

TRAIL LIABILITY AND OTHER REFORMS IN ONTARIO: A DISCUSSION PAPER

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INTRODUCTION

Increasingly, trail organizations are encouraging the development of trails in Ontario, including the provincial Trillium Trail Network and the Trans -Canada Trail. Landowners and other users appreciate the opportunities trails provide to explore the countryside and participate in recreation. In some cases, these trails pass over private lands with the consent of the owner, or may have effects on neighbouring private landowners.

There are a range of benefits and liability concerns for both trail promoters and for land owners and managers. The benefits, such as tourism and health, are increasingly recognized. For landowners, there is growing concern about public access that may result in trespassing or injury and potential law suits. Many rural landowners have heard of incidents where an owner's insurance premiums have increased as a result of an accident claim. With an increase in concern and insurance costs, there is a real risk that some landowners will be forced to prohibit access even though they would prefer to make access available. Unfortunately, this would close or significantly change trail routes, reduce tourism promotion and undermine economic development investments. Accordingly, there is an immediate need to address these concerns in order to retain and expand the many benefits trails provide.

The Haliburton Highlands Stewardship Council has taken a strong interest in this issue of landowner liability for recreational trails and other public access. Concurrently, the Ontario Trails Council and other organizations have been advancing a trails policy for Ontario. Within the proposed framework policy and through other avenues, a number of legal issues relating to trails have been identified, including liability concerns. Given these related interests and with financial and other support from Ontario Stewardship, the Haliburton Stewardship Council initiated the Trail Research Project. The Ontario Trails Council and Trent University's Trails Study Unit were brought in as partners with particular expertise and resources. Other individuals and organizations participated in meetings and consultations as the Project unfolded.

At the outset, the Project established a plan to research trails issues in three main areas: liability, other legal developments and economic benefits. Based on the research, this Discussion Paper has been developed to provide background and recommendations to address the identified legal and policy issues. Further consultation beyond this Project will then be required to advance and implement the recommendations.

Complementing this Paper are several discrete documents, attached as Appendices, which provide further background on the issues identified in the Project:

- a summary of results of a survey on trails issues (Appendix B);
- a summary of Ontario's and other provinces' legislation affecting trails and liability, with reference to related court cases (Appendix C);

- a review of trail benefits (Appendix D); and
- research results on property values near trails in central Ontario (Appendix E).

PROJECT MANDATE AND METHODS

The Trails Research Project was initiated in April 2001. The intent was to better understand trail liability concerns and opportunities and to position the resulting recommendations within a larger initiative to address trails legislation and policy in Ontario. By putting these issues within a larger context and engaging the Ontario Trails Council and Trent University's Trail Studies Unit as partners, it was felt that broader expertise, support and momentum for the recommendations could be achieved.

Initially, the Project set out a research plan focussed on three key parts: a review of trails liability issues, exploration of other trail -related legal issues, and a summary of the economic benefits of trails. A Trails Research Project Steering Committee was also established, which included:

- Haliburton Highlands Stewardship Council: Brent Wootton, Carolyn Coburn, and Steve Wilkins (later of Ontario Stewardship)
- Ministry of Natural Resources - Ontario Stewardship: Jim Faught (later of the Federation of Ontario Naturalists)
- Ontario Trails Council: Bill Bowick
- Trent University's Trail Studies Unit: John Marsh and Alan Brunger.

Over the course of the 18 month Project, some of the Steering Committee members moved on to other responsibilities but remained involved and supportive. Other individuals also contributed their time and efforts during the Project, including research assistants Michèle Moore and Jim Killen and respondents to the Project survey.

The Project's research explored the three areas of interest and did so through a number of means. There is a wealth of experience and practice with these issues available through landowners and Ontario's trail and stewardship organizations. Accordingly, the first means of research was a survey developed to canvass this experience, assess appropriate practices and identify directions for legal and policy reform. After consulting with the Project partners, the survey was distributed to members of the Haliburton Highlands Stewardship Council, all other Ontario Stewardship Councils, and to the Ontario Trails Council's list of trail organizations in the province. A total of some 250 surveys were distributed across Ontario (not including copies sent to individuals within an organization), with a substantial participation rate of 29 percent and helpful comments from 73 respondents. The results of the survey are presented in Appendix B and highlights are included in the main text of this Paper.

Second, because liability concerns are driven by legal standards of care, legislation and law suits (or at least fear of them), legal research was undertaken to more fully understand the nature of liability standards and possible responses. Legal searches for

court decisions and legislation in Ontario, across Canada and elsewhere dealing with recreational trail liability and related issues was also conducted. A cursory review of related legal developments that might affect the course of liability issues in the future was also made. The results of this legal research is incorporated into this Paper and a summary of legislation and cases is found in Appendix C. During the course of this Project, trail insurance rates have climbed steeply. Trail organizations have sought answers and solutions, and this Project has benefited from this effort.

Third, research on the benefits of trails was also undertaken. This analysis examined and compiled existing studies (see Appendix D) and also conducted original research on whether properties nearer to central Ontario trails have premium property values (Appendix E).

One of the unanticipated results of the Project has been involvement with several trails organizations and government agencies on trail insurance and broader open space economic benefit research. While these initiatives have yet to be completed, they point to the value the Project can contribute towards complementary initiatives and building a broad base of support for implementing the Project's recommendations.

This Discussion Paper has been prepared to reflect this research and make recommendations for legal, policy and other reforms in relation to liability and other trail issues. Further recommendations are made to foster a better understanding and recognition of trail benefits. As anticipated in the original design and funding of the Project, this Discussion Paper is only the first stage in the effort to reform liability and trail legislation, policy and practice. Further steps and funding will be required to work with landowner, trail, stewardship, agricultural and other sectors to refine the recommendations, bring them to governments' attention, and sustain engagement until they are successfully implemented.

TRAIL LIABILITY ISSUES

Issue

Landowners have a variety of concerns about liability for trails and other access on their properties. Among others, these concerns include: damage or injury by or to users who are either on or nearby to a trail; trespassing into unauthorized areas or with unauthorized uses; escape of and damage by livestock from damaged fences or opened gates; and the aggravation and higher insurance premiums resulting from the defence of frivolous law suits.

These legitimate concerns give rise to several issues which are a main focus of this Project. How can landowners offer public access without incurring undue liability and excessive insurance premiums? How can landowners prevent the problems of

trespassing when limited access is provided? How can collaboration with others assist in these objectives?

With the risk looming of landowners closing trails, it is important to address these issues at both the larger strategic level and also for site-specific solutions available for landowners. This part of the Discussion Paper explores the actual experience of trail incidents, then provides background on relevant law and insurance. The Paper then addresses non-trail liability and trespassing situations, and particular measures landowners can consider to decrease their liability exposures.

Discussion

The Project set out to determine what is the actual experience of injury and liability on trails. The Project survey generated data that suggests there are few and infrequent incidents with little liability on trails. Minor incidents (e.g. poison ivy rash, scratch), moderate incidents (e.g. twisted ankle, dizziness) and severe incidents (e.g. broken bones, heart attack) occurred predominantly only one to five times a year, versus such frequency per month or week. In the last five years, evacuation of an injured trail user had never occurred for half of the respondents while the other half reported just one to five incidents. The provision of medical assistance on site was slightly more rare, with it never occurring for 57% and one to five times for 39% of respondents. No respondent trail organization or individual had lost a liability lawsuit, and only 6 percent had settled a claim. Unfortunately, more detailed data on claims and settlements was not available from other sources, due to the need for organizations and insurers to protect confidentiality and proprietary and legal interests.

The survey also identified several significant factors leading to trail accidents:

- User inexperience 66%
- Equipment problems 41%
- Alcohol or drugs 32%
- Interaction with other users 21%
- Inadequate group leadership 19%

These results point to opportunities to reduce risks, injury and liability.

Legal Background

A landowner's liabilities may arise in several situations:

- taxes and other regulatory issues;
- environmental clean_up of contamination;
- nuisances caused to neighbouring lands;

- breach of the terms of a contract; and
- occupier's liability (negligence) for injuries to or damage to the property of visitors.

It is the latter concept of occupier's liability that will be the focus of the discussion in this Report. An "occupier" includes not only the land owner but also the person with care and control of the property, such as someone leasing it.

Occupier's liability arises at law from a number of sources. It is a branch of negligence law which contains several elements before liability is established. First, there must be the existence of a legal duty and standard to take care of visitors and their belongings while present on the property. Second, a breach of this duty and standard must have occurred. Third, the breach must have caused the visitor's injury or property damage. Other factors which become involved include: who may share this duty of care, the extent of injury or damage, or knowingly contracting away the right to sue. Defences against liability may be raised where there is an act of God, the visitor voluntarily assumes the risks, or there was contributory negligence (actions by the visitor which contributed to the negligence, injury or damage).

Courts have established these principles over many years and have distinguished three categories of entrants onto lands: trespassers, licensees entering for a particular purpose (e.g. delivery persons, contractors), and invitees entering as guests. With the courts awarding higher liability awards under these concepts, the Province of Ontario recognized the need to have clearer guidance on occupier's liability and trespassing and to encourage rural landowners to allow recreational land uses with less fear of being sued by injured users. Accordingly, the *Occupier's Liability Act* (OLA) and the *Trespass to Property Act* (TPA) were passed in 1980 to remove the complexity in court judgements and to encourage recreational uses¹.

The *Occupier's Liability Act* contains two standards of care which set out the responsibilities of the land owner or manager to visitors. The first standard of care is the one which is generally applicable to all situations, including on lands or in buildings:

3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and [their] property ... are reasonably safe while on the premises.

In the variety of situations relevant to rural lands and trails detailed below, the occupier is subject to the following reduced standard of care:

4(1) ...the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

Under certain circumstances, a person entering a property is considered to have

willingly assumed all risks. This allows the occupier a defence against liability so long as they meet this reduced duty of care. The occupier is subject to this reduced duty of care when:

- a. entry is prohibited under the *Trespass to Property Act*;
- b. the occupier has posted no notice and has not permitted entry; or
- c. entry is for a recreational purpose and: (i) no fee is paid for the entry or activity (other than payment by a government or non-profit recreation club), and (ii) the occupier does not provide the person's accommodation.

This reduced standard of care only applies on premises that are: agricultural, vacant, forested, wilderness, golf courses when not open for play, utility corridors (except utility structures), unopened road allowances, marked private roads, or recreational trails reasonably marked by notice as such. Under the *Motorized Snow Vehicles Act* (MSVA) and the *Off-Road Vehicles Act* (ORVA)ⁱⁱ, a landowner is also subject to this reduced duty of care when the person entering the property does so on or is towed by a snowmobile or an off-road vehicle.

Related to trails are the responsibilities for maintaining roads, highways and rental premises. These are found in the *Highway Traffic Act*, *Municipal Act* and their regulations, among others. Section 308 of the *Municipal Act* allows municipalities to pass by-laws regulating use of sidewalks and highways under its jurisdiction, and also holds municipalities liable for any want of repair of a highway that may result from construction, maintenance or use. Paths, walkways and driveways must be "maintained to provide a safe surface for normal use" by landlords under the *Tenant Protection Act's* maintenance standardsⁱⁱⁱ.

While not strictly an issue for landowners or occupiers, other players involved with trails may also have related responsibilities. Leaders of trail outings are usually not occupiers and thus they are not liable under the OLA. However, they still may be liable under the *Negligence Act*^{iv}. Leaders would be expected to exercise the skill and judgement of a competent leader, including assessing participants' skills and experience, choosing suitable trails, warning of known hazards, and acting to prevent foreseeable accidents. The Project's survey asked who should be responsible for activities on trails: landowners, users or both. The results strongly supported trail users assuming primary responsibility for their activities, although some felt that it should be shared with landowners. Landowners were split 4 to 1 in favour of sole user responsibility, while trail organizations and government respondents were split 2 to 1 in this direction. The *Occupier's Liability Act* largely reflects this emphasis, with trail users assuming all risks while landowners are only liable for deliberate dangers or disregard of the presence of trail users and their property.

Ontario's OLA was the first legislative attempt to reduce and specify this standard of care in Canada. The Project's review of other provinces' legislation on occupier's liability reveals that several provinces (British Columbia, Nova Scotia, Prince Edward Island)

have replaced the courts' common law standards with liability standards similar to those in Ontario. For trails in particular, occupiers owe no duty of care to a trail user except to not create a danger with deliberate intent of doing harm or damage to the person or the person's property; Ontario and B.C. add the "reckless disregard" concept quoted above. Nova Scotia's *Trails Act* applies this standard "whether the person is on the trail or not". PEI has legislated this same principle and goes further to establish that no claim for damages may be made by a recreational trail user in respect of "damage to property or bodily injury resulting from a defect in construction, improvement or maintenance of the trail".

Almost all States in the United States have passed "recreational use" statutes in order to encourage recreational uses on private lands and modify responsibilities set out in either the common law (judge's decisions over time) or as established by statute. All of the State laws remove liability for recreational use, but then either provide that there remains some duty of care or specify under what circumstances liability may result^v. As in Canada, typically these U.S. laws will impose liability for "wilful", "malicious", "reckless disregard", or "grossly negligent" conduct. This adopts the criminal law concept of having a particular state of mind, but it is not one of the elements of negligence law (which simply examines the act itself, not the intent). Many U.S. State laws specify that certain types of payments by a government, for maintenance or administrative or donation purposes, or up to certain maximum amounts will not invalidate the protection from liability provided under the statute.

Ontario's *Occupier's Liability Act*, *Motorized Snow Vehicles Act* and *Off-Road Vehicles Act* were intended to reduce liability for landowners in the identified situations. To some degree they clarified expectations of landowners and resolved some of the uncertainties found in judge's decisions. But have judges responded in their decisions?

During the Project a search was made of all court cases in Canada which reference trails, occupier's liability and related concepts (see Appendix C). This research highlighted several conclusions. First, landowners are rarely held liable for recreational trail accidents; courts tend to hold trail users responsible for assuming the risks, as set out in the OLA. Of eight reported trail liability cases in Ontario, and three under similar standards elsewhere in Canada, only four have held the occupier wholly or partially responsible. Of these four, two held that a toboggan hill in a city park and a railway line were not a trail (and thus these liability protections were not applicable) and two found that occupiers strung wires across roads with reckless disregard of the previous presence of snowmobilers. Thus, except in circumstances with considerable disregard for the presence of others, the courts have not found landowners liable for accidents on trails.

The second conclusion is that the injured person has the burden to show that the occupier deliberately created a danger, and this is rarely held to be the case. Third, rugged terrain and use of a motorized vehicle place more of the obligation to take care upon the user.

Insurance Background

Given these conclusions about the statutes and case law, is there really a problem? Unfortunately, the answer from landowners and trail organizations remains a clear "yes". This is because insurance premiums for both groups continue to rise in response to a growing number of claims, increased scrutiny and a variety of pressures on the insurance industry at large.

Obtaining general liability insurance for trail organizations, which typically also cover trail owners and sometimes adjacent landowners as well, has become difficult and expensive for 2002. This has created the situation where the Ontario Federation of Snowmobile Clubs has had insurance premiums rise ten fold while other user groups have seen premiums also rise by at least a third. Some limitations in the policy coverage have also been experienced: the Ontario Trails Association's current policy does not cover occupiers or adjacent landowners (thereby dissuading some landowners) nor the users of the member organizations' trails; and insurance packages will cover shared-use trails but not ATV user groups.

This situation is due to a variety of factors. At the insurance industry level, the impact of the \$80 billion claims arising from the attacks of September 11, 2001 in the United States has caused premiums to rise in order to pay for these claims and the higher cost of reinsurance through international insurance companies. Profits on insurance company investments have also declined with lower interest rates and falling stock market returns, thereby reducing the ability of this component of the industry to keep premiums lower. Where certain insurance markets became unprofitable, or too risky, insurance companies have now declined to provide coverage, or do so only with higher premiums and deductibles. This has reduced both competition and the insurance options available to landowners and trail organizations alike.

Other factors have also been in play. Increased scrutiny of snowmobile trail maintenance and operations has also occurred during a recent coroner's inquest into a fatal accident. Litigation, or the bringing of law suits, has become more common in our society, resulting in larger insurance claims in other sectors. Lawyers in Ontario just recently became able to use contingency fees to bring law suits. This means that lawyers can take on less certain cases with the reward of sharing in a portion of the court award if successful. This approach has contributed to the increase in the number of law suits and resulting damage payments in the United States.

It is practically impossible to prevent the initiation of law suits which appear to have no merit, often known as frivolous cases; the courts allow people to pursue their perceived rights as they see fit. Once initiated, however, there are means to control whether and how they proceed through the court system. If there is a valid reason why someone who is sued should not be named in the law suit, then that person can go to court early in the

process and ask a judge to be removed from the suit. There is a rule of court procedure that says that if a settlement offer is made but rejected and the judge's decision is eventually more favourable to the party making the offer, the party who made the offer will be awarded their costs for participating in the law suit. This encourages parties to settle out of court and avoid the public burden and expense of the court system. Similarly, a party who succeeds at court typically is awarded their legal and other preparation costs, and sometimes additional costs. All of these approaches to awarding costs are designed to dissuade parties from pursuing cases that are of little significance or which they have little chance of winning. While obtaining legal representation to initiate a law suit is expensive at the outset, contingency fees will reduce this barrier in the future.

When someone is held liable by a court, they may be held liable for damages occurring from out of pocket expenses (e.g. medical expenses, loss of future earnings), pain and suffering, and occasionally punitive damages. If a court finds more than one person liable, that person is "jointly and severally" liable, meaning that they may be required to pay the entire amount of the judgement regardless of their portion of responsibility. They can try to recoup the portion found to be the responsibility of others, but this places an enormous burden on any party and their insurer in a liability law suit. A ny action to recoup payments from others may prove unsuccessful if the other party has no resources or insurance. It is now wonder that public agencies and others with "deep pockets" are often added as defendants to a law suit.

As insurance premiums have risen, larger institutional landowners and public agencies have responded with a variety of strategies. Some accept higher deductibles to keep premiums affordable and within previous years' budgets; many have also attempted to transfer the risk to others. Their policies cover the full range of activities on their lands, often with higher risks than those associated with a trail (e.g. playgrounds, roads, buildings, etc.). Accordingly, for trails on their properties they often now require that the trail organization assume responsibility for managing the trail, have a "save harmless" agreement to transfer any liability to the trail organization, and extend insurance coverage to the landowner as a additional insured under the trail organization's liability insurance policy.

In many cases, this has resulted in over-insured trails and uses^{vi}. For example, the landowner or tenant has either institutional insurance or is covered by homeowner or tenant's insurance for non-motorized uses. The trail organization has liability insurance and the user has either homeowner or tenant's insurance or specialized insurance through membership in a motorized user organization. While somewhat confusing and overlapping, this also creates the opportunity to streamline insurance coverage and apply savings from layers of coverage to reduce the total of premiums paid.

As to the extent of insurance coverage, the Project's survey found that 82% of trail organizations have insurance, with 55% reporting coverage of \$2 million. Some 73% of landowners have insurance, with half insured up to \$5 million per incident. Government

agencies have a somewhat lower frequency of being insured (perhaps due to self - insurance arrangements) and only a third had coverage of \$5 million.

Insurance companies prefer to have larger pools of insureds in order to spread the risks more widely. Unfortunately, trails (and occupiers' liability more generally) are not a large segment of the insurance market. There are few insurers who provide policies to cover trails (and even fewer for motorized uses), and the larger dynamics in the insurance industry overwhelm this segment.

Unfortunately, neither the survey nor inquiries of organizations or insurance industry representatives was able to identify the number or size of occupier's liability claims for trails. This is in part due to proprietary and client confidentiality but also to the general practice that the statistics reported by insurance companies to the Insurance Bureau of Canada or Statistics Canada do not separately track trail or occupier liability claims.

Some individuals have suggested that trails and perhaps other recreational uses could develop a self-insurance scheme and thereby reduce premiums. The Ontario Municipal Exchange and the Ontario School Board Insurance Exchange are examples of public body self-insurance arrangements in this province. However, due to the small size of the Ontario trails community, the limited resources of the trails community across the country, and the high capitalization required to back up self -insurance, a recent trails insurance review concludes that it is unlikely that trails and associated activities could become self-insured^{vii}.

Another variation on insurance is no fault insurance. This has been adopted in some jurisdictions for car insurance, with each vehicle and driver being required to carry insurance. While drivers of snowmobiles and ATVs on public trails must have insurance, it would be more difficult to apply this requirement to self -powered uses of trails. Hiking, cycling, horseback riding and skiing tend to be more casual, local and diffuse in nature. Unlike regular police patrols on highways, these activities and locations would be harder to monitor and to enforce an insurance or user card requirement. These different situations and challenges are also reflected in the debates over schemes for trail user fees.

The courts, legislation and insurers make distinctions between, on one hand, motorized trail vehicles and trails where motorized vehicle access is permitted, and on the other hand, non-motorized uses and trails. While multiple use trails and uses are supported in many communities, it is apparent that legal, insurance and management practices will need to address this distinction more clearly.

Landowner Liability In Non-Trail Circumstances

A number of other situations involve access onto private property in situations other than for trail purposes. These situations include public access from trails onto adjacent

lands – trespassing by trail users was a substantial concern expressed by 85 percent of all Project survey respondents. Other situations may be public use of portages on private lands and the control of various uses on private roads and lands. While trails have been the focus of the Project’s research, these particular circumstances have a close relationship to many of the same landowner concerns as well as similar legal, insurance and related responses.

At the same time as the OLA was legislated in 1980, the *Trespass to Property Act* (TPA) was passed in order to give occupiers more control over entry and use of their property while encouraging recreational access. The TPA defines when trespass occurs, sets out means to notify what uses are permitted, creates an offence for trespassing, and sets out stronger enforcement powers and penalties than existed previously.

Under the TPA, where entry is prohibited or no notice respecting entry is posted or otherwise expressly permitted, the *Occupier’s Liability Act* then provides that only the reduced standard of care applies. This reduced standard also explicitly applies to private roads reasonably marked by notice as such. Notice can be provided by sign; the TPA specifically sets out acceptable means by which to name, graphically depict, and use oblique lines or red or yellow markings to identify permitted and prohibited activities. Notice may also be provided orally or in writing. Further, access to certain types of lands are deemed by law to be prohibited without any notice:

- (a) a garden, field or other land under cultivation (this includes a lawn, orchard, vineyard, agricultural woodlot, and land with planted trees less than 2 metres in height); and
- (b) premises enclosed in a manner that indicates the occupier’s intention to keep persons out or keep animals in.

The TPA recognizes that some persons may be authorized to enter onto lands. This will include persons who reasonably believe they have title to or a legal interest in the lands as well as persons authorized under other legislation (e.g. a surveyor, prospector, or regulatory inspector).

Where a person has been convicted of the offence of trespassing, the judge deciding the case can assess a fine up to \$2000, award compensation for property damage up to a maximum of \$1000 and, if a private person (such as the landowner) prosecutes the case, order the trespasser to pay the private prosecutor the reasonable costs of conducting the prosecution. While helpful to some degree, the maximum fine and damage compensation amounts are modest and do not reflect higher penalties under other statutes or maximum amounts for small claims courts. Enforcement officials and courts typically consider trespassing to be a minor offence and thus do not seek nor assess substantial penalties. The potentially serious and often repeated effects of trespassing, such as damage to fencing and other structures, vandalism, pollution, plus invasion of privacy, are rarely fully appreciated.

Regardless of the penalties, there remains the problems of enforcement, obtaining a conviction and thereby invoking such penalties. On rural lands, trespassers are rarely seen or identified but their presence, litter and sometimes damage is too often evident. The TPA authorizes some measures to address this situation: the burden is put on the person entering to prove her or his authority for entering; the occupier or her or his agent may arrest a trespasser without warrant; and the owner of a motor vehicle is liable where trespass occurs by means of that vehicle. Nonetheless, it will continue to be a challenge to identify trespassers and bring them to justice.

One type of person authorized to cross over private lands is someone portaging a boat and their belongings from one body of water to another. Under the *Public Lands Act*, the patenting and granting of lands from the Crown to private individuals is subject to the right of any person travelling on waters connected by a portage to pass over the portage with their belongings without the permission of or payment to the land owner^{viii}. A person who hinders or obstructs such passage over a portage is guilty of an offence. This right of passage over a portage is not explicitly reserved to the Crown itself and thus the liability for the condition of the land is uncertain. In the *Canoe Ontario v. Reed* case, the judge held that the public right to travel a navigable waterway did not give rise to a right of portage over private lands that, apparently, had not been public lands over which a portage had existed before the Crown grant of the lands^{ix}. This case also raised -- but did not decide -- the issue of potential landowner (but not Crown) liability if a portage right was granted. Portages would be typically used for a recreational activity and are often in rural, undeveloped, forested or wilderness areas. Accordingly, a landowner found to be responsible for a lands over which a portage existed would likely be held to the reduced standard of care under the OLA.

What Can Landowners Do to Reduce Liability?

As identified earlier in this report, landowners have a number of concerns about liability for injuries to visitors on their properties. The following provides some practical approaches and strategies to be considered in appropriate circumstances. Other recommendations in this Paper to modify the duty of care, clarify circumstances when liability will and will not occur, and address insurance, trespass and education issues will also help alleviate landowners' liability concerns.

Risk management is a key concept in reducing liability. It involves taking steps to identify potential risks and to evaluate their potential frequency and magnitude of loss. For example, one risk may be that many walkers will stub their toes but the magnitude of loss will be minimal. Once risks have been identified and evaluated, they then must be addressed, either through risk avoidance, reduction, retention or transfer.

Several practical approaches can be suggested:

- (c) Avoidance: prohibit certain uses or access to high risk areas, such as trail bike access near steep cliffs.
- (d) Reduction: regularly inspect, address and warn about hazards where people may enter onto the property (either by invitation or by trespass).
- (e) Retention: after assessing risks, make an informed decision to retain some risks such as small or infrequent losses (e.g. cattle escaping through opened gates onto a neighbour's field).
- (f) Transfer: several means may be used to transfer liability, including obtaining insurance, having hold harmless agreements, and leasing or contracting out the use and management of public access areas such as trails.

It is worth elaborating below on this latter point about transferring liability responsibilities through insurance, hold harmless agreements and contracting out trail management. When obtaining insurance, it is important to consider the details of the policy and what it does and does not cover. For example, the use of motorized vehicles on a property may not be covered in standard homeowners' policies. Accordingly, additional insurance may be required for such uses. If a trail is permitted on the property, the trail organization may be asked to include the landowner as an additional insured under the organization's insurance policy. Some landowners may only be willing to permit access to groups which can demonstrate that they have sufficient insurance coverage and will hold harmless the landowner or occupier should any claims arise.

Hold harmless agreements specify that one party will protect the other from claims and legal actions resulting from identified activities. Related to these are waivers, whereby users of a property enter a contract to release the landowner of responsibility and thus waive their rights to pursue legal actions for identified activities. It is important to write hold harmless agreements and waivers carefully to identify the parties and the circumstances they will cover and to explain the details to users or organizations which sign them. These agreements do not prevent landowners from being sued but rather provide them with an agreement that someone else will bear the responsibility for paying the costs of any claims or a defence against such claims.

Transferring use and management to a trail or other organization makes the organization the primary occupier of the lands with lead responsibility for management and any liabilities. Such transfer is typically made through a landowner agreement form, such as those long used by member clubs of the Ontario Federation of Snowmobile Clubs.

It is important that landowners work with trail organizations that are well-run and which have a clear risk management strategy in order to avoid liability problems in the first place. Elements of such a risk management strategy may include:

- (g) a policy commitment to risk management;
- (h) assignment of risk management responsibilities to particular staff or volunteers;
- (i) planning, development, maintenance, repair and improvement of trails and

programs in order to meet accepted trail standards (such as those implemented by the Bruce, Waterfront or Oak Ridges Trails or the Ontario Federation of Snowmobile Clubs);

- (j) regular assessment of uses and access on the trail and nearby lands;
- (k) regular inspections for, reporting of, warning about and addressing trail hazards;
- (l) documenting and acting on trail accidents and claims;
- (m) educating and training staff and volunteers;
- (n) obtaining appropriate and sufficient insurance (typically at least \$5 million per occurrence); and
- (o) regular monitoring and responding to legal developments.

In the Project's survey concerning risk management used for trails, several strategies had high rates of use: trail maintenance, improvements and fencing (75% of respondents), regular and ongoing inspections of the trail (73%), and the placing of warnings and signs (64%). Others had lower frequencies (from 21 to 37%): documentation and reporting of trail incidents and liability claims; education and training for managers, leaders, staff and volunteers; patrolling and law enforcement; inventory of trail features that may pose risk to human safety; education and training for trail users; a clear and explicit risk management plan or program; and monitoring of legal developments. These aggregated results point to the need to develop more comprehensive risk management strategies to protect users from injury and landowners and trail organizations from liability.

Where a landowner provides access for recreational uses, it is important to assess the advantages and disadvantages of charging a fee for such access. The *Occupier's Liability Act* and the statutes governing snowmobiles and ATVs provide for a reduced duty of care only where no fee is paid for entry and the person is not being provided with living accommodation. A benefit or payment received from a government agency or non-profit recreation club or association is not considered to be a fee which will cause the general and higher duty of care to apply. While there have been no court rulings interpreting this, it would appear that the provision of insurance, trail passes, trail improvements and the like by a trail organization would still make the occupier subject only to the reduced duty of care in the OLA. Where resorts provide accommodation or landowners charge fees, the higher duty of care will apply, potentially creating more exposure to liability.

Recommendations

Measures to address these liability concerns can be addressed in a number of ways: legislation changes, risk management strategies, insurance policies and practices, responsibility transfers, education, and other approaches. Beyond the measures taken by individual landowners and trail organizations, the following are recommendations to address the issues raised above on a wider scale.

- (p) The *Occupier's Liability Act* should be amended in several ways. First, it should clarify certain terms and thus allow individuals to better understand and judges to assess responsibilities under this Act. Second, the Act should adopt concepts from other jurisdictions to better address landowner liability concerns. Third, it should modify the legal duty of care. Specific changes are noted below:
- (q) Clearly define "recreational activity" and "recreational trail" to include both being on a trail or entering adjacent lands from a trail, related recreational uses such as canoeing or access points, and mixed uses of trails for both recreation and transportation.
 - (r) Clearly define "fee", "benefit" and "payment" to ensure that a landowner's, occupier's, or trail organization's receipt of a payment for trail establishment, maintenance, administration, membership, insurance premiums, voluntary donations and the like for a non-profit purpose do not cause the occupier to be subject to the general duty of care.
 - (s) Specify that trail users voluntarily assume all risks when using a trail, regardless of whether or not the person is on the trail.
 - (t) 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 sectoral standards (except under current limitations where user fees are charged or living accommodation is provided).
 - (u) Delete the reference to "reckless disregard" since it is difficult to determine and complicates negligence law with a criminal law concept.
 - (v) Expand the reduced duty of care to include public parks predominantly used for open space purposes, and physical recreation facilities with improvements that require regular maintenance for safe use.
 - (w) Expand the higher duty of care to include keeping visitors safe from the presence of non-recreational physical structures or improvements in areas made available to visitors.
- (x) The *Negligence Act* and the common law of negligence should be revised to permit volunteers and volunteer organizations to be subject to lower standards in meeting their duties of care. This would encourage volunteer activity as essential to many community endeavours, including trails.
- (y) Landowner and trail organizations, along with governments' involvement and financial support, should develop comprehensive risk management strategies and a master trail insurance policy in Ontario. Together, these would address landowners' concerns, develop risk management, trail design and management standards under various circumstances, identify and assess diverse insurance needs, ensure the availability of adequate and reasonably-priced insurance, coordinate insurance coverage to reduce duplication, educate those involved with trails, and provide for coordinated strategies to avoid claims and prevent

frivolous actions. Such a coordinated effort would benefit from establishing a Canadian Trail Risk Management Committee at the national level and potentially an overarching national insurance package, as recommended in the draft Ontario Trails Council Insurance Report.

- (z) Insurance companies, insurance industry organizations, Statistics Canada, other government agencies, trail organizations and, where appropriate, landowners and related organizations should develop a standardized tracking system to segment claims and other statistics concerning trails and occupier's liability. This would highlight low and high risk markets and thereby allow more appropriate pricing of insurance coverage. Depending upon the design and responsibilities for this system, some legal changes may be required to implement this recommendation.
- (aa) 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:
 - (bb) Raise the maximum fines and damage claims to \$10,000 each for trespassing.
 - (cc) Add authority for the judge who convicts a person under the Act to prohibit the entry of that person from entering a specific or class of properties or geographical area, the violation of which would result in contempt of court and additional, significant penalties.
 - (dd) Provide that access to private lands adjacent to trails is presumed to be prohibited unless otherwise signed.
 - (ee) 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 her or his use of the property.
 - (ff) Add additional enforcement measures to address the difficulties of identifying and apprehending trespassers.

OTHER TRAIL ISSUES

Issue

A variety of other issues concerning trails have been identified in Ontario. These issues include government leadership, overall legislation and policy, sustainable financing, trail access, natural amenity protection, fencing requirements, and trail organization sustainability. To build broad based support and momentum for the changes to occupier's liability noted above, it makes practical and policy sense to advance these other issues in an integrated fashion.

Discussion

The following discussion identifies and elaborates each of the noted issues. Relevant recommendations are consolidated into the next section of the Report.

Government Leadership for Trails

There is no lead government agency nor comprehensive legislation or public policy for trails in Ontario. This results in missed opportunities for trail development and associated economic development, confusion and delay in pursuing options and issue resolution, legislation and policy which does not address nor accommodate trail issues, administrative inefficiencies, inequities, higher insurance premiums, and other economic costs.

What little provincial policy there is concerning trails is scattered and uncoordinated. Policies within individual ministries address trails in relation to provincial parks, transportation corridors, taxation and, at the provincial level, abandoned railway rights-of-way. Since the late 1990s, numerous trail interests across the province have expended considerable volunteer and staff effort through the "Together for Trails" forum to develop recommendations for an Ontario Recreational Trails Policy. The result was a draft Policy ("Towards a Provincial Recreational Trails Policy") in January 2000 which was presented to the Ministers of both Tourism and Northern Development and Mines. A Trails North Workshop in March 2001 also developed complementary policy recommendations, including the designation of a lead ministry or ministerial group to deal with all trail matters. Such previous and current trail-related initiatives continue to suffer from gaps in and unclear or overlapping provincial government responsibilities.

It is time that government leadership for trails in Ontario be clearly established. This requires an organizational and resource response as well as collaboration in trail designation, regulation, monitoring and enforcement, as has occurred in other jurisdictions. While this will primarily involve the provincial government for Crown and private lands, the federal government must also identify a one-window approach and clear mandate for trails, particularly within federal responsibilities for a variety of national park, other federal land, railway, tax and other matters.

Sustaining Trail Operations and Organizations

The ability to sustain trails over the long-term is a large and complex issue, with different solutions for different situations. Because long-term trail operations are dependent upon sound organizations, sustaining trails will usually mean sustaining organizations. Given the liability concerns and risk management strategies raised in earlier sections of this Report, there will be an ongoing need to have effective operations and financially-viable organizations in place across the Ontario landscape.

Survey respondents were roughly split on the need for user fees or trail user memberships. Several approaches have been adopted within different trail sectors and regions, with some adopting user or membership fees and some proposing trail options as part of the provincial outdoors card or provincial funding. An overall strategy has yet to emerge in Ontario. Accordingly, this Discussion Paper has only made general recommendations that would, at least in part, enable implementation of more detailed approaches. Greater discussion of this issue should occur along with the development of legal and policy approaches to address such concerns.

Trail Access Easements

Trails may be found on both public and private lands. Rarely will a trail organization own all of the lands needed for a trail. Thus, on both public and private lands, access is typically provided on an annual basis through a simple licence or informal agreement. However, such lands may be sold or the current landowner may pass away, leaving the potential that the new owner will not be willing to provide trail access. This can leave a gaping hole in a trail system, require rerouting of the trail through other lands and less attractive settings, and open up liability concerns related to outdated signs, maps and now prohibited access. There is thus a need to develop a means to secure the long-term route of a trail, even when the ownership changes hands.

Permanent trail access can be accomplished in one of two ways, both of which require the consent and agreement of the landowner. First, a “common law easement” can be written that must tie the access over one property to a benefit resulting on a nearby property. This can be difficult to accomplish and is impractical for a longer trail where ownership of nearby small “anchor” parcels may be required.

The second approach is a trail easement, which is an agreement authorized by a statute for trail purposes and which does not require ownership of nearby lands. Such trail easements are authorized in Alberta and the Yukon^x. Unfortunately, the holding of trail easements in Ontario is quite limited – only one overextended provincial agency, the Ontario Heritage Foundation, may do so under the *Ontario Heritage Act*^{xi}. This means that trail arrangements between landowners and trail groups can be cumbersome and of limited term. This frustrates provincial policy to, for example, complete the Bruce Trail or establish a full Oak Ridges Moraine trail across private lands and support diverse and economically-beneficial trail activities throughout the province. Legal reforms to address the limited opportunities for easements for trail and other purposes have been proposed to the Ministry of Natural Resources and Ministry of Municipal Affairs and Housing in various forums, but little has occurred to date to address this situation. These reforms would consolidate easement purposes, permit non-profit charities to hold such agreements (as is permitted under the *Conservation Land Act*^{xii}), streamline and strengthen easement procedures, and recognize them under other legislation. Fully 95 percent of the respondents to the Project’s survey felt that the ability to enter such agreements was either important or very important.

Protecting Natural Amenities Along Trails

The need to protect natural amenities along trails, such as retaining vegetation and scenery, was viewed as “very important” by 92 percent of survey respondents, the highest level of endorsement of all of the general questions in the survey. This points to broad recognition of the source of several trail benefits (both economic and otherwise) and the existence of both owners’ and users’ concerns about maintaining such amenities.

The Nova Scotia *Trails Act* provides that “the Minister may enter into an agreement with the owner or occupier of land adjacent to a trail to manage or preserve that land so that it complements the trail”^{xiii}. This creates authority similar to a conservation easement, except that in Ontario this authority is limited to conservation purposes and generally does not include scenic purposes which could complement a trail (except for the Ontario Heritage Foundation, as described above for trail easements). Easements for scenic purposes are authorized in the Yukon, Alberta, Manitoba, Nova Scotia and Newfoundland and Labrador. One document could integrate permitted and prohibited activities for scenic, access and conservation objectives.

Regulatory powers over scenic elements could also be considered. For example, the *St. Lawrence Parks Commission Act* permits the Commission to pass regulations to protect scenic areas along the St. Lawrence River^{xiv}. Provincial parks, forest management and utility corridor planning in various ways attempt to reduce scenic impacts. Unfortunately, while landform protection and a continuous trail was included in the *Oak Ridges Moraine Conservation Plan*, direct protection of the Moraine’s and trail’s scenic attributes were excluded. Currently, the *Provincial Policy Statement* under the *Planning Act* is under review. It could include more specific directions to protect and incorporate scenic elements along trail and other corridors, to which municipalities would then have to have regard in all of their planning decisions. Clearer municipal authority for identifying scenic areas and scenic roads and protecting scenic elements could be incorporated into the new *Municipal Act, 2001*.

Other Trail Access

Access for trails may also be available over specialized public lands. This will include Crown lands (i.e. lands never granted by the Province), other provincial public lands acquired over the years, highways, roads, and road allowances. It is beyond this Paper to detail the numerous laws governing the ownership, disposition and use of these various types of lands. However, several aspects may be highlighted.

Provincial Crown lands are generally the responsibility of the Ministry of Natural Resources. The *Public Lands Act*, *Provincial Parks Act*, *Mining Act* and *Crown Forest*

Sustainability Act, 1994 are among the various statutes governing the use of these lands. While each of these statutes and their associated regulations and policies in some fashion deal with trail-related matters, trails are not discretely addressed nor are the opportunities to support appropriate trails and address concerns fully developed. More attention to such issues needs to be given.

One potential application is to modify classes of provincial park to create a “corridor” class of park. This would incorporate current “Waterway Class” parks, build on the “Recreation Class”, and contemplate trail and wildlife corridors between and beyond provincial park boundaries. Such an approach would bolster trail networks and contribute to “ecological integrity” of the protected areas system. As reported in the 2001-2002 Environmental Commissioner’s annual report, the province may undertake a review of the *Provincial Parks Act* in the near future, and the *Class Environmental Assessment for Provincial Parks* is already underway and could consider such a “corridor” class of provincial park.

Trails on highways are governed by the *Highway Traffic Act* and *Municipal Act*. This includes roads which have been assumed by the municipality and are thus maintained to required standards (see the legal discussion under Liability Issues).

There are other publicly-owned lands that can be and are used for trails, such as road allowances and shoreline allowances. These are governed by the *Municipal Act*, with restrictions on how they may be opened for travel and on offering these for sale first to adjacent landowners. Landowners who fence road allowances have priority of interest over all others except the municipality. Where exclusionary fencing does occur, this can prevent the use of the road allowance for trail or other purposes.

Trail Fencing

The fencing of trails is important for a number of reasons. It separates trail uses from adjacent and often incompatible land uses; it protects trail users from dangerous areas; it marks boundaries where access is and is not permitted; and it helps protect neighbours’ privacy. The *Line Fences Act* (LFA) sets out fencing principles and a dispute resolution mechanism for fences along property boundaries^{xv}.

Under section 20 of the LFA, railway rights-of-way are specifically required to be fenced. This reflects the history of these corridors where active railways were a danger to adults and particularly children; many court cases over the years have held that there is a high standard to erect and maintain fences along active railways. Now, many of these rights-of-way have been abandoned and converted to recreational trails, sometimes with complementary uses such as utility corridors or greenspace links. These are obviously less dangerous uses which may not require fencing to the same extent or standard as for railways.

While attractive and uniquely suited for trails, abandoned railway rights-of-way also

create concerns for adjacent landowners. Some worry about fence damage, escaping livestock, litter, trespassing, invasion of privacy, and access across the corridor to property holdings on the other side. Most if not all of these concerns can be addressed through constructive dialogue, careful trail planning and management, identification of fencing priorities, appropriate response and contingency arrangements, and dispute resolution measures.

Unfortunately, in some regions rail corridor fencing requirements have been used as a surrogate for landowner concerns and attempts to frustrate trail development. A few landowners have attempted to require expensive fencing while some municipalities have passed by-laws specifying lower requirements. In the two cases appealed to the provincial Line Fence Referee on this issue, requests for expensive fencing have been turned down. Section 20 was held not to constitute a mandatory fence-building obligation but to merely prevent (for ten years) an owner of the railway corridor from having fence viewers apportion the costs of a fence desired by the owner to the neighbours^{xvi}. Fence viewers were also ordered to consider the factors in the Act and not to require the right-of-way owner to be responsible for more than one-half of the fence or pay more than fifty percent of a basic fence's cost. Indeed, fencing requirements for railways was long ago held to be the exclusively a federal responsibility^{xvii} (although none are contained in the *Canada Transportation Act, 1996*). While these LFA cases may support trails on such rights-of-way by avoiding expensive fencing requirements, it may be that the current legislation needs fine tuning to incorporate these interpretations, address more fundamental issues, recognize contemporary uses of railway rights-of-way, establish clearer municipal standards, and achieve a reasonable balance between interests.

Respondents to the Project's survey indicated that it was more important to fence along urban and active farmland areas but that there was not a need to do so in wilderness or semi-wilderness situations. While responses are weighted in favour of trail interests, this reflects a common sense approach and one which should be in frequent practice.

Recommendations

Recommendations are made below which address the issues raised above and also which transcend those identified in other parts of this Report.

- (gg) The Province of Ontario should designate a lead agency for trails in Ontario and regularly convene an inter-ministerial committee to consider and advance strategic, legal, policy, economic and other tangible aspects related to trails in the province.
- (hh) A new Ontario Trails Act and complementary amendments should be developed to incorporate elements from other jurisdictions. The Trails Act and amendments should include:

- (ii) designation of trails on public lands, waterways, and on private lands with consent;
 - (jj) posting of trail signs;
 - (kk) land securement for trails (e.g. purchase, donation, and temporary or permanent access agreements);
 - (ll) protection of scenic and natural features along trail corridors;
 - (mm) research and education programs;
 - (nn) responsibilities and agreements for government leadership, administration and maintenance of trails;
 - (oo) regulation and enforcement of trail uses with consideration of traditional uses;
 - (pp) prohibitions against consuming alcohol, creating disturbances or destroying property on or near to a trail;
 - (qq) regulation of trail management standards; and
 - (rr) broad enforcement powers.
- (ss) Landowner, stewardship and trail organizations should advocate for an Ontario Trails Act and Policy and other changes, as described above, which incorporate the elements of Nova Scotia's and PEI's *Trails Acts* and makes appropriate complementary amendments to other Ontario legislation and policy. Such advocacy should be coordinated and promoted in a variety of forums in order to implement this Project's recommendations.
- (tt) Trail organizations and governments should continue to explore and develop approaches which will lead to the sustainability of trails and trail organizations. A variety of approaches and perhaps layers may be required to recognize diverse uses and local circumstances. Legal and policy reforms should simply enable appropriate arrangements, leaving the particular details to implementing regulations or practices.
- (uu) 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 permanently register them on title with the landowners' consent. Further amendments should streamline and strengthen easement procedures and recognize them under other legislation.
- (vv) The *Oak Ridges Moraine Conservation Plan*, *Provincial Policy Statement* and other provincial policies and legislation should be amended to recognize and protect scenic attributes, particularly along recreational trail and waterway corridors and through the development of more detailed planning documents.
- (ww) A new "Corridor Class" of Provincial Park should be established by Ontario Parks under the *Provincial Parks Act* and the *Class Environmental Assessment for Provincial Parks*. The Corridor Class would permit expert management of trails, waterways and other linkages between and beyond provincial parks.

- (xx) The Province of Ontario should put key elements of its Abandoned Railway Rights-of-Way policy into legislation in order that such rights-of-way are secured and made available for trails, including offering to act as the agent of trail organizations, communities, or land trusts which agree to secure and manage the rights-of-way for trail or related public purposes.
- (yy) The *Municipal Act, 2001* should be amended to permit municipalities to authorize the use of unopened road allowances for recreational trails and natural amenities without the necessity to meet road standards. The Act should be further amended to limit enclosure and fencing rights by adjacent landowners should the municipality authorize the use of an unopened road allowance as a trail. This authority should: be subject to consultation with nearby landowners, consider safety and environmental concerns, analyze feasibility, and allow restrictions to particular uses, locations and time periods. Such trail uses should not lead to a requirement to use the location for other uses.
- (zz) The *Line Fences Act* should be amended to clarify the provisions in section 20 along the lines of recent Line Fence Referee decisions and to enable the setting of reasonable fencing standards by municipalities.
- (aaa) Legislation governing the use of provincial public lands should consolidate and elaborate provisions for trails. This would require appropriate planning, safety, environmental, management and public consultation measures. In particular, the *Public Lands Act*, *Crown Forest Sustainability Act*, the *Timber Class Environmental Assessment*, and forest management plans should be required to identify, plan and arrange for management of recreation trails, canoe routes, portages and approved boat caches on provincial Crown and public lands, including forest access roads.
- (bbb) Trails organizations and governments should develop a comprehensive education program regarding the use of trails. Such a program may include standardized signs and trail users code, trail rating systems, informative maps, and trail user education on guided outings, in schools or through other programs. Education could also be directed towards landowner rights and responsibilities, trespass prevention, and awareness within the justice system.
- (ccc) Recognition of trails and implementation of this Project's recommendations should be adopted within the following government initiatives, among others: *Provincial Policy Statement* review; Smart Growth and Smart Growth Panels; *Oak Ridges Moraine Conservation Plan*, trail development and funding; tourism and recreational development initiatives; Ontario's Living Legacy; Ontario Stewardship; property tax incentives; *Municipal Act*, *Ontario Heritage Act* and *Provincial Parks Act* reviews; and opportunities presented by omnibus bills.

TRAIL ECONOMIC ISSUES

Issue

Along with legal, policy and practical measures, the Project examined economic issues related to trails. Tax incentives are an important element in encouraging landowners to allow their lands to be part of a trail system. Further, it is important to highlight the various economic and other benefits of trails and thereby attract further interest in the issues raised in this Paper. While in part an economic element of trails, the discussion of insurance was addressed under liability earlier in the Paper. Insurance issues remain a critical ingredient for landowners and organizations to achieve a successful and sustainable trail network in Ontario.

Discussion

Trails are increasingly recognized as having economic and other benefits within local communities and their surrounding regions. A few studies have documented elements of these benefits but there has not been a comprehensive compilation of data on the subject in Ontario.

The Project's literature review, original property value research and survey responses highlight the benefits of trails. Such benefits include: tourism, trail user expenditures on durable and non-durable goods, attracting businesses, jobs, tax generation, adding to on and off-site property values, enhanced property marketing, increased health, decreased health costs, better community interaction, access to and enhanced scenery, and conservation of ecological features and corridors.

These benefits are elaborated in Appendix B (Survey Results) and especially in the Review of Trail Benefits in Appendix D. Some important statistics were highlighted in the research. For direct economic benefits:

- (ddd) Ontario snowmobiling generated \$932 million in economic activity in 1996_97 (including \$73 million in provincial taxes).
- (eee) The Welland Canals Parkway is expected to cost \$40 million, support 7,600 jobs and generate \$218 million annual economic impact (including \$14 million P.S.T. and \$12 million G.S.T.).
- (fff) The Bruce_Grey Trail Network expansion is expected to cost \$20 million, bring in \$60 million in revenues and create 1,051 jobs.

Indirect economic benefits were also identified:

- (ggg) A 1995 Ontario Government study found that increased physical activity would have saved \$778 million in health costs and 5,653 person years lost to death and

- disability, and would have increased labour productivity by 0.25% to 1.5%.
- (hhh) Environment Canada's studies found that a property located 30 feet from a greenbelt will be worth \$3,252 more than one 500 feet away in Windsor.
 - (iii) Original research conducted for this Project determined that lands located near to central Ontario rail trails were valued at between \$2,358 and \$9,105 more than those further away (see Appendix E).
 - (jjj) New Brunswick collects \$100,000 more in taxes as a result of completing its provincial trail system.

Research elsewhere has pointed to methods and results that could be better and more widely documented in Ontario. Governments, landowner and trail organizations could adopt these methods and apply them to better identify the benefits, as well as the liabilities, of trails and therefore position trails as an important public policy issue requiring attention. One particularly useful means of researching trail impacts on property values would be to conduct detailed analyses of property assessment data both near and further from trails. This would require the cooperation of the Ministry of Finance and the Municipal Property Assessment Corporation in order to release confidential information for aggregated research purposes. Access to such detailed and protected data was not available during the benefits research conducted for this Project, leading to analyses that reflected only a few, publicly-reported, cost factors.

Persuasive means of packaging these results have been generated in the United States, leading to significant investments of public resources and finances towards trail development and related open space programs. Besides snowmobiling and a few specific trails, this approach and corresponding program have not yet been adopted in Ontario.

In spite of the documented benefits, there are few, if any, tax incentives in the federal or provincial *Income Tax Acts* which apply specifically to trails or which support landowners who permit trails on their properties. Donations of land title to a charity are eligible for a tax receipt but trail and scenic easements are not recognized at their appraised value for income tax credit purposes.

Similarly, there are few such property tax incentives under the provincial *Assessment Act* and *Municipal Act*. The Managed Forest Tax Incentive Program (MFTIP) and Conservation Land Tax Incentive Program (CLTIP) are oriented towards forests and conserving important natural lands. While trails may be permitted under these programs, trails are not recognized within the eligibility criteria and, as open areas under MFTIP, may be subtracted from qualifying minimum area size. The Farm Tax Program does not recognize trails within its criteria. For trail, scenic or conservation easements as discussed earlier in this Paper, the *Assessment Act* does not provide any recognition that the property is subject to restrictions and thus may be of lower assessed value. Overall, the lack of tax incentives acts as a barrier and disincentive to landowners who wish to permit trails and access easements on their properties.

Recommendations

- (kkk) The Ontario Ministries of Enterprise, Opportunity and Innovation, Environment, Finance, Municipal Affairs and Housing, Natural Resources, Northern Development and Mines, and Tourism and Recreation undertake, support and collaborate on detailed research on the benefits and liabilities of trails. In particular, analyses of property assessment data, health and environmental benefits, and insurance should be conducted, reported publicly, and used to guide future implementation of trails and open space initiatives.
- (lll) The federal and provincial *Income Tax Acts* should be amended to permit landowners who donate a trail easement or a long-term trail access agreement to receive a charitable tax credit for the agreement's appraised value.
- (mmm) Provincial property tax incentive programs under the *Assessment Act*, *Provincial Land Tax Act*, *Municipal Act* and other legislation should be adapted or developed to provide tax relief for landowners who permit trails or commit to long-term trail, scenic, conservation or other easements on their properties.

CONCLUSION

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ACKNOWLEDGEMENTS

The author wishes to thank the Haliburton Highlands Stewardship Council and Ontario Stewardship, plus the Ontario Trails Council and Trail Studies Unit at Trent University as Project partners, for their commitment and support in designing and delivering the Trails Research Project. Thanks are particularly extended to Brent Wootton, Steve Wilkins,Carolynn Coburn, Jim Faught, Bill Bowick, John Marsh, Alan Brunger, and research assistants Michèle Moore and Jim Killen

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APPENDIX A: SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations in “Trails Liability and Other Reforms In Ontario: A Discussion Paper”. They are divided into recommendations concerning liability issues, other and strategic issues, and economic issues. Discussion supporting these recommendations is found in the main text of the Discussion Paper.

Liability Issue Recommendations

1. The *Occupier's Liability Act* should be amended in several ways. First, it should clarify certain terms and thus allow individuals to better understand and judges to assess responsibilities under this Act. Second, the Act should adopt concepts from other jurisdictions to better address landowner liability concerns. Third, it should modify the legal duty of care. Specific changes are noted below:
 - a. Clearly define “recreational activity” and “recreational trail” to include both being on a trail or entering adjacent lands from a trail, related recreational uses such as canoeing or access points, and mixed uses of trails for both recreation and transportation.
 - b. Clearly define “fee”, “benefit” and “payment” to ensure that a landowner’s, occupier’s, or trail organization’s receipt of a payment for trail establishment, maintenance, administration, membership, insurance premiums, voluntary donations and the like for a non -profit purpose do not cause the occupier to be subject to the general duty of care.
 - c. Specify that trail users voluntarily assume all risks when using a trail, regardless of whether or not the person is on the trail.
 - d. 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 sectoral standards (except under current limitations where user fees are charged or living accommodation is provided).
 - e. Delete the reference to “reckless disregard” since it is difficult to determine and complicates negligence law with a criminal law concept.
 - f. Expand the reduced duty of care to include public parks predominantly used for open space purposes, and physical recreation facilities with improvements that require regular maintenance for safe use.
 - g. Expand the higher duty of care to include keeping visitors safe from the presence of non-recreational physical structures or improvements in areas made available to visitors.
2. The *Negligence Act* and the common law of negligence should be revised to permit volunteers and volunteer organizations to be subject to lower standards in meeting their duties of care. This would encourage volunteer activity as essential to many community endeavours, including trails.

3. Landowner and trail organizations, along with governments' involvement and financial support, should develop comprehensive risk management strategies and a master trail insurance policy in Ontario. Together, these would address landowners' concerns, develop risk management, trail design and management standards under various circumstances, identify and assess diverse insurance needs, ensure the availability of adequate and reasonably-priced insurance, coordinate insurance coverage to reduce duplication, educate those involved with trails, and provide for coordinated strategies to avoid claims and prevent frivolous actions. Such a coordinated effort would benefit from establishing a Canadian Trail Risk Management Committee at the national level and potentially an overarching national insurance package, as recommended in the draft Ontario Trails Council Insurance Report.
4. Insurance companies, insurance industry organizations, Statistics Canada, other government agencies, trail organizations and, where appropriate, landowners and related organizations should develop a standardized tracking system to segment claims and other statistics concerning trails and occupier's liability. This would highlight low and high risk markets and thereby allow more appropriate pricing of insurance coverage. Depending upon the design and responsibilities for this system, some legal changes may be required to implement this recommendation.
5. 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:
 - a. Raise the maximum fines and damage claims to \$10,000 each for trespassing.
 - b. Add authority for the judge who convicts a person under the Act to prohibit the entry of that person from entering a specific or class of properties or geographical area, the violation of which would result in contempt of court and additional, significant penalties.
 - c. Provide that access to private lands adjacent to trails is presumed to be prohibited unless otherwise signed.
 - d. 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 her or his use of the property.
 - e. Add additional enforcement measures to address the difficulties of identifying and apprehending trespassers.

Other and Strategic Issues Recommendations

6. The Province of Ontario should designate a lead agency for trails in Ontario and regularly convene an inter-ministerial committee to consider and advance strategic, legal, policy, economic and other tangible aspects related to trails in the province.
7. A new Ontario Trails Act and complementary amendments should be developed to incorporate elements from other jurisdictions. The Trails Act and amendments should include:
 - a. designation of trails on public lands, waterways, and on private lands with consent;
 - b. posting of trail signs;
 - c. land securement for trails (e.g. purchase, donation, and temporary or permanent access agreements);
 - d. protection of scenic and natural features along trail corridors;
 - e. research and education programs;
 - f. responsibilities and agreements for government leadership, administration and maintenance of trails;
 - g. regulation and enforcement of trail uses with consideration of traditional uses;
 - h. prohibitions against consuming alcohol, creating disturbances or destroying property on or near to a trail;
 - i. regulation of trail management standards; and
 - j. broad enforcement powers.
8. Landowner, stewardship and trail organizations should advocate for an Ontario Trails Act and Policy and other changes, as described above, which incorporate the elements of Nova Scotia's and PEI's *Trails Acts* and makes appropriate complementary amendments to other Ontario legislation and policy. Such advocacy should be coordinated and promoted in a variety of forums in order to implement this Project's recommendations.
9. Trail organizations and governments should continue to explore and develop approaches which will lead to the sustainability of trails and trail organizations. A variety of approaches and perhaps layers may be required to recognize diverse uses and local circumstances. Legal and policy reforms should simply enable appropriate arrangements, leaving the particular details to implementing regulations or practices.
10. 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 permanently register them on title with the landowners' consent. Further amendments should streamline and strengthen easement procedures and recognize them under other legislation.

11. The *Oak Ridges Moraine Conservation Plan*, *Provincial Policy Statement* and other provincial policies and legislation should be amended to recognize and protect scenic attributes, particularly along recreational trail and waterway corridors and through the development of more detailed planning documents.
12. A new "Corridor Class" of Provincial Park should be established by Ontario Parks under the *Provincial Parks Act* and the *Class Environmental Assessment for Provincial Parks*. The Corridor Class would permit expert management of trails, waterways and other linkages between and beyond provincial parks.
13. The Province of Ontario should put key elements of its Abandoned Railway Rights-of-Way policy into legislation in order that such rights-of-way are secured and made available for trails, including offering to act as the agent of trail organizations, communities, or land trusts which agree to secure and manage the rights-of-way for trail or related public purposes.
14. The *Municipal Act, 2001* should be amended to permit municipalities to authorize the use of unopened road allowances for recreational trails and natural amenities without the necessity to meet road standards. The Act should be further amended to limit enclosure and fencing rights by adjacent landowners should the municipality authorize the use of an unopened road allowance as a trail. This authority should: be subject to consultation with nearby landowners, consider safety and environmental concerns, analyze feasibility, and allow restrictions to particular uses, locations and time periods. Such trail uses should not lead to a requirement to use the location for other uses.
15. The *Line Fences Act* should be amended to clarify the provisions in section 20 along the lines of recent Line Fence Referee decisions and to enable the setting of reasonable fencing standards by municipalities.
16. Legislation governing the use of provincial public lands should consolidate and elaborate provisions for trails. This would require appropriate planning, safety, environmental, management and public consultation measures. In particular, the *Public Lands Act*, *Crown Forest Sustainability Act*, the *Timber Class Environmental Assessment*, and forest management plans should be required to identify, plan and arrange for management of recreation trails, canoe routes, portages and approved boat caches on provincial Crown and public lands, including forest access roads.
17. Trails organizations and governments should develop a comprehensive education program regarding the use of trails. Such a program may include standardized signs and trail users code, trail rating systems, informative maps, and trail user education on guided outings, in schools or through other programs. Education could also be directed towards landowner rights and responsibilities, trespass prevention, and awareness within the justice system.

18. Recognition of trails and implementation of this Project's recommendations should be adopted within the following government initiatives, among others: *Provincial Policy Statement* review; Smart Growth and Smart Growth Panels; *Oak Ridges Moraine Conservation Plan*, trail development and funding; tourism and recreational development initiatives; Ontario's Living Legacy; Ontario Stewardship; property tax incentives; *Municipal Act*, *Ontario Heritage Act* and *Provincial Parks Act* reviews; and opportunities presented by omnibus bills.

Economic Recommendations

19. The Ontario Ministries of Enterprise, Opportunity and Innovation, Environment, Finance, Municipal Affairs and Housing, Natural Resources, Northern Development and Mines, and Tourism and Recreation undertake, support and collaborate on detailed research on the benefits and liabilities of trails. In particular, analyses of property assessment data, health and environmental benefits, and insurance should be conducted, reported publicly, and used to guide future implementation of trails and open space initiatives.
20. The federal and provincial *Income Tax Acts* should be amended to permit landowners who donate a trail easement or a long-term trail access agreement to receive a charitable tax credit for the agreement's appraised value.
21. Provincial property tax incentive programs under the *Assessment Act*, *Provincial Land Tax Act*, *Municipal Act* and other legislation should be adapted or developed to provide tax relief for landowners who permit trails or commit to long-term trail, scenic, conservation or other easements on their properties.

APPENDIX B: PROJECT SURVEY RESULTS

APPENDIX C: SUMMARY OF TRAILS LEGISLATION AND CASES

APPENDIX D: REVIEW OF TRAIL BENEFITS

APPENDIX E: STUDY OF PROPERTY VALUES NEAR CENTRAL ONTARIO TRAILS

ENDNOTES

ⁱ *Occupier's Liability Act*, Revised Statutes of Ontario 1990, chapter O.2, and the *Trespass to Property Act*, Revised Statutes of Ontario 1990, chapter T.21.

ⁱⁱ Excerpt from the *Motorized Snow Vehicles Act*, Revised Statutes of Ontario 1990, chapter M.44:

22. Every person who is driving or riding a motorized snow vehicle or is being towed by a motorized snow vehicle on any premises shall be deemed, for the purposes of subsection 4(1) of the Occupier's Liability Act, to have willingly assumed all risks where,

- (a) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association; and
- (b) the person is not being provided with living accommodation by the occupier.

Excerpt from the *Off-Road Vehicles Act*, Revised Statutes of Ontario 1990, chapter O.4:

20. Every person who enters premises on an off-road vehicle or while being towed by an off-road vehicle shall be deemed, for the purposes of subsection 4(1) of the Occupier's Liability Act, to have willingly assumed all risks where,

- (a) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association; and
- (b) the person is not being provided with living accommodation by the occupier.

ⁱⁱⁱ *Tenant Protection Act*, Statutes of Ontario 1990, chapter T.21, and *Maintenance Standards Regulation*, Ontario Regulation 198/98, section 28.

^{iv} *Negligence Act*, Revised Statutes of Ontario, chapter N.1.

^v Arlene Kwasniak, *Occupier's Liability, Trails and Incentives* (Edmonton: Environmental Law Centre, 1999), at page 31. The remainder of the discussion of U.S. recreational use statutes draws heavily from the in-depth treatment of this publication.

^{vi} Doug Wyseman, "Ontario Trails Council Insurance Review" (Draft, 1 October 2002), page 15.

^{vii} Doug Wyseman, "Ontario Trails Council Insurance Review" (Draft, 1 October 2002), page 11.

^{viii} *Public Lands Act*, Revised Statutes of Ontario 1990, chapter P.43, subsection 65(4).

^{ix} *Canoe Ontario v. Reed*, Ontario Reports (2d series), volume 9, page 494 (High Court of Justice).

- ^x *Environmental Protection and Enhancement Act*, and *Environment Act* [].
- ^{xi} *Ontario Heritage Act*, Revised Statutes of Ontario 1990, chapter O.18.
- ^{xii} *Conservation Land Act*, Revised Statutes of Ontario 1990, chapter C.28.
- ^{xiii} *Trails Act*, Revised Statutes of Nova Scotia 1989, chapter 476.
- ^{xiv} *St. Lawrence Parks Commission Act* , Revised Statutes of Ontario, chapter S.24, section 10.
- ^{xv} *Line Fences Act*, Revised Statutes of Ontario, chapter L.17.
- ^{xvi} *Hughson v. Cataraqui Region Conservation Authority*, Decision of Deputy Referee on Appeal, file ADD 12/00 (March 22, 2001); *Casier et al. v. Bayham (Municipality)* , Decision of Deputy Referee on Appeal, file ADD 08/00 (March 23, 2001).
- ^{xvii} *Madden v. Nelson & F.S.R.Co.* , 1899 Appeal Court (Privy Council) at page 626.