
MIABC RISK MANAGEMENT TIDBITS



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ADDRESSING CLIMATE CHANGE: CAN NATURAL ASSET MANAGEMENT ACTUALLY REDUCE LIABILITY RISK?

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It has been widely acknowledged that climate change is having an impact on local governments. Lately, much has been written advocating for the use of natural asset management to reduce the impacts of climate change. But every novel approach carries with it uncertainty about the potential for increased risks. So, the next question that is trending is: what are the liability risks of addressing climate change through natural asset management?

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At the MIABC we monitor legal developments over the course of the year to identify and highlight areas of emerging risk to provide the best risk management advice to our members. We thought it would be a good idea to collect our observations and advice in one place.

Inside this special edition of Tidbits, you will find a collection of the legal cases and issues our internal and external counsel found notable along with some practical risk management advice.

We hope you enjoy this edition.

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1. Negligence

Negligence is the law that attributes liability to those who knew, or ought to have known, that their actions or inaction could cause harm to another party. Where there is a duty, local governments must meet a reasonable standard of care, given not only what the local government knew, but also what it ought to have known.

A local government can defend a claim in negligence if it has a bona fide 'policy' in place. A 'policy' is a clear, definable procedure or system based on social, political or economic factors.

As experts confirm that natural asset management is a reasonably effective approach, and the community adopts this practice, there are several ways that natural asset management can be defended from a potential negligence claim:

- a. a decision by a local government to adopt a climate adaptation plan that incorporates natural asset management (if done properly to meet the test) could be defended as a bona fide 'policy'; and
- b. there will be support for the defence that the local government acted reasonably and without negligence.

2. Nuisance

Nuisance is a substantial and unreasonable interference with the use and enjoyment of property. In the context of climate change, typical nuisance claims include flooding caused by infrastructure failures or limitations. Unlike negligence claims, it is no defence to a nuisance claim that the local government had a bona fide 'policy' in place or was not negligent.

There is case law that suggests that liability will only attach to those that cause or contribute to the nuisance. Therefore, generally speaking, a natural event like a deluge of rain will not attract liability in nuisance or negligence. However, a local government increases its risk of liability if it gets involved in some way that causes or contributes to the nuisance, such as approving a development that changes the direction of water. In the urban setting there is great potential for this type of liability



exposure because local governments are involved with the building of roads, sidewalks and other infrastructure, such as storm sewer systems and culverts, that alter the flow of water and impact the pervious nature of the earth's surface.

Given that the risk of liability in nuisance increases the more a local government is involved in changes to the natural flow of water, it arguably follows that the reliance on natural assets, rather than engineered solutions, could conceivably reduce the risk of liability in nuisance. This would be welcome relief given the limited availability of defences for nuisance claims.

3. Regulatory Risks

Climate change can result in various types of regulatory risks under federal or provincial legislation, including flooding that may cause a deleterious substance to enter fish bearing water or a drinking water source. Recent provincial legislation requires local governments to adopt targets, policies and actions to reduce greenhouse gas emissions in the community, which creates more regulatory requirements and resulting risks for local governments.

To defend a regulatory charge, a local government must show that it acted with

due diligence, or that reasonable steps were taken, considering what the local government knew or ought to have known.

Like potential negligence claims, expert evidence that supports the use of natural asset management as a reasonably effective approach will provide a potential due diligence defence to local governments.

Takeaway

As research confirms that natural asset management is at least equally as effective as engineered approaches, and as the use of natural asset management becomes accepted by mainstream experts and adopted by local governments, in time, we should find that the courts too will accept natural asset management as a reasonable approach. In fact, we may find that reliance on natural asset management may even decrease the risk of liability for nuisance claims. It is not often we find the potential for such a perfect storm (so to speak) of effectiveness, lower cost and lower liability risk. Let us hope for such a storm as local governments adapt to climate change.