

The Next Steps to Sue Big Oil: What happens after local governments agree to sue Big Oil?

The Sue Big Oil campaign is urging local governments to work together to bring a class action lawsuit against global fossil fuel companies for a share of the costs of climate change that BC communities are experiencing. The goal is to sign up a large number of local governments, with each contributing \$1 per resident towards the costs of the lawsuit. The focus of Sue Big Oil is to get a sufficient number of local governments on board so the lawsuit can be launched – perhaps 10-20 municipalities and regional districts representing a population of 500,000 or more British Columbians (roughly 10% of the province’s population).

But what happens when that goal is reached and the local governments are ready to move to the next stage? The precise steps are going to depend on what the local governments decide with their legal counsel, but here are the next steps of the litigation as West Coast Environmental Law, Secretariat to the Sue Big Oil campaign, envisions them.



Step 1 – Collaboration

The intention is to move forward with the lawsuit when there are enough local governments committed to the case to demonstrate to a court that there is a “class” that wants to see the case go forward and to raise funds for the Certification state of the class action lawsuit. When municipalities representing a population of at least 500,000 have signed on, the local governments need to meet to:

- **Retain a legal team:** This should be a team of lawyers specialising in class actions and civil litigation, and ideally willing to work on a partially pro bono or contingency basis. The law firm of Arvay Finlay has prepared a legal opinion for local governments on this type of case and might be part of the legal team, or the local governments could select other law firms to represent them;

- **Select one or more lead plaintiffs:** A class action lawsuit is filed by one or more lead or representative plaintiffs who provide instruction to the lawyers bringing the case and represent the interests of the class. Being the lead plaintiff requires a larger commitment from the local government(s) that assume that role. It would make sense to have at least one municipal lead plaintiff and a regional district lead plaintiff, but there may be tactical or legal reasons for other lead plaintiffs;
- **Develop a cooperation agreement:** Working with their legal team, the local governments should come to an agreement on how they will work together through the litigation. In particular, how the lead plaintiff(s) and the legal team will report to, take input from, and be supported by, the other local governments.

There may also be coordination with the Sue Big Oil campaign or other community groups to address communications, funding or other needs.

Step 2 – Filing and certifying the class action

Once the lead plaintiff(s) and legal team have been identified, they can file the lawsuit in the BC Supreme Court and have it certified as a class action. Certification will be one of the first steps in the litigation process, with a judge being asked to rule on whether the local governments' claims should be allowed to proceed as a class action.

If the local governments are successful, the judge will, as part of this certification process:

- determine if there is a “cause of action,” meaning a valid legal claim that could be won. If the local governments are successful in this part of the certification, the judge will confirm that there are no fundamental barriers to a successful lawsuit, and is likely to make some rulings on the relevant legal principles that could lead to a finding that the fossil fuel companies are liable;
- confirm that the local governments are an acceptable “class” of plaintiffs and that the lead plaintiff(s) are able to represent their interests;
- identify the “common issues” that will be considered through the class action, meaning legal questions that all of the local governments will need to answer to prove the liability of the fossil fuel companies. This would include questions like are local governments able to make a claim in respect of climate costs, are fossil fuel companies appropriate defendants, under what circumstances could they be responsible for harm caused by their products, what is each defendant's proportionate share of harm, do they have any valid defences, etc. It would not include individual issues, such as the particular climate costs faced by individual local governments;
- confirm that the case is most efficiently and appropriately dealt with as a class action.

This step is critical and it is likely that whichever side is unsuccessful will appeal to the BC Court of Appeal and possibly even the Supreme Court of Canada. While time consuming, this has the huge advantage of clarifying many of the legal issues at an early stage. Certification of a class action also protects the local governments from any adverse costs (having to pay the other side's legal fees if the case is lost) as the case proceeds through the next steps.

If the local governments are ultimately unsuccessful (after any appeals), then the case will not proceed to Step 3, and other options will need to be examined to recover the climate costs.

Step 3 – Court process and trial on common issues

Once the class action is certified, the case can proceed to the next stages of litigation. It's possible but unlikely that there could be a settlement offer at this stage.

The next stage of the litigation process involves discovery and disclosure. The lead plaintiffs and fossil fuel companies will need to provide information related to the case to the other parties. This will involve providing copies of any relevant documents and answering relevant questions under oath.

This stage of legal process has been hugely important in past lawsuits against manufacturers of harmful products, such as tobacco and opioids, providing damning evidence about what the defendants knew about the risks of their products and what they did with them.

After information has been exchanged, the case will proceed to a trial on the "common issues." As discussed above, these are the issues that the court has identified in the class action certification as being common to all of the claims of the local governments and will determine whether the defendants can be held liable to local governments for the types of harm claimed.

In addition to the legal process, there will need to be work done to support the litigation, especially financially. The \$1 per resident contributed by local governments should be sufficient to get through the certification of the class action (Steps 1 and 2), but further funds will be required at this stage. Fortunately, a ruling in the certification that the case could be won should put the local governments in a solid position to secure further funds, through community fundraising, foundation funding, crowd-funding, private funding or further contributions by local governments. The goal is to use a range of funding sources to keep the costs to the lead plaintiffs and other local governments manageable.

Step 4 - Settlement or trial on individual issues

If the local governments are successful in the trial on the common issues, it will confirm that the fossil fuel industry defendants are generally liable, but will not answer questions related to liability to particular communities.

There is a high likelihood that the legal team can negotiate a settlement at this stage, since in broad terms the liability of the defendants will be clear. Any settlement will need to be approved by the court as being fair to all members of the class.

If a settlement does not happen, then individual local governments will need to hire their own lawyers at this stage to argue the remaining individual issues and establish what is owed to them.

Conclusion

At the end of the day, the alternative to a class action lawsuit by local governments for climate costs is that residents and taxpayers will need to pay all of the costs of climate change, while leaving fossil fuel companies free to continue polluting and delaying climate action without any consequences.

The costs of any class action lawsuit will be far less than the increased costs of climate change that the local governments stand to recover if this type of lawsuit is successful.

We look forward to supporting local governments as they bring this important class action forward.

For more information contact the Sue Big Oil campaign at info@suebigoil.ca.