

AUDITING ASSOCIATION OF CANADA: INSPIRING GENERATIONS – MANAGING RISK



***The Bottom Line on Managing Climate  
Change Risk - Legal Liability as a Driver to  
Integrate Climate Change Risk and  
Adaptation***

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# What Will Happen: Impacts of Climate Change on Physical Assets

- **Significant understanding today of the probable effects of climate change and its effects on physical assets/infrastructure**
  - > Increasing precipitation
  - > Increased intensity of storm events such as flooding, ice storms, heavy winds and tornadoes
  - > More frequent and severe freezing and thawing cycles
  - > Growing number of summer heat wave days+
  - > In the North, permafrost degradation
  - > In coastal communities, rising sea levels

# **Climate Change Risk: A Management Issue for any Business**

## **Extent depends on:**

- **type of industry**
- **nature of its products and services**
- **business model**
- **nature of competition within the industry**
- **jurisdiction(s) in which head office exists, in which it makes and sells its products or services, and owns its properties and physical assets**
- **jurisdiction(s) in which the key elements of its supply chain are located and those through which they must travel to reach the firm's production or sales locations**

- **compliance with mandatory GHG regulation – multi-layered/multi-jurisdictional (costs of business itself plus pass-through costs of suppliers)**
  - > in Canada, B.C., Alberta, Quebec and others to come
  - > Europe
  - > Australia and New Zealand
  - > China
- **continuous disclosure obligations for reporting companies**

- **insurance/reserves/funds available for repair, refurbishment, and construction of physical assets potentially affected by climate change**
  - **litigation risk: for companies that own, develop, design, build or operate physical/capital assets, potential liability for:**
    - i. alleged negligence in failing to design or adapt properties to climate change-related effects; or**
    - ii. for alleged nuisance arising from climate-related impacts on properties**
- which, in turn, cause damage to the property of others or injury to third parties**

## Key Dimensions of Climate Risk for Management ...*cont'd*

- **implications of all of the above for:**
  - > financing/capital availability/insurance
  - > reputation risk
  - > competitive risk

## Attention to Climate Change Adaptation – Physical Impacts



- **Issue of legal liability as a driver/barrier examined by Torys LLP for NRTEE — report published in April 2008**
- **Prospect of an owner’s costs increasing with respect to climate-related effects on physical assets PLUS potential legal liability for those integrally connected with ownership/development should be regarded as a significant driver of climate change adaptation**

- **Put another way...**

**The additional cost of planning, building, refurbishing, or maintaining physical assets/capital assets to take into account climate change effects has to be viewed in light of potential future costs of repair, refurbishment, rebuild and potential legal liability arising from a decision to not take climate change effects into account**

- **Statutory Requirements**
  - > Legislation directly relating to climate change adaptation is coming
  - > Building codes and standards are being examined with respect to climate change adaptation
- **Common law liability: negligence and nuisance**
- **Fiduciary and other duties of directors and officers**

- **What is it? Person(s) hurt or property damaged because another person has failed to take reasonable care**
  - > **Example:** Heavy rainfall causes a dam to overflow and floods neighboring farms and basements
  - > Four elements:
    - (1) someone owed the injured person a duty of care
      - There will be a duty of care if it was reasonably foreseeable that the alleged negligence might result in losses to the injured person
      - There will be a duty of care if there was a close and direct relationship between the person with the duty of care and the injured person
      - In the case of a governmental or quasi-governmental entity, review of the statute authorizing the entity's operation and behavior is required, and consideration as to whether policy reasons exist to negate or limit the duty of care
        - » policy versus operational decision

- (2) person with a duty of care committed an act or omission that breached a reasonable standard of care
  - . omission includes a failure to warn of a risk
  - . compliance with building codes may not be enough if an owner knows that the building code doesn't adequately deal with climate change risk
- (3) act or omission caused the harm or loss
- (4) not necessary for the act or omission to be the sole cause
  - . a reasonable person would have known there was a real possibility or real risk that the particular damage at issue would have resulted from the act or omission
  - . foreseeability

- > Modified test if liability is sought under principles relating to occupier's liability
  - " injury suffered must result from occupier's failure to take reasonable steps to make premises safe
  - " differing standards for contractual entrant, invitee, licensee, trespasser
  
- " **In 2013, our knowledge of the likely effects of climate change in Canada is considerably advanced... much easier to objectively determine in the context of physical assets/capital assets what is reasonably foreseeable!**

- **Who could be liable?**
  - > owner or occupier (including a governmental entity)
  - > governmental entities
  - > engineers, architects and other design professionals
  - > contractors
  
- **Defences and other barriers to liability**
  - > **Legal principles on which liability can be alleged are subject, in appropriate circumstances to defences that will act as a bar to liability**
    - contributory negligence
    - voluntary assumption of risk
    - Act of God (unlikely)
    - limitation periods

## What is it?

- **Private Nuisance:** an owner or occupier of land uses land in a way that causes damage to another person's land or interferes with the use of another person's land
  - > if physical damage occurs, just prove damage resulted from other person's use of land
  - > if interference with the use of another person's land is alleged, must prove substantial and unreasonable interference

- > **Examples:** severe weather (such as a heavy rain storm) causes a dam to overflow resulting in flooding and damage to adjacent land
- > permafrost degradation causes toxic tailings to seep from a mine tailing pond onto adjoining lands thereby contaminating such lands
- > heavy winds cause a transmission pole to fall onto adjoining lands thereby damaging buildings on the adjoining lands



- **Defences and other barriers to legal liability**
  - > legislative authority - very narrow defence
  - > statutory immunity provisions - often applicable to governmental and quasi-governmental entities
  - > limitation periods

- **Analysis must be done for “new build” as well as refurbishment of existing assets**
  - > Could climate change effects impact the asset during the lifecycle of that asset?
  - > Owners should consider undertaking vulnerability studies
- **If the asset could be affected by a climate change event, does the technology exist to design the new asset or repair or otherwise improve the asset to withstand the impacts of climate change?**
- **The additional cost of building/refurbishing/maintaining to take into account climate change effects has to be viewed in light of potential future costs of repair, refurbishment, rebuild and potential legal liability arising from a decision to not take climate change effects into account**

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