Understanding the 2018 changes to O.Reg. 239/02

Minimum Maintenance Standards for Municipal Highways - Encroachments

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On May 3, 2018, a number of new items were added to O.Reg. 239/02 – “Minimum Maintenance Standards for Municipal Highways”, (the “MMS”). Understanding the new additions to the MMS regulation, and implementing policies and procedures to better achieve compliance with them, will be a critical risk-management task for Ontario municipalities. This article deals with one of them, namely “encroachments”.

First and foremost, when approaching the regulation, three things must be kept in mind:

• They are a legal defence, pure and simple, and are one of three alternate legal defences which a municipality may assert, where appropriate, pursuant to s.44(3) of the Municipal Act, 2001, when sued for “something wrong with the highway”.

• They are optional. A municipality may choose to comply with the standards under the regulation, or choose not to comply. Non-compliance may be for a variety of reasons, including lack of budgetary resources, equipment, or policy reasons/decisions.

• The law in Ontario is that a municipality shall keep its highways in a reasonable state of repair given the character and location of the highway. This includes everything found within the limits of the road allowance, including every inch of the roads, curbs, boulevards, and sidewalks that fall within it.

Encroachments – s.16.2

This new standard is meant to address, in part, the growing number of claims against municipalities by pedestrians and others who, for whatever reason, step off or wander from the sidewalk and onto the area adjacent to it.

The amended regulation provides a definition in s.1 for encroachments, as follows:

“encroachment” means anything that is placed, installed, constructed or planted within the highway that was not placed, installed, constructed or planted by the municipality;

Pursuant to the new s.16.2, the standard for inspecting the area adjacent to a sidewalk for encroachments is once per calendar year, with no more than 16 months between inspections. Following such inspection, all encroachments that fall within the “adjacent area” to a sidewalk, (with two exceptions) are deemed in a state of repair until the next inspection.

The “adjacent area” in which encroachments are being looked for, is a maximum of 45 cm to either lateral side of a sidewalk (red arrows in Figure 1 below). If, prior to 45 cm, a curb is present, then that lesser area is considered the “adjacent area”. Similarly, if, prior to 45 cm, the limit of the highway is reached, then this lesser area is considered the “adjacent area”.
The new s.16.2 creates a standard for dealing with two specific types of encroachments, namely those which are either (a) determined by a municipality to be highly unusual given its character and location or (b) to constitute a significant hazard to pedestrians. These must be treated within 28 days, by painting/marking them, making repairs, or restricting access to the area. ¹

There is no definition provided for what constitutes either a “highly unusual” encroachment or one which poses a “significant hazard to pedestrians”. The lack of a definition is deliberate, as municipalities are thereby given the flexibility and ability to develop their own definitions, suited to their particular locale and resources. What is “highly unusual” in Sudbury, may not be in Toronto. Variances between neighbourhoods within the same municipality may also exist. An encroachment at the bottom of a hill, or next to a multi-use path, may be deemed a significant hazard, whereas the same exact one at the top of a hill or adjacent to a low-volume sidewalk, may not be considered so. Each situation is unique, based on the “character and location”, and the regulation was specifically drafted to allow for a high degree of discretion and flexibility.

The task for municipalities moving forward, it to develop a set of criteria and perhaps a Council- approved level of service policy and guidelines, setting out the core elements of what the municipality feels meets the foregoing definitions. The trade-off inherent within the new “encroachments” standard is readily evident. In exchange for expanding the annual sidewalk inspection program to look for and address the narrow subset of encroachments that are either “highly unusual” or which are deemed to be a “significant hazard to pedestrians”, all encroachments that are found within the adjacent area are deemed in a legal state of repair between annual inspections. This deeming means that the municipality cannot be sued for them, even if they allegedly caused or contributed to the Plaintiff’s injury. The reality is that in many municipalities, there are tens of thousands of encroachments present, which no reasonable amount of resources can possibly remedy or remove. Not all of them are highly dangerous, or unusual. The unfairness of a municipality being potentially liable for all of them, regardless of their nature, is tempered to an extent by this new regulatory standard.

¹ s.16.2(5) and (6) of O.Reg. 239/02, states “(5) If a municipality determines that an encroachment is highly unusual given its character and location or to constitute a significant hazard to pedestrians, the standard is to treat the encroachment within 28 days after making such a determination, and the encroachment is deemed in a state of repair for 28 days from the time of the determination by the municipality. (6) .... treating an encroachment means taking reasonable measures to protect users, including making permanent or temporary repairs, alerting users’ attention to the encroachment or preventing access to the area of the encroachment.”
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