



CLIMAtlantic

Climate Risk, Responsibility, and Liability for Municipalities:

Exploring Municipalities' Responsibilities to Consider, Manage, and Disclose Climate Change Flood Risks¹

Supplemental Summary of Key Messages

This document summarizes key messages delivered in a report prepared by East Coast Environmental Law on behalf of CLIMAtlantic. The 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. Focusing in particular on the risks represented by climate change flooding, the report asks: 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?

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.

¹ Prepared for CLIMAtlantic by East Coast Environmental Law, Halifax, NS, October 2022

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 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 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.

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.

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 the author's 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”. 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.