

# The Evolution of Property Rights in the Face of Climate Change

**Land & Development Conference**

May 3, 2017



Laura Zizzo  
Founder and CEO

# Zizzo Strategy Inc.

- Climate change is re-defining risk management, legal liabilities and business imperatives
- We are a multi-disciplinary strategic consultancy firm
  - Drawing on law & policy, engineering, science, accounting
- We help to:
  - Understand critical issues
  - Create frameworks to enable better decision making
  - Implement effective and efficient solutions

## Client groups include:

- Asset owners, builders and operators
- Industry Associations & Not-for-profits
- National and regional governments
- Utilities
- Financial services & institutional investors

# Climate Change Trends and Opportunities

## Significant Economic Impacts of Climate Change Increasingly Recognized

- Bank of Canada warns that estimated cost of inaction could be \$21-43 billion/year by 2050
- Insurance sector feeling impacts
  - Extreme weather payouts rose to \$3.2 Billion in 2013
  - 2016 Fort McMurray Fire = \$3.58 billion alone
- “Trillions” at stake in move to low-carbon economy
  - Global low-carbon market of >\$5.8T and projected to grow at 3% per year
- World Economic Forum named climate change top trend in 2017 Global Risks Report
- Investors, stock exchanges, securities regulators, rating agencies pushing for enhanced climate-related disclosure
- Financial Stability Board – Task Force on Climate Related Financial Disclosures
  - Mandate to improve and standardize the integration of climate change in financial reporting

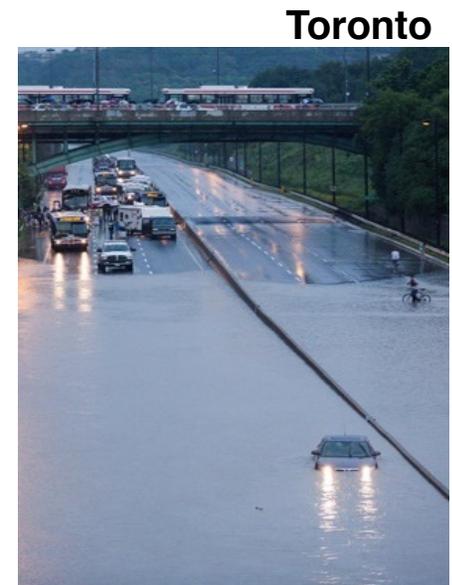
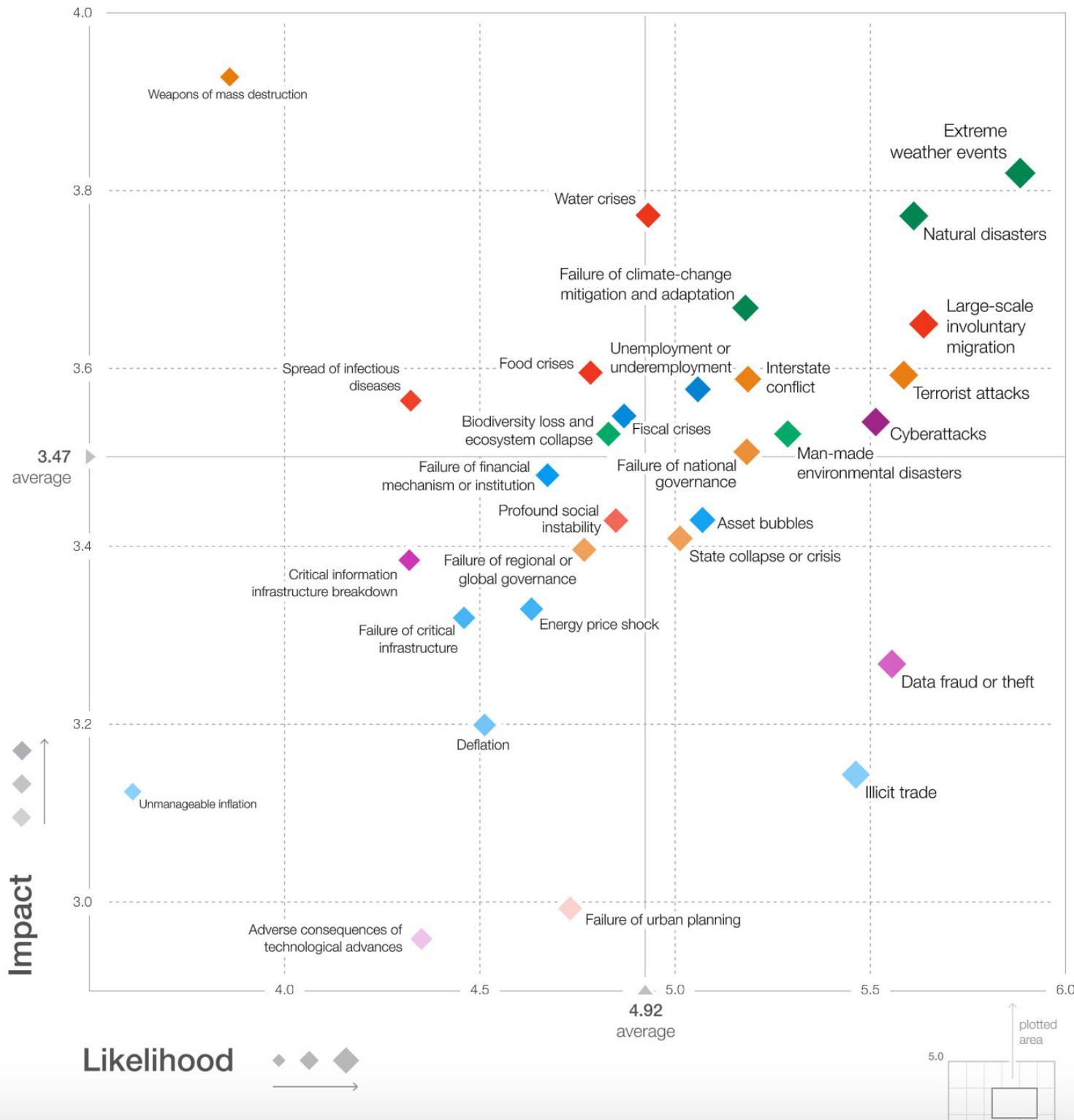


Photo courtesy of Tom Ryaboi

Federal and provincial policy developments responding to these trends and showing opportunity for Canadian leadership in the transition to a low-carbon and climate resilient economy

# World Economic Forum

## The Global Risks Report 2017 12th Edition



# Potential Climate Impacts



- Increasing precipitation & intensity of storms
- More frequent severe freezing/thawing cycles
- More frequent intense summer heat days
- Water level fluctuations
- Water quality and availability changes



- **Increased costs due to impacts on physical assets & potential legal liability**
- **Significant need to adapt**

# Climate Change Impacts Business

## INSURABLE?

Toronto



Photo courtesy of Tom Ryaboi

Calgary

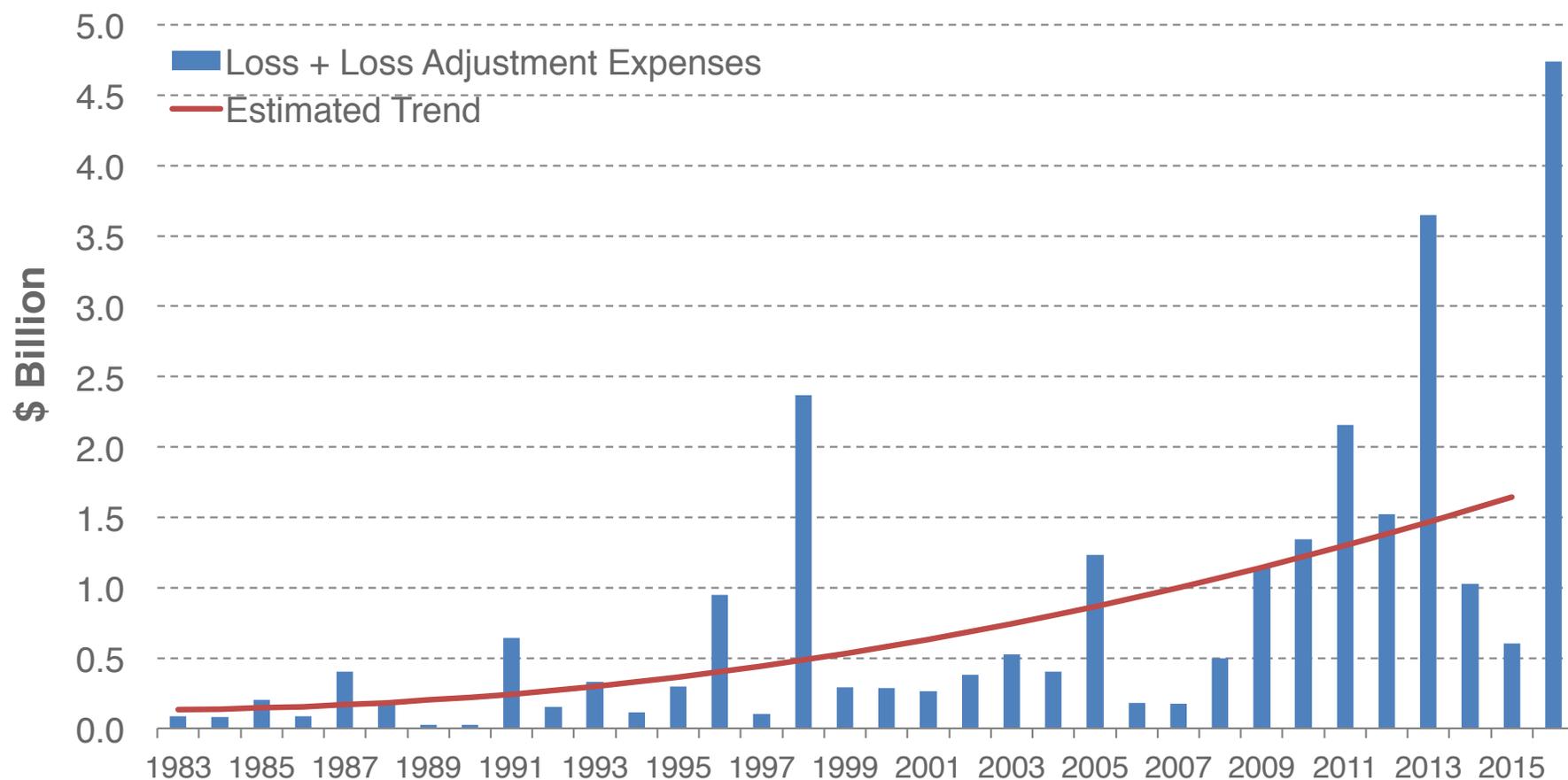


Photo courtesy of the Canadian Press

- Who's responsible?
- Developing adaptation strategies vital to safeguarding the economy
- Insurance availability in a climate adjusted future??

# Risks Related to Climate Impacts

Catastrophic Insurable Losses in Canada (in billions of 2016 dollars)

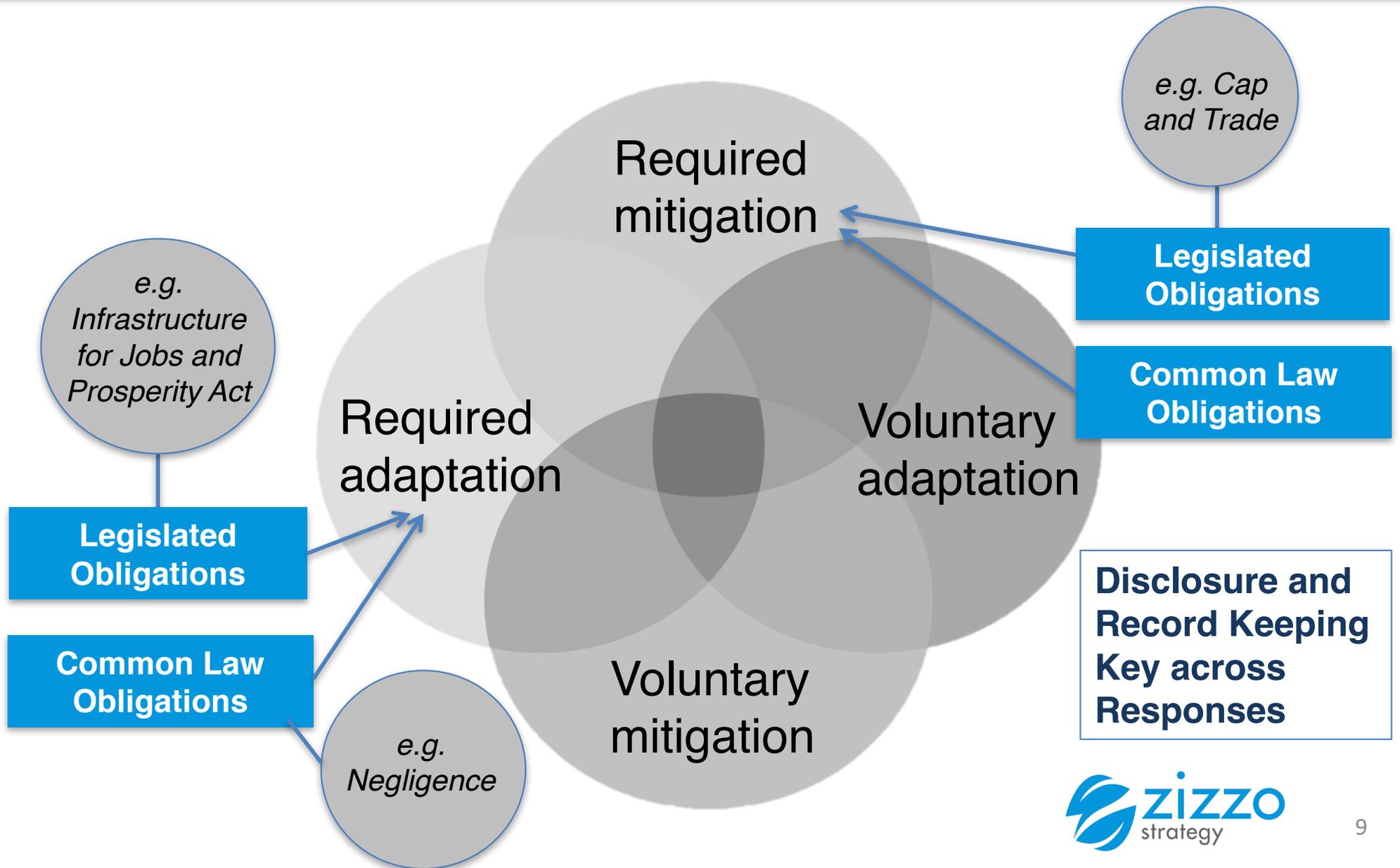


# Increasing Impacts

- Are we ready?



# Response to Climate Change



# Jurisdictional Context



# COP 22 in Marrakech

## From Agreement to Implementation

- Pairs Agreement formally ratified
  - Enforced November 4<sup>th</sup>, 2016
  - Goal: limit warming to well below 2°C above pre-industrial levels and pursue efforts to limit increase to 1.5°C
  - Decarbonization of economy in second half of century
  - 5 year global stock takes, national determined contributions
- Dealt with problems of transparency, next steps towards implementation
- Role of sub-nationals front and centre!
- Action from NGOs and private sector
- Despite Trump election, momentum is unstoppable



*Canadian Minister of the Environment and Climate Change, Honorable Catherine McKenna (middle) speaking at the conference*

**“Global Momentum is Unstoppable”**

# The Pan-Canadian Framework on Clean Growth and Climate Change

11 of 13 provinces & territories signed The Framework

**SK** opposed the Framework

**MB** supported principles of Framework but did not sign due to healthcare-related hold out

**BC** implemented carbon tax in 2008 at \$10/tonne capped at \$30/tonne in 2012 and remains. Raised concerns about other provinces “catching up” and future equivalency among provinces

**AB**’s cap on oil sands emissions and related pipeline approval was key to Framework agreement. AB’s carbon levy begins at \$20/tonne in 2017 and rises to \$30/tonne in 2018.

**MB, ON, QB** looking forward to opportunities related to interprovincial transmission of clean electricity

All members of WCI and have or plan to implement a cap and trade system

Released December 9, 2016

PAN-CANADIAN FRAMEWORK



on Clean Growth and Climate Change

Canada's Plan to Address Climate Change and Grow the Economy

# Framework includes high-level strategies, concrete actions and spending commitments

- Framework organized around Working Group pillars
  1. Carbon pricing
  2. Other emissions reduction measures
  3. Adapting to climate change and building resilience
  4. Accelerating innovation, clean tech and job creation
- Each pillar includes discussion of:
  - High-level strategic priorities
  - Relevant case studies and successful project examples
  - New actions federal and/or provincial and territorial governments will take
- “Actions” range from concrete (e.g. develop model building code by 2030) to vague (e.g. explore ways to collaborate)
- Commits to reporting on progress in transparent way, details not yet developed

Opportunity for private organizations to convene and mobilize for additional emissions reductions to reach targets

# Provincial Patchwork

- Cap and Trade
- Baseline Credit
- Carbon Tax
- Adaptation and resiliency initiatives
- Municipal leadership



# Legislative Requirements



# Legislative/Regulatory Liability Overview

- Greater adaptation requirements in legislation
  - Direct incorporation of climate change considerations
  - Indirect incorporation of climate change considerations
- Additional liability for decision makers
- Standards developing (some by design, some reactively)



# Legislative Requirements

- Ontario *Infrastructure for Jobs and Prosperity Act, 2015*
  - Infrastructure should be designed to be resilient to the effects of climate change
- Ontario *Water Opportunities and Water Conservation Act (2010)*
  - May require assessment of climate risks
- British Columbia *Living Water Smart* strategy
  - Outlines new approaches to water management that “will address the impacts from a changing water cycle, increased drought risk and other impacts on water caused by climate change.”
  - Promises to link climate change consideration to provincial funding

# Negligence



# Negligence

- Injury to person(s) or property because another failed to take reasonable care
  - Duty
  - Standard of Care
  - Causation, Foreseeability, Damages
- Policy decisions may be exempt
- Possible Defendants:
  - Owner or occupier (including government)
  - Government entities
  - Engineers, architects and other design professionals
  - Contractors

# Standard of Care

- Relying on outdated standards/processes can be negligent if new info suggests they should be reconsidered
- Factors to determine standard of care:
  - Industry standard of practice is key (encourages coordination)
  - Statutory requirements considered, not determinative
  - Standard “at the time” of act that is being claimed as negligent
  - Guided by reasonableness in the circumstances

# Evolving Standards

- Historical data can no longer adequately predict the future
- Need for better vulnerability assessment tools:
  - Examples:
    - PIEVC
    - Green Building Standards/Building Code Evolution
    - New standards of care
    - Application of climate models
    - Risk management frameworks

# Class Actions

- A real and present threat – currently at least two major cases regarding flooding with municipal defendants:
  - City of Thunder Bay (\$300M)
  - City of Mississauga (\$200M) (withdrawn)
  - City of Stratford (settled for \$7.7M)
  - Chicago Famers Insurance (referenced climate change, withdrawn)
- Uses traditional causes of action (e.g. negligence)
- Efficient and improved access to justice
- Representative plaintiff for similarly situated, defined class
- Common issues decided together

# 2016 Muskoka Class-Action

- \$900M lawsuit launched by Muskoka residents
- Damage caused by flooding due to high water levels and abnormal spring runoff
- Allegations that Ministry of Natural Resources was negligent for failing to control water levels



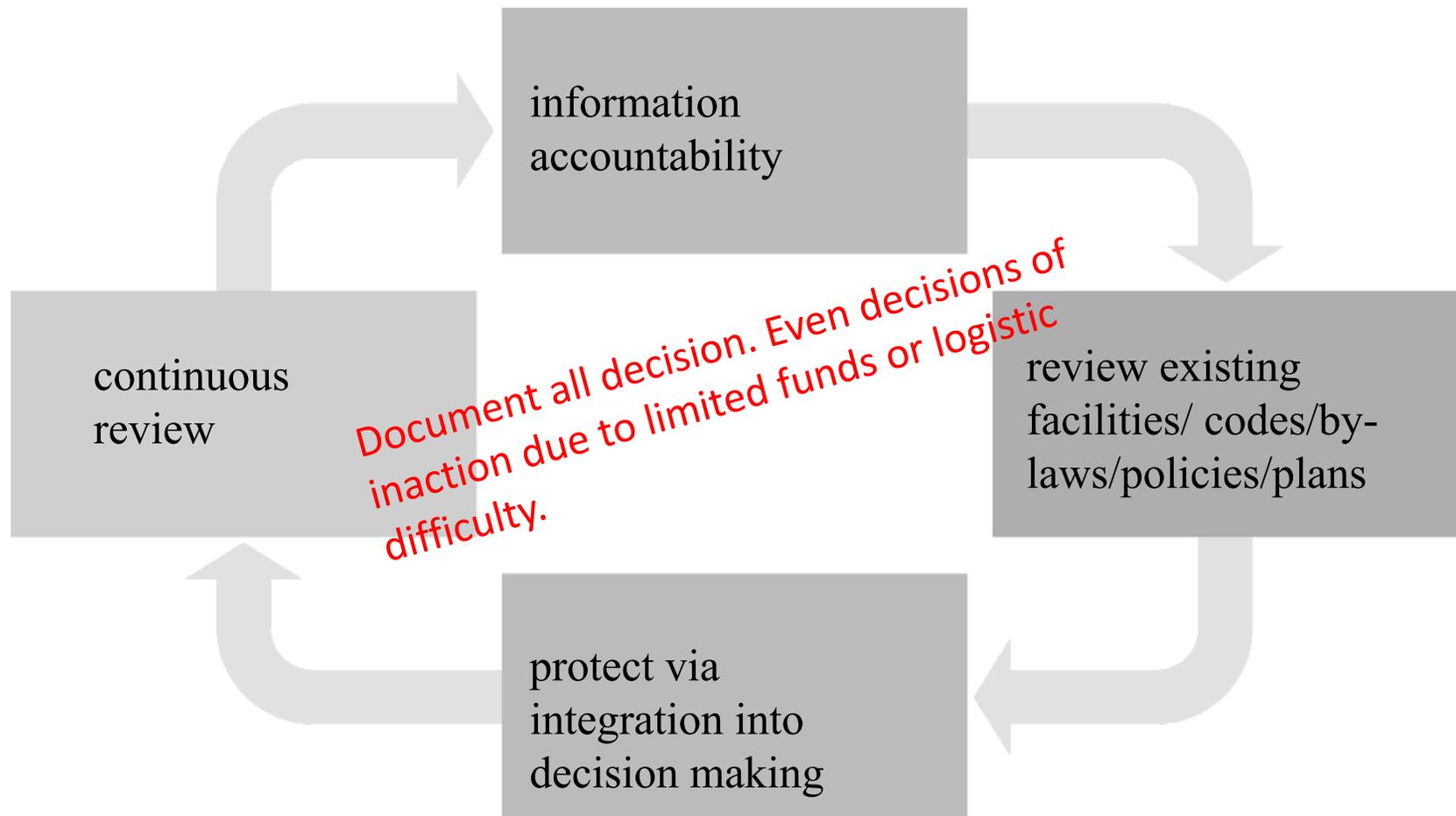
Source: <http://rsmuskoka.com/muskoka-flood-2016-causing-significant-damage-lakeside-properties/>

# Special Issues

- Inspection schemes can be both policy or operational based on facts of the case
  - Inspections must be carried out non-negligently
  - Negligent conduct of owner/occupier doesn't absolve municipality
- Permitting could be negligent
  - Little case law, but some guidance that if authority knew or should have known there was a risk before issuing permit could be negligent
- Enforcement could be negligent
  - Decision not to enforce a by-law could be negligent

# Risk minimization

Put your mind to issues – not willfully blind



# What Can You Do?



- Identify problem
- Policy solution
- Implement consistently and with due diligence
- Role for standards, education, all in context of what is “reasonable”, and “should be known”

# Comments and Discussion

## Thank You



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