



Responsibility and liability in emergency management to natural disasters: A Canadian example

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ARTICLE INFO

Article history:

Received 4 December 2015

Received in revised form

9 January 2016

Accepted 9 January 2016

Available online 2 February 2016

Keywords:

Law

Emergency management

Disaster risk reduction

ABSTRACT

Most provincial emergency management legislation (Quebec excepted) fails to include regulatory guidelines as to how local authorities reduce community vulnerability. This exposes individual(s) and groups to greater vulnerability to disasters if the local authority decides not to act or provide inadequate management. In addition, access to financial resources to assist or compensate local governments and/or private landowners for damages endured often come with attachments or do not exist. When damages result from a government's action or inaction in the event of an emergency, provisions in provincial legislation and court findings have reduced government exposure to civil liability at common law further exposing private landowners to financial risk.

This paper argues that a lack of standards in emergency management legislation, restrictive access to financial assistance and/or compensation and reduced government exposure to civil liability at common law expose private landowners to greater vulnerability to disasters and the liability attached. It is essential that those responsible for proactive/preventative planning for disasters work from a standard playbook, one which sets minimum safeguards for the public. Absent of clear and fulsome compensation guidelines, private landowners will bear an unfair and disproportionate financial risk.

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1. Introduction

In 1970, the Manitoba government completed the Portage Diversion water control work that diverts water from the Assiniboine River during periods of high flow. Its purpose is to deter flooding of valuable farmland and to protect residents of Winnipeg, acting as an emergency mitigation strategy. It is one of several works that the government has completed to control the flow of water within the province. In the spring of 2011, lands along Lake Manitoba and in the Interlake Region experienced significant flooding. Lawsuits commenced arguing that the diversion of water by the Province through the Portage Diversion and the operation of the Shellmouth and Fairford Dams caused increased exposure to flooding in parts of lower Manitoba and that the damages suffered by land owners and First Nations are, in large measure, a result of the Province's actions (see [1]).

In *Anderson et al. v. Manitoba et al.* [1], the plaintiffs argue that the Province should be found liable for damages on, inter alia, the basis of operational negligence and nuisance. The Government of Manitoba, however, argues that it has “statutory responsibilities to operate water control works as necessary or expedient in the

public interest, and policy decisions which balance the interests of all Manitobans are immune from civil liability” (MBQB 255, para. 29–31). In this case, jurisdiction, responsibility and exposure to civil liability at common law are major considerations in determining what liability, if any, a government has in emergency management policy and practice. The intersection of water resources management by provincial authorities and emergency management planning and implementation are directly implicated in the determination of liability.

Despite some progress in transitioning emergency management systems to include disaster risk reduction, emergency management agencies remain reluctant to adopt proactive management for natural hazards. This is due, in part, to the difference in stakeholders' interests, jurisdictional conflict between levels of government, and citizens as ‘aggressive consumers’ of policy [34]. In fact, governments have rejected adopting risk reduction strategies due to liability concerns, competing priorities, and disruption of cultural values [3,34,4]. This inaction is a reflection of the institutions that govern day-to-day activity as well as the governing bodies who dictate responsibilities and priorities.

Research by the United Nations Office for Disaster Risk Reduction (UNISDR) [42] argues that poor emergency management governance is a main reason for the increase of natural disasters that are otherwise preventable. The main argument advanced is that those responsible for emergency management to natural

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disasters do not actively address disaster risk reduction in their policy and practices [25]. This absence is partly rooted in a culture of blame and blame avoidance. As Charbonneau and Bellavance [5] argue, blame avoidance results from limited transparency, incentives and a lack of consequences attached to performance. This is confirmed by Moynihan's [29] examination of networks in the aftermath of Hurricane Katrina. Moynihan notes that political responsibility is centered in a culture where intra-network and extra-network reputations create "incentives to utilize blame avoidance strategies when failure occurs" (567). The lack of accountability within these networks of public policy from blame avoidance strategies has directly impacted the approach taken to emergency management to natural disasters (see [2,29]).

One approach to resolving this issue is through laws and regulations; however, even then many activists and experts claim that these laws addressing disaster risk reduction have failed to make "the difference they promised" ([25], ix). The adequacy or inadequacy of existing legislative efforts raises an important issue of the relationship between responsibility and liability in emergency management in the context of emergency disaster risk reduction.

Emergency management legislation serves two functions: first, it outlines the powers and authority in a Province to plan for and respond to an emergency; and, secondly, it sets limits on civil liability to protect governments for their actions. As it stands, governments already have reduced exposure to civil liability at common law when compared to an individual or private entity. The underlying issue in each case remains at what point is government action or inaction so unreasonable such that individual (s) or group(s) should not be expected to bear that risk and loss? For example, if a Province, being in control of most waterways within their provincial boundaries, decides to divert water to protect one community but in doing so, puts an individual at greater risk of flooding, is it reasonable for that individual to bear all or even some of the damages that occur without full compensation? At what point should governments be liable for the damages that result from their action or inaction in an emergency situation?

The lack of any emergency planning standard in emergency management legislation and the obscurity of financial assistance and compensation for those impacted by the emergency raise important issues in the law of emergency management. We argue that the absence of accountability and use of blame avoidance are deeply rooted within legislation and financial programs/arrangements which, as a result, gives rise to greater exposure to liability for damages. We propose that there is a need for explicit standards in emergency management policy and practice. Critical to that issue is whether, from a public policy perspective, the risk of inadequate emergency management planning or the absence of such planning should be borne by private interests when there are no measurable standards to which governments must adhere and the courts have recognized a zone of protection from civil liability for all levels of government.

2. Legislative standards

Jurisdiction over emergency management law results from a gap in the Constitution Act [40] which divides legislative authority of the Provinces and federal government over matters in Canada. Both federal and provincial levels of governments are at liberty to define their respective roles in these matters because neither level of government is vested with clear authority for emergencies. While the *Emergency Management Act* (Canada) (SC 2007, c 15) [10] recognizes responsibility for emergency management as a provincial area of responsibility, each province in turn has the authority to delegate that responsibility to municipalities through

legislation. As a result, the federal government has very little involvement in emergency management planning and implementation and the Provinces have jurisdiction to make laws that impose obligations on local governments to do things or not do things. Emergency management in Canada has, in large measure, been devolved to municipal governments. This is not to say that the Provinces have no responsibility in emergency management as they have responsibility for land and water within their provincial boundaries. As shown above, they have been involved in controlling the flow of water throughout their provinces which has been utilized as a tool in emergency management—the preparation for impeding emergencies caused by natural forces.

Unlike the Province or federal government, municipal governments do not have the luxury of determining their roles. They derive their power and existence through legislation, such as a *Local Government Act* (RSBC 1996, c 323, as amended) [28] or *Municipal Act* (SO 2001, c 25, as amended) [31]. They are creatures of statute. Municipal governments, like private entities and citizens, are bound by provincial statutes, including those that impose obligations and standards for emergency preparedness and response. They make emergency planning and implementation decisions in both a common law and statutory context.

Most emergency management legislation provide no standards for emergency management practice. For example, Section 6(2) of the *Emergency Program Act* (RSBC 1996, c 111, as amended) [15] in British Columbia states, "a local authority must prepare or cause to be prepared local emergency plans respecting preparation for, response to and recovery from emergencies and disasters." What this piece of legislation and other legislation pertaining to emergency management fails to include is a defined standard which municipalities must meet for the preparation, response and recovery plans. This undefined obligation leaves the door open for municipalities to interpret the law as they see fit. 'Preparation for' an emergency can be understood as simple as having an evacuation plan adopted and ready if an emergency requires such action. 'Preparation for' does not impose particular steps of preparedness, i.e. certain action takes place throughout the province as dictated through legislation, such as updating flood plain maps. For example, Section 11 of Alberta's *Emergency Management Act* (RSA 2000, c E-6.8, as amended) [9] states,

A local authority (a) shall, at all times, be responsible for the direction and control of the local authority's emergency response unless the Government assumes direction and control under Section 18; (b) shall prepare and approve emergency plans and programs.

Nothing in these provisions specifies what these plans and programs should consist of.

In some cases, provincial statutes fail to impose obligations on local governments to even have emergency management/measure plans by making it optional. Section 7(b) of Prince Edward Island's *Emergency Measures Act* (RSPEI 1988, c E-6.1, as amended) [13] states,

The Minister may request municipalities to prepare emergency measures plans including mutual assistance programs, and to submit them to the Emergency Measures Organization for review for adequacy and integration with the provincial emergency plan.

Section 8 of the same legislation states, "Each municipality (a) may establish and maintain a municipal emergency measures organization by passage of a by-law; [...] (d) pursuant to clause 7 (b), may prepare and approve emergency measures plans." There is no obligation on a municipality to have an emergency measures plan according to this legislation unless the Minister directs it to

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