

Report arising from the 2007 Provincial trails Summit on Legal and Liability Issues

Preamble

This is a synopsis report to the General Membership of the Ontario Trails Council regarding issues, concerns and recommendations to the trails sector including government and planners of trails policy concerning issues related to trails insurance, liability and legal practices to promote and sustain trails in Ontario; as discussed during the strategic session on liability, legal change and insurance held at the Provincial trails Summit, May 16th, 2007.

Content

107 members of the Ontario Trails Council, representing trails managers from trail user groups, municipalities, insurance industry, risk management departments and land management offices convened to discuss issues of trail liability, regulation and legal reform.

The participants were divided into 8 groups of 10-14 persons and they were asked to respond to the following 3 questions:

- 1) Please identify as best you are able the top three issues in relation to insurance. Liability and legal reforms you would like to see.
- 2) Given the three issues you have identified, how would you suggest the Ontario trails Council and the Province of Ontario work to resolve or mitigate these issues?
- 3) If we were to work to resolve these issues what would you suggest to the Province it could do through policy to resolve your three issues? Locally, Regionally, Nationally?

Responses:

For the purposes of this report there will be two formats. The first will provide a complete listing of group responses by group in response to the questions answered. The second format will be a roll-up of the responses such that a basic interpretation allows for straight forward recommendation. These are the responsibility of the author and are designed to capture the essence and theme described.

Group 1)

Top Three Issues:

- a) Trail Use – who is using, enforcement, responsibility (volunteers? Park and recreation? Etc) individual's trail insurance (do they have it, need it?)
- b) Need for standardization of signage: requirements, what are they, cost, and minimum acceptable signage consist of what?
- c) Inspections: ongoing, whose responsibility? Frequency, documentation, distance (north), training (qualifications).
- d) Structures (Bridges): what are the [reasonable] requirements?

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Mitigation of issues:

- e) Education – early, ties into school curriculum, ownership through cleanups
- f) Umbrella supports: insurance and guidelines
- g) Maintenance and operational plan: trail design and signage, maintenance schedules, some mechanism for funding dollars to do the work needed, remote communities, model after program for Communities in Bloom
- h) Promotion of trails needed, but no promotion of particular trails unless the minimum standard is met.
- i) Emergency plan, for medical reasons paired with 911 programs

Policy Recommendations

- j) Locally: education programs, for kids and users, for trail managers
- k) Regionally: ensuring neighboring communities have same seasonal and trail requirements
- l) Provincially: to get \$'s grants/be included in Tourism, you must have a risk management/mitigation plan
- m) Disincentives: fines for prohibited uses, or only assigned trails, courts set reasonable upper limits
- n) National: establish clear policies on what is considered as reasonable practices, line fences changes, remote areas need more \$

Group 2)

Top Three Issues:

- a) Cost
- b) Assessing the risks – who, what, where, when, how?
- c) Natural hazards – i.e. fallen trees
- d) Money – costs to access qualified people who can carry out due diligence as requirements in policy.

Mitigation of issues:

- e) Policies that work: regular maintenance policy

Policy Recommendations :

- f) Local: establish standards by which trails are inspected and maintained – regularly scheduled
 - a. Consistent training for inspection maintenance and work of repair
 - b. Documentation: i.e. standardized checklist
 - c. Work protocol: date of completion , need to consider level of hazard and priority of remediation
- g) Regional: Consistent policy from one jurisdiction to another where the trail extends beyond the borders of one area to another.
- h) National: nothing noted

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Group 3)

Top Three Issues:

- a) Frivolous Lawsuits: Conflicting use
- b) Costs associated with risk management, how much is enough, at what point can we accept that natural areas have inherent risk through use
- c) Costs associated with litigation
- d) Do use agreements actually increase municipal liability? i.e. due to encouraging multiple uses

Mitigation of issues:

- e) Use agreements – spread risk over larger body
- f) Build trails to provincial standards, where they exist, or if they existed
- g) Develop requirements for user groups to have membership in provincial organizations, OFAH, OEF etc.
- h) Vette trails, master plans and/or risk management plans through the insurer
- i) Tort reform: “use at your own risk”
 - a. Develop standards for trails, for different uses, if they exist compile them and publish them, biking, ATV, equestrian, multi-use
 - b. Common identifiers, akin to ski hill ratings, i.e. beginner versus black diamond
 - c. Alternate dispute resolution: i.e. opportunity to mediate claims outside of judicial system

Group 4)

Top Three Issues:

- a) Development of Risk Management Plan and implementation programs: when to put up “use at your own risk signs” where can we increase use?
- b) Cost: more costly for rural areas
- c) Concern: someone getting hurt on trail anywhere
- d) Cost: where do you draw the line, need enough so that our liability is covered, but too much
- e) Injury issues, property damage, law suits frivolous, cost of insurance
- f) No provincial protection legislation exists

Mitigation of issues:

- g) Risk Management Policy and Practices: regular trail inspection, documentation, signage, process similar to playground supervision, management and inspection
- h) Recognized standards, own or in part
- i) Good communication between insurance companies, crown agencies, agencies, trail managers
- j) Basically need OTC to be liaison between trail bodies and the government
- k) Trail Standards need to be developed by the OTC membership that use existing support that become provincial standards but not provincial government develop the standards

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Policy Recommendations

- l) Provincially: to get \$'s for signage, work with the OTC and the OFSC to adapt their signage and risk management policies to adapt to individual trails with the OTC guidance, also add in the Bruce Trail
- m) Look at other jurisdictions where successful trails tourism economic development systems exist and copy best practices, e.g. Alberta, California, Sweden, Denmark, Vermont, New Hampshire, New Zealand, EOTA
- n) Look at other successful models don't need to reinvent.
- o) Needs broader trail coalition between public health, obesity and trails etc.

Group 5)

Top Three Issues:

- a) The entire liability issue can be ignored if everyone were required to be responsible for their own actions/safety.

Mitigation of issues:

- b) Education
- c) Regular maintenance
- d) Stewardship
- e) Signage
- f) Designated use areas

Policy Recommendations

- g) The entire liability issue can be ignored if ever yone were required to be responsible for their own actions/safety.

Group 6)

Top Three Issues:

- a) Insurance costs – unregulated pricing, differences in costs varies wildly
 - a. Individual partners/volunteers may not be covered
 - b. Aging infrastructure
 - c. Difficulty in financing, maintenance, sign replacement
 - d. \$'s small groups cannot sustain themselves due to additional costs in insurance

Mitigation of issues:

- b) Waivers
- c) Due diligence
- d) Risk Management plan most appropriate for your particular trail
- e) Trails Act provincially would be nice

Policy Recommendations :

- f) Locally: OTC designs and implements locally
- g) Regionally: provide clear understanding of due diligence , develop standard policies
- h) Provincially: limits on personal liability and premiums
- i) National: standardization across or Canadian umbrella

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A. Legislation Changes

In 2003 Ian Attridge presented the OTC with ideas regarding legislative changes that would aid the trail community. These are proposed legislated changes designed specifically to reduce the liability facing landowners, trail managers and operators thereby reducing costs related to risk of litigation.

The OTC has reviewed his recommendations in conjunction with the broader range of issues that arose during group discussion at the 2007 Provincial Trails Summit and is providing these areas that remain for positive change, as well as its own inferences of potential economic benefits to these changes as a sectional summary statement.

1) The Occupiers Liability Act - is amended to clarify certain terms thereby clarifying its intent for judges and litigants. It should:

- Clearly define recreational activity and recreational trail to mean both being on a trail and accessing a trail from nearby lands, related recreational uses such as canoeing or access points, and mixed uses of trails for both recreation and transportation
- Clearly define fee, benefit and payment to ensure that a landowners, occupier's or trail organization's receipt of payment for trail maintenance, administration, membership, insurance premiums, voluntary donations and the like for non-profit purposes cause the occupier to be subject to general duty of care.
- Specify that trail user voluntarily assume all risks when using a trail, regardless of whether or not the person is on the trail
- Specify that no claims for damages may be made by a recreational trail user in respect of property damage or bodily injury resulting from a defect in construction, improvement, signage or maintenance of a trail which meets prescribed or established sector standards (except under current limitations where user fees are charged or living accommodation is provided).
- Delete the reference to reckless disregards, since it is difficult to determine and complicates negligence law with a criminal concept.
- Expand the duty of care to include public parks predominately used for open space purposes, and physical recreation facilities with improvements that require regular maintenance for safe use.
- Expand the higher duty of care to include keeping visitors safe from the presence of non-recreational physical structures or improvements made in areas for visitors.

Economic Benefit to Ontario – these changes in clearer duty of responsibility will enable trail managers to correctly assess the potential liability they face. The likelihood of closure is diminished due to lawsuit or other actions.

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2) The Trespass to Property Act - should be amended to emphasize the seriousness of trespassing as an offence and its impacts on the willingness of private landowners to provide public access. Amendments should include:

- Raising minimum fines and damage claims to \$10,000
- Add authority for the judge who convicts a person under the act to prohibit entry of that person to a specific or class of properties or geographical area, the violation of which would result in contempt of court and other penalties
- Provide that access to private lands adjacent to trails is presumed to be prohibited unless otherwise granted
- Provide that occupiers of lands, which are the subject of trespassing charges, would be permitted to provide the court with a statement as to the impact of the trespassing on the occupier and his or her use of the property.
- Add additional enforcement measures to address the difficulties of identifying and apprehending trespassers.

Economic Benefit to Ontario: ensures a more level playing field when issues of responsibility for acts committed on trail lands are questioned, therefore the likelihood of trail closure is diminished due to diminished sole liability in event of an accident.

3) A New Act – The Ontario Trails Act - A new Ontario Trails Act and complementary amendments should be developed to incorporate elements from other jurisdictions. The Trails Act and amendments should include:

- Designation of trails on public lands, waterways, and on private lands with consent,
- Posting of trail signs,
- Land securement for trails e.g. purchase, donation, and temporary or permanent access agreements
- Protection of scenic and natural features along trail corridors,
- Research and education programs
- Responsibilities and agreements for government leadership, administration and maintenance of trails.
- Regulation and enforcement of trail uses with consideration for traditional use
- Prohibitions against alcohol consumption, creating disturbances or destroying property on or near a trail, with related funding of enforcement and policing mechanisms, outside of the non-profit sector
- Regulation of trail management standards,
- Broad operational enforcement powers.

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Economic Benefit to Ontario: ensures clearer lines of accountability and steering for trails related issues. Ensures that the insurance industry is aware of the standards of governance and professional steering of the trails industry. This should reduce the level of risk on trails.

4) The Ontario Heritage Act - should be amended to permit not-for-profit charities and other identified organizations to acquire trail access, scenic and conservation agreements over private lands and registers them on title with the landowners consent. Further amendments should streamline and strengthen easement procedures.

Economic Benefit to Ontario: ensures a long-term sustainability of access to the important trail requirement, land. It also ensures that this accessibility is not a burdensome cash flow problem as the likelihood of future low-cost supply is ensured. It also works to benefit landowners looking to provide land to parks or trails.

5) The Provincial Parks Act and the Class Environmental Assessment for Provincial Parks – should be amended by Ontario Parks to designate a new class of Park a “Corridor Class” or “Trails Zone”, that would speak to the unique management of trail, forest and water adjacent to trail right of ways.

Economic Benefit to Ontario: ensures that there is recognition that Trail Economic Zones are valued and declared. Works to ensure that there is a class of park devoted to trails issues within the Provincial Parks system. This will ensure resources of all types; technological, human, financial are supplied to maintain this important park sub-system.

6) Public Lands Act and the Crown Forest Sustainability Act - these acts should elaborate and consolidate provisions for trails. This would require that appropriate planning; safety, environmental, management and public consultation processes are in place during the trail development process.

Economic Benefit to Ontario: ensures that there are planning standards in effect that draw upon known professional expertise in the implementation of any trail system. This will ensure that known standards are enacted that reduces liability and insurance costs.

7) Income Tax Acts – should be amended to permit landowners that donate a trail easement or a long- term trail access agreement to receive a charitable tax credit for the agreements appraised value.

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Economic Benefit to Ontario: encourages the donation of lands, but also acknowledges the act of donation in that if the property were sold it would garner a probable market rate. Landowners should receive fair market value for the donation. This donation would also aid in the equity position of the charity issuing the receipt.

8) Assessment Act, Provincial Land Tax Act, Municipal Act – should be adapted or developed to provide tax relief for landowners, including landowners who permit trails or commit to long term trail, scenic, conservation or other easements on their properties.

Economic Benefit to Ontario: encourages the donation of lands. The Acts should also develop additional equity provisions that allow trail management organizations to benefit from the body of land they are using in trust. This would allow non-profit organizations to benefit from other positive aspects of other legislation, i.e. Environmental Policy, Health Benefits etc; these could accrue to the trail organization to offset operating costs.

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2. Policy Adjustment and Process Enactment

There are a number of significant policies and process changes that could be made that would have profound operational impact on the trails industry. They can be achieved through promotion and enactment of specific strategic planning financial supports.

These changes would include the policy and process recommendations needed to enact the changes recommended in the Funding Stability, Insurance Control and Legislation sections already discussed. Generally these policy and process changes would fundamentally secure safer trails operations and greater trails efficiencies due to:

- better early recognition of issues facing trails operators.
- Allow for better planning, maintenance and supervision of trails.
- Utilization of best practices across the trails industry.

The OTC and its government partners have accomplished most of the groundwork. These included 4 significant policy decisions:

- Streamline Relationships: A 'one stop shop' idea in-which the provincial government assist in the creation of an organization for trails development, maintenance and operations legitimacy where resources can be found to research and resolve problems, issues and barriers to efficient and effective trail networking.

Proposed Action: Financially support the Ontario Trails Council to move forward with the government as its 'One stop shop' partner.

- Enhance the Lead Ministry: The Province of Ontario adequately supports and funds the lead Ministry to work with the Ontario Trails Council to deal with all trails matters, from capitalization to operations, and from standards to safety.

Proposed Action: The OTC would specify that the ministerial group deal with one umbrella organization partner from the trails sector – OTC. This would help the government capture its goals of recommendation 6 of the Workshop: The provincial government recognize and use the resources of the wide spectrum of trails NGO's for a variety of planning, environmental scanning, trail management and development issues.

- Develop a Trails Institute: Or a so named Institute of Ontario Trails is established as soon as is practicable.

Proposed Action: Funding a strategic planning process that includes, as its mandate the development of a trail institute would begin this process.

3) Control Insurance Costs for Ontario

This problem would be addressed immediately by instituting a financial rebate mechanism similar to the one offered to customers of Ontario Power Corporation.

In the event that a not-for-profit or trails agency has suffered a three times or greater insurance cost increase in a period of 18-24 months the government would provide a yearly cost recovery of 75% of the total cost of the new premium.

This would allow for the not-for-profit organization to continue working within its existing structures to enact economies for insurance, while reducing the crisis environment that currently exists.

The rebate would allow for immediate sector stabilization ensuring that recreational activities and recreational trail earning continue to accrue, while allowing the sector to engage in best practices and other options to reduce costs or create funding sources for insurance.

This would also allow the motorized trails community the opportunity to educate the other sectors on positions and practices it may need to enact in order to prepare for the future.

Enacting such a process would also prepare structures and mechanisms within government in the event that the insurance crisis spills into the non-motorized and municipal communities.

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Attending Participants:

Dayle Abrams		Eastern Ontario Trails Alliance
Carol-Anne Albertson		Min. of Natural Resources, Land Information
Steve Alcock		Park to Park Trail Association
David Alexander	Councillor	
Dan Andrews	Manager, TCTO	Trans Canada Trail
Ian Attridge	Lawyer	
Darcy Baker		Niagara Peninsula Cons. Auth.
Marcia Barrett	Executive Director	Ontario Equestrian Federation
Brian Baty	Chairman	Regional Niagara Bicycling Com.
Tom Beaton		Chatham Kent Rec. & community services
Paula Berketo		
Martin Berzins		Niagara Falls Trails & Bikeway Com.
Lorna Boratto	Nurse	Oxford Health Unit
Mr. Boratto		
Peter Boyce		City of Welland
John Broderick	President	OFATV
Al Buck		OFTR
Jan Smith-Bull		Town of Caledon
Cindy Cassidy	Executive Director	Eastern Ontario Trails Alliance
David Clark		
Marie Clarke		Hastings & Prince Edward Counties Health Unit
Jeff Claydon		City of Niagara
Dan Cousins	Manager, Parks & Rec	Prince Edward County
Patrick Connor	Executive Director	OTC

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Diane Czapla		Town of Midland
Wayne Daub	Executive Director	OFATV
Philip Davies		Lake Simcoe Cons. Auth
Graeme Davis		County of Simcoe
Jack deWit	President	OEF
William Donohue		Bluewater Trails
Frances Edmonds		Delhi Rail Trail
Mary Edmonds		Delhi Rail Trail
Gayda Errett		Friends of Ont. Rec. Trails
Mike Farr		OFSC
Ken Forgeron		Niagara Planning & Dev. Dept
Susan Freeman	Councillor	Lanark County
Lional Gadoury		Context Creative
Rick Gray		Chatham Kent Trails Council
Stuart Green	City of StCatherines	Rec. & community services
John Gregoire		Timberline
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David Hahn		Township of South Frontenac
Signe Hansen		Town of Fort Erie
Michael Harding	Mayor	County of Oxford
Warren Harris		Town of Halton Hills
Jim Hayes		County of Oxford
Brad Hertner		Upper Thames River Cons. Auth.
Wendy & Heinz Hoernig		Hike Ontario
Ken Hoeverman	Executive Director	Ontario Federation of Trail Riders

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Julia Hogan		Discovery Routes Trails Organization
Don Holmes		County of Brant
Marjory & Richard Hotte		
Robert Howse	Councillor	Town of Niagara- On-The-Lake
David Hunt		Cycle Ontario Alliance
Lori Ingriselli		Park to Park Trail Association
Suzanne Jelley		OTC
Thom Jenkins		Ministry of Health Promotion
Dan Jones		Upper Thames River Cons. Auth.
Georgia Kapelos		Ministry of Citizenship & Immigration
Tarra Kelly		Context Creative
Brian Kemp		Lake Simcoe Cons. Auth
Deborah Kidd		City of Niagara
Mike King	Insurance Broker	Capri Insurance
Mark Kiteley		Ministry of Health Promotion
Richard Knobbs		Fontasy
Rod Lafontaine	Trail Coordinator	Menesetung Bridge Association
Rob Lang	Treasurer	OFTR
Al Leach		Saugeen Valley Cons. Auth.
Bill Leask		County of Brant
Terry LeRoux	President	Hike Ontario
Al MacPherson		
Dan Major		City of Woodstock, Parks Dept.
John Marsh		Trent University
Bev. McCarthy	Past president	city of Brampton

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Jennifer McCourt		Discovery Routes Trails Organization
Marylin McCrea		Orange group
Rob Mcdonald		City of Niagara
Jim McGrath	Ontario Realty Corp.	Public Infrastructure Renewal
David McLaughlin		
Margaret Misk-Evans		County of Oxford Ausable Bayfield Cons. Auth.
Kate Monk		
Heather Morrison		County of Grey
Jeff Muzzi		County of Renfrew
George Nicholson	Director	Niagara Regional Planning Dept Ministry of Health Promotion
Carol Oitment	Policy Advisor	
Kevin Okimi		
James O'Neil		Town of Pelham
Patrick O'Reilly		City of Kawartha Lakes
Dennis Paris	for president's dinner only	Niagara Timber-Line riders
Judy Pease		Town of Lincoln Ontario Fed. Of Anglers & Hunters
Robert Pineo		
Frank Prospero	Executive Director	Get Active Now
Ron Purchase		Ontario Federation of Snowmobile clubs
Kathy Purchase		
Marjorie Rosetto	Insurance Claims Analyst	Municipality of Niagara Niagara Parks Commission
Robert Ritchie	Parks Naturalist	
Cynthia Roberts		City of Niagara Kestrel Forestry Consulting
James Rogers		

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Janie Romoff		Ministry of Health Promotion
Nancy Rosset		FedNor
Harold Sellers		Hike Ontario
Bonnie Simpson	Physically Challenged trail advisor	
Tanya Southwick		OFSC
Kirsten Spence		Trans Canada Trail Niagara Bruce Trail Club
Barb Skelton		
Mark Schmidt	Director	IMBA Ministry of Health Promotion
Craig Stewart		Park to Park Trail Association
Tom Sutclift		
John Swart		Niagara Freewheelers bicycle touring club
Barb Szychta		Cowan Insurance
Warren Thaxter		OFTR
Leslie Thatcher		Independent
Bruce Timms	Councillor	Regional Municipality of Niagara
Eugene Todd	Director, Parks & Rec	Municipality of Port Hope
Russ Vamplew		Bluewater trails
Marion Watkins		
Tim West		OFSC
Chris White		Upper Thames River Cons. Auth. Park to Park Trail Association
Tyana Wilson		
Peter Wood		OF4WD
Tim Wood		Credit Valley Cons. Auth.