

Stormwater Management in Ontario: Legal Issues in a Changing Climate

A Report for the Credit Valley Conservation Authority

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1. Executive Summary

The rise in extreme weather events in Ontario and resulting strain on municipal infrastructure have brought increased attention to stormwater management at all orders of government. Recent class action lawsuits against municipalities, conservation authorities and the Province for flooding, both after extreme rainfall events and on a recurring basis due to alleged systematic problems, are examples of the potential avenues open to residents who are harmed by flooding.

Many actors, including government decision makers (municipalities, conservation authorities and the Province) as well as private landowners and residents, make decisions, investments and policies that have a direct impact on the safe and effective management of stormwater. In the absence of a clear set of best-practices and standards across the Province, our consultations indicate that many of these actors have important unanswered questions about the appropriate level of service that should be provided. This uncertainty is enhanced in light of increased municipal development and climate change that may create new costs and technical challenges for existing systems.

A better understanding of potential legal liabilities can assist municipalities and others who are involved in stormwater management to ensure thoughtful and diligent stormwater management practices. Some key points from our review of the law include:

- Legal obligations related to stormwater management are determined by both statutory and common law;
- Municipalities can no longer be sued for a nuisance related to "the escape of water or sewage from sewage works or water works", but they can be sued under the common law principles of negligence and riparian rights;
- Municipalities can be held liable for flooding damage that results from a negligent operational decision;
- Changing information, including as related to climate change, could increase the number and size of
 lawsuits against municipalities, as those who are owed a duty (for example, residents receiving
 stormwater management services) become more vulnerable, particularly if the potential impacts of
 climate change that could be avoided are reasonable foreseeable;
- A valid municipal *policy* decision (as opposed to an operational decision) can negate a finding that a duty of care exists (one of the key tests for assessing negligence);
- Policy decisions should be based on social, economic and political factors;
- Relying on outdated standards or processes can be negligent if new information suggests that they
 should be reconsidered, even if the standards and processes were not negligent before the new
 information came to light;
- Municipalities do not need to change all possible standards and processes and upgrade all of their
 infrastructure in light of climate change information; it is acceptable, after considering the risks, to
 determine that a particular action or investment is not worth the cost (i.e. have a considered policy);



- To minimize risk, however, municipalities should at least "turn their minds" to stormwater related standards, processes and infrastructure, if information suggests that there may be increased risk to persons or property from those standards, process or infrastructure;
- A negligent decision breaches the required standard of care;
- While the standard of care applicable to the design of infrastructure is likely to be the standard of care
 at the time of the design, municipalities should be very cautious in thinking that their stormwater
 systems will be uniformly assessed on this basis: inspections, maintenance, repairs and other process
 decisions may be ongoing and judged against a more recent standard of care, which may include
 considerations of changing information; and
- An important tool for showing that the standard of care has been met is demonstrating that a
 municipality has met the standard of practice followed in other, similarly situated municipalities;
 coordination between municipalities could thus assist in mitigating risk by setting a clear industry
 standard.

Some steps that can help minimize risk:

- Have a process for collecting new information (including relevant climate change data) and ensuring it is passed on to the appropriate parties within the municipality and also to relevant contractors;
- Do not ignore information that suggests there may be a risk to people or property, since doing so is
 unlikely to be considered a valid policy decision and likely does not meet the standard of care for a
 municipality;
- Ensure active, valid policy decisions are being made and documented with respect to stormwater management decisions and systems, including existing processes, even if a decision is made that changes are too costly given risks and current resources;
- Consider policies and decisions that enhance flood control, including lot-level controls, which could include education to homeowners;
- Work with consultants and other service providers to ensure they are considering the best available information; and
- Work with other stormwater management actors to develop best practices and industry standards.

From a legal risk perspective, stormwater management is a shared responsibility. Since decisions, policies and procedures of municipalities, conservation authorities and the Province can all impact the effective management of stormwater, and since all orders of government can be sued for negligence in relation to their operational decisions, each order of government has a strong incentive to consider its existing procedures and systems in light of new information, including information about climate change. Private actors are also clearly subject to legal liability if they act negligently and have roles to play in the management of stormwater. Courts have determined that residents can be expected to participate in this management by reporting known problems to authorities, for example. The availability of class actions to bring multiple claims before a single court (resulting in potentially large settlements or cost awards), combined with the constraints faced by the insurance industry in covering claims related to flooding going forward, highlight the need for municipalities to actively manage legal risks and work towards shared solutions for stormwater management.



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2. Purpose and Scope

Recent flooding events in Ontario have brought significant attention to stormwater management. As flooding-related damage increases, interest in the legal liability associated with flooding and other stormwater events has grown as well. In light of predictions that climate change will make extreme weather events more frequent and intense, physical damage and liability concerns may prompt municipalities to ask whether, and to what extent, they should adapt their stormwater management policies and infrastructure.

While the degree of adaptation will depend on a municipality's specific situation, this chapter will provide an overview of legal issues and risks associated with stormwater management, focusing on legal risks from private lawsuits. This chapter is intended to stimulate discussion and provide tools to help municipal and other public-sector decision makers pursue legally defensible stormwater management. The general discussion will focus on trends and proactive steps that municipalities and other public bodies can take to recognize—and minimize—liability risks.

2.1. Challenges Faced by Municipalities in Stormwater Management

Municipalities face many challenges, including competing objectives, in developing, maintaining and improving stormwater management systems. In particular, scientific predictions of climate change impacts are becoming increasingly clear and specific to particular geographical areas. For example, the Intergovernmental Panel on Climate Change ("IPCC") Fifth Assessment Report indicated that precipitation events are very likely to become more intense and more frequent in Canada.³ These changes create significant risks for stormwater management since predicted increases in heavy rain and extreme weather will put additional strain on municipal sewer systems. These climate impacts, coupled with other changing conditions such as increased development and aging infrastructure, create reciprocal needs for improvements and additions to many stormwater systems. As stormwater management becomes increasingly debated in light of climate change, it is more important to consider questions such as:

• Who has authority and jurisdiction over the construction and operation of stormwater facilities?

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Dan Sandink, "Urban Flood Risk and Insurance" (November 4, 2013) online: Credit Valley Conservation http://www.creditvalleyca.ca/wp-content/uploads/2013/11/2-Dan-Sandink-Urban-Flood-Risk-and-Insurance.pdf [Urban Flood Risk and Insurance].

² Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis, online: IPCC

http://www.climatechange2013.org/images/uploads/WGIAR5_WGI-12Doc2b_FinalDraft_Chapter14.pdf at 145.

Ibid.



- Who could be liable when things go wrong?
- How can municipalities ensure decisions and appropriate improvements are made in light of projected climate impacts?

Some of the challenges identified in preparing this chapter include:⁴

- · Lack of dedicated funding for stormwater management;
- Lack of information on what needs to be done, and how, with respect to stormwater management (for
 instance, if the current design standard is to build for the historical "1 in 100 year storm" but recent
 records indicate storms of that nature are occurring more frequently, what should be the new
 standard?);
- Lack of pressure from leaders and decision-makers to prioritize stormwater management;
- Lack of authority to go beyond management standards prescribed in the Provincial Policy Statement⁵
 and current Conservation Authorities Act regulations⁶ (without provincial approval); and
- Lack of understanding of legal obligations related to stormwater management.

Within the context of these challenges, and particularly the lack of understanding of legal obligations, this chapter will explore how avoiding private law liability can influence stormwater management decision making. In many cases, minimizing the risk of successful private claims will provide a strong incentive for municipalities to evaluate and update their stormwater management decision making, investments and record keeping, particularly as the likelihood of damage related to extreme events increases with climate change.

3. Legal Obligations and Stormwater

3.1. Source of Legal Obligations

In common law jurisdictions like Ontario, the legal obligations of governmental authorities are derived from two main sources:

- 1) Legislation (federal or provincial); and
- 2) The common law (sometimes called judge-made law) developed by the courts.

Legislation includes statutes, regulations and municipal by-laws. These laws govern activities the government has deemed worth regulating. How these statutes are interpreted and applied is often clarified through the common law, which is derived from decisions of the courts.

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Based on consultation with Credit Valley Conservation staff and contacts.

⁵ Ministry of Municipal Affairs and Housing, "Provincial Policy Statement, 2005", online: Ministry of Municipal Affairs and Housing http://www.mah.gov.on.ca/Asset1421.aspx.

O Reg. 160/06 s 11.



In addition to serving an interpretive function, the common law can impose legal requirements where a statute does not specifically deal with an issue. In some cases, courts have even decided that common law requirements exceed statutory requirements, meaning that compliance with legislation is not always enough to ensure protection against liability. There is always a risk that a person or government will be subject to a challenge based not only on legislation but also on the common law (for example, for nuisance or negligence).

The overlap of common law and legislation creates challenges because it means there is not one definitive set of rules that clarifies which actions are legally required. In practice, the circumstances and facts of each decision or policy will dictate potential liability.

3.2. Sources of Jurisdiction to Adapt

The rest of this chapter will focus on why and how municipal and other government decision makers may wish to adapt their stormwater management decisions in light of changing conditions. At the outset, however, it is helpful to identify a municipality's legal authority to do so.

Depending on the type of adaptation in question, municipalities have numerous sources of jurisdiction that can allow them to take action. Examples include:

- a) Direct statutory authority (discussed in more detail in section 3.3);
- b) Implied authority based on the objectives of the enabling statute;
- c) Natural person rights;8 and
- d) Common law obligations (discussed in more detail in section 4).

The Canadian *Constitution*⁹ is the source of all government authority in Canada and grants federal and provincial governments powers to regulate various areas. Provinces are permitted to delegate some of their authority to municipal governments. In Canada, municipalities are often referred to as "creatures of the province" since they receive authority from the province through statute and have no legal status under the *Constitution*. The same is true for conservation authorities in Ontario, which also obtain jurisdiction by way of provincial statute.

3.3. Sources of Jurisdiction to Manage Stormwater

In Ontario, more than one public authority is granted powers and obligations that can be classified as stormwater management, each with a different objective. This means that various government actors,

As more fully discussed in section 5.1 below.

Municipal Act, SO 2001, c 25, s 9 [Municipal Act].

Constitution Act, 1867, c 3. See also, Constitution Act, 1982 [Constitution].

¹⁰ Rogers LLP, Canadian Law of Planning and Zoning, 2d ed Volume I (Toronto: Thomson Carswell, 2013) at 4-2(2).

¹¹ Constitution, supra note at s 92-8.



including the Province, municipalities and conservation authorities, may find it advisable to examine the impact of their decisions and policies on stormwater management. At the same time, a lack of clarity on the required level of stormwater management service means that, in many cases, governments will need to look not only to statute, but also to the common law, for guidance on how to limit their risk.

Ontario Water Resources Act and Environmental Protection Act

The provincial government is responsible for approving sewage works in Ontario. Under section 53 of the *Ontario Water Resources Act*, ¹² persons, including municipalities, wishing to use, operate, establish, alter, extend or replace new or existing sewage works (including stormwater), must obtain provincial approval. ¹³ The provincial government also has oversight of sewage works under part II.1 (Environmental Compliance Approvals) of the *Environmental Protection Act*. ¹⁴

Stormwater approvals made under the *Ontario Water Resources Act* often require the owner of the stormwater system to conduct ongoing maintenance and monitoring, including inspecting the condition of the stormwater management system and keeping records of inspections and maintenance.¹⁵ In March 2003, the province released the Stormwater Management Planning and Design Manual.¹⁶ The Manual is intended to "be used as a baseline reference document in the review of stormwater management applications for approval under section 53 of the *Ontario Water Resources Act*" and provides practical, tested guidance while also encouraging innovation.¹⁷

Municipal Act

Municipalities must exercise their authority within the scope delegated to them by the provincial legislature. Ontario municipalities are granted very broad powers under section 8(1) of the *Municipal Act* (the "*Municipal Act*") to "enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues". More specifically, sections 10 and 11 of the *Municipal Act* permit a municipality to enact by-laws and provide services to the public that it deems necessary, including the management of stormwater and storm sewers. Although section 23 of the *Municipal Act* permits municipalities to enter into an agreement with any person to construct, maintain and operate a

¹² Ontario Water Resources Act, RSO 1990, c O-40.

¹³ *Ibid* at ss 1 and 53.

 $^{^{14}}$ Environmental Protection Act, RSO 1990, c E-19 part II.1.

¹⁵ Correspondence with Cassie Corrigan, Water Resources Specialist, Credit Valley Conservation, December 2013.

 $^{^{16}}$ "Stormwater Management Planning and Design Manual" (March 2003), online: Ontario Ministry of the Environment

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079721.pdf [Manual].

Ibid at Preface.

¹⁸ City of Verdun v Sun Oil Co. [1952] 1 SCR 222 at 228.

Municipal Act, supra note 8 at s 8(1).

²⁰ *Ibid* at ss 10-11.



sewage works, including for stormwater, 21 in some cases municipalities retain ultimate legal responsibility for the work. 22

Planning Act and Building Code Act

Building and planning legislation also allow, or require, municipalities to consider stormwater management. For instance, under section 41(7) of the *Planning Act*, a municipality may require an owner of land to provide for stormwater disposal. Likewise, under section 41(8), upper-tier municipalities must ensure stormwater disposal on land abutting a highway within the jurisdiction of the municipality. Furthermore, section 10.1 of the *Building Code Act* requires that the operation and maintenance of sewage systems be in compliance with that act, including requirements for health and safety of the public. ²⁵

In Ontario, appeals and applications relating to municipal planning, financial and land matters are observed by the Ontario Municipal Board (the "OMB"). Municipalities and conservation authorities should be aware that some of these appeals and applications adjudicated by the OMB may deal with stormwater liability; however, a wholesome discussion of potential liability associated with OMB appeals and applications was outside the scope of this chapter.

Conservation Authorities Act

Conservation authorities also have broad powers to manage stormwater. In order to achieve their objects, section 21 of the *Conservation Authorities Act* grants conservation authorities explicit power to control the flow of surface waters to prevent flooding and to reduce the adverse effects thereof.²⁷ Furthermore, under section 3(c) of Ontario Regulation 97/04, conservation authorities are empowered to regulate development and activities in or adjacent to the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards.²⁸ Just like municipalities, conservation authorities enjoy a wide scope of power. In a decision involving one conservation authority, Justice Abella of the Ontario Court of Appeal (as she then was²⁹) potentially extended the role of conservation authorities to enforcing "the significant legislative mandate of protecting the natural resources of the watershed within defined territorial jurisdictions throughout Ontario".³⁰ Conservation authorities may thus be expected by courts to take action in enforcing their object of protecting and preserving natural resources, which could include preventing flooding,

²¹ Ibid at s 23

As more fully discussed in section 7.2 below.

²³ Planning Act, RSO 1990, c P.13 at s 41(7).

²⁴ *Ibid* at s 41(8).

²⁵ Building Code Act, SO 1992, c 23 s 10.1.

²⁶ OMB Home, "About", online: Ontario Municipal Board https://www.omb.gov.on.ca/english/AbouttheOMB/AbouttheOMB.html>.

 $^{^{\}rm 27}$ Conservation Authorities Act, RSO 1990, c C-27 s 21 [Conservation Authorities Act].

²⁸ O reg 97/04 at s 3(c) [*O reg 97/04*].

²⁹ Justice Abella now sits on the Supreme Court of Canada.

³⁰ Maitland Valley Conservation Authority v Cranbrook Swine Inc. (2003) 64 OR (3d) 417 at para 40 [Maitland Valley].



where possible. Since conservation authorities are responsible for being knowledgeable about flood-prone zones,³¹ this may be interpreted as being responsible for keeping and updating appropriate mapping.

3.4. No Prescribed "Level of Service" for Stormwater

Unlike drinking water standards, which outline the level of service that should be provided to those receiving municipal drinking water,³² stormwater standards are less understood and arguably not even prescribed by statute and provincial guidance. Consultation³³ and research conducted to-date located no legislated requirements or comprehensive prescriptive guidance with respect to the level of service for stormwater in Ontario that specifies, for example, how systems should respond in certain situations and during major rainfall events.

Generally, stormwater management systems are governed by their approvals under provincial legislation. These approvals sometimes, but not always, provide prescriptive requirements and ongoing monitoring and maintenance obligations. Municipal standards and other criteria for design and maintenance are usually based on a subwatershed or flood study, and often built to accommodate the "100-year storm" or regional requirements.³⁴ As mentioned above, the Ministry of the Environment has released guidance³⁵ for those designing, constructing and managing stormwater management systems and seeking approvals under section 53 of the *Ontario Water Resources Act*. This guidance, however, does not set out a comprehensive level of service for stormwater management.³⁶

The lack of statutorily prescribed levels of service for stormwater management does not mean there are no legal requirements to provide certain standards of service in specific circumstances. As discussed above, where there is a statutory gap or lack of clarity, it is typically advisable to turn to the common law to help understand whether there are other legal requirements.

Since legislative clarity is lacking in this case, the appropriate (and legally required) level of service for stormwater management in a given lawsuit is likely to be determined on a case-by-case basis. Based on this, decision makers and service providers (including municipalities) should work towards ensuring their decisions and policies are made with a good understanding of common law obligations, in addition to the application of the various statutes, regulations, approvals and guidance documents that could apply.

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³¹ Don Pearson, "The State of Floodplain Mapping in Ontario" (June 15, 2007), online: Conservation Ontario

http://www.iclr.org/images/2007_June_ICLRPRESFloodMapping.pdf [Floodplain Mapping]. See also, "Conservation Authorities" (July 9, 2013), online: Ontario Ministry of Natural Resources http://www.mnr.gov.on.ca/en/Business/Water/2ColumnSubPage/STEL02_163413.htm>. See also, "Flood Status Messaging" online: Conservation Ontario http://conservation-ontario.on.ca/projects/documents/2012COFloodFactSheet_001.pdf.

³² Under section 10 of the Safe Drinking Water Act, SO 2002, c 32 s 10, drinking water must meet the requirements of the drinking water quality standards prescribed by regulation (O Reg 169/03 s 2(1)) [Drinking Water].

Those consulted for the purpose of developing this chapter point to the lack of a level of service for stormwater as being a major hurdle. We have not conducted exhaustive research on this topic but are relying on the advice and instruction of those connected to us by Credit Valley Conservation Authority.

Correspondence with Dave Maunder via email, December 2013.

³⁵ Manual, supra note 16.

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4. The Common Law

4.1. Tort Law and Stormwater Management

Governments, including municipalities, can be subject to tort liability under common law. While the common law may not create a positive obligation to provide drainage or drainage facilities for surface water,³⁷ municipalities open themselves to common law liability once they decide to provide stormwater management or take actions that impact stormwater (i.e. if those actions cause harm to others).

Understanding the law of tort, particularly negligence, can provide valuable guidance for a municipality on reducing its risk from stormwater management operations, including the potential impact of climate change on those operations.

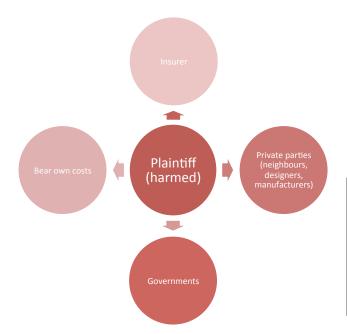
What is a Tort?

In common law jurisdictions such as Canada, a tort is a civil wrong that causes a person to suffer a loss or harm. This loss or harm often results in legal liability and an award of damages against the person who commits the tortious act, called a "tortfeasor". In general, torts do not require criminality.

Understanding tort law risk is particularly important because after a harm has occurred (for example, a flooded basement), those injured (plaintiffs) are likely to seek compensation for their loses rather than bearing the costs themselves. Plaintiffs have several potential avenues to pursue compensation following injury (see figure below). If available, most individuals turn first to their insurers, but their insurers may in turn pursue claims against a municipality and any other parties the insurer thinks could be responsible for the harm (in whole or in part). In cases where adequate recovery from insurance is not available, an individual may launch a lawsuit directly. Municipalities and other government entities are often seen as attractive defendants because of their "deep pockets".

³⁷ Kay v Caverson 2011ONSC 4528 (CanLII) at para 203. Appeal was dismissed by the ONCA in Kay v Caverson (2013) 2013 ONCA 220 [Kay].





After experiencing harm, a plaintiff may seek compensation against private parties and/or governments under tort law.

The following tort claims against governmental authorities are considered in this chapter (with an emphasis on the law of negligence):

- Negligence;
- Nuisance;
- Strict liability; and
- Riparian rights.

4.2. Negligence

4.2.1. The Test for Municipal Negligence

Many recent municipal liability cases relating to stormwater management have involved the tort of negligence. At a very general level, courts determine whether a defendant was negligent by considering whether a duty of care was owed to the plaintiff, whether the standard of care was breached, and whether the defendant's act caused the plaintiff's damage. In Canada, negligence by a municipality is assessed differently than negligence by a private person.



What is the Test for Negligence of Municipalities?*

There are 5 elements to a negligence claim:

- 1. Does the defendant owe the plaintiff a **duty of care**? In municipal liability cases this involves 3 questions:
 - a. Was the harm that occurred a reasonably foreseeable consequence of the defendant's act?
 - b. Was the plaintiff closely and directly affected by the defendant's actions, such that the defendant ought to have reasonably known its act or omission could cause a risk for the plaintiff?
 - c. If the answers to (a) and (b) above are yes, are there any policy considerations that prevent ("negative") the imposition of a duty of care?
- 2. Did the defendant breach the **standard of care**? Was the conduct of the defendant reasonable in the circumstances?
- 3. Did the defendant's act or omission **cause the harm** to the plaintiff? (For example, can a "chain of causation" be established between the act/omission and the harm suffered by the plaintiff?)
- 4. Was the harm too remote?
- 5. Has damage been sustained by the plaintiff?

4.2.2. Duty of Care

It may seem obvious that municipalities owe a duty of care to those people who could be affected by their provision of stormwater services; however, determining whether a duty exists is actually quite complicated. This prong of the negligence test is where some of the most important issues relating to increased municipal development and climate change are likely to be considered.

The Supreme Court of Canada has developed a test to determine whether there is a duty of care in a negligence claim against a municipality.⁴⁰ This two part test includes determinations of (1) foreseeability and proximity and (2) policy considerations that could negate a duty.⁴¹

(i) Foreseeability and Proximity

The first stage of the negligence analysis involves asking whether the defendant owed a duty of care to the plaintiff. This considers (a) "whether the harm that occurred was a reasonably foreseeable consequence of the

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^{*} The above high-level summary has been adapted from case law³⁸ and treatises³⁹. This chapter will not deal with elements 4 and 5 in detail.

³⁸ Cooper v Hobart [2001] 3 SCR 537 at para 30 [Cooper]. See also; Kamloops, supra note 40 below, Just, supra note 52 below, and Brown, supra note 56 below.

David G. Boghosian and J. Murray Davison, *The Law of Municipal Liability in Canada*, (Toronto: LexisNexis Canada Inc, 1999 with service issues for 2004) at 2.57 [Municipal Liability].

Kamloops (City) v Nielsen [1984] 2 SCR 2 at 12 [Kamloops].

⁴¹ *Cooper, supra* note 38.



defendant's act" and (b) "whether there was a sufficient relationship of proximity between the parties to justify the imposition of liability". ⁴² In general, courts ask whether the cause of action falls within a recognized category of proximity. A detailed review of foreseeability and proximity will not be required if a court has already rendered a decision establishing proximity and foreseeability in similar circumstances. ⁴³

Canadian courts have found foreseeability and proximity in municipal stormwater cases. For instance, in a case of flooding caused by a backup in a municipal combined sanitary and storm sewer, the Ontario Court of Appeal indicated that a duty of care by the municipality to the citizens was recognized and it was foreseeable that harm could be suffered. Courts have also held that if there are studies and warnings to the government about a potential issue, the foreseeability aspect of the test is likely to be satisfied. Based on this case law, it seems likely that courts will determine it is reasonably foreseeable that citizens may be harmed by a particular governmental decision related to stormwater management and that there is a sufficient proximity between citizens receiving stormwater services and the governmental provider of these services. This is unsurprising, since it is foreseeable to most people that a failure to take appropriate action to manage stormwater increases the risk of a flood, potentially creating harm to persons and property where the flood occurs.

(ii) Policy Considerations

If a court finds that a relationship of proximity and reasonable foreseeability has been established, it then considers whether there are any policy considerations that "may negative the imposition of a duty of care". ⁴⁶ Policy considerations generally do not attract liability because courts recognize that municipalities need to make difficult decisions about resource allocation and political priorities. This test has been divided into a series of "immunities" that protect municipalities when making policy, legislative, and quasi-judicial decisions. ⁴⁷ Making conscious *policy* decisions is one important tool for reducing the risk of liability in light of new information.

Under the common law, municipal policy decisions can negate a duty of care.⁴⁸ This principle is reinforced by section 450 of the *Municipal Act*, which does not permit proceedings "based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a <u>policy decision of a municipality</u> or local board made in a good faith exercise of the discretion"⁴⁹ (emphasis added).

⁴² *Municipal Liability, supra* note 39 at 2.18.1.

⁴³ Cooper, supra note 38 at para 31.

⁴⁴ Oosthoek v. Thunder Bay (City) (1996) 30 OR (3d) 323 at para 23[Oosthoek].

⁴⁵ Eliopoulos v. Ontario (Minister of Health and Long Term Care) [2004] CanLII 4030 (ONSC) at para 25 [Eliopoulos]. See also, Oosthoek, supra note 44.

⁴⁶ Cooper, supra note 38.

⁴⁷ Municipal Liability, supra note 39 at 2.18.3

⁴⁸ Cooper, supra note 38 at para 38.

⁴⁹ Municipal Act, supra note 8 at s 450.



Some stormwater management decisions have been classified as policy decisions. For instance, the development of a by-law⁵⁰ and the decision to inspect or not inspect infrastructure⁵¹ have been seen as policy decisions in previous cases.

By contrast, a municipality could be liable in negligence for operational decisions. Operational decisions can be described as the manner in which a municipality executes or carries out a given policy decision.⁵²

The problem with the policy/operational test lies in applying it to real world decisions. The distinction has been characterized as artificial⁵³ and "a convenient mechanism for allowing the judiciary to exercise an unfettered discretion in finding either liability or immunity for municipalities".⁵⁴

Not every governmental decision will be considered to be a policy decision. ⁵⁵ According to the Supreme Court, true policy decisions "involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual importance". ⁵⁶ (Emphasis added.)

The Supreme Court has explained that policy decisions can be made at all orders of government as long as they are based on social, economic and political factors.⁵⁷ In order for a decision to qualify as "policy", the decision maker must have specifically considered the issue at hand and made a conscious decision to act or not to act based on social, political and economic factors.⁵⁸ Simply failing to consider an issue is unlikely to be considered a policy decision. "Inaction for no reason cannot be a policy decision taken in the bona fide exercise of discretion."⁵⁹ The same can be said for routine procedures that have not been re-evaluated in light of new or relevant policy considerations.⁶⁰ This principle has a key implication for municipalities facing changing conditions that could cause harm to people

Making conscious policy decisions is one important step in reducing the risk of liability in light of new information. To reduce liability risk, municipal decision makers should actively "turn their minds" to information, associated risks, and costs, of different policy options. On the other hand, simply failing to deliberate is unlikely to qualify as a policy decision.

Oosthoek, supra note 44 at para 26.

⁵¹ Ingles v Tutkaluk Construction Ltd. 1 SCR 298 at para 19 [Ingles].

⁵² Just v British Columbia [1989] 2 SCR 1228 at 1245 [Just].

⁵³ C. M. Loopstra et al, "Statutory Starting Points, Tortious Roots", Waging War in the Municipal Trenches: Municipal Liability in the New Millennium 2000 at 6 (Toronto: Continuing Legal Education Ontario, March 2000).

⁵⁴ Ibid.

⁵⁵ *Just, supra* note 52 at 1239.

 $^{^{56}}$ Brown v British Columbia (Ministry of Transportation & Highways) [1994] 1 SCR 420 at 441 [Brown].

⁵⁷ Ihid at 1/12

⁵⁸ Brown, supra note 56. See also, Eliopoulos, supra note 45 at para 50.

Oosthoek v. Thunder Bay (City) ([1994] OJ No 2619 at para 7 [Oosthoek Trial].

Municipal Liability, supra note 39 at 2.41. See also, Laurentide Motels Ltd. v Beauport (City) [1989] 1 SCR 705 at 726-727 [Laurentide]. ("In the absence of a policy decision to which the omission alleged to have caused damage can be attached, the inspection and repair of the fire hydrants must be taken to be in the operational sphere since they are the practical execution of the municipality's policy decision to establish the water system and allocate personnel and money to maintenance").



and property: to avoid risk, decision-makers should consider whether they need to revise their routines and practices.

Operational decisions, on the other hand, are "concerned with the practical implementation of the formulated policies" and the operational area "mainly covers the performance or carrying out of a policy". "Operational decisions will usually be made on the basis of administrative direction, expert or professional opinions, technical standards or general standards of reasonableness". 62

Some examples of decisions considered "operational" in the context of stormwater management are:

- Implementation of a work plan to address flooding within a municipality, as it detailed operations to be undertaken, was viewed as the operational output of a governmental policy. ⁶³ By contrast, the decision to implement an inspection scheme, following the implementation of a plan, could constitute a policy decision. ⁶⁴
- In a class action suit against the City of Thunder Bay for negligence and nuisance, plaintiffs experienced flooding from a heavy rainstorm caused by a backup in combined sanitary and storm sewers. The problem was identified in 1965 by an engineer noticing that the increase in hard surfaces and new development in the surrounding area eliminated absorptive soils and increased water movement to city sewers. In the 1970s, recommendations were made to the city to redirect some of the pipes to disperse the water, which would lessen the amount of water going into the sewer during a storm. In 1985, the city passed a by-law to redirect the pipes but did not enforce it. The Ontario Court of Appeal found that the decision not to enforce the by-law was not a policy decision since the city did not consciously consider whether to enforce the by-law or not. According to the court, inaction without a reason cannot constitute a policy decision. 65

In short, policy decisions are generally exempt from negligence claims, making it important to consider changing conditions at a policy level. Merely naming a decision as a policy decision, however, will not protect decision makers from liability. Even in cases that appear to be policy decisions, courts may still review these decisions for tort liability where bad faith is present or actions are taken for an improper purpose. ⁶⁶ One commentator notes: "where a municipality adopts a policy of ignoring the safety of its citizens, that in itself is evidence of serious negligence entitling the plaintiff to succeed in the action." It may be that a policy decision to do nothing in the face of information that suggests a risk to human health or safety will be open to a negligence claim.

⁶¹ Brown, supra note 56.

bid.

⁶³ Lissack v. Toronto [2008] O.J. No. 5563 (Ont Sm Cl Ct).

⁶⁴ Eliopoulos, supra note 45. See also, Lewis v British Columbia [1997] 3 SCR 1145.

⁶⁵ Oosthoek Trial, supra note 59.

⁶⁶ Just, supra note 52 at 1238. The Supreme Court emphasized, for example, that that while budgetary considerations will almost always be considered policy, even a budgetary decision must be a good faith exercise of discretion

⁶⁷ Municipal Liability, supra note 39 at 2.46 citing Dorschell v Cambridge (City) (1980) 30 OR (2nd) 714 (CA) at 718-19, per Brooke J.A. and at 720-21 per Thorston J.A. (C.A.).



4.2.3. Standard of Care

Once courts determine that the defendant owed a duty of care to the plaintiff, the courts then consider the relevant standard of care. The test is whether the disputed conduct falls below the standard reasonably expected to be met in the circumstances. One of the most challenging questions relating to stormwater management is the appropriate standard of care, given that many municipalities are being asked to consider changing information as part of their risk management and stormwater management programs. A further issue is the content of that standard, particularly in the case of infrastructure designed many years, if not decades, before more complete information about risks became available to municipalities, their engineers, and other design professionals.

Determinations of the appropriate standard of care will always be made on a fact- and case-specific basis. To determine whether the standard of care was breached a court considers a number of factors, including statutory requirements and guidance, industry codes of practice and general industry/sector custom and practice. Actions of other similarly situated authorities may also be an important consideration of what is reasonable.

An important tool for showing that the standard of care has been met is demonstrating that a municipality has met the standard of practice followed in other similarly situated municipalities. This suggests that coordinating between municipalities on obtaining and using climate change information could assist in mitigating risk by setting a clear standard of care.

These considerations, taken together, will inform the applicable standard of care. Compliance with a statute, however, or with any particular guidance, will not be determinative. Likewise, following standard industry practice will not, in itself, ensure that the standard of care is met.⁷²

While not a complete defence, one of the most promising ways of meeting the standard of care is through coordination and information sharing with similarly situated municipalities. This is because evidence of the standard practice in similarly situated municipalities is relevant in determining the standard of care. It can lead to a presumption of negligence if a municipality does not meet the standard followed by others in similar situations and, conversely, it can demonstrate that a defendant has met the standard of care if that defendant follows or exceeds the standard set

A municipality can be negligent even if it complies with a relevant statute or industry practice, particularly if it receives information suggesting that these standards pose risks to others.

⁶⁸ Municipal Liability, supra note 39 at 2.97.

lbid.

⁷⁰ Ryan v Victoria (City) [1999] 1 SCR 201 [Ryan]. See also, ter Neuzen v Korn (1995) 3 SCR 674 at 676 [ter Neuzen]. See also, MacLeod v Roe [1947] SCR 420 at 430.

⁷¹ Vizbaras v Hamilton (City) 2005 CanLII 49207 (ON SCI) at para 58 [Vizbaras]. See also, Municipal Liability, supra note 39 at 2.96.

⁷² Ernest J Weinrib *Tort Law Cases and Materials*, 2d ed (Toronto: Edmond Montgomery Publications Limited, 2003) at 82 citing *Trimarco v Klein* 436 NE 2d 502 (NY CA 1982) [*Trimarco*].

⁷³ Municipal Liability, supra note 39 at 2.96.



by similarly situated municipalities.⁷⁴ These principles suggest that actively assessing risks and coordinating best practices for stormwater management with fellow municipalities will be valuable in demonstrating both the appropriate standard of care and that it was met.

Municipalities have expressed concern that current standards of care could be applied unfairly to historical infrastructure. Generally, when determining the standard of care, courts will consider the standard that should have applied at the time of the action or omission in question.⁷⁵ Cases involving stormwater

management, however, can involve multiple alleged actions or omissions that will be the subject of a standard of care analysis. For example, a hypothetical lawsuit could allege negligence in infrastructure design, system inspection and system maintenance. While the system may have been designed on a certain date, the inspections and maintenance may have been conducted on an ongoing basis.

Because these actions occurred at different times, the appropriate standard of care may not be limited to the standard applied when the stormwater infrastructure was built. The allegedly negligent inspections and maintenance may attract a more recent standard of care, particularly if new information emerges to suggest that there is added risk to people or property. By way of example, in the case of *Oosthoek v. Corporation of the City of Thunder Bay*, 200 basements were flooded as a result of a backup of the city's sanitary and storm sewers, which were constructed between 1907 and 1925 to then-current industry standards. The defendant city was subsequently made aware of problems and risks of flooding (in the 1960s and 1970s) and made a policy decision to enact by-laws to address the

Depending on the facts, plaintiffs may claim negligence in design, inspection, operation and repair, as well as a host of other actions or inactions. As a result, while the standard of care applicable to design may be based on the time the infrastructure was built, ongoing activities, such as design and operation, could be subject to more recent standards.

problem, at least in part. The defendant was found negligent, however, for not enforcing these by-laws.⁷⁷

Various cases have illustrated stormwater related actions or decisions that breached the standard of care. For instance, in *Pearson v. Fort Frances (Town)*, after allegations against a municipality for negligent installation and maintenance of a storm sewer, the court concluded that once physical manifestations of damage began to show, the defendant city should have found the defect in question upon inspection and should have taken aggressive action to remedy the situation. Since the defendant city did not take aggressive action, it was found negligent.⁷⁸ Likewise, in *Scarborough Golf & Country Club v. City of Scarborough*, the Ontario Court of Appeal indicated that if a municipality was aware of the consequences of its inaction and still chose not to act, this could be a negligent decision, even if the municipality had statutory authority to act or to omit to act.⁷⁹

⁷⁴ Ibid.

⁷⁵ Krohnert v Regional Municipality of Halton (1989) 70 OR (2d) 430. See also, ter Neuzen, supra note 70.

⁷⁶ Oosthoek, supra note 44 at para 20 and Trimarco, supra note 72.

Oosthoek, supra note 44 at para 27.

⁷⁸ Pearson v. Fort Frances (Town) (2012) ONSC 5027 at para 298.

⁷⁹ Scarborough Golf & Country Club v City of Scarborough, (1989) 66 OR (2d) 257 [Scarborough].



(i) Causation

After determining that there was a breach of the standard of care, it must be shown how that breach caused harm to the plaintiff. The courts consider whether "but for" the defendant's negligence the plaintiff would have suffered the harm. Whether a court will find that the defendant's negligence caused the harm to the plaintiff will depend on the specific facts of the case. When there is clear evidence that the authority's action or inaction significantly contributed to the damage to the plaintiff, it is likely that courts will conclude that causation has been established. 181

4.2.4. Special Municipal Negligence Issues

Inspections, permitting and enforcement are all parts of an effective water management system. Although a comprehensive review of these roles and responsibilities is outside the scope of this chapter, we have provided a short summary of points that shed some light on how inspection, permitting and enforcement can create special issues for municipal liability in the context of stormwater management.

(i) Inspections

Flooding after faulty construction and city inspection was at issue in *Ingles v. Tutkaluk Construction Ltd*. The court scrutinized the defendant city's inspection scheme and found that inspection schemes can be both policy and operational depending on the facts of the case. When an inspection is carried out, it must be done in a non-negligent manner that is in line with the objective of the enabling statute. In the *Ingles* case, the court found that a faulty building inspection resulted in injuries to the plaintiff. The defendant city was found negligent since a duty of care arose and it was foreseeable that a deficient inspection of the construction could result in damage to the property or injury to the property's owners. The court found that the purpose of the *Building Code Act*, to ensure the imposition of uniform standards of construction safety, supported the establishment of this duty. Once the defendant city chose to exercise its power to enter upon the premises and inspect the renovations at the plaintiff's home, it owed a duty of care to those who could be reasonably foreseen to be injured by the negligent exercise of that power.

Of interest for our purposes, the court found that the negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care in exercising its power of inspection. Herefore, once a municipality takes on an inspection role, it can be found liable for the consequences of a negligent inspection. A municipality will only be absolved of the liability that flows from a negligent inspection when the conduct of the owner-builder makes it impossible for the inspector to do anything to avoid the danger. Herefore, once a municipality will only be absolved of the liability that flows from a negligent inspection when the conduct of the owner-builder makes it impossible for the inspector to do anything to avoid the danger.

⁸⁰ Zippilli v Hamilton (Corporation) (2010) ONSC 3949 at para 70. (Ontario Court of Appeal upheld trial judge's decision in a case where a plaintiff's basement flooded after a heavy storm. Even though there was irregular inspection of the culvert that was backed up and that caused the flood, evidence at trial demonstrated that the blockage occurred on the day of the flood and it was not possible for the government to inspect the culvert in time to prevent the damage and therefore, a chain of causation was not established.

⁸¹ Scarborough, supra note 79.

⁸² Ingles, supra note 51 at para 19.

⁸³ *Ibid* at para 24.

⁸⁴ *ibid* at para 32.

⁸⁵ *ibid* at para 33.



The measure of what constitutes a reasonable inspection will vary, depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost that would be incurred to prevent the injury. Municipalities will not be held to the standard of insurers for the work, nor are they required to discover every latent defect. Inspections that are found to be in compliance with standards in by-laws or statutes are unlikely to be found negligent. Additionally, municipalities are unlikely to be liable for injuries where inspections that could have prevented the injury would be too costly or impractical.

(ii) Permitting

It is clear that there is a duty of care to the public related to building and site plan approval and inspection, and that this may result in liability to municipalities that negligently issue permits. However, there is little case law guidance on the matter relating to stormwater management in Ontario. An important question for municipalities granting permits is whether allowing development in areas known to have a high risk of flooding will expose government to liability, even if permit applicants are notified. This issue is particularly important in situations where the land in question is considered uninsurable because of flood risks.

A 1984 case from Manitoba considered the issue of whether the city could be liable for damages relating to erosion due to the issuance and inspection of a building permit issued for a residence that was being built on a riverbank prone to erosion. ⁹⁰ The court concluded that if inspectors knew or ought to have known at the time the building permit was issued that the property was not suitable for its intended purpose, the municipality was under a common law duty of care to either prohibit the construction by denying the permit or, at least, to communicate the knowledge it had or ought to have had to the property owners. ⁹¹ In this particular case, the court found that the problems related to erosion were not so obvious that issuing the permit was negligent (in other words, the city was not held liable); given different facts, however, the outcome could vary.

(iii) Enforcement

As a general rule, according to the Supreme Court, the decision not to enforce a by-law is an operational decision that is subject to a claim in negligence. 92

In an Ontario Court of Appeal case discussed above,⁹³ the City of Thunder Bay was found negligent for flooding after a heavy rainstorm. The City knew that there was a potential flood danger and had a by-law to address this risk (by directing disconnection of rainwater leaders and prohibiting further connection), yet failed to enforce the by-law appropriately. There was no evidence that a considered policy decision was taken not to

⁸⁶ *ibid* at para 40.

⁸⁷ Vizbaras, supra note 70 at para 77. See also, Kay, supra note 37 and Crosty v City of Burlington (1978) 21 OR (2d) 753 (ON SCJ) [Crosty].

⁸⁸ Krohnert, supra note 75. The court found that inlets and storm sewers are prone to blockage and during construction there is no fool proof way of ensuring blockage does not happen and it is impractical to check an inlet every hour or so to ensure that blockage does not occur. A regular spring and fall inspection routine was enough and a more regular inspection (short of a 24 hr guide) would not have prevented the flood.

⁸⁹ Kay, supra note 37 at para 205.

⁹⁰ Pawella v. Winnipeg (City) (1984) (Man QB).

⁹¹ *Ibid* at para 18.

⁹² Kamloops, supra note 40 at 12.

⁹³ Oosthoek, supra note 44.



enforce the by-law. The Ontario Court of Appeal explained that whether the by-law imposes a duty or allows the power to act, the general principle classifying it as an operational decision remains. This case clarified that a municipality is free to not enforce its by-laws, but this must be done at the policy level. Here, the City of Thunder Bay did not consider the issue of enforcement or non-enforcement and therefore the lack of enforcement (in this particular case) was found to be negligent.⁹⁴

4.3. Nuisance

The tort of nuisance is a claim that unreasonable use of one's land results in interference with the use and enjoyment of the land of another. In previous cases of flooding, governmental authorities could be sued in nuisance, leading to municipalities being subject to significant cost claims and potential liability. The Ontario government put a stop to nuisance claims against municipalities related to "the escape of water or sewage from sewage works or water works" by legislative amendment in 2001. Nevertheless, these historical nuisance cases provide much food-for-thought for municipal tort liability avoidance.

4.4. Strict Liability/Rylands v. Fletcher

The strict liability doctrine is also commonly known as the rule in *Rylands v. Fletcher*: if a person brings and collects anything on her land that may cause harm, she is liable for damages if it escapes from her land and causes damage. In relation to stormwater, the Supreme Court of Canada concluded that the application of the rule requires the damage to occur as the result of a use that is inappropriate to the place, so the rule cannot be invoked where a municipality or regional authority, "acting under the warrant of statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality". ⁹⁸ Therefore, in relation to stormwater management, the tort of strict liability is unlikely to be invoked.

4.5. Riparian Rights

When a person owns land bordering a stream, river, or lake, her interest in the land gives her a riparian right to "continued flow of the water in its natural quantity and quality, undiminished and unpolluted". 99 Thus, if a person upstream changes the quantity or quality of water heading downstream, she may be liable under civil

⁹⁴ Oosthoek, supra note 44 at para 27.

⁹⁵ Municipal Liability, supra note 39 at 2.98.

⁹⁶ Municipal Act, supra note 8 at s 449(1).

⁹⁷ Tock v St. John's Metropolitan Area Board [1989] 2 SCR 1181 [Tock]. See also, Scarborough, supra note 79 and Oosthoek, supra note 44.

⁹⁸ *Tock, supra* note 97 at 1190.

⁹⁹ David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery Publications Limited, 1993) at 114 [*Environment on Trial*]. See also, *Scarborough*, *supra* note 79.



law,¹⁰⁰ even if the change occurred prior to the downstream person becoming an owner.¹⁰¹ In order to succeed in court, it is not necessary for the plaintiff to show injury; however, the plaintiff must be able to demonstrate that the challenged activity is likely to continue and to cause further alteration of water quality and/or quantity.¹⁰²

A riparian owner is also entitled to have water leave her land without obstruction. However, this right has been limited by the courts. For instance, in the 1912 case of *Re: Orford Township and Aldborough Township*, the Ontario Court of Appeal stated that it is not the intention of the law that riparian proprietors should be entitled to the natural flow of water at times of flood. 104

It should be noted that riparian rights claims may be brought by a municipality against another municipality, as occurred in the *Orford* case discussed above. A claim may also be brought against municipalities and conservation authorities. In *Scarborough Golf & Country Club v. City of Scarborough*, the defendant municipality and conservation authority were both subject to a riparian rights claim. The plaintiff had operated a golf course with a creek running through it since 1912. In 1912, the surrounding area was mostly agricultural and most of the water that fell into the area was absorbed through the soil. After rapid urbanization in subsequent years, falling water was increasingly directed into municipal storm sewers. The defendant city controlled most of the creek valley above the club and a conservation authority controlled the valley below the club. According to expert evidence presented at trial, the defendant city's actions, including rapid urbanization and water control plans, caused the creek to become wider and deeper, eroded the banks and resulted in flooding of the course during heavy rainfall, which made parts of the course unplayable and decreasingly enjoyable.

The Ontario Court of Appeal concluded that urbanization by an upper riparian municipality was causing flooding and erosion of a creek in the land of the lower riparian plaintiff. According to the court, the erosion of the creek caused the widening of the waterway on the land of the plaintiff golf club, which negatively affected the use and enjoyment of the plaintiff's land. The defendant city was obliged to pay damages. Although the conservation authority was negligent for not determining whether the municipal conduct would have an adverse effect on the plaintiff, it was not held liable because the court did not find that the authority's negligence caused the damage. 106

In Krohnert v. Regional Municipality of Halton, the court dismissed an argument for riparian rights after flooding caused by an obstruction to an inlet at a nearby storm sewer created a significant back-up and

 $^{^{100}}$ Environment on Trial, supra note 99 at 114.

¹⁰¹ *Ibid* at 115.

¹⁰² *Ibid.* It is immaterial, in an action of riparian rights that the defendant carries on a business important to the community in a proper manner. Likewise, the economic necessities of the defendant are not relevant. See, *McKie v. KVP Company Limited* [1948] OR 398. Any person can be subject to liability for interfering with riparian rights, even individuals who are not riparian owners. See, *R v. Henderson* (2008), 292 DLR (4th) 114 at para 13.

Markesteyn v Canada, [2001] 1 FC 345 at para 38.

¹⁰⁴ Re: Orford Township and Aldborough Township (1912) (ONCA) at para 6.

Scarborough, supra note 79.

¹⁰⁶ Ibid.



flooded the plaintiff's property. Although the court recognized the plaintiffs' riparian rights to the natural drainage of their watercourse, it distinguished the case from the *Scarborough* case discussed above. The court determined that the defendant did not increase the volume of water by artificial means and did not fail to accept the plaintiff's drainage when the defendant's sewer system experienced the failure, as is necessary for a riparian rights claim to succeed. ¹⁰⁷ In *Krohnert*, the court found that the defendant municipality designed the sewer for a 100-year storm, which conformed to the engineering norms at that time, and that a better inspection system (that may have detected the obstruction) would have been "expensive and impractical". ¹⁰⁸

5. Defences of Statutory Immunity and Contributory Negligence

If the plaintiff establishes the elements of negligence, the defendant is granted an opportunity to defend itself.

5.1. Statutory Immunity

Generally, governments performing statutory duties must do so non-negligently. The defence of statutory immunity, however, can provide protection against negligence if the statutory prescriptions strictly define how to perform a certain duty. 109

While it is not always easy to tell whether a statute will support the defence of statutory immunity, according to the Supreme Court, the weight to be given to an applicable statute will depend on the circumstances and the nature of the statute. If a specific statute prescribes the manner of performance and precautions to be taken, then it is more likely that compliance with the statute will be reasonable in the circumstances. ¹¹⁰ In other words, the more specific the legislation, the more likely the defence of statutory immunity will protect against liability.

As a result, mere compliance with a statute, even a prescriptive statute, does not extinguish the obligation of reasonableness. ¹¹¹ Municipalities and conservation authorities must minimize risk by acting reasonably in a given set of circumstances. For instance, in one Supreme Court decision, a regulation permitted railway authorities to use a wider flangeway but this wider flangeway was not appropriate for the location of the railroad. The court concluded that the choice of the flangeway was not reasonable in the circumstances, ¹¹² despite the fact that the regulation permitted that size of flangeway. Even if the statute explicitly states that a government authority is not required to construct, maintain or expend money on a particular domain, this is

¹⁰⁷ Krohnert, supra note 75.

¹⁰⁸ Ibid

Ryan, supra note 70 at para 40.

¹¹⁰ Ibid.

¹¹¹ *Ibid* at para 29.

¹¹² *Ibid* at para 58.



not a statutory exemption from the duty of care. ¹¹³ As a result, when municipalities are complying with a statute, they will often be open to liability in negligence.

5.2. Contributory Negligence of the Plaintiff

Another common defence is contributory negligence of the plaintiff. This can be claimed when the actions of the plaintiff led or contributed to the harm suffered. The defence can be used by a government to argue that it is not liable, or at least that it should only be liable for some of the damages.

Although governmental authorities are permitted to invoke the defence of contributory negligence, courts usually do not completely absolve the government of all liability. For example, in one case, a plaintiff permitted construction to take place on his property without a valid building permit. The permit was eventually issued by a governmental authority and later, the construction was found to be faulty. The Supreme Court found that although the plaintiff was clearly negligent, the inspecting authority still had a duty of care in the circumstances¹¹⁴ and clarified that only in rare cases will a plaintiff's negligence lead to finding of a lack of causation. ¹¹⁵

6. Rise of Class Actions to Address Flooding Damage

A growing number of lawsuits against municipalities are being brought in the form of a class action. These cases often focus on the municipalities' failure to mitigate risks and prevent damage.

Class actions allow multiple plaintiffs to bring a case as a group and try common issues together. The pooling of resources and structure of these cases mean that individuals who would be unlikely to pursue legal action independently have improved access to the courts.

Class actions are potentially significant threats to municipal finances and have already resulted in settlements related to flooding. A class action against the City of Stratford resulted in a settlement of \$7.7 million, notwithstanding the City had already paid over \$1.3 million dollars in emergency relief funding related to a 2002 flood. The settlement was made 8 years after the flood took place, showing how long the process of class actions can take (note that this class action was settled before going to trial and thus no finding of tortious conduct was made against the defendant city). The length of class action suits also mean costs associated with their defence can be significant.

¹¹³ Swinamer v. Nova Scotia [1994] 1 SCR 445 at 459 [Swinamer].

Ingles, supra note 51 at para 39.

lbid.

Donal O'Connor, "City settles flood suit" London Free Press (24 March 2010), online: The London Free Press http://www.lfpress.com/news/london/2010/03/23/13335481.html.



There are currently at least two flood-related class actions with municipal defendants underway in Ontario: one in Thunder Bay in relation to a 2012 flood and the other in Mississauga in relation to alleged reoccurring flooding on residential property, in each case citing concerns regarding planning and water management systems. Neither of these cases have been fully considered by the courts and no finding of negligence has been made out. 117

6.1. Procedural Streamlining

Class actions in Ontario are made possible through the *Class Proceeding Act, 1992.*¹¹⁸ Usually described as procedural in nature, the legislation is intended to provide an efficient and streamlined method for the courts to consider complex litigation and improve access to justice by allowing one or more persons to bring an action on behalf of a group of similarly situated persons (i.e. the class). Class actions use the traditional causes of action discussed above (for example, negligence) and are intended to provide more efficient and improved access to justice. By pooling potential damage awards or settlements, class action suits allow lawyers to take on the risks associated with pursuing litigation through a contingency fee arrangement (meaning the plaintiffs normally do not pay any legal fees directly, but instead provide their legal counsel with a percentage of any award or settlement).

Upon certification, class actions go forward with a representative plaintiff for a similarly situated, defined class. Certification is a determination by the courts (either after hearing arguments¹¹⁹ or considering joint statements by the parties¹²⁰) that the action can proceed as a class action to improve judicial efficiency and expedite claims. Certification is generally seen as a major hurdle in bringing a class action and often involves lengthy arguments in court. Historically, it has been difficult to obtain certification for environmentally related claims.¹²¹ In recent years, however, a shift in the legal landscape has broadened the types of claims that can take advantage of class actions¹²² and resulted in a growth in class actions generally, which could extend to environmental damage cases.¹²³

6.2. Case Examples

In the Stratford case mentioned above, the flooding event was allegedly caused by the City of Stratford's negligence in interconnecting and overcharging municipal sewers in certain districts and failing to fix problems in both storm and sanitary sewer systems. The plaintiff claimed that the defendant city's \$1.3 million in

See "City of Thunder Bay Class Action: Statement of Claim" online: Watkins Law Professional Corporation < http://www.watkinslawforthepeople.com/wp-content/uploads/2013/05/September-23-2013-Certification-of-Order.pdf> [Cerra]. See also, Panza v City of Mississauga, Statement of Claim, online: http://singerkwinter.com/wp-content/uploads/2013/10/Statement-of-Claim-website.pdf [Panza] and McLaren v Stratford (City) (2005) CanLII 19801 (ON SC) [Stratford].

¹¹⁸ Class Proceedings Act, SO 1992, c 6.

¹¹⁹ As in the case of *Stratford, supra* note 117.

As in the case of *Cerra, supra* note 117.

Hollick v Toronto (City) (2001), 205 DLR (4th) 19. The Supreme Court of Canada denied certification of a class related to pollution from a landfill site, finding that the common issues were negligible in comparison to the individual issues. Due to the usual variety of impacts related to environmental damages this decision was seen at the time of making environmental class actions unlikely.

¹²² Cloud v AG Canada (2004), 247 DLR (4th) 66.

¹²³ Pearson v Inco Ltd., et al (2006) 78 OR (3d) 641; OJ No 4918. See also, Stratford, supra note 117.



compensation provided prior to the lawsuit only equaled about \$5000 per claim and was not enough to make "whole" many who were impacted by the flood. The court certified the class in June 2005, almost 3 years after the flood event. Further appeals of the certification decision were denied. It would be another 5 years before a settlement was reached. The lawyers for the class were responsible for distributing the award to the class, representing approximately 880 homes that flooded.

In *Cerra et al. v. The Corporation of the City of Thunder Bay,* ¹²⁴ a case that is ongoing, the plaintiffs allege that the City of Thunder Bay did not properly construct, maintain and/or operate the Atlantic Avenue Water Pollution Control Plant before and during the May 28, 2012 rainstorm in the area, resulting in homes and properties being flooded with sewage, water and other contaminants, some for several weeks. ¹²⁵ The statement of claim alleges that the City of Thunder Bay had information that the intense rain was foreseeable and had deficient overflow protection and oversight of the control systems, resulting in damages to the class of plaintiffs. ¹²⁶

The City of Thunder Bay recently consented to the certification of the \$375 million class action. The city manager has noted that this was a tactical legal move;¹²⁷ however, many who follow these issues were surprised to see the consent, as certification is often heavily contested. According to the lawyers representing the class, the court approved the Notice of Certification on September 23, 2013,¹²⁸ which means that the court has given approval for the action to proceed as a class action. The court has not yet determined the merits of the action. The case now moves on to the "discovery" stage, in which the parties share information and attempt to uncover exactly what happened during the flood. At this stage, it is unclear when this case will come to a close and whether it will go to trial or be settled outside of court like the Stratford case.

The final example is the ongoing case of *Panza et al v. The Corporation of the City of Mississauga et al*, ¹²⁹ in which the plaintiffs allege that inadequacies in storm and sewage water handling systems that service the community are responsible for repeated flooding of basements and other surface areas and causing damage, increased costs and loss of property values. The members of the proposed class are owners in the "Lisgar Flood Area," ¹³⁰ including those who have experienced flooding and those who have allege being stigmatized by living in the area. The statement of claim was issued in February 2012 and, to the best of our knowledge, has yet to be certified or considered by the courts. This case is interesting as it discusses numerous instances of flooding rather than one particular event and deals with systemic planning concerns, which will likely become an important consideration in light of climate change going forward.

¹²⁴ Cerra, supra note 117.

¹²⁵ Cerra, supra note 117 at para 3.

¹²⁶ Cerra, supra note 117 at para 33 and para 56.

CBC News, "Thunder Bay \$375M flood lawsuit moves ahead" (24 September 2013), online: CBC News < http://www.cbc.ca/news/canada/thunder-bay/thunder-bay-375m-flood-lawsuit-moves-ahead-1.1865969>.

Notice of Certification can be found online at < http://www.watkinslawforthepeople.com/wp-content/uploads/2013/05/NOTICE-OF-CERTIFICATION.pdf>.

Panza, supra note 117.

Described in the Statement of Claim as "An area bordered on the north by a rail allowance extending east and west from the Lisgar GO station, on the west by the Ninth Line, on the South by Britannia Road West and on the east by Tenth Line West in the City of Mississauga, Province of Ontario".



Municipalities may wish to follow these cases closely to better understand potential risks and guide risk-management.

7. Shared Responsibility

Protecting against injury caused by climate impacts such as flooding and other extreme weather events is a shared responsibility involving the actions of many different parties. From a technical and legal perspective, flood prevention should not be seen as the sole responsibility of any particular person or entity. All orders of government, community members and professional service providers, among others, should take appropriate adaptation actions where they can, and may have legal obligations to do so in certain cases.

The insurance industry in Canada, facing higher payouts for increased severe weather, has identified flooding and weather-related impacts as issues of major concern. In addition to the lack of availability of insurance for overland flooding, ¹³¹ the industry is also providing indications that coverage may become more costly or limited going forward. ¹³² Reduced insurance could create even more incentives for government and private parties to consider how responsibilities are shared and how governments, community members and insurance companies can work together to address risks.

The preceding pages discussed the various legal risks and responsibilities municipalities and conservation authorities may face in light of common law obligations. Because of the unique challenges and risks related to stormwater management, and in light of the multiple orders of government and parties with stormwater management responsibility, governmental authorities may find it helpful to work with other orders of government, service providers and residents to reduce risk and clearly share responsibilities.

7.1. Municipalities

As discussed above, municipalities have jurisdiction for overseeing water management systems in Ontario. This normally includes both the delivery of potable water as well as the management of wastewater and stormwater.¹³³ Over past decades, safe and reliable drinking water standards were developed and municipalities generally have a good understanding of how to comply with these standards.¹³⁴ Our discussion on reducing liability by creating common norms of practice for similarly situated municipalities in section 4.2.3 above suggests that the same consistency and standardization should be the goal with respect to wastewater and stormwater management. Municipalities must consider how planning decisions impact water

Blair Feltmate and Jason Thistlewaite , "Assessing the Viability of Overland Flood Insurance: The Canadian Residential Property Market", online: The Co-Operators http://www.cooperators.ca/en/About-Us/about-sustainability/extreme-weather-and-insurance.aspx at Forward [Flood Insurance].

Ibid at ii.

Municipal Act, supra note 8.

Drinking Water, supra note 32.



management systems, even at smaller scales.¹³⁵ Additionally, the need for infrastructure improvements and upgrades is evident in many areas of the province.¹³⁶ Municipalities have a significant role to play in managing these improvements and deciding on areas to prioritize.

7.2. Conservation Authorities

As discussed above, conservation authorities have jurisdiction for overseeing water management systems in Ontario. They are empowered to control the flow of surface waters to prevent flooding and to reduce the adverse effects thereof. ¹³⁷ They are also permitted to regulate development and activities in or adjacent to certain lakes ¹³⁸. Furthermore, since conservation authorities are responsible for being knowledgeable about flood-prone zones, ¹³⁹ they may be expected to keep and update appropriate mapping. These powers are an indication from the legislature that conservation authorities play a significant role in managing stormwater and may even be expected by courts to take action to enforce their object of protecting and preserving natural resources ¹⁴⁰. In light of the above discussion of common law obligations, like municipalities, conservation authorities have broad powers to manage stormwater and may be held liable for negligence within their jurisdiction.

7.3. Municipal and Conservation Authority Employees and Contractors

Municipalities and conservation authorities often rely on employees and contractors to perform work and make decisions. Courts have considered whether governmental authorities are liable for the negligence of their employees or contractors in certain situations. According to the Supreme Court, governments can be liable for the negligence of their employees and contractors, since it is through these workers that governments can act. As an example, public service workers such as firefighters often make operational decisions when carrying out policies. Due to their nature as operational, these decisions are subject to a claim in negligence for which the governing authority may also be liable. 142

Contractors hired by governmental authorities may also be subject to a negligence claim. According to the Supreme Court, whether a government authority will be liability for the negligence of its independent contractor will depend on the statutory provisions involved. In a case where a commuter was killed on a highway because a governmental contractor was negligent in performing the scaling of a cliff, the government was found liable, even though it was the contractor's negligence that led to the accident. The applicable

For instance, based on our discussion of permitting in section 4.2.4(ii), when providing approvals for development and construction, even at the lot level, municipalities should consider how these changes could impact the larger system to prevent against flooding, where possible.

Flood Insurance, supra note 131 at vii and at 31.

Conservation Authorities Act, supra note 27.

¹³⁸ O reg 97/04, supra note 28.

Floodplain Mapping, supra note 31

Maitland Valley, supra note 30.

¹⁴¹ Swinamer, supra note 113 at 461.

Laurentide, supra note 60 at 727.

Lewis v British Columbia [1997] 3 SCR 1145 at para 27 [Lewis].



statute stated that the Minister "shall direct", "control" and "manage" maintenance of highways. The Supreme Court concluded that words such as "shall direct" imply that once the Ministry undertakes maintenance operations, it must personally direct those works, which makes this duty non-delegable. Therefore, in many cases even if a contractor performs work, it is the government's job to ensure the work is not done negligently and the government cannot delegate ultimate legal responsibility to its contractor.

According to the Supreme Court in *Lewis*, since citizens are vulnerable, they are entitled to believe that the government will take care of municipal services in a non-negligent manner.¹⁴⁵ Furthermore, the government is likely to be in a better financial position to compensate the plaintiff than a contractor.¹⁴⁶ Lastly, the government has the ability to enter into an agreement with a contractor and to include an indemnification clause for the negligence of a contractor,¹⁴⁷ meaning that the government is free to sue the contractors and recover costs. Despite a contractual agreement, however, the government may not be able to dodge liability and a finding of negligence. Even in a case where another party was responsible for negligently constructing, operating and maintaining a sewer, a municipal government was found to be 50% liable because the municipality was responsible for the sewer even if it outsourced the work.¹⁴⁸

In short, in many cases a municipality or a conservation authority will share responsibility with its workers and contractors for negligent actions. The governmental authority will need to ensure that the work performed was not negligent, especially if legislation prescribes specific duties on the governmental body. This principle does not mean that the government will be liable for every failure of construction and operation: the actions of its employees or contractors must still be found to be negligent for liability to be imposed. These principles indicate, however, that courts may be willing to find a governmental authority liable for the negligence of its employees and contractors for reasons of fairness, not simply because the statute indicates that the government ought to be responsible.

7.4. Consultants and Professional Advisors

The role of consultants and service providers is crucial in addressing flooding risks. Contractors, engineers and other professionals should consider potential liability in negligence and other causes of action under the common law.¹⁵⁰ Additionally, professionals may have a higher standard of care due to specialized knowledge.¹⁵¹ In situations where multiple parties are involved in an impugned decision, consultants and

¹⁴⁴ *Ibid* at para 22 and para 25.

¹⁴⁵ *Ibid* at para 33.

¹⁴⁶ *Ibid* at para 35.

¹⁴⁷ Ibid at para 37.

¹⁴⁸ Creasy v. Sudbury [1999] OJ No 4843 at para 49.

Lewis, supra note 143 at para 37.

Donald L. Martson, *Law for Professional Engineers: Canadian and Global Insights*, 4th ed (Canada: McGraw-Hill Ryerson, 2008) at 39.

¹⁵¹ Ihid



professional advisors could each be held liable for negligent actions or omissions that lead to damages. ¹⁵² They should thus consider legal requirements in light of reasonable foreseeable climate impacts, wherever possible.

Professionals are expected to perform their duties in a non-negligent fashion, considering reasonable foreseeability and adhering to reasonable standards. In light of climate change, these standards are continually changing and professionals are well advised to consider their recommendations and actions in light of foreseeable climate impact such as increased severe weather and higher risks of flooding. This role may be increasingly important as municipalities and other government decision makers change their procurement policies to ask consultants to consider climate change issues.

7.5. Community and Individuals

Along with the government and its workers and advisors, landowners and residents also share responsibility for stormwater management and maintenance. Failure of community members to meet their responsibilities could impact whether a municipality is found negligent and whether, if a finding is made, the municipality can successfully claim contributory negligence. ¹⁵³ In many cases, residents have a legal obligation to protect themselves from injury related to a city interest and to reasonably mitigate potential harm. As an illustration, in a case where a municipality was sued because the plaintiff tripped on a municipally owned and controlled water cap that "popped-up" on the plaintiff's property, the municipality was not found negligent. The court found that the city's policy of inspecting the water caps by responding to complaints was reasonable given the low frequency of accidents and lack of a better method. ¹⁵⁴ In that case, the resident was expected to report problems to the authority and share in the responsibility of managing the hazard. In another case, the court did not find a municipality negligent for flooding caused by disturbance to the city sewer by tree roots. The court concluded that the municipality could not have inspected the sewer without entering the plaintiff's property and it was the responsibility of the plaintiff to report malfunctions caused by the tree roots. ¹⁵⁵

In another case, the Ontario Court of Appeal determined that a swale between two private landowners that needed to be excavated so that water could drain to the municipal ditch was the responsibility of the landowners since the swale was not constructed by the city, nor was it within the city's property, possession, or control. These decisions indicate that landowners and residents play a role in protecting themselves and their property from injury and that further, when a resident has more awareness of an issue, he or she should contact the relevant government authority to prevent damage. Thus, the governmental authorities, landowners and residents should be working together to mitigate possible risks.

Negligence Act, RSO 1990, c n-1 s 1. See also, Ingles, supra note 51 at para 59. See also, Rothfield v Manolakos [1989] 2 SCR 1259 [Rothfield].

See section 5.2 above.

¹⁵⁴ *Vizbaras, supra* note 70 at para 77.

Crosty, supra note 87.

Kay, supra note 37 at para 221.



7.6. Insurance Industry Considerations

Insurance companies play a role in helping those who are harmed by flood damage. These companies are aware of the risks associated with increased extreme weather and property damage associated with flooding, which have now become the main source of claims in Canada. Increased extreme weather and the changing climate present challenges to the insurance industry. As early as 2001, the IPCC indicated that insurance companies will experience stress to the point of withdrawal of coverage or bankruptcies as a result of climate change, particularly in the casualty and property insurance sectors.

Although many Canadians are covered for flooding resulting from sewer back-ups, Canada is the only G8 country where homeowner insurance for overland flood damage is non-existent. According to Kathy Bardswick, chief executive of Co-Operators Group Limited, the potential increase in severe weather, as predicted by the IPCC, is not only likely to cause more damage but could also affect the availability of property insurance coverage in some areas throughout Canada. In Increase in severe weather, as

A recent report by The Co-Operators Group Limited highlighted the need for improved flood maps. ¹⁶¹ It noted that without sufficient knowledge of flood-prone areas and the extent of potential damage in these areas, it would be difficult to provide adequate flood insurance. ¹⁶² There is particular interest from the insurance industry in maps that accurately identify the new risks arising from a changing climate.

Insurance companies are unlikely to be willing to bear the cost of floods independently and often require government support and cooperation. One suggestion is for insurance companies to restrict coverage of high-risk areas and require governments to bear the financial consequences of risk posed in these areas. Increased insurance coverage for flooding in Canada will likely rely on cooperation between the government and private insurance companies in developing adequate flood maps and devising policies to protect citizens from significant loss. 164

If the private insurance market cannot adequately provide protection against the financial consequences of heavy rain predicted to increase in frequency and intensity, those who suffer damages will likely turn to the government for support and protection, possibly through increased lawsuits.

¹⁵⁷ Urban Flood Risk and Insurance, supra note 1.

Working Group II Contribution to the IPCC Third Assessment Report Climate Change 2001: Impacts, Adaptation and Vulnerability Contribution to the IPCC Fifth Assessment Report Climate Change 2013: Insurance and Other Financial Services online: http://www.ipcc.ch/ipccreports/tar/wg2/pdf/wg2TARchap8.pdf at 419.

¹⁵⁹ Flood Insurance, supra note 131 at 12.

 $^{^{160}}$ Flood Insurance, supra note 131 at Forward.

¹⁶¹ *Ibid* at 1 and 9.

¹⁶² *Ibid* at ii and 9.

¹⁶³ *Ibid* at 42-43.

 $^{^{164}}$ Flood Insurance, supra note 131 at 42. See also, Urban Flood Risk and Insurance, supra note 1.



7.7. Other Orders of Government

Provincial governments can be named as defendants in civil proceedings related to flooding. ¹⁶⁵ It is also possible that the federal government may be implicated if the facts warrant such inclusion. ¹⁶⁶ Each order of government has a responsibility to fulfill its duties in a non-negligent way and to act reasonably in given circumstances. Even in situations not involving tort law, other orders of government are frequently involved when disasters strike and emergency funding is required. Because of this, all orders of government have an incentive to adapt to climate impacts and protect citizens from damage caused by flooding.

It is not unusual for a provincial government to be sued for negligence. ¹⁶⁷ The province providing money (arguably not enough money) towards a certain service does not necessarily attract liability. ¹⁶⁸ In a case related to funding for emergency services, the court applied the same considerations to the province as it does to municipalities when determining the elements of negligence. ¹⁶⁹ In that case, the province was sued for allegedly not allocating enough funding for emergency services in a hospital. The court dismissed the claim and concluded that the province owed no duty of care to the plaintiff because the ministry involved was not granted authority to supervise the day-to-day operations of the hospital, meaning it did not have a close enough relationship to find a duty of care under the applicable test of negligence. ¹⁷⁰ Furthermore, the decision to fund hospitals was a policy decision made in the public interest and, therefore, the court did not intervene with that decision. ¹⁷¹ Like a municipality, however, the provincial government may be subject to lawsuits related to flooding. In the *Panza* class action related to flooding in Mississauga discussed above, the province is named as a defendant, along with the municipality and conservation authority. ¹⁷²

Generally, the province has the obligation to take statutorily required actions in a non-negligent manner. It may be liable for negligent approvals¹⁷³ (for example, approving sewage works that do not adequately protect the natural environment may lead to a finding of negligence). Approval authorities and those charged with the construction, maintenance and oversight of sewage works must work together to avoid negligence and ensure sewage systems work adequately. Furthermore, even if the province grants an approval for a sewage works, this approval does not relieve the recipient of the approval from liability associated with negligently managing the sewage works. In short, there is shared responsibility for ensuring negligence related to approvals is avoided.

It is clear that particular actions of the provincial government must conform to the objectives of the legislature. As heavy rainstorms and other extreme weather events become more frequent as a result of

Panza, supra note 117.

The Federal Government can be sued in negligence, see e.g.: Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans), [1995] 2 FC 467.

Mitchell v. Ontario (2004) 242 DLR (4th) 560 [Mitchell]. See also, Holland v Saskatchewan [2008] 2 SCR 551 and Just, supra note 52.

¹⁶⁸ Mitchell, supra note 167 at para 30.

¹⁶⁹ *Ibid* at para 18.

¹⁷⁰ *Ibid* at para 31.

¹⁷¹ *Ibid* at para 32.

Panza, supra note 117.

¹⁷³ Rothfield, supra note 152.



climate change, provincial governments will have a strong incentive to consider improving stormwater management within their jurisdiction. They may choose to accomplish this by revising the approval mechanism for construction and operation of stormwater works or by other more direct involvement in relation to stormwater management. Because the province is a potential defendant, if it fails to take action, it may also become an attractive target for plaintiffs with damage relating to stormwater.