Your speaker

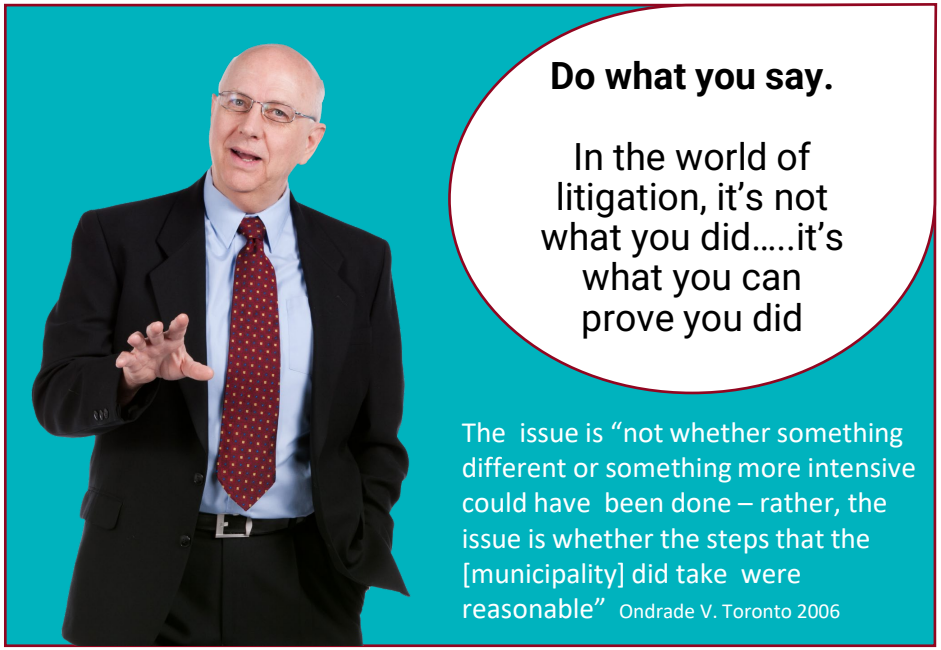
Brian Anderson

Intact Public Entities assists client municipalities with their road safety issues, supported by Brian's experience building, maintaining and managing municipal infrastructure.

Prior to joining Intact Public Entities, Brian worked for both urban and rural municipalities as well as the Ministry of Transportation and the Ontario Good Roads Association.

Brian has been involved with the MMS since the original Task Force was formed in 1997, he facilitated the 2013 amendment to the regulation and has trained staff across the province on MMS for nearly 20 years and is a member of the 3rd 5-year review Task Force.

Agenda



This webinar will:

1. Identify liability defences available under the Municipal Act;
2. Discuss what is included in the MMS and what is not;
3. Demonstrate how the MMS has shielded municipalities in a liability claim;
4. Answer your questions.

The MMS

Background
- Developed to provide municipalities with a third defence against road liability claims.
- S44(3)(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.

Municipal Liability

For Highway Repair

"The law of municipal liability for non-repair of its highways has evolved from an "event based" model of liability to one of a "risk based" model. This means that rather than look at how quickly and reasonably a municipality responded to icy or snow-covered roads AFTER they became hazardous, the Courts focus instead upon how reasonable the efforts were BEFORE the hazard(s) even arose in the first place."

Source Charles Painter, Dolden Wallace Folick LLP

What are you defending in court?

That what you did was reasonable

- The reasonableness standard is a test that asks whether the decisions made were legitimate and designed to remedy a certain issue under the circumstances at the time. Courts using this standard will look at both the ultimate decision and the process by which a party went about making that decision.
- This is supported by the Supreme Court of Canada which states that: "**A "reasonable" decision is based on a logical chain of reasoning. It has to make sense in light of the law and the facts"**
- Municipal Act Section 44 (1) 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. 2001, c. 25, s. 44 (1).

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Chief Justice Fitzpatrick, on behalf of the Supreme Court of Canada, in *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.) at 718 stated:

"A municipal corporation is not an insurer of travelers using its streets; its duty is to ***use reasonable care*** *to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety."*

The Court went on to say:

"Moreover, it is only common sense to distinguish between highways and byways. ***Precautions that might well be required to be taken on a much travelled main thoroughfare would often be quite uncalled for on an unimportant and little frequented sidestreet. The city cannot be held liable because every street is not equally safe for all possible purposes of traffic."***

At trial

Defences available under the Municipal Act

Defence

44(3) Despite subsection (2), 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 reasonably 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; or

(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. 2001, c. 25, s. 44 (3).

O.Reg. 239/02

Minimum Maintenance Standards for Municipal Highways

Section 2.1 – “The purpose of this regulation is to clarify the scope of the statutory defence available to a municipality under clause 44 (3) (c) of the Municipal Act by establishing maintenance standards which are **non-prescriptive as to the methods or materials to be used in complying with the standards** but instead describe a desired outcome.”

The MMS only applies to maintenance activities within the road right of way

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To use MMS as a defence in court

A municipality must prove (via their documentation) that they met the standards as set out in the MMS.

NOTE: A municipality may choose to provide a level of service that is less than what is set out in the MMS. **The municipality must then prove that the level of service provided was reasonable in the circumstance, given the traffic volume, character and location of the road, etc.** before defending that you met your level of service (LOS).

Will a judge compare your level of service to MMS? Answer – yes

LOS for work not covered by MMS

MMS or LOS

Included in MMS

- Patrolling
- Weather Monitoring
- Winter Operations
- Potholes
- Shoulder Drop-offs
- Debris
- Luminaires
- Signs
- Traffic Signals
- Bridge Deck Spalls
- Roadway Surface Discontinuities
- Sidewalks
- Closure of a Highway

Not Included MMS requiring an LOS

- Roadside Safety Hardware
- Roadside Maintenance including mowing and trees
- Pavement Markings
- Roadside Drainage
- Multi-use trails/paths within ROW
- Bike Lanes exception snow accumulation
- Sightlines at intersections
- Class 6 Roads plus seasonal roads
- Obstruction of bridges and culverts
- Small diameter culverts

Key Phrases

Used in the MMS

“ought reasonably to be aware of the fact” – is based on constructive knowledge which means knowledge that a person using ordinary care or diligence would possess

“substantial probability” – is a judgment call by a municipality to determine if an action is required. It is more than a mere possibility and closer to being a near certainty

“as soon as practicable” - this will be a local decision based on your knowledge of your road system, traffic speed and volumes, type of traffic (heavy trucks) and how your network will react to a given type of event.

“deemed to be in a state of repair” – a person cannot sue a municipality for something that is in a state of repair. A municipality can only be sued for non-repair.

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Classification Table

Column 1 Average Daily Traffic (number of motor vehicles)	Column 2 91 - 100 km/h speed limit	Column 3 81 - 90 km/h speed limit	Column 4 71 - 80 km/h speed limit	Column 5 61 - 70 km/h speed limit	Column 6 51 - 60 km/h speed limit	Column 7 41 - 50 km/h speed limit	Column 8 1 - 40 km/h speed limit
53,000 or more	1	1	1	1	1	1	1
23,000 - 52,999	1	1	1	2	2	2	2
15,000 - 22,999	1	1	2	2	2	3	3
12,000 - 14,999	1	1	2	2	2	3	3
10,000 - 11,999	1	1	2	2	3	3	3
8,000 - 9,999	1	1	2	3	3	3	3
6,000 - 7,999	1	2	2	3	3	4	4
5,000 - 5,999	1	2	2	3	3	4	4
4,000 - 4,999	1	2	3	3	3	4	4
3,000 - 3,999	1	2	3	3	3	4	4
2,000 - 2,999	1	2	3	3	4	5	5
1,000 - 1,999	1	3	3	3	4	5	5
500 - 999	1	3	4	4	4	5	5
200 - 499	1	3	4	4	5	5	6
50 - 199	1	3	4	5	5	6	6
0 - 49	1	3	6	6	6	6	6

When is maintenance required

The lynch pins

Weather Monitoring

- From May 1 to September 30 monitor the weather both current and forecast to occur in the next 24 hours, once per calendar day
- From October 1 to April 30 monitor the weather both current and forecast to occur in the next 24 hours, once per shift or 3 times per calendar day, whichever is more frequent

Patrolling

- Patrol as per the table in Section 3, plus
- If it is determined by the municipality that the weather monitoring referred to in section 3.1 indicates that there is a substantial probability of snow accumulation on roadways, ice formation on roadways or icy roadways, the standard for patrolling highways is, in addition to that set out in subsection (1), to patrol highways that the municipality selects as representative of its highways, at intervals deemed necessary

Class of Highway	Patrolling Frequency
1	3 times every 7 days
2	2 times every 7 days
3	once every 7 days
4	once every 14 days
5	once every 30 days

Patrolling

What the courts have said

[27] Patrollers and inspectors keep a log and they note, among other things, road conditions, problems and abnormalities observed, road incidents, air and pavement temperatures, weather forecasts received over the radio system. **They [the patrol person] are the City's eyes and ears** for purposes of monitoring the performance of the contractors and for purposes of detecting problems on the roads.

[29] Together with the supervisors, the patrollers keep their fingers on the pulse of the weather and make decisions as to if, when, and the extent to which maintenance equipment is to be sent out to fight winter storm conditions on the roads . . .

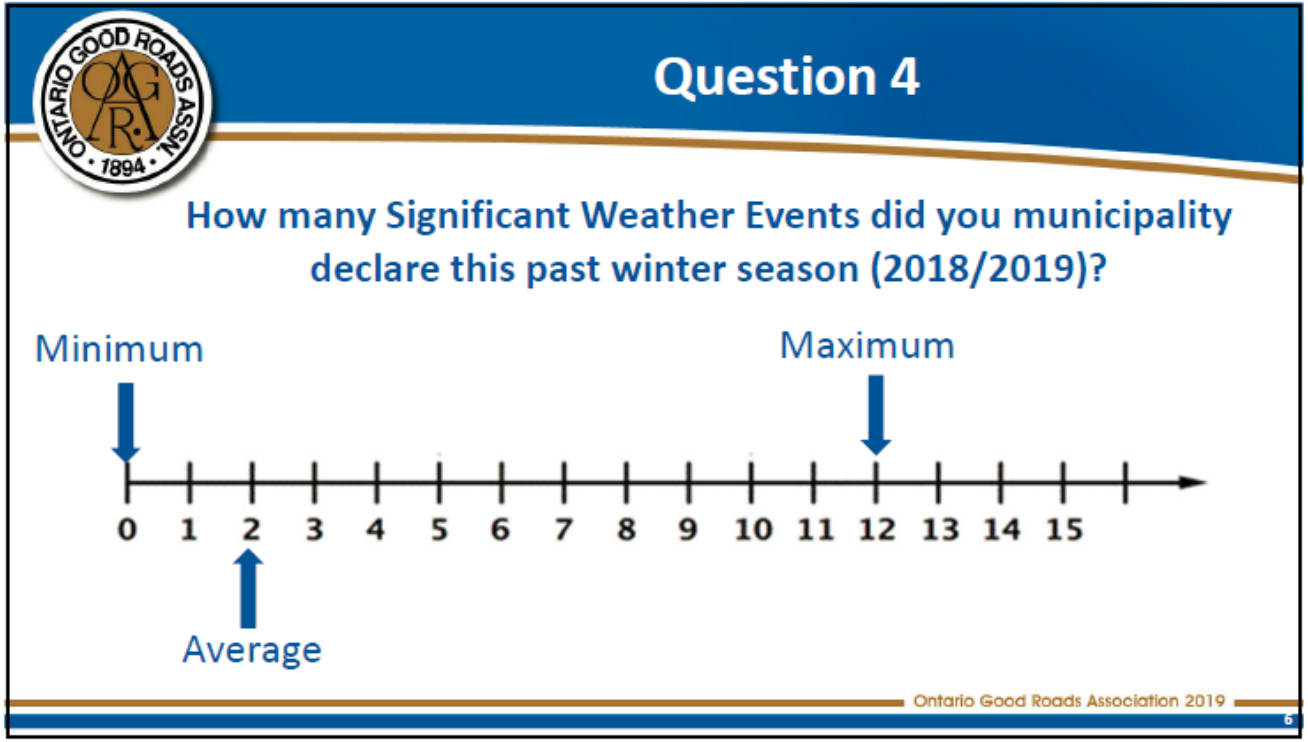
Ondrade v. Toronto 2006

Significant Weather Event

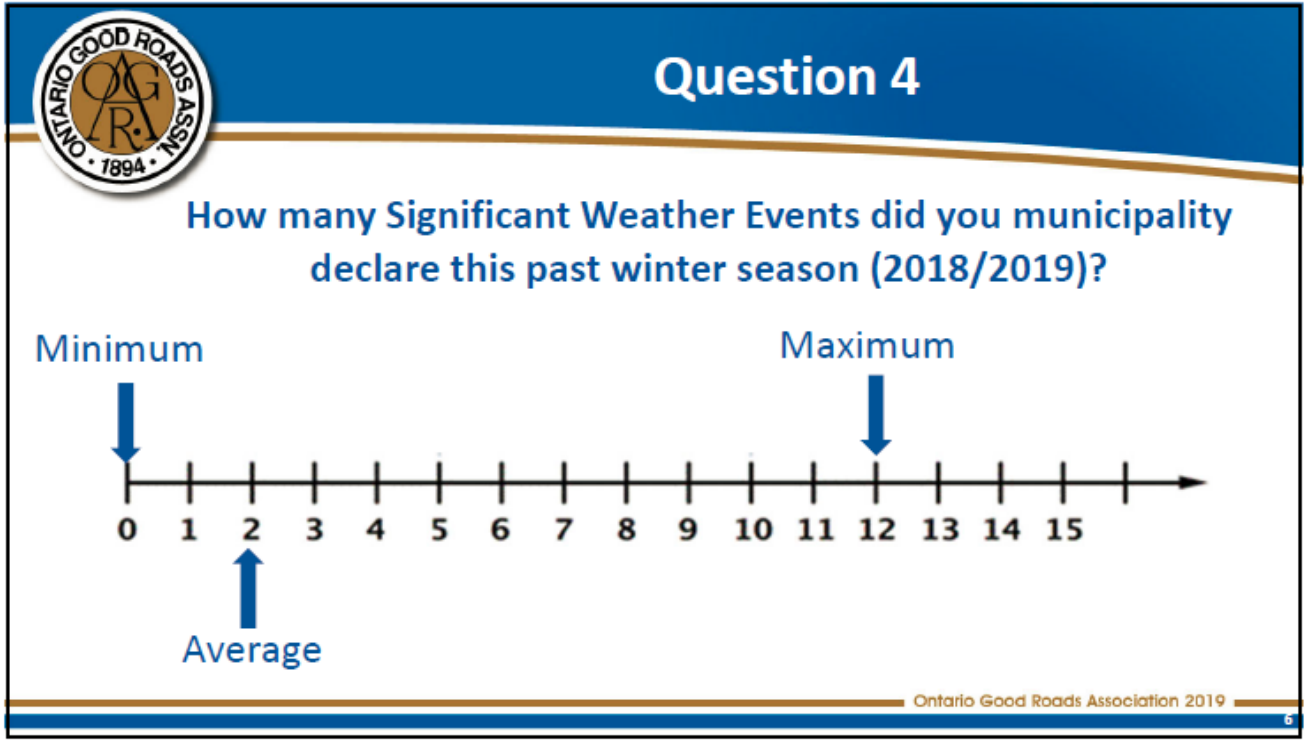
Question 3

How useful was the ability to declare a Significant Weather Event?

Significant Weather Event



Significant Weather Event



Significant Weather Event

If a significant weather event is declared but does not occur and the end of the event declared, no harm no foul.

If the non-event occurs numerous times will the drivers ignore the declaration and be caught off guard when there is a significant weather event.

Significant Weather Event

It is unknown at this time how the courts will respond to a significant weather event.

What must be remembered:
During the time a declaration of a significant weather is in place a municipality's roads are deemed to be in a state of repair.

If the severity of the event comes into question at trial, a plaintiff's lawyer could challenge the declaration and imply that the municipality was using the declaration of a significant weather event to circumvent sections 4 and 5 of the MMS. If the challenge is successful, a court could determine that the municipality was not acting in good faith.

Highly unusual encroachment

In the area adjacent to the sidewalk

16.2(4) The area adjacent to a sidewalk is deemed to be in a state of repair in respect of any encroachment present unless the encroachment is determined by a municipality to be highly unusual given its character and location or to constitute a significant hazard to pedestrians.

Closure of a highway

Summer and winter

16.8 (1) When a municipality closes a highway or part of a highway pursuant to its powers under the Act, the highway is deemed to be in a state of repair in respect of all conditions described in this Regulation from the time of the closure until the highway is re-opened by the municipality.

Winter

Closure of sidewalks

FACT: many municipalities do not maintain their entire sidewalk network in winter for a variety of reasons: e.g. budget limitations, unsafe with even minor accumulations of snow

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Closure of sidewalks in winter

What to consider before closing

1. Who uses the sidewalk? e.g. children, seniors, persons with mobility issues
2. How familiar are users of the sidewalk with the area? e.g. visitors to a bed and breakfast
3. Where are pedestrians to walk if sidewalk closed?
    1. If there is a shoulder and how wide is it?
    2. What is the traffic volume on the road where pedestrians are expected to walk?
    3. What is the posted and average operating speed?
    4. What type of vehicles are using the road?
4. Are there arenas, community halls, schools, business, etc. that people would typically walk to?
5. How will you notify the public of the closure?
6. Are there means to mitigate risk?

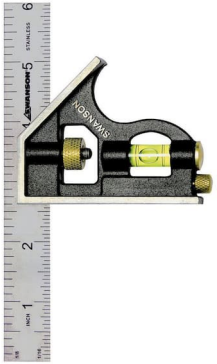
MMS is a defence

Dickson v. Vezina

- Lost control on a snow-covered curve in the road, vehicle went off the road an rolled over
- County of Perth met the MMS and action dismissed

Comartly v. Waterloo

- Trip and fall on a sidewalk discontinuity,
- Municipality had a program of inspection; the surface discontinuity was measured to be less than 20mm, MMS was met, and action dismissed



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Documentation

Proving you did what you said you would

Minor discrepancies or haphazard record keeping can be used by a plaintiff's lawyer to cast doubt on staff testimony.

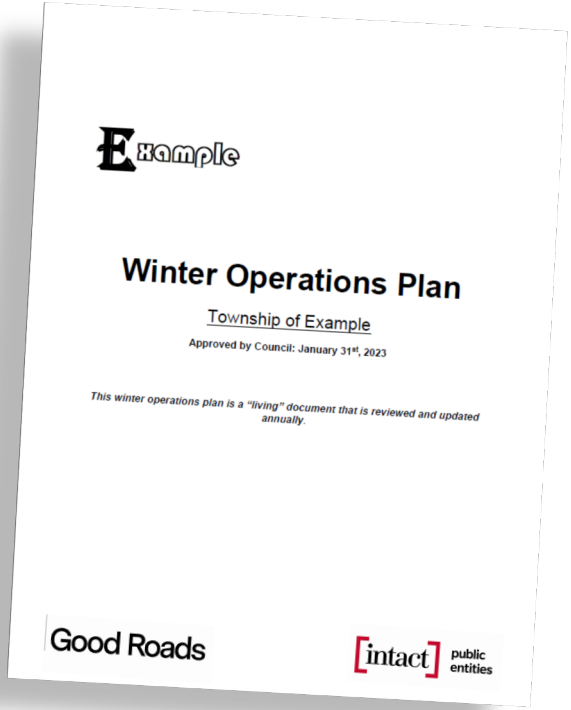
What records do you provide to IPE and the plaintiff's lawyer in the case of a claim of deficient winter operations?

Short answer, everything:

- Winter Road Maintenance Policy or Standards
- Route Maps
- Sand and Salt Beat Maps
- Weather Reports & Records
- Supervisor's Logs/Diaries
- Patrol Record/Logs
- Operator Records/Diaries
- Work orders
- And so on

Best Practice

- Well written policy approved by council and shown to be adhered to,
- Records demonstrating compliance with the MMS/LOS,
- Complete and well-preserved records,
- Photos of the loss scene including the roadway and materials used to combat the cause of the loss (e.g., salt application).



Example

Winter Operations Plan

Township of Example

Approved by Council: January 31st, 2023

This winter operations plan is a "living" document that is reviewed and updated annually.

Good Roads

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Connect With Us

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