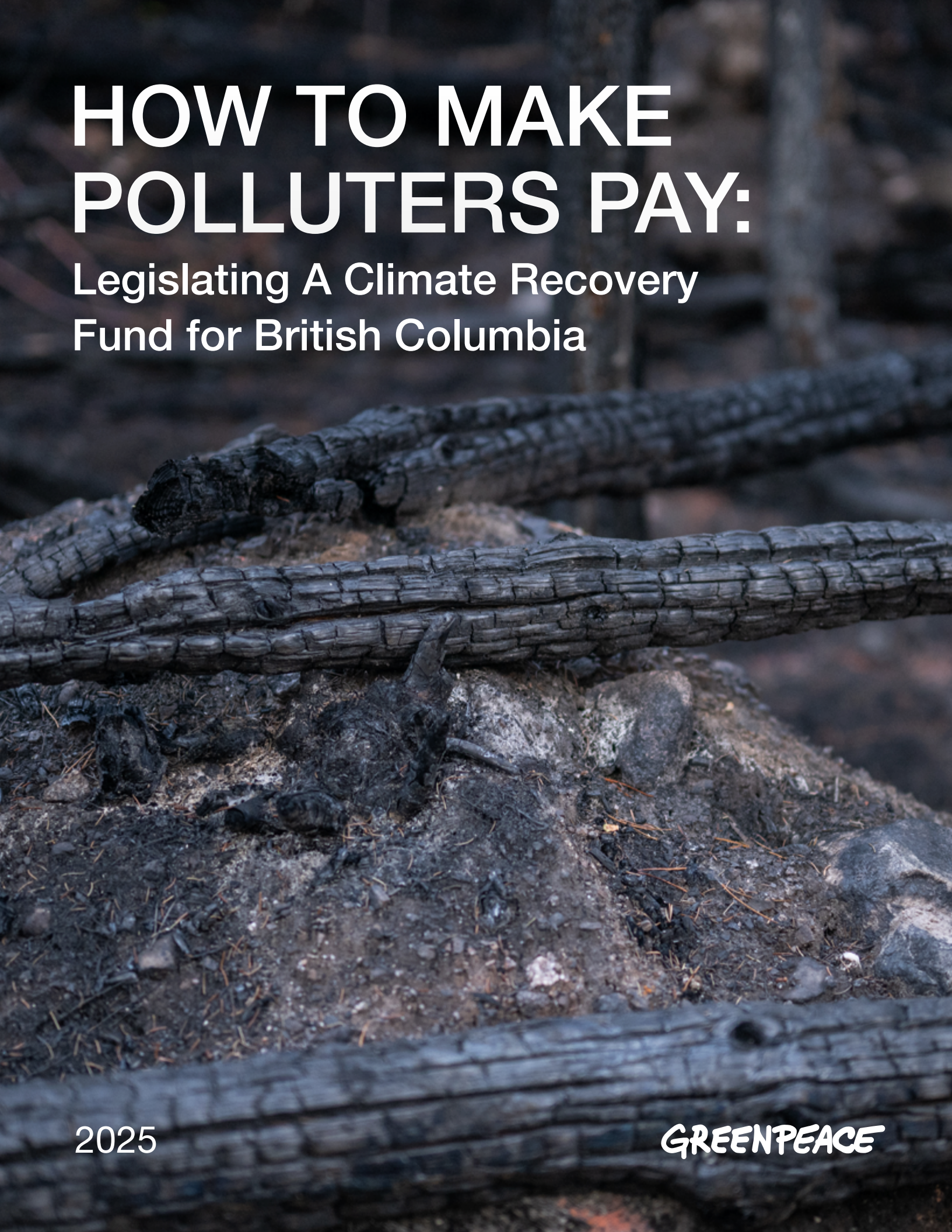
HOW TO MAKE POLLUTERS PAY:

Legislating A Climate Recovery Fund for British Columbia



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About Greenpeace Canada

Greenpeace Canada is an independent campaigning organization, which uses non-violent, creative confrontation to expose global environmental problems, and to force the solutions which are essential to a green and peaceful future. Greenpeace's goal is to ensure the ability of the Earth to nurture life in all its diversity.

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EXECUTIVE SUMMARY

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The world's largest fossil fuel companies have enjoyed extraordinary profits while devastating our planet and communities. For decades, these companies have known that their actions in extracting, refining and marketing fossil fuels were causing climate change, and imperiling global health and safety. As climate-related harms materialize in our communities through record wildfires, drought, flooding, and extreme temperatures, our governments are now on the hook for billions of dollars in climate adaptation costs and infrastructure repairs. Yet the polluters most responsible for causing climate change, who have profited richly from it, have not been held to account for the true costs of their harmful actions.

In jurisdictions around the world, governments are now taking action to make polluters pay. Following in the footsteps of cost recovery legislation for tobacco and opioid related harms, a new wave of legislation seeks to hold the largest fossil fuel emitters financially responsible for the climate-related harms they have caused. Vermont and New York are the first US states to have enacted climate cost recovery legislation. Other US states have tabled similar legislation. Unlike earlier models of tobacco and opioid cost recovery legislation, which triggered decades of litigation in the courts, climate cost recovery legislation creates an administrative framework to directly levy charges on responsible fossil fuel companies. These charges are then used to fund urgently needed climate adaptation and repair projects. The laws apply only to the entities that have emitted more than one billion metric tons of covered greenhouse gas emissions globally – those most responsible for climate change. Liability is apportioned based on each company's relative share of emissions during a defined period, which begins in 1995 or 2000, by which point the harmful effects of greenhouse gas emissions were widely understood, and scientifically undeniable.

British Columbia is well positioned to introduce Canada's first *Climate Cost Recovery Act.* Communities in B.C. are being devastated by climate disasters on a yearly basis. Financial costs are in the billions of dollars for the province and municipalities, as well as Indigenous governments and communities who are disproportionately impacted by climate-related harms. Legislating climate cost recovery will make the polluters most responsible for climate-related harms in B.C. share in the cost. B.C. is also an experienced first-mover in cost recovery legislation. B.C. was the first Canadian jurisdiction to pursue tobacco and opioid cost recovery, and successfully defended its cost recovery legislation against corporate legal challenges.

This report makes the case for a *Climate Cost Recovery Act* in B.C.. The report has three parts. First, it describes the immense financial burden of climate disasters on governments in B.C., why fossil fuel companies should bear financial responsibility, and why B.C. is well positioned to bring climate cost recovery legislation to Canada. Next, the report summarizes the basic tenets of climate cost recovery legislation, drawing on the US precedents in Vermont and New York. Third and finally, the report addresses the legal foundation for a *Climate Cost Recovery Act* in B.C.. Although industry groups will inevitably challenge the law, as they challenged previous cost recovery laws, the law will stand on solid constitutional ground. B.C. has the jurisdiction to implement climate adaptation and repair projects inside the province, and the authority to charge the entities most responsible for causing climate-related harms in B.C. a portion of the costs of addressing them.

The cost of inaction is too great.

THE COST OF INACTION

02

While the largest fossil fuel companies have enjoyed trillions of dollars in profits from the extraction, refining and marketing of fossil fuels, the price tag for the external costs of their products is falling to communities and governments in British Columbia and elsewhere. Action is needed to ensure that the parties most responsible for causing, and profiting from, climate disasters pay their fair share of the costs.

The crippling financial burden of climate disasters on governments in B.C.

Climate change has imposed, and will continue to impose, billions of dollars in added costs for governments and communities in British Columbia. This is due largely to increased frequency of climate-related disasters such as wildfires, heat events, floods, drought, pine beetle outbreaks, and others. These climate-related events impose tremendous fiscal strain on governments.

For example, the 2021 B.C. Budget allocated $200 million to respond to various emergency measures. However, extreme weather events in 2021 required an additional $522 million in disaster and emergency assistance related to floods and landslides, as well as $655 million fighting wildfires.[1] As a result, the 2022 B.C. Budget allocated $2.1 billion to help people and communities recover, rebuild and prepare following extreme weather disasters in the preceding year.[2] Proactive investment in climate adaptation and resilience is needed to avoid even greater costs of repair projects after the fact.[3]

The costs of climate change are borne by municipal and provincial governments in British Columbia as well as by Indigenous communities and governments, which bear the costs of climate change disproportionately.[4] In 2021, the town of Lytton, at the geographical centre of the Nlaka'pamux Nation in the Fraser Canyon region, was devastated by a series of climate disasters: a drought in spring and early summer was followed by the Pacific Northwest heat dome in June, reaching peak temperatures of 49.6 °C, then a forest fire that burned the town to the ground in 21 minutes, and finally a regional atmospheric river in the fall that wiped out all but one access road.[5] Thousands of communities across B.C. are at risk of climate disaster today and are in urgent need of climate adaptation, resilience and repair.

Increasingly, government and non-government institutions have the tools to quantify the economic and fiscal impact of climate-related disasters, and the associated costs of climate adaptation and repair programs. The Canadian Disaster Database includes estimated total costs associated with specific climate-related disasters, including floods, wildfires and extreme heat events.[6] The Canadian Climate Institute has published a series of five reports on the costs of climate change.[7] The B.C. government has itself published reports that quantify costs associated with disaster events, such as over $3 billion in suppression and prevention expenditures relating to wildfires between 2003 and 2017. [8] With respect to mitigating harms from wildfires, the B.C. Auditor General estimated a cost of $6.7 billion simply to treat hazardous fuels in the province. [9]

The largest emitters should pay their fair share of climate recovery costs

While governments in B.C. and elsewhere are forced to spend billions of dollars in climate adaptation and repair costs, fossil fuel companies who are disproportionately responsible for causing climate-related harms have enjoyed unprecedented profits. Oil and gas companies in Canada reported profits of $64.6 billion in 2022 and $37.0 billion in 2023.[10] Since 1990, at which point the impact of fossil fuel extraction on the climate had been well known for many years, the big four carbon majors – BP, Shell, Chevron and Exxon – have generated $2 trillion in profits globally.[11]

Just as tobacco and opioid companies are being required to compensate governments for the external costs of their harmful products, there is a growing movement that seeks to hold fossil fuel companies liable for the billions in costs resulting from their extraction, refining and marketing of fossil fuels in full knowledge of the harms these activities would cause. Strategies to hold fossil fuel companies responsible include a wave of cost recovery litigation[12] and, more recently, legislation in the United States mandating the largest historical emitters to pay into climate cost recovery funds at the state level.[13]

The impact of fossil fuel extraction on climate change has been widely understood for decades. In 1990, the Intergovernmental Panel on Climate Change (IPCC) released its First Assessment Report, concluding with certainty that greenhouse gas (GHG) emissions from human activities were contributing to climate change. Carbon majors have had a sophisticated understanding of the climate impacts of their products dating back to the late 1970s. In the face of such knowledge, fossil fuel production and marketing (and corresponding profits) multiplied over the decades. In Canada alone, GHG emissions have increased by 18% between 1990 and 2015, driven largely by the fossil fuel and transportation sectors.[14]

Yet the companies most responsible for catastrophic climate change, who have enjoyed billions of dollars in profits, have been let off the hook for the damage their actions caused.

B.C. is well positioned to pioneer a *Climate Cost Recovery Act* in Canada

B.C. has a history as the "first mover" in the area of cost recovery legislation for social harms. In 1997, B.C. became the first Canadian province to introduce tobacco health care cost recovery legislation. Similar legislation was later adopted by provinces across the country, and resulted in a recent $32 billion plan to compensate individuals and governments for harms caused by the effects of smoking, including a $3.5 billion payment to the B.C. government.[15] In 2018, B.C. again was the first province in Canada to legislate health care cost recovery from opioid companies,[16] and in 2024, B.C. tabled (but did not pass) broader, non-industry specific health care cost recovery legislation.[17]

B.C. is also uniquely impacted by the climate-related harms within Canada, as a coastal province that experiences wildfires, drought, flooding and extreme temperatures on a yearly basis. Given B.C.'s history as the first mover in cost recovery legislation, and the extreme climate change harms it experiences, B.C. is well positioned to once again pioneer new cost recovery legislation in this country by legislating Canada's first *Climate Cost Recovery Act*.

Like other provinces, B.C. already recognizes the "polluter-pay principle" in the context of environmental spills.[18] A *Climate Cost Recovery Act* would extend the polluter-pay principle – the idea that wherever possible the entities responsible for environmental damage should pay the costs of remediation – more broadly to pollution of the atmosphere by greenhouse gas buildup as a result of the burning of fossil fuels. Based on decades of research it is now possible to determine with great accuracy the share of greenhouse gases released into the atmosphere by specific fossil fuel companies and therefore operationalize the polluter-pays principle in the context of climate-related harms.[19]

A climate cost recovery fund will mean that B.C. communities and taxpayers would no longer have to carry the burden of funding climate adaptation and repair projects on their own. The entities most responsible for necessitating these projects would pay their fair share.

In B.C., projects funded under a *Climate Cost Recovery Act* could include:

- rebuilding communities and infrastructure damaged by climate disasters, including extreme weather, wildfires, and floods, and upgrading standards to make them more resilient to future climate disasters;
- wildfire prevention and mitigation projects;
- nature-based solutions and flood protections;
- climate home buyouts, where residents whose homes are increasingly vulnerable to the impacts of climate change agree to sell their property to the government and relocate;
- upgrading stormwater drainage systems;
- making defensive upgrades to roads, bridges, railroads, and transit systems;
- preparing for and recovering from extreme weather events;
- undertaking preventive health care programs and providing medical care to treat illness or injury caused by the effects of climate change;
- relocating, elevating, or retrofitting sewage treatment plants and other infrastructure vulnerable to flooding;
- installing energy efficient cooling systems and other weatherization and energy efficient upgrades and retrofits in public and private buildings, including schools and public housing, designed to reduce the public health effects of more frequent heat waves and forest fire smoke;
- upgrading parts of the electrical grid to increase stability and resilience, including supporting the creation of self-sufficient microgrids;
- addressing urban heat island effects through green spaces, urban forestry, and other interventions. These measures can disproportionately help protect low-income, racialized and Indigenous communities; and
- responding to toxic algae blooms, loss of agricultural topsoil, crop loss, and other climate-driven ecosystem threats to forests, farms, fisheries, and food systems.[20]

CLIMATE COST RECOVERY ACTS IN THE US

03

Vermont[21] and New York[22] are the first states to have passed climate cost recovery legislation, sometimes referred to in the US as climate superfund laws. Similar bills have been tabled (but not passed) in California,[23] Maryland,[24] Massachusetts,[25] New Jersey,[26] Oregon,[27] Rhode Island[28] and Connecticut.[29] All of these bills create a statutory mechanism to require the largest fossil fuel companies to fund climate adaptation and repair programs in each jurisdiction. Unlike prior health care cost recovery models which targeted tobacco and opioid companies, these climate superfund bills do not create a statutory cause of action or contemplate litigation. Instead, they provide for the direct charging of carbon majors for costs according to regulatory procedures created under the legislation.

Vermont and New York Laws

In May 2024, the Vermont legislature enacted the *Climate Superfund Act*, which establishes the Climate Superfund Cost Recovery Program at the Agency of Natural Resources (ANR) to hold certain fossil fuel extractors and crude oil refiners accountable for GHG emissions from 1995 to 2024. Responsible parties, defined as those emitting over one billion metric tons of covered GHGs globally, will be strictly liable for cost recovery payments to the state, proportional to their emissions.[30]

In December 2024, the *Climate Change Superfund Act* was signed into law by New York Governor Kathy Hochul. Unlike the Vermont law, which delegates to a state agency the task of determining the size of the cost recovery fund, the New York law establishes a $75 billion Climate Change Adaptation Fund, funded through yearly payments of $3 billion over a 25-year period, to fund climate adaptation projects. The Act will apply to companies engaged in the extraction and refining of fossil fuels based on emissions between 2000 and 2024.[31]

When signing the bill into law, Governor Hochul said:

> **"With nearly every record rainfall, heatwave, and coastal storm, New Yorkers are increasingly burdened with billions of dollars in health, safety, and environmental consequences due to polluters that have historically harmed our environment. Establishing the Climate Superfund [will] hold polluters responsible for the damage done to our environment and [require] major investments in infrastructure and other projects critical to protecting our communities and economy.**[33]

The Vermont Public Interest Research Group (VPIRG) summarized the rationale for Vermont's bill in testimony to the legislature:

> **"VPIRG strongly supports [the Climate Superfund Act] for the simple reason that the costs of climate change are staggering, and Vermonters should not have to shoulder those costs alone. The parties responsible for the climate crisis should be required to pay their fair share for the cost to Vermont to adapt to, become more resilient to, and respond to the climate crisis…**
>
> **The key question is, who do we think should pay for the costs caused by the climate crisis? In our view the answer is clear: Vermont should do everything it can to ensure the world's largest fossil fuel companies pay their fair share, rather than accepting that Vermont and Vermonters have to shoulder this burden on our own.**[32]

Key provisions of Climate Cost Recovery Acts

- ***What is the name of the law?*** Many states use the term 'climate superfund', while some also use the language of 'climate cost recovery'.
- ***What are the functions of the climate cost recovery program?*** Each bill establishes a climate cost recovery program with the following functions (or variations thereof): to develop, adopt, implement, and update climate adaptation planning; to secure compensatory payments; to determine proportional liability; to impose cost recovery demands; to accept and collect payment; and to disperse funds.
- ***Which agencies assign liability to entities?*** All versions of legislation use the state-level version of the Environmental Protection Agency to house the program and apportion liability to responsible entities based on their relative share of emissions during the covered period.

- ***How is the amount of recoverable costs determined?*** The states differ in approaches to how the amount of recoverable costs is calculated. In some jurisdictions, including New York, recoverable costs are statutorily defined (ranging from $9 billion to $75 billion)[34] while in others, including Vermont, the task of quantifying recoverable costs is delegated to a government agency to determine by study (this process is underway in Vermont).[35]

- ***Which investments does the fund support?*** The bills fund a wide range of climate adaptation and repair investments. In the Vermont legislation, for example, "climate change adaptation project" is defined broadly to include projects "designed to respond to, avoid, moderate, repair, or adapt to negative impacts caused by climate change and to assist human and natural communities, households, and businesses in preparing for future climate-change-driven disruptions." Numerous examples are included in the statute.[36]

- ***What activities attach liability?*** All of the bills include fossil fuel extraction and refining as activities attaching liability. Liability is assessed based on relative share of emissions associated with extraction and refining activity during the covered period. Some bills also include other fossil fuel related activities such as sales and distribution.

- ***What is the covered period?*** The covered period for Vermont is 1995-2024 and for New York is 2000-2024. The bills typically look back to 1995 or 2000 and extend until a fixed point in time prior to implementation of the legislation. The preamble of the New York legislation states that: "By 2000 the science of climate change was well established, and no reasonable corporate actor could have failed to anticipate regulatory action to address its impacts."[37]

- ***What entities are covered?*** All states define responsible parties as those entities responsible for more than one billion metric tons of covered greenhouse gas emissions. The definitions of "responsible party" are substantially similar and include: (i) The entity holds or held a majority ownership in a business engaged in extracting or refining fossil fuel during the covered period, or is a successor; (ii) During any part of the covered period, the entity did business in the state or otherwise had sufficient contacts with the state to give the state jurisdiction over the entity pursuant to civil procedure; and (iii) The agency determines that the entity is responsible for more than one billion metric tons of covered fossil fuel emissions, in aggregate globally, during the covered period.

- ***For responsible entities, what emissions are covered?*** Covered entities are strictly liable for cost recovery payments in accordance with their relative share of covered greenhouse gas emissions during the covered period. In some states, including New York, only the share of emissions over one billion metric tons are covered for the purpose of calculating relative share. In other states, all emissions are covered in the calculation of relative share.

- ***How are responsible entities liable for other entities they own?*** In most states, responsible entities are made liable for the emissions of any entity of which they own 10% of or more. They are deemed responsible for the percentage of that entity's total emissions equal to the percentage they own. In other words, if they own 23% of the entity, they are responsible for 23% of its covered emissions. The bills also include provisions that treat related corporate entities as a single entity for the purpose of identifying responsible parties and attributing liability.

- ***How are charges made?*** Each bill defines "cost recovery demand" as a charge assessed against a responsible entity for cost recovery payment (or words to that effect). "Notice of cost recovery demand" is defined as a written communication informing a responsible party of the amount of cost recovery demand payable to the fund (or words to that effect).

- ***What is the appeals process?*** All states provide for an appeals process, either beginning at the agency level, or in the state courts.

- ***Can others still sue fossil fuel businesses?*** Most states explicitly preserve private causes of action and other remedies.

- ***What communities are consulted?*** Vermont and New York each legislate consultation requirements in the development of a Resilience Implementation Strategy (Vermont) or Climate Change Adaptation Master Plan (New York), including representatives of "disadvantaged communities" or "environmental justice focus populations".

- ***How are labour standards treated?*** The New York legislation has the most substantial pro-labour provisions, directing agencies to manage the program in a way that increases employment opportunities and improves job quality, among other measures.

As with tobacco and opioid cost recovery legislation in prior decades, B.C. can draw upon extensive legislative precedents from the US. A B.C.-specific *Climate Cost Recovery Act* can be tailored to the unique needs of British Columbians as well as the Canadian legal landscape. In accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), legislation implementing UNDRIP in B.C., and section 35 of the *Constitution Act*, 1982[38], a B.C.-specific *Climate Cost Recovery Act* would require consultation and cooperation with Indigenous peoples and governments who are on the frontlines of the climate crisis in B.C. and mandate their involvement in decision-making about how a climate cost recovery fund should be managed and distributed.

Legal challenges to the US laws

The Vermont and New York climate superfund acts have each recently been challenged in the courts, and the challenges have not yet been decided. In December 2024, the Vermont law faced its first legal challenge initiated by the American Petroleum Institute and the United States Chamber of Commerce.[39] The federal government under President Trump has since filed legal challenges against both the Vermont law[40] and the New York law.[41] One US legal scholar published a detailed memorandum analyzing the constitutionality of a state climate superfund program, addressing arguments grounded in federal pre-emption, the due process clause, and the federal commerce clause, finding that such arguments are likely to fail.[42]

While the lawsuits challenging the climate superfund acts in Vermont and New York are in their early stages, the issues they raise are unique to the American constitutional framework. The Canadian constitutional framework avoids many of the issues raised in those lawsuits. Recent constitutional jurisprudence strongly supports the viability of similar laws in Canada.

LEGAL VIABILITY IN CANADA 04

After multi-year legal battles, B.C. successfully defended its tobacco and opioid cost recovery laws at the Supreme Court of Canada in the face of legal challenges from industry groups. The precedents set in each of these cases demonstrate the flexibility of Canada's constitutional framework and its responsiveness to pressing societal demands. Corporate allegations that the tobacco and opioid cost recovery laws impermissibly targeted corporations headquartered outside the province ("extraterritorial entities") were uniformly rejected by the Supreme Court.

The structure of a proposed *Climate Cost Recovery Act* is different in key respects from prior cost recovery laws. Rather than legislating a cause of action to claim past losses, the law would authorize direct levies to the largest historical emitters to fund climate adaptation and repair projects. While the law will face the inevitable corporate legal challenges at the front end, one of the benefits of this model of cost recovery is that once the initial constitutional hurdles are overcome, B.C. can proceed directly to implementing the climate cost recovery program, levying responsible entities, and funding much-needed climate adaptation and repair projects, potentially avoiding years of protracted litigation.

Regulatory charges to fund local works in the province

Rather than legislating a cause of action and facilitating the determination of liability through court litigation, the proposed *Climate Cost Recovery Act* would create an administrative procedure to directly charge the entities most responsible for causing climate-related harms in B.C.. The purpose of these charges would be to fund specific climate adaptation and repair projects within the province. Thus the law would not charge entities for past losses but for future expenditures incurred as a result of the responsible entities' misconduct.

Industry groups may attempt to challenge the legislation as unlawful indirect taxation by the province. But such arguments are unlikely to succeed. First of all, from a constitutional standpoint, the law would not amount to revenue-raising for general purposes – i.e. taxation. Rather, the law would provide for "regulatory charges" in connection with specific local works or undertakings and could be successfully defended on this basis. Moreover, even if the law is construed as taxation, it would still be within the province's jurisdiction to enact.

Regulatory charges are not taxes because they are connected to a regulatory scheme and can be supported by one of the province's regulatory powers, such as local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), or matters of a merely local or private nature (s. 92(16)).[43] Since the levies under the proposed law would have as their purpose the "financing or constituting of a regulatory scheme" as opposed to "[raising] revenue for general purposes," they would be properly characterized as regulatory charges as opposed to taxation.[44]

The local projects funded under a *Climate Cost Recovery Act* – including wildfire prevention, flood protections, infrastructure repairs, and other climate adaptation and repair projects listed above – would fall squarely within the jurisdiction of the B.C. government.

All revenue generated under the scheme would be "tied to the costs of the regulatory scheme" i.e. the cost of climate adaptation and repair projects inside the province.[45] The law would establish a mechanism to quantify the costs of such projects and would only charge amounts needed to fund them. Whereas the New York law quantified the size of its climate recovery fund in the statute itself, the Vermont law delegated the task of quantifying climate adaptation costs to a state agency, a process that is ongoing.[46] While B.C. has already begun the work of quantifying the cost of various climate adaptation and repair projects, it can also draw upon the Vermont experience in approaching this question.

Even if the cost recovery levies are construed as taxation rather than regulatory charges, they would still be within the province's jurisdiction to enact. Any attempt by fossil fuel companies to argue that the law imposes impermissible "indirect taxation", that is, a tax intended to be passed down to consumers,[47] is unlikely to succeed given that, among other things, the charges would be imposed based on historic emissions, not current or ongoing emissions. The purpose of the law is not to reduce emissions or change current behaviour; it is to hold entities responsible for a share of the climate adaptation and repair costs necessitated by their past emissions. The covered period for the legislation is entirely retroactive – the scheme exclusively charges companies for their past activities – it does not pertain to commodities in the course of being produced or marketed. As such, the charges serve the purpose of financing a regulatory scheme, not raising revenue for general purposes (taxation), or indirectly taxing consumers to achieve behaviour modification (indirect taxation).

In short, B.C. has the constitutional authority to legislate climate adaptation and repair projects within the province and to recover the costs of such projects from entities most responsible for necessitating them.

Background on the tobacco and opioid cost recovery precedents

B.C.'s tobacco cost recovery legislation, modelled after Florida legislation, created an aggregate cause of action against tobacco companies to retroactively recover healthcare costs for treating diseases caused by tobacco use. To overcome causation hurdles – the difficulty of definitively linking specific injuries to tobacco, and of linking individual claimants to specific tobacco companies – the law authorized the use of statistical and epidemiological data to establish causation, and codified liability based on a company's proportionate share of the tobacco market in B.C., referred to as "market share" liability.[48]

Although the initial version of the law was struck down on grounds of extraterritoriality (i.e. having impermissible impacts beyond the province's borders),[49] a revised version of the law was upheld by the Supreme Court of Canada in the *Imperial Tobacco* decision.[50] The Supreme Court dismissed extraterritoriality arguments, finding the "pith and substance" (i.e. dominant purpose) of the Act was "plainly the creation of a civil cause of action… by which the government of British Columbia may seek compensation for certain health care costs incurred by it," which falls within the province's authority to legislate in relation to property and civil rights under s. 92(13) of the *Constitution Act, 1867*.[51] The Supreme Court decided that the Act respected the legislative sovereignty of other jurisdictions:

> **"Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians — namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco — liable for the costs incurred by the government of British Columbia in**

treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province."[52]

The Supreme Court also rejected arguments that the Act offended principles of judicial independence or the rule of law.[53] Following the *Imperial Tobacco* decision, all other provinces and territories adopted similar legislation and pursued cost recovery claims against tobacco companies.

In 2018, the B.C. government announced a class action lawsuit against opioid drug manufacturers, wholesalers and distributors, alleging that their marketing practices contributed to the opioid addiction epidemic and harmed the public health-care system. Shortly thereafter, the government enacted the *Opioid Damages and Health Care Costs Recovery Act ("ORA")*, modelled after tobacco health care cost recovery legislation, that applied to the already commenced class action.[54] Since then, all provinces and territories in Canada, except Yukon, have enacted functionally identical legislation.[55]

These Acts bear much resemblance to the tobacco cost recovery legislation that came before them. They create a direct cause of action allowing the government to sue opioid companies for health care cost recovery on an aggregate basis, calculated by way of statistic evidence, using principles of market share liability.[56] However, there are also some key differences. Notably, the *ORA* includes class action provisions authorizing the B.C. government to bring a class action and act as representative plaintiff on behalf of itself and all other Canadian governments (provincial, territorial and federal). Other jurisdictions retain the right to opt out of this class action, although none have thus far.[57] In addition, the *ORA* broadened the definition of companies liable, to include opioid wholesalers and consultants in addition to manufacturers.[58]

The class action provisions resulted in the first "multi-Crown" class action in Canada, which names over 40 defendants, including Purdue Canada and Shoppers Drug Mart. The constitutionality of the class action provisions of the *ORA* was challenged by a group of opioid manufacturers and distributers who argued that the provisions were impermissibly extraterritorial in scope. The challenge was dismissed by all three levels of court, including by the Supreme Court in its recent decision in *Sanis Health*.[59] The Court found that the class action provisions were procedural in nature, falling within the province's power over the administration of justice under s. 92(14) of the *Constitution Act, 1867*.[60]

Law of extraterritoriality is not a barrier

Industry groups challenged B.C.'s tobacco and opioid cost recovery schemes based on arguments about extraterritoriality. These arguments were ultimately dismissed by the Supreme Court of Canada which has laid out a detailed framework about how to address questions of extraterritoriality in provincial lawmaking. Notably, the Supreme Court's recent jurisprudence has rejected earlier formulations of the law that took a rigid approach to territorial limits on provincial lawmaking. In its place, the Supreme Court has "put the focus less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation."[61] The Supreme Court has also cautioned against relying too much on other jurisdictions given Canada's unique constitutional arrangements.[62]

Extraterritoriality arguments may relate to the *validity* or the *applicability* of a provincial law. The *Imperial Tobacco* and *Sanis Health* decisions addressed questions of constitutional validity. The Supreme Court in each case was asked to determine the constitutionality of the legislation, not to apply it to any particular defendants, a process that would only occur later during the litigation contemplated by the legislation.

In contrast, a constitutional challenge to climate cost recovery legislation would likely raise questions of validity and applicability at the front end, since the legislation would itself codify the processes for directly levying responsible entities. This means that once the initial constitutional hurdle is cleared, B.C. can proceed directly to implementing the climate cost recovery program, levying responsible entities, and funding much-needed climate adaptation and repair projects.

Constitutional validity

The constitutional validity of provincial legislation with extraterritorial effects is determined through a two-step process:

- The first step is to determine the "pith and substance", or dominant feature, of the legislation, and to identify a provincial head of power under which it might fall.[63] Incidental or ancillary extra-provincial aspects of legislation are irrelevant to its validity.[64] Courts must refer to the law's purpose and its effects, having regard to intrinsic and extrinsic evidence.[65] If a particular provision is subject to challenge, the "character of the provision must be assessed in the context of the larger statutory scheme."[66]
- Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power – i.e. whether it "has a meaningful connection to the province"[67] and "[pays] respect to the legislative sovereignty of other territories."[68] If the pith and substance of the legislation is "tangible" (i.e. something with an intrinsic and observable physical presence), this is simply a question of location.[69] If the pith and substance is "intangible", "the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it."[70] The analysis is based on identifying and weighing contacts between the territory and the parties and matters at issue.

With respect to step one, the pith and substance of a *Climate Cost Recovery Act* would be to fund climate adaptation and repair programs within the province of B.C. by making the corporations most responsible for causing climate-related harms in B.C. pay a share of the costs. Such legislation would be directed exclusively to responding to the *local* impacts of climate change. This would fall under s. 92(10) "local works and undertakings", s. 92(13) "property and civil rights", and/or s. 92(16) "matters of a merely local or private nature in the province". Any impacts the legislation may have on extraterritorial entities would be incidental or ancillary to the law's dominant purpose of addressing local impacts of climate change inside the province.[71]

In *Imperial Tobacco*, B.C.'s tobacco cost recovery legislation was upheld because the cause of action was rooted in healthcare costs for tobacco-related diseases incurred in the province, even though the cause of action applied to non-B.C. residents and the Supreme Court acknowledged that such diseases might have been caused by exposure to tobacco outside B.C.:

- The legislation in *Imperial Tobacco* "served exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians — namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco — liable for the costs incurred by the government of British Columbia in treating that disease."[72]
- Similarly, a proposed *Climate Cost Recovery Act* would make the persons ultimately responsible for climate-related harms inside the province of British Columbia — namely, the largest greenhouse gas emitters who, through their wrongful acts, caused those British Columbians to be exposed to climate-related harms — liable for a share of the climate adaptation and repair costs incurred by the government of British Columbia.

There are "strong relationships" among the enacting territory (British Columbia), the subject matter of the law (climate adaptation and repair costs incurred inside British Columbia) and the persons made subject to it (the fossil fuel

companies most responsible for those costs), such that the Act can "easily be said to be meaningfully connected to the province."[73]

This approach was reaffirmed most recently in *Sanis Health* which confirmed that a law may have extraterritorial effects, so long as they are incidental to a valid local purpose. The question of meaningful connection is tested "by assessing the law's connection to the enacting territory, to the subject matter of the law, and to those made subject to it."[74] As the Supreme Court held in *Sanis Health*, "the search remains one for a 'meaningful connection', and not a connection with no extraterritorial effects."[75] Indeed, "[s]ome intrusions on the powers of other governments 'are proper and to be expected' in a federation where intergovernmental cooperation on cross-border issues is essential."[76]

Imperial Tobacco and *Sanis Health* provide a clear pathway to constitutional *validity* for a climate cost recovery statute, as long as the statute is properly geared towards local objects (repairing and adapting to climate-related harms in British Columbia) and any extraterritorial effects can be characterized as incidental or ancillary to the law's predominantly local purpose.

Fossil fuel companies may also seek to argue that the law impermissibly determines liability in part based on actions (emissions) outside the province. Similar arguments were raised, and dismissed by the Supreme Court, in *Imperial Tobacco*, which acknowledged the fact that some tobacco-related diseases will have been caused outside the province yet still fall within the ambit of the law. The Supreme Court emphasized that the Act exclusively targeted the recovery of health care expenditures by the government of British Columbia for the health care of British Columbians.[77]

In the climate context, the connection between emissions occurring outside the province and local harms inside the province is even stronger given what the Supreme Court has termed the "inherently global nature of GHG emissions."[78] Corporations challenging a proposed *Climate Cost Recovery Act* on the basis that its emissions occurred (in majority) outside the province cannot credibly argue that they were not aware of the impacts their emissions would have, including inside British Columbia. Like the tobacco legislation, this Act would exclusively target *local* climate-related harms and fund adaptation and repair projects inside British Columbia.

Given the clearly local nature of the purpose of the legislation, which establishes the law's constitutional *validity*, arguments about extraterritorial impact would need to be addressed as a matter of constitutional *application* – i.e. to which entities can this otherwise valid law apply. This is addressed in the next section.

Constitutional applicability

Where the court is concerned with the application of an otherwise valid provincial law to an out-of-province party, the issue is one of constitutional applicability.[79] An otherwise valid provincial law is not *ultra vires* (i.e. invalid) because of its extraterritorial impacts on an out-of-province entity. Rather, the principles of statutory interpretation will apply to limit or read down the territorial reach of otherwise broadly framed provincial legislation such that it is consistent with s. 92 of the *Constitution Act, 1867* by requiring a "sufficient connection" between the legislation and the out-of-province party.

The test for constitutional *applicability* is thus relevant for assessing which fossil fuel companies, and on what basis, B.C. could impose fees on. Entities covered by the legislation must have a "sufficient connection" to British Columbia and the subject matter of the legislation. The test for "sufficient connection" was set out by the Supreme Court in *Unifund*:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not "sufficiently connected" to the province;
2. What constitutes a "sufficient connection" depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by the law;

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements; and
4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.[80]

Establishing a sufficient connection does not require the physical presence of the entity made subject to the law in the enacting territory. In *Unifund*, the Supreme Court disavowed early formulations of the law that emphasized physical presence alone.[81] The Supreme Court noted that "different degrees of connection to the enacting province may be required according to the subject matter of the dispute."[82] For example:

- In product liability cases, "the knowing dispatch of goods into the enacting jurisdiction in the reasonable expectation that they will be used there is regarded as sufficient" and "the presence of the defendant manufacturer in the jurisdiction is considered unnecessary";[83] and
- In the regulatory context, the "sufficient connection" requirement was satisfied where the accused, although a non-resident, had "not only sold its products (which were not defective) in the enacting jurisdiction, but had hired a local agent to promote their sale."[84]

The proposed *Climate Cost Recovery Act* could be designed to apply only to fossil fuel companies with a "sufficient connection" to British Columbia during the covered period, effectively incorporating considerations of constitutional applicability into the legislation itself. This is the approach followed by the state laws in the US, which incorporated nexus requirements under US constitutional law into the definition of "responsible parties" – the laws only apply to entities that "did business in the state or otherwise had sufficient contacts with the state to give the state jurisdiction over the entity pursuant to civil procedure."

In the same way, a provincial law in B.C. could incorporate the Canadian requirement of "sufficient connection" to ensure that the law only applies to entities in accordance with Canada's constitutional framework. For example, such a law could apply to carbon majors that did business in British Columbia during the covered period, which could include the extraction, refining, distribution or marketing of fossil fuel products. It could apply not only to companies based in or operating in B.C., but also companies that sold or marketed their fossil fuel products in B.C. or knowingly dispatched them to B.C..

Following the US model, the covered period for the assessment of liability would go back to 1995 or 2000, which are conservative dates by which the world's largest emitters understood the impact their products were having on the climate, including the impacts this would have inside British Columbia.

Once the constitutionality of the scheme is established, B.C. could then proceed directly to implementing the cost recovery program, including the planning and development of climate adaptation and repair projects, the identification of covered fossil fuel companies, the determination of proportional liability, the issuance of cost recovery demands, and the distribution of funds. Covered fossil fuel companies would have recourse to procedural rights that may be defined in the legislation, and could seek judicial review of any decisions, but such reviews would generally be confined to ensuring that the provincial agency acted reasonably and in accordance with its statutory mandate.[85]

CONCLUSION 05

In the coming years, governments and communities in B.C. will be on the hook for billions of dollars in climate adaptation and repair costs. The largest fossil fuel companies who are most responsible for causing climate change, and who profited richly from it, should have to pay a share of the costs they caused. A B.C.-specific *Climate Cost Recovery Act* would require these companies, the largest and most profitable fossil fuel companies with connections to B.C., to pay their fair share of climate adaptation and repair costs incurred in the province.

Based on decades of research it is now possible to accurately determine the share of greenhouse gas emissions attributable to specific fossil fuel companies during specific periods, and therefore operationalize the polluter-pays principle in the context of climate-related harms. Multiple US states have enacted legislation establishing climate cost recovery programs. Drawing on these precedents, B.C. is well positioned to enact the first *Climate Cost Recovery Act* in Canada. Such legislation would respect the Canadian constitutional framework. It would mandate consultation with Indigenous governments and communities on the frontlines of the climate crisis. Most of all, it would ensure that the companies most responsible for dangerous greenhouse gas buildup in the atmosphere, and resulting climate disasters in B.C., pay their fair share of the billions of dollars in adaptation and repair costs that B.C. will have to incur as a result.

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16 *Sanis Health Inc. v. British Columbia*, 2024 SCC 40.

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18 See e.g. B.C. Government News, "Factsheet: Polluter-pay principle"; *Environmental Management Act*, SBC 2003, c 53, at Division 2.1 – Spill Preparedness, Response and Recovery; *Spill Preparedness, Response and Recovery Regulation*, B.C. Reg 185/2017.

19 See e.g. presentations given by Richard Heede, Director, Climate Accountability Institute, to the Vermont Senate: "Attributing emissions to major carbon producers & holding FF companies accountable for remediation" (February 22, 2024); "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010", *Climatic Change*, Vol. 121, No. 4 (December 11, 2013).

20 This list of projects includes examples from the Vermont and New York legislation, discussed below.

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22 New York Senate, Bill S2129A, *Climate Change Superfund Act* (2024).

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24 Maryland General Assembly, House Bill 1438, as introduced.

25 Commonwealth of Massachusetts, Bill H.872, as introduced.

26 New Jersey Legislature, Assembly Bill 4696, as introduced.

27 Oregon Legislative Assembly, Senate Bill 1187, as introduced.

28 Rhode Island State Legislature, House Bill 5424, as introduced.

29 Connecticut General Assembly, Committee Bill No. 6280, as introduced.

30 Vermont General Assembly, Act No. 122, S.259, *Climate Superfund Act* (2024).

31 New York Senate, Bill S2129A, *Climate Change Superfund Act* (2024). The initial covered period of 2000 to 2018 was recently extended to 2024: New York Senate, Bill S824 (2025).

32 New York Governor's Office, "Governor Hochul Signs Landmark Legislation Creating New Climate Superfund" (December 26, 2024).

33 Ben Edgerly Walsh, VPIRG Climate & Energy Program Director, VPIRG Testimony to House Environment & Energy on S.259, the Climate Superfund Act (April 17, 2024).

34 The preamble of the New York legislation provides rationale for the $75 billion amount: "The cost to the state of climate adaptation investments through 2050 will easily reach several hundred billion dollars, based on an array of estimates for projects impacting different regions across the state, far more than the $75 billion being assessed on the fossil fuel industry." It then provides examples of such estimates. New York Senate, Bill S2129A, *Climate Change Superfund Act* (2024), s. 2 – Legislative Findings.

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38 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 35.

39 Climate case chart: *Chamber of Commerce of the United States of America v. Moore* (2024).

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43 *Westbank First Nation v. British Columbia Hydro and Power Authority*, 1999 CanLII 655 (SCC); *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7.

44 *Westbank First Nation v. British Columbia Hydro and Power Authority*, 1999 CanLII 655 (SCC) at para 30; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para 25.

45 *620 Connaught, supra* at para 38. This requirement was well-illustrated in *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68, where EI premiums were held to be regulatory charges, intended to fund the cost of the EI program, except for a period of three years when the premiums were set without legislative guidance as to the necessary cost of the EI program.

46 Vermont Climate Action Office, Climate Superfund Act (2025).

47 Pursuant to s. 92(2) of the *Constitution Act, 1867*, provinces are only given authority to charge "direct" taxes, subject to limited exceptions. Generally speaking, direct taxes are taxes that are not intended or expected to be passed on to consumers.

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49 *JTI-Macdonald Corp. v. AGBC*, 2000 BCSC 312 at para 188.

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50 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

51 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 32.

52 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at paras 37.

53 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at paras 44-77.

54 *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c 35 ("*ORA*").

55 The language of the statutes in all jurisdictions save Quebec is based on and nearly identical to the B.C. *ORA*. The Quebec statute is organized and drafted differently, but has largely the same effect as the B.C. *ORA*.

56 *ORA*, ss. 2, 3, 5, 6, 10.

57 *ORA*, s. 11.

58 *ORA*, s. 2(1). The Act also captured damages resulting from "disease, injury or illness," which it defined broadly as including "problematic substance use, addiction and general deterioration of health," broader than the language of "tobacco-related disease" in the tobacco legislation. *ORA*, s. 1.

59 *Sanis Health Inc. v. British Columbia*, 2024 SCC 40.

60 *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 at paras 79-81.

61 *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at paras 62-63.

62 *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at para 28.

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65 *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 at para 44.

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82 *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at para 65.

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