

# Torys' Video Podcast Series: Climate Change

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## Liability for Failing to Adapt Infrastructure to Climate Change Events

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Sabrina Gherbaz discusses the need for owners and operators to consider the effect of climate change on infrastructure assets.



### *Edited Transcript*

If an owner or operator does not adapt its infrastructure asset to take climate change effects into account, it is quite possible that that owner or operator could be liable – civilly liable, that is – if a person's personal property or body is injured as a result of a climate change event. In these circumstances, liability is likely to be based either on existing legislation or on the common law principles of strict liability, nuisance or negligence. In my opinion, it's most likely that liability could be based on nuisance or negligence, as opposed to existing legislation or strict liability.

In addition to infrastructure owners and operators being potentially liable, it's important for other infrastructure stakeholders to note that they could also be liable. For example, a design professional, involved in the design of an infrastructure asset, a contractor involved in the construction of an infrastructure asset and even a governmental authority who is involved in either inspecting or permitting an infrastructure asset could be held civilly liable if the infrastructure asset that they were involved in fails, and either someone is injured or their property is damaged.

An owner or operator who complies with written standards and codes may not be protected from civil liability. In many instances, codes and standards fall below the common law standard of care required of an owner or operator of an infrastructure asset.

Many standards organizations in Canada now recognize that their codes and standards are out of date and don't take into account possible climate change effects on infrastructure. They also plan to update these codes and standards, but this is likely to take at least a few years to implement. In the interim, it's still necessary for owners and operators of infrastructure assets to consider whether they need to adapt their infrastructure to take climate change risks into account, and not rely solely on existing codes and standards.

It's not necessary for all infrastructure assets in Canada to be adapted to take climate change events into account. What is necessary is that owners and operators think about whether a climate change event could have an impact on their infrastructure asset during its life cycle.

As we learn more about the timing and the impact of climate change events, owners and operators must continually review this information to determine whether an infrastructure asset in fact needs to be adapted. The information that is available today may not be the same as the information that will be available in three or four years, so adaptation may in fact be necessary in a shorter order than what was previously thought.

However, even in northern Canada where the effects are being felt, it may not be possible in all instances to adapt infrastructure to climate change events. There are a number of obstacles. First, there are financial obstacles that may be difficult to overcome. Second, people don't know the state and rate of permafrost degradation in the north; without knowing this, it's impossible to determine what adaptation strategies need to be implemented. Finally, there's a general lack of information in the market as to what others are doing to adapt their infrastructure assets; without this information it's difficult to know how to adapt.

This lack of information creates a significant barrier to adapting infrastructure assets. But infrastructure owners, operators, governmental authorities and design professionals need to realize that regardless of these barriers, they still could be held civilly liable if their infrastructure assets fail and someone is personally injured or suffers property damage. **T**