

7.0 Red River Floodway Act Update

TABLE OF CONTENTS

7.0 RED RIVER FLOODWAY ACT UPDATE..... 1

7.1 INTRODUCTION..... 1

7.2 NATURAL AND ARTIFICIAL FLOODING IN THE RED RIVER VALLEY 2

7.3 ELIGIBLE DAMAGE AND LOSS..... 3

7.4 PROGRAM ADMINISTRATION 3

7.5 STATUS OF BILL 23, THE RED RIVER FLOODWAY ACT 4

7.6 REGULATION FOR THE RED RIVER FLOODWAY ACT 5

7.7 CONCLUSION 6

7.0 RED RIVER FLOODWAY ACT UPDATE

This section summarizes the legislation for compensation in the event that Floodway operation causes artificial flooding during spring flooding in the Red River Valley.

7.1 INTRODUCTION

Since the 1997 flood, compensation for artificial flooding has been a major concern in the Red River Valley. Although residents generally understand and accept the need to protect Winnipeg, they believe strongly that those who suffer loss or damage as a result of artificial flooding due to Floodway operation should be fairly compensated.

After the Clean Environment Commission's extensive public consultations on the preliminary assessment of ways to enhance Winnipeg's level of flood protection in early 2002, the government announced its commitment to modernize the Red River Floodway through expansion. The expansion design capacity is 4,000 cubic metres per second (140,000 cubic feet per second). This capacity provides protection to a level greater than the 1826 flood, meeting Recommendation 2 in the International Joint Commission's report titled "Living with the Red", dated November 2000. The formal environmental licensing process for Floodway expansion began in summer 2003 with the filing of a licence application.

Wherever possible, flood protection rather than flood compensation should be the goal of citizens, communities and government, so that environmental, economic, personal and social impacts of flooding may be averted or reduced. In order to achieve this goal, since 1997, Canada and Manitoba have jointly spent \$130 million in flood protection including \$110 million to protect communities, homes and businesses in the Red River Valley where flooding occurred in 1997. The funding was provided to attain a flood protection level at a minimum the 1997 peak water level plus 0.6 metres (2 feet) freeboard.

The 1 in 700 year flood level will be 2.0 metres (6.5 feet) higher than the 1997 peak level immediately upstream of the Floodway inlet control structure and tapering to approximately 0.6 metres (1.7 feet) for the reach of the Red River between Aubigny and Emerson. Many of the communities, homes and businesses between Aubigny and Emerson have permanent flood protection that may be sufficient against the 1 in 700 year level and if not, additional flood protection measures, whether temporary or permanent, may be required. For the area between the inlet structure and Aubigny, current flood protection levels are not likely sufficient against a 1 in 700 year flood.

Physical flood protection in the Valley to the 1 in 700 year peak level is not likely economically feasible. As stated in chapter 2 of the Canadian Handbook on Health Impact Assessment, Volume 1: The Basics, dated June 1999, "If this (mitigation) is not attainable, compensation which usually takes the form of monetary payments, for damages caused by the project can be utilized. Monetary payment or compensation does not reduce the environmental impacts but serves to financially compensate the individual(s) for tolerating the negative impact."

The Government of Manitoba heard the citizens' concerns, issues and difficulties with recovering from the impacts of the 1997 flood. In its November 27, 2002 Throne Speech, the Government of Manitoba announced its commitment to introduce legislation providing a right to compensation for persons who experience artificial flooding caused by the operation of the Red River Floodway.

In January 2004, the Honourable Steve Ashton, Minister of Water Stewardship, distributed a summary of the draft legislation for public review. The summary included all of the ideas, concepts and points that were contained in the initial draft of the legislation. The summary was made available to the general public and also mailed directly to mayors and reeves of municipalities and to stakeholder groups in the Red River Valley from Morris to Lake Winnipeg. The information in the summary was also presented during the Manitoba Floodway Expansion Authority's public involvement program in the spring 2004. In the covering letter with the summary, Minister Ashton encouraged readers to review the summary and provide comments at the public meetings or written comments, as they would be used in producing the final draft legislation. In fact, the legislation was amended between second and third readings in the legislature as a result of comments provided (see below Section 7.5 "Status of Bill 23, the Red River Floodway Act). Following is a summary of the legislation.

7.2 NATURAL AND ARTIFICIAL FLOODING IN THE RED RIVER VALLEY

Red River Valley residents know better than most Manitobans that natural flooding is a recurring, cyclical event. Flooding of this nature can occur in any year, and can leave much damage in its wake. Natural flooding, however, is not the subject of the Red River Floodway Act. Assistance to cope with the results of natural disasters, including flooding, will continue to be provided under the Disaster Financial Assistance (DFA) program as established for each event.

The Red River Floodway Act is designed to deal with artificial flooding of the Red River caused by Floodway operation. Artificial flooding is flooding that would not have occurred naturally, in the absence of the Floodway and related flood-control infrastructure (Shellmouth Dam and Reservoir, Portage Diversion and the City of Winnipeg Primary Dykes). Compensation will cover artificial flooding damage in the Red River Valley, **both north and south of Winnipeg.**

Whenever the Floodway is operated to regulate the level of the Red River for flood control purposes, a report is made to the Minister of Water Stewardship. In years when spring Floodway operation occurs, the Minister could make that report widely available to the public by late spring or early summer. This report would indicate whether or not the Department believes that the natural level of the Red River was exceeded as a result of Floodway operation.

Compensation will be payable whenever damage or loss results from Floodway operation that raises the level of the Red River beyond the natural level that would be expected during flooding of the same magnitude if the Floodway and its related infrastructure did not exist.

7.3 ELIGIBLE DAMAGE AND LOSS

The Disaster Financial Assistance (DFA) program exists to assist claimants with excessive recovery costs associated with a natural disaster. The purpose of the Red River Floodway Act will be to financially restore claimants to their former, pre-flood position. Accordingly, it will cover a much broader range of damage and loss experienced by claimants. All persons who suffer artificial flood damage or loss will be eligible to claim compensation, including individuals, farms and businesses, non-profit organizations and local authorities. Successful claimants will be compensated for all property damage caused by artificial flooding. This would represent an improvement over the DFA program in several important ways:

- DFA limits the types of property damage for which assistance may be provided to a pre-approved list of basic necessities. Under the Red River Floodway Act, the relevant criteria will be whether or not artificial flooding caused the damage, rather than the type of property damaged. If the damage was caused by artificial flooding, all property damaged as a result will be eligible for compensation, regardless of its type or value.
- DFA similarly limits the amount that may be paid to assist claimants in repairing or replacing damaged property. **The Red River Floodway Act will have no claim ceiling for eligible property and no deductible that claimants would be expected to bear.**
- **Claims could be processed based on claimants' proof of loss, rather than proof of repair or replacement.** With this change, claimants will not have to repair or replace their damaged property before making a claim or incur debt in order to do so. This approach should result in much more timely compensation awards.
- The existing DFA does not provide assistance for economic loss. Economic loss refers to financial losses such as foregone income due to the inability to work or carry on business as a result of flooding. **A major improvement with the Red River Floodway Act is that it will compensate for economic loss due to artificial flooding.**

One important feature of the Red River Floodway Act is an expectation that claimants would take all measures that a reasonable, prudent person would take to avoid and/or mitigate their flood damages. This would include, for example, the obligation to flood proof vulnerable property outside community dykes.

A general principle of fairness is that legislation usually does not apply retroactively to activities or events that occurred in the past. Generally, both sanctions and benefits only apply from the date that new legislation takes effect. The Red River Floodway Act does not have any retroactive application.

7.4 PROGRAM ADMINISTRATION

Although it's anticipated that the need for artificial flood compensation will only arise relatively rarely, it's important that the Red River Floodway Act be fairly administered in a timely, cost-effective manner. For example:

- It would be undesirable to create a new bureaucratic structure for this purpose. It would be preferable to use the expertise of existing bodies with claims experience.

- The body responsible for Floodway operation should not administer compensation for flooding caused by Floodway operation.
- At a time when claimants' lives are already disrupted, the procedure for claiming compensation should not be an additional source of frustration. The goal should be to make the process as convenient as possible for claimants.
- Although legislative compensation could be expected to enhance and improve on the DFA program in several important ways, the Manitoba government still expects to access DFA cost sharing for the basic portion of individual claims.
- Litigation generally fails to provide an accessible, cost-effective, timely means of resolving disputed issues. There should be an opportunity to appeal disputed claims to an independent, non-judicial body.

Since the Emergency Measures Organization (EMO) also administers DFA, it is uniquely positioned to offer an integrated, one-stop claims procedure for flood compensation. Subject to the approval of federal DFA officials, legislative compensation would supplement assistance available under other government programs, including DFA. The cost sharing aspect would not be visible or relevant to claimants and would not affect the amount or timing of their compensation.

To further avoid unnecessary duplication, the existing Disaster Assistance Appeal Board will review disputed claims, using the rules established under the new legislation. The Board's composition and structure could be modified to allow it to accommodate a higher volume of potential appeals in the event of artificial flooding caused by Floodway operation. The decision of the Disaster Assistance Appeal Board may be appealed upon a question of law to the Court of Appeal with leave granted by a judge of that court.

As with Autopac or Workers Compensation, the legislation's claims and appeal procedures would take the place of litigation.

7.5 STATUS OF BILL 23, THE RED RIVER FLOODWAY ACT

The proposed legislation, Bill 23, The Red River Floodway Act, received First and Second Reading by the Legislative Assembly of Manitoba on March 11, 2004 and June 2, 2004, respectively. On Monday, June 7, 2004, the Standing Policy Committee on Social and Economic Development heard public presentations on Bill 23 from the following witnesses:

Mr. L. James Shapiro, Private Citizen
Mr. Jack Jonasson, Coalition for Flood Protection North of the Floodway
Mr. Jim Stinson, Private Citizen
Mr. Robert Duerksen, 768 Association Incorporated
Mr. Ian Wishart, Keystone Agricultural Producers
Mr. Paul Clifton, Private Citizen
Mrs. Maxine Clifton, Private Citizen
Mr. Doug Chorney, Private Citizen.

The Committee also received a written submission from Mr. Gerry Bristow, private citizen. The Hansard transcript from the Committee meeting can be found at the website:

http://www.gov.mb.ca/legislature/hansard/2nd-38th/sed_04/sed_04.html.

The Committee agreed to report Bill 23 to the Manitoba Legislative Assembly with the following amendment, that Clause 5(2):

"Appeal board's decision final

5(2) The Disaster Assistance Appeal Board's decision about an appeal is final and not subject to any further appeal."

of the Bill be replaced with the following:

"Appeal to Court of Appeal

5(2) A decision of the Disaster Assistance Appeal Board under subsection (1) may be appealed upon a question of law to The Court of Appeal with leave granted by a judge of that court.

Application for leave to appeal

5(3) An application for leave to appeal must

- (a) state the grounds of the appeal; and
- (b) be made within 30 days after the date of the decision sought to be appealed, or within such further time as the judge under special circumstances allows.

Notice of the application must be served on the government in accordance with section 11 of *The Proceedings Against the Crown Act*."

Bill 23 received concurrence and Third Reading on June 9, 2004 by the Legislative Assembly of Manitoba and Royal Assent from the Lieutenant Governor on June 10, 2004. The Bill will come into force on a day to be fixed by proclamation. A copy of the Bill may be obtained by contacting Statutory Publications at 945-3101, or in person at 200 Vaughan Street. There is a small fee per copy. Bills may also be obtained from the Legislative Assembly Internet site at <http://web2.gov.mb.ca/laws/statutes/ccsm/index.php>.

7.6 REGULATION FOR THE RED RIVER FLOODWAY ACT

Clause 13 of the Red River Floodway Act provides that the Lieutenant Governor in Council may make regulations, amongst other matters, respecting: eligibility of persons to claim compensation, eligible property and economic loss, applications for compensation, appeals and floodway operations reports. Regulations are currently being drafted and are targeted for approval by spring 2005. Comments by the public at meetings held by the Manitoba Clean Environment Commission in 2002 and at meetings held by the Manitoba Floodway Expansion Authority are being considered in the drafting of the regulation.

7.7 CONCLUSION

Artificial flooding caused by spring Floodway operation should only occur during spring floods of such an extreme magnitude that the Floodway can no longer both protect Winnipeg and maintain the Red River's natural upstream level.

With the Floodway's current capacity, artificial flooding could be expected to occur, on average, once in 90 years. Based on historical records and studies of tree rings dating back to the late 1600's, only the floods of 1826, 1852 and 1997 would meet or exceed this level. With the Floodway's expanded capacity, artificial flooding could only be expected to occur, on average, once in 120 years, and only the flood of 1826 exceeded this level. **After Floodway expansion, artificial flooding due to Floodway operation should be rare south of the City, and shouldn't occur north of the City. In the event that a spring flood of this extreme magnitude does occur, those affected by artificial flooding caused by Floodway operation would be compensated under the Red River Floodway Act.** It is believed that there is no other legislation in any other Province that is comparable.