

FLOODING CLAIMS

Introduction

Flooding claims are fairly common and can be fairly costly!

The Legal Framework

In the past, claims for damages occasioned by flooding were based either in nuisance or were brought pursuant to section 58 of *The Saskatchewan Watershed Authority Act, 2005* (“the SWAA”) (basically a statutory cause of action in nuisance).

[Note to succeed in a claim in nuisance, one need not prove negligence. Basically, it entails unreasonable interference with another’s use and enjoyment of their property. So from a Plaintiff’s perspective, nuisance is much easier to prove].

However, with the recent amendment to *The Municipalities Act, S.S. 2005, c. M-36.1* (“the MA”) prohibiting claims in nuisance against municipalities, any claim for damages occasioned by flooding would have to either fit within section 58 of the SWAA, or be based on negligence.

The gist of a claim under section 58 of the SWAA is that someone has by their actions diverted surface water on to the property of the claimant.

Negligence - failed to exercise degree of care which would be expected of in the circumstances.

Claims are usually based on either:

- i) inadequate drainage facilities; or
- ii) failure to maintain existing drainage facilities.

So what can you do to minimize the risk of such claims?

- ➡ Wherever carrying out the upgrading or reconstruction of any roads, seek expert advice on what drainage facilities are required. Particularly, what size of culvert is required, in order to ensure it can accommodate the flows that can reasonably be expected.
- ➡ In emergency situations, think carefully before doing anything that could be viewed as altering the natural drainage patterns (i.e. result in a diversion).
- ➡ Periodically inspect existing drainage facilities to ensure that they are unobstructed. This should be done in the spring, so as to ensure, to the extent possible, that your drainage facilities are functional.

What You Can Do to Assist Us in Defending Claims

There is much that you can do to assist us in defending claims, both before and after the incidents happen which may give rise to claims.

As to what you can do before incidents happen that might give rise to a claim, the key is to keep good records.

Whether we are talking about road construction and maintenance or any other municipal activity that could give rise to claims, good record-keeping can be invaluable to the defence of a claim.

Records are essential if we are going to convince a judge that the RM has made every reasonable effort to meet its obligations.

By the same token, an absence of records, even if you have done all of the things that you should have done, can pose a problem.

With respect to road maintenance activities generally, the following are some of the things which you should be keeping records of:

- ➔ Grading. [Noting the date and by whom it was done.]

- ➔ Graveling.

- ➔ Inspections. [Including the date and by whom it was done, what was being looked for if specific (for example, culverts), any deficiencies noted and what was done to remedy the same.]

- ➔ Complaints received and actions taken. [We often argue that an absence of complaints shows that the road was in a reasonable state of repair. The court will not, however, give any weight to that argument if you did not have a reliable system for recording complaints].

- ➔ All warning signs posted on your roads. [This could then be utilized by whoever goes out to inspect signs to ensure they are still up and are visible.]

- ➔ Accidents. [At least those in which the road may have been a factor.]

As for what you can do after an incident happens that might give rise to a claim, the following should be noted:

1. Notify your insurer (Kathie Caleval, if a member of the SARM Liability Self-Insurance Plan) as soon as possible following receipt of a notice of claim, Summons or Statement of Claim (or even sooner if you become aware of an incident which has a high probability of resulting in a claim).

2. Gather, and provide to your insurer, as much information as possible as to the events giving rise to the claim. This would include the names of potential witnesses with contact information, possibly a chronological summary of relevant events, copies of any relevant documents, and so on.

3. If there is a risk that any evidence will be lost, take what steps you can to preserve the same. This may be as simple as taking photographs of the location of an accident where the condition might change.

Finally, it is important that you not voluntarily admit on behalf of the RM liability for any accident nor even express any personal opinion as to who may be at fault. Such statements can be characterized by a court as an admission against interest and can be a problem.

Questions ?

THE EMERGENCY PLANNING ACT

RMs have the authority to make a Local Emergency Declaration (“LED”) pursuant to section 20 of *The Emergency Planning Act* (“the EPA”).

An emergency is defined in subsection 2(b) of the EPA which includes “ ... a calamity caused by ... forces of nature; or ... a present or imminent situation or condition, ... that requires prompt action to prevent or limit: ... the loss of life; ... harm or damage to the safety, health or welfare of people, or ... damage to property or the environment”.

As mentioned previously, the authority to make a LED is found in s. 20 of the EPA which reads in part as follows:

“At any time when a local authority is satisfied that an emergency exists or may exist, in all or any part of the municipality, it may by resolution make a local emergency declaration relating to all or any part of a municipality ...”. See subsection 20(1) of the EPA.

So generally this is done by Council as a whole, by resolution.

However, where “it is not possible to assemble a sufficient number of members of [the council] to pass a resolution” and a member of [the council] “believes that: (i) a local emergency exists; and (ii) the emergency requires immediate action”, then he or she may make a LED “on behalf of” the council: see subsection 20(2) of the EPA.

In the LED, you must identify (i) the nature of the emergency and (ii) the area of the municipality in which the emergency exists: see subsection 20(3) of the EPA.

Note “immediately after” making the LED, you are required to cause details of the LED “to be published by any means of communication that [you consider] is most likely to

make those details known to the majority of the population of the area affected ... ”: see subsection 20(4) of the EPA.

As well, a copy of the LED must be forwarded to the Minister.

The powers of a local authority in an emergency are set out in section 21 of the EPA. These include the powers to put into operation any emergency plan or program that the council considers appropriate, to acquire or utilize any real or personal property that the council considers necessary to prevent, combat or alleviate the effects of the emergency, to control or prohibit travel to or from any area of the municipality, to require evacuation of any area, to authorize the entry on to any land by any person when necessary to implement an emergency plan, to cause the demolition or removal of any trees, structures or crops if necessary in order to deal with the emergency and whatever else is necessary “to meet the local emergency”.

Note subsection 21(2) of the EPA requires the local authority to pay compensation if any property is acquired, utilized, damaged or destroyed as a result of the exercise of these powers. Note this is subject to the approval of the “Lieutenant Governor in Council”, ie. the Province – presumably because such may be covered under PDAP.

As with everything, it is important to keep good records, in case there is any dispute down the road as to whether the RM had the authority to do what it did.

REMOVAL OF BEAVER DAMS OR OTHER OBSTRUCTIONS

Often times, water courses can become obstructed by beaver dams or other things, and an RM needs to act to remove such obstructions to prevent damage to municipal infrastructure, or is asked to act to prevent damage to the property of others.

There are a number of things which must be considered in this regard.

I will address a couple of these here.

1. What, if any, approvals are required?
2. What if the beaver dam or other obstruction is located on private land, and the landowner will not consent to your entry upon the land?

Approvals

– Saskatchewan Watershed Authority

At the outset, it must be noted that removing a beaver dam could be considered a drainage work within the meaning of *The Saskatchewan Watershed Authority Act, 2005*, S.S. 2005, c. S-35.03 ("the SWAA"). As such, section 59 of the SWAA would apply, pursuant to which one has to obtain the approval of the Saskatchewan Watershed Authority prior to undertaking the work.

However, having said this, a number of types of work have been exempted from the requirement for Saskatchewan Watershed Authority approval under *The Drainage Control Regulations, R.R.S. c. D-33.1 Reg 1* ("the Regulations"). Of relevance here is clause 11(1)(e) of the Regulations which exempts "a work that is undertaken to ... remove obstructions, including silt, blow dirt, beaver dams, debris, trees and shrubs, from, and the clearing of, channels and watercourses, ... where ... water is not diverted by the work

from the outlet through which the water would normally drain and where a significant increase in the volume of water downstream does not result ...".

Thus, provided the above conditions are met, the RM does not require the approval of the Saskatchewan Watershed Authority.

– **Ministry of Environment**

Regard must also be had to The Environmental Management and Protection Act, 2002, S.S. 2002, c. E- 10.21 ("the EMPA"). In particular, reference must be made to section 36 of the EMPA, which prohibits the altering of "the configuration of the bed, bank or boundary of any river, stream, lake, creek, marsh or other watercourse or water body", without a valid permit authorizing the activity. As you will appreciate, the removing of a beaver dam would have the effect of altering the configuration of the bank of a water body.

There are no exemptions from this permitting requirement, such as there are for that of the Saskatchewan Watershed Authority. However, I have been told in the past that it is the policy of the Ministry of the Environment not to require permits "for the removal of beaver dams, nor for the haying or mowing along watercourses" [there is also a prohibition against the removal of vegetation along a watercourse]. To be safe, you should check with the office of the Ministry of the Environment in your area to determine whether or not this is still their policy.

– **Department of Fisheries and Oceans**

Note if removal might result in harmful alteration or destruction of fish habitat, it could be a problem. Note the example of CN being charged under section 35 of the *Fisheries Act* as a result of removal of some beaver dams (acquitted). If there is any risk, check with the Department of Fisheries and Oceans.

– **Landowner Won't Permit Entry on Land**

Even if no permits are required, the RM still needs to obtain the permission of a landowner if it is necessary to go on private land to remove a beaver dam. To enter upon the land of another without their permission would constitute a trespass.

An exception is recognized where one has the authority to enter upon the land of another, without their consent, pursuant to some statutory authority.

No provision of which I am aware explicitly gives an RM the authority to go on to the land of another to remove beaver dams or other obstructions.

A couple of possibilities occur to me.

1 - Nuisance Abatement Bylaw

See generally sections 362 to 370 of *The Municipalities Act, S.S. 2005, c. M-36.1* (“the MA”).

Most RMs have enacted a Nuisance Abatement Bylaw.

A “nuisance” is defined to include “a condition of property, or a thing, ... that adversely affects or may adversely affect the safety, health or welfare of people in the neighbourhood, or people’s use or enjoyment of their property”.

Arguably, if a beaver dam is obstructing the drainage of water flowing in a natural watercourse, thereby causing or threatening to cause damage to property upstream, it could be considered a nuisance.

[Note, however, there is some debate as to whether a natural occurrence such as this could be considered a nuisance.]

Assuming it could be, the designated officer of the RM would issue an Order to Remedy, as contemplated by section 364 of the MA, directing the owner of the land to take steps to remove the obstruction.

Review section 364 of the MA for details as to what must be set out in the Order (see also Nuisance Guide produced by the Ministry of Municipal Affairs).

Note there is a right to appeal to a local appeal board (or council, if no local appeal board) – see section 365 of the MA.

If a landowner fails to comply with the Order, within the time required, and there is no appeal (or, if there was, it was dismissed), the RM can take steps to “remedy the contravention” – see section 366 of the MA.

Note also section 367 of the MA, which gives the RM the authority to circumvent this process, and immediately take whatever actions or measures are necessary, to deal with the problem.

However, that authority can only be exercised if it is an “emergency” as defined in the MA. It is defined in subsection 367(6) of the MA to include “a situation in which there is imminent danger to public safety or of serious harm to property”.

If the RM proposes to utilize that authority, make sure it has good evidence to support its decision, should it be challenged at a later date. This would include photographs, and something in writing from a person qualified to express an opinion on the matter (ex. SWA or an engineer), i.e. to support the position that immediate action was required to prevent the damage.

2 - Local Emergency Declaration

The definition of emergency can be found in section 20 of the EPA as stated earlier.

As I noted, a LED can be restricted to a part only of a municipality.

The advantage to going this route is that you avoid any risk associated with the uncertainty as to whether a beaver dam could be considered a nuisance. Also, this is perhaps more fair as the RM would bear the cost of the measures, rather than expecting the landowner to do so.

In either case, I stress the importance of having proof that removal is necessary to prevent damage.

It would also be good to have evidence of your efforts to get the permission of the land owner, as I expect if we ever had to deal with a claim, the court would look more favourably on the RM if it could show it tried to get permission.

(If you do not get permission, get it in writing if practical. Be clear about what you intend to do, and do no more than that, and also ask the landowner to let you know if there are any unusual conditions you need to be aware of – put the onus on them).

Any Questions?