

TO: UBCM Members

FROM: Mayor Helen Sparkes,
UBCM Co-chair of the UBCM-MIA
Task Force

DATE: September 6, 2002

RE: **RESPONSE TO DISCUSSION PAPER
ON CIVIL LIABILITY**

POLICY PAPER

#2

2002 Convention

1. DECISION REQUEST

For the members to 1) consider the recommendations in response to the Attorney General's Discussion Paper on Civil Liability and 2) to reconsider/restate some related recommendations.

2. BACKGROUND

UBCM has been pursuing legislative reforms with respect to liability since its first Liability Action Plan in 1986. Numerous resolutions have been endorsed and submissions made over the years.

We had hoped initially that local government liability might be addressed as part of the Community Charter. However, the Attorney General earlier this year launched a broader review of liability issues through a Civil Liability discussion paper.

The UBCM-MIA Joint Liability Task Force shifted its focus to responding to the discussion paper. The Task Force recommendations are the central purpose of the report.

3. RECENT ACTIVITIES

We have chosen to make recommendations on four specific areas (see Section 4). The main recommendations are consistent with previous UBCM resolutions and policy.

Our submission to the Attorney General will conclude with these recommendations but will include supporting information, arguments and rationale as drawn from:

- a) precedents in other jurisdictions
- b) how the recommendations can assist local government in BC to clarify roles and responsibilities, especially in the construction industry.

Our full submission will be consistent with and supportive of the recommendations.

4. RECOMMENDATIONS ON CIVIL LIABILITY

In response to the discussion paper on Civil Liability and the questions raised by the Attorney General the Joint Task Force recommends:

A Fundamental Principle

- a) That civil liability reforms should be guided by the fundamental principle that individuals and organizations should be responsible for the consequences of their actions, not for the actions of others; and their liability should be commensurate with their degree of responsibility.

Joint and Several Liability

- b) That the concept of joint and several liability for property damage and economic loss is inappropriate in a modern society and should be abolished.
- c) That joint and several liability be replaced by a system of pure several or proportionate liability (such as now exists in cases of contributory liability) under which defendants are responsible only to the degree to which they contributed to the loss.

Ultimate Limitation Period

- d) That UBCM support the BC Law Institute July 2002 report on "The Ultimate Limitation Period: Updating the *Limitation Act*". In particular:
 - i) that the 30 year ultimate limitation period of general application be reduced to 10 years;
 - ii) that the *Limitation Act* provide a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or willful concealment of facts material to the claim;
 - iii) that the provisions of the *Limitation Act* which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, be repealed; and
 - iv) that the *Limitation Act* be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's action is based on breach of duty, whether that duty arises under a contract, statute or the general law.

Vicarious Liability and Non-Delegable Duty

Consistent with the fundamental principles:

- e) That local government not be responsible for intentional misconduct by employees that would not, under any circumstances, be condoned or accepted by local government as the employer.

- f) That the doctrine of non-delegable duty not be retained where there is no fault attributable to local government in the selection of independent contractors to deliver local government services.

Implementation

- g) That the legislation to effect the above be introduced as soon as practicable, but no later than the spring 2003 legislative session.

5. RATIONALE FOR THE RECOMMENDATIONS

The full rationale supporting these recommendations appears in the joint paper by MIA and UBCM, which will be submitted to the provincial government. Some of the key arguments in support of the recommendations follows.

The basic rationale for the recommendations is the core value of individual responsibility.

The consequences of the failure to act run counter to the principle and will undermine the financial stability of local government and taxpayers.

The specific rationale includes:

- a) **Abolishing Joint and Several Liability**
- a) is an outdated legal principle – courts now assign proportionate responsibility.
 - b) legal principle predated expansion to economic loss.
 - c) is unfair to multiple defendants – if a sole defendant is insolvent there is no recovery; but local government becomes the “deep pocket” in cases where there are multiple defendants and some of those are insolvent.
 - d) concept arose in a period when there was immunity for building regulation liability and the opening of claims by subsequent owners.
 - e) class action lawsuits have broadened the scope of liability further.
- b) **Proportionate Liability**
- a) expands an already accepted legal concept.
 - b) is fundamental to the ability to properly manage one's risks.
 - c) is an accepted concept in many other jurisdictions.
 - d) offers fair and equitable treatment of all defendants;
 - e) incurs financial responsibility that is commensurate with each party's responsibilities.
 - f) supports quality construction in B.C. – with clear legal and financial responsibility and accountability for the quality of the work.
 - g) will improve the availability of insurance for all parties.
- c) **Ten Year Ultimate Limitation Period.**
- supported for the reasons stated in the BC Law Institute July 2002 report.
 - is an accepted concept in many other jurisdictions.
 - will improve the availability of insurance for all parties.

- d) Vicarious Liability Limits.
 - is consistent with the principle of individual responsibility.
 - no insurance available for these sorts of claims.
- e) Non-delegable duty limits.
 - is consistent with the principle of individual responsibility.
 - concept is fraught with legal uncertainty.
- f) Implementation
 - failure to act soon will only exacerbate a deteriorating financial condition.

6. RECONSIDERATION OF RELATED RECOMMENDATIONS

The recommendations on civil liability respond to an important initiative and a key interest of local government. There have been other resolutions related to liability or the building construction process that are needed as part of the larger response. Principal among these are:

- a) That the federal government be requested to provide relief to homeowners affected by damages due to premature building envelope failure.
- b) That professionals, such as on architects or engineers, be held responsible when local governments rely them for both plan review and inspections; or where local government relies on certified products.
- c) That *Local Government Act* (potentially *Community Charter*) limitation periods, indemnities and indemnification be reviewed and aligned with the recommendations above.

7. REFERRED RESOLUTIONS

There are three resolutions that were referred for consideration in preparation of this policy paper. Resolutions C40 and 42 are expressly encompassed by the recommendations in this report. Resolution C41 was addressed in amendments to the *Engineers and Geoscientists Act* at the Spring legislative session.