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MUNICIPAL LIABILITY AND RISK MANAGEMENT

Tuesday, August 22, 2023

AUDIENCE ENGAGEMENT QUESTIONS

What comes to mind when you think of municipal insurance, costs, coverage and liability issues?
(Open-ended question)

How much have your municipal insurance costs increased since 2019?

No change

Under 10%

Between 10-20%

Between 20-30%

Above 30%

I don't know/I am not sure

TECHNICAL WORKING GROUP FORMATION

- In January 2022, the Attorney General, on behalf of the government, invited AMO to form an officials-level Technical Working Group comprised of staff representatives from municipalities, AMO, and the Government of Ontario
- 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
- AMO invited 13 municipalities of various sizes from across Ontario to participate in the Working Group
- The Working Group met 15 times between March 2022 and June 2023
- A variety of stakeholders, including from the insurance, actuarial, risk management, legal, and road maintenance and safety sectors, also participated in Working Group meetings on an ad-hoc basis depending on the topics being discussed

TECHNICAL WORKING GROUP OBJECTIVES

- Create an inter-governmental dialogue on municipal insurance costs, coverage and liability issues, including joint and several liability
- Identify and discuss gaps in data that need to be resolved to better understand and disseminate the underlying factors driving municipal insurance challenges
- Discuss alternate liability models that may address concerns with municipal insurance cost growth and the impact on municipalities to settle out of court to avoid protracted and expensive litigation
- Develop a list of practical short-term and long-term options to address municipal insurance challenges and identify steps necessary to implement them

BACKGROUND

- For many years, the common narrative around insurance costs suggested that joint and several liability was a key contributing factor to challenges with increasing municipal insurance costs and coverage due to disproportionate assignment of liability costs in cases where others found responsible cannot pay an award
 - AMO understands that municipalities believe 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 2019, the Ministry of the Attorney General led a consultation on insurance and liability issues, including joint and several liability. Over 400 municipalities were invited to participate, and the Ministry received submissions from over 100 municipalities and 7 organizations
 - AMO submitted a paper to the 2019 consultation titled: Towards a Reasonable Balance: Addressing Growing Municipal Liability and Insurance Costs, which included several proposals for addressing municipal insurance cost issues

KEY CONTEXT: THE INSURANCE MARKET

THE INSURANCE MARKET

- The commercial insurance market operates in cycles of “hard” and “soft” markets
 - In a soft market, insurers seek to grow and compete for business, resulting in lower premiums and more coverage options. As losses build, insurers shift their focus to managing their existing books of business
 - In the resulting hard market, there is less competition for business, higher premiums, and fewer coverage options
- Municipal governments have faced cyclical pressures on insurance premiums for several reasons

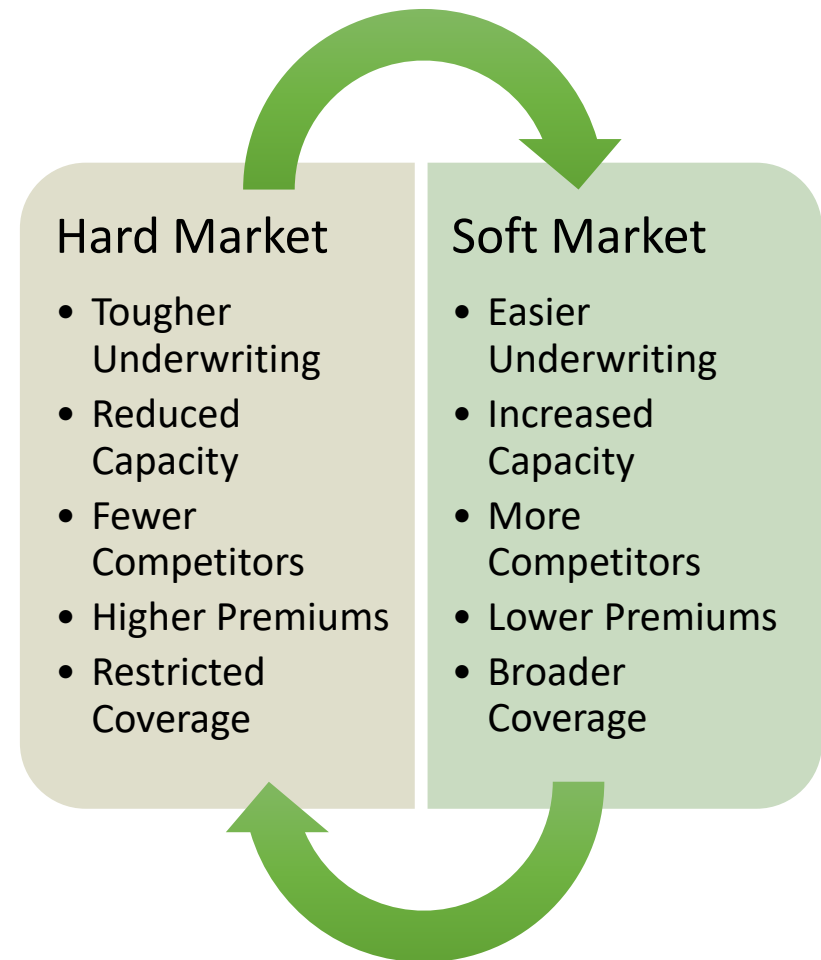


Image Credit: [LTCA](#)

THE INSURANCE MARKET, CONT'D.

- The current hard market began around 2019, following a 15-year soft market
- Global macroeconomic conditions, the growing volume and scale of claims from extreme weather events (both local and international), and the COVID-19 pandemic are all contributing to an “extended” hard market
- Insurers use international markets to support their books of business. As a result, social, economic, and environmental events elsewhere in the world can affect municipal insurance pricing and market capacity in Ontario
- Insurance pricing is fundamentally driven by insurers’ business decisions, their desire for investor returns while managing unpredictable losses (i.e., the “cost of capital”), and the hard market factors mentioned above

CURRENT MARKET

The previous soft market kept insurance premiums depressed

Acquisitions have decreased the competitive space

Insurers are pulling back coverage for a variety of exposures

Inflation pressures

Municipal operation and asset growth broadens the risk profile

Global risk pressures – climate change and catastrophic losses

DEMYSTIFYING ASSUMPTIONS ON JOINT AND SEVERAL LIABILITY

JOINT AND SEVERAL LIABILITY

- In the 2019 consultation, municipalities generally identified joint and several liability as an “important factor” in rising insurance premiums
 - However, other potential cost drivers, such as changing market conditions, the increasing value of municipal assets, and the growing scale of environmental claims, make it difficult to know whether joint and several liability materially affects insurance premiums
- Stakeholder views continue to evolve. It seems to be increasingly accepted that joint and several liability is not the key factor in rising insurance premiums
 - However, there remains a widespread view among municipalities that joint and several liability remains an important factor
- 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 joint and several liability 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

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

TECHNICAL WORKING GROUP FINDINGS



No evidence that there is a direct correlation between joint and several liability and insurance premiums



There has never been a finding of 1% liability



No consolidated data from any source identifies the impact of joint and several liability on municipal claim settlement and/or insurance premiums



AMO-LAS ongoing partnership with ClearRisk presents an opportunity to collect municipal risk data and isolate costs related to joint and several liability

OTHER TECHNICAL WORKING GROUP KEY OBSERVATIONS

ROAD LIABILITY

- Roads are the most expensive, extensive, used municipal asset and are a major source of risk for municipalities
- Municipal governments are responsible for 2.5 times more km's of roadway than the Provincial and Federal governments combined

Collisions

- Assuming the road authority is negligent (regardless of the degree of negligence), the balance of compensation awarded in serious road injuries typically falls on the road authority
- Not clear that changes to auto insurance would have a material effect as drivers typically already carry \$1M or \$2M liability coverage (minimum is \$200k)
- Return to \$2M in statutory accident benefit coverage likely to have more impact than changing minimum liability coverage

MINIMUM MAINTENANCE STANDARDS

- The Minimum Maintenance Standards (MMS) are reviewed every five years by an expert Task Force led by Good Roads. The latest review is underway (began in May 2023)
- The review will look to respond to emerging risks and liability issues identified since the 2018 review, including micromobility
- The Technical Working Group sees micromobility as an area of emerging interest for municipal risk and liability. Limited data exists regarding the increased risk and liability from new vehicle types. The current MMS review may not fully resolve many of the risk and liability concerns in this area.

MICROMOBILITY

- The Ministry of Transportation has proposed to consolidate five micromobility pilots into one regulation and to explore the introduction of an urban mobility vehicle pilot
 - The pilot programs are used to collect data and evaluate the safe integration of innovative vehicle types, including with pedestrians and other modes of transportation, as well as the need for any unique operating or licensing requirements
- In response to this emerging area of interest for the Technical Working Group, AMO recently provided a submission to MTO to indicate that addressing the increased risk and liability should be a key principle in the development of standards for new vehicle types
- Municipalities and the Province share the same objectives when it comes to road safety. However, they do not share the same level of risk – micromobility vehicles are already on Ontario’s roads
- AMO will continue to identify opportunities to collaborate to support the Province’s micromobility work to address issues such as data collection and infrastructure improvements

BUILDING CONSTRUCTION

- Extreme weather event losses (e.g., flood, fire, wind) are the key short to medium term source of risk and costs
- Exacerbated by dramatic increase in real estate values and (re)construction costs
- Building inspection cases are a growing source of claims (and are particularly expensive to defend)

LEGISLATIVE LIMITS ON LIABILITY

- Many participants expressed the view that liability rules in the *Municipal Act*, MMS, Building Code, and *Negligence Act* (among others) are not “strict” enough or have been ‘eroded’ by case law
- However, participants also observed that any legislative changes would likely include an element of judicial discretion or judgment and thus still expose municipalities to litigation costs and the risk of liability
- Under the *Negligence Act*, a defendant must be found negligent or at fault in order to be found liable

MANAGING RISK

- Many presenters stressed the importance of treating this not simply as “another tick in a box” but as a key pillar of municipal financing
- Risk mitigation strategies “on the ground”, e.g., improving record-keeping practices, can be key to reducing municipal liability findings
- Smaller municipalities and/or those without specialized risk management staff often take care of insurance and risk management “off the side of their desk” due to limited resources
- Risk Management professionals identify, assess, treat and finance risk to help organizations both manage risk and the cost of risk
- Procurement of insurance coverage is complex as multiple coverages, exclusions and claim management need to be considered along with cost
- Changing insurers often and/or frequently issuing RFP's can put a municipality at a disadvantage

CATASTROPHIC LOSS FUND

- Several participants suggested creating a fund to support seriously injured victims of motor vehicle accidents
- The viability of this proposal would depend on:
 - obtaining evidence that catastrophic injuries from road accidents are a major source of municipal losses; and
 - determining how the fund would be financed and managed

OTHER INSURANCE OBSERVATIONS

- All insurance is risk sharing – the losses of the few are covered by the many
- Higher deductibles move entities towards self-insurance and this needs to be strategically budgeted
- Some evidence that premiums are more affected by ‘first loss dollars’ than by catastrophic claims
- Policy decisions made by other entities and levels of government can have a significant impact on municipal insurance premiums and risk profiles

ALTERNATIVE RISK FINANCING

Reciprocals

- A municipal sector reciprocal insurance exchange or other risk funding/pooling structure may be a promising option for responding to these conditions and providing municipalities with premium stability in the long term
- This option would give municipalities the agency to tailor particularly challenging insurance requirements (e.g., cyber coverage, deductibles) to their needs. Since profit is not a consideration in reciprocals, and client acquisition costs are limited, it also reduces the ancillary costs of purchasing and managing insurance
- Reciprocals elsewhere in Ontario and Canada have generally been successful. Public sector risk pooling is also common in the US

Pooling

- Two municipal pools operate in Ontario – Waterloo Region Municipal Insurance Pool and Durham Municipal Insurance Pool
- Alternate risk financing structures like reciprocals and pools are born during hard markets

ACTION PLAN

AMO is committed to continued work on this issue. The Working Group identified the following as viable next steps to make meaningful progress based on the issues identification process:

- Confirm the feasibility of a new municipal sector reciprocal insurance exchange or other alternative risk financing structure
- Ensure robust municipal involvement in the ongoing MMS review
- Continue to collect JSL data through AMO-LAS in order to further unpack the relationship between JSL and municipal insurance premiums before re-engaging on potential opportunities for legislative change
- 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
- 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)

FUTURE OF THE TECHNICAL WORKING GROUP

- AMO to promote education and outreach to share learnings and ongoing work to support this important area of municipal concern
- Continue inter-governmental dialogue through a semi-annual forum to identify emerging risks and monitor progress on the Action Plan

MENTEE AUDIENCE ENGAGEMENT QUESTION

Please identify the key observations in order of most interest to your municipality:

Road liabilities

Building construction

Legislative liability

Managing risk

Litigation cost

Alternative risk financing

Catastrophic loss fund

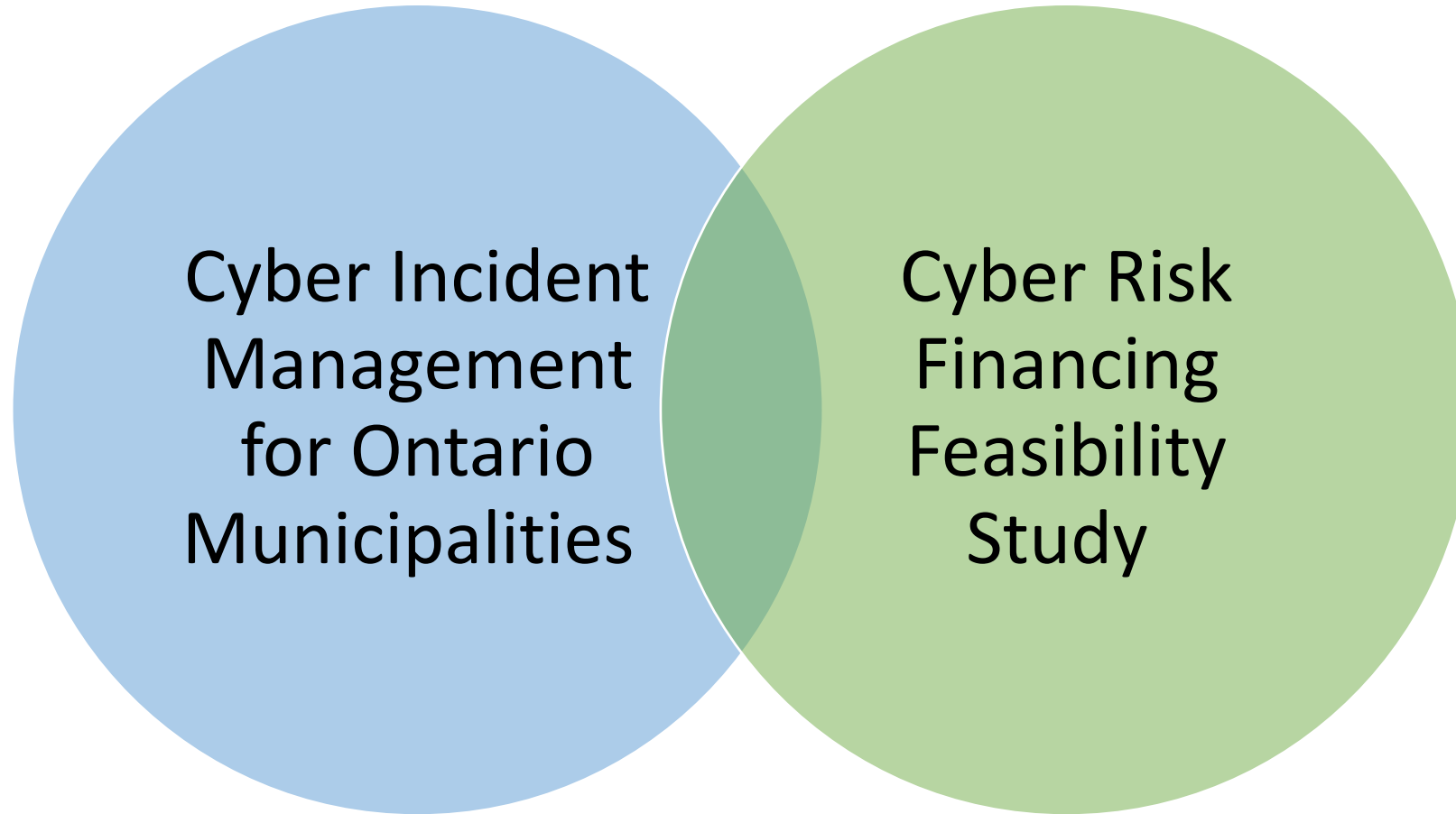
AMO-LAS MUNICIPAL RISK PROGRAM

Technical Advisory Groups

Risk Education

Partnerships

AMO-LAS MUNICIPAL RISK PROGRAM



QUESTIONS TO ASK YOUR CAO ON INSURANCE

Choose one to start a discussion on your municipal risk program:

- Do we know why our premiums have increased? What kind of analysis is available to us?
- Do we have the data we need to take a deeper look at what insurance, risk and claims cost us?
- How many claims do we receive in a year?
- Have our deductibles changed recently? How have we budgeted for those increases into the future?
- What kind of claims do we see frequently?