CLIMAtlantic

Climate Risk, Responsibility, and Liability for Municipalities:

Exploring Municipalities' Responsibilities to Consider, Manage, and Disclose Climate Change Flood Risks

Prepared for CLIMAtlantic by

Tina Northrup, Staff Lawyer
East Coast Environmental Law

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The legal information and legal analysis provided in this report are based in part on publicly accessible consolidations of provincial statutes, regulations, and policies. All reasonable efforts have been made to ensure the accuracy of the information provided, but if discrepancies are found between the contents of this report and the contents of provincial legislation and policies as they appear online, the online versions published on provincial government websites should be preferred.

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1.0 Introduction

Climate change effects are already being felt by municipalities across Canada. Unprecedented heatwaves and fires in some jurisdictions, unprecedented flooding in others; increased precipitation, storm frequency, and storm intensity; rising winds and rising sea levels—all of these effects put pressure on municipal infrastructure and risk loss of human life and property.

This report was inspired by a need for resources that can help municipalities in Atlantic Canada understand how the climate crisis may affect their responsibilities and liabilities. The report proceeds from an understanding that many municipalities are beginning to incorporate climate risk information into their decision-making, but there is still much to learn in this area, and municipal decision-makers may not be fully aware of or fully understand how climate risks can impact their decisions and responsibilities. Moreover, many municipalities in Atlantic Canada have limited resources to invest in climate change adaptation; some struggle even to access information that would help them to identify the most pressing climate risks within their jurisdictions. Some municipal governments may want to take action but do not know where to begin or how best to prioritize limited resources—uncertainty made all the more paralyzing by the spectre of liability for failing to do the right thing.

As a first step toward addressing these issues, this report considers climate risk, responsibility, and liability for municipalities in the specific context of climate change flood risks.

1.1 Key Questions and Terms

The key questions that this report addresses are these:

What are municipalities' legal responsibilities to consider, manage, and disclose climate change flood risks, and what liabilities could municipalities face if they fail to meet those responsibilities?

By "municipalities", we mean elected local governments empowered by provincial legislation throughout Atlantic Canada, whether their enabling statutes define them more specifically as "towns", "cities", "municipalities", "regional municipalities", or "local governments". The report notes legal nuances between such definitions when they are essential to the information and analysis provided, but "municipalities" is used more generally as an umbrella term.

By "climate change flood risks", we mean risks created by the combination of two things: (i) climate change flood hazards; and, (ii) vulnerability to loss and damage caused by climate change flooding. This working definition draws on the distinction that Natural Resources Canada ("NRCAN") makes between "flood hazard mapping" and "flood risk mapping". As the NRCAN website explains, flood hazard mapping maps "geographic areas that could be covered by a flood", whereas flood risk mapping uses flood hazard information "to identify vulnerability and estimate the consequences in terms of people impacted, damage to buildings, and/or other impacts of the hazard".[1]

[1] Natural Resources Canada, "Flood mapping types and process" (undated), online: <https://www.nrcan.gc.ca/science-and-data/science-and-research/natural-hazards/flood-mapping-types-and-process/24264>.

Within the context of this report, “climate change flood hazards” are flood hazards caused or exacerbated by climate change, such as flood hazards created by sea level rise, coastal storm surges, and increased precipitation, storm frequency, and storm intensity. “Climate change flood risks” include loss and damage caused by climate change flooding, including potential consequences of the breakdown or inadequacy of municipal infrastructure such as sewer, stormwater, and water systems that were not designed to withstand the climatic changes that are expected in the years to come.

By “considering” climate change flood risks, we mean taking them into account in municipal decision-making, such as by considering whether they ought to inform infrastructure investments, land use planning, or development permitting. By “managing” climate change flood risks, we mean taking positive actions to avoid, mitigate,[2] or accept such risks on the basis of informed and conscientious decision-making. “Managing” a climate change flood risk, in this context, does not necessarily mean eliminating the risk, as total elimination may be beyond a municipality’s power. By “disclosing” climate change flood risks, we mean sharing information about projected future flood risks with the public at large and/or those who are most likely to be harmed.

1.2 Key Messages of the Report

The information and analysis presented in this report are not intended to frighten municipalities by raising prospects of litigation or suggesting that they will fail to meet their duties if they do not take immediate action to consider, mitigate, or disclose climate change flood risks. Instead, the report aims to demonstrate why it is important for municipalities to begin exploring these issues, seeking more information, and discussing what can and should be done.

The report identifies five categories of potential sources of municipal responsibility to consider, manage, and disclose climate change flood risks in Atlantic Canada: (i) municipalities’ enabling legislation; (ii) external legislation that imposes liability for environmental harms and personal injuries; (iii) the common law; (iv) the Constitution; and, (v) funding agreements and other contractual relationships in which relevant requirements are included as terms or conditions. The report then explores these potential sources of responsibility with an eye to three spheres of municipal activity: (i) management of municipal infrastructure; (ii) land use planning; and, (iii) development permitting.

Category 1: Municipalities’ Enabling Legislation

A key finding of the report is that municipalities in Atlantic Canada do not yet have clearly legislated responsibilities to consider, manage, and disclose climate change flood risks. By “clearly legislated responsibilities”, we mean mandatory requirements that are imposed explicitly in the statutes and regulations that establish Atlantic Canadian municipalities and frame their powers and responsibilities. Although municipalities throughout Atlantic Canada have legislated powers and some requirements to conduct flood hazard mapping and/or flood risk mapping, the legislation imposing those responsibilities does not explicitly contemplate climate change flooding, and the requirements differ from province to province. Newfoundland and Labrador appears to be the only one of the Atlantic Canadian provinces that has explicitly incorporated

[2] Although “mitigation” has a specific meaning in the context of the global climate regime, where “climate change mitigation” and “climate change adaptation” are understood as two separate endeavours, the verb “mitigate” is used in its general sense throughout this report, as meaning to reduce the severity of something (in this case, to reduce the severity of climate change flood risks).

climate change flood risks into its provincial flood mitigation regime, and, currently, the requirements imposed in that province are set out in policy, not legislation.

Category 2: External Legislation

In addition to the legislation that establishes municipalities in Atlantic Canada and frames their powers and responsibilities, external legislation can set expectations and impose liabilities for failure to anticipate and avoid preventable loss and damage. The report does not conduct an exhaustive review of external legislation that could impose municipal responsibility to consider, manage, or disclose climate change flood risks in Atlantic Canada, but it offers some examples to illustrate one of its key messages, which is that municipal failure to consider climate change flood hazards and mitigate risk appropriately may increase the chances that infrastructure breakdown will violate regulatory requirements.

Category 3: The Common Law

A key finding of the report is that Canada's courts have not yet produced reported decisions that explicitly address municipal responsibilities to consider, manage, or disclose climate change flood risks. Although there is a significant amount of case law addressing municipal liabilities for flood damage more generally, it appears that Canada's courts have not yet been asked to determine how municipalities should be preparing (or should have already prepared) for risks presented by climate change flooding.

Having found no reported Canadian court decisions that explicitly address municipal responsibilities to consider, manage, or disclose climate change flood risks, the report identifies the common law causes of action that historically have figured most prominently in disputes alleging municipal liabilities for flood loss and damage. It then assesses how those common law causes of action might give rise to municipal liability for loss and damage caused by climate change flooding. A longstanding distinction in Canadian negligence law between "core policy" decisions and "operational" decisions by governmental authorities creates a protective sphere that immunizes municipalities from some liability in negligence. Under the law, municipalities cannot be held liable in negligence for "core policy" decisions, provided those decisions are made rationally and in good faith.

A key finding of the analysis is that the common law of negligence is the likeliest source of municipal liability for future climate change flooding. The common law of "failure to warn", which the report treats as a category of negligence, could also be a significant source of liability for municipal failure to disclose known climate change flood risks.

Canada's common law of negligence recognizes that all governments have limited resources with which to carry out their functions and provide the public services that their communities want and need. Municipalities may not have much capacity to identify and mitigate climate change flood risks within their jurisdictions—some may determine that they have no capacity at all. The law does not require municipalities to take actions that are beyond their power: what it requires is that municipalities determine, rationally and in good faith, what is within their power and establish core policy responses through informed deliberation.

It is important to emphasize, however, that the law's protection for core policy decisions made rationally and in good faith means that municipalities cannot simply ignore problems that are

staring them in the face. Burying one's head in the sand is not a rational or good faith response to a problem and is not a prudent approach within this legal framework.

Municipalities may ask themselves if the common law distinction between "core policy" and "operational" decisions could immunize them from liability for failure to warn if they decide, as a matter of policy, not to disclose climate change flood risk information to municipal residents. Although the report finds no case law addressing this question explicitly, it is, in our view, highly doubtful that a municipal decision to withhold known climate change flood risk information that could benefit public safety would be accepted as a rational, good-faith decision that should be protected from liability.

Category 4: The Constitution

The *Canadian Charter of Rights and Freedoms* ("the *Charter*") is a constitutional document that guarantees the rights and freedoms set out within it, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[3] To date, four high-profile court cases have used *Charter* rights and freedoms as bases to allege that inadequate climate action by governments in Canada violates *Charter* rights. Three of those four cases have been discontinued, and one is still proceeding through the courts. Although the report finds no reported Canadian court decisions in which *Charter* claims alleging inadequate climate action have been brought against municipalities, the case law that has emerged to date demonstrates some willingness, on the part of the courts, to interpret the *Charter* progressively as law evolves to confront the climate crisis. A key message of the report is therefore that municipalities should not assume that a Canadian court will never agree that inadequate climate action by a municipality violates *Charter* rights. Municipalities should bear in mind that the climate crisis has the potential to change the law as we know it today.

Category 5: Funding Agreements and Other Contractual Relationships

Legislation, the common law, and the Constitution are not the only sources of law that can impose municipal responsibilities to consider, manage, or disclose climate change flood risks. As municipalities manage their infrastructure, they frequently enter into funding agreements and other contractual relationships that are necessary to facilitate municipal asset management. A key message of the report is that funding agreements and other contractual relationships can impose binding legal requirements upon their parties, and municipalities should bear in mind that they may be required by contract to consider, manage, or disclose climate change flood risks under certain circumstances.

1.3 Limitations of the Report

This report is intended to provide general legal information and high-level legal analysis. We have not attempted to identify and comment on every possible scenario in which a municipality, municipal councillor, or municipal employee may have responsibilities to consider, manage, or disclose climate change flood risks, nor have we attempted to identify and comment on all imaginable sources of liability. To do so would require a depth of analysis and commentary that is beyond the scope of the report.

[3] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at section 1.

The report's primary purpose is to provide information and analysis that spark conversations and motivate municipalities to make further inquiries into what could be done to address climate change flood risks they are or may soon be facing. For all of these reasons, we emphasize that this report should not under any circumstance be used as a substitute for tailored legal opinion and legal advice. A municipality, municipal councillor, or municipal employee who needs to understand their legal rights, responsibilities, or potential liabilities in any specific scenario should seek legal counsel that is fully attuned to the specific circumstances of their case.

Our comments on the common law are based on reported decisions by Canadian courts. Many lawsuits that are initiated in Canada are settled quietly before they go to trial, particularly when the parties wish to avoid the expense of trial or the risk that the court may decide against them. Our review of lawsuits against municipalities has not included cases in which legal proceedings were initiated but settled before a court was asked to render a decision. Municipal councillors, municipal employees, and others reading this report may have anecdotal knowledge of settled cases where relevant issues were raised, but such cases are not addressed here.

Our focus on reported court decisions will not help municipalities to assess how frequently flooding-related lawsuits are initiated against municipalities today nor whether the numbers are increasing due to climate change; however, our approach will help municipalities understand how Canada's courts have dealt with such disputes when they have been asked to resolve them, and that gives us a basis from which to speculate how courts may assess municipal liability for climate change flood risks in the future.

2.0 Overview of Municipal Responsibilities to Consider, Manage, and Disclose Climate Change Flood Risks

Unlike the Government of Canada and the provincial governments of New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, municipal governments are not established and do not govern with powers granted to them directly by Canada's Constitution. Instead, municipalities are established and empowered by provincial legislation (statutes and regulations) that delegate to them certain governance powers that belong constitutionally to the provinces. For this reason, municipalities are sometimes called "creatures of statute".

Historically, Canadian courts took the view that, as "creatures of statute", municipalities had limited powers that were defined entirely by the express wording of their enabling statutes and regulations. Legislation that listed municipal powers to take certain actions or address certain issues was typically interpreted as granting those listed powers and those listed powers alone. Municipal governments were restrained, legally, from going beyond the bounds of powers and responsibilities that were set out clearly in their enabling legislation.

Over the past several decades, Canadian courts' perspectives on municipalities have changed significantly. Thanks to precedent-setting decisions from the Supreme Court of Canada,[4] Canadian courts now recognize and are expected to apply the principle of subsidiarity when interpreting municipalities' enabling legislation and assessing the scope of municipal governance powers. Under this relatively new approach, courts are expected to interpret enabling legislation broadly and purposively, recognizing the significant role that municipalities play as the governments that are often closest to the people and that often have the most influence over essential services upon which Canadians rely in their day-to-day lives.

In some cases, provincial governments have responded to and amplified this new judicial approach by amending municipalities' enabling legislation to recognize more expansive municipal purposes and powers. Clauses that are sometimes referred to colloquially as "general welfare" clauses are now common in enabling legislation, serving to recognize municipal powers to engage in a wide array of activities designed to benefit the communities they serve, whether or not those activities are listed specifically.[5] Enabling legislation may also include provisions stating explicitly that powers listed specifically in the statute should not be interpreted restrictively as being the sum total of powers held by municipalities.[6]

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[4] See for example the dissenting opinion of Justice McLachlin (with Chief Justice Lamer and Justices L'Heureux-Dubé and Gonthier concurring) in *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, and the opinion of the majority (authored by Justice L'Heureux-Dubé) in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

[5] See for example section 9A of Nova Scotia's *Municipal Government Act*, SNS 1998, c-18, which states that the purposes of a municipal government are to "provide good government", "provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality", and "develop and maintain safe and viable communities". Notably, a municipal legislation review undertaken in Newfoundland and Labrador identified that municipal legislation in the province has remained prescriptive (defining municipalities' powers narrowly), compared to developments in other jurisdictions: see Newfoundland and Labrador, *What We Heard: Municipal Legislation Review* (November 2018) at pages 3 and 18, online: <https://www.gov.nl.ca/mpa/files/publications-pdf-municipal-legistlation-what-we-heard.pdf>.

[6] See for example section 171A of Nova Scotia's *Municipal Government Act*, SNS 1998, c-18, which states: "Where this Act confers a specific power on a municipality in relation to a matter that can be read as coming within a general power also conferred by this Act, the general power is not to be interpreted as being limited by the specific power". For another example, see section 7 of New Brunswick's *Local Governance Act*, SNB 2017, c 18, which states: "Recognizing that a local government is a responsible and accountable level of government, the powers of a local government under this or any other Act shall be interpreted broadly in order to provide broad authority to the council to enable it to govern the affairs of the local government as it considers appropriate and to enhance the council's ability to respond to issues in the local government".

Arguably, this relatively new conception of municipal governance shapes judicial, provincial, and public understanding of municipal responsibilities as well as municipal powers. In this regard, enabling legislation that recognizes broad municipal purposes such as the provision of good government, the development and maintenance of safe and viable communities, the fostering of economic, social, and environmental wellbeing, and/or the stewardship of public assets may be interpreted as setting governance expectations as well as providing governance powers.[7]

It is difficult to argue that a municipality is empowered to exercise broad powers to foster and maintain the general welfare of a community without acknowledging that municipalities are expected to serve the public interest to the extent that they can within their jurisdiction.

To the extent that municipalities are expected to provide good government, develop and maintain safe and viable communities, foster economic, social, and environmental wellbeing, and/or steward public assets, fundamental expectations such as these do not necessarily tell us what a municipality is required to do, or not do, under specific circumstances. In some cases, enabling legislation imposes explicit requirements on municipalities, stating that they must or must not do certain things. In other cases, municipal decision-making is a matter of wide discretion, limited only by requirements to exercise that discretion in good faith, rationally, and with due diligence. Further, enabling statutes and regulations are not the only sources of municipal responsibility. Canada's common law imposes certain requirements that must be met to avoid liability for tortious actions such as negligence, and other sources of law can impact municipalities as well, such as environmental laws under which municipalities may be held responsible for environmental harms.

This report discusses five categories of potential sources of municipal responsibility to consider, manage, and disclose climate change flood risks in Atlantic Canada:

- municipalities' enabling legislation;
- external statutes and regulations that impose liability for environmental harms and personal injuries;
- the common law;
- the Constitution; and,
- funding agreements and other contractual relationships in which requirements to consider, manage, or disclose flood risks are included as terms or conditions.

The report does not explore each of these categories in equal detail; instead, it focuses primarily on the legal regimes established by municipalities' enabling legislation and the common law. The discussion addressing external statutes and regulations and the discussion addressing funding agreements and other contractual relationships do not aim to provide comprehensive information on or analysis of those subjects; instead, they aim to highlight possibilities and identify issues into which municipalities may wish to inquire further. The discussion addressing the Constitution provides an overview of climate litigation that has occurred to date in Canada, along with some brief commentary.

For each of the five categories listed above, our ability to provide information and analysis addressing municipalities' responsibilities to consider, manage, and disclose climate change

7 See: New Brunswick's Local Governance Act, SNB 2017, c 18 at section 5; Nova Scotia's Municipal Government Act, SNS 1998, c-18 at section 9A, and Halifax Regional Municipality Charter, SNS 2008, c 39 at section 7A; and, Prince Edward Island's Municipal Government Act, SPEI 2016, c 44 at section 3. The statutes that empower municipalities in Newfoundland and Labrador do not have analogous purpose provisions.

flood risks is complicated by the fact that climate change flood risks are not addressed explicitly in most of the sources informing our discussions.

Although flood risks are addressed to some extent in the enabling legislation of municipalities in Atlantic Canada, the flood risks contemplated by the key statutes and regulations are, for the most part, existing flood risks that have been identified through flood mapping or local knowledge of flood events. Newfoundland and Labrador appears to be the only one of the Atlantic Canadian provinces that has explicitly incorporated climate change flood risks into its existing flood mitigation regime. It is not clear whether projected future flood risks can or should be treated in the same way as the other flood risks that are currently addressed by the regimes in New Brunswick, Nova Scotia, and Prince Edward Island, which do not yet account for climate change flood risks explicitly. This means that legislated responsibility is vague in most cases, although some tentative conclusions may be drawn.

Where explicit requirements are not imposed by legislation, the common law often serves as a supplementary source of responsibilities and associated liabilities. However, our review of reported court decisions from across Canada found no cases in which Canada's courts were asked to resolve disputes in which a municipality's failure to consider, manage, and/or disclose climate change flood risks was a live issue. It seems likely that Canada's courts will be asked to address such issues in future, and, in doing so, determine retrospectively what a municipality should have done to take climate change flood risks into account when conducting its affairs. However, because we have not yet seen judicial commentary on these issues, we must use existing case law on municipal liabilities for flood loss and damage to infer speculatively how courts may determine municipal liabilities for consequences of climate change flooding in the future.

The information and analysis in the sections that follow are presented with an eye to three spheres of municipal activity in which flood risks can figure prominently:

- management of municipal infrastructure;
- land use planning; and,
- development permitting.

These are the primary spheres of activity from which existing case law on municipal liabilities for flood loss and damage has emerged. That history suggests where disputes are most likely to arise in the future, if the existing legislated regimes and the common law remain more or less the same.

It is important to keep in mind, however, that just as climate change consequences are being felt already by municipalities across Canada, so too are laws and policies changing to meet the crisis at hand. Municipalities should bear in mind that whatever responsibilities to consider, manage, or disclose climate change flood risks may be found in the law today, changes to statutes, regulations, and the common law may impose new responsibilities and create associated liabilities in the future.

3.0 Legislated Responsibilities and Sources of Liability

Municipalities have been called "creatures of statute" because their powers and responsibilities are shaped largely by their enabling legislation—the provincial statutes and regulations that delegate provincial powers to municipalities and, in doing so, empower municipalities to act.

Although the statutes and regulations that empower municipalities throughout Atlantic Canada enable municipalities to exercise discretion in many spheres of municipal governance, they also impose several requirements that municipalities are legally required to meet. For this reason, a good starting point for any analysis of a municipality's responsibilities to consider, manage, and disclose climate change flood risks is to ask if the municipality's enabling legislation imposes requirements along these lines.

Climate change flood risks have the potential to impact several spheres of municipal activity, including management of municipal infrastructure, land use planning, and development permitting. Indeed, all three of these spheres of activity are spheres in which flood risk is an important consideration outside of the climate change context, and they are the primary spheres of activity from which existing case law on municipal liabilities for flood damage has emerged. This chapter does not provide an exhaustive summary of existing municipal responsibilities in these spheres of activity; instead, it focuses on assessing whether municipalities' enabling legislation in Atlantic Canada imposes explicit requirements to consider, manage, or disclose projected future flood risks caused by climate change.

3.1 The Key Enabling Statutes in Atlantic Canada

The key statutes that enable municipalities in New Brunswick are the *Local Governance Act* and the *Community Planning Act*, the latter of which deals specifically with municipal powers and responsibilities with respect to land use planning.

In Newfoundland and Labrador, the *Municipalities Act, 1999* is the enabling legislation for most municipalities in the province, but the cities of Corner Brook, Mount Pearl, and St. John's are empowered under separate statutes called, respectively, the *City of Corner Brook Act*, *City of Mount Pearl Act*, and *City of St. John's Act*. Municipal powers and responsibilities with respect to land use planning are set out in the *Urban and Rural Planning Act, 2000*.

Most municipalities in Nova Scotia are empowered by the *Municipal Government Act*, which covers municipal land use planning powers and responsibilities as well as other municipal purposes and powers. The Halifax Regional Municipality ("HRM") is empowered separately under the *Halifax Regional Municipality Charter*, which similarly covers the HRM's land use planning powers and responsibilities as well as the HRM's other municipal purposes and powers.

In Prince Edward Island, municipalities are empowered generally by the *Municipal Government Act*, and the *Planning Act* sets out municipalities' specific powers and responsibilities with respect to land use planning.

3.2 Legislated Responsibilities to Consider and/or Manage Climate Change Flood Risks

New Brunswick

New Brunswick's *Local Governance Act* does not impose explicit requirements to consider or manage climate change flood risks. Neither flooding nor climate change are mentioned in the Act.

Arguably, the municipal purpose section of the *Local Governance Act* sets an expectation that municipalities in the province (which are called "local governments") will consider climate change risks within their jurisdictions, as it states that the purposes of local governments include the purposes of providing good government, developing and maintaining safe and viable communities, and fostering the economic, social, and environmental wellbeing of their communities.[8] However, these purpose provisions do not impose explicit legal obligations in and of themselves.

Flood risks and flood risk planning are addressed explicitly in the *Community Planning Act* (*"CPA"*). Among other things, the *CPA* establishes processes through which local governments can ask the provincial Minister of Local Government and Local Governance Reform to designate flood risk areas within their jurisdiction.[9] A flood risk area designation by the Minister enables a local government to enact a Flood Risk Area Bylaw designed to mitigate flood risk in various ways, including by prescribing relevant engineering standards that must be met for all developments within the area, as well as by prohibiting developments within the area that would exacerbate flood risk by interfering with floodways.[10] These processes and powers under the *CPA* are discretionary, not mandatory: local governments can choose to use them, but the Act does not require them to do so.

Importantly, the *CPA* requires the Government of New Brunswick to establish, by regulation, one or more statements of provincial interest that establish land use planning standards that are designed to apply provincially. Through amendments that are scheduled to come into force (become legally operative) in January 2023, that requirement will be changed to require the provincial government to establish statements of "public interest", by regulation, "to protect the public interest in the use and development of land".[11] If a statement of public interest is established that imposes requirements to consider climate change flood risks and implement such considerations in land use planning and development permitting, local governments will need to meet those requirements.[12]

It is also worth noting that New Brunswick's *Emergency Measures Act* ("*EMA*") requires municipalities in the province to prepare and approve emergency measures plans.[13] As is outlined in the *Province of New Brunswick Planning Guide for Municipal Officials*, a document developed by the New Brunswick Emergency Measures Organization ("EMO"), municipalities

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[8] *Local Governance Act*, SNB 2017, c 18 at section 5.
[9] *Community Planning Act*, SNB 2017, c 19 at subsection 71(1).
[10] *Ibid* at section 72.
[11] See scheduled amendments to the *Community Planning Act*, SNB 2017, c 19 at section 13.
[12] Notably, the *Flood Risk Reduction Strategy* that the Government of New Brunswick published in 2014 flagged inconsistencies in land use planning that addresses and mitigates flood risks throughout the province, and the strategy set as an objective the development of a provincial flood risk policy that would establish more consistent standards: see Province of New Brunswick, *Flood Risk Reduction Strategy* (2018) at pages 6-8, online: <https://www2.gnb.ca/content/dam/gnb/Departments/env/pdf/Flooding-Inondations/ NBFloodRisk ReductionStrategy.pdf>.
[13] *Emergency Measures Act*, RSNB 2011, c 147 at subsection 9(d).

must begin the emergency planning process by enacting bylaws that establish municipal authority to prepare, approve, and implement emergency measures plans.[14] Legislated requirements under the *EMA* and its corresponding regulations do not currently address climate change flooding, nor does the planning guide developed by the EMO, but the guidance does demonstrate a clear expectation that municipalities will assess and make plans to mitigate potential emergencies caused by flooding and major weather events like hurricanes.

Newfoundland and Labrador

Newfoundland and Labrador's *Municipalities Act, 1999* does not impose explicit requirements to consider or manage climate change flood risks, nor do the *City of Corner Brook Act*, *City of Mount Pearl Act*, or *City of St John's Act*. Neither flooding nor climate change are mentioned in these statutes, nor are climate change and flooding mentioned in the *Urban and Rural Planning Act, 2000*.

The *Urban and Rural Planning Act, 2000* ("*URPA*") empowers municipalities to establish land use plans for municipal planning areas that have been designated by the provincial Minister of Municipal and Provincial Affairs, but the Act does not impose extensive requirements for such plans. Instead, the Act grants discretionary powers that enable municipalities to create land use plans that "describe and determine the physical, economic and social environment", "provide for the protection, use and development of environmentally sensitive lands", "provide for storm water control and erosion control", and "provide for the protection, use and development of natural resources and for the prevention of natural resource development with incompatible negative impacts", among other things.[15] Again, these powers are discretionary, not mandatory: municipalities can choose to use them, but the Act does not explicitly require them to do so. That being said, the Act does require proposed land use plans and associated development regulations to be submitted to the Department of Municipal and Provincial Affairs for review before they are adopted,[16] and the Act also requires the Minister to review plans and development regulations after they have been adopted, "to determine if they are contrary to law or a policy of the government".[17] This requirement opens the door for flood risk planning to be required in municipal land use planning through the application of provincial laws and policies that exist beyond the *URPA*.

The Government of Newfoundland and Labrador has established a Policy for Flood Plain Management that is rooted in provincial government powers under the *Lands Act* and *Water Resources Act*.[18] Notably, this policy not only takes into account known floodways and floodway fringes but also addresses "climate change flood zones", which are areas determined by climate change modelling as being likely to be impacted by flooding in the future.

Given the *URPA* requirements described above (those which require proposed land use plans and development regulations created by municipalities to be submitted to the Department of Municipal and Provincial Affairs for review before they are adopted and require the Minister to review municipal land use plans and development regulations after they have been adopted, "to determine if they are contrary to law or a policy of the government"), the provincial Policy for

[14] New Brunswick Emergency Measures Organization, *Province of New Brunswick Planning Guide for Municipal Officials* (April 2008), online: <https://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/emo/officials-e.pdf>.
[15] *Urban and Rural Planning Act, 2000*, SN 2000, c U-8 at section 13.
[16] *Ibid* at subsection 15(2).
[17] *Ibid* at subsection 24(1).
[18] Government of Newfoundland and Labrador, Environment and Climate Change, "Policy for Flood Plain Management" (undated), online: <https://www.gov.nl.ca/ecc/waterres/regulations/policies/flood-plain/>.

Flood Plain Management should inform municipal land use planning. The policy itself expects this, stating:

Where flood risk mapping has been prepared for a community (or any city, town or area) the information in the flood risk maps must be incorporated in the Municipal Plan (if one exists) and the flood risk areas must be zoned so as to permit only those project categories specified by this policy. In the absence of official flood risk mapping, communities will be encouraged to determine flood risk areas in accordance with this Department's standard hydro technical methods for delineating flood risk zones and to zone those lands in accordance with this policy. Failing this, communities will be encouraged to at least make provisions in planning documents for minimum setbacks from watercourses to provide some margin of safety and to recognize potential flood susceptibility.[19]

Although the legal import of the policy may vary under different circumstances, it clearly aims to incorporate flood risk considerations—including consideration of climate change flood hazards—into municipal land use planning.

Corresponding responsibilities to engage in preemptive climate change flood risk management are also envisioned by the Policy for Flood Plain Management, as the policy sets priorities addressing developments in identified climate change flood zones and requires that developments in such zones be approved by the Minister before they proceed.[20] Municipalities should be cognizant that if climate change flood zones are identified by the province, municipal attempts to authorize developments in such areas without the approval of the Minister may be unlawful.

Nova Scotia

Nova Scotia's *Municipal Government Act* ("*MGA*") and *Halifax Regional Municipality Charter* ("*HRM Charter*") do not impose explicit requirements to consider or manage climate change flood risks. Climate change is not mentioned in either statute, although climate change mitigation and adaptation are listed in Nova Scotia's *Minimum Planning Requirements Regulations*, included among the matters that municipal planning strategies may, but are not explicitly required to, address.[21]

Arguably, the municipal purposes listed in the *MGA* and *HRM Charter* set expectations that municipalities will consider climate change hazards within their jurisdictions, as both statutes list the provision of good government and the development and maintenance of safe and viable communities among a municipality's purposes.[22] However, these purpose provisions do not impose explicit legal obligations in and of themselves.

The *MGA* and *HRM Charter* both require municipal land use planning to be reasonably consistent with statements of provincial interest that are established under the *MGA*.[23] The Government of Nova Scotia has established a Statement of Provincial Interest Regarding Flood Risk Areas ("Flood Risk SPI"), and that statement is set out in Schedule B of the *MGA*.

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[19] *Ibid* at section 6.08.
[20] *Ibid* at section 6.01. To establish this requirement, the policy relies on the Minister's permitting and enforcement powers under the *Water Resources Act*, SN 2002, c W-4.01.
[21] *Minimum Planning Requirements Regulations*, NS Reg 140/2019 at subsection 9(a).
[22] *Municipal Government Act*, SNS 1998, c 18 at section 9A; *Halifax Regional Municipality Charter*, SNS 2008, c 39 at section 7A.
[23] *Municipal Government Act*, SNS 1998, c 18 at subsection 198(1); *Halifax Regional Municipality Charter*, SNS 2008, c 39 at subsection 214(1).

Under the Flood Risk SPI, municipal planning documents that are prepared for flood risk areas designated under the Canada-Nova Scotia Flood Damage Reduction Program must be reasonably consistent with a number of requirements, including specified development restrictions on developments within mapped floodways and floodway fringes as well as developments within known but unmapped floodplains.[24] The Flood Risk SPI also recognizes that there are other flood-prone areas within the province that have not been mapped under the Canada-Nova Scotia Flood Damage Reduction Program, and it states that "where local knowledge or information concerning these floodplains is available", municipal planning documents should reflect that information and the provincial interests that the Flood Risk SPI describes.[25]

Although the Flood Risk SPI does not explicitly address flood risks related to climate change, its statement that local knowledge or information concerning floodplains should be taken into account in land use planning could arguably be interpreted as setting an expectation that municipalities will consider and incorporate available climate change flood hazard and flood risk information when engaging in land use planning. However, neither the Flood Risk SPI, the *MGA*, nor the *HRM Charter* imposes absolutely clear requirements that this be done.

When Nova Scotia's *Coastal Protection Act* (enacted but not yet proclaimed) and its corresponding regulations (currently under development) come into force, municipalities will have responsibilities to ensure that development agreements and building permits for developments within the designated "coastal protection zone" comply with the Act and regulations. This will give some municipalities in Nova Scotia new responsibilities for co-managing coastal flood risks, including risks anticipated as a result of sea level rise and coastal storm surges caused by climate change.

Prince Edward Island

Prince Edward Island's *Municipal Government Act* ("*MGA*") does not impose explicit requirements to consider or manage climate change flood risks. Neither flooding nor climate change are mentioned in the Act.

Arguably, the *MGA*'s preamble and purpose sections set an expectation that municipalities will consider climate change hazards within their jurisdiction, as these sections speak of the important roles that municipalities play in ensuring economic, environmental, and social prosperity for Islanders and also recognize the importance of giving municipal councils flexibility to respond to the needs and changing circumstances of the municipalities they govern.[26] However, these provisions do not impose explicit legal obligations in and of themselves.

Under the *Planning Act*, climate change adaptation is included as a matter of provincial interest that the Minister of Agriculture and Land must take into account when the Minister carries out planning responsibilities under the Act.[27] Although the Act does not include an analogous provision that imposes the same requirement on municipal councils engaging in land use planning, the planning regime established by the Act includes several interconnections between municipal and Ministerial powers and responsibilities. These interconnections include the

[24] *Municipal Government Act*, SNS 1998, c 18, Schedule B, Statements of Provincial Interest, "Statement of Provincial Interest Regarding Flood Risk Areas".
[25] *Ibid.*
[26] See the preamble to the *Municipal Government Act*, SPEI 2016, c 44 as well as clause 2(1)(c).
[27] See the *Municipal Government Act*, SPEI 2016, c 44 at clauses 2.1(1)(p) and 2.1(1)(r).

requirement that official plans adopted by municipal councils be submitted to the Minister for approval.[28] Ministerial approval is also required for bylaws giving effect to interim planning policies.[29] Because the Minister is required to take climate change adaptation into account when carrying out planning responsibilities under the Act, these interconnections indicate that official plans and interim planning policies should do so as well, as such documents are subject to ministerial oversight and approval.[30]

The *Planning Act* creates several mechanisms through which the Lieutenant Governor in Council can establish, by regulation, minimum development standards, land use policy regulations, and provincial planning regulations with which municipal land use planning must comply. Our review of the requirements established to date indicates that they do not impose explicit requirements on municipalities to consider or manage climate change flood risks. If such requirements are established by regulation in the future, they will impose clearer legislated responsibilities that municipalities in Prince Edward Island must fulfil.

3.3 Legislated Responsibilities to Disclose Climate Change Flood Risks

As noted above, climate change flood risks are not mentioned explicitly in most of the key legislation that empowers municipalities in Atlantic Canada. The exception is Newfoundland and Labrador's Policy for Flood Plain Management, which is technically not legislation in and of itself, but which feeds into the land use planning regime established under the *Urban and Rural Planning Act, 2000*. With this in mind, assessing whether municipalities in Atlantic Canada have legislated responsibilities to disclose climate change flood risks—whether to the public at large or, more narrowly, to those who are most likely to be harmed—requires a broader approach that explores access to information requirements that apply to municipalities more generally.

Under their enabling legislation, municipalities in all four of the Atlantic Canadian provinces are subject to access to information requirements that exist in large part to foster governmental transparency and accountability. Members of the public who wish to access certain records in the possession or control of municipalities can request such records through established channels. Understood broadly, these access to information regimes favour transparency in municipal deliberation and decision-making. Although the regimes accommodate several exceptions designed to protect personal information and information that is otherwise confidential or privileged, on the whole, the regimes favour openness rather than secrecy in government decision-making and matters of public interest.

New Brunswick's *Local Governance Act* requires the clerks of local governments to make several kinds of information available for public examination, including: adopted minutes of council meetings; records of closed meetings that identify the meeting dates and the types of matters that were under discussion; and, all other documents that the Act or regulations require be made available.[31]

Newfoundland and Labrador's *Municipalities Act, 1999* requires town councils and regional councils to make several kinds of information available for public inspection, including: "adopted

[28] *Planning Act*, RSPEI 1998, c P-8 at clause 14(2)(b).
[29] *Ibid* at subsection 10(5).
[30] *Ibid* at clause 9(3)(a).
[31] *Local Governance Act*, SNB 2017, c 18 at section 75.

minutes of the council" and all documents "tabled or adopted" by town councils and regional councils at public meetings that are not otherwise listed specifically.[32] The *City of Corner Brook Act* and the *City of Mount Pearl Act* impose the same requirements on the councils of those cities.[33] The *City of St John's Act* stands apart by not imposing the same requirement on the St. John's Municipal Council, but the Act does provide for public access to the minutes of council meetings, other than the minutes of special or privileged meetings.[34]

Nova Scotia's *Municipal Government Act* includes a part dedicated to freedom of information and protection of privacy, with stated purposes including the purpose of ensuring that municipalities "are fully accountable to the public" and the purpose of facilitating "informed public participation in policy formulation".[35] The Act gives members of the public "a right of access to any record in the custody, or under the control, of a municipality" upon request, subject to the privacy and confidentiality restrictions that are set out in the Act and associated statutes and regulations.[36] Under the *Halifax Regional Municipality Charter*, the *Municipal Government Act*'s provisions addressing freedom of information and protection of privacy apply equally to the Halifax Regional Municipality.[37]

Prince Edward Island's *Municipal Government Act* includes provisions addressing access to information and protection of privacy within the context of municipal administration.[38] Among other things, the provisions require municipalities to enact and maintain bylaws that accord with the *Access to Information and Protection of Personal Information Regulations ("ATIPPI Regulations*") that are established under the Act.[39] The *ATIPPI Regulations* require municipalities to make several kinds of information accessible to the public, including: the minutes of all council and council committee meetings; current strategic plans; and, all municipal policies.[40] In addition to the kinds of information listed in the *ATIPPI Regulations*, the *Municipal Government Act* also requires municipal Access to Information Bylaws to provide for public access to "all documents that have been tabled or adopted at open meetings" of council or council committees that are not captured by other access requirements or protected by confidentiality rules or solicitor-client privilege.[41]

As we discuss in more detail in Section 5.0, which addresses the common laws of negligence and failure to warn, one of the clearest ways for municipalities to protect themselves from liability for those torts is to develop rational, good faith policy approaches to issues that are within municipal control.

The requirements cited above suggest that if municipalities are gathering and using climate change flood risk information to inform municipal deliberations and the establishment of municipal policies—as is likely within their own best interest to do—their enabling legislation may require that such information be made accessible to members of the public upon request.

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[32] *Municipalities Act, 1999*, SN 1999, c M-24 at subsection 215(1).
[33] *City of Corner Brook Act*, RSN 1990, c C-15 at subsection 46(1); *City of Mount Pearl Act*, RSN 1990, c C-16 at subsection 46(1).
[34] *City of St John's Act*, RSN 1990, c C-17 at subsection 41(1).
[35] *Municipal Government Act*, SNS 1998, c 18 at subsection 462(a) and clause 462(b)(i).
[36] *Ibid* at subsection 465(1).
[37] See the *Halifax Regional Municipality Charter*, SNS 2008, c 39 at section 366, which states that Part XX of Nova Scotia's *Municipal Government Act* applies to the Halifax Regional Municipality.
[38] *Municipal Government Act*, SPEI 2016, c 44 at sections 147 and 148.
[39] *Ibid* at subsection 147(1).
[40] *Access to Information and Protection of Personal Information Regulations*, PEI Reg EC2019-696 at subsection 3(2).
[41] *Municipal Government Act*, SPEI 2016, c 44 at clause 147(1)(o).

Our discussion of the tort of "failure to warn" in Section 5.0 takes this discussion further by exploring how the common law may create municipal responsibilities to disclose climate change flood risks to those who are likely to be harmed.

3.4 Legislated Sources of Liability for Failure to Consider, Manage, or Disclose Climate Change Flood Risks

In addition to determining whether their enabling legislation requires them to consider, manage, or disclose climate change flood risks, municipalities should also consider how other legislated regimes may set expectations and impose liabilities for failure to anticipate and avoid preventable flood loss and damage.

Management of municipal infrastructure such as sewer, stormwater, and water systems is one of the spheres of municipal activity where climate change impacts are easily imaginable.

Climatic changes such as rising winds and increased precipitation, storm frequency, and storm intensity, along with the impacts of sea level rise and coastal storm surges, can all be expected to put pressure on municipal infrastructure. Loss and damage caused by the breakdown or inadequacy of infrastructure such as sewer, stormwater, and water systems may give rise to liability under legislated regimes that are external to municipalities' enabling legislation, such as environmental laws under which municipalities may be held responsible for environmental harms.

New Brunswick's *Clean Environment Act* prohibits persons from releasing contaminants into the environment without authorization if doing so would or could: "affect the natural, physical, chemical or biological quality or constitution of the environment"; "endanger the health, safety or comfort of a person or the health of animal life"; "cause damage to property or plant life"; or, "interfere with the visibility, the normal conduct of transport or business or the normal enjoyment of life or property".[42] Given the broad definition of "contaminant" set out in the Act, the release of sewage into the environment due to a sewer system breakdown could constitute an offence. Municipalities supplying wastewater services could therefore be exposed to liability for violating this prohibition.

Provisions prohibiting the unauthorized release of contaminants into the environment are common in environmental legislation, and provisions analogous to the one discussed above are found in Newfoundland and Labrador's *Environmental Protection Act*,[43] Nova Scotia's *Environment Act*,[44] and Prince Edward Island's *Environmental Protection Act*.[45] Some federal statutes and regulations create analogous provisions as well: for example, the federal *Fisheries Act* prohibits the deposit of deleterious substances into waters frequented by fish or any other places where such substances may enter such waters.[46] This prohibition exists specifically to address the release of contaminants and other injurious substances that could harm fish and other aquatic species within the federal government's jurisdiction.

[42] *Clean Environment Act*, RSNB 1973, c C-6 at subsection 5.3(1).
[43] *Environmental Protection Act*, SN 2002, c E-14.2 at section 7.
[44] *Environment Act*, SNS 1994-95, c 1 at section 67.
[45] *Environmental Protection Act*, RSPEI 1988, c E-9 at section 20.
[46] *Fisheries Act*, RSC 1985, c F-14 at section 36.

Prohibitions such as these create regulatory offences, which are sometimes referred to as "strict liability" offences. Unlike criminal offences in Canada, which cannot be proven without demonstrating necessary aspects of the defendant's "guilty act" and "guilty mind", strict liability offences assign liability more straightforwardly when regulatory violations occur. Proof of a regulatory violation, with or without a "guilty act" or "guilty mind", is enough to establish liability unless the defendant can mount a successful defence.

Persons, including municipalities, who are charged with strict liability offences can defend against the charges by asserting the "defence of due diligence". Essentially, the defence of due diligence aims to demonstrate that the defendant did everything that could reasonably be expected to avoid the circumstances that gave rise to the offence.

Diligent maintenance of municipal infrastructure and efforts to identify and address future needs if possible are actions that can reduce the risk of statutory liabilities for infrastructure breakdown and inadequacy.

Our discussion of municipal asset management in Section 6.0 continues this discussion by exploring how a growing field of assessment management planning and emerging asset management standards may shape due diligence standards in the future.

4.0 Common Law Responsibilities and Sources of Civil Liability

The common law is law that has taken shape through generations of decision-making by courts. Although the common law includes several rules and legal frameworks that are considered "settled" law and are not expected to change, it is important to recognize that the common law evolves continuously as courts are asked to resolve new issues and ensure that judicial decision-making keeps pace with evolutions in Canadian society.

The common law may shape municipal responsibilities to consider, manage, and disclose climate change flood risks in at least two significant ways.

First, the common law is the primary source of law that addresses private losses suffered as a result of legal wrongdoing by others (excluding criminal conduct, which is dealt with under Canada's *Criminal Code*). Negligence and nuisance—two torts with which most municipalities are familiar—are types of legal wrongdoing that have been defined primarily by the common law. Not only does the common law shape municipalities' obligations to avoid causing harm through torts like negligence and nuisance, it also offers legal immunities and defences that can shield municipalities from liability for actions that cause harm.

Second, it is through the common law that Canada's courts interpret and define the rights and freedoms that are protected under Canada's Constitution and, in particular, the *Canadian Charter of Rights and Freedoms*, which was added to the Constitution in 1982. The early waves of climate litigation in Canada have called on Canada's courts to interpret the *Charter of Rights and Freedoms* as requiring more ambitious climate action by the governments of this country. We explore this subject in more detail in Section 7.0, which offers an overview of climate litigation in Canada to date.

Statutes and regulations enacted by governments can override the common law by expanding or restricting its effects. Provincial governments have used this power to shield municipalities from liabilities to which they would otherwise be exposed under the common law. This means that a municipality's legal obligations under the common law should always be assessed in light of the municipality's enabling legislation to determine whether the requirements of the common law have been expanded or restricted in any way. Some examples of statutes limiting common law liability are presented below in our discussions of nuisance and trespass to land.

The following subsections discuss four common law "causes of action" (wrongdoings that can ground civil proceedings in which plaintiffs seek compensation for personal injury or property damage). Those causes of action are: nuisance, negligence, the rule in *Rylands v Fletcher*, and trespass to land. These are the common law causes of action that plaintiffs have asserted most often in litigation alleging municipal liability for flood loss and damage, which suggests that they are the common law causes of action that plaintiffs are most likely to assert in future cases alleging municipal liability for consequences of climate change flooding.

This section ends with commentary on an additional common law cause of action that municipalities may find themselves facing if they choose to mitigate climate change flood risks through land use planning. That cause of action, called "*de facto* expropriation", was recently revisited by the Supreme Court of Canada, making it worthwhile for municipalities to keep their eyes on future developments in the case law.

4.1 Nuisance

Under the common law, the tort of "nuisance" has two forms: "private nuisance" and "public nuisance". Private nuisance involves substantial and unreasonable interference with a person's use and enjoyment of their land. Public nuisance involves activities that substantially and unreasonably interfere with the public's interest in health, safety, morality, comfort, or convenience.

Many public works owned and operated by municipalities have the potential to cause nuisances when they fail or break down. In some cases, even the routine operation or necessary maintenance of such systems can cause nuisances to private persons or the public at large. Sewer, stormwater, and water systems are common culprits: overflowing culverts, blocked drainages in pipes, routine flushing and repairs—these circumstances and others can cause water to intrude onto private or public property in ways that constitute private or public nuisances.

To facilitate the delivery of necessary services and protect municipalities from litigation alleging nuisance, the statutes and regulations that empower municipalities often limit municipal liability for nuisance.

Additionally, in situations where a municipality's enabling legislation does not limit the municipality's liability for nuisance under the circumstance in question, a common law defence called the "defence of statutory authority" may offer some additional protection.

Legislated Protections from Liability in Nuisance

New Brunswick's *Local Governance Act* states that local governments are not liable for nuisance if the damage giving rise to the legal proceeding is caused by: (a) "water overflowing from a water or wastewater system, drain, ditch or watercourse due to excessive snow, ice, mud or rain"; or, (b) "the construction, operation or maintenance of a system or facility for the distribution of water or for the collection, conveyance, treatment or disposal of wastewater, storm water or both".[47]

In Newfoundland and Labrador, the *Municipalities Act, 1999* protects local service district committees, municipalities, and councils (as defined by the Act) from liability for nuisance.[48] The *City of Corner Brook Act* protects the City of Corner Brook and its council from liability in nuisance,[49] and the *City of Mount Pearl Act* does the same for the City of Mount Pearl and its council.[50] Similarly, the *City of St. John's Act* states that the city is not liable for a nuisance.[51]

In Nova Scotia, the *Municipal Government Act* limits municipalities' liability for damages caused by the operation, maintenance, repair, breaking, and malfunction of water and stormwater systems and wastewater facilities, unless the damages are shown to be caused by negligence; the same section protects municipalities from liability for damages caused by the discharge of sewage or water from municipal sewers, unless certain factors establishing municipal culpability

[47] *Local Governance Act*, SNB 2017, c 18 at section 177.
[48] *Municipalities Act, 1999*, SN 1999, c M-24 at sections 394 and 411(2).
[49] *City of Corner Brook Act*, RSN 1990, c C-15 at section 180.1.
[50] *City of Mount Pearl Act*, RSN 1990, c C-16 at section 179.1.
[51] *City of St. John's Act*, RSN 1990, c C-17 at section 179.1.

are proven.[52] Substantially equivalent provisions are found in the *Halifax Regional Municipality Charter*.[53]

In Prince Edward Island, the *Municipal Government Act* limits municipalities' liability for nuisance and any other torts that do not require a finding of intention or negligence if the damage giving rise to the legal proceeding "arises, directly or indirectly, from streets, sidewalks or the operation or non-operation of: (a) a public service or facility; or, (b) a dike, ditch or dam".[54] However, the Act also establishes some significant exceptions to this rule, stating that the protection does not apply if the nuisance or other tort in question: "unreasonably imposes on one person or some persons a burden that is significantly greater than the burden it imposes on others" and "the municipality could reasonably have chosen an alternative, having regard to: (i) the municipality's duties and resources; (ii) the public benefits and costs of each alternative; and, (iii) the burdens imposed by each alternative".[55]

Although climate change impacts may put new pressures on municipal sewer, stormwater, and water systems in the years to come, legislated protections from liability in nuisance will likely reduce municipalities' legal liabilities for at least some harms caused by system failures.

Ultimately, however, the applicability and effect of the provisions described above will need to be determined on the facts of each case if and when such cases arise.

The Common Law Defence of Statutory Authority

The common law defence of statutory authority can defend a municipality from liability in nuisance if the municipality establishes two things:

(i) legislation authorized the municipal action that caused the nuisance; and
(ii) the nuisance was the "inevitable result" of the action that was authorized by legislation.

When a municipality wishes to use this defence, the burden is on the municipality to prove both that its actions were authorized by legislation and also that the resulting nuisance was inevitable. What constitutes "inevitability" for the purpose of this defence will be a legal and factual determination based on the specific circumstances of each case.

4.2 Negligence

At heart, the tort of "negligence" involves failure to take reasonable care to avoid harming those whom we know, or ought to know, could be harmed by our actions. The common law of negligence in Canada is vast and complex, which is why we devote Section 5.0 to exploring it in more detail.

Our analysis of existing case law on municipal liability for negligence suggests that the common law of negligence is the likeliest source of municipal liability for future climate change flooding.

[52] *Municipal Government Act*, SNS 1998, c 18 at section 514.
[53] *Halifax Regional Municipality Charter*, SNS 2008, c 39 at section 378.
[54] *Municipal Government Act*, SPEI 2016, c 44 at subsection 246(1).
[55] *Ibid* at subsection 246(2).

Municipal liability for negligence is conditioned by several factors.

First, the common law of negligence creates a distinction between “core policy” decisions and “operational” decisions made by governmental authorities, including municipalities and municipal employees. Under the common law, municipalities and municipal decision-makers are immunized from liability in negligence for “core policy” decisions, although liability can still attach to “operational” decisions that fail to take reasonable care.

Second, even when municipalities and municipal decision-makers are not immune from liability due to the distinction between “core policy” and “operational” decisions, the common law does not recognize a “duty of care” in all instances. Municipalities and municipal decision-makers acting under statutory authority are often characterized as owing duties to the general public—that is, as having responsibilities to act in the “public interest”, speaking broadly—as opposed to owing private duties of care to specific individuals. Although private duties of care have been recognized in some spheres of municipal activity, such as in the maintenance of public roads and the permitting of buildings, the fact remains that not all municipal decisions that cause harm to members of the public give rise to liability for negligence.

Finally, just as municipalities’ enabling legislation may limit municipal liability in nuisance, so too may such statutes and regulations limit liability for negligence. On the whole, the key statutes enabling municipalities in Atlantic Canada recognize that municipalities may be liable for negligence under certain circumstances; however, some limitations of liability for this tort do appear. For example, under Prince Edward Island’s *Municipal Government Act*, a municipality will only be liable “for an injury to a person or damage to property caused by snow, ice, slush or water of any form or kind on or adjacent to a street, sidewalk or trail” when the municipality is “grossly negligent”—a provision that heightens the ordinary threshold under the common law by requiring “gross” (i.e., particularly egregious) negligence to be proven.[56]

Ultimately, whether or not a municipality or municipal decision-maker may be found negligent in any given case will depend on the circumstances in question, the applicable elements of the common law, and any applicable limitations of liability established in legislation.

4.3 The Rule in *Rylands v Fletcher*

The tort known as “the rule in *Rylands v Fletcher*” comes from a nineteenth-century British case that led to the recognition of a common law rule that a person engaging in an unnatural use of land who brings onto their property something likely to cause damage if it escapes will be liable if the thing does escape and harm other persons or property.

In *Tock v St John’s Metropolitan Area Board* (“*Tock*”), a 1986 decision of the Appeal Division of the Newfoundland Supreme Court, the court held that the rule in *Rylands v Fletcher* could not make a municipality liable for damage caused by the escape of substances from municipal water and sewer systems because such systems are not unnatural uses of land—in fact, said the court, such systems are “essential to the proper operation of the municipality”.[57] When the decision was appealed to the Supreme Court of Canada, the court agreed that the rule did not apply.

[56] *Municipal Government Act*, SPEI 2016 c 44 at subsection 247(6).
[57] *Tock v St John’s Metropolitan Area Board*, 1986 CanLII 2419 (NL CA) at paragraph 20.

Supreme Court Justice La Forest, writing for himself and Chief Justice Dickson, wrote that the rule in *Rylands v Fletcher* "cannot be invoked where a municipality or regional authority, acting under the warrant of a statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality".[58] Justice La Forest adopted as a "definitive statement" the following comments on what constitutes an "unnatural" use of land for the purpose of the rule:

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.[59] [emphasis added]

Justice Wilson, writing for herself and two other members of the Supreme Court, agreed.[60]

The Supreme Court of Canada's decision in *Tock* remains the leading authority on municipal liability under the rule in *Rylands v Fletcher*, and it suggests that municipalities will not be liable under the rule when loss and damage are caused by municipal works that exist for the benefit of the community.

4.4 Trespass to Land

The tort of "trespass to land" is a tort that protects private property interests by enabling private landowners to sue for damages when their land is intruded upon without their consent. Trespass to land does not need to involve a person setting foot on another's land without permission: among other things, the tort can be established through the discharge of substances such as water onto plaintiffs' lands. However, the tort does require direct and physical intrusion onto land: indirect or "consequential" interference will not suffice to ground a claim.[61]

It has been held that in cases where floodwaters intrude onto land, defendant municipalities will likely not be liable for trespass because they do not "control" the floodwaters in question;[62] however, it has also been held that if a defendant municipality "does in fact 'control' the waters, such as through the installation of storm sewers that escape", there may be liability.[63]

Case Study: High Country Outfitters Inc v Pitt Meadows (City)

High Country Outfitters Inc v Pitt Meadows (City) is a 2012 decision from the British Columbia Supreme Court that illustrates the nature of the tort of trespass to land. The decision also offers some food for thought for municipalities that are considering works and improvements designed to mitigate flooding.

[58] *Tock v St John's (City) Metropolitan Area Board*, [1989] 2 SCR 1181 at page 1190.
[59] *Ibid* at page 1989.
[60] *Ibid* at page 1204.
[61] *High Country Outfitters Inc v Pitt Meadows (City)*, 2012 BCPC 308 at paragraph 70.
[62] *Ibid* at paragraphs 70-74, citing and adopting reasoning by the Alberta Provincial Court in *Stachniak v Thorhild (County) No 7*, 2001 ABPC 65 at paragraph 25.
[63] *Stachniak v Thorhild (County) No 7*, 2001 ABPC 65 at paragraph 25, citing *Heddinger v Calgary (City)*, 1992 CanLII 6118 (AB QB).

The circumstances giving rise to the case were as follows. In 2007, British Columbia's Ministry of the Environment predicted that there would be unusually high spring freshets, and, in the hopes of mitigating the flood damage that might be caused, the provincial government established a funding program designed to enable municipalities to improve their flood defence infrastructure. The City of Pitt Meadows obtained funding from the province and made improvements to a dike system that it already had in place. Some time later, a private property owner initiated a legal proceeding against the city, alleging that the work done on the dike system allowed water to run off or seep through the dike and accumulate on his property. The plaintiff alleged that, as a result of the accumulation of water caused by the dike, his septic system failed and caused damage to his property.

Trespass to land was one of the causes of action upon which the plaintiff relied. Ultimately, the court held that the dike improvements were not the reason the septic system failed. However, even apart from that finding, the court held that the trespass claim could not succeed because the city did not have sufficient control over the water that was allegedly running off or seeping through the dike. In the court's view, this was not a situation where the city had "created an elaborate system of water storage or distribution in which the control necessary to ground liability for trespass might be found"; instead, it was a situation where "the alleged trespass is incidental to the mere presence of a structure".[64]

We are unaware of any cases in which this decision has been applied in Atlantic Canada. The decision suggests that the trend in the common law, as applied to date in Canada, is that municipalities may be liable for trespasses to land that occur as a result of waters they control (such as through the creation and operation of municipal infrastructure designed to gather, store, and/or redirect floodwaters), but they will not necessarily be liable for trespass to land if structures designed to mitigate flood risks create indirect incursions of water or other substances onto private property. Ultimately, the applicability of the tort will need be determined on the facts of each case if and when such cases arise.

Legislated Protections from Liability in Trespass

The key statutes and regulations that empower municipalities in New Brunswick, Newfoundland and Labrador, and Nova Scotia do not explicitly limit municipalities' liability for the kinds of trespass to land that are under discussion in this report—namely, trespasses occurring as a result of infrastructure breakdown or inadequacy. Provisions allowing municipal employees to enter private lands without permission in certain circumstances do exist, but those are not the kinds of trespass situations under consideration here.

Provisions in the *City of St. John's Act* limiting municipal liability for certain kinds of flood damage may be broad enough to protect against liability for trespass to land under certain circumstances. The Act states that the city "shall not be liable for a loss or damage to property resulting from flooding by water occasioned by rainstorms or thaws, or the breaking of a water main or sewer pipe for a cause over which the city has no control".[65] Although the provision may possibly be broad enough to limit municipal liability for trespass to land, we did not find any court decisions in which an interpretation along those lines was considered and applied.

Provisions in Nova Scotia's *Municipal Government Act* and *Halifax Regional Municipality Charter* that limit municipal liability for certain kinds of flood damage may likewise be broad

[64] *High Country Outfitters Inc v Pitt Meadows (City)*, 2012 BCPC 308 at paragraph 73.
[65] *City of St. John's Act*, RSN 1990, c C-17 at section 179.

enough to protect against liability for trespass to land under certain circumstances. The *Municipal Government Act* states: "Where an overflow of water from a sewer, drain, ditch or watercourse is a consequence of snow, ice or rain", a municipality "is not liable for a loss as a result of the overflow".[66] An equivalent provision appears in the *HRM Charter* as well.[67] Although these provisions may possibly be broad enough to limit municipal liability for trespass to land, we did not find any court decisions in which interpretations along those lines were considered and applied.

Finally, the provisions in Prince Edward Island's *Municipal Government Act* that limit municipal liability for nuisance appear to limit liability for trespass to land as well. The provisions state that municipalities are not liable in actions based on nuisance, "or on any other tort that does not require a finding of intention or negligence", providing the circumstances listed in the provisions are met and none of the exceptions to the limitation apply.[68] Trespass to land is a tort that does not require a finding of intention or negligence, so the limitation may possibly apply; however, we did not find any court decisions that consider this provision and offer guidance on how it may be interpreted.

4.5 *De Facto* Expropriation

Municipalities' enabling statutes and regulations typically empower municipalities to expropriate private land—that is, take land for municipal purposes, even if such taking goes against the landowner's wishes. Provincial legislation establishes the rules under which expropriations must proceed, and such rules typically require that fair compensation be paid to landowners whose lands are expropriated.

Landowners sometimes feel that land use regulation has impacted their property rights to such an extent that the land has been expropriated in effect even if it has not been expropriated formally through the transfer of title. In such cases, landowners often turn to the common law of *de facto* expropriation. The common law of *de facto* expropriation is a legal tool that landowners can use to seek compensation for the "constructive taking" of their land in circumstances where land use regulation has restricted their property rights substantially but the land has not been expropriated formally under a legislated expropriation regime.

Within the context of climate change flood risks, it is easy to imagine situations in which municipalities choosing to restrict developments in areas projected to experience future flooding may find themselves facing allegations of *de facto* expropriation from landowners whose properties are affected.

Canada's common law of *de facto* expropriation requires plaintiffs alleging *de facto* expropriation to prove two things:

> (i) the governmental authority that imposed the land use regulation has acquired a beneficial interest in the land in question; and,
>
> (ii) the land use regulation has removed all reasonable uses by the landowner of the private property.[69]

[66] *Municipal Government Act*, SNS 1998, c 18 at subsection 513(2).
[67] *Halifax Regional Municipality Charter*, SNS 2008, c 39 at subsection 377(2).
[68] *Municipal Government Act*, SPEI 2016 c 44 at section 246.
[69] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at paragraph 4.

Until recently, Canadian courts' application of this analytical framework made it quite difficult for landowners to prove that land use regulation amounted to the *de facto* expropriation of their lands. In particular, the first element of the analysis (the one requiring plaintiffs to prove that the governmental authority that imposed the land use regulation acquired a beneficial interest in the land by imposing the regulation) was very difficult to establish, because the courts interpreted it to mean that plaintiffs needed to prove that governmental authorities accused of *de facto* expropriation had acquired proprietary interests in the lands in question. In other words, the courts were reluctant to order compensation for *de facto* expropriation unless plaintiffs could establish that their property had actually be "taken" from them in effect and acquired by government, even though there was no formal transfer of title.[70]

A *de facto* expropriation case originating in Nova Scotia and involving allegations against the Halifax Regional Municipality made its way to the Supreme Court of Canada ("SCC") in 2021 and resulted in an SCC decision that will change the application of the law going forward.[71] In a split decision with a narrow 5-4 majority, the SCC reinterpreted the analytical framework for *de facto* expropriation and concluded that the first element of the analysis does not require plaintiff landowners to prove that land use regulation has given governmental authorities proprietary interests in their private lands. Instead, the "beneficial interest" acquired by the government can now be understood more broadly as an "advantage".[72]

The SCC's decision has been received with concern that it will jeopardize land use regulation in the public interest. Although there is a strong possibility that the decision will expose municipalities to increased challenges and more prospective liability for *de facto* expropriation, that outcome is not certain. Much will depend on how Canada's lower courts interpret and apply the new directions that the SCC has set. Moreover, the SCC's decision makes it clear that provincial legislatures can immunize municipalities from liability for *de facto* expropriation by enacting legislation that clearly expresses a government intention to allow restrictive land use regulation—even regulation that amounts to a "constructive taking" of private property—to be imposed without compensation.[73]

Municipalities that wish to use land use regulation to manage climate change flood risks may find it in their best interests to advocate for legislative amendments that will immunize them from liability for *de facto* expropriation.

[70] *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 at paragraph 71.
[71] See *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36.
[72] *Ibid* at paragraph 4.
[73] *Ibid* at paragraph 22.

5.0 Spotlight on the Common Laws of Negligence and Failure to Warn

> Public bodies set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties. This is an inevitable aspect of the business of governing. Accountability for that harm is found in the ballot box, not the courts. Courts are not institutionally designed to review polycentric government decisions, and public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits.[74]

So wrote the Supreme Court of Canada in *Nelson (City) v Marchi*, a 2021 decision designed to clarify how the common law of negligence applies to governments in Canada.

At its core, the tort of negligence involves failure to take reasonable care to avoid causing harm to others. Although the principle grounding the law is simple and straightforward—*we must consider those whom we know or ought to know could be harmed by our conduct and take care not to harm them*—in its application, the common law of negligence is vast and complex, with numerous analytical frameworks, rules, and principles shaping how courts assess liability.

Canada's common law of negligence applies a legal distinction between "core policy" and "operational" decisions when negligence by a government is alleged. The distinction creates a protected sphere of activity in which governments are immunized from liability in negligence. This protection is deemed to be necessary because, without it, governments might not dare to make the difficult decisions that governing sometimes requires. Also—and what is more deeply felt by the courts—without boundaries to protect certain kinds of government activities from judicial review, the courts would overstep their constitutional roles and intrude improperly into the creation of public policy by democratically elected representatives.

In this section, we take a closer look at the common law of negligence to examine how the Supreme Court of Canada has characterized the distinction between core policy and operational distinctions, and we explore the kinds of operational activities that might give rise to negligence claims in the context of climate change flood risks.

This section also examines the tort of "failure to warn", which we treat as a category of negligence that retains the basic elements of negligence but requires something additional as well: proof of a positive duty to act.

> Municipalities should consider failure to warn and its intersections with other aspects of negligence law as they consider whether, how, and to whom climate change flood risks should be disclosed.

5.1 The Basic Elements of Negligence

When a plaintiff alleges that they have been harmed by another's negligence, the plaintiff must establish the following basic elements of the tort: (i) the defendant (the person accused of being negligent) owed the plaintiff a "duty of care"; (ii) the defendant failed to meet the requisite "standard of care"; and, (iii) the defendant's failure to meet the standard of care caused foreseeable harm to the plaintiff.

[74] *Nelson (City) v Marchi*, 2021 SCC 41 at paragraph 1.

Duty of Care

To establish that the defendant owed the plaintiff a duty of care, the plaintiff must prove that there was sufficient "proximity" between them—that is, the plaintiff must prove that there was a connection close and direct enough that the defendant should be expected to have had the plaintiff in mind as a person who could be harmed by the defendant's conduct.

Several established categories of proximity have been recognized in the common law—"categories" that are, in essence, kinds of relationships that the common law recognizes as being close and direct enough to ground a duty of care. An example familiar to governments is the relationship between the users of public roads and the governments that are responsible for maintaining those roads; another is the relationship between municipal building inspection and permitting officers and the subsequent residents of the homes that a municipality permits to be built and occupied.

In the context of alleged duties of care owed by public authorities such as governments and government employees, the proximity needed to ground a duty of care is assessed with an eye to the legislated regimes in which the public authorities act. Public authorities carrying out their functions under legislated regimes designed with the public interest in mind are typically not understood as owing duties of care to private individuals, because the duties are owed more broadly to the public at large. As the British Columbia Court of Appeal has put it: "public authorities generally have powers and duties to act in the public interest rather than in a manner designed to protect the private interests of individuals affected by a scheme of regulation"; however, duties to act "in the private interests of a clearly defined class of people" have been found in some circumstances.[75]

Standard of Care

To establish that the defendant failed to meet the requisite standard of care, the plaintiff must make a persuasive case as to what that standard should be. This element of the negligence framework often becomes an evidentiary battleground in litigation, with lawyers on all sides calling expert witnesses to establish what a reasonable person in the defendant's circumstances would have done.

When the matters at issue are highly technical—as may be the case when the alleged negligence relates to defects in the engineering, design, construction, maintenance, or operation of infrastructure—established industry standards can play an important role in helping a court to identify the standard of care. However, established industry standards may not be sufficient, in and of themselves, to establish the standard of care. It is open to courts to find that an industry as a whole has fallen behind the times and has failed to maintain an appropriate standard. This same possibility applies with respect to municipal governments that rely on the commonality of practices shared by many municipalities. Although commonly shared practices are relevant and will be considered by courts, it remains open to courts to find that such common practices are wanting. Although municipalities may find this prospect unsettling, it serves a valuable public purpose by ensuring that industries and other sectors with common interests cannot work together to maintain artificially low standards of care in order to limit their liability.

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[75] *Held v Sechelt (District)*, 2021 BCCA 350 at paragraph 33.

Foreseeability – Causation in Fact and Law

To establish that the defendant's failure to meet the standard of care caused foreseeable harm to the plaintiff, the plaintiff must prove three related things: (i) the plaintiff suffered harm; (ii) the defendant's action or inaction was a factual cause of the harm suffered by the plaintiff; and, (iii) the harm suffered by the plaintiff was of a type that was reasonably foreseeable, not a type so unexpected or "remote" that the defendant cannot be expected to have considered it. The latter two elements of this analysis are sometimes referred to as "causation in fact" and "causation in law".

It is important to recognize at the outset that liability for negligence requires proof of harm. A person can owe a duty of care and fail to take reasonable care without becoming liable for negligence if their lack of care does not actually cause harm to anyone. This is important to keep in mind when exploring municipalities' potential liability for negligent failures to consider, manage, or disclose climate change flood risks today: ultimately, negligence liability can only manifest if such failures cause actual harm to someone in future.

To assess "causation in fact", Canadian courts apply a test known as the "but for" test, through which they ask: *But for the defendant's conduct, would the plaintiff have suffered the harm?* In essence, the "but for" test looks for a consequential connection between the action or inaction of the defendant and the harm suffered by the plaintiff. The defendant's conduct need not have been the sole cause of the harm to the plaintiff: two or more defendants can be held liable for separate actions that, together, cause harm, and, in some cases, plaintiffs themselves are found to have contributed to their harm through contributory negligence.

To assess "causation in law", Canadian courts assess whether the harm suffered by the plaintiff is of a type that the defendant should reasonably have foreseen. For example, it should be foreseeable to a bank that losing an account holder's money may cause the account holder to suffer financial hardship and even mental suffering; however, it may not be foreseeable that the account holder, upon checking their balance, will spill their hot coffee into their lap and suffer severe burns while also ruining an expensive pair of pants. In this scenario, a court might find that the burns and damaged clothing were harms too "remote" to establish causation in law.

5.2 The Common Law Distinction between Core Policy and Operational Decisions

Canada's courts have long maintained a legal distinction between "core policy" and "operational" decisions when negligence by a government is alleged,[76] but court decisions from across the country have demonstrated that it is often difficult to draw the distinction in practice. The lines between so-called "policy" and so-called "operational" decisions have often been blurry, leading to inconsistent findings by courts and uncertainties for governments seeking to understand their responsibilities.

These difficulties motivated the Supreme Court of Canada ("SCC") to weigh in on the case of *Nelson (City) v Marchi*, quoted above in the epigraph to this section. The case involved a plaintiff, Ms. Marchi, who suffered extensive injuries while trying to cross a snowbank that City of Nelson employees had created while ploughing downtown streets and sidewalks after a

[76] The phrase "true policy" has sometimes been used instead of "core policy", but "core policy" is the phrase used in the most recent guidance from the Supreme Court of Canada.

snowfall. Downtown parking spaces adjacent to sidewalks were ploughed in order that members of the public might park in them to access local businesses, and adjacent sidewalks were ploughed as well, but no paths were made in the large snowbanks that the ploughing created between the parking spaces and the sidewalks. It was while trying to cross a snowbank to reach a ploughed sidewalk from a ploughed parking space that Ms. Marchi was injured. Ms. Marchi sued the city, alleging negligence. The Supreme Court of British Columbia, which delivered the first decision on the case, accepted that the ploughing decisions were policy decisions by the city and were therefore protected from liability in negligence. The British Columbia Court of Appeal disagreed. When the city sought leave to appeal to the SCC, the court agreed to hear the case, and, in doing so, took the opportunity to clarify how "core policy" decisions should be distinguished from "operational" decisions under Canada's common law.

Key to the SCC's decision in this case is the separation of powers between the executive, legislative, and judicial branches of government in Canada. The executive and legislative branches of government are the branches in which democratically elected representatives weigh competing considerations and make value judgements to establish public policy. Canada's courts are wary of usurping the governmental roles that belong to the executive and legislative branches.

The immunity that Canada's common law of negligence provides to core policy decisions reflects the courts' view that subjecting public policy decisions to judicial oversight and private law duties of care "would entangle the courts in evaluating decisions best left to the legislature or the executive".[77]

In its decision in *Nelson (City) v Marchi*, the SCC emphasized:

> Core policy decisions of the legislative and executive branches involve weighing competing economic, social, and political factors and conducting contextualized analyses of information. These decisions are not based only on objective considerations but require value judgments—reasonable people can and do legitimately disagree. […] If courts were to weigh in, they would be second-guessing the decisions of democratically-elected government officials and simply substituting their own opinions.[78]

"Relatedly", the court continued, "the adversarial process and the rules of civil litigation are not conducive to the kind of polycentric decision-making done through the democratic process. […] Nor is the fact that one core policy decision is better than other amenable to proof in the sense that courts usually require".[79]

For all of these reasons, the SCC explained (and along with some additional concerns about the possible "chilling effects" on governments exposed to excessive risks of liability), core policy immunity from negligence liability is necessary. That immunity applies to all core policy decisions by governments, provided those decisions are "neither irrational nor taken in bad faith".[80]

What constitutes a "core policy" decision that is protected from negligence liability? The SCC's decision in *Nelson (City) v Marchi* emphasizes that core policy decisions are decisions that reflect the core roles and competencies of the executive and legislative branches of

[77] *Nelson (City) v Marchi*, 2021 SCC 41 at paragraph 42.
[78] *Nelson (City) v Marchi*, 2021 SCC 41 at paragraph 44.
[79] *Ibid* at paragraph 45.
[80] *Ibid* at paragraph 35.

government. Core policy decisions are decisions based on public policy considerations, polycentric analysis, deliberation, and value judgments by governmental authorities who are carrying out functions with which courts cannot interfere without disturbing the constitutional separation of powers.

To help governments recognize the distinctions between core policy decisions and operational decisions, the SCC's decision in *Nelson (City) v Marchi* identifies four factors that should be taken into account:

> (i) "the level and responsibilities of the decision-maker" (this factor reflects the court's unwillingness to usurp the roles of elected government bodies; the court's guidance indicates that decisions made at the highest level of a government's hierarchical structure are more likely to be core policy decisions than decisions made by government employees who are far removed from the work of establishing public policy);[81]
>
> (ii) "the process by which the decision was made" (in the court's words, "[t]he more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision"; by contrast, "the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence");[82]
>
> (iii) "the nature and extent of budgetary considerations" (high-level, whole-of-government budgetary decisions are more likely to be core policy decisions than the "day-to-day budgetary decisions of individual employees");[83] and,
>
> (iv) "the extent to which the decision was based on objective criteria" (government decisions that weigh competing interests and make value judgments are more likely to be recognized and protected as core policy decisions, whereas decisions that can be evaluated based on objective criteria—such as the standards that should have been used in the design and construction of a specific piece of infrastructure—can be assessed appropriately by courts).[84]

Ultimately, in *Nelson (City) v Marchi*, the SCC agreed with the British Columbia Court of Appeal that the ploughing decisions made by the city's employees were not core policy decisions that protected the city from negligence liability. In the court's view, the ploughing decisions were not high-level, deliberative decisions made by elected representatives or municipal staff working closely with those representatives; the decisions were lower-level and largely reactionary, far removed from the governmental roles that necessitate a hands-off approach by courts to protect the constitutional separation of powers.

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[81] *Ibid* at paragraph 62.
[82] *Ibid* at paragraph 63.
[83] *Ibid* at paragraph 64.
[84] *Ibid* at paragraph 65.

5.3 Municipal Decisions that Could Give Rise to Negligence Liability in the Context of Climate Change Flood Risks

In the context of municipal failure to consider, manage, or disclose climate change flood risks, the common law distinction between “core policy” and “operational” decisions means that municipal policy decisions made rationally and in good faith, on the basis of informed deliberation, will likely be immunized from negligence liability, whereas negligence may still attach to operational decisions made in the implementation of such policies.

It is important for municipalities to understand that the common law’s protection for policy decisions made rationally and in good faith means that municipalities cannot simply ignore problems that are staring them in the face. Burying one’s head in the sand is not a rational or good faith response to a problem and is not a prudent approach within this legal framework.

The law does recognize, however, that all governments have limited resources with which to carry out their functions and provide the public services that their communities want and need. Municipalities may not have much capacity to identify and mitigate climate change flood risks within their jurisdictions—some may determine that they have no capacity at all. The common law of negligence does not require municipalities to take actions that are beyond their power: what it requires is that municipalities determine, rationally and in good faith, what is within their power and establish core policy responses through informed deliberation.

The following examples are hypothetical scenarios intended to illustrate how this might work in practice.

A municipality that suspects that climate change may cause flood problems for riparian developments in the years to come but has no climate change flood hazard or flood risk modelling to substantiate that suspicion and no resources to commission such modelling may decide, as a matter of policy, that it is not in a position to commission climate change flood modelling or change its land use planning or development permitting to mitigate possible future flood risks. The municipality may instead decide, as a matter of policy, that the necessary first step is to look for resources such as funding programs, collaborations, or other opportunities that will allow it to commission climate change flood hazard and flood risk modelling so that it can identify and assess the climate change flood risks that are likely to emerge. A policy decision like this, made rationally and in good faith on the basis of informed deliberation, could protect the municipality from future allegations that it should have done more at that point in time to mitigate flood risks that it suspected were on the horizon.

A municipality that has more information about climate change flood risks may know that certain areas within the municipality will likely experience new or intensified flooding in years to come as a result of climate change. The municipality may decide, as a matter of policy, to enact land use regulation and permitting bylaws that allow some developments to proceed in climate change flood hazard areas but require such developments to meet certain engineering and design conditions in order to minimize the risks that future flooding may cause. A policy decision like this, made rationally and in good faith on the basis of informed deliberation, could protect the municipality from future allegations that it should have prohibited developments entirely in order to protect the public.

A municipality that has information about climate change flood risks and has been integrating that information into its asset management planning may know that several pieces of municipal infrastructure would benefit from upgrades to help them withstand the new pressures that climate change is expected to cause. If the municipality has limited resources at its disposal and cannot afford to do those upgrades immediately or all at once, it may, as a matter of policy, establish an upgrade schedule that is designed to tackle the highest priorities as soon as possible and work steadily down the list until all upgrades are completed. If infrastructure covered by the policy fails sooner than expected and causes personal injury or property damage, a policy decision like this, made rationally and in good faith on the basis of informed deliberation, could protect the municipality from allegations that the infrastructure should have been upgraded sooner.

A municipality's core policy decision to allow some developments within climate change flood hazard areas may be protected from negligence liability, but negligence liability could still attach to operational decisions that are made in the implementation of that policy. For example, if the municipality enacts land use regulation and permitting bylaws that require all developments within climate change flood hazard areas to meet certain engineering and design conditions, municipal failure to enforce those conditions when granting development and occupancy permits could potentially give rise to liability in negligence if persons are injured or property is damaged as a result.

Likewise, a municipality's core policy decision to establish a prioritized schedule for infrastructure upgrades may be protected from negligence liability, but when actual upgrades are done, they must be done without negligence, meeting all applicable engineering and design standards and whatever other legal requirements there may be.

These examples are given as illustrations only and should not be relied on as definitive statements as to what would or would not constitute negligence under the common law. A municipality that needs to assess its potential liability in negligence under any specific circumstance should seek tailored legal opinion and advice.

5.4 Failure to Warn

Canadian court decisions are not entirely consistent when it comes to the tort of "failure to warn", particularly when the defendants are governmental authorities. Some courts have considered duties to warn and failures to warn as aspects of the standard of care in the ordinary negligence analysis;[85] other, more recent, court decisions have characterized failure to warn as an independent tort that shares the basic elements of negligence but requires something additional in return: namely, proof of a positive duty to act.[86]

This report does not attempt to reconcile the conflicting case law on failure to warn; instead, it focuses on the elements that are common to most of the court decisions we have found. For the purposes of public legal education and accessible understandings of the law, we believe it is most helpful to think of failure to warn as a category of negligence that requires plaintiffs to

[85] Some examples of court decisions in this line that involved municipal defendants accused of negligence include: *Munshaw Colour Service Ltd v Vancouver (City)*, [1962] SCR 433; *Pawella v Winnipeg (City)*, 1984 CanLII 3648 (MB QB); *Grewal v Saanich (Dist)*, 1989 CanLII 2781; *Day v Regional District et al*, 2000 BCSC 1134; *Vizbaras v Hamilton (City)*, 2005 CanLII 49207 (ON SC); *Bowes v Edmonton (City)*, 2007 ABCA 347.
[86] See for example: *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42; *Salamon v Toronto (City)*, 2011 ONSC 4192; *Walsh v Atlantic Lottery Corp*, 2013 NSSC 409; *Gelowitz v Revelstoke (City)*, 2022 BCSC 46.

establish the basic elements of negligence as well as an additional element: proof that the defendant had a positive duty to act by warning the plaintiff of danger. This is the direction in which commentary by the Supreme Court of Canada ("SCC") has headed, although that commentary has not been extensive to date.[87] Municipalities concerned about possible liability for failure to warn should be aware that the law in this area is not entirely settled, although relevant duties to warn have been found in several noteworthy cases.

The Analysis

The SCC's 2011 decision in *Knight v Imperial Tobacco Canada Ltd*—a decision emerging from the extensive litigation against "Big Tobacco" in recent years—distinguishes a tort of "failure to warn" from general negligence by holding that failure to warn requires something in addition to the ordinary negligence factors: namely, "evidence of a positive duty towards the plaintiff".[88] To support this distinction, the SCC points back to a decision it made in 2006, in a negligence case called *Childs v Desormeaux*.

In *Childs v Desormeaux*, the SCC recognized that a failure to act can constitute negligence, but it emphasized that: "[d]uties to take positive action in the face of risk or danger are not free-standing".[89] The court held that a "positive duty of care"—that is, a duty to take positive action to protect another person from harm—may be established under the common law of negligence, but only if the harm is foreseeable and the relationship between the plaintiff and the defendant is marked by some kind of "special link or proximity".[90] The court identified three situations in which courts have found special links or special proximities creating positive duties to act: situations where "a defendant intentionally attracts and invites third parties to an inherent and obvious risk" that the defendant has created or controls; situations that involve "paternalistic" (i.e., quasi-parental) "relationships of supervision and control"; and, situations involving "defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large".[91]

By combining the SCC's analysis in *Childs v Desormeaux* with the court's later commentary in *Knight v Imperial Tobacco Canada Ltd*, the elements of failure to warn may be described as follows:

(i) the defendant must have owed a duty of care to the plaintiff;

(ii) the relationship giving rise to the duty of care must be one of special proximity, sufficient to ground a positive duty to warn the plaintiff of danger;

(iii) the defendant must have breached the standard of care by failing to warn the plaintiff; and,

(iv) the defendant's failure to warn must have caused foreseeable harm to the plaintiff.

Again, because the case law in this area is not entirely consistent, municipalities should think of these elements as guideposts, not definitive statements of the law. The analysis that a future court may bring to an alleged failure to warn may differ from the analysis presented here.

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[87] See *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42.
[88] *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 208.
[89] *Childs v Desormeaux*, 2006 SCC 18 at paragraph 31.
[90] *Ibid* at paragraph 34.
[91] *Ibid* at paragraphs 35-37.

Two Case Studies

Two case studies help to illustrate the somewhat unpredictable nature of the law in this area.

House and Harding v Patey & Town of Happy Valley-Goose Bay is a 2014 decision of the Newfoundland and Labrador Provincial Court. The case involved plaintiff homeowners who purchased a residential property and later experienced significant flooding. The plaintiffs sued the former homeowners, who had constructed the house, alleging that they negligently failed to construct the house at the proper grade, in accordance with the applicable building permit and local building regulations. The plaintiffs also sued the municipality, the Town of Happy Valley-Goose Bay, alleging that it negligently allowed the house to be built below grade. The court considered whether the municipality's failures to inspect the house and enforce local building requirements were policy decisions immune from liability or operational decisions to which liability could attach, and it held that they were not policy decisions immune from liability. In the alternative, the court held that even if it was wrong about the policy immunity, the municipality nevertheless had a duty to warn its residents that it was not carrying out inspections or enforcing local building requirements, so that residents would know to take additional precautions themselves.[92] This decision is unusual in that the judge appears to have raised the duty to warn issue himself and does not rely on any case law addressing the tort of failure to warn. The decision's value as a precedent is therefore questionable, but it offers an interesting illustration of the view that municipalities should be transparent about and, if necessary, warn residents of, limitations on the services they provide.

Gelowitz v Revelstoke (City) is a 2022 decision of the British Columbia Supreme Court. The case involved an unfortunately common negligence scenario: the plaintiff was camping at a lakeside park and campground owned by the City of Revelstoke, and he was catastrophically injured when he dove into the lake and struck his head on a submerged object. The plaintiff sued the city, alleging that the city was negligent for failing to warn campground users of the dangers of diving in the lake. The court applied the SCC's analysis in *Childs v Desormeaux* and considered whether the relationship between the plaintiff and the city was marked by special proximity sufficient to ground a positive duty to act, and it found that it was. Ultimately, the court held that the city was liable in negligence for failing to warn the plaintiff of the dangers of diving in the lake, although it also held that the plaintiff was contributorily negligent for failing to take adequate care himself.

Considerations for Municipalities

There are several things for municipalities to consider if they are concerned about common law liability for failing to disclose climate change flood risks.

First, it is important to remember that, under the common law, liability for both negligence and failure to warn requires proof of damage. Actions and inactions that, in hindsight, seem misguided or imprudent do not give rise to liability under these areas of the law unless actual harm is caused.

Second, although the analytical frameworks that courts have applied to failure to warn have not been consistent, most of the cases in which municipalities have been found liable for failure to warn are cases involving familiar examples of municipal negligence liability, such as: cases

[92] *House and Harding v Patey & Town of Happy Valley-Goose Bay*, 2014 CanLII 43378 (NL PC) at paragraph 183.

alleging negligent building inspection and permitting;[93] cases alleging failure to warn of hazardous or faulty municipal infrastructure;[94] and, cases alleging failure to warn of hazards known to municipalities in areas where members of the public are invited to make use of municipal works and services, such as campgrounds or roads.[95]

Among the failure to warn cases involving municipal defendants that we identified in our research, cases involving allegations of negligent building inspection and permitting comprised the largest group. Ultimately, a municipality's liability in any given case will need to be decided with all of the relevant facts and applicable laws taken into account, if and when such cases arise.

The case law suggests that if the common law develops to address future cases alleging municipal failures to warn of climate change flood risks, municipalities may be particularly vulnerable in situations where plaintiffs allege that they should have been warned about climate change flood risks before being allowed to develop, occupy, and/or modify homes or other buildings in climate change flood hazard areas.

Finally, given this report's discussion of the core policy immunity provided by the common law of negligence, municipalities may ask themselves if the common law distinction between core policy and operational decisions could immunize them from liability for failure to warn if they decide, as a matter of policy, not to disclose climate change flood risk information to municipal residents. Although we found no case law addressing this question explicitly, it is, in our view, highly doubtful that a municipal decision to withhold known climate change flood risk information that could benefit public safety would be accepted as a rational, good-faith decision that should be protected from liability.

[93] See for example *Pawella v Winnipeg (City)*, 1984 CanLII 3648 (MB QB); *Grewal v Saanich (Dist)*, 1989 CanLII 2781; *Day v Regional District et al*, 2000 BCSC 1134; *Gibbs v Edmonton (City of)*, 2003 ABCA 138; *Bowes v Edmonton (City)*, 2007 ABCA 347; *House and Harding v Patey & Town of Happy Valley-Goose Bay*, 2014 CanLII 43378 (NL PC).
[94] See for example *Vizbaras v Hamilton (City)*, 2005 CanLII 49207 (ON SC); *Salamon v Toronto (City)*, 2011 ONSC 4192.
[95] See for example *Gelowitz v Revelstoke (City)*, 2022 BCSC 46

6.0 Municipal Asset Management

In our overview of municipal responsibilities to consider, manage, and disclose climate change flood risks (Section 2.0), we noted that one category of potential sources of liability is funding agreements and other contractual relationships in which requirements to consider, manage, or disclose flood risks are included as terms or conditions. This section does not attempt to identify all of the various agreements and relationships that could be relevant in this regard but instead offers a brief discussion of one area where municipal responsibilities to consider, manage, and disclose flood risks may exist now or emerge in years to come. That area is municipal asset management.

Management of municipal assets such as local infrastructure is one of the spheres of municipal activity where climate change impacts are easy to imagine. Climatic changes such as rising winds and increased precipitation, storm frequency, and storm intensity, along with the impacts of sea level rise and coastal storm surges, can all be expected to put pressure on municipal infrastructure such as sewer, stormwater, and water systems, bridges and roads, and even "green" infrastructure like trees and managed green belts.

By and large, the key statutes and regulations that empower municipalities in Atlantic Canada do not set explicit legal requirements or standards for the management of municipal infrastructure. Instead, the legislation tends to assume that municipal responsibilities to construct, operate, and maintain such infrastructure will be reflected by the common law frameworks through which liability for tortious mismanagement will be assessed, along with external legislated frameworks such as environmental law regimes through which violations of regulatory standards may give rise to strict liability.

Recognizing that municipalities can be held liable in tort or under external legislated regimes for failures to construct, operate, or maintain municipal infrastructure appropriately, enabling legislation tends to focus on immunizing municipalities from certain kinds of civil liability (i.e., liability to compensate private individuals for personal injuries and/or property damage), making it easier for municipalities to act without fear of legal consequences for every mishap and unintended harm. However, our discussions above of strict liability (Section 3.0) and the common law of negligence (Section 5.0) should make it clear that municipalities act in their own best interests when they exercise due diligence and take reasonable care in the construction, operation, and maintenance of municipal works and facilities and the provision of municipal services.

Municipal asset management is a growing field of practice that seeks to regularize and improve the ways in which municipalities collect information about their infrastructure needs and make informed decisions about the long-term management of such infrastructure, including maintenance, upgrading, repair, and replacement. The Canadian Network of Asset Managers has developed an introductory resource entitled *Asset Management 101* that provides a useful overview of the field.[96]

Some funding arrangements by the Government of Canada and the provinces are requiring municipal asset management as a condition of municipal receipt of funding to support the maintenance and improvement of municipal infrastructure. Under the federal Gas Tax Fund (which has now been renamed the Canada Community-Building Fund), improvements in

[96] Canadian Network of Asset Managers, *Asset Management 101: The What, Why, and How for Your Community* (undated), online: <https://cnam.ca/wp-content/uploads/2021/10/CNAM_AM101_BOOKLET_2021_EN_ DIGITAL.pdf>.

municipal asset management planning are required. The funding agreements between the Government of Canada and all four of the Atlantic Canadian provinces reflect this requirement, albeit in slightly different ways.

Among other things, the Canada-New Brunswick agreement requires the Government of New Brunswick to ensure that municipalities receiving funding under the agreement develop capital asset management plans that include inventories of infrastructure assets, asses the physical conditions of those assets, and set priorities for life cycle management of those assets.[97] The Canada-Newfoundland and Labrador agreement requires the Government of Newfoundland and Labrador to develop guidance for municipalities to use as they work to improve their asset management planning, and the agreement sets an expectation that municipalities in the province will be working to develop and implement asset management plans.[98] Under the Canada-Nova Scotia agreement, the Government of Nova Scotia committed to requiring capital investment plans from municipalities and also expressed its intention to develop a provincial asset management system for municipal infrastructure, which is to include training to equip municipalities to develop and implement strong asset management practices.[99] The Canada-Prince Edward Island agreement similarly reflects the Government of Prince Edward Island's intention to implement a provincial asset management system that will support asset management planning by municipalities.[100]

Although these funding agreements do not refer explicitly to climate change impacts on local infrastructure, climate change is clearly part of the broader asset management conversation, and best practices for asset management planning that are emerging from the field can be expected to take climate change impacts into account. As these practices continue to grow, municipalities may be required to give increasing attention to how projected effects of climate change affect their long-term infrastructure needs.

> As municipalities seek funding and other resources to support the development and maintenance of municipal infrastructure, they should be aware that contractual requirements and developing standards of practice may require them to take climate change flood risks into account as they assess and manage their infrastructure needs.

Moreover, if emerging "best practices" in asset management grow to incorporate consideration and management of climate change flood risks, those best practices may also inform the standards by which due diligence and reasonable care in the management of municipal infrastructure are assessed when regulatory standards are violated or negligence is alleged due to infrastructure failure or breakdown.

[97] Administrative Agreement on the Federal Gas Tax Fund between the Government of Canada and the Government of New Brunswick, at Schedule F, online: <https://www.infrastructure.gc.ca/prog/agreements-ententes/gtf-fte/2014-nb-eng.html>.
[98] Administrative Agreement on the Federal Gas Tax Fund between the Government of Canada and the Government of Newfoundland and Labrador, at Schedule F, online: <https://www.infrastructure.gc.ca/prog/agreements-ententes/gtf-fte/2014-nl-eng.html>.
[99] Administrative Agreement on the Federal Gas Tax Fund between the Government of Canada and the Government of Nova Scotia, at Schedule F, online: <https://www.infrastructure.gc.ca/prog/agreements-ententes/gtf-fte/2014-ns-eng.html>.
[100] Administrative Agreement on the Federal Gas Tax Fund between the Government of Canada and the Government of Prince Edward Island, at Schedule F, online: <https://www.infrastructure.gc.ca/prog/agreements-ententes/gtf-fte/2014-pe-eng.html>.

7.0 Constitutional Responsibilities: Considering the Growing Trend of Climate Change Litigation in Canada

Climate change litigation in Canada is still in its infancy, but there is no doubt that Canadian law is grappling with the climate crisis. To date, four legal actions brought under the *Canadian Charter of Rights and Freedoms* have been the primary battlegrounds in which members of the public have tested the scope of Canadian governments' responsibilities to mitigate global warming and prevent its harmful effects.

The *Canadian Charter of Rights and Freedoms* ("the *Charter*") is a constitutional document that guarantees the rights and freedoms set out within it, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[101] The *Charter* binds all levels of government in Canada, including municipal governments.

To date, the rights established in *Charter* sections 7 and 15 have been the foundations of *Charter* actions brought against the Government of Canada and the Government of Ontario for alleged failures to mitigate global warming effectively and in good faith. We are not aware of any similar *Charter* actions having been brought against municipal governments in Canada, but it is conceivable that such actions may be attempted in the future.

7.1 Overview of the Rights Established in *Charter* Sections 7 and 15

Section 7 Rights to Life, Liberty, and Security of the Person

Section 7 of the *Charter* establishes constitutional rights to life, liberty, and security of the person. It states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Canada's courts have interpreted section 7 as establishing what are called "negative rights". In this context, a negative right is understood as a right not to be deprived of something that one possesses already. The negative rights established by section 7 mean that a government cannot take an individual's life (such as by imposing a death penalty), cannot take an individual's liberty (such as through imprisonment), and cannot diminish an individual's security of the person (such as through action that causes physical suffering or serious psychological suffering) unless such actions are done "in accordance with the principles of fundamental justice" or, if they are not in accordance with those principles, can nevertheless be "demonstrably justified in a free and democratic society".

Although the wording of section 7 clearly establishes negative rights not be deprived of life, liberty, and security of the person that one possesses already, it is far less clear that the section establishes "positive rights" as well. In this context, a positive right is typically understood as a right to be provided something that one does not possess already, such as secure housing or social assistance that enables a better quality of life.

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[101] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at section 1.

Canada's courts have typically interpreted claims to positive section 7 rights as attempts to make the government do something (i.e., take "positive" action) to rectify a social problem. This is contrasted with negative section 7 rights claims, which typically arise in situations where a government has taken action (such as by enacting or enforcing law) and, in doing so, has allegedly deprived someone of life, liberty, or security of the person. In negative section 7 rights claims, the typical remedy sought is for the government to stop imposing the law or enforcement measures that are deemed to be unjust.

To date, Canada's courts have not interpreted section 7 as establishing positive rights, and they have strongly resisted plaintiffs' attempts to use section 7 litigation to force government action to rectify social problems. The courts' primary concern in such cases has been the constitutional separation of powers between the executive, legislative, and judicial branches of government. Whereas Canada's constitutional structure empowers the courts to ensure that when governments choose to enact or enforce laws those actions are constitutional, the courts maintain that the Constitution does not empower them to command government action of one kind or another when government action is not otherwise required.

All four of the *Charter* actions that have been brought to date against Canadian governments for alleged failures to mitigate global warming effectively and in good faith have asserted that those failures violate one or more of the plaintiffs' section 7 rights to life, liberty, and security of the person.

Section 15 Rights Protecting against Discrimination

Section 15 of the *Charter* establishes constitutional protections against discriminatory treatment by stating that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[102]

All four of the *Charter* actions that have been brought to date against Canadian governments for alleged failures to mitigate global warming effectively and in good faith have asserted that those failures are discriminatory and violate section 15 of the *Charter* by disproportionately exposing children and youths in Canada to projected climate harms. This alleged discrimination is characterized as discrimination based on age, which is one of the bases of discrimination that section 15 prohibits explicitly.

7.2 The Climate Change *Charter* Actions

To date, four climate change *Charter* actions have produced court decisions that assess the scope of Canadian governments' constitutional responsibilities to mitigate global warming and prevent its harmful effects.

Environnement Jeunesse c Procureur general du Canada was a case in which a not-for-profit environmental organization representing Québecois children and youths attempted to initiate a

[102] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at subsection 15(1).

class action proceeding against the Government of Canada, alleging negligence, bad faith, *Charter* violations, and violations of Québec's *Charter of Human Rights and Freedoms* by virtue of the government's failure to set appropriate targets for the reduction of greenhouse gas ("GHG") emissions.

La Rose v Canada was a case in which fifteen children and youths took action against the Government of Canada, alleging that through its contributions to climate change, the federal government was violating the plaintiffs' rights under sections 7 and 15 of the *Charter* and was also failing to meet public trust obligations that, in the plaintiffs' view, require the federal government to preserve natural resources for the benefit of present and future generations.

Mathur v Ontario is an ongoing case in which seven children and youths have taken action against the Government of Ontario for repealing the 2016 statute that established Ontario's cap and trade program and establishing a new plan that sets a less ambitious GHG emissions reduction target. The plaintiffs allege that the new target violates their rights under sections 7 and 15 of the *Charter*, and they have asked the court to declare that the rights enshrined in the *Charter* include "the right to a stable climate system, capable of providing youth and future generations with a sustainable future". The plaintiffs also allege that the province's new GHG emissions reduction target violates an unwritten constitutional principle that prohibits government conduct that will or may cause future harm, suffering, or death to the government's citizens.

Misdzi Yikh v Canada was a case in which Wet'suwet'en hereditary chiefs took action against the Government of Canada, alleging that the federal government's failure to enact appropriate laws to reduce GHG emissions and mitigate climate change violated their *Charter* rights and the *Charter* rights of their community members, breached constitutional duties, and was contrary to several common law doctrines and principles, including the public trust doctrine and the principle of intergenerational equity.

Among these cases, *Mathur v Ontario* is the only one that is still active. *Environnement Jeunesse c Procureur general du Canada* ended in December 2021 after the Québec Superior Court refused to certify the class action proceeding and the Québec Court of Appeal agreed that certification should be denied.[103] *La Rose v Canada* and *Misdzi Yikh v Canada* ended in October 2020 and November 2020, respectively, when they were vanquished by motions to strike (legal processes through which courts can refuse to allow the full trial of claims that are deemed to have no reasonable prospect of success).[104]

Environnement Jeunesse c Procureur general du Canada, *La Rose v Canada*, and *Misdzi Yikh v Canada* all failed, ultimately, because the judges hearing them held that the plaintiffs' core claims and the remedies sought were not properly within the jurisdiction of the courts. A significant factor in all three cases was that the plaintiffs had not pointed to a specific law, specific nexus of laws, or specific government action as the source of the alleged *Charter* violations. In all three cases, the courts interpreted the plaintiffs' claims as being overly broad and nebulous, amounting fundamentally to general assertions that the Government of Canada is not doing enough to mitigate climate change and must do more. Without specific laws or specific government actions to assess for their constitutionality, the courts dismissed the actions as not respecting the constitutional separation of powers between the executive, legislative, and judicial branches of government. In their view, it was the Government of Canada's role to decide

[103] See *Environnement Jeuness c Procureur général du Canada*, 2019 QCCS 2885 and *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871.
[104] See *La Rose v Canada*, 2020 FC 1008 and *Misdzi Yikh v Canada*, 2020 FC 1059.

how best to address climate change as a matter of politics, law, and public policy, so long as the government acted constitutionally.

Unlike *La Rose v Canada* and *Misdzi Yikh v Canada*, *Mathur v Ontario* survived a motion to strike because the case hinges on a specific law / specific nexus of laws that the plaintiffs allege are unconstitutional, namely: the provincial plan that replaced Ontario's cap and trade program and set a less ambitious target for GHG emissions. In essence, the plaintiffs are alleging that it is unconstitutional for the Government of Ontario to set a GHG emissions reduction target that will expose them to greater harm than would a scienced-based target reflecting Ontario's fair share of the remaining global carbon budget. In its reasons dismissing the motion to strike and allowing the case to proceed, the Ontario Superior Court of Justice held that a court would be within its jurisdiction to address the issues as the plaintiffs framed them.

7.3 Considerations for Municipal Governments

At least two insights can be gleaned from the four climate change *Charter* actions described above.

The first insight is that a case alleging the unconstitutionality of a specific law, specific nexus of laws, or specific government action has a better chance of proceeding to trial than a case asserting broad failures on the part of government to effectively mitigate climate change. Canada's courts are reluctant to disturb the constitutional order by usurping governments' rights to set public policy, but the courts recognize their responsibility to ensure that when governments choose to take action their actions are constitutional.

Outside of the climate change context, Canadian law already requires municipalities to uphold *Charter* rights when they enact bylaws, establish public programs, provide public services, and carry out other governmental functions. This is unlikely to change. Future developments in climate change litigation may see courts dismissing broad claims that municipalities are violating *Charter* rights by failing to take certain actions to mitigate or adapt to climate change; however, municipal governments should recognize that if they choose to take action to mitigate or adapt to climate change by enacting bylaws, establishing public programs, providing public services, or carrying out other governmental functions, they must act constitutionally.

The second insight to be gleaned from the climate change *Charter* actions that have been brought to date is their illustration of the reality that constitutional interpretation evolves over time, and established approaches to assessing *Charter* rights may change to keep pace with new and emerging social realities. For example, although none of the courts in the four cases described above were prepared to hold that section 7 of the *Charter* establishes positive rights that require the Government of Canada (or other governments in Canada) to take positive action to mitigate climate change, two of them—the Federal Court in *La Rose v Canada* and the Ontario Superior Court of Justice in *Mathur v Ontario*—made a point of emphasizing that the law might evolve to recognize such rights in the future.[105] With this in mind, municipalities should not assume that a Canadian court will never agree that inadequate climate action by a municipality violates *Charter* rights. Municipalities should bear in mind that the climate crisis has the potential to change the law as we know it today.

[105] See *La Rose v Canada*, 2020 FC 1008 at paragraph 70 and *Mathur v Ontario*, 2020 ONSC 6918 at paragraph 165.

8.0 Conclusion

It is no longer unusual for Canadian courts to recognize the climate crisis. The Supreme Court of Canada has stated that climate change is an "existential threat",[106] and courts across the country have acknowledged various harms that unmitigated global warming is predicted to cause. Likewise, governments at all levels throughout Canada are aware of the crisis and exploring ways to address it through law and policy.

The information and analysis presented in this report indicate that municipal responsibilities to consider, manage, and disclose climate change flood risks are not entirely clear at this moment in time. Municipalities' enabling statutes and regulations impose few if any explicit responsibilities, and, although responsibilities and liabilities may exist under external legislated regimes and the common law, such responsibilities and liabilities are highly fact-specific and must be assessed taking all relevant laws and circumstances into account if and when problems arise.

Some key insights, however, can be gleaned from the discussions presented in this report. In our view, the most important of these is that although Canada's common law of negligence recognizes that municipalities do not always have the resources they need to solve existing problems or avoid future harms, and although the law does not require municipalities to take actions that are beyond their power, the law nevertheless maintains that municipalities cannot simply ignore the pressing problems that confront them. To protect themselves from liability under this area of the law, municipalities must at the very least consider such problems and make rational, good faith policy decisions as to whether and how such problems can be addressed. Although that requirement is not the legal standard for all of the laws, policies, and agreements discussed throughout this report, we believe it offers a useful starting point for municipalities that are just beginning to consider how climate change may affect their responsibilities and liabilities.

As we noted above, the information and analysis presented in this report are not intended to frighten municipalities by raising prospects of litigation or suggesting that they will fail to meet their duties if they do not take immediate action to consider, mitigate, or disclose climate change flood risks. Instead, the report aims to demonstrate why it is important for municipalities to begin exploring these issues, seeking more information, and discussing what can and should be done. Municipalities may not yet be in a position to take decisive action to investigate, identify, and manage climate change flood risks within their jurisdictions, but it is within their interests to begin considering the issue if they have not done so already. We hope that the discussions presented in this report will be useful in that regard and that they will spark ongoing conversations and analysis.

[106] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paragraph 171.