



# Climate change: Global issue, local concern

## Regulatory liability considerations for local governments



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The provincial and federal governments, the Federation of Canadian Municipalities, and the Union of BC Municipalities have officially stated that climate change is having an impact on local governments and their infrastructure. The legal liability risks of climate change impacts include potential negligence claims, nuisance claims, and regulatory liability.

Numerous studies have shown that climate change impacts include such things as increased flooding risks, rising sea levels, and extreme weather events. To address climate change, recently enacted 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.

In this article, we discuss regulatory liability<sup>1</sup> issues that arise for local governments due to climate change in the context of the *Fisheries Act* (the “Act”) and the statutory defence of “due diligence.”

### Local Governments’ Response to Climate Change and Associated Risks

Under the Act there are a number of provisions that engage local governments’ response to climate change and the associated risks.

#### Deleterious substances

For example, subsection 36 (3) of the Act states that no one shall deposit or permit the deposit of a deleterious substance in water frequented by fish.

This provision applies to a person who owns or has the charge, management, or control of the deleterious substance or activity that resulted in, caused, or contributed to the occurrence or the danger of the occurrence.

Courts have found local governments to have the charge, management, or control of infrastructure, such as storm drains, which may cause or contribute to such occurrences due to, for example, increased incidents of flooding caused by climate change.

#### Due diligence defence

Section 78.6 of the Act provides local governments with a potential due diligence defence to this regulatory liability.

*This article is an overview intended for general information only and should not be relied on for legal advice.*

<sup>1</sup> Regulatory liability arises when there is non-compliance with laws and regulations.

In order to establish this defence, it must be demonstrated that all reasonable steps (not all conceivable steps or super-human efforts) were taken to avoid the harm in question.<sup>2</sup> Reasonableness is determined on the basis of what is actually known by the local government in question, as well as what ought to be known.

Given the local government community's widespread acknowledgment of climate change impacts, it is clear that local governments need to take climate change impacts into account when considering its processes and due diligence.

The due diligence defence generally must include proof:

- of an appropriately designed pollution prevention system that is properly maintained and effectively operated;
- that regular training of the systems is provided; and
- that there are back-up systems to account for human error.<sup>3</sup>

Actual knowledge of a risk or potential harm will raise the degree of care expected by local governments.<sup>4</sup>

Once there is an adverse event or other notice of a risk, there is an expectation that behaviour will be adjusted to avoid a recurrence. Further, the courts have held that the diligence required varies depending on the risk to the environment and the nature of the defendant's activities.<sup>5</sup>

### Three Examples to Illustrate Principles of Due Diligence

Local governments have been held to a high standard and are expected to be aware and to take decisive action to do what is possible before, during, and after the event to prevent and mitigate harm to the environment. Specifically, the degree of care required will involve consideration of:

- the gravity of the potential harm: the greater the potential for substantial injury, the greater the degree of care that is required;

- the alternatives available to the local government;
- the likelihood of harm;
- the degree of knowledge or skill expected of the local government;<sup>6</sup> and,
- the extent the underlying causes of the offence are beyond the control of the local government.<sup>7</sup>

The court will balance the utility of the conduct or safety concerns with protection of the environment.<sup>8</sup>

To illustrate the application of these principles, the following three cases from different jurisdictions involving public entities across the country show where the due diligence defence failed.

#### 1. *R v Gibsons*, BCPC 2001 Carswell BC 3069

A blockage caused a manhole to overflow, resulting in sewage being deposited into a storm drain and ultimately into water frequented by fish. The Town of Gibsons was charged with two counts under the Act for the deposit of a deleterious substance into waters frequented by fish.

The only issue at trial was whether Gibsons exercised due diligence.

It was acknowledged by the court that the town had a robust prevention system in place that met a higher standard than most municipalities in the region. This included flushing 100 percent of the sewer system each year, flushing problem areas every three months, enacting relevant by-laws, and using video inspection to locate potential problems.

However, the town failed to have an adequate response strategy in the event of an overflow. The court stated that there should have been a quicker response time, an adequate response plan, and employee training. Additionally, the court suggested alternatives that would have prevented the overflow to the storm drain, such as using a different type of pump or blocking the storm drain – with

sandbags, for example – to prevent further contamination.

Gibsons had prior knowledge that if the manhole at this location were to overflow, sewage would inevitably enter the storm drain. The town also knew that the storm drain released into Shoal Channel, that this channel was frequented by fish, and that sewage was a deleterious substance.

The knowledge of such a possibility, combined with the cumulative effect of the town's shortcomings, resulted in the failure of Gibson's due diligence defence.

#### 2. *Canada (Fisheries and Oceans) v Ontario (Ministry of Transportation)*, 2014 ONSC 7071

In the spring of 2008, a road washout occurred that resulted in erosion and debris to be deposited into water frequented by fish.

The Ontario Ministry of Transportation (the "Ministry") had made several unsuccessful attempts to drain the snow melt that had been building up prior to the washout. The road washout was likely caused by this build-up and the associated rising water levels.

The court found that the Ministry did not have or did not apply the necessary expertise to assess the situation or recognize it as an emergency in a timely way. The Ministry should have taken steps to determine the cause of the blocked culvert before the situation deteriorated with the spring thaw.

Overall, the Ministry lacked appropriate protocols and there were alternative strategies available to determine the cause of the rising water prior to the flood.

#### 3. *Canada (Environment Canada) v Canada (Northwest Territories (Commissioner))*, 1993 CarswellNWT 51

There had been an ongoing confusion and dispute between the City of Iqaluit and the Northwest Territories (the

2 *R v Sault Ste. Marie (City)*, 1978 SCC 353; *R v British Columbia Hydro and Power Authority*, 1997 BCJ No. 1744 at para 55.

3 *R v Island Industrial Chrome Co.*, 2002 BCPC 97.

4 *Ibid.*

5 *Quebec v 3723259 Canada Inc.*, 2017 QCCQ 5290.

6 It has been held that a city was expected to be knowledgeable about the substances it used and their potential harm (*R. v Imperial Oil Ltd.* 2000 BCCA 553).

7 *R v Gibsons*, BCPC 2001 Carswell BC 3069.

8 *R v Canadian Pacific Ltd.* 2001 BCPC 36; *R v Canadian National Railway* 2004 BCSC 727.

NWT) regarding who had responsibility for a sewage lagoon.

The NWT was attempting to transfer its responsibility for the lagoon to the city, but the city was reluctant and had not accepted responsibility. The NWT's supervision and control only existed on paper and no one seemed to be in charge. However, at trial, the NWT ultimately acknowledged it was responsible for the lagoon.

There had been previous issues with the sewage lagoon. The lagoon's west dyke had failed five times within 10 years, sometimes due to snow melt. In this particular year, it was unusually warm in Iqaluit, which made the runoff and snowmelt reasonably foreseeable.

Snowmelt overran the lagoon's drainage ditch, the lagoon overflowed the west dyke, and the dyke subsequently failed. The lagoon's entire contents washed out. When the dyke failed, municipal employees responded because NWT employees were not present.

The dyke was not repaired in a manner consistent with the NWT's guidelines, and thus continued to seep sewage. The NWT was charged under subsection 36 (3) of the Act.

The court found that the NWT had constructive and actual notice of the operational and maintenance needs involved in the sewage lagoon, including the problems of spring runoff and snowmelt. Some municipal employees were concerned about the state of the lagoon but had no authority or direction to address such concerns. They had requested information from the NWT but received none. Additionally, a major construction project took place near the lagoon, which the NWT was aware of;

however, it did not undertake any risk assessments.

As a consequence of all of these shortcomings, the NWT was unable to rely on the defence of due diligence.

### Steps to Reduce Potential Liability

The legal authorities on due diligence demonstrate that local governments and other public entities are held to a high standard. With existing knowledge and recognition of the risks associated with climate change, the standard is even higher.

Local governments can take several steps to reduce their potential liability, including:

- ensure that the requisite expertise is applied to the situation at hand;
- adopt a proactive management strategy, which includes risk assessment that takes into account the potential impacts of climate change;
- ensure a good knowledge and understanding of the risks of the local government's activities and substances used to ensure that those risks are adequately addressed;
- develop appropriate protocols and policies, including back-up systems that account for human error;
- provide regular training and practice in prevention and response; and
- develop procedures for reporting spills or other environmental incidents to environmental officials.

Some local governments are considering the use of natural asset management (NAM) to address the impacts of climate change.

NAM refers to the stock of natural resources or ecosystems that is or could be relied upon or managed for the

sustainable provision of one or more municipal services. NAM seeks to address both climate change mitigation and adaptation, as natural assets tend to be more flexible, cost-effective, and easier to adaptively manage than built infrastructure under intensifying climate conditions. They also offer a wide variety of benefits, including health benefits to society and ecosystems.

As experts accept the use of NAM as a reasonably effective approach, we should find that the courts, in turn, will accept local government reliance on NAM. Moving away from reliance on infrastructure could reduce potential regulatory liability risk, as it could be argued that local governments do not have "charge management or control" of natural assets and, as such, statutory requirements under the Act would not apply to local governments. Additionally, as reliance on natural assets is accepted by experts and courts, there may also be a potential due diligence defence.

### Climate Change, Adaptation, and Local Government Due Diligence

As the effects of climate change intensify, it is crucial for local governments to turn their minds to such impacts and their risks, and how they may prevent and manage harm to the environment. 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 due diligence defence. **MW**

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