OFF THE BEATEN PATH:
How Far Does a Municipality's Duty To Maintain A Sidewalk Extend?

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INTRODUCTION

Lawsuits against municipalities for trip and falls resulting from sidewalk deficiencies are hardly a novelty. However, despite the growing number of cases relating to such trip and falls, there is still no cemented (pun intended) definition of the term “sidewalk”, and a concrete (yet another appropriate pun) determination of the physical boundaries of a sidewalk has still not emerged. Despite the lack of clarity in this regard, legislatures and Courts alike have agreed that municipalities have a positive duty to inspect and maintain sidewalks...whatever those may be. Although it is widely accepted that municipalities ought not to be treated as insurers for all the perils faced by the travelling public, the early caselaw has generally been decided in favour of the travelling public rather than the municipalities.

Recently, there has been a shift in the way that Canadian courts have been adjudicating these types of cases. The Courts have begun to generate common law that has made it more difficult for plaintiffs to successfully litigate their sidewalk-related claims. Canadian courts have become more diligent about limiting the liability of municipalities, reaffirming and enforcing the principle that municipalities are not insurers. This paper will discuss the historical consideration of sidewalks by the Court, the evolution of a municipality’s statutory duty to maintain its sidewalks, the role of adjacent property owners in sidewalk-related personal injury claims, as well as emerging case law concerning ubiquitous portions of the road allowance.

DEFINITION OF A SIDEWALK

As a starting point, it is useful to review the legal development of the term sidewalk. In 1961, the Court in Ransome v Woodstock (City) held that a sidewalk included that portion of the roadway set aside for use by pedestrians and to which the general public had access.¹

Decades later, the law still seemed to be in search of a clearer definition of a sidewalk. In 1986, the Court in Simpson v Gateman relied on the Webster's definition that a sidewalk is “a walk for foot passengers at the side of a street or road; a foot pavement.”²
Although the definition of sidewalk that emerged from *Simpson* made no mention regarding the access to the sidewalk, the Court in *Larson v Thunder Bay (City)*³ reiterated the idea that a sidewalk was an area to which the public had access:

> While the Municipal Act does not define sidewalk as such, it is clear that a sidewalk, as set out in section 284(4) of the Act falls within the definition of highway under the Act and, as such, can only mean a pedestrian walkway on Municipal land used in common by the public.⁴

The early case law broadly defined what constituted a sidewalk and, accordingly, created an expansive avenue for liability of municipalities.

**Statutory Duty to Maintain Sidewalks**

As noted in *Larson*, while the term sidewalk has not been formally defined in any municipal statute, Section 44 of the current *Municipal Act, 2001*,⁵ solidifies the duty of a municipality with respect to maintenance of the sidewalks within it:

> Maintenance

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.

While the section speaks of highways and bridges, sidewalks have consistently been confirmed by Canadian Courts to be included in a municipality’s maintenance duties. The Court in *Anderson v. Hamilton (City)*⁶, held:

> There is only one reference to sidewalks in s. 44, and that deals with ice and snow. From the case law, s. 44 governs the liability of the City in matters dealing with sidewalks.

In the *Law of Canadian Municipal Corporations*, 2nd Ed., ("LCMC"), Ian MacF. Rogers, Q.C. states at Volume 3, page 1168, the following:

> A sidewalk is that part of a street set apart for pedestrians. It is generally part of the highway. A crossing on the street specially constructed for pedestrian use is a sidewalk within the meaning of a statute referring to sidewalks and crossings, but a part of the asphalt roadway for vehicular traffic lying between the ends of a concrete sidewalk at an intersection and not set apart for the use of pedestrians is not a sidewalk. In order for a walkway to be a highway it must be shown that it was established by dedication and user or by original survey and later opened by by-law but a walkway which was perpendicular to and connected with a street was not a ‘highway’ for purposes of ss. 48(8) and (10) of the Act. ...” [footnotes omitted]

However, the seemingly broad duty of a municipality to maintain sidewalks does come with some limitations. Many of Ontario’s municipalities have adopted the *Minimum Maintenance Standards for Municipal Highways* ("MMS").⁷ The MMS codifies the standard of care that is to be met by municipalities in order to be shielded from liability for sidewalk-related claims related to trip hazards. Specifically, Section 16.1 states:
**Sidewalk surface discontinuities**

16.1 (1) The minimum standard for the frequency of inspecting sidewalks to check for surface discontinuity is once per calendar year, with each inspection taking place not more than 16 months from the previous inspection.

(1.1) A sidewalk that has been inspected in accordance with subsection (1) is deemed to be in a state of repair with respect to any surface discontinuity until the next inspection in accordance with that subsection, provided that the municipality does not acquire actual knowledge of the presence of a surface discontinuity in excess of two centimetres.

(2) If a surface discontinuity on a sidewalk exceeds two centimetres, the minimum standard is to treat the surface discontinuity within 14 days after acquiring actual knowledge of the fact.

(2.1) A surface discontinuity on a sidewalk is deemed to be in a state of repair if it is less than or equal to two centimetres.

(3) For the purpose of subsection (2), treating a surface discontinuity on a sidewalk means taking reasonable measures to protect users of the sidewalk from the discontinuity, including making permanent or temporary repairs, alerting users’ attention to the discontinuity or preventing access to the area of discontinuity.

(4) In this section,

“surface discontinuity” means a vertical discontinuity creating a step formation at joints or cracks in the surface of the sidewalk.

In short, the MMS dictates the minimum standards in terms of patrol frequency, the discontinuity threshold that must be met to necessitate a repair, and the standard for treatment of identified discontinuities.

**WHO CAN BE AN OCCUPIER OF A SIDEWALK**

**Municipality**

The Occupiers’ Liability Act makes it clear at Subsection 10(2), that the OLA does not apply to a municipality, where the municipality is an occupier of a sidewalk:

10(2) This Act does not apply to the Crown or to any municipal corporation, where the Crown or the municipal corporation is an occupier of a public highway or a public road.

Nevertheless, countless claims for sidewalk-related incidents plead and rely on the OLA as a source of statutory authority for a finding of liability as against municipalities.

The appropriate scenario where a municipality can be deemed an occupier of a pedestrian walkway, is when the walkway that is not located within an open road allowance, is classified as a “recreational trail”, as specified in Section 4 of the OLA:
Risks willingly assumed

4 (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

...

Trespass and permitted recreational activity

(3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),

(a) where the entry is prohibited under the Trespass to Property Act;

(b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or

(c) where the entry is for the purpose of a recreational activity and,

   (i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and,

   (ii) the person is not being provided with living accommodation by the occupier.

The significance of the “recreational trail” designation is that a municipality’s duty under the OLA shifts from an obligation to ensure that persons are “reasonably safe” to an obligation under the OLA “not to create a danger with the deliberate intent of doing harm.” Therefore, a municipality’s duty of care is much lower if the area is considered part of a recreational trail.

Adjacent Homeowner

In the seminal decision of Bongiordina v York (Regional Municipality), the Court stated that a homeowner has a duty to ensure that his or her own property is maintained in a reasonable condition so that persons entering the property are not injured. If the homeowner complies with this duty, he or she will likely be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks. The snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality not the adjacent property owner.

Accordingly, the Court held that municipalities cannot offload their statutory obligation to maintain its sidewalks onto residents living adjacent to those sidewalks.

However, the Court also stated that there are two exceptions to this general rule by which an owner of property adjacent to municipal lands may be found to have a duty of care and potential liability exposure namely:
(a) where an adjacent property owner may be deemed, in law, to be an occupier of the adjacent public property if the owner assumes control of that property; and

(b) where the adjacent property owner permits a condition or activity on his or her property to flow onto the land occupied by the municipality and in doing so creates the danger (taken from Bogoroch v Toronto (City),\textsuperscript{11} and Moody v Toronto (City)\textsuperscript{12}).

The Court in \textit{Bongiardin}a initiated the removal of at least some sources of liability from municipalities, carving out situations in which adjacent property owners could be held liable for a plaintiff’s injuries.

\textbf{Corporation}

In \textit{MacKay v Starbucks Corporation},\textsuperscript{13} the Ontario Court of Appeal further explained the criteria by which an adjacent property owner can be held liable for a plaintiff’s injuries arising from an incident on municipal property.

The Court of Appeal unanimously upheld the lower-court ruling that found Starbucks was responsible, under the OLA for a portion of the ice-covered sidewalk at its side entrance where the plaintiff fell and broke her ankle during the winter of 2007. Justice Sanderson, writing for the lower Court, found that by taking such measures as making a path over the sidewalk leading directly to the side door, which almost exclusively Starbucks customers used, as well as clearing, salting, and sanding it to ensure it was safe for customers, Starbucks “assumed sufficient control over the sidewalk and the persons it allowed to enter its premises using [it]”, to fall within the definition of “occupier under Section 1 of the OLA.\textsuperscript{14}” Additional evidence was tendered at trial that a Starbucks shift manager acknowledged that employees were told to clear the pathway from the sidewalk to a patio near the entrance, which indicated that the management and employees saw a duty to take care of the sidewalk in the same way they did the patio.\textsuperscript{15}

In upholding Justice Sanderson’s decision, the Court of Appeal stated that the purpose and public policy objectives of the OLA “is to impose liability on those who, by their conduct, assume control over and responsibility for a portion of the immediately adjacent sidewalk and the safety of those who use it”.\textsuperscript{16}

While this may appear to contradict the principle established in \textit{Bongiardina v York (Regional Municipality)},\textsuperscript{17} that a property owner or tenant is not considered an occupier of an adjacent sidewalk “merely by clearing that sidewalk of snow and ice”, the Court of Appeal held that “more will be needed to meet that definition”.\textsuperscript{18} It appears, therefore, that the extra steps taken by Starbucks, i.e., constructing a path over the sidewalk leading to the side door, which was almost exclusively used by Starbucks’ patrons, met that definition. The Court in \textit{MacKay} went on to state that the determination of an occupier is a case-by-case analysis, and that, “There is no blanket rule”.\textsuperscript{19}

The Court also stated that there is no general common law duty of care, based on proximity principles, owed by an adjacent property owner or tenant in respect of sidewalks that abut that person’s property.\textsuperscript{20} However, it went on to note that the only duty that is owed is that statutory duty that is owed by a person who meets the definition of occupier under the OLA.\textsuperscript{21} Specifically, Section 2 of the OLA “replaces the previous common law rules that determined the nature of the duty of care owed by an occupier of premises ... to visitors... with one single duty of care”.\textsuperscript{22}

The Court, therefore, has stated that adjacent property owners can be held liable by their own actions, especially in instances where the adjacent property owner has consistently taken on the maintenance responsibilities of the municipal property/sidewalk.
THE UBIQUITOUS BOULEVARD/DRIVEWAY APRON

Gribowski v Singh

Litigation concerning the jurisdiction of the boulevard and/or driveway apron appears to have begun with the 2013 summary judgment motion heard in Singh. In this case, the plaintiff slipped on ice or snow while she was crossing a portion of a driveway located adjacent to the home of the Singh defendants. The plaintiff commenced her action against the Singhs and the City of Mississauga and alleged that either or both of these defendants were responsible for the maintenance of the area where the plaintiff claimed she fell.

It was accepted that the Singhs laid the driveway over their property and across the municipal road allowance known as the apron area. This apron directly abutted the travelled portion of the roadway in front of their property. The Singhs also acknowledged that they had hired a contractor to maintain their entire driveway, including the apron area, during the winter months of 2008 and 2009, and that they and their son also shovelled and applied salt to the entire length of the driveway including the apron.

The City of Mississauga stated that it provided winter maintenance to the travelled portion of its roads as well as to its sidewalks. The City of Mississauga was careful to point out, however, that it did not carry out winter maintenance to the driveway apron area that formed part of its road allowance, adjacent to the Singh's property. The same was true of all aprons and related private driveways in the City of Mississauga.

In making its decision, the Court considered the first exception described in Bongiardina, above. Specifically, Section 1 of the OLA provides that an "occupier" includes a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises. The Court in Singh also noted that there can be "special circumstances" where an adjacent property owner may be determined to be an occupier of municipal lands.

In the end, Justice Daley dismissed the Singh’s motion for summary judgment, indicating that the record disclosed that the case appeared to involve special circumstances whereby the Singhs may be found to be occupiers of the apron area of their driveway, and as such, they may have a duty to maintain that area. Further, Justice Daley held that the moving defendants and the City of Mississauga may both be found to be occupiers of the area in question, and as such, may have concurrent duties to maintain the area where the plaintiff alleges she fell.

Bondy v London (City)

The abutting property debate was revisited in Bondy. In Bondy, however, the issue turned from ownership and control of the apron area of a driveway to the paved portion of a boulevard. The plaintiff claimed against the City of London and the adjacent homeowner, Ms. Lyszczek, for damages relating to a slip and fall which occurred on the paved portion of the boulevard, abutting the city sidewalk, and used for driveway access to Ms. Lyszczek's property.

In deciding whether the Municipal Act imposed liability on the City for accidents and injuries that occurred on a boulevard, used for driveway access, the parties agreed that the boulevard falls within the definition of "highway" pursuant to Section 1(1) of the Municipal Act.

Justice Gorman held that London could not attempt to exempt themselves from liability by attempting to categorize a boulevard as the "un-travelled portion" of a highway. In this regard, Justice Gorman adopted the reasons of Justice Brennan in Green v North York (City), where the municipality had attempted to rely on the "travelled portion of the highway" exception under the then equivalent of Section 44 of the Municipal Act in order to avoid responsibility for a slip and fall that had occurred on a private parking lot.
The analysis then shifted to whether Ms. Lyszczek could be deemed an occupier of the boulevard under Section 1 of the OLA. On the facts presented, Justice Gorman was unable to conclude that Ms. Lyszczek exercised any control over the boulevard. It was found that she did not restrict others from accessing it, nor did she salt it, because she did not think it was her responsibility to do so. Accordingly, while it is possible for an adjacent property owner to be held liable under the OLA, Justice Gorman found that Ms. Lyszczek was not liable.

Given the relatively new area of litigation with respect to the boulevards and aprons, this area of law is unsettled. The theme that has surfaced through this litigation however, is that the adjacent property owner can become an occupier under the OLA. However, the adjacent property owner needs to exercise the care and control necessary over that portion of the road allowance, to be deemed an occupier. Perhaps the same can be said in cases involving whether or not a municipality is responsible for the inspection/maintenance of a boulevard or apron. Where there is a lack of care and control, ie. where a municipality is not responsible for the maintenance of the boulevards, perhaps the municipality's coveted no-liability position will begin to carry some weight.

However, the cases that have been adjudicated do not seem to provide the indicia that the courts are looking for in order to make such determinations. It would appear that the evidence tendered in Singh would be sufficient to show care and control over an apron or boulevard in order to deem the adjacent property owner an occupier, but without a definitive decision from the court, this area of law remains ubiquitous, especially with respect to municipalities.

RECENT SIDEWALK-RELATED CLAIMS

*Minimum Maintenance Standard Measurements as a Sword*

Barbeau v Kitchener (City)27

The Court recently considered the standard of care required of a municipality for a sidewalk in Barbeau. The plaintiff sued the City of Kitchener for injuries sustained as a result of a trip and fall incident, on a city-owned sidewalk.

Kitchener’s exposure to liability derived from Section 44 of the Municipal Act. This called for a two-step analysis in order to determine liability:

1. The plaintiff must prove that the sidewalk in question was not kept in a state of repair reasonable in the circumstances, including its character and location; if successful

2. The municipality must prove that one or more of the defences afforded to it under Subsection 44(3) apply.

The plaintiff claimed that her toe got caught on the sidewalk, causing her to fall. She returned the following day to take photographs. She placed a loonie at the joint between the two slabs, and testified that the diameter of the loonie was 26 mm and the height differential between the lower slab, upon which the coin was resting, and the top of the adjacent and higher slab, was at least the same height as the loonie.

Kitchener’s measurements were taken with a carpenter’s square. From the photographs taken from this investigation, the measurement of the alleged hazard was 16 mm. There were two other measurements taken in the alleged area of the plaintiff’s fall, which measured 19 mm and 11 mm. Kitchener’s testimony at trial was that none of the measurements taken showed a discontinuity of 20 mm or more.
Kitchener also produced inspection records in the vicinity of the fall for eight years, leading up to the year of the fall. These records indicated that any discontinuities between 20 mm and 38 mm were classified as “trip minor”, and were to be spray-painted and repaired by way of asphalt patches within 14 days of identification. Anything over 38 mm was classified as “trip major” and were to be spray-painted and repaired/replaced within 14 days. Any defects of less than 20 mm would not be repaired, as they did not exceed the MMS requirement.

The area in question was found to be one with a low volume of pedestrian traffic, being a quiet residential street. Justice Broad found that the discontinuity the plaintiff tripped over was never identified as a defect in any inspection during the eight years leading up to her fall. Justice Broad also found Kitchener’s method of measurement, and the measurements themselves as more reliable than that of the plaintiff.

With respect to the Municipal Act, Justice Broad held that Subsection 44(1)’s purpose, insofar as it relates to sidewalks, is to seek to prevent injury to persons utilizing sidewalks either on foot or by wheeled contrivances, such as wheelchairs, motorized scooters, strollers and buggies. Injuries may be caused by an unreasonable discontinuity or height differential between horizontal planes of sections of sidewalk. It is the differential in the horizontal planes of adjacent sections of sidewalk as experienced by users of the sidewalk that is relevant to the assessment of reasonableness.

The onus of proving unreasonable repair on the part of Kitchener was on the plaintiff. There was nothing preventing the Plaintiff from utilizing a device designed to measure distances between two horizontal surfaces or from arranging for someone else to do so. It is apparent that the Plaintiff was content to measure with a loonie and not go further with her investigation because it appeared to support her position that the discontinuity exceeded 20 mm. As a result, Justice Broad found, based upon the totality of the evidence, that the discontinuity or height discrepancy between the two sidewalk slabs where the plaintiff fell ranged from 11 mm to 19 mm, with differential at the spot closest to where the plaintiff stuck her toe being 16 mm.

Given the adoption by Kitchener of the Provincial Minimum Maintenance Standards in 2010, in the absence of persuasive evidence to the contrary, Justice Broad accepted the Provincial regulatory standard, as adopted by Kitchener, as representative of what would be considered reasonable in the circumstances of this case. While Barbeau was ultimately decided in favour of the municipality and the plaintiff’s action dismissed, the Court’s application of a “reasonableness” standard takes away from the force of the MMS as a complete defence. As previously stated, the Court held that “the Provincial regulatory standard, as adopted by the City, [was] representative of what would be considered reasonable in the circumstances of this case.” This language discounts the fact that the MMS, and adherence thereto, without any qualifying standard, is an iron clad defence in sidewalk deficiency cases. Indeed, there is no limiting language in the regulation. As such, whether or not a municipality has formally adopted the MMS is not material an assessment of liability. Further, the character of the street – be it quiet residential or busy arterial – does not serve to change the application of the MMS, which ought to be uniformly applied. Once the Court had determined that the discontinuity in the subject sidewalk had not exceeded limits prescribed by the MMS, no further analysis was required. The MMS ought to be viewed as hard and fast rules used to clarify previously nebulous liability disputes related to the inspection and maintenance of municipal sidewalks.
Plaintiffs to Watch Their Step: Limiting the Boundaries of a Sidewalk

Walelegne v City of Toronto

Another recent decision that considered the boundaries of a sidewalk is the summary judgment decision of Walelegne. The plaintiff, Selome Walelegne, tripped and fell as a result of a missing paving stone near a newspaper box, adjacent to a sidewalk. The plaintiff sought damages from the City, alleging that the City had failed to keep the sidewalk, which in the plaintiff’s opinion, included the area constructed with paving stones, in a state of repair that was reasonable in the circumstances.

In considering the City’s motion for summary judgment, the Court first reiterated the City’s statutory maintenance duties with respect to sidewalks. The Court confirmed the City’s duty to maintain highways pursuant to the Toronto Act, stating that a cause of action for its breach is legislated by statute:

42. (1) The City shall keep a highway or bridge over which it has jurisdiction in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

(2) If the City defaults in complying with subsection (1), the City is, subject to the Negligence Act, liable for all damages any person sustains because of the default.

The Court once again confirmed that the word “highway”, as it is found in the Toronto Act, indeed includes sidewalks and cited Cumberbatch v Toronto (City) as authority for this principle.

As in Barbeau, the Court considered the evidence regarding the alleged discontinuity in the sidewalk. Despite the plaintiff’s evidence to the contrary, the Court characterized the area where the plaintiff fell as not having taken place on the sidewalk where it is a flat and continuous surface. Rather, the Court stated that the area where the plaintiff fell was at a place “removed from the general area of passage, next to a box from which newspapers are sold”.

Counsel for the plaintiff proposed that it was a failing of the City that it did not go back and produce a history of records of the construction of this portion of the sidewalk. This, according to the Court, was an odd proposition. The Court found that the City had taken reasonable steps to guard against the alleged default and held that the regular program of patrols and inspections met the minimum standards. No defect had been noted during the inspection the year before the fall and the City was entitled to rely on its records of inspection and maintenance. The defence provided at Subsection 42(3)(b) of the Toronto Act was found to apply and therefore, invoked the applicability of Subsection 42(3)(a) of the Toronto Act.

What the Court deemed “far more important” was the fact that the plaintiff chose to walk on a section of the sidewalk that was not intended for the passage of pedestrians. As a result of the people in the area at the time, the plaintiff moved away from the travelled portion of the sidewalk and proceeded through a narrow gap, the width of the curb, next to a newspaper box.

In fact, the decision mentions (in more than one place), that the plaintiff should have taken more care when walking and conveys that even though the plaintiff allegedly fell around a newspaper box, presumably an area where pedestrians would need to approach to get a newspaper, the discontinuity was “not on a portion of the sidewalk intended for walking.” The Court stated:
I note that the City of Toronto Act, s.42(5) provides that the City is not liable for a personal injury caused by snow or ice on the sidewalk except in the case of gross negligence. This has no direct application here. There was no snow or ice. However, it does demonstrate that, with changed conditions or unusual circumstances, we expect people to take more care, to be more responsible for their own actions. The principle applies here, though not to the extent as in the case of ice and snow.

The City’s motion for summary judgment was granted and the action was dismissed.

CONTRIBUTORY NEGLIGENCE OF PEDESTRIANS

Recent case law has been increasingly critical of plaintiffs for failing to be aware of their surroundings and not watching where they are going. In Barbeau, the Court noted that onus is on the defendant to prove that the plaintiff was contributorily negligent. Recognizing that the standard of repair of a municipal sidewalk is not that of perfection and that a municipality cannot be expected, nor is it required, to maintain perfectly even sidewalk surfaces (see Worthey v Hamilton (City)), a reasonable pedestrian ought to pay reasonable attention to see upcoming height differentials on the sidewalk surface. The Court found that the plaintiff was familiar with the area and had earlier observed the defect that had been noted by Kitchener, consisting of a broken slab. The evidence also indicated that at the time that she tripped she was not observing the sidewalk in front of her but was looking towards Queen Street. In these circumstances, the Court found the Plaintiff contributorily negligent to the extent of 20%.

Moreover, the Court did not mince words in Walelegne when pointing the finger at the plaintiff for choosing to move from the path people are expected to take. As she moved past the newspaper box that would have blocked her view, the Court held that she bore the responsibility of looking where she was going. However, the Court did not attribute a percentage of negligence to the plaintiff, since her claim was dismissed in its entirety.

IMPACT OF RECENT DECISIONS ON MUNICIPAL LAW

Although the Courts have consistently reminded plaintiffs that municipalities are not to be treated as insurers of every pedestrian who walks its streets, the early case law seemed to broaden the obligations of municipalities just enough to make sure that injured plaintiffs were “equitably” compensated. With the 2013 amendments to the MMS, it appeared as though the guesswork had been removed from the analysis of what constituted an actionable deficiency found on a municipal sidewalk. Unfortunately for municipalities, the Courts have continued to read in some sort of reasonableness standard when assessing whether a deficiency is such that a plaintiff may recover damages. A recent example of this is seen in Justice Broad’s decision in Barbeau, where the deficiency in question was found to be reflective of a “reasonable standard” in the context of a “small residential street”.

Indeed, the appropriate interpretation of the MMS since the 2013 amendments ought to be that the standards are an iron clad statutory defence to plaintiff’s claims against municipalities. Where there was once room for interpretation, the MMS provides a hard and fast standard as to what municipalities are, and are not liable for. However, in light of the codification of the standard municipalities are to meet, the evidentiary burden that municipalities face to prove that they have met the provincial standard is higher. Specifically, it is incumbent on municipalities to ensure that their inspection records are clear, concise, up-to-date, and that they have identified potential hazards which are addressed in a timely manner. So long as municipalities satisfy this criterion, the MMS should be a fool proof defence. However, this means more workers (and more tax dollars) will be required to attend to the tasks in order to fully realize the potential of the MMS defences.
As such, as defence counsel and municipal risk managers, we are in some ways further ahead in our defence of claims, but in others, we are not.