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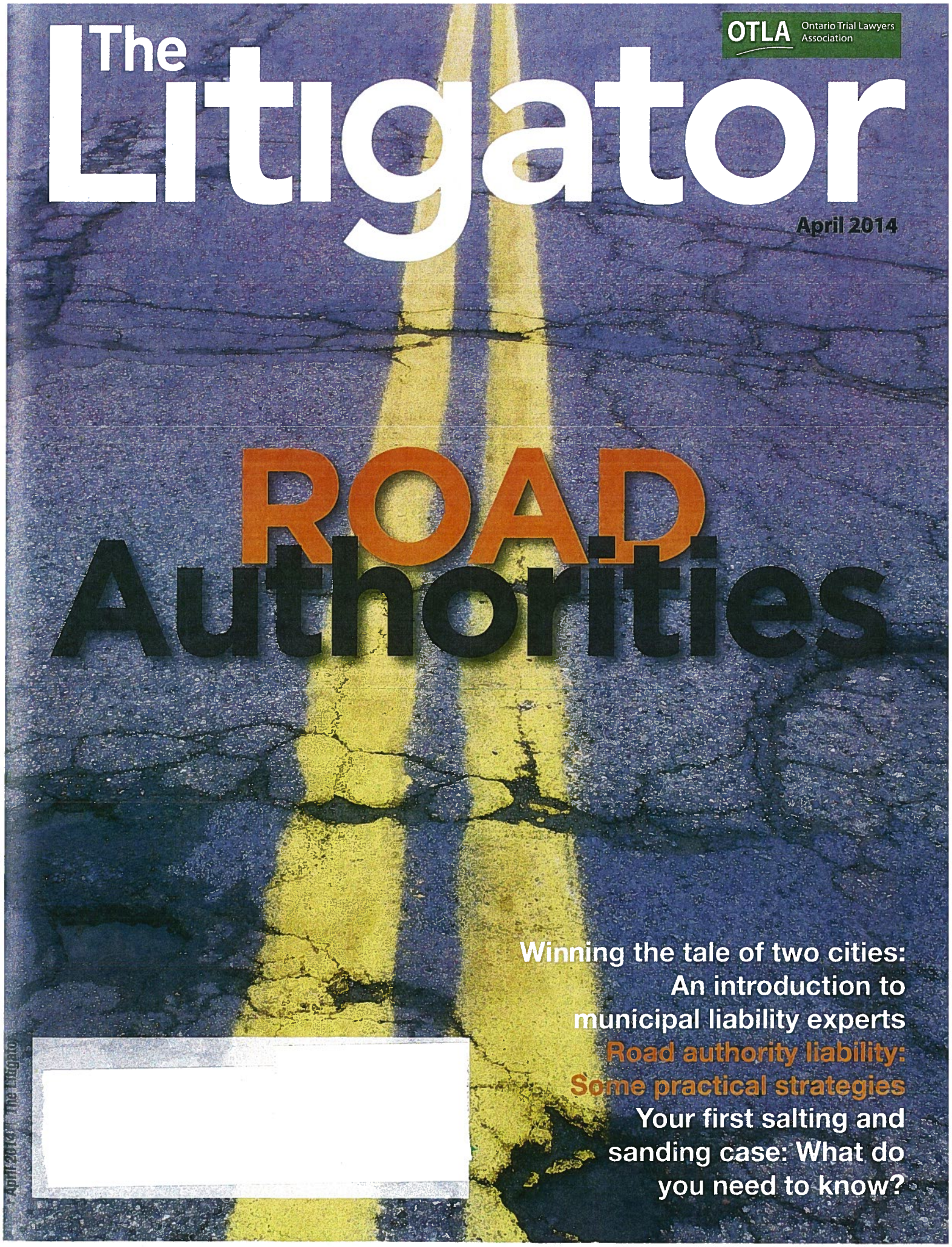

ROAD Authorities

Winning the tale of two cities: An introduction to municipal liability experts

Road authority liability: Some practical strategies

Your first salting and sanding case: What do you need to know?

BY TIMOTHY P. BOLAND AND DARCY W. ROMAINE

THE 2013 MINIMUM MAINTENANCE STANDARDS: THE WORST BY DEEMING IT SO

Snow is measured in centimeters. So too is the progress to correct the *Minimum Maintenance Standards for Municipal Highways* ("minimum maintenance standards"). Unfortunately, determining the standard of care remains a game of point and counter-point between the judiciary, who hear specific cases and insist on reasonableness, and the special-interest drafters of the regulation who can and do amend the regulation every five years, or earlier, to countermand the courts' decisions. This is not a mere contest over tax policy. It is a battle about the safety of the motoring public.

The minimum maintenance standards regulations came into force in 2002. According to section 44 of the *Municipal Act*, if a municipality complies with the standards, then the municipality is absolved of liability. The regulations set standards for routine patrolling, snow accumulation, ice, potholes, shoulder drop-offs, weather monitoring, cracks, debris, luminaires, warning signs, traffic control systems and sub-systems, bridge deck spalling and surface discontinuities.

While clarifying a standard of care for the benefit of the public is a positive goal, much like the *Ontario Building Code*, the effect of the minimum maintenance standards diminishes the standard of care set by the Ministry of Transportation (MTO) since the 1970s, and by the courts. The minimum maintenance standards have never been reviewed by engineers to determine if they set a safe standard. They do not describe typical operating practices. In fact, they run contrary to standard operating practices.

Consider the following example taken from the 2002 minimum maintenance standards. A road which experiences average traffic volumes in excess of 15,000 per day with a speed limit of 70 kph is considered a class II road by the minimum maintenance standards. The regulation allows 4 hours to pass before ice is treated (not removed) and allows 6 hours to pass to clear snow depths of 5 cm or greater.

How would that compare to the former MTO standard? Under the MTO's operational policy 98-01, the road would be a class I road because it has more than 10,000 vehicles per day, salting would start when there is ½ cm of snow, ploughing would start when there is approximately 2 cm, and the theoretical circuit would take 1.3 hours to complete. Even if it was a class II road, the circuit time would be 1.8 hours.

The minimum maintenance standards remediation time frame is 461% longer than the MTO remediation time frame and eliminates the immediate salting requirement. The MTO's early salting requirement is essential to keep the snow from bonding to the asphalt so it can be ploughed off. Once ice bonds to the road, the MTO training documents

recognize that it takes approximately 10 times more salt to remove the ice. Meanwhile, the minimum maintenance standards allow ice to form, allow it to remain for hours, say nothing about the salt distribution rate to remedy the ice, and say nothing about the timeframe within which the ice must be cleared. It need never be cleared according to the 2002 minimum maintenance standards as long as some unknown quantity, effective or not, was sprinkled on the ice after it had been there for less than 4 hours. Neither do the minimum maintenance standards impose a requirement that the streets be returned to bare pavement within any timeframe.

That is just one example of many.

When members of the judiciary review the effect of the minimum maintenance standards, they have considerable concern with them.

Justice Howden stated in *Thornhill v. Shadid:*

> [31] The issue of the legality of the minimum maintenance standards should be dealt with in a proceeding where the issue is squarely before the court and fully tested by evidence and argument. It will suffice to say at this point that it is an issue which appears to merit close scrutiny because of the use of a regulation to apparently dispense with the notion of constructive knowledge embedded in its enabling legislation and the jurisprudence surrounding it, and which may seriously dilute the content of the duty to keep highways in repair, to the prejudice of the public using those highways.[1]

Justice Lauwers stated in *Silveira v. York Region:*

> [11] The plaintiffs say that: "the defence provided by O.Reg 239/02 (Minimum Maintenance Standards) is invalid as it conflicts with s.44(3) of the Municipal Act, 2001, which only absolves a municipality of liability if it did not know and could not reasonably have been expected to have known about the state of repair of a highway or bridge. The plaintiff seeks to argue that York Region ought to have known of the hazardous road conditions if it did not have actual knowledge. Furthermore, the plaintiffs will argue that the Minister was not empowered to regulate repair times, which the Minimum Maintenance Standards do, but was only empowered to regulate when a roadway or class of roadway falls into disrepair."
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> ...
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> [13] I find that the claim is legally tenable. Justice in this case requires that it be decided.[2]

Justice O'Connor of the Ontario Court of Appeal stated in *Giuliani v. Halton (Municipality)*:

> To use the common law language, a municipality is not liable for negligently failing to maintain a highway if it complied with the minimum standards that applied to its failure.[3]

One of the motivators for the 2002 iterations of the minimum maintenance standards was to reverse the Ontario Court of Appeal's decision in *Montani v. Matthews.*[4] In that decision the court recognized that road authorities have a duty to take steps to prevent ice from forming on stretches of roads which had proven to be extremely hazardous in the past due to their propensity to ice over. The 2002 minimum maintenance standards removed constructive knowledge, requiring road authorities to act only when they knew (not ought to have known) of an existing (not anticipated) icy condition. They eliminated any requirement to treat roads that are known to become treacherous any differently than any other road with the same traffic and speed limit. The 2002 minimum maintenance standards were written to allow hours to pass before any action on the part of the road authority is taken. The 2002 minimum maintenance standards were drafted to remove any obligation to salt early in a storm.

The *Giuliani* case was reminiscent of the *Montani* decision. The issue, again, was preventative maintenance. More particularly, the court considered the obligations of municipalities to act before snow reached the trigger depth set forth in the minimum maintenance standards, namely 5 cm for the class II road in question. Halton Township, represented by counsel for the Ontario Good Roads Association, which was instrumental in drafting the regulations, argued that Halton had no obligation to do anything before the snow reached the trigger depth of 5 cm. The Court of Appeal affirmed the trial judge's recognition of the absurdity created by Halton's argument, as follows:

> If it were otherwise, municipalities could avoid any of their obligations to clear the roads of snow by waiting until the snow becomes compacted (not reaching the trigger depth) and turns into ice and then claiming that a new time limit is triggered from the time when the municipality becomes aware that the roadway is icy. [parenthetical information added][5]

While clarifying a standard of care for the benefit of the public is a positive goal, much like the *Ontario Building Code*, the effect of the minimum maintenance standards diminishes the standard of care set by the Ministry of Transportation (MTO) since the 1970s, and by the courts. The minimum maintenance standards have never been reviewed by engineers to determine if they set a safe standard. They do not describe typical operating practices. In fact, they run contrary to standard operating practices.

The Court of Appeal found that there was a gap in the legislation that allowed the common law (and common sense) to shine through:

> ...the minimum maintenance standards did not establish a minimum standard to address the accumulation of less than five centimeters of snow on a class II highway, nor did it establish a minimum standard for the treatment of a highway before ice is formed and becomes an icy roadway.[6]

> ...It is important to note that the conclusion that a minimum standard did not apply to the circumstances of this case does not leave those circumstances unregulated. A municipality must take steps to keep the highway in a reasonable state of repair having regard to all the circumstances pursuant to s. 44(1).[7]

In response, the drafters of the regulation sought special authority to amend the regulation to respond to *Giuliani*, even though the regulation had just been amended in 2010 to respond to Howden J.'s 2008 decision in *Thornhill v. Shadid* where he found that the minimum maintenance standards patrol standard of 3 times every 7 days could not possibly apply to winter storm conditions. In response to *Giuliani*, the drafters wrote-in a deeming provision which allows road authorities to do nothing until the trigger depth is reached, despite the absurdity recognized in *Giuliani*.

> 4(2) If the depth of snow accumulation on a roadway is less than or equal to the depth set out in the Table to this section, the roadway is **deemed** to be in a state of repair with respect to snow accumulation. (emphasis added)[8]

In effect, the drafters of the 2013 minimum maintenance standards have resurrected their original intended operation of the minimum maintenance standards despite the Court of Appeal recognizing that such an interpretation created an absurdity of delaying service for hours. The consequence is unsafe roads for the public, and little recourse to compensation for the injured.

On April 16, 2010, in a case called *Silveira v. Her Majesty the Queen*,[9] which fell under the 2002 minimum maintenance standards, the plaintiff brought an application to have the minimum maintenance standards declared invalid. The challenge alleged that section 44 of the *Municipal Act* imposed a statutory duty of reasonable care and that the minimum maintenance standards regulations prescribed a grossly negligent standard of care. The applicants argued that the conflict required the minimum maintenance standards to be read down where the standard was less than reasonable.

Numerous procedural hurdles arose throughout the litigation. First, Her Majesty the Queen objected to the matter proceeding by Rule 14 application in the Superior Court and insisted that it be heard at the Divisional Court. Lauwers J. had ordered that the matter proceed in the Superior Court when he decided to hive off the application as a separate issue from the litigation. Once the Application was issued, the matter was re-heard *de novo* and Lauwers J. affirmed his earlier decision. Unsatisfied, Her Majesty the Queen sought leave to appeal, which was granted. Her Majesty the Queen ultimately lost at the Divisional Court as the court concluded that a superior court judge has jurisdiction to determine whether an application is to be heard in the Superior Court or Divisional Court.

After much delay on jurisdictional issues, affidavits were exchanged, affiants were cross-examined, and comprehensive facta were exchanged. The parties were poised to argue the application. However, three significant events had occurred by the time the minimum maintenance standards challenge reached a hearing:

1) The Court of Appeal in *Giuliani v. Halton* cured some, but not all, of the mischief caused by the 2002 minimum maintenance standards;
2) The Regional Municipality of York withdrew its reliance on the minimum maintenance standards in the context of the underlying action; and
3) The minimum maintenance standards were amended

in 2010 and 2013, rendering the 2002 version of limited consequence.

On January 7, 2014, the respondents, Her Majesty the Queen, the Ontario Good Roads Association and the Regional Municipality of York, moved to strike the matter on account of it being moot, due to the three factors listed above. Given the withdrawal by York Region of its reliance on the minimum maintenance standards, the applicant had lost her standing-as-of-right. Public interest standing was sought, but Boswell J. could not justify the expenditure of judicial resources on the validity of the 2002 minimum maintenance standards when they had been severely curtailed by the *Giuliani* decision and amended in 2013. However, Boswell J. gave some insight of how the court would receive an application to challenge the 2013 iteration of the minimum maintenance standards, stating as follows:

> [27] Far more compelling, in terms of the issues raised in the application, would be the validity of the current iteration of the minimum maintenance standards. As I indicated, the 2002 minimum maintenance standards were amended in 2010 by O. Reg. 23/10. They were further amended in 2013 by O. Reg. 47/13. The new amendments include a deeming provision, which appears designed to close a gap in the regulation highlighted by the *Giuliani* decision.
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> ...
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> [31] In my view, a challenge to the validity of the minimum maintenance standards raises serious justiciable issues. The issues outlined in the Applicant's Factum are **legitimate, compelling** and certainly raise **serious** issues worthy of the Court's consideration. But there is a problem with the application as presently constituted. As I have indicated, there is little pressing concern with the validity of the 2002 iteration of the minimum maintenance standards, given subsequent amendments to the regulation and the effect of the *Giuliani* decision.
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> [32] The applicants argue that a successful challenge to the 2002 minimum maintenance standards may provide guidance to the Court hearing a future application to challenge the 2013 iteration. That may well be true, but when judicial economy is considered, it makes little sense to continue with a challenge of the 2002 minimum maintenance standards as a means to ultimately challenge the 2013 amendments. I am not prepared to grant public interest standing to the applicants to challenge a regulation that now has very little application. (emphasis added)[10]

The 2013 minimum maintenance standards restore the dangerous original intent of the 2002 minimum maintenance standards. The absurdity that the Court of Appeal dismissed in *Giuliani* is now a reality for Ontario motorists. The minimum maintenance standards cannot be left to stand. The validity of the 2013 minimum maintenance standards must be challenged. It should be a mission for OTLA. This, as Winston Churchill once said, is not the end; this is not even the beginning of the end; this is only the end of the beginning.

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NOTES

1 *Thornhill v. Shadid* [2008] OJ No 372 para 31

2 *Silveira v. Vaughan (City)* [2010] OJ No. 9 05 para 9

3 *Giuliani v. Halton (Regional Municipality)* [2011] OJ No 5845 para 22

4 *Montani v. Matthews* [1996] OJ NO 1974 (ON CA)

5 *Giuliani v Halton (Regional Municipality)* [2011] OJ No 5845 para 33

6 *Giuliani v Halton (Regional Municipality)* [2011] OJ No 5845 para 39

7 *Giuliani v Halton (Regional Municipality)* [2011] OJ No 5845 para 37

8 *Giuliani v Halton (Regional Municipality)* [2011] OJ No 5845

9 *Silveira v. Ontario (Ministry of Transportation)* [2012] OJ No. 3010 (Div Ct)

10 *Silveira v. Ontario (Ministry of Transportation)* [2014] OJ No. 37 para 27, 31, and 32