

## Committee of the Whole (2) Report

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**DATE:** Tuesday, September 24, 2019

**WARD(S):** ALL

**TITLE: UPDATE ON JOINT AND SEVERAL LIABILITY**

**FROM:**

Wendy Law, Deputy City Manager, Administrative Services and City Solicitor

**ACTION:** FOR INFORMATION

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**Purpose**

To provide an update on the Government of Ontario's consultations regarding joint and several liability, insurance costs, and current market trends affecting municipal insurance programs.

**Report Highlights**

- The Province of Ontario is conducting consultations regarding joint and several liability as it relates to insurance costs and everyday public services.
- The Province has requested input from the municipalities. Staff are preparing a response, which will be provided to the province by September 27, 2019.

**Recommendations**

1. That this report be received for information.

**Background**

Recent Provincial Direction

During the 2019 Rural Ontario Municipal Association (ROMA) conference, the Premier of Ontario announced a review of joint and several liability. On July 12, 2019 Doug Downey, Attorney General sent a letter (Attachment #1) to each of the 444 municipalities in the province requesting their participation in the government's

consultations. That letter states that the province is undertaking an evidence-led consultation and policy development process. The communication includes three main themes for municipalities to address and included thirty (30) questions:

1. Describe the nature of the problem as the municipality sees it.
2. Evidence that supports the views listed in point one (1).
3. Suggested solutions that ensure catastrophically injured persons are fairly compensated and that costs are not simply transferred to the publicly funded health care system.

The Attorney General requested that municipal officials respond, in writing, by September 27, 2019. The Attorney General will be putting together a Technical Team comprised of provincial and municipal elected officials to build on the Association of Municipalities Ontario's (AMO) existing Task Force.

#### What is Joint and Several Liability?

Joint and Several Liability (also known as the 1% rule) is a legal principle holding that those who have combined to cause a single loss are each liable to the injured person for the full amount of the damages suffered, regardless of the extent of their liability. Put another way, where an individual is harmed through the fault of several wrongdoers, the individual can collect the full amount of their damages from a defendant who is even only 1% at fault for the damage, where the other defendants are unable to pay their share.

Joint and Several Liability impacts those corporations or entities that are perceived to be a 'deep pocket'. These corporations or entities have larger limits on their insurance liability policy are often brought into actions where additional funds may be required.

#### Prior Provincial Consultation on Joint and Several Liability and Insurance Premiums

In 2011 AMO completed the first ever comprehensive survey of municipal insurance costs across the province. The survey was prompted by anecdotal reports of rising insurance costs. It sought to quantify, in part, some of the costs associated with joint and several liability in the provincial *Negligence Act*. The report was created in order to support municipalities in a call for change to the *Negligence Act*. The report found that of the participating municipalities, liability premiums had increased 22.2% between 2007 and 2011. The report noted that based on current trends, insurance costs will rise from \$155.2 million to \$214 annually by 2020.

The Province consulted with various stakeholders including organizations like the Ontario Trial Lawyers Association who do not believe that change is required, citing access to justice issues for innocent victims. Four alternative options were introduced which were as follows:

1. Adopt a strict “several liability” model, where defendants only pay their individual share of assessed liability, even if there is a “shortfall”.
2. Adopt the Saskatchewan Model, where if a plaintiff is held to be contributorily negligent and one of the defendants cannot pay their share of a Judgment, then the “shortfall” is split amongst all of them in proportion to their assessed degree of fault.
3. Adopt the “Multiplier Model” where a defendant will only have to pay a maximum of double their assessed share of liability if there is a “shortfall”.
4. Combined Saskatchewan/Multiplier Model - Combine the two, applying (if applicable) first the Saskatchewan Model and then, depending on the size of the shortfall and the “split”, apply as a “cap” to the prorated apportionment of the “shortfall” the Multiplier Model, so that a municipality still never pays more than double its original assessed % of liability.

In 2011, AMO supported Option 4 – Combined Saskatchewan/Multiplier Model.

Upon review of all material, the provincial government of the time opted not to make any changes. In February 2014, the Ontario Legislature unanimously passed a motion calling on the provincial government to implement a “comprehensive, long-term solution to reform joint and several liability for municipalities by no later than June of 2014”. By August of 2014, the provincial government had announced that they would not be making any changes due to lack of evidence. Later that year, the Insurance Bureau of Canada wrote an article titled *Disjointed – A Look at Joint and Several Liability*. It is attached (Attachment #3) to this report for further information and examples of the types of claims affecting municipalities.

### **Previous Reports/Authority**

N/A

### **Analysis and Options**

#### **AMO Response to Provincial Consultation on Joint and Several Liability**

AMO has put together a working group comprised of municipal risk managers and defence lawyers to collectively discuss the province’s request. This group is known as

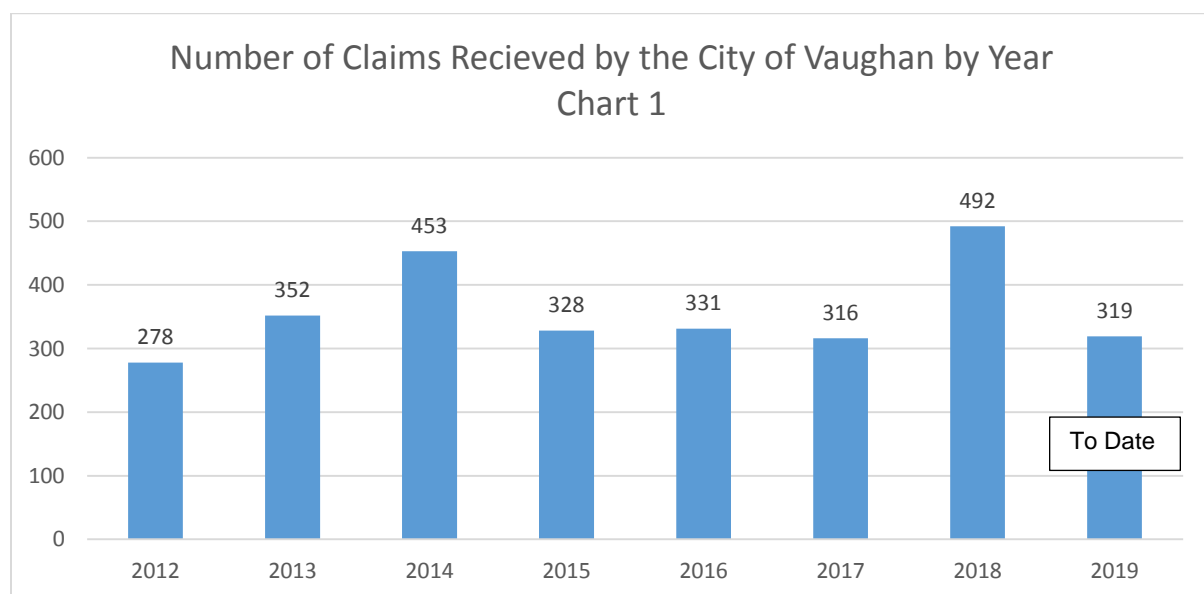
AMO's Joint and Several Liability Task Force. In August of 2019, this Task Force met with government officials to start the conversation. At the time of writing this report, the findings of this group have not been released. A media release/backgrounder from AMO on this matter can be viewed on their website at <https://www.amo.on.ca/AMO-Content/Backgrounders/2018/MunicipalLiability.aspx>

### City of Vaughan's Response

The City of Vaughan's Insurance and Risk Management group is working on a submission for this provincial review. The direct impact on the pure cost of joint and several liability is difficult for any municipality to quantify, and much of the requested data will be difficult to collect in the time provided by the Province. However, some data points will be provided with the main ones discussed below:

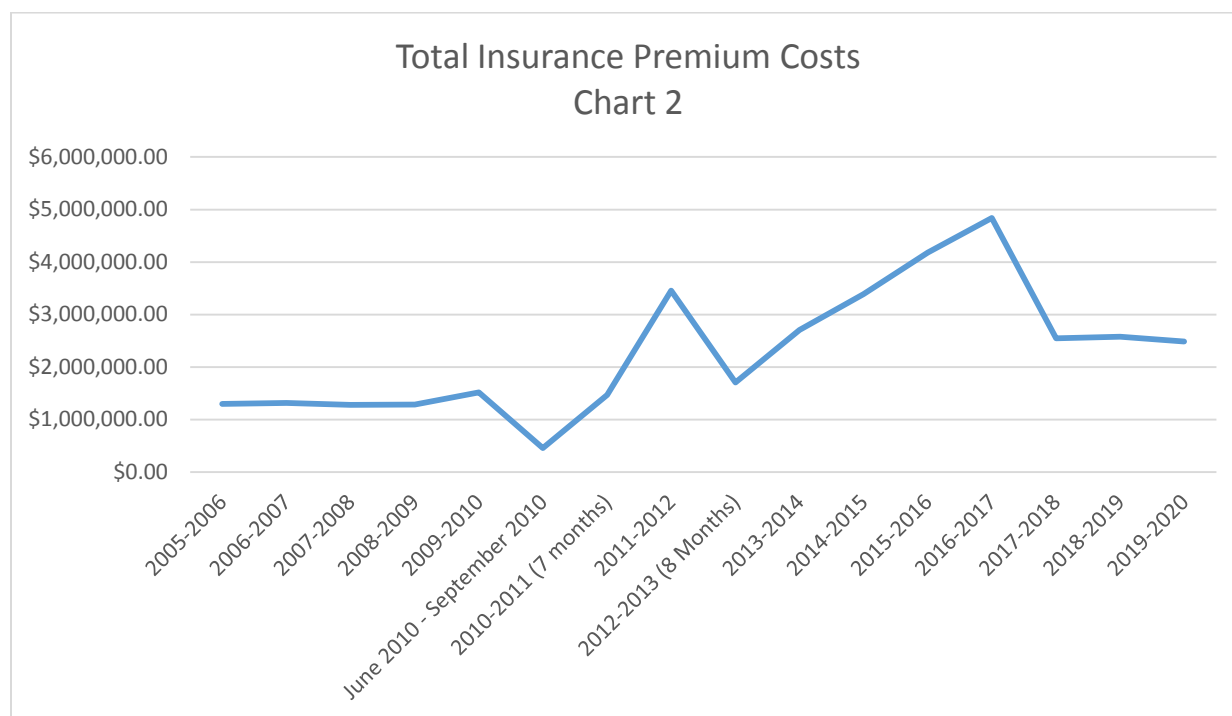
### **Insurance Claims History**

There was an increase in claims in 2014 due to extreme weather such as the December 2014 ice storm. The number of claims received in 2015, 2016 and 2017 was more in line with historic numbers, approximately 18% higher than 2012. In 2018, the City realized a 50% increase in claims as compared to the previous year. The number of claims this year is only 3.3% below where they were at this time last year (as of August 2019). This trend indicates that the City may incur almost 500 claims in 2019. The increase in the number of claims received in 2018 and 2019 cannot be attributed to one single event but appear to be reflective of a broadened risk profile and the rise of litigious behavior (see Chart 1 for the number of claims the City has received in recent years).



## Insurance Premiums History

Chart 2 illustrates the total cost of insurance premiums since the 2005-2006 policy period. It illustrates a rising trend that is typically offset by the issuance of an RFP (2010, 2012 and 2016). The City's insurance premiums have remained flat since the 2016 RFP but staff do anticipate an increase for 2020.



While the issuance of an RFP's in response to rising premium costs is standard, this practice adds to the cyclical nature of the business. It is not a long-term solution but rather a temporary one. This is not true of every municipality, but it is the experience of the majority. The cost of an insurance policy is just one aspect to consider when purchasing insurance. Other factors to consider include financial stability of insurers, experience in the Canadian market place (and more specifically in Ontario), breadth of coverage, exclusions and additional services offered.

Joint and Several Liability is just one piece in a large and complicated puzzle that is Public Sector risk, insurance and claims. The insurance market place for municipalities is much different than it is for private automobiles and homes. There are typically five to six brokers/managing general agents who have access to insurers who write this type of business. With the demise of the not for profit insurance reciprocal for municipalities (Ontario Municipal Insurance Exchange - OMEX), all options are for profit entities. On August 15, 2019, Intact Insurance announced its intent to purchase The Guarantee and

MGA Frank Cowan Company. It remains to be seen how this merger will impact the Public Sector practice.

As of the time of writing, the market is experiencing lessening capacity, which means that those insurers providing coverage are not able to provide the limits of coverage that they have in the past. This in turn increases the cost of the policy. Also impacting the cost of insurance is the claim experience of the municipality. Several municipalities that have purchased insurance in 2019 have faced increases from 10% to 59%.

The City of Vaughan is currently entering into the renewal period with the current carriers through our broker, AON. Very early analysis indicates a potential premium increase, an increase in the deductible for certain policies or a combination of both.

### **Implementation of ClearRisk**

Since January 1, 2017, the City's risk group has been working to create enhanced reporting capabilities through a software program called ClearRisk. This software not only tracks the claims but is allowing the department to work towards claim trending reports which will assist all decision makers across the corporation in identifying and treating the multitude of risks faced by the City which can generate a claim. Fully realizing the capabilities of this software has been delayed due to an increase in the number of claims submitted to the City. The increase in claims has necessitated an increase in staff time devoted to claims administration. While the creation of risk reports is paramount, ultimately the work required to administer each claim must take priority. Standard operating procedures are being implemented as efficiencies are sought out to provide for more time for staff to focus on risk management and analysis of claims and other strategic initiatives. This is becoming more difficult as the claim counts continue to rise.

### **Financial Impact**

If the *Negligence Act* is not amended, municipalities will continue to run up against this legislation when attempting to negotiate the purchase of insurance. While there is no way to specifically pinpoint the direct financial impact of joint and several liability, the concept is woven into every claim as it is managed. It is ever-present and the risk of paying 60% of a judgement when you are 20% responsible must be considered before taking any matter to trial.

As noted above, there is a potential of an increase in premiums or deductible or both in our insurance renewal term. Increases in deductible could potentially have an impact on staff resources and external legal costs, as a higher number of claims will need to be managed by Risk Management and Legal Services without insurance coverage.

## **Broader Regional Impacts/Considerations**

York Region's risk management team faces the same challenges as joint and several liability impacts their claim process and their carriers. Their risk manager currently sits on AMO's Joint and Several Liability Task Force.

## **Conclusion**

Managing the cost of risk is of paramount importance in the current environment and will be as we move through the next insurance cycle. Much like the real estate market, the insurance market place has proved to be cyclical in nature. Key 2019 market indications show that there is less capacity (which impacts the amount of insurance an insurer will provide) along with a hardening market (which impacts the cost of insurance). Joint and Several Liability, together with other factors, may contribute to both capacity and premium rates for municipal programs.

The City's Insurance and Risk team will complete the report for the Province. As part of our 2020 initiatives, Risk Management and Legal Services are commencing a litigation and risk management services review to look at process improvement and alignment, as well as overall risk mitigation strategies.

**For more information**, please contact: Shannon Devane, Manager, Risk and Registration Services, ext. 8167

## **Attachments**

1. Letter from Doug Downey, Attorney General, dated July 12, 2019
2. AMO's 2011 Municipal Insurance Survey Results – Managing the Cost of Risk
3. Disjointed – A Look at Joint and Several Liability – Insurance Bureau of Canada, 2014

## **Prepared by**

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