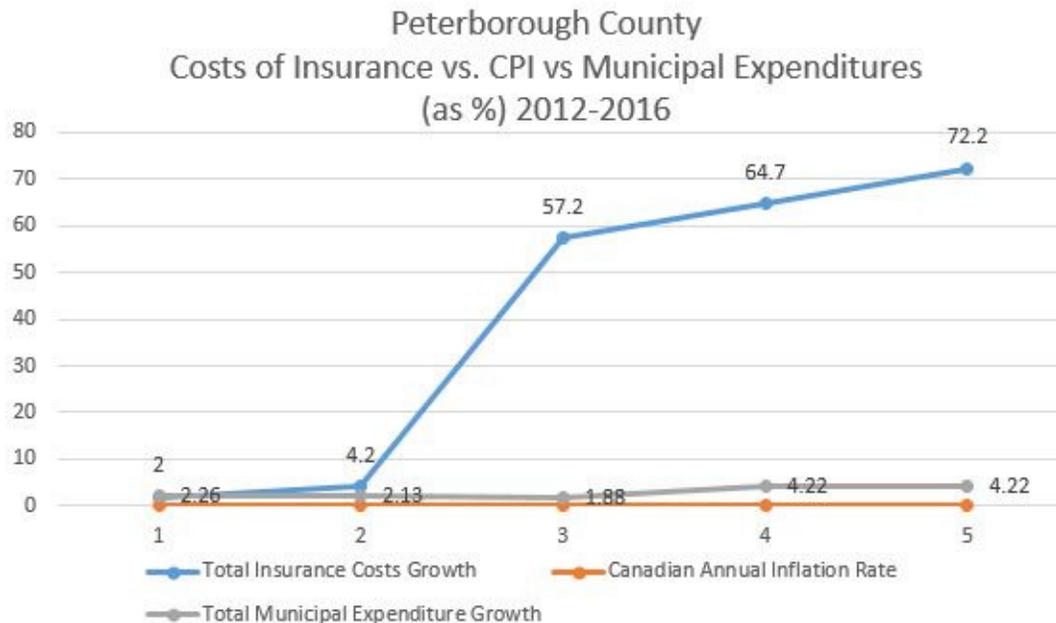
Using the City of Kawartha Lakes as an example, rising insurance costs do impact the City’s ability to offer services, leading it to conduct a Core Service Review. Public funds used to pay insurance premiums would be better spent financing road and sidewalk maintenance, or rehabilitation projects or facility maintenance that would benefit the community. Legal contracts are reviewed for appropriate insurance and indemnification wording to ensure there is appropriate risk transfer where available, and risk management is becoming embedded within the City’s corporate culture.

2) Supportive Evidence

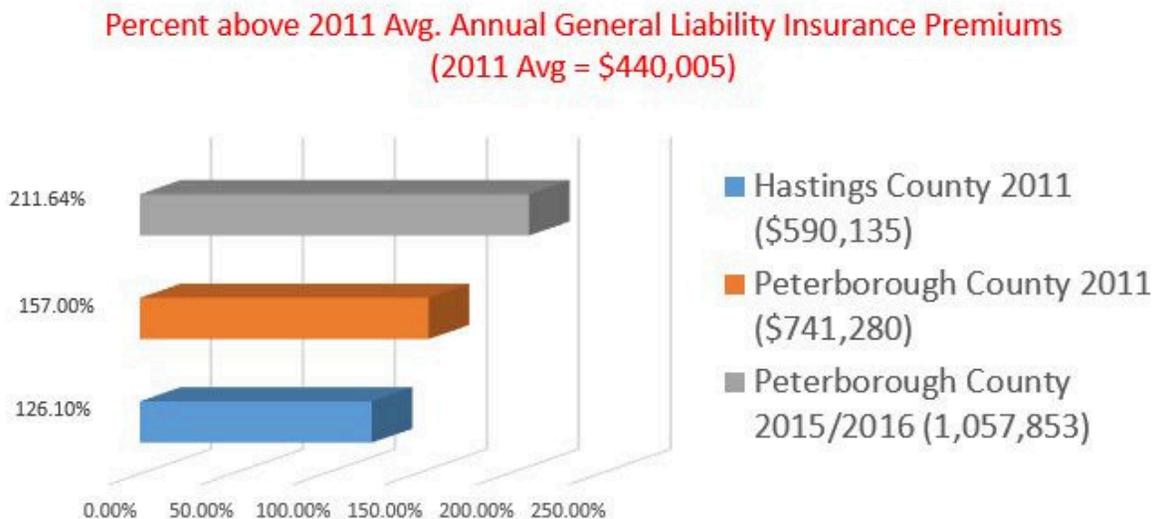
Municipal insurance premiums have increased across Eastern Ontario in the last decade, as explained in the chart below:

2011 Survey Results	Upper Tier Municipalities
Total Insurance Costs	
Average Annual Insurance Premiums 2011	\$943,702
Avg % Change in Premiums since 2007	Up 25.1%
Liability Insurance	
Avg. Annual General Liability Insurance Premiums 2011	\$440,005
Avg. % Change in Premiums since 2007	Up 30.9%
Avg. Per Occurance Deductible	\$913,947
Avg. % Change in Deductible since 2007	Up 0.8%
Avg. Total Annual Dollar Limit of Coverage	\$28,684,737
	Source: AMO

The following example from the County of Peterborough also illustrates the trend across Eastern Ontario. At the rate presented, municipalities are faced with an additional 1% minimum tax rate increase – every two years – solely due to insurance premium costs. This is not sustainable for municipalities and presents fiscal challenges when preparing and managing current and future budgets.



Below, the County of Hastings and the County of Peterborough are compared to the average annual general liability insurance premiums in 2011. It is important to highlight that insurance premiums have only further increased since that time.



Eastern Ontario Case Examples

County of Peterborough

In the County of Peterborough, a situation occurred whereby a driver's vehicle hit the back of a County truck. Due to their actions, the driver and his passenger were largely at fault for the accident. Unfortunately, the passenger was severely injured, requiring extensive and costly care moving forward. The driver of the car only had an insurance policy of \$1 million. The County's insurers were concerned that the courts would want to award a large settlement to care for the injured passenger, and would award an even larger claim against the County under joint and several liability. Thus, the claim was settled for \$11 million, even though the driver and his passenger were largely at fault. In addition to the cost of the claim, it resulted in the County's insurance costs substantially increasing for a number of years.

County of Hastings

The County of Hastings was one of eight defendants named in a \$10-million lawsuit by the family of the deceased in a fatal car accident. Responsibility for the road where the accident occurred was transferred to a local municipality 11 years prior to the accident. It was snowing and the roads were snow covered at the time of accident, and the deceased driver was over the median line at the time of the accident. The County was named and not dismissed from the accident, as there were allegations of improper design and road construction. These allegations were ultimately not proven. The case settled in October 2017 and the County did not contribute to the settlement; however, it incurred \$458,149 in expenses to defend itself, and a further \$7,500 was paid under indemnity.

County of Prince Edward

In March 2015, a multi-vehicle accident occurred in the County of Prince Edward involving a child who suffered a severe brain injury. A statement of claim was served, noting \$14 million in damages. The insurers noted this matter would not conclude until the child reaches the age of majority, which will not occur until 2022. The County has already paid \$516,490 to date.

In July 2015, a sign archway fell on an individual during Canada Day events. A statement of claim was issued and served and the examinations for discoveries have now been completed. The insurer will soon receive the defense counsel reports, and it hopes to resolve the case in mediation. In the meantime, to date, the County has already incurred \$561,785 in costs.

3) Solutions and Conclusion

The EOWC supports changes that reflect and represent the needs of municipalities across rural Eastern Ontario. The EOWC also supports the recommendations put forward by the Association of Municipalities of Ontario (AMO) during this consultation. The EOWC welcomes a joint municipal and provincial commitment to rectify joint and several liability and its impacts on municipalities and their residents.

The EOWC fully supports that the Attorney General has commenced an extensive municipal consultation on municipal liability and insurance costs. As in previous years, the EOWC continues to advocate for reform on joint and several liability, and looks forward to participating in the second phase of the consultation process later this fall.

Regards,

**Mayor Andy Letham, 2019 Chair
Eastern Ontario Wardens' Caucus**