

B.C.'s forever litigation: first tobacco, then opioids, now 'forever chemicals'

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On June 21, 2024, the B.C. government filed a proposed national class action in the Supreme Court of British Columbia against manufacturers of perfluoroalkyl and polyfluoroalkyl substances (PFAS), commonly known as “forever chemicals”.

In a continuation of its tendency to launch industry-wide lawsuits (the B.C. government sued big tobacco two decades ago and then sued opioid manufacturers and distributors six years ago on behalf of all Canadian governments.^[1]), the province has now targeted the PFAS industry and seeks to represent a class comprising not only the provinces and territories, but also an indefinite number of municipalities, regions and other entities across the country.

The lawsuit is the first such proceeding commenced by a Canadian government to recover costs associated with detecting and removing forever chemicals from drinking water systems. It follows in the wake of similar U.S. litigation which targeted many of the same defendants named in the B.C. action (and others) in respect of alleged PFAS contamination in the U.S.

The proposed B.C. class action names 3M, DuPont, Tyco and BASF in their capacities as manufacturers, marketers, distributors, and sellers of products containing forever chemicals. Those products include aqueous film-forming foam (AFFF), which is used for fire fighting purposes.

Background to PFAS

As we explain in greater detail in [Regulation of “forever chemicals” \(PFAS\) in Canada](#), PFAS are comprised of more than 4,700 human-made synthetic chemicals and have many beneficial properties (e.g., high thermal resistance). These traits make PFAS widely used in consumer products and in industrial applications. Products containing PFAS include non-stick cookware, cosmetics, textiles, personal care products, paints, sealants, varnishes, and AFFF.

While PFAS have desirable traits, they are also considered to be bioaccumulative and environmentally persistent — meaning that they do not readily degrade under normal conditions (and, for that reason, have been labelled “forever chemicals”). PFAS have been detected in wildlife, environmental media, and humans.

Prior U.S. litigation

As often occurs before similar claims are advanced in Canada, the U.S. has experienced significant litigation relating to PFAS contamination of drinking water systems. In 2018, a class action was brought against 3M by American public water utilities alleging that 3M's PFAS-containing firefighting foams contaminated drinking water. In June 2023, just before the trial was due to commence, 3M settled with the water utilities for \$12.5 billion to be paid over 13 years. Another claim was settled just weeks earlier against Chemours, DuPont, and Corteva by American water utilities for \$1.185 billion.

Allegations made by the B.C. government

In its Notice of Civil Claim, the B.C. government alleges that the defendants manufactured, marketed, distributed, and sold PFAS-containing products "for decades". The government goes on to say "At the same time that the Defendants were profiting from the supply of these [products], they knew that when these [products] were used as directed, toxic PFAS chemicals would be released, would contaminate the environment for centuries, and would pose significant threats to human health."

The theory of the case is centered around an alleged failure by the defendants to warn the public about such products or modify or remove their products to avoid those harms. As B.C. Attorney General Niki Sharma stated "B.C. is suing the defendants listed in the claim for negligently designing defective products, negligently failing to warn of the risks associated with their products, breaches of the Competition Act and civil conspiracy."^[2] Moreover, the B.C. government has alleged that PFAS contamination — caused by the defendants — is a public and private nuisance.

The allegations include that the defendants "concealed and affirmatively contradicted the known dangers in public statements and marketing campaigns designed to enrich themselves at the public's expense." The Notice of Civil Claim also alleges that the defendants conspired with each other or acted pursuant to a common design to promote PFAS-containing products.

The B.C. government pleads that it is seeking recovery of costs necessary to (a) "fully investigate, remediate, treat, assess, and restore the lands, waters, sediments and other natural resources of class members and (b) to monitor and treat PFAS contamination in drinking water, wastewater, storm water discharges, and biosolids." It seeks property damages, economic damages, punitive damages, and disgorgement of the defendants' profits.

Significantly, the lawsuit has been brought on behalf of (i) all provincial and territorial governments in Canada that incurred costs related to PFAS contamination of water resources and (ii) all municipalities, regional districts, and other governance authorities and other persons in Canada that were responsible for a drinking water system. It seeks to recover costs incurred by those putative class members since February 18, 1970 until the lawsuit is resolved.

Conclusion

B.C.'s commencement of this PFAS class action is the third installment in its saga to attempt to recover billions of dollars from corporations. The government sued big tobacco in 1998, opioid manufacturers and distributors in 2018,^[3] and now has directed its crosshairs at the

PFAS industry. And, although it recently put legislation on hold that would have enabled it to sue many other industries, it remains to be seen whether B.C.'s litigation strategy is one that might just last forever.

[1] The B.C. government also attempted to pass legislation (but put it on hold) that would have enabled it to sue companies in a variety of other industries for "health-related wrongs", such as social media, gaming, gambling, health and beauty, home goods, food and beverage, and fitness.

[2] <https://news.gov.bc.ca/releases/2024AG0033-000978>

[3] Osler represented certain defendants in the tobacco litigation and currently represents certain defendants in the opioids litigation.