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# SUING FOSSIL FUEL GIANTS

## AN INTRODUCTION FOR LOCAL GOVERNMENTS

Andrew Gage, Staff Counsel

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In January 2017, over 50 BC-based environmental groups asked the province's local governments to consider a class action lawsuit to recover a share of their climate-related costs from global fossil fuel companies. Since then the State of Rhode Island, New York City, San Francisco and a dozen other local governments in the U.S. have launched such lawsuits, and in BC there is growing interest in ways to pay for rising costs of climate change and to press fossil fuel companies to pay a fair share of those costs.

### **Why do climate lawsuits matter to our communities and our planet?**

BC communities face millions, and collectively, billions, of dollars of expenditures to prepare for and recover from events made worse by climate change (wildfires, flooding, coastal erosion, drought, etc.). Canada is warming twice as fast as the global average, and in 2018 Canadian governments paid an estimated \$5.7 billion to rebuild public infrastructure harmed by extreme weather,<sup>1</sup> much of it attributable to climate change.

Currently taxpayers pay all of these costs. At the local level, elected officials who want to maintain existing levels of services will need to find ways to pay for mounting climate costs. Provincial and federal funding is uncertain, and raising local taxes is challenging.

### **Fossil fuel giants should pitch in to address climate costs**

Fossil fuel companies — Chevron, ExxonMobil and other global corporations — share responsibility for causing climate change, as do all of us who use their products. Unlike

taxpayers, however, the fossil fuel companies are escaping responsibility for climate costs. Climate litigation can hold fossil fuel companies legally accountable for a fair share of the bill.

Demanding that fossil fuel companies take responsibility for harm caused by their products reduces the burden on taxpayers. It also helps fossil fuel companies, their investors and governments value the costs and benefits of oil, gas and coal more realistically by including some of the climate costs of fossil fuel products on the corporate balance sheet. Corporate behaviour and investment is already shifting as a result of climate litigation, with companies investing more in renewable energy and disclosing risks related to fossil fuels.

### **Like climate change, climate litigation has a global impact**

Climate litigation targets global fossil fuel companies for their *global* operations, giving local governments the power to demand accountability beyond Canada's borders. Canadian law on international disputes allows BC municipalities to sue global companies in Canadian courts because harm is experienced in BC.<sup>2</sup>

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<sup>1</sup> Insurance Bureau of Canada. [“Severe Weather Causes \\$1.9B in Insured Damage in 2018”](#) (Jan. 16, 2019). For every \$1 paid out in insurance, IBC estimates that Canadian governments pay out \$3 to recover public infrastructure. \$1.9B in insured losses means approx \$5.7 billion in taxpayer costs.

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<sup>2</sup> Gage, A. and Wewerinke, M. [Taking Climate Justice into our own Hands](#). (Vancouver: West Coast Environmental Law, 2015).

### What might a class action lawsuit look like?

The specifics would be up to the local governments and their lawyers. However, based on our research, and with input from senior litigation specialists, West Coast has the following general recommendations:

<b>A class action</b>	A class action would reduce the costs of multiple lawsuits by allowing plaintiffs to work together to settle key questions of fossil fuel company responsibility for climate change. BC's class action rules protect parties from having to pay the other side's legal fees if they lose.
<b>Brought by local governments for climate adaptation costs</b>	Legally, to protect their citizens, local governments must build infrastructure now to withstand future climate patterns, based on the best available science. A court is likely to accept the link between current costs and climate change, giving the municipalities the right to sue to recover the costs.
<b>In nuisance</b>	Nuisance is unreasonable interference with property, including municipal infrastructure (private nuisance) or with our common rights and interests in a healthy global atmosphere (public nuisance).
<b>Against fossil fuel companies</b>	Just five companies (Chevron, Exxon Mobil, Saudi Aramco, British Petroleum and Shell) are responsible for approximately 14% of historic greenhouse gas emissions. <sup>3</sup> A lawsuit could claim a contribution from each company based on their respective percentage as well as the efforts of companies to mislead the public and delay action on climate change.

Big Tobacco, Asbestos, and Big Pharma all learned that if you sell products that you know will cause massive harm, sooner or later you will be sued.<sup>4</sup> The same goes for the fossil fuel industry.

### How can we manage the costs of litigation?

Class actions provide for flexibility in funding. Options to manage costs include:

- sharing the costs, based on each community's ability to pay and desire to play an active role in the litigation;
- crowdfunding from members of the public;
- funding from private foundations or philanthropists; and
- hiring lawyers and experts willing to work at a reduced rate, or on a contingency basis.

The first stage of a class action lawsuit is to ask a judge to certify that the case should be allowed to proceed as a class action. Successful certification may raise the profile of the case and increase options for funding (including using any settlements to fund the litigation against remaining companies).

Parties in class action lawsuits in BC are not generally required to pay defendants' legal costs.

<sup>3</sup> R. Heede. *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010*, Climatic Change [Vol. 122: 1-2, January 2014], pp. 229-241.

<sup>4</sup> M. Olszynski et al. *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*. Georgetown Environmental Law Review [Vol 30:1] 1.

### Why sue fossil fuel companies?

There's no way around it: solving climate change means dealing with our collective fossil fuel dependency. Plentiful and relatively cheap energy from fossil fuels has benefitted modern society, but we're now realizing that there were enormous deferred costs to our communities.

In a society relying on fossil fuels, we're all responsible for climate change. That means that both consumers AND producers need to take responsibility. Fossil fuel companies, along with consumers, *share* responsibility for climate change.

Right now taxpayers carry the entire burden of climate costs caused by fossil fuels, while fossil fuel producers continue to make a lot of money from selling them. Asking companies to bear *some* of those costs is not about blaming the industry or denying individual responsibility – it's about acknowledging our shared responsibility.

Chevron, Exxon Mobil and other fossil fuel companies knew in the 1960s that their products would cause climate change and devastating impacts to communities around the world. Still, they chose to:

- undermine technology in solar, wind and low-emission vehicles (among others) that could have offered consumers less-polluting choices;
- fund and participate in misinformation campaigns designed to mislead the public (consumers) on climate science;
- lobby against laws and international agreements intended to fight climate change.<sup>5</sup>

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<sup>5</sup> CIEL. [Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis](#) (November 2017), last accessed 10 April 2019.

### How long will climate litigation take?

On average class action lawsuits in Canada take three to four years, but complex litigation against fossil fuel companies could take significantly longer. However, once a class action is filed it would have immediate impacts.

Facing climate lawsuits in the U.S. and possible litigation elsewhere, oil giants like Chevron<sup>6</sup> and Saudi Aramco<sup>7</sup> have already warned their investors to factor this type of litigation into their investment decisions. As well, oil giants have demonstrated an increased interest in climate action since being sued:

- ExxonMobil endorsed a proposal for a U.S. carbon tax starting at \$40/tonne that would also protect oil companies against U.S. litigation<sup>8</sup> – a cynical move, but it shows how seriously the company takes the risks of litigation.
- Shell increased investments in renewable energy to \$2 billion/year shortly after being sued in the U.S., and has plans to increase that to \$4 billion/year;<sup>9</sup>
- Shell, and to a lesser extent Chevron and ExxonMobil, have recently withdrawn from industry associations that oppose climate action.<sup>10</sup>

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<sup>6</sup> ThinkProgress. [“Chevron is first oil major to warn investors of risks from climate change lawsuits”](#) (Mar. 2, 2017).

<sup>7</sup> Climate Home News. [“Saudi Aramco says climate lawsuits ‘could result in substantial costs’”](#) (Apr. 2, 2019).

<sup>8</sup> Vox. [“Exxon is lobbying for a carbon tax. There is, obviously, a catch.”](#) (Oct. 18, 2018).

<sup>9</sup> The Guardian. [“Shell says it wants to double green energy investment”](#) (Dec. 26, 2018).

<sup>10</sup> Reuters. [“Citing climate differences, Shell walks away from U.S. refining lobby”](#) (Apr. 2, 2019).

### **Why litigate, instead of carbon pricing?**

A global price on carbon for the actual costs of burning fossil fuels would be ideal. Such a price would shift investment decisively to renewables, while providing revenue to communities harmed by climate change. A global price would not allow companies to move around to avoid it.

But global pricing systems – for example, the International Oil Spill Compensation Funds – have often emerged *as the result* of national efforts to secure liability (through courts or legislation) against international polluters.<sup>11</sup>

Without the possibility of litigation, fossil fuel producing countries have in the past opposed carbon pricing proposals, leaving it to individual countries to take action. In Canada, a carbon price (unlike a lawsuit under Canadian law) applies only to Canadian emissions, affecting only a small portion of global GHG emissions.

In the absence of strong global action to regulate greenhouse gases, litigation is a way for communities to build momentum for corporate and government climate action.

### **How do climate accountability letters and legislation relate to a class action lawsuit?**

Many BC communities are sending climate accountability letters to fossil fuel companies demanding compensation, and calling on the provincial government to enact a law to clarify the legal responsibility of these companies. Along with litigation, climate accountability letters and legislation are important tools in the toolbox for holding fossil fuel companies accountable for harm caused by their products.<sup>12</sup>

Climate accountability letters are an accessible way for a community to call attention to the moral and legal responsibility of fossil fuel companies for local climate costs. They help shift corporate and public dialogue about who should pay for climate costs, and demonstrate to courts, legislators and corporations that there is public interest in seeing fossil fuel companies pay a fair share. They do not commit a local government to taking other legal action.

Climate lawsuits can, and should, be brought under existing legal rules – but fossil fuel companies and their corporate lawyers are going to aggressively argue that those rules shouldn't apply to them. A *Liability for Climate-related Harms Act* could answer fundamental questions and shorten years of litigation and appeals. Similar to the *Tobacco Damages Recovery Act* from the 1990s, and the more recent *Opioid Damages and Health Care Recovery Act*, BC could enact legislation that would clarify liability around climate costs.<sup>13</sup>

### **Conclusion**

A lawsuit by BC's local governments against global fossil fuel companies for climate costs will ensure that governments, corporations and investors start to address the true costs of fossil fuels in their financial decisions. Knowing that they may need to pay for the harm caused by their products gives these companies a strong incentive to invest their considerable expertise and resources in building a sustainable future. At the same time climate litigation helps ensure our communities have the resources needed to protect themselves from climate change.

For more information, contact Staff Lawyer Andrew Gage at [agage@wcel.org](mailto:agage@wcel.org).

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<sup>11</sup> P.D. Lowry. *The Shipowner and Oil Pollution Liability*. McGill Law Journal (1972) Vol 18(4) 577.

<sup>12</sup> Gage, A. [Climate Accountability Letters: An Introduction for Local Governments](#). (West Coast Environmental Law, 2017).

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<sup>13</sup> Gage, A. and Wewerinke, M. [Taking Climate Justice into our own Hands](#) (West Coast Environmental Law, 2015).