

An Open Letter on Climate Accountability Litigation in Canada

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We, the undersigned Canadian law professors, write to support current proposals asking local, provincial and federal governments to take legal and other action to recover a share of local climate costs from global fossil fuel companies, as a means of shielding taxpayers from the full range of current and future costs resulting from climate change.

For governments to explore such strategies is not just prudent, it is imperative given the mounting public and private costs of managing the impacts of climate change.

The logic is simple: those who profit from selling harmful products should bear their fair share of the cost of the harms caused by their products. Those suffering the harm, and the governments that represent them, should not bear the entire cost.

This logic can be applied to a wide range of problems—from tobacco to opioids, defective breast implants or asbestos. In environmental law, it is captured by the polluter pays principle—the polluter should bear the cost of pollution. This principle is well established in Canadian law.

Local leadership

Local governments in Canada and beyond have a well-earned reputation for environmental leadership and innovation, including in the field of climate change. Exploring ways to hold major fossil fuel companies accountable for the local costs of climate change is a logical extension of this leadership. The Cities of Toronto and Victoria are actively considering lawsuits against fossil fuel companies for a share of climate costs. A growing number of communities are asking the federal and provincial governments for legislation to clarify the legal rules for such litigation. Others have written to global fossil fuel companies asking them to take responsibility for the costs caused by their products.

Climate accountability litigation

The legal system has never had to deal with a problem quite like climate change. On the one hand, climate change is caused by fossil fuel use and other actions that have become ubiquitous in our society, implicating everyone to some degree. On the other, the direct effects of climate change represent a widespread violation of a huge range of legal rights on a scale difficult to comprehend.¹

A lawsuit against major fossil fuel corporations for climate-related costs will clearly be novel, in the sense that courts will need to answer difficult questions that they have not previously considered. It is consequently difficult to predict the prospects for its success,

¹ See Kysar, Douglas A. 2011. “What Climate Change Can Do About Tort Law” *Environmental Law* 41(1): 1-71 (available at <https://ssrn.com/abstract=1645871>) at 9-10 for discussion of these contradictions.

because established legal principles will need to be applied in new ways and in a new context.

However, this does not mean that such a lawsuit cannot be won or that local governments should not explore its potential. Such a case would be novel in the same way that the first court cases demanding recognition of indigenous rights or gay marriage, or claiming compensation against tobacco or asbestos companies, were novel. Many members of the legal community viewed such cases as impossible when they were first proposed, and yet they ultimately proved successful.

In our view, existing legal principles could form a solid basis for a lawsuit filed by a local government against fossil fuel companies for local climate costs.² There is also precedent for senior levels of government to expand upon these principles, or address the real or perceived roadblocks to such litigation, through legislation.³

Reasons to act

There are good reasons for Canadian governments, including local governments, to explore a possible lawsuit against global fossil fuel companies:

- **Litigation may be necessary to protect taxpayers from massive public costs.** Climate change is already increasing government expenses associated with public infrastructure, emergency response, disaster relief and associated costs. These expenses will rise dramatically.⁴ Local governments have limited options to raise new funds to pay these increasing costs and should explore all alternatives to taxpayers paying all of them.
- **Litigation can help solve a global problem.** Litigation can be directed not just at emissions occurring in Canada (as is the case for most Canadian regulations), but also emissions outside Canada that cause harm in Canada.⁵ It

² For discussion of the legal issues involved in such litigation in a Canadian context, see Collins, Lynda M. and Heather McLeod-Kilmurray. 2014. *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book), pp. 267-294; Doelle, Meinhard, Dennis Mahony and Alex Smith. 2012. "Canada" in Richard Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press), pp. 525-55.

³ Collins & McLeod-Kilmurray, *ibid.*, p. 291; Olszynski, Martin Z.P., Sharon Mascher and Meinhard Doelle. 2017. "From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability" *Georgetown Environmental Law Review* 30(1): 1-45 (available at <https://ssrn.com/abstract=2957921>).

⁴ The Insurance Bureau of Canada estimates that public infrastructure costs associated with extreme weather are three times the privately insured losses associated with such events. In 2018, privately insured losses were \$1.9 billion, which would translate to \$5.7 billion in public losses. Insurance Bureau of Canada. 2019. "Severe Weather Causes \$1.9 Billion in Insured Damage in 2018" (16 Jan.) <http://www.ibc.ca/on/resources/media-centre/media-releases/severe-weather-causes-190-million-in-insured-damage-in-2018>.

⁵ Gage, Andrew and Margarethe Wewerinke. 2015. *Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act* (Vancouver; Port Vila, Vanuatu: West Coast Environmental Law and Vanuatu Environmental Law Association) (available at <https://www.wcel.org/publication/taking-climate-justice-our-own-hands>).

therefore has the potential to affect behaviour and business decisions related to climate change at a global level.

- **Litigation can establish accountability for past actions.** Efforts at climate change regulation are aimed mainly at reducing future greenhouse gas emissions, not at remedying harms put in motion by past emissions. Providing remedies for harms caused by past actions is among the main functions of civil litigation. Climate accountability litigation and climate change regulation are thus two complementary pillars of an integrated climate change strategy.
- **Litigation is an appropriate response to a history of corporate deception.** A large body of evidence has been uncovered in recent years demonstrating that fossil fuel companies were well aware that their products would cause harmful climate change, but chose to expand their production and profits while misleading the public and lobbying against climate action.⁶
- **Advances in climate science make litigation more feasible.** The science of global climate change is increasingly clear and improving all the time. Scientists are increasingly able to draw causal links between localized harms and climate change⁷ and to quantify the proportionate contribution of particular fossil fuel companies to global greenhouse gas emissions.⁸
- **Global precedents show that climate accountability litigation has potential.** Lawsuits against fossil fuel companies in other countries have confirmed the general validity of these types of claims.⁹ A number of cases in the United States were dismissed at early stages (some of which are under appeal), but these decisions generally hinge on legal principles unique to the US, and some statements of law in those cases are helpful for potential plaintiffs in Canada.

The alternative to holding fossil fuel companies accountable for a share of climate change costs is that those companies continue to make massive profits from selling fossil fuels while Canadians (and others around the world) bear 100% of the costs.

⁶ Center for International Environmental Law. 2017. *Smoke and Fumes. The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis* (Washington, DC: CIEL) (available at <https://www.ciel.org/reports/smoke-and-fumes/>).

⁷ Marjanac, Sophie and Lindene Patton. 2018. “Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?” *Journal of Energy & Natural Resources Law* 36(3): 265-298; Frumhoff, Peter C., Richard Heede and Naomi Oreskes. 2015. “The Climate Responsibilities of Industrial Carbon Producers” *Climatic Change* 132: 157-171.

⁸ Heede, Richard. 2014. “Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010” *Climatic Change* 122: 229-241; Frumhoff, Heede & Oreskes, *ibid.*

⁹ Although no court has ruled on a climate damages case on its merits, the Higher Regional Court of Hamm in *Lluyia v. RWE*, in a decision dated 30 November 2017 ruled that a claim against German Coal giant RWE had a basis in law and should proceed to an evidentiary hearing (unofficial translation available at <https://germanwatch.org/sites/germanwatch.org/files/announcement/20812.pdf>). The Philippine Human Rights Commission has conducted hearings into the role of 47 private global fossil fuel companies in violating human rights through their contribution to climate change (<http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>).

One of the purposes of tort law is to ensure that businesses incorporate the full costs of their products, to ensure that they have an incentive to improve their behaviour over time.

It is important to emphasize that exploring climate accountability litigation and related strategies is not an attack on Alberta or the Canadian energy sector. Rather, such strategies can help level the global playing field, rewarding Canadian energy companies that invest in emissions reducing technologies and support sensible climate policies.

Conclusion

As climate change worsens, local governments will struggle to deal with the rising costs of building climate resilient infrastructure and communities and of dealing with the impacts of climate disasters. It is critical that communities begin to assess how they will pay for these costs and explore whether private parties that have made a globally significant contribution to causing climate change should pay some share of those costs.

Sincerely,

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