



CITY OF HAMILTON
CORPORATE SERVICES DEPARTMENT
Legal and Risk Management Services Division

TO:	Chair and Members Audit, Finance and Administration Committee
COMMITTEE DATE:	October 17, 2019
SUBJECT/REPORT NO:	Hamilton Submission to Attorney General Study of Joint & Several Liability (FCS19085) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	John McLennan (905) 546-2424 Ext. 5736
SUBMITTED BY:	Nicole Auty City Solicitor Legal and Risk Management Services
SIGNATURE:	

RECOMMENDATION

- (a) That Report FCS19085 Hamilton Submission to Attorney General Study of Joint & Several Liability be received;
- (b) And that a letter, similar to the draft version attached as Appendix "A", on behalf of the City of Hamilton from the Mayor be sent to the Office of the Ministry of the Attorney General prior to November 1, 2019.

EXECUTIVE SUMMARY

Council was notified in July 2019 by written correspondence (Appendix "B") from the Attorney General regarding the Province's intention to review the impact of joint and several liability legislation on municipal insurance costs as well as the impact on the delivery of services. The Attorney General requested individual submissions from municipalities detailing their specific experience with the impact of joint and several liability.

A submission to the Ministry is suggested to request material relief for municipalities from the financial burdens associated with the current joint and several liability scheme. Schedule "A" is draft correspondence from the Mayor which outlines financial costs

associated with the current scheme, while also proposing legislative changes and other initiatives for the establishment of a comprehensive and fair compensation scheme.

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FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: Favourable amendments to joint and several liability legislation would result in significant “cost of risk” savings for municipalities. Cost of risk encompasses claims payments under deductible, claims reserves, insurance costs, and all related administration costs to managing risk. Depending on the type and level of amendment savings could reasonably exceed \$1,000,000 per year.

Staffing: Not applicable

Legal: Not applicable

HISTORICAL BACKGROUND

The joint and several provisions of the Negligence Act state:

“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...”

The above passage is commonly known as “the 1% rule,” due to the fact that a defendant found only 1% liable is obliged to pay the entire judgment in the event that other defendants do not have the financial means to do so.

The most common joint and several circumstance for municipalities is with motor vehicle accidents or other significant personal injury. The province allows for only a minimum of \$200,000 in liability coverage for motorists. Injuries suffered in a given motor vehicle accidents can of course be catastrophic and numerous depending on the number of passengers and vehicles involved. Minimum liability coverage of \$200,000 for an “at fault” motorist would only scratch the surface of covering damages for a serious accident. Municipal road authorities are routinely brought into motor vehicle accident actions by way of broad and unfounded allegations of negligence.

Municipalities found liable even to a small degree on any allegation, and considering the potential that the primary tortfeasors would be unable to fund a significant damage award, creates a disproportionate risk or cost of municipal damage payments due to the application of joint and several liability. Costs in an individual claim of personal injury can run into the millions of dollars. These factors lead to decisions in settlements where

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the municipality has to protect itself through accepting higher shares of damages, or having to take on the greater risks after a trial that the end financial result will be well above actual exposure.

The City's most recent example (Smith vs Safranyos) of the severe financial burden created by joint and several liability. The simple financial impact of the case was a payment of approximately \$15,000,000 forced on the City where the apportionment of liability equated to a payment of less than \$5,000,000.

Joint and several liability has been unfairly impacting cost of risk for municipalities for decades. As a result, property tax dollars are diverted away from the delivery of public services through higher insurance and claim costs. The impact has been exacerbated in recent years due to the exponential rise in damage awards. While municipalities may have the ability to fund damage awards through the tax base, Council is well aware of the inaccuracy of considering municipalities as "deep pocket" defendants. The costs involved of being treated as having deep pockets take away from service delivery or are passed on in tax increases. Combined with various other factors affecting cost of risk and municipal budgets across the board, the continued presence of the current form of joint and several liability is untenable.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

N/A

RELEVANT CONSULTATION

Municipal and private sector risk management/insurance/claims professionals, Pearson Dunn Insurance (City's Broker of Record), Jardine Lloyd Thompson Canada (City's Insurance Program Manager), Legal Services Division, private law firms.

ANALYSIS AND RATIONALE FOR RECOMMENDATION(S)

Municipalities face an unfair and severe financial burden due to the presence of joint and several liability legislation. By providing details of the City's experience with joint and several liability it is hoped that the Attorney General will institute change sufficient to lessen the burden on municipalities while also ensuring those in need are reasonably compensated.

ALTERNATIVES FOR CONSIDERATION

The City could choose not to submit correspondence to the Attorney General although this is clearly not recommended. As a full service, large municipality the City is among

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the municipalities most adversely impacted by joint and several liability. As such, it is important that the City take a prominent consultative role with the Attorney General.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Our People and Performance

Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Appendix “A” to Report FCS19085 – Mayor’s Correspondence to Attorney General – Draft

Appendix “B” to Report FCS19085 – Attorney General Request for Municipal Input

JM/dz