



# AMCTO Zone 5

**Protecting Your Municipality, Practical Risk Management Techniques**

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**Presented by BFL CANADA**



# FACTORS RESPONSIBLE FOR THE INCREASED COST OF MUNICIPAL CLAIMS



## — Rising Litigation and Legal Expenses

- ✓ Includes expenses related to legal representation, court fees, settlements & judgements
- ✓ Litigation insurance

## — Long-Tail Claims

- ✓ Multiple parties
- ✓ Complexity and severity of claims, expert reports
- ✓ Age of the injured party

## — Joint and Several Liability (1% Rule)

- ✓ Mainly applies to Motor Vehicle Accidents with multiple defendants, not trip and falls claims
- ✓ Potential large damage settlements
- ✓ Municipality is viewed as a deep pocket defendant

## — Economic Factors

- ✓ Inflation, labour costs, changes in costs of goods and services

## — Social Inflation

- ✓ Changing societal attitudes, higher settlements, legal precedent

## What is Risk Management:

- ✓ It is defined as the process of planning, organizing, directing and controlling the resources and activities of the organization to eliminate the adverse effects that accidental losses might cause.

## Risk Control Techniques:

- ✓ Risk Avoidance
- ✓ Risk Transfer (Insurance, Contracts)
- ✓ Risk Reduction (Controls, Policies, Procedures)
- ✓ Risk Acceptance
- ✓ Developing a Risk Management Plan

## What is your role?

- ✓ Each employee and volunteer of your Municipality is required to show the highest possible concern for the safety of fellow employees, volunteers and members of the public;
- ✓ To do your utmost to prevent losses to the assets of the Municipality;
- ✓ Includes observation of risk outside of your division or job function/responsibilities;
- ✓ Duty to report concerns.

# HOW TO TRANSFER RISK

- Insurance
- **Contracts - Types of Contracts, Agreements**
  - ✓ Road & Sidewalk Winter Maintenance Agreement
  - ✓ Snowmobile Clubs/ATV Clubs
  - ✓ Permits/Site Plan & Subdivision Agreements
  - ✓ Third party Cyber consultants, event organizers
  - ✓ Contact for higher risk activities ie. inflatables, fireworks
  - ✓ Vendors, performers, portable stages etc.
  - ✓ Mutual Aid Agreements, Lease Agreements
  - ✓ Construction – CCDC
  - ✓ Memorandum of Understanding with Community Groups
- Facility Users Program
- Requesting Certificates of Insurance from all third parties and adding the Municipality as an additional insured.

TRANSFER

# RISK TRANSFER – CONTRACTS & THIRD PARTIES

## — Does Your Agreement:

- ✓ Clearly describe the work and each party's responsibilities, including transferring any maintenance responsibilities to the other party?
- ✓ Follow your Municipality's set policies and procedures?
- ✓ Have an indemnification and hold harmless clause in favour of the Municipality?
- ✓ Is there a **limitation of liability** in the agreement?
- ✓ Has your contract been properly vetted by your legal counsel, risk management?
- ✓ Do the insurance requirements reflect the risk?
- ✓ Have you requested to be added as an additional insured?
- ✓ Does your certificate of insurance match the insurance section of the agreement?

## — Difficulties Faced By Municipalities

- ✓ Not all losses are insurable
- ✓ Creating balance between protecting the Municipality and fair contract language
- ✓ Accepting the terms and conditions of a contract because the other party is not willing to negotiate

# REVIEW YOUR MUNICIPAL CLAIMS HISTORY

- ✓ Review loss history (10 years)
- ✓ Look for trends, lessons learned, where you can improve processes
- ✓ Who should be involved in the review? Senior management, operations, strategy specialists

## – You will have a better understanding of:

- ✓ The claims process and reporting requirements
- ✓ Challenges faced by staff
- ✓ The role of the adjuster and defense counsel
- ✓ The role technology can play (GPS, electronic records)
- ✓ Identify training needs, educational opportunities

## – Accident Incident Reporting

- ✓ Understand where losses are happening and why
- ✓ Create SOPs

## – Internal communication and involvement ... build the buy in!

## – Create a risk culture

## – Municipal insurers are more focused on what risk management and claim mitigation practices are in place for their insureds

# BEST PRACTICES – POLICIES & PROCEDURES

- ✓ Must be reasonable for staff to maintain on a consistent basis
- ✓ Regular staff training and review
- ✓ Understand what would be considered the “industry standard” or a standard “guideline”
- ✓ What are your neighbouring Municipalities doing?
- ✓ Are your policies & procedures current?
  - **Are you incorporating legislation changes**
    - ✓ Minimum Maintenance Standards
    - ✓ 10 Day reporting Rules – Roads & Sidewalks
    - ✓ 60 Day reporting Rules – Occupier’s Liability
  - **What is the industry standard for building/maintaining a trail system, skateboard/BMX parks or other infrastructure?**
  - **What is recommended by a governing association? For example:**
    - ✓ Ontario Recreation Facilities Association has created “Public Skating Guidelines and Best Practices”
  - **Look ahead.... what is coming?**

POLICY

PROCEDURE

# POLICIES & PROCEDURES – ADDITIONAL CONSIDERATIONS

## — Studies

- ✓ If you have completed a study, have you followed through with the recommendations that are considered high priority or develop a policy on how you are going to address/budget for completing those recommendations in the future?
- ✓ Do any supporting policies need to be updated?

## — Minimum Maintenance Standards

- ✓ Have you adopted these as your standards?
  - Roads (winter maintenance)
  - Sidewalks (trip ledges & winter maintenance)
  - Potholes
  - Street lighting
  - Patrolling
  - Weather monitoring
  - Declaring a significant weather event
- ✓ Documentation needs to support the Municipality's policies and procedures
- ✓ What does it mean if you do not meet your set standards?

**POLICY**

**PROCEDURE**

**\*\*POLICES SHOULD NEVER BE ABSOLUTE\*\***



# KEY POINTS – DOCUMENTATION

## TYPES OF DOCUMENTS:

- ✓ Weather reports / weather monitoring
- ✓ Routine patrol /winter patrol
- ✓ GPS records
- ✓ Patrol route map / plow route map
- ✓ Timecards
- ✓ Level of service policies, procedures
- ✓ Winter event record summaries
- ✓ Supervisor diary, logbook, planners
- ✓ Maintenance logs/Inspection reports
- ✓ Prior complaints, incidents
- ✓ Training records
- ✓ Certificates of insurance, third party contracts
- ✓ Third party contracts
- ✓ Accident history
- ✓ Signage inventory
- ✓ Other \_\_\_\_\_

# KEY POINTS – DOCUMENTATION AND HOW LONG SHOULD RECORDS BE KEPT?

- Having the right documentation can mean the difference between the Municipality being found negligent, contributing to the negligence or being absolved of all negligence.
  
- **Documentation confirms your Municipality has:**
  - ✓ Fulfilled your duty of care in a reasonable manner.
  - ✓ Has policies and procedures in place that establish acceptable standards.
  - ✓ Your employees and volunteers are well trained and carried out their duties according to the operational guidelines established by your Municipality
  
- **How long should your records be kept?**
  - ✓ As long as physically possible but for a minimum of 2 years
  - ✓ A minor can bring forward a claim up to 2 years after they turn 18
  - ✓ If the event or program will mainly attract minors, review the retention period for keeping these event specific documents
  
- **What about your contractor's records? Are they collected & retained?**

# DOCUMENTATION – TELL THE STORY

## — All documentation:

- ✓ Need to be clearly written
- ✓ Accurate, sufficient detail
- ✓ Factual, no silly commentary
- ✓ Proper retention

## — Essential information:

- ✓ Who did the work?
- ✓ When? Where?
- ✓ What was done (plowing, spot salting, continuous salting, sanding etc.)
- ✓ What equipment was used?
- ✓ How much material was used? (salt, sand, mix)
- ✓ Inspections completed
- ✓ Maintenance completed/required
- ✓ Signage

Logbooks are Municipal property  
**They should not be taken home!**

**REMEMBER!**

**Records are corporate documents producible  
in litigation and subject to FOI requests**

# BEST PRACTICES – WHO IS AN INSURED?

## Committees of Council vs Services Clubs

- ✓ Who is an insured as defined in the insurance contract?
- ✓ Are they under the control of or answerable to your Municipality and added by endorsement?
- ✓ Are they an independent organization with their own insurance?

## Why be Involved?

- ✓ Are they following municipal policies and procedures?
- ✓ Are they working within their terms of reference?
- ✓ Are staff aware of the tasks being performed on behalf of the Municipality?
- ✓ Have they been properly trained?
- ✓ Are they considering risk management when undertaking tasks, planning activities or events?

## ➤ Activities considered too high risk which could result in:

- ✓ Bad public relations
- ✓ Serious multiple injuries
- ✓ Municipal Liability

**SPECIAL EVENT**

# BEST PRACTICES - VOLUNTEERS

## We should work with Volunteers when:

- ✓ The type of work is appropriate
- ✓ They have the required skills
- ✓ Your Municipality has the resources to supervise your volunteers
- ✓ There is little or no risk to the public or to the volunteer

## It is 100% your municipality's responsibility to:

- ✓ Keep volunteers safe, they have legal recourse against whoever negligently caused their injuries

## Duty of Care:

- ✓ Care in selection of volunteers
- ✓ Provide proper safety gear, easy access to first aid, medical treatment
- ✓ Define the work to be done
- ✓ Determine the skill set / qualifications needed for their assigned tasks
- ✓ Waivers, vulnerable sector checks, minors

*A Volunteer is someone who works at the invitation of and with the consent of your municipality including committees of council.*

➤ **Volunteers are representatives of your Municipality**

# BEST PRACTICES – SPECIAL EVENTS

## Whether It Is Yours Or A Community Group's Event....



Inspections should be completed before, after the event, and if possible, during the event and documented to show date, time and who inspected.



All areas should be accessible to fire, police, ambulance. Do emergency services need to be on site?



Certificates need to be collected from all third-party vendors, performers etc. adding your Municipality as an additional insured.



If alcohol is involved the certificate needs to confirm that coverage extends to Liquor Liability.



If there are higher risk activities such as a midway, fireworks, inflatables a certificate needs to confirm coverage for that activity and up to full policy limits. Vendor to provide set up and supervision.



To prepare for a potential incident at the event volunteers and staff needs to be trained on what to do and how to complete your Municipality's standard incident report form.



Public communication



# CYBER RISKS

- Insurers are looking very closely at each Municipality's commitment to investing in cyber security.
- If the Municipality is not committed to improving their cyber security, it greatly reduces the ability to place the coverage or to secure coverage with another insurer.
- **Insurers are focusing on:**
  - MFA for all remote users and vendors
  - Installing critical patches within 24 hours
  - Monitoring for threats on a 24/7 basis
  - Firewalls in place to prevent lateral movement
  - Phishing exercises and cyber security training for all employees on a consistent basis
  - Having in place an incident response plan
  - Testing your incident response plan
  - Completing ransomware simulations
  - Penetration testing
  - Replacing legacy operating systems
- **Engage Cyber Insurer for service offerings**

# COMMUNICATIONS – GENERAL PRINCIPLES

- Freedom Of Information Requests
- Mark records as privileged or created for litigation
- Avoid using your personal phone or computer for Municipal business
- Be careful what is communicated to the public
- Any details relating to a claim or incident are all strictly confidential
- **When communicating to the public:**
  - ✓ Have staff received any training on what to say in the event of an emergency?
  - ✓ Is there a designated employee for communicating to the public?
  - ✓ When should public documents, including emails be vetted by legal counsel?



# CLAIMS MITIGATION PRACTICES – STAFF’S ROLE

## What you Can Do – Apologize but not admit liability:

### The Apology Act, 2009 provides:

“apology” means an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate.  
2009, c. 3, s. 1.

### What You Should Not Do:

- ✓ Comment on the coverage or amount of insurance available
- ✓ Comment on how much the claim may cost
- ✓ Comment on how long the claim process will take
- ✓ Comment on other claims from the same area or cause
- ✓ Never admit liability
- ✓ Never admit to any past losses or problems with the area
- ✓ Always be aware that innocent statements can come back to haunt you when discussing liability

**APOLOGIZE**

# WHERE TO BEGIN....

- Review your claims history
- Communicate with staff, departments, senior management
- Create a risk culture
- View relationship with insurer as a partnership
- Build relationships with your external resources (adjuster, legal, municipal etc.)
- Review record keeping, records retentions, digitize where possible
- Review policies, procedures and SOPs
- Training and educational opportunities for all staff

# Questions?



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