

# CON·STRUCT

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## DEALING WITH CLIMATE CHANGE: CAN NATURAL ASSET MANAGEMENT REDUCE LIABILITY RISK?

It has been widely acknowledged that climate change is impacting local governments and their infrastructure due to increased extreme weather events and rise in sea levels. The legal liability risks of climate change impacts include potential negligence claims, nuisance claims and regulatory liability. Lately, much has been written advocating for the use of natural asset management to reduce the impacts of climate change, but every novel or innovative idea carries with it uncertainties as to whether there will be increased risks associated with the novel approach. So, the next trending question is: what are the risks of addressing climate change through natural asset management?

### Negligence

Simply put, negligence is the law that attributes liability to those who knew, or ought to have known, that their actions, or inaction, could have caused harm that has resulted to another party. Reasonable foreseeability is an important factor considered by the Courts in a claim of negligence. 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 Court will consider the knowledge and standards in the community. Therefore, the official statements of other levels of government, the Federation of Canadian Municipalities (FCM) and the Union of British Columbia Municipalities (UBCM) that climate change is having an impact on local governments and their infrastructure are relevant in considering whether a local government could be found liable for losses arising therefrom.

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. To constitute a 'policy', a decision needs to have been made (even if the decision is to not do anything). A failure to consider

an issue cannot be a 'policy', legally speaking.

As such, it is clear that there is a risk of legal liability exposure if local governments fail to address reasonably foreseeable climate change impacts.

### Nuisance

Nuisance is a substantial and unreasonable interference with the use and enjoyment of property. In determining whether something is a nuisance, the Court will balance the social or public utility against the harm. 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.

Defences to nuisance claims are limited. For example:

- Local governments in B.C. may have a statutory authority defence, but only if it can be proved that there is no way for them to perform the statutory duty without causing nuisance, which is a very high standard to meet. The Courts will consider the costs and practical feasibility of the alternatives in this assessment;
- Local governments in B.C. are statutorily protected from certain nuisance claims (section 744 of *Local Government Act*), but only where the damages claimed are caused by the breakdown or malfunction of a sewer, water or drainage facility or system, or a dike or road. Consequently, this defence does not provide any immunity for floods due to overcapacity of the infrastructure, as there is no "breakdown" or "malfunction".

To protect against such nuisance claims, it is necessary to take steps to try to avoid the incident, such as ensuring that the

*(Continued on page 2)*

design capacity of infrastructure addresses the impacts of climate change in the future.

There is also 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 that flows over a local government's land, causing damage to another's property would not normally attract liability in nuisance or negligence. But a local government does increase its risk of liability in nuisance where it gets involved in some way, such as approving a development that changes the direction or flow of water, causing a nuisance. 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.

### **Regulatory Risks**

Climate change can result in various types of regulatory risks under federal or provincial legislation. For example, flooding 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. As such, local governments need to take climate change impacts into account when considering what due diligence steps ought to be taken.

### **Mitigation Strategies**

Climate change resiliency requires the development of a climate adaptation plan. The first step in addressing climate change is to conduct an assessment of the risks and impact of climate change. Such an assessment will equip local governments with the knowledge needed to develop appropriate policies and prioritize the use of limited resources to include adaptation strategies in capital, infrastructure, land use, and emergency planning. The prioritization of its resources strengthens a local government's liability defences, including its policy and due diligence defences.

When surveyed by FCM, 19% of responding municipalities reported using formal policies or practices to factor climate

change adaptation strategies into decision-making in relation to the following assets: stormwater (16%), roads and bridges (15%), wastewater (16%), buildings (14%), potable water (14%), sport and recreation facilities (13%) and public transit (6%).

The FCM has reported that:

- every dollar invested today in climate change adaptation saves \$9-\$38 in future damages; and
- the average annual cost of extreme weather events is estimated at \$5 billion by 2020, and is expected to increase to \$43 billion per year by 2050.

Historically, local governments have looked to engineered mitigation measures. Recently though, a number of communities in many provinces across Canada, including B.C., are reporting that the management and restoration of natural assets that provide filtering, erosion control and storage (such as forests, riparian areas and wetlands) are just as effective as engineered solutions, and can be managed at a lower cost.

### **How do these Risks Apply to Natural Asset Management?**

1. **Negligence:** 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 that it is a clear, definable procedure or system based on social, political or economic factors) 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:** Given that the risk of liability in nuisance increases the more a local government takes steps that may change the natural flow of water, it arguably follows that the approach of 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.

**Regulatory Risks:** like potential negligence claims, expert evidence that supports the use of natural asset manage-

(Continued on page 3)

ment as a reasonably effective approach will provide a potential due diligence defence to local governments.

### **Conclusion**

As research confirms that natural asset management is equally effective as engineered approaches, and the use of natural asset management becomes accepted by mainstream experts and adopted by local governments, 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 we continue to face and adapt to climate changes.

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Adrienne brings over 24 years of legal experience in litigation and dispute resolution in the areas of local government, construction, public procurement professional liability, and insurance. Adrienne has advised and represented clients in relation to a variety matters, including municipal powers, duties, jurisdiction and procedural requirements, judicial reviews and constitutional challenges, builders' lien, delay claims and other construction disputes, environmental, regulatory, procurement, administrative hearing processes, tax sales, remedial action orders, bylaw challenges, contract claims, FOIPPA and privacy issues, insurance, risk management and expropriation. Adrienne is one of only a handful of lawyers in B.C. with experience in the Expropriation Inquiry process. Adrienne worked with the MIABC for 21 years, both as outside counsel, and for 8 years in-house as Senior Staff Lawyer. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

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