

LIABILITY: Are You at Increased Risk of Liability for 'Climate Damages'?



The most common environmental liability risk that companies face is for violations of the environmental laws of the jurisdictions in which they operate. Companies may also face the risk of liability for lawsuits based on specific environmental harm they cause to others, such as contamination of someone's property due to a spill. But the [Canadian Centre for Policy Alternatives](#) recently released a [study](#) by Andrew Gage, Staff Counsel at West Coast, and University of British Columbia professor Michael Byers, that found that Canadian oil and gas companies could be liable for billions of dollars in damages for their contribution to climate change in general. Here's a look at this study, its conclusions and what they may mean for companies in the oil and gas industry and others that generate high amounts of GHGs.

BACKGROUND

Climate change is no longer a far-off threat but a current reality. Examples include extreme weather events like Hurri'cane Sandy, flooding in Alberta and Bangladesh, wild'fires, habitat change (such as the damage caused by the Mountain Pine Beetle) and industry stress (such as reduced industrial access to areas of Northern Canada caused by melting permafrost). For 2010 alone, the global financial cost

of damage associated with climate change has been estimated at \$591 billion, which is expected to increase dramatically in the coming years. In Canada, the National Roundtable on the Environment and the Economy has estimated that climate change will cost \$5 billion annually by 2020.

Given these significant costs, attention will inevitably shift to the issue of compensation and liability, noted the researchers. That is, who'll pay for the costs and damages caused by climate change, as well as the necessary adaptive measures'

The idea that companies responsible for large-scale GHG emissions might be responsible for financial losses associated with climate change isn't new, observed the researchers. Several lawsuits claiming compensation for climate change damages have already been filed in the US. Although these cases have encountered some problems, recent developments in climate science, rising global damages and the lack of progress of international climate negotiations are spurring ever greater interest in what the study refers to as 'climate damages litigation.'

The report explores scenarios in which the legal landscape concerning climate damages litigation could suddenly and dramatically change. The researchers point out that climate change is a global problem: emissions originate in every country and their effects are experienced, to varying degrees, in every country. So nation-specific assessments of the potential for climate damages litigation may overlook the significant and growing risks posed to large-scale GHG producers from transnational lawsuits, including the possibility that a judgment handed down by a court in one country could be enforced in the courts of another. (See, ['Ontario Case Looks at Jurisdiction over Foreign Environmental Judgments,'](#) for one such case pending in an Ontario court.)

The global nature of climate change raises the possibility of

transnational litigation involving a climate victim suing GHG producers in his or her own country' even if the producers are from other countries. Such litigation involves complex questions about:

Jurisdiction. Which country's courts should hear a case' In transnational litigation, there's a presumption that the courts of the place where the wrongful action (called a 'tort' under the law) took place have jurisdiction over compensation for the resulting harm. But, in the case of climate change, the researchers argue that we shouldn't assume that the tort took place in the location where the emissions were produced because those emissions only caused damages in conjunction with global emissions. Instead, claims for climate damages could be brought in countries where the damages are suffered. In fact, improvements in climate change science, the growing frequency of visible climate impacts and the lack of meaningful international action on climate change are making it increasingly likely that courts in countries suffering damage will assert jurisdiction over such cases.

Choice of law. Which country's laws should apply' After a court has asserted jurisdiction, it may be necessary to consider which country's laws apply. Although one might assume that a court will apply the laws of the country in which it's located, in transnational litigation, courts may apply foreign laws instead. In many jurisdictions, including Canada, the law to be applied is the law of the place where the tort took place (such as where the GHGs were emitted). But again, in climate damages litigation, there's a real question as to where the tort took place, meaning that the laws of the country where climate damages have been suffered might apply.

Recognition and enforcement. Which countries will enforce a judgement obtained in another country' GHG producers might assume that damage awards issued by courts in countries where they don't have assets pose little risk. However, in many countries around the world, once a court in a 'foreign

jurisdiction' has awarded damages against a company, the award may be recognized as a debt and enforced against the company almost anywhere it has assets, depending upon the laws of the individual country. The existence of this possibility has serious consequences for GHG producers in developed countries like Canada because it exposes them to climate damages litigation almost anywhere in the world.

Insider Says: The study notes that most commentary on climate damages litigation assumes that liability will be based on current legal frameworks. However, as occurred with tobacco compensation laws in several Canadian jurisdictions, governments sometimes alter rules related to liability in response to new developments. Concerns about the rising costs of climate change could very well prompt governments around the world to enact legislation clarifying uncertainty around climate liability, changing the rules for proving liability or even creating new causes of action. (See the box at the end for some of the legal theories that could be argued in climate damages cases.)

THE STUDY

The potential liability risk borne by GHG producers depends on many factors, including the rights of the individuals suing, the nature of the claim they're making and the type of defendant. The study considers the total potential liability of five oil and gas companies currently trading on the Toronto Stock Exchange: EnCana, Suncor, Canadian Natural Resources, Talisman and Husky. Another study labeled these companies as 'carbon majors,' or among the 90 entities responsible for 63% of total GHG emissions to date.

To calculate the contribution of each Canadian company to the global costs of climate change, the researchers multiplied its percentage of global emissions from 1751-2010 by the total global cost of climate change as provided by the Climate Vulnerable Forum/DARA report. As illustrated by the chart

below, the potential liability of each company is significant, ranging from \$295.6 million to \$709.6 million in 2010 alone and rising to between \$2.090 billion and \$5.015 billion annually in 2030.

Potential Global Liability of Canadian Oil & Gas Companies

ENTITY	% OF GLOBAL EMISSIONS 1751-2010	ANNUAL CONTRIBUTION TO NET COSTS/DAMAGES OF CLIMATE CHANGE (2010)	ANNUAL CONTRIBUTION TO NET COSTS/DAMAGES OF CLIMATE CHANGE (2030)
EnCana	0.12%	\$709.6 million	\$5.015 billion
Suncor	0.10%	\$591.3 million	\$4.179 billion
CNR	0.07%	\$413.9 million	\$2.925 billion
Talisman	0.06%	\$354.8 million	\$2.507 billion
Husky	0.05%	\$295.6 million	\$2.090 billion

Note: Figures are in Canadian dollars

The same method was also used to calculate the contribution of these Canadian companies to the costs of climate change in a sample of representative developing countries impacted by climate change. In India, for example, the potential liability of each Canadian company is between \$37.8 million and \$90.8 million in 2010, rising to between \$297.9 million and \$714.9 million in 2030.

The researchers note that the fact that these figures reflect the total contribution of each company to climate change damages doesn't mean that litigation would be brought successfully for this full amount. For example, even if courts around the world become increasingly willing to award climate damages against fossil fuel companies, there will always be damages due to climate change where the link can't be sufficiently proven. (In Canada, the courts have generally

applied a 'but for' test—that is, whether the harm would not have occurred 'but for' the actions of the defendant.) The only way that awards based purely on damages could even approach these levels would be if lawsuits by governments for all climate damages suffered by their citizens and their country (encompassing a wide range of the climate damages) became commonplace.

On the other hand, the calculations don't reflect the possibility of so-called 'punitive damages,' which are intended to punish egregious behaviour and may be issued in addition to compensation for actual damages. And the study's figures don't reflect the considerable legal costs that companies would incur defending themselves in such lawsuits.

BOTTOM LINE

The researchers conclude that fossil fuel companies and other large-scale GHG producers have contributed, globally, to trillions of dollars of damages related to climate change. As with tobacco companies in the 1980s, these companies appear confident that the law won't hold them responsible for these damages. But rising levels of climate damage, increasing scientific evidence about the links between GHG emissions and the particular damage they cause, and an emerging public debate about who's financially responsible for this damage, could change the situation very quickly.

The most serious risk to Canadian companies isn't litigation in Canada but rather the potential for climate damages litigation nearly anywhere in the world. The potential for climate damages litigation is global in scope. Cases could be brought in a large number of countries, under a wide range of legal theories, and then enforced in Canada or other countries in which GHG producing companies have assets. As a result, these companies are exposed to significant legal and financial risks—and these risks will only grow.

Although there isn't currently any single jurisdiction in which a climate damages award is imminent, the sheer number and diversity of venues, and means through which such litigation might be successful, suggest that civil liability is likely, particularly as the costs associated with climate change rise, say the researchers. And the likelihood will only increase if, as also seems likely, countries severely impacted by climate change adopt laws that remove legal hurdles to climate liability.

Increasingly, around the world, climate change is causing significant damage, leading to demands for compensation. If these demands aren't met through other means, they'll likely be addressed through climate damages litigation. Major GHG producers can manage this risk only by reducing their emissions, which may require moving away from fossil fuels, voluntarily taking steps to reduce emissions even when not legally required and supporting efforts to conclude new international agreements that address climate liability and related issues in comprehensive and meaningful ways.

Although the actual projected liability figures could end up being lower or higher, this report provides a first attempt at quantifying the significant liabilities that Canadian GHG producing companies may be incurring globally. The study concludes that given the sheer number and diversity of potential venues for litigation and the growing interest in pursuing it, civil liability for large-scale GHG emitters is extremely likely, particularly as the costs associated with climate change rise. And although the study focused on oil and gas companies, companies in other industry sectors that also emit high levels of GHGs should also take note of its findings.

INSIDER SOURCE

['Payback Time' What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies,'](#)

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Possible Legal Theories for Climate Damages Lawsuits

The report explains that courts in Canada and the US have recognized that mul'tiple polluters can't escape liability by claiming that no one of them caused the pollution alone. Existing and proposed legal theories that could be applied to climate change in'clude the following:

Significant contribution. Cases in Canada and the US concerning water and air pollution have long recognized that defendants can be held liable for their 'significant' contribution to pollution, even if it only became harmful in combination with other sources of pollution. In fact, lawyers in the US have targeted significant GHG emitters using this approach.

Globally detectable emissions. There's a well-developed body of law in Canada and the US protecting the owners of prop'erty bordering rivers and lakes from water pollution caused by mul'tiple polluters. This case law holds that any detectable change in the naturally occurring quality of water is legally recognized harm, even if that change can't be linked to any particular damages suffered. This theory could be applied to the global atmosphere, meaning that defendants can be said to have caused a 'public nuisance' if the emissions for which they're responsible are detectable at a global level.

Material contribution test. In cases where it's impossible to de'terminate which of a number of negligent acts by multiple parties actually caused the injury but it's established that one or more of them did, in fact, cause the injury, the courts may find a company liable where it has materially contributed to the risk that resulted in the loss. A test based on a material in'crease in risk would clearly improve the prospects of success for cli'mate change lawsuits.

Market share approach. The market share approach allows a court to assign liability for harm caused by a product based on a defendant's respective 'share' in the manufacture and sale of that product. Some commentators advocate extending this theory to climate litigation.

Co-mingled product approach. In cases over groundwater contamination from the gasoline additive methyl tertiary butyl ether (MTBE), the harmful product had come from multiple gasoline manufacturers. In handling one such case, a US court said, 'When a plaintiff can prove that certain gaseous or liquid products of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm.' The co-mingled product approach is applicable to climate damages litigation. In fact, GHG emissions resemble MTBE in significant ways as emissions have no 'chemical signature' that would allow them to be traced to particular emitters and they co-mingle in the global atmosphere.

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