



LEGAL PRIMER

Natural Asset Management by Local Governments in Canada



February 2023



Invest in Nature

The Municipal Natural Assets Initiative (MNAI) is a Canadian not-for-profit that is changing the way municipalities deliver everyday services - increasing the quality and resilience of infrastructure at lower costs and reduced risk. The MNAI team provides scientific, economic and municipal expertise to support and guide local governments in identifying, valuing and accounting for natural assets in their financial planning and asset management programs, and developing leading-edge, sustainable and climate-resilient infrastructure.

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1 Introduction

1.1 Purpose of this legal primer

This legal primer provides an overview of several aspects of the law relating to **natural asset management** by local governments.¹ It aims to accomplish four objectives:

- 1/ Identify where the legal authority for local governments to undertake natural asset management lies and any related limitations about which local governments (and their enabling provinces and territories) should be aware.
- 2/ Identify legal and policy tools available to local governments for implementing natural asset management and protection, noting that the Municipal Natural Assets Initiative (“MNAI”)² and partners³ have already undertaken significant work in this area.
- 3/ Describe legal risks facing local governments that do not undertake natural asset management and protection, as well as those local governments that do.
- 4/ Bring attention to legal developments related to natural asset management, including case law (both recently decided and ongoing) and other legal developments, that may indicate how the landscape of local governance is changing.

This legal primer is intended to be general and national in scope; however, where elaboration on the similarities and differences between provinces is helpful, four provinces—what we have referred to as the “sample provinces” throughout—have been chosen: British Columbia, Alberta, Ontario, and New Brunswick.⁴ Importantly, this legal primer is not intended to capture all the nuances between provinces and territories nor does it address in any specificity the relationship between natural asset management (“NAM”) and the civil law system of Québec.

This legal primer should be seen as a basis for discussion around: how the law applies to NAM; where there is still uncertainty or a need for clarity, and; factors that local governments may benefit in considering when determining whether

1 Although the term *local government* is used throughout this legal primer, we note that the term “local government” means different things in different provinces and under different pieces of legislation. As such, while we use the term throughout this legal primer for consistency, we use it in a general sense to refer to municipalities and other local government-like entities, such as regional districts in BC. There will be some instances where the contents of this legal primer do not apply to all forms of local government across Canada.

2 See, e.g., MNAI, 2018, *Towards a Collaborative Strategy for Municipal Natural Asset Management: Private Lands*, available at: mnai.ca/media/2021/10/reportmnaifeb7.pdf

3 See, e.g., Climate Caucus, *Managing Natural Assets*, available at: www.climatecaucus.ca/resources/councillor-s-handbook

4 Although the contents of this legal primer are relevant to Vancouver and Toronto, we have not specifically looked at the unique legislative regimes for these cities (i.e. the *Vancouver Charter*, SBC 1953, c 55 and the *City of Toronto Act*, 2006, SO 2006, c 11).

and how to adopt natural asset management and protection going forward. Further, it is anticipated this legal primer will be followed by the development of targeted legal resources for local governments interested in undertaking natural asset management and protection. Accordingly, we encourage feedback on the types of resources that would be helpful.

1.2 What are natural assets?

Local government natural assets refer to the stocks of natural resources or ecosystems that contribute to the provision of one or more services required for the health, well-being, and long-term sustainability of a community and its residents (e.g. water filtration, stormwater management, climate regulation).⁵ The terms “natural asset” and “green infrastructure” have often been used interchangeably; however, green infrastructure refers to a broader set of assets that includes natural assets, but also includes designed and engineered elements created to mimic natural functions and processes (e.g., green roofs and rain gardens), as illustrated in Figure 1.⁶

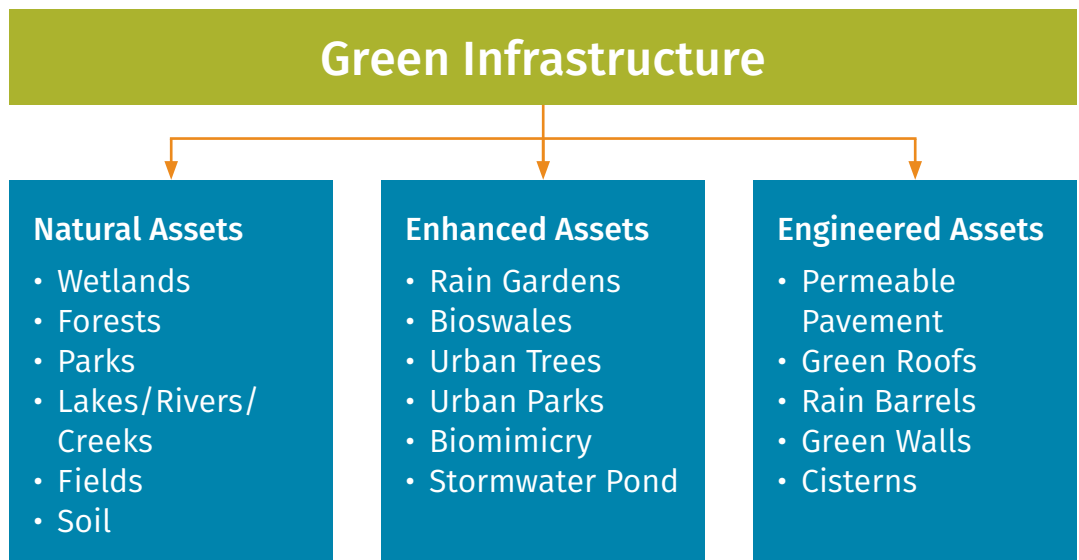


Figure 1: After MNAI (2017).

1.3 What is natural asset management?

Modern asset management is an integrated system to provide sustainable local government services, rather than efforts focused solely on each asset⁷. Natural assets are a critical part of this system that can support local governments in managing service delivery in a manner that is cost-effective and sustainable.

5 MNAI, 2017, *Defining and Scoping Municipal Natural Assets*, available at: mnai.ca/media/2018/02/finaldesignedsept18mnai.pdf

6 Ibid.

7 See, e.g., Asset Management BC's 2019 framework describing a systematic approach to managing assets, available at: www.assetmanagementbc.ca/wp-content/uploads/Asset-Management-for-Sustainable-Service-Delivery-A-BC-Framework-.pdf

Traditionally, natural assets have not been considered core local government assets and, until recently, there has been little guidance on how to incorporate natural assets into local government asset management planning. This is starting to change as a growing number of local governments in Canada are developing natural asset inventories and implementing natural asset management projects, using asset management planning as an effective platform upon which this work can be based.⁸

Local governments that are undertaking natural asset management initiatives provide evidence of the significant value of natural assets and the services they provide. Natural assets are cost-effective, resilient, and can often deliver several local government services more efficiently than costly engineered alternatives.⁹

Case in point: The Town of Gibsons determined that the stormwater services provided by ponds in White Tower Park have a value of \$3.5-\$4.0 million if they had to be replaced by an engineered asset, a cost that can be avoided through regular maintenance in the Park.

MNAI has developed several resources elaborating upon different components of NAM, including:

- defining and scoping natural assets;¹⁰
- developing levels of services for natural assets and the relationship between these and the concept of ecosystem services;¹¹
- working with private landowners in the context of NAM;¹² and
- implementing numerous aspects of NAM in a local government context.¹³

We encourage readers to review these other resources in order to complement their review of this legal primer.

1.4 The differences between NAM and environmental management by local governments

For better usage and understanding of the contents of this legal primer, an important distinction must be drawn between NAM and environmental management activities already undertaken by all local governments.

8 See, e.g., Town of Gibsons, 2017, *Advancing Municipal Natural Asset Management: The Town of Gibsons experience in financial planning & reporting*, available at: mnai.ca/media/2018/01/GibsonsFinancialPlanningReport-WEB.pdf; MNAI, *Municipal Natural Assets Initiative: Town of Oakville*, available at: mnai.ca/media/2018/07/MNAI-oakville-final.pdf

9 Ibid.

10 Supra note 5.

11 MNAI, 2022, *Developing Levels of Services for Natural Assets: A Guidebook for Local Governments*, available at: mnai.ca/media/2022/01/MNAI-Levels-of-Service-Neptis.pdf

12 Supra note 2.

13 See MNAI's resources for local governments, available at: mnai.ca/resources-for-local-governments/

Local governments have a legal obligation to comply with the provincial and federal environmental legislation and regulations applicable to their activities (e.g., wastewater regulations, species at risk legislation, environmental assessment legislation). To do so, most, if not all, have dedicated departments or staff devoted to this task.

NAM should not be seen as a replacement of this, but rather an approach that, in many ways, goes beyond what is required by legislation. In other words, NAM is about better understanding of, accounting for, and managing the services (those services typically provided by grey infrastructure and otherwise)¹⁴ that nature provides. This can involve putting in place a framework for understanding these services and applying this to strategic decision-making and/or using by-law making powers to protect the service-provision aspects of natural assets. In some cases, this could also mean limiting development or regulating it in certain ways.

This distinction should be kept in mind while reading this legal primer, as its contents are not intended to address the requirements of local governments under environmental legislation and regulations that readers are likely already familiar with or the legal risks associated with them, except to the extent they overlap with those applicable to NAM.

¹⁴ See Appendix A of *supra* note 11 for definitions. Available at: mnai.ca/media/2022/01/MNAI-Levels-of-Service-Neptis.pdf

2 Executive Summary

2.1 How To Use This Primer

This legal primer provides an overview of several aspects of the law relating to NAM by local governments in Canada. Each section focuses on legal risk, authority, or tools that local governments, whether they are currently implementing natural asset management strategies or not, should be aware of.

Environmental law continues to evolve as more cases and legal disputes help form precedent for people's responsibilities to nature. This legal primer provides a basis for this continued discussion, and it is anticipated that more targeted legal resources for local governments undertaking natural asset management and protection.

This document includes:

LEGAL AUTHORITY FOR NAM

Local governments are, generally, created and empowered by provincial and territorial legislation. As such, local governments must look to this legislation for their authority to undertake NAM.

For the sample provinces examined for this legal primer—BC, Alberta, Ontario, and New Brunswick—municipalities and several other types of local governments' authority for undertaking NAM can be found in the same place as the authority for undertaking a practice of asset management more generally—i.e., a local government's legislated purposes (such as to provide good governance).

A distinction should be made, however, between what is legally permissible and what is legally required. While municipalities and other types of local government in BC, Alberta, and New Brunswick **may** undertake NAM, municipalities in Ontario **must** undertake NAM, and asset management more generally, in accordance with O Reg 588/17. Notably, the shape that NAM must take under O Reg 588/17 is not exhaustive and Ontario municipalities may wish to consider going above and beyond the requirements of the regulation.

LEGAL AND POLICY TOOLS FOR NAM

At its core, NAM is about addressing the value that natural assets provide to sustainable service delivery. The legal and policy tools available to local governments for accomplishing this can be placed into two categories: those for implementing a NAM framework and those for protecting the aspects of nature assets important to service delivery.

With respect to the former, the most common types of tools used by local governments include bylaws, policies, plans, and strategies. While each of these tools serves an important function in NAM, their legal effect differs. Most notably, bylaws can set out legally binding obligations that are enforced through

the courts. In contrast, policies, plans, and strategies are usually adopted to inform the internal decision-making of a local government. As such, adoption of a bylaw relating to a NAM framework can be useful for a local government interested in putting in place a higher level of public-facing accountability.

With respect to the latter, the tools available to local governments are generally the same as those available for environmental protection and management—land use planning and zoning, ownership of and other interests in lands, financial tools (e.g., development cost charges), and the various forms of regulatory bylaws that local governments are empowered to enact).

LEGAL RISKS RELATING TO NAM

Several of the most common types of legal actions faced by local governments are relevant to NAM and the protection of natural assets. This includes challenges to the legality of a specific local government action (e.g. judicial review) as well as civil actions in negligence and nuisance. Recently-decided case law also suggests that constructive taking—or ‘*de facto* expropriation’—may be relevant to the protection of certain types of natural assets.

While this primer does not intend to set out an exhaustive list of the legal risks associated with NAM, nor does it capture the nuance of law as it applies within each province, several scenarios are presented that elaborate on a core conclusion of this legal primer: NAM is legally possible for local governments and can be impactful if the associated legal risks are managed.

LEGAL DEVELOPMENTS TO WATCH

This legal primer concludes by providing a broad overview of several legal developments that are likely to affect local government jurisdiction generally and the need to understand and undertake NAM specifically. These developments include Indigenous peoples’ growing exercise of their inherent rights of self-determination and self-government, Ontario’s recently-enacted *More Homes Built Faster Act, 2022*, litigation looking to hold governments accountable for harms experienced as a result of climate-related disasters, and innovative environmental law developments such as the Rights of Nature movement.

3 The Changing Context of Environmental Governance

Canada's climate and environmental context is regularly and rapidly changing. Governments at all levels are reacting to the reality that we are in climate and biodiversity crises, the effects of which we do not fully comprehend, but which are already disrupting lives and many systems. Accordingly, in addition to situating NAM within the context of sustainable service delivery, it is important to understand the ways in which it responds to, reflects, and helps to address the wider patterns and shifts we are witnessing more generally.

For instance, the recently-adopted Kunming-Montreal Global Biodiversity Framework—the Post-2020 Framework for the Convention on Biological Diversity—calls on local governments to be a part of a movement of “urgent and transformative action [...] to halt and reverse biodiversity loss.”¹⁵ This Framework recognizes the critical importance of ecosystem services and articulates a vision for 2050 in which “biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people.”¹⁶ As is a common theme through this legal primer and MNAI's work more generally, NAM is a critical way that local governments can contribute to this vision.

Local governments have a critical role to play in reducing GHG emissions, influencing over roughly 50% of Canada's emissions.¹⁷ In this vein, local governments are key to the success of the *Canadian Net-Zero Emissions Accountability Act*,¹⁸ the Government of Canada's legislative framework for achieving net-zero GHG emissions by 2050.¹⁹ Accordingly, NAM by local governments can be looked to not only for sustainable service delivery, but also as a way to contribute to both GHG emission reduction and local climate resilience.²⁰

The infrastructure deficit facing Canada—with estimates ranging between \$50 and \$570 billion, with most averaging between \$110 and \$270 billion²¹—is another significant contextual factor in relation to which NAM should be considered. With climate change putting an additional strain on engineered

¹⁵ See Article 4 of CBD, 2022, Kunming-Montreal Global Biodiversity Framework, available: www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf

¹⁶ See Article 28 of *ibid.*

¹⁷ See: fcm.ca/en/programs/municipalities-climate-innovation-program.

¹⁸ *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22.

¹⁹ Canada, accessed on Feb 2, 2023, *Canadian Net-Zero Emissions Accountability Act*, available at: www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/canadian-net-zero-emissions-accountability-act.html

²⁰ FCM, accessed on Feb 2, 2023, *Natural assets bolster climate resilience*, available at: fcm.ca/en/resources/mcip/natural-assets-bolster-climate-resilience

²¹ CanInfra, accessed on Feb 2, 2023, *Estimates of Canada's Infrastructure Deficit Vary Widely*, available at: www.caninfra.ca/insights-6

infrastructure that is, in many ways, already in poor or very poor condition,²² the cost-effectiveness of natural asset alternatives underpins a strong business case for NAM's adoption by local governments.

Also noteworthy is that the increased number and severity of extreme weather events (e.g., the 2021 heat dome event, large-scale wildfires, and extensive flooding in BC) and their impacts (e.g., devastation of communities such as Lytton and Abbotsford in BC) has led to growing and increasingly-explicit understandings that measures to build resilience to climate change, including protection of nature and biodiversity, are essential.

Put together and put simply, the climate and biodiversity crises—and their associated threats to ecosystems and societies—mean that the world has changed, is continuing to change, and environmental governance frameworks—of which NAM forms a part—are quickly attempting to catch up.

As such, is it helpful to understand not only the currently tools and authorities as they apply to NAM (Sections 4-6), but also some emerging legal developments (Section 7) that may affect the operating environment for local governments as it relates to NAM.

22 Canadian Infrastructure, 2019, *Canadian Infrastructure Report Card*, available at: canadianinfrastructure.ca/downloads/canadian-infrastructure-report-card-2019.pdf

4 Legal Authority for Natural Asset Management in a Local Government Context

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This section shows where local governments in Canada can derive legal authority for incorporating NAM into their asset management practices. While local governments generally do not have an explicit legal duty or obligation to undertake NAM—with the exception of municipalities in Ontario—there is also generally no legal prohibition against it.²³ At the same time, while it is possible for local government enabling legislation outside of Ontario to more explicitly require NAM, NAM can also be understood as a way to comply with other local government legal obligations that already exist (e.g., a requirement to provide good governance).

This section also identifies the legal obligation for local governments to undertake financial reporting in line with Public Sector Accounting Board (“PSAB”) requirements as a possible barrier to undertaking NAM. As is made clear, however, this barrier is not an unsurmountable one.

4.1 Overview of local government jurisdiction

Unlike the provinces and federal government, which derive their powers from the *Constitution Act*, 1867, local governments generally operate by virtue of the provincial or territorial legislation that empowers them. Accordingly, local government jurisdiction over any matter, including NAM, will generally find its legal source in provincial or territorial legislation.

²³ As a reminder, we have focused primarily on the sample provinces in this legal primer. As such, local governments outside of the sample provinces should consult their legal counsel about the relevance of this statement to their circumstances.

4.2 Legal authority for and duties in relation to asset management

It is widely recognized that robust asset management—not just NAM—forms a key component of good governance and sustainable service delivery for local governments.²⁴ The extent to which asset management constitutes a legal duty for local government, however, varies from province to province.

The starting point for the four sample provinces is generally the same. Each province’s enabling legislation establishes municipalities²⁵ as a corporate entity with the capacity, rights, powers, and privileges of a natural person.²⁶ These corporate entities are then granted various powers to be exercised in accordance with the purposes of a municipality, which are legislatively defined and generally described similarly across the provinces (see Table 1 for the ways in which the sample provinces define “municipal purposes”). Notably, the language of “asset management” is generally not used; however it is reasonable to connect systematic asset management with a municipality’s purpose of providing good governance.

24 See, e.g., Asset Management BC, 2019, *Asset Management for Sustainable Service Delivery*, available at: www.assetmanagementbc.ca/wp-content/uploads/Asset-Management-for-Sustainable-Service-Delivery-A-BC-Framework-.pdf

25 We have focused on ‘municipalities’ here, rather than local governments generally, as a result of language usage in enabling legislation. For application to other forms of local governments, or other jurisdictions outside of the sample provinces, qualified legal counsel should be consulted.

26 For municipalities in BC, see section 8(1) of the *Community Charter*, SBC 2003, c 26 (“*Community Charter*”). For municipalities in Alberta, see section 6 of the *Municipal Government Act*, RSA 2000, c M-26 (“*Municipal Government Act*”). For municipalities in Ontario, see section 9 of the *Municipal Act*, 2001, SO 2001, c 25 (“*Municipal Act*”). And for municipalities in New Brunswick, see section 6(1) of the *Local Governance Act*, SNB 2017, c 18 (“*Local Governance Act*”).

TABLE 1: MUNICIPAL PURPOSES

	BRITISH COLUMBIA <i>Community Charter</i>	ALBERTA <i>Municipal Government Act</i>	ONTARIO <i>Municipal Act</i>	NEW BRUNSWICK <i>Local Governance Act</i>
Description of Municipal Purposes	<p>section 7/ The purposes of a municipality include</p> <p>(a) providing for good government of its community,</p> <p>(b) providing for services, laws and other matters for community benefit,</p> <p>(c) providing for stewardship of the public assets of its community, and</p> <p>(d) fostering the economic, social and environmental well-being of its community.</p>	<p>section 3/ The purposes of a municipality are</p> <p>(a) to provide good government,</p> <p>(a.1) to foster the well-being of the environment,</p> <p>(a.2) to foster the economic development of the municipality,</p> <p>(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,</p> <p>(c) to develop and maintain safe and viable communities, and</p> <p>(d) to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.</p>	<p>section 2/ Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.</p>	<p>section 5/ The purposes of a local government are</p> <p>(a) to provide good government,</p> <p>(b) to provide services, facilities or things the council considers necessary or desirable for all or part of the local government,</p> <p>(c) to develop and maintain safe and viable communities, and</p> <p>(d) to foster the economic, social and environmental well-being of its community.</p>
Connection of Municipal Purposes to Authority of Municipality	<p>section 4/ (1) The powers conferred on municipalities and their councils under this Act or the Local Government Act must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.</p>	<p>section 7/ Subject to section 7.1, a council may pass bylaws for municipal purposes respecting the [matters set out in subsections (a)-(i)].</p>	<p>No equivalent provision; however, it is generally recognized that municipalities should be informed by section 2 when exercising their authority.²⁷</p>	<p>section 6/ (2) A local government only has the capacity, rights, powers and privileges of a natural person in respect of municipal purposes.</p>

Table 1: Municipal Purposes

27 See, e.g., *Linlis Development Inc v Aurora (Town)*, 2009 CanLII 14390 (ON SCDC).

While “municipal purposes” generally inform how municipalities exercise their legal authority—including which bylaws and resolutions they adopt and services they provide—they also inform how a municipality should manage its internal affairs. As such, municipalities in the sample provinces will generally be able to root legal authority for implementing an asset management program—and a NAM program as part of or separate from this—in their municipal purposes.²⁸

Some provinces, however, have gone further by expressly requiring municipalities to implement different elements of an asset management program. Municipalities in Ontario, for instance, are subject to the detailed asset management planning requirements set out in O Reg 588/17,²⁹ a regulation enacted under the Infrastructure for Jobs and Prosperity Act, 2015.³⁰ O Reg 588/17 mandates that every municipality:

- Prepare a strategic asset management policy—which must have been done by July 1, 2019—that includes several mandated components, including but not limited to:
 - the municipality’s goals, policies, or plans that are supported by its asset management plan;
 - consideration of the impact of climate change on the municipality’s infrastructure assets;
 - a process to ensure the municipality’s asset management plan is aligned with Ontario’s land-use planning framework; and
 - the personnel responsible for the municipality’s asset management planning.³¹
- Review their strategic asset management policy at least every five years.³²
- Develop an asset management plan in respect of “core municipal infrastructure assets”³³ by July 1, 2022 and in respect of all other municipal infrastructure assets³⁴ by July 1, 2024.³⁵
- Include within their asset management plan several components, including:
 - a description of current levels of service being provided for each regulated asset category;

28 See section 5 of this primer for an elaboration on the legal tools available for implementing an asset management program.

29 Asset Management Planning for Municipal Infrastructure, O Reg 588/17 (“O Reg 588/17”). Amended by O Reg 193/21.

30 Infrastructure for Jobs and Prosperity Act, 2015, SO 2015, c 15.

31 O Reg 588/17 at section 3.

32 O Reg 588/17 at section 4.

33 “Core municipal infrastructure assets” are defined at section 1(1) of O Reg 588/17. See: Asset Management Planning for Municipal Infrastructure, O Reg 588/17, s 1, <canlii.ca/t/912p#sec1>, retrieved on 2023-02-02.

34 “All other municipal infrastructure assets” here would be defined as all “municipal infrastructure assets,” as it is defined in O Reg 588/17, other than “core municipal infrastructure assets.”

35 O Reg 588/17 at section 5.

- a description of the current performance of each regulated asset category;
 - a summarized inventory of regulated assets that includes information about the condition and replacement cost of the assets in each category;
 - a description of the lifecycle activities that would be needed to maintain the current levels of services for each regulated asset category for 10 years; and
 - information about assumptions being made by the municipality, with different details required for municipalities with different population levels.³⁶
- By July 1, 2025, update their asset management plans to include information about proposed levels of services and performance for the regulated asset categories for each of the 10 years referenced in the previous bullet.³⁷
 - Conduct a review of its asset management plan at least every five years and conduct an annual review of asset management progress.³⁸

In general, there is no legislative equivalent in any of the other sample provinces for the development of an asset management system or framework—i.e., local governments are not under a legislative duty to create asset management plans, policies, or other instruments.³⁹ Nevertheless, asset management as a program or practice has become a contractual obligation for several local governments as a result of conditions attached to funding provided through Infrastructure Canada’s Canada Community-Building Fund (what used to be the Gas Tax Fund).⁴⁰ Indeed, “supporting and encouraging long-term municipal planning and asset management practices” is one of the three main outcomes of the Canada Community-Building Fund.⁴¹

Incidentally, it is also worth noting that as a “natural person,” local governments will generally also have legal authority to incorporate separate corporate entities to undertake different types of initiatives (e.g., run a business, administer a service or utility). Local governments that do this can impose asset management requirements on the corporate entities for which they are responsible by ensuring asset management forms a component of the governing documents of these entities.

³⁶ *Ibid.*

³⁷ *O Reg 588/17 at section 6.*

³⁸ *O Reg 588/17 at sections 7-8.*

³⁹ *Alberta’s Municipal Government Act and the Municipal Corporate Planning Regulation, Alta Reg 192/2017 require municipalities to develop a capital plan that includes planned capital property additions and information relating to funding for these additions; however, this has generally not been interpreted as a full asset management framework by Alberta municipalities.*

⁴⁰ *Canada, accessed on Feb 2, 2023, Canada Community-Building Fund by Province and Territory, available at: www.infrastructure.gc.ca/prog/gtf-fte-summaries-sommaires-eng.html#on*

⁴¹ *Ibid.*

4.3 How do natural assets fit within this legislative framework?

MNAI and its collaborators have noted that, because natural assets provide services that local governments can rely on, and because modern asset management focuses on the concept of sustainable service delivery rather than the details of the asset providing that service, natural assets and NAM form an integrated part of asset management more generally.

However, Ontario is the only one of the sample provinces that has legislative language that explicitly addresses some components of NAM. In particular, O Reg 588/17 includes “green infrastructure assets” as part of the “other municipal infrastructure assets” that must be accounted for in a municipality’s asset management plan and policy. A “green infrastructure asset” is defined as:

*an infrastructure asset consisting of natural or human-made elements that provide ecological and hydrological functions and processes and includes natural heritage features and systems, parklands, stormwater management systems, street trees, urban forests, natural channels, permeable surfaces and green roofs*⁴²

While the wording of O Reg 588/17—with it having little to no direct impact on individuals’ rights—suggests that a legal challenge to the substantive aspects of a municipality’s compliance with its requirements is unlikely (and none have yet happened), it may nonetheless be interesting to note how the drafting of the regulation connects with the long-term policy goals of NAM by local governments.

Namely, likely in part due to the PSAB requirements for local government financial reporting that restrict natural assets being reported as tangible capital assets,⁴³ O Reg 588/17 distinguishes between “green infrastructure assets” and “core infrastructure assets.” While the inclusion of the former acknowledges the important role that natural assets play in service delivery, the distinction should also be seen in light of the interpretive rule for legislation that says that language used in legislation (and regulations) is always presumed to have been included intentionally. Accordingly, while the inclusion of “green infrastructure assets” in the regulation should be celebrated, its framing risks courts interpreting the option of using natural assets for service delivery as secondary, and less preferable, to engineered assets.

Nevertheless, as O Reg 588/17 can be interpreted as the minimum requirements a municipality must follow, there is little that legally precludes a municipality in Ontario from integrating NAM more thoroughly into their asset management framework. Similarly, although the other sample provinces do not have comparable legislative requirements to O Reg 588/17, this does not mean a local

⁴² O Reg 588/17 at section 1(1).

⁴³ See, e.g., November 27, 2018 letter to PSAB from MNAI and partners, available at: mnai.ca/media/2021/02/PSAB-input_Nov27_Final.pdf

government cannot undertake and implement NAM. As long as a municipality that does so does not contravene any other legal obligation, NAM is generally permitted.

4.4 Financial report requirements

As discussed above, local governments in the sample provinces all have the legal authority to both develop and implement an asset management program that incorporates natural assets. However one legal barrier to the success of this lies in the current articulation of the PSAB standards for local government financial statements. In short, PSAB standards restrict local governments from putting a value on natural assets in their financial statements and in their financial reporting.⁴⁴ While valuation of natural assets is still possible, the regulatory burden of having to separate this process out of the legislatively-required compliance with PSAB's standards⁴⁵ proves challenging. MNAI has separately been working with partners to address this concern.⁴⁶

Key takeaways from Section 4:

- 1/ Local governments are generally permitted by their enabling legislation to undertake NAM. NAM can be rooted in the legislated "municipal purposes" of municipalities and in the connection between asset management and funding from Infrastructure Canada's Canada Community-Building Fund.
- 2/ Municipalities in Ontario have a legal duty to undertake NAM in accordance with O Reg 588/17. This requirement should be seen as a minimum standard that can be exceeded by Ontarian municipalities.
- 3/ PSAB standards for financial reporting by local governments presents a practical barrier to the adoption of NAM; however, they do not create a legal barrier.

⁴⁴ Asset Management BC, 2019, *A companion document to Asset Management for Sustainable Service Delivery: A BC Framework*, available at: www.assetmanagementbc.ca/wp-content/uploads/Integrating-Natural-Assets-into-Asset-Management.pdf

⁴⁵ See, e.g., *Community Charter* at section 167(2).

⁴⁶ See, e.g., *supra* note 45.

5 Survey of Legal and Policy Tools for Managing and Protecting Natural Assets

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This section sets out a survey of the legal and policy tools of relevance to NAM. A thorough analysis of all possible tools available is beyond the scope of this legal primer,⁴⁷ however, the contents of this section provide sufficient background for readers to better understand the implications of the following two sections (Sections 6-7) relating to the legal risks and areas of potential exposure to liability associated with natural asset management and protection.

5.1 Asset management governance framework: Asset management bylaws vs policies, plans, and strategies

While several resources have been developed to help local governments in creating the core components of their governance framework for asset management⁴⁸—e.g., policies, plans, and strategies—the legal effect of these different components has received less attention. For instance, while some local governments have taken the step of adopting asset management bylaws to either supersede or supplement the other components of their governance framework,⁴⁹ there is little commentary on the benefits and drawbacks of this practice.

⁴⁷ For more information, see *supra* note 2 as well as reports of MNAI partner community projects available at: mnai.ca/communities/

⁴⁸ See, e.g., FCM, 2018, *How to develop an asset management policy, strategy and governance framework*, available at: fcm.ca/sites/default/files/documents/resources/guide/how-to-develop-asset-management-policy-strategy-mamp.pdf. See also the following resources generated by Asset Management BC: www.assetmanagementbc.ca/framework/.

⁴⁹ See, e.g., City of Selkirk Capital Asset Management By-law, No 5300, available at: www.myselkirk.ca/wp-content/uploads/2017/12/5300-Capital-Asset-Management-By-law-passed-signed.pdf. See also Asset Management Bylaw No. 2981, 2019, available at: www.courtenay.ca/assets/City_Hall/Bylaws/General_Regulatory/Bylaw-2981-Asset-Management-November-2019.pdf.

In general, local governments exercise their legal authority by means of bylaw or resolution, each of which serves different purpose.

Bylaws operate as legislation at the local government level. Just like federal or provincial legislation, they can be used to impose regulations, prohibitions, or requirements on those subject to their provisions (usually the residents, visitors, and businesses of a particular local government, but in some cases the personnel of the local government itself). One critical feature of bylaws that distinguishes them from resolutions is that contravention of their provisions can form the basis of an enforcement action (e.g., ticketing, court action). Further, depending on the provision in question, enforcement action can be undertaken by the local government or by a third party (e.g., a person who is affected by a local government's failure to enforce their own bylaw could attempt to use the courts to force the local government to act).⁵⁰

In contrast, **resolutions** are used by local governments to, among other things, grant permits, communicate a position (e.g., make a political statement in favour of a particular provincial or federal legislative amendment), approve a legal document (e.g., a contract that the local government is entering into), or provide policy direction to administration. **Importantly, the contents of a legal document that is approved by resolution is not enforceable in the same way that the provisions of a bylaw are.**

RELEVANCE TO NAM IN THE LOCAL GOVERNMENT CONTEXT

In general, asset management policies, plans, and strategies are adopted by resolution and their contents cannot be enforced in the courts. If the creation of these documents is legally required by legislation or regulation—such as in the case of Ontario's O Reg 588/17—then the courts can use their powers to ensure compliance with this requirement, but adjudicating on compliance with the contents of a policy, plan, or strategy is generally outside of a court's jurisdiction.

In contrast, a local government can adopt an asset management bylaw to ensure certain aspects of its asset management framework can be enforced in the courts. While there have been no cases seeking to enforce any of the asset management bylaws adopted by Canadian local governments, the spectre of legal action creates a layer of public accountability that can prevent future councils/boards from backtracking on progress in asset management.

Ultimately, though, the components of an asset management governance framework that a local government chooses to use will be a factor of both what is legally required by their enabling legislation and their goals.

⁵⁰ A thorough analysis of the enforcement of bylaws is beyond the scope of this legal primer. Qualified legal counsel should be consulted for more detailed information and advice.

5.2 Land use plans and other planning instruments

Land use plans and other planning instruments (e.g., provincial policy statements or directives) are used by planning authorities, including municipalities and other local governments, to articulate a vision for planning and development of the communities for which they are responsible. Land use plans are high-level, strategic documents that serve several functions:

- guiding elected officials in exercising their discretionary and legislative authority;
- instructing administrations on how to implement the planning and development authority of their local governments;
- informing residents and businesses on the direction their community is going in as well as the kinds of development projects and other initiatives that are likely to receive municipal approval; and
- conveying a vision for what the community could look like—to retain and draw in residents and businesses and to attract investment.

Land use plans usually fit within a nested hierarchy of plans and planning documents developed by provincial and territories governments, regional governments, municipal governments, and other planning authorities. As a result, a municipal land use plan will generally be legally required to align with all plans and planning documents above in the hierarchy—usually focusing on a regional or provincial scale on planning—and all land use plans below the municipal land use plan in the hierarchy will need to align with the latter.⁵¹ In general, zoning bylaws (land use bylaws in Alberta) are also usually required to comply with the land use plans applicable to the areas to which they apply.

RELEVANCE TO NAM IN THE LOCAL GOVERNMENT CONTEXT

Land use plans are a key instrument for incorporating NAM into all dimensions of a local government's land use-related strategies and decisions, as planning legislation generally requires all decisions of a local government to be taken in alignment with a plan. Land use plans are also an important tool for influencing the direction that development takes on private land.

Municipalities in the sample provinces have several avenues through which they can incorporate NAM considerations into their land use plans, some of which are shown on Table 2. Incidentally, there are other types of land use plans for which other forms of local governments in the sample provinces are responsible (e.g., regional growth strategies by regional districts in BC). These can include similar considerations and are a key way for local governments to coordinate in relation to natural assets or service infrastructure that crosses borders. All local government-level plans, however, will need to conform to provincial requirements wherever these apply (e.g., the provincial policy statement in Ontario, statements of provincial interest in New Brunswick).

⁵¹ Land use plans also need to accord with other applicable legislation. For an analysis of the relationship between official community plans and the riparian areas protection regime in BC, see *Cowichan Valley (Regional District) v Wilson*, 2023 BCCA 25.

TABLE 2: LAND USE PLAN CONTENTS OF RELEVANCE TO NAM

	BRITISH COLUMBIA <i>Local Government Act</i>	ALBERTA <i>Municipal Government Act</i>	ONTARIO <i>Planning Act</i>	NEW BRUNSWICK <i>Community Planning Act</i>
Municipal land use plan	Official community plan	Municipal development plan	Municipal official plan	Municipal plan
Sample of NAM-Related Plan Contents	<p>An official community plan (a municipal level plan) must include statements and map designations relating to the following:</p> <ul style="list-style-type: none"> • “the approximate location, amount and type of present and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses” • “restrictions on the use of land that is subject to hazardous conditions or that is environmentally sensitive to development” • “the approximate location and phasing of any major road, sewer and water systems” <p>An official community plan can also designate development permit areas, including those relating to the following NAM-related purposes:</p> <ul style="list-style-type: none"> • “protection of the natural environment, its ecosystems and biological diversity” • establishment of form and character objectives for different kinds of development • “establishment of objectives to promote the reduction of greenhouse gas emissions” 	<p>Municipal development plans are required to address:</p> <ul style="list-style-type: none"> • the provision of municipal services and facilities either generally or specifically • the future land use within the municipality <p>Municipal development plans may address:</p> <ul style="list-style-type: none"> • proposals for the financing and programming of municipal infrastructure • environmental matters within the municipality • financial resources of the municipality 	<p>Municipal official plans must contain:</p> <ul style="list-style-type: none"> • goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic, built and natural environment of the municipality or part of it, or an area that is without municipal organization <p>Municipal official plans may contain:</p> <ul style="list-style-type: none"> • a description of the measures and procedures proposed to attain the objectives of the plan 	<p>A municipal plan must include statements of policy with respect to:</p> <ul style="list-style-type: none"> • the development and use of land in the municipality • the conservation and improvement of the physical environment • the control and abatement of all forms of pollution of the natural environment • the reservation and projected use of land for municipal purposes • the provision of municipal services and facilities

Table 2: Land Use Plan Contents of Relevance to NAM

5.3 Zoning

Zoning land use is a tool that allows a municipality to divide the land within its borders into different zones or districts. Zoning bylaws are used to accomplish several things:

- regulating uses within zones;
- regulating density within zones;
- regulating the siting, size, and dimensions of buildings within zones, and;
- regulating standards for works and services within zones.

In general, zoning bylaws must be in alignment with land use plans developed by municipalities, as well as any other applicable planning instruments (e.g., those developed by regional governments or a provincial government).

RELEVANCE TO NAM IN THE LOCAL GOVERNMENT CONTEXT

Zoning is a powerful tool for preventing development of natural assets that a local government relies upon. It can also be used to facilitate restoration of natural assets over the long-term. While existing uses are generally protected by the principles of lawful non-confirming uses (i.e., a lawful use at the time a zoning bylaw changes will continue to be permitted, subject to certain legislated conditions), the rezoning of a property is a clear way to communicate a long-term intention for a property.

5.4 Land ownership and other legal interests in land

With some exceptions (e.g., local trust areas in BC), local governments can own and hold other interests in land. The ability to own land is particularly useful where control over a natural asset within a property (e.g., a small wetland) would be advantageous. In other cases, where ownership of land where a natural asset is located is impractical or infeasible (e.g., due to the cost of ownership or the natural asset spreading across several properties), local governments can use their ability to hold other interests in land in order to protect and manage the natural assets they rely upon.

Some of the most common forms of other interests in land that a local government can hold include **conservation covenants/easements**⁵² and **statutory rights-of-way/public utility easements**. While slight nuances between provinces exist, the former is generally structured as an agreement between a landowner and a public authority or land trust that imposes certain restrictions on the use of land. The latter, however, is a mechanism by which a public authority or utility is given access to land upon which certain infrastructure exists and is needed to be maintained. Other forms of land interests (e.g., leases and licences) can also be used by local governments, and generally most forms of land interests referenced in this subsection can be expropriated by local governments, subject to strict requirements set out in legislation.

⁵² The language of “easement” and “covenant” are used by different provinces to mean the same type of conservation-related legal instrument.

It is also worth highlighting that ownership of land and service infrastructure on or under the land can come with certain legal responsibilities. For instance, local governments may have a legal obligation to maintain, replace, and repair their service-providing infrastructure, regardless of the ownership status of the land where it is located.⁵³ This legal obligation can extend to natural assets that form part of a service (e.g., wetlands that form part of a stormwater management system); however, given the nature of natural assets, it is worth noting that the costs of maintenance may actually be lower than their engineered alternatives as natural assets can, in many ways, maintain themselves.

5.5 Financial tools

Local governments can also use their financial powers to generate funds for the protection and restoration of natural assets. For instance, in BC, the Town of Gibsons has used its ability to impose development cost charges to generate revenues for the restoration and improvement of natural areas. The same power, however, cannot be used in the same way in the other sample provinces, which define the application of development charges more narrowly. As another example, the District of West Vancouver has established an Environmental Reserve Fund and a corresponding annual District Environmental Levy through bylaws. A prescribed use of the fund is for “sustainability and protection of the District’s natural capital assets.”⁵⁴ Local governments in Alberta and BC can also impose taxes to raise revenues to pay for specific services. In Alberta, these are called special taxes,⁵⁵ while in BC they are referred to as parcel taxes.

As is the case with local government jurisdiction more generally, however, revenue sources can be limited and so creative ways of raising funds (e.g., green bonds) or use of regulatory powers that can help avoiding the need for additional funds (e.g., planning and zoning bylaws that protect natural assets rather than needing to purchase them) are often better solutions.

5.6 Miscellaneous bylaws and other tools

Local governments have several additional powers, including bylaw-making authority, that can be leveraged to protect and regulate natural assets. While a thorough analysis of every additional power is beyond the scope of this legal primer,⁵⁶ some of the relevant powers include:

53 See, e.g., *Raubvogel v Vaughan (City)*(2016), 2016 ONSC 7478 and *Ward v Cariboo Regional District*, 2021 BCSC 1495.

54 See *District of West Vancouver Environmental Reserve Fund Bylaw 5188* at westvancouver.ca/media/1143

55 *Municipal Government Act* at section 382.

56 Another valuable resource for local governments to consult, especially those in BC, is the 2021 Edition of the *Green Bylaws Toolkit*, available at: stewardshipcentrebc.ca/PDF_docs/GreenBylaws/GreenBylawsToolkit_3rdEdition_2021.pdf.

- The establishment of committees and commissions, which can be established to support or advise upon a local government's NAM framework
- Asset- or system-specific plans (e.g., master drainage plans/strategies, urban forest plans/strategies)
- Nuisance bylaws, which can address private and public nuisances (see explanation of the distinction between these in Section 6)
- Tree protection/retention bylaws, which can regulate the removal of trees
- Soil deposit/removal bylaws, which can have regulate drainage patterns
- Pesticide bylaws, which can help prevent contamination of water sources
- Watercourse protection bylaws, which can help protect riparian areas
- Storm sewer bylaws, which can regulate and protect a local governments stormwater system that can include natural assets

Key takeaways from Section 5:

- 1/ A NAM framework can be developed by means of a bylaw or policy instruments like plans and strategies. The benefit of the former is that it creates a degree of public accountability that could encourage longer-term success and commitment to NAM. In contrast, policy instruments adopted by resolution are advantageous for their flexibility.
- 2/ Land use planning and zoning are critical tools for introducing land use and development policies rooted in NAM. They are also powerful tools for influencing the protection of natural assets on private land.
- 3/ Local governments can also acquire interests in land in order to have direct control over natural assets, or at least access to land where natural assets are located.
- 4/ The legal and policy tools available to a local government to develop and implement a NAM framework are numerous. The appropriate tool for a particular situation depends on the type of natural asset, its purpose, its condition, and other applicable law to that natural asset. As such, a local government that conducts a natural asset inventory would benefit from undertaking a legal analysis of the legislation, regulations, and other enactments applicable to each natural asset in the inventory in order to determine areas of opportunity for legal reform to more meaningfully implement their NAM framework.

6 Types of legal actions against local governments

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This section provides a high-level summary of the types of legal actions commonly faced by local governments. While the relevance of each of these types of legal actions is introduced in this section, it is Section 7, which identifies different scenarios applicable to NAM in the local government context and the legal risks associated with each, where the relevance of these legal actions to NAM is explored in more detail.

Understanding Binding vs Persuasive Case Law Precedent

As this legal primer is national in scope—with specific emphasis on the sample provinces of BC, Alberta, Ontario, and New Brunswick—a brief explanation regarding the relevance of legislation and case law from one province to cases considered in another province may be helpful to the reader.

Except for Québec, which operates under a civil-law tradition, Canada's legal system is largely based on a common-law tradition.⁵⁷ This generally means that cases will be decided by the courts on the basis of precedent (i.e., past decisions). The legal effect of precedent on a particular dispute being heard by a court, however, depends on the nature of that precedent. That is, some precedent is binding whereas other precedent is merely persuasive.

Past decisions that will be considered binding on a court will be those made by the Supreme Court of Canada, by courts higher up in the hierarchy of courts (which can generally be understood as superior courts at the bottom, then courts of appeal, and then the Supreme Court of Canada at the top), and by courts within the same level of the hierarchy.

⁵⁷ The word "largely" is used here to acknowledge that the bijural nature of Canada's legal system is a legacy of the suppression of Indigenous legal orders. In reality, Canada is a legally plural state where not only common and civil law operate, but also several Indigenous legal orders.

In contrast, persuasive precedent includes decisions that a court is not required to follow, but may nonetheless influence that court's decision-making. This includes decisions made by superior courts and courts of appeal from other provinces (including Québec) and territories as well as, in some cases, decisions from courts in other countries. Importantly, it is not uncommon for decisions from other provinces and territories, especially those of courts of appeal, to be drawn from by the courts, especially where a legal question has not yet been considered by a court within its own court system.

6.1 Challenging a local government for acting outside of or contrary to legal authority

Local governments must act in accordance with their enabling statutes. When they do not, actions they take (e.g., the passing of a bylaw or adoption of a resolution) may be legally challenged. The legal mechanisms available for challenging local government bylaws and resolutions differ between provinces. In some provinces, a significant number of land use-, development-, and planning-related disputes are handled at first instance by tribunals established for this specific purpose (e.g., the Ontario Land Tribunal, the Land and Property Rights Tribunal in Alberta). Decisions by these tribunals can then be judicially reviewed through the courts.

In other provinces, local government-enabling legislation sets out very specific, time-bound mechanisms for using the courts to challenge the legality of a local government decision. These usually have very specific requirements for providing a local government with notice of an intention to challenge a decision within a short period of time after the decision is made, and are usually handled in a relatively efficient manner. Importantly, certain provinces prevent the “reasonableness” of a decision from being challenged under this mechanism.⁵⁸ Reasonableness, from the perspective of the law, involves a question of whether there are reasons—although extensive, voluminous reasons are not necessary—to support a decision that has been made.⁵⁹

Finally, other provinces (e.g., BC) retain a right of judicial review of local government decisions without the need to first engage a tribunals. Judicial review is the tool by which courts exercise their supervisory powers over decision-makers and allow for the actions of public decision-makers to be challenged on the basis of substance, procedural obligations, or both.

58 See e.g., *Alberta's Municipal Government Act* at section and *Ontario's Municipal Act* at section 272.

59 *Grosh v Revenue Canada Taxation Fairness Review Board*, 2007 FC 654 at para 8.

Relevance to NAM: Challenging Local Government Authority

Local government decision-making can be challenged and overturned when a local government does not comply with legislative requirements or the procedural fairness rights of those affected by a decision. The following types of decisions relating to NAM could be challenged if done in contravention of these requirements:

- Adoption of a land use plan
- Approval of a rezoning in contravention of a land use plan that requires alignment with certain policies relating to natural asset protection
- Rejection of a development-related permit on the basis that the development would compromise the natural assets being relied upon by the local government

Where an effort to incorporate NAM into a local government's practices relates more clearly to its legislative functions, the risk of a decision being challenged is likely lower (e.g., most enabling legislation references local governments' role in providing or administering storm sewer or drainage services, and so incorporation of NAM as a policy or framework into these types of services is more intuitively justifiable). In contrast, efforts to incorporate NAM that may push the boundaries of what has previously been done may face a higher risk of being legally challenged.

Importantly, however, the risk of a legal challenge and the risk of a successful legal challenge are not the same. As usual, local governments should work with their legal counsel to minimize the latter.

6.2 Negligence

The most notable potential source of civil liability in relation to local governments undertaking NAM is negligence.

A claim for negligence may be successful—and therefore compensation may be owed—when the following factors are proven by a plaintiff (i.e., the injured party):

- 1/ **Duty of care.** The law recognizes that the defendant owed the plaintiff a duty of care.
- 2/ **Standard of care.** The defendant's acts or omissions (i.e., lack of action) amounted to a breach of the applicable standard of care.
- 3/ **Harm.** The plaintiff sustained damage.
- 4/ **Causation.** The damage was, in fact and in law, caused by the defendant's breach.⁶⁰

60 See, e.g., *1688782 Ontario Inc v Maple Leaf Foods*, 2020 SCC 35 at para 18.

The first, second, and fourth of these will now be elaborated upon in turn. The third—harm—will not be addressed in more detail, other than to say that whether a plaintiff has suffered harm is a factual analysis that is usually straightforward, and can include both actual harm (e.g., a plaintiff suffered financial consequences as a result of a defendant’s negligence) and loss of opportunity.

DUTY OF CARE

A duty of care is a legal obligation held by one person towards another. If a duty of care exists, the person who owes the duty must conduct themselves in a manner whereby the potential effects of their acts or omissions on the other person should be contemplated in accordance with a certain ‘standard of care’.

The legal test for whether a duty of care exists under the law of negligence is referred to in Canadian jurisprudence as the “Anns/Coopers” test. It consists of a two-stage analysis:

- 1/ Is there a sufficiently-close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on their part might cause damage to the plaintiff?
- 2/ If so, are there any considerations which ought to negate or limit the scope of the duty, the class of persons to whom it is owed, or the damages that a breach may give rise to?⁶¹

The first stage of this analysis considers the “proximity” of the parties. In general, courts will first look at whether past case law already recognizes a duty of care reflected in the dispute before them. If so, a *prima facie*⁶² duty of care will be found to exist. If not, courts will then consider whether “the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.”⁶³

A recent decision from the BC Court of Appeal⁶⁴ provides a helpful summary of the factors a court will consider when determining whether a government authority acting in a **regulatory capacity** (i.e., as opposed to acting in a **private capacity**, such as in entering into a contract or as the owner of land) has a relationship of sufficient proximity to specific individuals such that a *prima facie* duty of care would be found to exist. While this summary is reproduced in **Appendix A**, some of the factors⁶⁵ that would lean a court towards finding a private law duty of care include:

- the legislation imposes a duty to act towards individuals in specific ways (i.e., in contrast to the duties of the government authority being framed as being towards the public more generally); and

61 *Kamloops v Nielsen*, 1984 CanLII 21 (SCC) at 10-11.

62 “*Prima facie*” refers to a duty of care that is presumed to exist unless some other relevant factor determines otherwise.

63 *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 29.

64 *Waterway Houseboats Ltd v British Columbia*, 2020 BCCA 378.

65 Importantly, no single factor is determinative.

- where an analysis of the legislation is not determinative, an analysis of the interactions between the harmed party and the government authority can be characterized as directly transactional rather than as being between a government authority and the part the public being regulated.

Factors that would lean a court towards **not** finding a private law duty of care include:

- the legislation explicitly excludes private law duties of care; and
- the finding of a private duty of care would conflict with the government authority's duty to the public.

If a duty of care is found to exist at the first stage, courts will then ask whether there are any public policy reasons for why the alleged defendant should be immune from liability for negligence. The public policy reason of most relevance to local governments is immunity from negligence claims for 'core policy decisions.'

The Supreme Court of Canada recently revisited and clarified the law relating to immunity for core policy decisions in *Nelson (City) v Marchi* ("Marchi").⁶⁶ In short, local governments (and public authorities more generally) will be immune from negligence claims where harm suffered by a person is caused by a decision made "as to a course or principle of action that [is] based on public policy considerations, such as economic, social and political factors."⁶⁷ Importantly, the Court in *Marchi* clarified that this immunity only applies to "a narrow subset of discretionary decisions" and not to all discretionary government decisions. The Court also outlined four factors for assessing whether a decision is a 'core policy decision':

[62] First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (Just, at pp. 1242 and 1245; Imperial Tobacco, at para. 87).

⁶⁶ *Nelson (City) v Marchi*, 2021 SCC 41.

⁶⁷ *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 90.

[63] Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

[64] Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions “concerning budgetary allotments for departments or government agencies will be classified as policy decisions” because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., Criminal Lawyers’ Association, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.

[65] Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment (Makuch, at pp. 234-36 and 238). Conversely, the more a decision is based on “technical standards or general standards of reasonableness”, the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

[66] Thus, in the course of weighing these factors, the key focus must always be on the underlying purpose of the immunity and the nature of the decision. None of the factors is necessarily determinative alone and more factors and hallmarks of core policy decisions may be developed; courts must assess all the circumstances.⁶⁸

Where a regulatory decision of a local government falls outside of the narrow band of core policy decisions, it will be considered an “**operational decision**” and therefore attract potential liability in negligence if the standard of care is not met and a person is harmed as a result of the decision. A helpful way to understand the distinction between core policy decisions and operational decisions is that the latter are often taken in the process of implementing the former.

⁶⁸ *Supra* note 64 at paras 62-66.

Further, it is worth adding that core policy decisions—which can include the exercise of legislative authority—can still attract liability in negligence if the decision is “irrational” or “taken in bad faith.”⁶⁹ An irrational decision is one that lacks any plausible reason for it being made. And a decision taken in bad faith can involve “the illegal exercise of delegated authority”⁷⁰ or “dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, unreasonable conduct, and conduct based on an improper motive or undertaken for an improper, indirect or ulterior purpose.”⁷¹

STANDARD OF CARE

If a duty of care is found to exist, then courts will turn to an analysis of the standard of care.

Standard of care is the standard of conduct considered reasonable in a particular set of circumstances and the threshold that must be met by a person with a duty of care towards another to avoid incurring liability. While a court will look at all the relevant circumstances in order to define the standard of care for a particular situation, it is worth noting here that courts will generally look at policy-related factors to determine the applicable standard of care in cases involving governmental authorities. This includes issues such as budgetary, fiscal, personnel, equipment, material, and political constraints.⁷²

CAUSATION

For a court to find a person liable for negligence, the harm experienced by a person will have to have occurred as a result of the conduct of the person who has a duty of care towards them. This connection between the actions of one and the harm experienced by another is referred to as ‘causation’, and causation must be proven on both factual and legal bases.

While the meaning of the former is straightforward, the latter may benefit from some explanation. **Legal causation** is proven when the harm experienced by a person was a reasonably-foreseeable consequence of the actions of the person with the duty of care. In other words, a person is not responsible for *all* the consequences of their carelessness but rather only those consequences that are considered by the law to not be too remote.

Incidentally, it is worth adding a comment about how local governments can be held liable notwithstanding the fact most of their acts and omissions are taken by employees, contractors, and agents of the local government (i.e., a council generally only acts by means of passing bylaws, resolutions, and orders). In general, local governments will be held to be vicariously liable—liable for the actions of those for which they are legally responsible—for the unlawful or tortious conduct of their employees and agents, but not their independent

⁶⁹ *Supra* note 65.

⁷⁰ *MacMillan Bloedel Ltd v Galiano Island Trust Committee* (1995), 1995 CanLII 4585 (BC CA) at para 154.

⁷¹ *Ibid* at para 153.

⁷² *Just v British Columbia*, [1989] 2 SCR 1228 at 1242-43 and 1245.

contractors or councillors. While there are exceptions to this statement, a deeper analysis is beyond the scope of this legal primer.

Relevance to NAM: Negligence

Determinations of negligence are highly fact-specific. As such, summarizing the relevance of negligence to NAM in a local government context can be challenging. Nevertheless, some high-level takeaways to take from this subsection include:

- The adoption of a NAM bylaw, policy, plan, or strategy are likely to be considered by courts to be “core policy decisions” and therefore not likely to attract a finding of a duty of care.
- Their implementation, on the other hand, would likely be considered to be “operational decisions” that could attract a finding of a duty of care.
- **Failure to act can incur liability in negligence in much the same way that acting can.**

These takeaways and the principles described above are applied and further elaborated upon in Section 7 to specific scenarios that a local government may find itself in relating to NAM. We encourage readers to review that section to better understand how some of nuances behind negligence could apply to NAM, including where a duty to warn or a duty to consider certain information may apply. As application of these principles is also highly fact specific, we encourage local governments to consult their legal counsel as to the applicability of this section to their circumstances.

6.3 Occupier’s liability

Occupier’s liability is a cause of action that seeks to protect users of land or property by requiring certain conduct of occupiers of land or property towards these users. Although legally distinct from negligence, occupier’s liability is generally proven through the same principles as negligence. That is, a claim of occupier’s liability may be successful—and therefore compensation may be owed—when the following factors are proven by a plaintiff (i.e., the injured party):

- 1/ The law recognizes that the defendant owed the plaintiff a duty of care.
- 2/ The defendant’s acts or omissions (i.e., lack of action) amounted to a breach of the applicable standard of care.
- 3/ The plaintiff sustained damage.
- 4/ The damage was, in fact and in law, caused by the defendant’s breach.⁷³

In contrast to negligence, however, the existence of a duty of care and the standard of care applicable to an occupier will generally be set out in legislation.⁷⁴

⁷³ See, e.g., 1688782 *Ontario Inc v Maple Leaf Foods*, 2020 SCC 35 at para 18.

⁷⁴ See, e.g., *Occupiers’ Liability Act*, RSO 1990, c O.2.

Notably, occupier's liability legislation across the country generally includes provisions reducing the duty or standard of care applicable to certain kinds of property (e.g., rural premises), property used in certain kinds of ways (e.g., utility rights-of-way), and types of users (e.g., trespassers). Further, Alberta's Municipal Government Act protects municipalities in relation to liability for inspection or maintenance of property it may otherwise have a duty of care towards under Alberta's Occupiers' Liability Act.⁷⁵ Specifically:

530(1) A municipality is not liable for damage caused by

(a) a system of inspection, or the manner in which inspections are to be performed, or the frequency, infrequency or absence of inspections, and

(b) a system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.

Lastly, while occupier's liability continues to be alive in BC, Alberta, and Ontario, it has been abolished in New Brunswick. In its place, the general principles of negligence (described above) now apply.

Relevance to NAM: Occupier's Liability

Occupier's liability, where the concept still applies, may be applicable to natural assets that are owned or otherwise occupied (e.g., leased) by a local government and that are used by members of the public (e.g., a municipal park).

As occupier's liability applies different standards of care to different circumstances, local governments should turn their minds to how certain natural assets being seen as part of service provision may affect the application of these different standards. For instance, a reduced standard of care usually applies in the context of "recreational trails reasonably marked by notice as such."⁷⁶ If a recreational trail interconnects with a wetland that is explicitly used by a local government for water filtration (e.g., the local government has developed a plan for water management that includes the wetland in the infrastructure and assets it relies upon for service provision), certain steps may need to be taken to ensure that this double purpose does not mean the trail is no longer legally characterized as a recreational trail for the purposes of occupier's liability. Local governments in this position should consult their legal counsel.

⁷⁵ *Occupiers' Liability Act*, RSA 2000, c O-4.

⁷⁶ See, e.g. *Occupiers Liability Act*, RSBC 1996, c 336 at section 3(3).

Incidentally, it is worth noting that occupier's liability applies in the context of engineered assets as well, so using natural assets as an alternative to engineered ones for service delivery should not be seen as adding new sources of potential liability for the purposes of occupier's liability, but rather changing the legal analysis that is needed to be undertaken.

6.4 Nuisance and the rule in *Rylands v Fletcher*

NUISANCE

There are two main types of nuisance: private and public.

Private nuisance is the unreasonable and substantial interference with another's reasonable use and enjoyment of their land. **Public nuisance**, on the other hand, is "any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience."⁷⁷

While an individual can bring a claim in private nuisance against a neighbouring property owner or other legal party, public nuisance is more restrictive in terms of who can bring a claim. More specifically, an individual is not permitted to bring their own claim unless they have suffered "direct and substantial damage beyond that suffered in common with the rest of the public."⁷⁸ Otherwise, the Attorney General has responsibility for bringing actions on behalf of a community affected by a public nuisance.

Interestingly, the Supreme Court of Canada has stated that in circumstances where ecosystems are unlawfully destroyed or damaged by a public nuisance, a case could be made that a defendant should owe compensation not only for the commercial value of the ecosystem, **but also for the loss of the inherent value and other uses (including ecosystem services) of the ecosystem.**⁷⁹ This suggests that Canadian courts already acknowledging the value of that natural assets provide to service provision and to communities more generally.

Lastly, it is important to note that statutory authority provides a defence to nuisance. Specifically, a "public body or private actor is not liable for creating a nuisance which is an inevitable consequence of exercising a statutory authority."⁸⁰

THE RULE IN RYLANDS V FLETCHER

The rule in *Rylands v Fletcher* is a strict liability tort that has been held to constitute a "specialized form of nuisance."⁸¹ Courts will find a municipality liable under the rule in *Rylands v Fletcher* where the following factors are present:

⁷⁷ *Ryan v Victoria*, 1999 CanLII 706 (SCC) at para 52.

⁷⁸ *Whaley v Kelsey*, 1928 CanLII 431 (ON CA).

⁷⁹ *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at paras 131 to 154.

⁸⁰ *Supra* note 75.

⁸¹ *Danku v Town of Fort Frances et al*, 1976 CanLII 683 (ON SC).

- 1/ The defendant made a “non-natural” or “special” use of their land.
- 2/ The defendant brought onto their land something that was likely to cause harm to the property of another if it escaped.
- 3/ The thing in question in fact escaped.
- 4/ Damage was caused to the plaintiff’s property as a result of the escape.⁸²

Importantly, a “non-natural” use of land does not mean any form of development, but rather a use of land that is “inappropriate to the place.”⁸³ As such, a use that accords with relevant planning and land-use regulations will generally not be considered either “non-natural” or “special.”

IMMUNITY FROM LIABILITY

Notably, several provinces have adopted legislation protecting local governments from liability under the rule in *Rylands v Fletcher* (or nuisance) under certain circumstances (see Table 3).

TABLE 3: LEGISLATIVE PROTECTION FROM LIABILITY UNDER THE RULE IN RYLANDS V FLETCHER

BRITISH COLUMBIA <i>Community Charter</i>	ALBERTA <i>Municipal Government Act</i>	ONTARIO <i>Municipal Act</i>	NEW BRUNSWICK <i>Local Governance Act</i>
<p>section 744/ A municipality, municipal council, regional district, regional district board, improvement district or greater board is not liable in any action based on nuisance or on the rule in the <i>Rylands v. Fletcher</i> case if the damages arise, directly or indirectly, out of the breakdown or malfunction of</p> <p>(a) a sewer system,</p> <p>(b) a water or drainage facility or system, or</p> <p>(c) a dike or a road.</p>	<p>section 528/ A municipality is not liable in an action based on nuisance, or on any other tort that does not require a finding of intention or negligence, if the damage arises, directly or indirectly, from roads or from the operation or non-operation of</p> <p>(a) a public utility, or</p> <p>(b) a dike, ditch or dam.</p>	<p>section 449/ (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,</p> <p>(a) a municipality or local board;</p> <p>(b) a member of a municipal council or of a local board; or</p> <p>(c) an officer, employee or agent of a municipality or local board.</p>	<p>section 177/ A local government shall not be liable in an action in nuisance, if the damage is the result of</p> <p>(a) water overflowing from a water or wastewater system, drain, ditch or watercourse due to excessive snow, ice, mud or rain, or</p> <p>(b) the construction, operation or maintenance of a system or facility for the distribution of water or for the collection, conveyance, treatment or disposal of wastewater, storm water or both.</p>

Table 3: Legislative Protection from Liability under the rule in Rylands v Fletcher

⁸² CED Negligence II.5.(c).(v).

⁸³ See, e.g. *Mihalchuk v Ratke* (1966), 1966 CarswellSask 7 (Sask QB)(herbicide sprayed from aircraft drifting over plaintiff’s land and injuring crops); *Christa v Marshall* (1945), 1945 CarswellAlta 42 (Alta SC)(drilling of artesian wells resulting in flooding of land); *Heard v Woodward* (1954), 1954 CarswellBC 48 (BC SC)(defendant allowing toxic fumes to escape onto plaintiff’s property).

Relevance to NAM: Nuisance

Nuisance and the rule in *Rylands v Fletcher* can be relevant to NAM in the local government context in several ways, including:

- Actions taken that undermine a natural asset that a community relies upon—if the right facts are present—could support an action by a local government in public nuisance. Although this principle remains largely untested by appeal courts since the Supreme Court of Canada’s comments in *British Columbia v Canadian Forest Products Ltd*, it is conceivable that this principle could apply to natural assets both within and outside of a local government’s boundary. Importantly, though, the defence of statutory authority may prevent a successful claim from being made.
- Statutory provisions providing immunity from liability in nuisance or the rule in *Rylands v Fletcher* are worded broadly enough to extend the immunity to the context of many natural assets that can form part of the services or utilities that are subject to the immunity (e.g., water or wastewater systems). Local governments that utilize natural assets in this way should consult their legal counsel in order to ensure can be are protected under these statutory provisions.

6.5 Constructive taking

The Supreme Court of Canada recently revisited and clarified the law in relation to constructive taking in *Annapolis Group Inc v Halifax*.⁸⁴ **Constructive taking** or *de facto* expropriation⁸⁵ can generally be understood as an expropriation of private property by a public authority for public purposes in a manner that falls outside of the legislative scheme for expropriation (i.e., *de jure* expropriation).

More specifically, courts have held that compensation will be owed by a public authority for constructive taking when an act by that public authority results in the following:

- 1/ an acquisition of a beneficial interest by the public authority in the property or flowing from it; and
- 2/ removal of all reasonable uses of the property from the original owner⁸⁶

⁸⁴ *Annapolis Group Inc v Halifax*, 2022 SCC 36 (“*Annapolis Group Inc v Halifax*”).

⁸⁵ Courts have referred to *de facto* expropriation in a variety of ways other than *de facto* expropriation: *de facto* taking, constructive expropriation/taking, disguised expropriation/taking, and regulatory taking (as the concept is known in the US). Incidentally, however, while “disguised expropriation” is sometimes used by common-law courts, this concept is not the same as “disguised expropriation” under Québec’s civil code, which is subject to a different legal test.

⁸⁶ *Canadian Pacific Railway v Vancouver (City)*, 2006 SCC 5 at para 30. See also see *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*(1999), 177 DLR (4th) 696 (NSCA) at para 48 (“*Mariner*”); *Manitoba Fisheries Ltd v R* (1978), [1979] 1 SCR 101 (SCC)(“*Manitoba Fisheries*”); and *British Columbia v Tener*, [1985] 1 SCR 533 (SCC).

This test for de facto expropriation is rooted in the “expropriation rule,” which was summarized by the BC Court of Appeal in *Medical Assn (British Columbia) v British Columbia* as follows:

16 I think the rule may be divided into three parts. The first is that the property of the subject cannot be taken by the Crown [or another public authority] without some form of authorization. The second is that the authorization must be clear. If there is any ambiguity about whether the Crown [or another public authority] may take the subject's property, the authorization must be construed in favour of the subject. The third is that, even if the authorization clearly permits the taking of the subject's property, there is a presumption, based on justice and fairness, that the Crown [or the expropriating public authority] will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.⁸⁷

Importantly, one outcome of the law of constructive taking—and the Supreme Court of Canada's decision in *Annapolis Group Inc v Halifax* in particular—is that in a narrow set of circumstances a local government may be found by courts to owe compensation to landowners as a result of the effects of land-use regulations on the use of their private land.

In *Annapolis Group Inc v Halifax*, Annapolis Group Inc acquired a large amount of land in the 1950s with the intention of developing and reselling it in the future. In 2006, Halifax Regional Municipality adopted a planning strategy to guide land development in the municipality, including Annapolis Group Inc's lands. As part of this strategy, part of the Annapolis Group Inc lands were reserved for possible inclusion in a regional park while the rest was left open to potential development. In 2016, however, the municipality passed a resolution refusing to allow development of the lands. This resolution was challenged on the basis of constructive taking.

While the majority of the Supreme Court of Canada ultimately held that the dispute should return to trial at the Nova Scotia Supreme Court for consideration of whether constructive taking has actually occurred, the decision raises flags for local governments seeking to protect natural assets located on private land. In particular, it suggests that a local government that refuses to allow development of private land while at the same time benefitting in some way from that lack of development (e.g., by use of the land as a park or through protection of natural assets that contribute to service provision) may be found to owe compensation—in the context of constructive taking, this would generally be the compensation payable under the relevant expropriation legislation—to the landowner. A local government can minimize the risk of this happening, however, by working with legal counsel to ensure that the private land being restricted is still able to be used for some reasonable purpose (a question that will ultimately depend on the circumstances).

87 *Medical Assn (British Columbia) v British Columbia* (1984), [1985] 2 WWR 327. Cited with approval in *Lynch v St John's (City)*, 2016 NLCA 34 at para 34.

Another recent decision, *Dupras v Ville de Mascouche*,⁸⁸ found disguised expropriation where a municipality zoned private land for conservation and refused to rezone or purchase the land upon inquiries from the landowner. Although the cause of action in this case—disguised expropriation—is rooted in Québec’s civil law rather than the common law that informs constructive taking, the decision is nonetheless relevant. In particular, the Québec Superior Court’s decision, which was affirmed by the Québec Court of Appeal, found that all reasonable uses—relevant to the second component of the test for constructive taking—of the landowner’s land were removed by virtue of the land effectively becoming part of an adjacent public park.

While the nuances of the above cases must be considered, **recent developments clearly show that local governments will need to consider the relevance of constructive taking on efforts to protect private land that forms part of the natural assets they rely upon for service provision.** Furthermore, local governments interested in practising NAM may wish to advocate for legislative changes within their provinces to obtain statutory protection from compensation claims where natural assets on private land are protected through land-use regulation for the purpose of maintaining or securing local government service provision.

Relevance to NAM: Constructive Taking

Local governments will need to consider the law of constructive taking (or de facto expropriation) when looking at using land-use regulations to protect natural assets located on private land. Although successful constructive taking cases are rare, legal counsel should be sought to ensure implementation of land-use regulations for protection of natural assets on private land is structured to minimize the risk of a claim.

⁸⁸ *Dupras c Ville de Mascouche*, 2022 QCCA 350, upholding in part 2020 QCCS 2538. Incidentally, although decisions by Québec’s court system are usually less relevant to common-law provinces, the similarity of the test for disguised expropriation and constructive taking adds to the persuasive value of this decision.

7 Scenarios: Legal Risks and Natural Asset Management in the Local Government Context

Legal Disclaimer

This legal primer is provided with the understanding that its authors and MNAI, as well as those consulted in its development, are not providing legal or other professional advice to its readers. Its contents are intended to provide local government elected officials and senior managers with general legal information regarding natural asset management and protection in a local government context in Canada applicable to the time of publication. The advice and guidance of qualified legal counsel should be sought before application of any of the information contained in this legal primer to any reader or local government's circumstances.

Although, as described above, local governments have several sources of legal authority to implement NAM, there is little Canadian case law that explicitly addresses NAM as a program or practice (i.e., as discussed above, as distinct from environmental management more generally). Nevertheless, it is possible to apply general legal principles relevant to local governments to understand some of the areas of risk facing local governments that implement a NAM system - *as well as those that do not*.

As such, this section builds on Section 6 by describing the legal considerations at play in a variety of scenarios that a local government may find itself in while considering or implementing NAM. Possible strategies for minimizing risk are also discussed.

7.1 **Scenario A: A local government chooses not to adopt a NAM framework**

WHERE THERE IS NO LEGISLATIVE REQUIREMENT

A local government in a province or territory where NAM is not legislatively mandated faces little immediate legal risk for failure to adopt a framework (i.e., an overarching bylaw, policy, plan, and/or strategy) for NAM. In other words, if there is no legal duty to do this, then there would generally be no basis for someone to challenge a decision to not do it.

At the same time, while it is difficult to see how a local government in this scenario could be held liable specifically for the decision to not adopt a NAM framework, other decisions that are made as a result of the lack of a framework could attract liability.



For instance, if a creek is developed regardless of a local government's access to information showing its importance to its stormwater management system, a court could look to the lack of consideration of the stormwater management services provided by a natural asset such as a creek—especially if a local government had access to this information and allowed the creek to be developed over—as proof of negligence in the event of a flood that would have been avoided or mitigated had it not been developed over. This analysis is elaborated upon more fully in Scenario B.

As it is difficult to know what risks may arise as a result of the decision to not undertake NAM—although it is not difficult to know that there are risks—it would be wise for local governments to adopt a NAM framework to be best positioned to make most evidence-based and legally-safe decisions.

WHERE THERE IS A LEGISLATIVE REQUIREMENT

In contrast, a municipality in Ontario—where some aspects of NAM are required under O Reg 588/17—could face legal action if it fails to implement the legally-mandated components of NAM under the regulation.

7.2 **Scenario B: A local government has developed a NAM framework and has failed to protect natural assets that it relies upon for service delivery**

A distinction should be made here between natural assets that form part of a service provided by a local government (e.g., there is a legal duty or permissible power to provide the service or a bylaw has been adopted in relation to the service) and natural assets that provide ecosystem services to the community, but the local government does not have any recognized authority in relation to those services.

For the former, if, for example, certain natural assets (e.g., a creek) form part of a local government stormwater management system and those natural assets are undermined by neglect of the local government, the local government could be exposing itself to claims in negligence as a result.

As with any potential legal claim, the “devil will be in the details.” However, a step that local governments should take wherever they are in the circumstance of providing a service they know relies upon the functioning of certain natural assets, is understand the extent to which they rely upon those natural assets. Incorporating them into an asset management framework, including inventorying and setting levels of services for the natural assets being relied upon, would all be valuable steps to mitigate risk. Further, as implementation of a NAM framework in this manner would likely be considered by courts to be an operational decision under the law negligence, compliance with such an evidence-based framework would, at best, prevent negligence claims from happening in the first place (e.g., a possible plaintiff could be deterred because their chances of success would be lower) or, at worst, provide a strong defence to a claim.

For the latter, it is difficult to see where legal risk lies in circumstances where the local government has no legal authority in relation to any services relating to certain natural assets. Local governments are not, generally speaking, trustees for the environment or in relation to natural assets within their jurisdiction, nor have courts held them to hold fiduciary obligations that would extend to a positive obligation to manage and protect these assets.

Incidentally, the law of negligence, in some circumstances, imposes a duty to warn on government authorities when they have knowledge of a potential or imminent hazard or harm facing people under their jurisdiction that, if the information was shared with them, would be able to take steps to mitigate this harm. A similar duty is also imposed under many provinces’ freedom of information legislation.

Lastly, it is worth highlighting that a key risk management strategy for local governments that have undertaken NAM and may protect natural assets they rely upon is to acquire insurance coverage (e.g., parametric insurance policies) that will provide protection in the event of failure.

7.3 Scenario C: A local government has knowledge of its reliance upon certain natural assets for service provision and the actions of a neighbouring or upstream community threaten the health of those assets

Local governments in this situation would do best to rely upon legal and policy tools that can facilitate collaboration and co-governance between neighbouring communities. These include cross-border and regional planning tools (e.g., regional growth strategies in BC, intermunicipal collaboration frameworks in

Alberta, regional plans in New Brunswick), tools under environmental legislation (e.g., water sustainability plans under BC's *Water Sustainability Act*), and provincial-level planning tools that all local governments must consider (e.g. provincial policy statements in Ontario).

Nuisance and negligence claims could be a possible outcome where these tools fail protect natural assets; however, there is little case law that suggests a claim would be successful where one local government's jurisdiction is recognized in law in relation to a natural asset relied upon by another, and the former has no legislated requirement to take other local government's concerns into consideration (e.g., it would be difficult to prove that one local government held a duty of care towards another in this case).

7.4 **Scenario D: A local government is creating a natural asset inventory and developing levels of services/valuations for its natural assets**

There is some degree of legal risk associated with replacing engineered assets—in relation to which there is a robust set of best practices—with natural assets for the same types of services. The source of this risk lies in the emerging nature of the skills and know-how associated with being able to determine equivalency between the two, and the ways in which this would affect defining the standard of care in the context of a negligence claim.



For instance, a local government that undertakes a process to replace an engineered dike with a natural asset serving the same purpose could face legal liability under negligence if the latter fails to provide the level of protection expected of it and someone or their property is harmed as a result. In considering this situation, a court may need to define the standard of care expected of the local government and will look at policy decisions taken by a local government to assess equivalency.

As such, utilization of best practices resources like the proposed CSA standard for completing natural asset inventories⁸⁹ and MNAI's Natural Assets Management Considerations for Engineering and Geoscience Professionals⁹⁰ can mitigate the risk associated with relying upon natural assets in place of engineered ones, as courts will look favourably upon evidenced-based frameworks relied upon by local governments to make equivalency decisions. At the same time, further risk mitigation will benefit from the development of standards for regulated professionals involved in the process as well as legislative support for this adoption.

7.5 **Scenario E: A local government is considering a development approval for a development that could compromise a natural asset it relies upon for service delivery and it has information showing this to be the case**

A local government's development approval processes will be guided by its enabling legislation. In some cases, there will be a legislated requirement to consider the impact of a proposed development on natural assets relied upon by the local government (e.g., where these considerations have been made mandatory as part of a land use plan that the approval must align with or where a bylaw applicable to the approval otherwise requires it). In other cases, where the decision to be taken is subject to a legislated public hearing process, disclosure of the information that the local government has about the potential issue will generally be required.

Ultimately, whether a civil claim can arise in this situation will depend on the circumstances, and whether there are other reasons within the local governments' discretionary authority for approving the development regardless of its impact on a natural asset. For the purposes of this legal primer, however, it is sufficient to say that local governments should not, at minimum, ignore the information or fail to disclose it where required, as doing so could substantiate a negligence claim if and when someone is harmed in connection with a decision taken by the local government.

⁸⁹ See: mnai.ca/natural-asset-inventories-standard-now-out-for-public-review/.

⁹⁰ MNAI, 2021, *Companion Guide to the Engineering and Geoscientists BC Professional Practice Guidelines: Local Government Asset Management*, available at: mnai.ca/media/2022/03/MNAI-EGBC-companion-guide-mar2021-105.pdf.

8 Legal Developments to Watch

Previous sections have sought to provide a high-level overview of the current state of the law in relation to the legal tools and legal risks associated with NAM. This section focuses on where the law could be going. It highlights a selection of cases to watch, legal developments that are likely to impact local government jurisdiction and governance practices, and other legal developments that could have an impact on NAM.

In this vein, it is worth emphasizing that the law is constantly evolving and is often responding to—rather than anticipating—changes in social, economic, and environmental circumstances. Accordingly, local governments would do well to act in a manner that anticipates some or all these potential legal developments.



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8.1 Ontario's More Homes Built Faster Act, 2022 (Bill C-23) and Changes to the Greenbelt Plan and Oak Ridges Morain Conservation Plan

In the last few months of 2022, the Ontario government announced and implemented several initiatives involving significant changes to that province's planning and development framework. While an extensive review of these changes is beyond the scope of this legal primer, key aspects of the changes that demonstrate their significance are set out below.

MORE HOMES BUILT FASTER ACT, 2022 (BILL 23)

The *More Homes Built Faster Act, 2022*⁹¹ was enacted with the stated goal of enabling the building of 1.5 million homes in 10 years. Its adoption resulted in the amendment of several pieces of planning- and land use-related legislation (i.e., *Planning Act*; *Municipal Act, 2001*; *Development Charges Act, 1997*; *Ontario Land Tribunal Act, 2021*; *Ontario Heritage Act*; *Conservation Authorities Act*) as well as the adoption of the new *Supporting Growth and Housing York and Durham Regions Act, 2022*, which addresses two specific public works projects in the GTA: the York Region sewage works project and the Lake Simcoe phosphorus reduction project.

91 *Ontario's More Homes Built Faster Act, 2022*, available at: www.ola.org/sites/default/files/node-files/bill/document/pdf/2022/2022-11/b023ra_e.pdf

Some notable changes brought about by adoption of the *More Homes Built Faster Act, 2022* and associated (proposed) regulations include:

- changes to planning and development that increase “as of right” small-scale residential development, regulate inclusionary zoning, reduce parkland dedication requirements, increase the flexibility around amendment of official plans and secondary plans and approval of zoning bylaw and minor variance amendments;
- introduction of several discounts and exemptions in the development charge rates that municipalities can charge for new development; and
- amendments to the Conservation Authorities Act that have the potential to allow development in areas previously prohibited by regulation as well as a narrowing of their authority in relation to certain pieces of legislation.

AMENDMENT TO THE GREENBELT PLAN AND OAK RIDGES MORAIN CONSERVATION PLAN

In connection with its stated goal of building 1.5 million homes in 10 years, the Province has amended the Greenbelt Plan by adding 13 new Urban River Valley areas and removing or redesignating 15 other areas of land. Similarly, the Province amended the Oak Ridges Morain Conservation Plan.

RELEVANCE TO NAM

Several components of the *More Homes Built Faster Act, 2022* and related plan amendments have been criticized for sidelining environmental protection at a time when governments elsewhere are largely focused on the climate and biodiversity crises facing the world. As set out elsewhere in this section, this failure to account for these crises could have legal repercussions down the road. Regardless of the potential legal developments described in this section, as mentioned in Sections 6 and 7, failure to account for the role of natural assets in certain services and systems could be evidence towards civil claims in negligence or nuisance. While courts will always consider the legislative context within which a local government acted, a court may still look at the extent to which a local government used the powers it had to protect natural assets that its residents relied upon.

Indeed, it is worth noting that actions such the *More Homes Built Faster Act, 2022* and related plan amendments are the types of governmental decisions that public interest litigants tend to focus their efforts on as easier targets for systemic change through the courts. As such, while the steps taken by the Province have a risk of undermining the ability local governments to manage and protection natural assets, decisions such as this may also precipitate future court decisions that change the baseline by which future provincial actions in relation to planning and development must operate.

8.2 Cases to watch

As NAM is an emerging practice, it is unsurprising that there is little to no case law that addresses it in specific detail. Nevertheless, there are some cases currently making their way through the courts that are worth considering. These are summarized and elaborated upon in the following two subsections.



On December 23, 2021, a notice of civil claim⁹² was filed under BC's *Class Proceedings Act*⁹³ against the City of Abbotsford, the Fraser Valley Regional District, and the Province of BC in connection with the flooding of the Sumas Prairie and the failure of the Sumas Dike during the November 2021 atmospheric river.

The notice of civil claim alleges that each of the defendants were grossly negligent in (1) “failing to warn the Plaintiffs and Class Members of the impending and foreseeable Sumas Flood in a timely manner”⁹⁴ and (2) in failing “to implement their emergency measures and warning systems when they knew or ought to have known that a flood impacting the Sumas Prairie was the foreseeable consequence”⁹⁵ of the November 2021 atmospheric river.

A key allegation in this proposed class action is that the defendants are alleged to have known since at least July 2015—the date an engineering report was prepared for BC's Ministry of Forests, Lands, and Natural Resource Operations detailing the state of dikes in the Lower Mainland—that the Sumas Dike “likely need[ed] to be updated.”⁹⁶ Furthermore, the notice of civil claim alleges that at the time of the flood in 2021, “there were policies in place to fix the diking system in the Sumas Prairie that had yet to be implemented.”⁹⁷

Importantly, this proposed class action has not yet been certified—a key procedural step that occurs prior to any allegations being tested in court and which is used to screen cases that are not appropriate for a class proceeding. Therefore, it is currently unknown where the lawsuit will proceed.

92 Notice of Civil Claim dated Dec 23, 2021 available at: www.slatervecchio.com/wp-content/uploads/2022/01/2021-12-23-Filed-Notice-of-Civil-Claim-Mostertman-v-City-of-Abbotsford....pdf

93 *Class Proceedings Act*, RSBC 1996, c 50.

94 *Supra* note 91.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

Two initial takeaways from this proposed class action are immediately relevant to this legal primer:

- If the lawsuit does proceed, a decision in favour of the plaintiffs and class members could have rippling consequences on local government with aging, inadequate, or failing infrastructure—consequences that could be very expensive. In this vein, the potential lower cost of natural assets relative to equivalent engineered assets may become a more attractive feature of the former.
- Even if this lawsuit does not proceed, it may be a bellwether for the types of legal actions local governments and other governments can expect to face in the future, especially considering Canada’s infrastructure deficit, the changing frequency and severity of natural disasters, and the risk of existing engineered assets being inadequate in face of these changing circumstances.



On June 23, 2020, a statement of claim⁹⁸ was filed under Ontario’s *Class Proceedings Act, 1992*⁹⁹ against the Town of Oakville, Conservation Halton, the Regional Municipality of Halton, the Town of Milton, the Province of Ontario, and the mayor of Oakville in connection with the impacts or potential impacts of upstream development approvals on downstream flood risks, property values, and the size of the regulatory floodplain (and therefore the developability of certain property that fall now within the larger regulatory floodplain).

The statement of claim argues that the defendants should be found liable in negligence, nuisance, and breach of fiduciary duty because of their cumulative actions and omissions.

As with the Sumas Dike class action, this proposed class action has not yet been certified. As such, the impact it may have on NAM and local governance more generally is hard to say. Most significantly, if the plaintiffs are successful, the decision could have significant repercussions on the extent to which impacts on services provided by natural assets should be taken into account by governments with authority approve development.

98 Statement of Claim dated Jun 24, 2021 available at: www.willdavidson.ca/wp-content/uploads/2021/04/Amended-Amended-Statement-of-Claim-dated-June-24-2021.pdf.

99 *Class Proceedings Act, 1992*, SO 1992, c 6.



Climate and environmental rights litigation

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A growing wave of cases in Canada has sought to push an evolution in constitutional law to recognize Canadians as holding a constitutionally-protected right to a healthy environment, or governments as holding certain duties in relation to the quality of the natural environment.¹⁰⁰ Three of the most notable cases and their current status is summarized below:

***Environnement Jeunesse c Procureur général du Canada*:**¹⁰¹ This was a proposed class action based in Québec that sought declarations from the court that the Government of Canada had violated class members (i.e., all Québec residents aged 35 and under) rights under the Canadian Charter of Rights and Freedoms and Québec Charter of Human Rights and Freedoms for “failing to put in place the necessary measure to limit global warming.” The proposed class action asserted breaches of the Canadian Charter of Rights and Freedoms’ right to life and right to equality and the Québec Charter of Human Rights and Freedoms’ “right to live in a health environment in which biodiversity is preserved.” The proposed class action failed at all levels of court, including being dismissed by the Supreme Court of Canada.

***La Rose v Her Majesty the Queen in Right of Canada*:**¹⁰² This was an action brought by a group of children living in different parts of Canada who each had personal characteristics that made them particularly vulnerable to climate change. It challenged the federal government’s climate policy on the basis of the Canadian Charter of Rights and Freedoms’ right to life and right to equality, as well as breach of the public trust doctrine—an as-of-yet unapplied legal concept in Canadian law that asserts the Crown holds certain duties to maintain clear air, land, and water for all. The action was dismissed by the Federal Court prior to the merits of the case being heard. It is unclear whether the decision is being appealed.

***Mathur v Her Majesty the Queen in Right of Ontario*:** This action was brought by a similar group of youth plaintiffs as the La Rose case and on a similar legal basis (e.g. looking at the connection between climate change and the Canadian Charter of Rights and Freedoms as well as whether Ontario has a constitutional

¹⁰⁰ In contrast to the current legal landscape, which provides for shared jurisdiction over the environment between the federal and provincial governments, but no minimum duties to protect, conserve, or manage the environment.

¹⁰¹ *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885. Decision confirmed at 2021 QCCA 1871.

¹⁰² *La Rose v Canada*, 2020 FC 1008.

obligation to ensure a stable climate system); however, this action challenges the climate policy of Ontario rather than of Canada. Notably, this action is the first of its kind to be heard on its merits, with the case being heard in August 2022. No decision has yet been issued.

While none of these directly involved municipalities or other local governments, any decision by a court to recognize environment- or climate- related rights as part of the Canadian Charter of Rights and Freedoms will have far-reaching consequences. Indeed, every decision taken by a local government going forward, should the decision in *Mathur* result in an evolution of Canadian Charter of Rights and Freedoms in the direction sought by the plaintiffs, would need to consider any environmental rights or duties recognized by the court. It is not unreasonable to conclude that this has the potential of making NAM more appealing to local governments.



8.3 Indigenous law and legal developments

Although a detailed exploration of the relationship between Indigenous and Aboriginal law¹⁰³ and local governments is beyond the scope of this primer, municipalities will benefit from a high-level understanding of the ways in which developments in this area may affect them both generally and in the specific context of natural asset management.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Since 2019, the Province of BC and the Government of Canada have both enacted legislation affirming the application of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) to Canadian law.

UNDRIP is a non-binding international human rights instrument that interprets how human rights from a variety of legally-binding human rights instruments apply to the unique circumstances of Indigenous peoples. It sets out the rights that “constitute the minimum standards for the survival, dignity and well-being

¹⁰³ In short, Aboriginal law is Crown law (i.e. common and civil law) applied to Canada’s Aboriginal peoples (as this term is defined in the *Constitution Act, 1982*) and Indigenous law refers to the laws of Indigenous peoples under their own legal orders.

of Indigenous peoples around the world”¹⁰⁴ as well as rights under the following 10 themes:

- 1/ General Principles
- 2/ Self-Determination, Self-Government, and Recognition of Treaties
- 3/ Implementation and Redress
- 4/ Lands, Territories, and Resources
- 5/ Environment
- 6/ Civil and Political Rights
- 7/ Participation in Decision-Making and Indigenous Institutions
- 8/ Economic and Social Rights
- 9/ Cultural, Religious, and Linguistic Rights
- 10/ Education, Information, and Media

Importantly, BC and Canada’s UNDRIP legislation include provisions requiring both governments to take “all measures necessary” to ensure that the laws of BC (including all legislation that empowers local governments) and Canada, respectively, are consistent with UNDRIP.

While both governments have begun facilitating this process, given the scope of rights set out in UNDRIP, it is a truly transformative process that may take decades if not longer to fully realize. Indeed, the key takeaway from these efforts at the implementation of UNDRIP for NAM is that local governments more generally—if UNDRIP is fully implemented—will have to grapple with the reality that Indigenous peoples’ inherent right of self-government and right of self-determination will have a significant effect on most aspects of local government jurisdiction, including:

- local government laws will need to more meaningfully coexist with one or more Indigenous legal orders;
- natural assets relied upon for local government service delivery may hold dual purposes, as some may be key to the exercise of Indigenous peoples’ rights; and
- certain land and natural assets currently under local government jurisdiction may fall outside of local government control or fall under shared decision-making arrangements with Indigenous governing bodies.

ABORIGINAL TITLE LITIGATION

Local governments will also benefit from an awareness of the relevance of certain recent and ongoing litigation relating to the enforcement of Aboriginal title.

104 See Article 43 of the United Nations Declaration on the Rights of Indigenous Peoples, available at: www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

While the legal concept of Aboriginal title has been part of Canadian law since at least 1888,¹⁰⁵ only one case—*Tsilhqot'in Nation v British Columbia*, decided by the Supreme Court of Canada in 2014¹⁰⁶—has resulted in a declaration of the existence of Aboriginal title. Importantly, the *Tsilhqot'in Nation*'s claim in this case deliberately excluded consideration of the legal status of privately-held land. While this was a strategic decision taken by the *Tsilhqot'in Nation* in order to facilitate a certain outcome, it left consideration of the relationship between Aboriginal title and private land for another day. As such, local governments, especially those in parts of BC without treaties, should be aware of several ongoing cases considering this question. Depending on the outcome of these cases, local governments' authority to undertake land-use planning and development regulation could change significantly. While it is difficult to predict the shape of this prospective change, local government jurisdiction could ultimately be shared with Indigenous Nations whose Aboriginal title is recognized on private land within their boundaries.

As in the case of implementation UNDRIP, the implications of this for NAM by local governments could be transformative, not least because certain natural assets currently relied upon by local governments could become subject to constitutionally-protected Aboriginal title.



Historic Treaties and *Yahey v British Columbia*

In June 2021, the BC Supreme Court issued its seminal decision in *Yahey v British Columbia*,¹⁰⁷ the first time a court has directly considered the cumulative effects of industrial development on the exercise of treaty rights. In this decision, the Court clarified the effect of the Supreme Court of Canada's 2005 decision in *Mikisew Cree First Nation v Canada*,¹⁰⁸ which held that: (1) not all decisions by the Crown to take up¹⁰⁹ treaty lands for resource development constitute an

¹⁰⁵ See, e.g., *St Catherines Milling and Lumber Co v the Queen*, (1887) 13 SCR 577.

¹⁰⁶ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

¹⁰⁷ *Yahey v British Columbia*, 2021 BCSC 1287.

¹⁰⁸ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

¹⁰⁹ "Take up" is language used in several of the historic treaties to refer to the Crown use of land that is otherwise subject to treaty rights. For instance, Treaty 8 reads: "And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

infringement of treaty rights that requires legally-sufficient justification and (2) a First Nation may have an action in treaty infringement if the government takes up so much land that there is no longer a meaningful ability to exercise treaty rights.

Specifically, it has now been confirmed that the cumulative effects of industrial development must be taken into consideration when assessing whether treaty rights have been infringed when the Crown has ‘taken up’ lands under a historic treaty. Similarly, the Court has affirmed the importance of considering what was promised in each treaty, rather than solely looking at the present-day exercise of rights in relation to a specific act by the Crown.

Most immediately, the impact of this decision has been felt through recently-announced agreements with Treaty 8 Nations located within BC that aim to facilitate greater consideration of cumulative effects as well as co-management between First Nations and the Crown in relation to land use, wildlife, and other decisions. Looking forward, the implications of the Court’s decision are likely to be widespread—both because many of the numbered treaties contain the same “taking up” clause as Treaty 8 (the treaty considered in the decision); and, because of ongoing contestation and litigation around the country relating to the meaningfulness of Treaty Nations’ ability to exercise their rights and the cumulative effects of development, including local government-related development, on the exercise of these rights.



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8.4 Rights of Nature

In 2008, Ecuador became the first country in the world to recognize the concept of the “Rights of Nature” in its national constitution. Since then, several governments have followed suit by adopting laws and other legal instruments recognizing Nature or Mother Earth as a rights-bearing entity or specific ecosystems as legal persons, including:

- In 2010, Bolivia’s Legislative Assembly adopted a Law of the Rights of Mother Earth.
- In 2014, the New Zealand Parliament adopted the Te Erwera Act, recognizing Te Urewera—a former national park—as having “legal recognition in its own right.”

- In 2016, Colombia's Constitutional Court ruled that the Rio Atrata had rights to "protection, conservation, maintenance, and restoration."
- In 2017, Mexico City incorporated language into its city constitution, requiring a law to be passed that would "recognize and regulate the broader protection of the right of nature formed by all its ecosystems and species as a collective entity subject to rights."
- In 2017, the New Zealand Parliament adopted the Te Awa Tupua Act, granting the Whanganui River legal personhood.¹¹⁰
- In 2022, Panama adopted a Rights of Nature law at the national level.¹¹¹

An examination of the nuances and assumptions underpinning the legal concept of the Rights of Nature is beyond the scope of the legal primer. However, it is worth noting that the concept has made its way into Canadian jurisprudence. In particular, in February 2021, the Innu Council of Ekuanitshit and the Minganie Regional County Municipality declared Muteshekau Shipu (Magpie River) a legal person with certain legal rights like the right to live, to exist, and to flow. While the legal effect of this declaration has been debated, and the future of similar initiatives across the country is unclear, it is interesting to contemplate the potential impact on NAM if the very assets being managed and protected are eventually seen as legal persons with legally-enforceable rights to, among other things, maintain their essential ecosystem functions.

¹¹⁰ For this and the preceding bullets, see: www.ijc.org/system/files/commentfiles/2019-10-Nicolette%20Slagle/FAQ.pdf (accessed on Feb 2, 2023).

¹¹¹ See Panama's law at: www.earthlawcenter.org/panama-1 (accessed on Feb 2, 2023).

9 Conclusion

This legal primer provided a high-level overview of several aspects of the law relating to natural asset management by local governments. Aimed at local elected officials and senior management, three key conclusions were drawn out and illustrated:

- 1/ Local governments in the four sample provinces, other than municipalities in Ontario, generally do not have a legal duty to undertake natural asset management; however, they are legally permitted to do so.
- 2/ While there is a lot of case law guiding environmental management actions by local governments, NAM as a practice has received less judicial attention. Nevertheless, application of legal principles common in the local government context to NAM suggests there are certain vulnerabilities to liability that can be addressed by undertaking NAM.
- 3/ Several possible legal developments suggest that the importance of undertaking NAM will only increase—and possibly become more legally necessary—with time.

Therefore, to summarize, while it is already apparent there is a strong business, service delivery, environment and policy case for undertaking NAM, there is also a growing legal justification for doing so as well.

Lastly, as this legal primer was limited in its scope, several additional aspects of the law relating to natural asset management by local governments and other involved in NAM should be considered in the future, including:

- A more detailed examination of Indigenous jurisdiction relating to NAM.
- A detailed review of the legal considerations and tools applicable to local governments in specific provinces, including but not limited to provinces and territories outside of the four sample provinces.
- Development of template bylaws and legal language for using the tools and policies identified in this legal primer.
- Strategies for incorporating a legal analysis into the development of natural asset inventories by local governments, including development of a risk matrix that can be used by local governments as part of this process.
- A review of best practices for co-governance/joint governance models for addressing natural assets that fall under multiple jurisdictions.

Appendix A

Factors Relevant to Duty of Care Analysis for Public Authorities

Paragraphs 243-244 of *Waterway Houseboats Ltd v British Columbia*, 2020 BCCA 378:

[243] There are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator. At the first stage, the task is to determine whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care. At the second stage, if the legislation is not determinative, courts must look to the interaction between the regulator and the plaintiff to determine whether a sufficiently close and direct relationship exists to impose a prima facie duty of care:

STAGE ONE: the legislative scheme

- *The existence of a legislative scheme does not foreclose the possibility of finding proximity, but it is generally insufficient on its own to establish proximity: **Cobble Hill** at para. 66; **Wu** at para. 54.*
- *At the first stage, the task is to determine whether the statute discloses a legislative intention to exclude or confer a private law duty of care: **Cooper** at para. 43; **River Valley Poultry** at para. 66; and **Imperial Tobacco** at para. 44.*
- *The first step is to identify the purpose of the legislation: **Cooper** at para. 43; **Taylor** at para. 76; and **Imperial Tobacco** at para. 44.*
- *Public law duties aimed at the public good do not generally create private law duties, even if the plaintiff is a person who benefits from the proper implementation of the scheme: **Wu** at para. 56.*
- *However, a statutory duty to act can be a strong indicator of an intention to create a private law duty of care: **Fullowka** at paras. 37–55; and **Elder Advocates** at para. 72.*
- *A private law duty is unlikely to be recognized if it conflicts with the public authority's duty to the public: **Los Angeles Salad** at paras. 39–40; **Cobble Hill** at para. 66; **Taylor** at para. 78; **Wu** at para. 57; and **Imperial Tobacco** at para. 44.*

- Where the legislative scheme requires the government actor to exercise its powers having regard to multiple interests, including both the public interest and private interests, the legislation cannot be interpreted as expressly prohibiting consideration of a regulated party's interests: **Carhoun** at para. 104.
- It may be inferred that the legislature did not intend to create a private law duty of care where a statutory scheme provides immunity to the regulator or creates remedies for injured parties other than tort remedies: **Taylor** at para. 78; and **River Valley Poultry** at para. 67.
- The proximity analysis considers specific and limited policy considerations arising from the statute itself. The object is to determine whether there is a sufficiently close relationship between the claimant and the government authority. At the first stage, the policy considerations are relevant as the court is considering whether the legislature imposed proximity on two persons who had never met each other: **Carhoun** at para. 96; and **Cooper** at paras. 37–39.

STAGE TWO: interactions between the parties

- If the legislative scheme is not determinative, courts then consider the specific circumstances of the interactions between the regulator and the plaintiff to determine if a close and direct relationship exists sufficient to establish proximity: **Imperial Tobacco** at para. 50; and **Taylor** at para. 79.
- Findings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific: **Taylor** at para. 80.
- Proximate relationships may involve physical closeness, direct relationships or interactions, or the assumption of responsibility; or may turn on expectations, representations, reliance, or the nature of property or other interests involved. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests: **Cooper** at paras. 32–34; and **Wu** at para. 51.
- Courts have found a duty of care where there is a relationship and connection between the regulator and individual that is distinct from, and more direct than, the relationship between the regulator and that part of the public affected by the regulator's work: **Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41 [Hill]** at para. 33; **Fullowka** at paras. 44 and 55; and **Taylor** at paras. 80–87.
- Courts have also found interactions between the plaintiff and regulator to create a duty of care where the nature of the duty imposed by the legislative scheme is consistent with the existence of a private law duty to an individual plaintiff: **Taylor** at para. 88; and **Hill** at paras. 36–41.

- Policy has a more limited role at the second stage of the proximity analysis where the regulator and the regulated party are in a direct transactional relationship: **Cooper** at paras. 37–39; and **Carhoun** at para. 96.

[244] Before applying these principles, it is important to recognize the distinction between (i) situations in which the actions of the regulator directly impact on the plaintiff as the regulated party and cause harm to that plaintiff, and (ii) situations in which the harm to the plaintiff is caused by the actions of a third party (and the plaintiff's claim is that the regulator should have acted to prevent the actions of that third party): *Taylor*, at para. 87. Both **Cooper** and **Imperial Tobacco** serve as examples of the second situation. The Plaintiffs' claim also fits into this second category. The Province, as regulator, did not directly harm the plaintiff; rather, the Works done by the District and the McLaughlins caused the harm, and the Plaintiffs allege that the Province should have acted to prevent that harm.

Municipal Natural Assets Initiative

