

Substantive Changes to Ontario’s Highway Minimum Maintenance Standards Now in Effect

Friday, May 18, 2018

As of May 3, 2018, substantive changes were made to the Minimum Maintenance Standards for Municipal Highways, O Reg 239/02 and the Minimum Maintenance Standards for Highways in the City of Toronto, O Reg 612/06. The most notable changes are:

1. The introduction of winter maintenance standards for bicycle lanes;
2. The introduction of winter maintenance standards, including patrol obligations, for sidewalks;
3. The ability for municipalities to declare a "significant weather event" with implications for winter maintenance on roadways, bicycle lanes and sidewalks during the duration of the event; and
4. Inspection standards for areas "adjacent to sidewalks."

Each of these changes are detailed below.

Bicycle Lanes

The Minimum Maintenance Standards ("MMS") now provide a definition for a bicycle lane which includes a portion of the roadway with marked or buffered lanes, whether for the exclusive or preferential use of cyclists.

The MMS now include specific sections outlining winter maintenance standards for snow accumulation in bicycle lanes. The table below compares the new snow accumulation depth standards for bicycle lanes as compared with the existing standards for roadways:

Class of Highway or Adjacent Highway	Depth	Time for bicycle lanes	Time for roadways
1	2.5 cm	8 hours	4 hours
2	5 cm	12 hours	6 hours
3	8 cm	24 hours	12 hours
4	8 cm	24 hours	16 hours
5	10 cm	24 hours	24 hours

It is noteworthy that the snow accumulation standards for bicycle lanes is lower than for the adjacent roadways in which they are contained, with the implication that where maintenance is performed on the roadway and bicycle lane in unison, both standards should be satisfied.

Similar to the sections dealing with roadways, the MMS provide that where the depth of snow accumulation on a bicycle lane is less than or equal to the depth set out in the table, the bicycle lane is deemed to be in a state of repair in respect of snow accumulation.

While there is no separate section dealing with ice formation on bicycle lanes, the section which sets out the standards for ice formation on roadways does note in section 5(5) that "this section applies in respect of ice formation on bicycle lanes on a roadway, but does not apply to other types of bicycle facilities."

Sidewalk Winter Maintenance

For the first time, the MMS now contain specific sections dealing with sidewalk winter maintenance. Section 16.3 provides that snow accumulation on sidewalks shall be reduced to less than or equal to eight centimetres within 48 hours of the end of a snow event. The section further provides a standard of a minimum maintained width of one metre. This section appears to mirror the standards which many municipalities on their own initiative have had in place for some time. Notably, the section does not require clearing to bare pavement; rather, simply reducing the depth to less than or equal to eight centimetres.

Sidewalks are deemed to be in a state of repair with respect to snow accumulation (a) where snow depth is less than or equal to eight centimetres; and (b) during ongoing snow accumulation, even where it exceeds eight cm, until 48 hours after the snow accumulation ends.

Section 16.5 sets out standards with respect to ice formation on sidewalks. It requires that municipalities monitor weather in accordance with section 3.1, and to "treat the sidewalk if practicable to prevent ice formation or improve traction within 48 hours if the municipality determines that there is a substantial probability of ice forming on a sidewalk, starting from the time that the municipality determines the appropriate time to deploy resources for that purpose". This appears to be an effort to impose standards for sidewalk maintenance during ice formation events. Necessarily, this standard still leaves the municipality with considerable discretion in terms of the deployment of resources during such events.

Similar to the other "deeming" provisions found in the MMS, where ice forms on a sidewalk despite complying with the standard in subsection (1), the sidewalk is deemed to be in a state of repair in respect of ice until 48 hours after the municipality first becomes aware of the fact that the sidewalk is icy. Pursuant to subsection (3), an icy sidewalk is deemed to be in a state of repair for 48 hours **after** it has been treated.

The deeming provisions with respect to snow accumulation and ice ought to provide municipalities with more objective arguments in defending sidewalk slip-and-fall claims together with the gross negligence defence provided in section 44(9) of the *Municipal Act, 2001* and section 42(5) of the *City of Toronto Act, 2006*.

Section 16.7 for the first time introduces standards for winter sidewalk patrols, which are to be conducted by the municipality where "the weather monitoring referred to in section 3.1 indicates that there is a substantial probability of snow accumulation on sidewalks in excess of eight cm, ice formation on sidewalks or icy sidewalks." The patrols are to be conducted on sidewalks that the municipality selects "as representative of its sidewalks at intervals deemed necessary by the municipality." Accordingly, there is no expectation that all sidewalks are to be patrolled; rather, this section appears to reflect the practice already in place in many municipalities to inspect "representative" sidewalks for winter maintenance conditions.

Significant Weather Event

The amendments include the introduction of the concept of a "significant weather event" which is defined as "an approaching or occurring weather hazard with the potential to pose a significant danger to users of the highways within a municipality." "Weather hazard" is also a

defined term and means the "weather hazards determined by Environment Canada as meeting the criteria for the issuance of an alert under its Public Weather Alerting Program."

Under the new MMS, the declaration of a "significant weather event" has a uniform implication for the following sections of the MMS:

- Snow accumulation on roadways (section 4.1)
- Snow accumulation on bicycle lanes (section 4.3)
- Icy roadways (section 5.1)
- Snow accumulation on sidewalks (section 16.4)
- Icy sidewalks (section 16.6)

In each case, during the course of a declared significant weather event, the standard for addressing winter maintenance is simply "to monitor the weather in accordance with section 3.1" and to deploy resources to address the issue "starting from the time that the municipality deems appropriate to do so." Once the significant weather event is declared to have been concluded, the municipality shall address the issue pursuant to the regular standards for maintenance.

Section 16.9 sets out how a municipality must notify the public of the start or end of a "significant weather event:"

1. By posting a notice on the municipality's website.
2. By making an announcement on a social media platform, such as Facebook or Twitter.
3. By sending a press release or similar communication to internet, newspaper, radio or television media.
4. By notification through the municipality's police service.
5. By any other notification method required in a by-law of the municipality.

Encroachments

Section 16.2 sets out standards for encroachments on areas adjacent to sidewalks.

"Sidewalk" is now a defined term meaning "the part of the highway specifically set aside or commonly understood to be for pedestrian use, typically consisting of a paved surface but does not include crosswalks, medians, boulevards, shoulders or any part of the sidewalk where cleared snow has been deposited."

"Encroachment" is also a newly defined term meaning "anything that is placed, installed, constructed or planted within the highway **that was not** placed, installed, constructed or planted by the municipality" (emphasis added).

Section 16.2(1) provides that areas adjacent to sidewalks are to be inspected for encroachments once per calendar year, with each inspection taking place not more than 16 months from the previous inspection. The area is deemed to be in a state of repair in respect of any encroachment present "unless the encroachment is determined by the municipality to be highly unusual given its character and location or to constitute a significant hazard to pedestrians." Where an encroachment is "highly unusual given its character and location or constitutes a significant hazard to pedestrians," the standard is to address the encroachment within 28 days of making such a determination. Within that 28-day period the encroachment is deemed to be in a state of repair.

This section appears to be a recognition by the legislature that municipalities are often faced with items being installed or constructed in areas adjacent to pedestrian sidewalks without any notice being provided to the municipality.

Other Notable Changes

Other notable additions to the MMS include:

- Section 2.1 reinforces the purpose of the MMS as providing statutory defences to a municipality as opposed to representing mandatory standards by which a municipality must meet.
- Section 6(1.1) provides that the area and depth of a pothole may be determined by a municipal employee, agent or contractor by either performing an actual measurement or performing a visual estimate. This provision may have significant implications from an evidentiary standpoint, especially in circumstances where it is not practical to perform an actual measurement.
- The definition of "surface discontinuity" in section 16.1 which deals with sidewalk surface discontinuities was amended to add "any vertical height difference between a utility appurtenance found on or within the sidewalk and the surface of the sidewalk." "Utility appurtenance" was added as a defined term which means "maintenance holes and hole covers, water shut-off covers and boxes, valves, fittings, vaults, braces, pipes, pedestals, and any other structures or items that form part of or are an accessory part of any utility."

Given that these changes to the MMS are substantive in nature, they will only apply to claims arising from incidents occurring on or after May 3, 2018.

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