

The Climate is Changing,

Are We?

Developing risk resilience from extreme weather events

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The provincial and federal governments, the Federation of Canadian Municipalities (FCM) and the Union of British Columbia Municipalities (UBCM) have officially stated that climate change is having an impact on local governments and their infrastructure due to increased extreme weather events and a rise in sea levels. The legal liability risks of climate change impacts include potential negligence claims, nuisance claims and regulatory liability. This article provides an overview of the law in each of these areas, followed by a discussion on mitigation strategies.

Negligence

Negligence is simply the law that attributes liability to those who knew, or ought to have known, that their actions, or inaction, could have caused the 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 FCM and UBCM about the impacts of climate change 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.

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 an 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.

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.

- Local governments in B.C. are protected from 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”.¹

To protect from such nuisance claims, it is necessary to take steps to try to avoid the incident, such as ensuring that the design capacity of infrastructure addresses the impacts of climate change in the future.

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

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 investments 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 FCM², 19 per cent 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 per cent), roads and bridges (15 per cent), wastewater (16 per cent), buildings (14 per cent), potable water (14 per cent), sport and recreation facilities (13 per cent) and public transit (six per cent).

Can local governments afford this?

The FCM reports that:

- Every dollar invested today in climate change adaptation saves \$9 to \$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.

Therefore, an investment in climate change mitigation should pay off in the future. There are programs to assist local governments through FCM or provincial and federal governments. So, perhaps the better question is, can local government afford not to do this? ▸

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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References

1. For more on immunity related to certain nuisance actions, see *The Nuisance of Sewer Backups* in the Fall 2015 issue of *The ROADRUNNER*.
2. *Informing the Future: The Canadian Infrastructure Report Card*, 2016.

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