MIABC
RISK MANAGEMENT TIDBITS

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MUNICIPAL INSURANCE ASSOCIATION OF BRITISH COLUMBIA

Risk Management Considerations for Children's Playgrounds

Managing the risks surrounding children's playgrounds is a balancing act between preventing avoidable injuries without stifling active outdoor play.

Summer is here and local playgrounds are filling up with children freed from the constraints of their classrooms. It is an excellent time for local governments to review their risk management practices in relation to playgrounds.

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There are several elements to an effective risk management policy for playgrounds.

Maintenance and Inspection

Local governments should have in place a policy of regular inspection and maintenance. Depending on the community, it may be appropriate to increase the frequency of inspections during the summer and scale them back in the winter. Risk Management Services (RMS) has developed a playground inspection checklist which is available to the MIABC's members on our website.

Equipment Recalls

Latent defects in playground equipment can have serious implications. For example, earlier this year the slide manufacturer Playworld Systems Inc. recalled a number of stainless steel slides sold between 2000 and 2016 following two incidents of finger amputations.

As part of an effective playground risk management policy, local governments should ensure they keep abreast of playground equipment recalls. Information regarding equipment recalls is available on the Government of Canada's website.

Record-Keeping

Both from a safety and liability perspective, it is essential to create and maintain good records of inspection, maintenance, and complaints concerning playgrounds. Even with a *bona fide* inspection and maintenance policy that is assiduously followed, a policy defence may fail if there is insufficient documentation to prove it. In addition, keeping a careful record of complaints may assist in showing prior safe use.

For example, in *Thompson v. Saanich (District)*, the plaintiff alleged that the District of Saanich was negligent in permitting children to play a game called "grounders" on a playground structure at a day camp. Defence counsel was able to present evidence that in over 11,000 program days of summer youth activity between 2007 and 2012, there had been no documented injuries involving this game. The Court considered this evidence in finding there was no negligence.

In contrast, in *Campbell v. Bruce (County)*, the Court was critical of the defendant municipality for failing to have in place an adequate reporting system for serious injuries at its mountain bike park. For this and other reasons, the Court imposed liability.

Playground Design

The Canadian Standards Association publishes and periodically updates standards for safety in the design of playground structures. While it may be prudent to ensure that new equipment meets current standards and that obvious hazards on older equipment are addressed, the law does not require local governments to continually update their equipment to conform with the latest standards. The courts recognize that the standard of care of an occupier is reasonableness, not perfection.

Further, as discussed below, there is a movement afoot that suggests ensuring playgrounds are "too safe" may come with its own set of risks.

Too Safe?

As the spectre of liability has grown over the past several decades, playgrounds have become increasingly safe. There are more handrails, fewer moving parts, and often a rubbery ground surface. While the prevention of playground injuries is a laudable goal, research indicates that freer outdoor play is essential to children's development. With less opportunity to engage in risky play, children today have fewer chances to test limits and boundaries, activities important to building resilience.

These and other concerns have led to the recent growth in popularity of "natural playgrounds", outdoor areas designed with nature-based materials to encourage active play. Several BC local governments have installed playgrounds with natural elements. That this new type of playground will not meet CSA standards does not necessarily create a greater liability risk, provided risk management practices are adapted accordingly.

Risk and Liability

No case in Canada has considered liability for an injury on a natural playground, but generally speaking, the law does not require that children be protected from all injuries.

Aron Bookman is a lawyer, father, and a board member of the Child and Nature Alliance of Canada, a charitable organization that promotes nature-based learning. He was defence counsel in the *Thompson v. Saanich (District)* case. According to Mr. Bookman, "there is a misperception surrounding how judges view these cases. Liability concerns have made playgrounds safer, but I believe the law recognizes that playgrounds need not be risk-proof."

In *Thompson v. Saanich (District)*, Mr. Bookman submitted materials from ParticipAction supporting a more robust approach to children's play. The judge was receptive. He wrote in his reasons for judgment:

> *I suspect that most Canadians are aware, in a general way, of ParticipAction's mission for a more vigorous national lifestyle. Their "report card" concludes, amongst other things, that long-term physical health and development should be valued as much as safety, and that rules and regulations designed to prevent injuries and reduce tort liability have become excessive and counter-productive to youth health and fitness. One of their rallying cries is: "Adults should get out of the way and let children play."*

Though these are merely the comments of a single judge in a single case, they suggest a tolerance for some level of risk in children's activities.

For more information on risk management for playgrounds, contact the MIABC's Member Services Department.

COURT DISMISSES TRIP-AND-FALL CLAIM

Dreyshner v. Richmond (City)

Background Facts

In 2010, Lina Dreyshner suffered injuries after tripping on a portion of uneven sidewalk in the City of Richmond (the "City"). She commenced a lawsuit against the City alleging negligence in the maintenance of the sidewalk. She also alleged that the sidewalk was a nuisance and that the City's conduct violated her rights under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*).

The case proceeded to trial last August. Steven Haakonson, one of the MIABC's external counsel, represented the City. He was successful in having the action dismissed.

The Decision

Generally speaking, a government entity is immune from liability in negligence for policy decisions. A person claiming negligence against a municipality for failing to maintain its property must establish that the cause of the injury was an operational decision (rather than policy) or that the policy decision was not *bona fide* or so irrational or unreasonable to not constitute an exercise of discretion.

In the present case, it was the City's policy not to inspect its 500 kilometres of sidewalk, but rather respond and address complaints as they arose. The City argued that it could not be held liable in negligence for its *bona fide* decision not to carry out proactive inspections, which was based on budgetary constraints.

While the Court found the sidewalk to be a tripping hazard, which caused the plaintiff's injuries, the City's policy not to inspect the sidewalks was a *bona fide* policy decision which could not attract liability. Accordingly, the plaintiff's negligence claim was dismissed.

The plaintiff also mounted a novel *Charter* argument in which she submitted that the City's reliance on the policy defence violated her right to life, liberty, and security of the person. She argued that this violation was not in accordance with the principles of fundamental justice because the City, as a government entity entitled to rely upon a policy defence, did not receive equal treatment with other property owners. The judge carefully reviewed these arguments but ultimately found the plaintiff had not established any violation of her rights under the *Charter*.

Although he dismissed the claim, the judge went to some lengths in his reasons for judgment to encourage the City to review its sidewalk policy. The judge noted that municipalities are taking proactive steps to encourage residents to use alternative forms of transit, which necessarily will require the safe use of sidewalks. He suggested it was disingenuous to promote the use of its sidewalks while, at the same time, refuse on policy grounds to inspect the sidewalks for safety. He also indicated that in his opinion, a proactive inspection policy would be relatively inexpensive.

Final Thoughts

The judge's suggestion that the City rethink its sidewalk policy is not part of his formal decision and accordingly is not binding on the City or any other municipality that may have a complaints-based sidewalk policy in place. That said, it is sound risk management practice for local governments to periodically review their policies to ensure they continue to accord with the municipality's current objectives and constraints. Provided a policy is based on a good faith consideration of social, political, and financial factors, it will give rise to a policy defence, whether or not a judge believes it is the best policy.

SAVE THE DATE

The MIABC's 2017
Webinar Series

Registration is now open for the next two webinars in the MIABC's 2017 series:

Tuesday, July 18 — **The MIABC's User Group Portal**
11:00am - 11:30am

Wednesday, Sept. 13 — **Enterprise Risk Management for Local Governments**
11:00am - 12:00pm

To register, visit www.miabc.org/webinars or contact Ian Lau at ilau@miabc.org.

Distinguishing Between Traditional Risk Management and Enterprise Risk Management

Enterprise Risk Management (ERM) has become increasingly popular in recent years in both the private and public sectors. Is ERM an entirely new approach, or simply a new name for a practice that has been around for decades?

Keith Old is the Managing Director of ERM Focus Services Inc., a company that develops software-based ERM services with a particular focus on local governments. In Mr. Old's view, ERM has little in common with traditional risk management practices. He cites three main distinctions.

First, ERM aims to be comprehensive, encompassing all of the risks of the organization. Traditional risk management tends to focus only on certain risks, such as insurable risks and health and safety risks. In contrast, ERM looks at all risks across the organization that could prevent it from achieving its objectives. This generally includes regulatory, operational, and reputation risk.

Second, ERM is a continuous process as opposed to a discrete task. Traditional risk management tends to be reactive rather than proactive and involves duties such as annually reviewing insurance coverage and responding to complaints. Mr. Old describes ERM as a "culture" that requires participants to build risk management into all major decisions. This makes for a more resilient organization.

Third, the ERM approach recognizes that risks must be managed, as opposed to avoided. Some risks are necessary to effectively pursue an organization's goals. ERM is as much about seizing opportunities as it is about avoiding calamity.

An ERM approach can benefit organizations both large and small. Mr. Old is currently working on a project for the MIABC which will offer smaller members a customized ERM policy and framework to assist them in identifying and managing their risks.

Looking for more information? Mr. Old will conduct a webinar in September entitled "Enterprise Risk Management for Local Governments". See page 3 of this newsletter for details.

THE MIABC'S GLOSSARY OF LEGAL TERMS

In this recurring feature, we explain the meaning of some frequently used legal terms.
Following each issue, the terms will be added to a growing glossary available on the MIABC's website.

Canadian Charter of Rights and Freedoms

Enacted in 1982, the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) is a part of the Canadian Constitution. It sets out a number of rights and freedoms, including the right to equality before the law, freedom of expression, freedom of assembly, and freedom of religion.

Because the *Charter* is part of the Constitution, the rights and freedoms it enshrines are considered to be part of the supreme law of the land and are therefore "guaranteed".

The *Charter* applies to the laws and actions of all levels of government, including local government. This means that local government bylaws must comply with the *Charter*. It is not uncommon for bylaws to be challenged on this basis. For example, litigants have challenged sign bylaws under the *Charter* on the basis that they are an unreasonable intrusion on the right of freedom of expression.

The decisions and conduct of local government actors may also be challenged under the *Charter*. For example, a property owner may argue that a bylaw officer violated his right to be free from unreasonable search and seizure. Where a court finds a *Charter* right was infringed, it has a broad discretion to order a remedy.

The rights and freedoms protected under the *Charter* are not absolute. Section 1 provides that they are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For example, a law that restricts the sale of pornography may be considered a justifiable intrusion on the freedom of expression. As a result, every analysis of an alleged infringement of a *Charter* right entails a two-step process. The first step is to determine whether or not a protected right has been infringed. If so, it is then necessary to determine if it can be justified under section 1.