

First Of Its Kind – Ontario NDP Tables Civil Liability for Climate Change Bill



On March 26, 2018, Ontario NDP MPP Peter Tabuns introduced Bill 21: ‘an Act respecting civil liability for climate-related harms,’ which seeks to: (i) impose civil liability on companies engaged in fossil fuel production; and (ii) ‘enhance legal tools’ to ensure that such companies ‘contribute their fair share to paying for the harms to which their products contribute and for the necessary steps to prevent future harms.’ Bill 21 did not pass third reading before the Ontario legislature was dissolved prior to the upcoming election. However, the introduction of Bill 21 foreshadows future efforts by government to impose liability for climate change-related harms.

Tobacco legislation/American lawsuits

Bill 21, drafted with the assistance of Greenpeace, is modelled after Ontario’s Tobacco Damages and Health Care Costs Recovery Act, 2009. If passed, it will significantly reduce barriers to recovery in civil suits against fossil fuel producers for ‘climate-related harms.’ As justification for the bill, its promoters allege that companies engaged in fossil fuel production were aware of the connection between their product and climate change; and misrepresented and failed to warn of the risk.

The purported justification for Bill 21 appears to be inspired by the allegations raised in American climate change litigation. Municipalities in the United States, including the City of New York and a number in California, have launched climate-related suits against major oil and gas producers. The lawsuits seek billions to cover the infrastructure costs associated with preparing for climate change, and allege that the producers were aware of the risk of climate change from their product, but sought to conceal those risks from the public.

Strict liability

Bill 21 provides that companies engaged in the production of fossil fuels are

strictly liable for 'climate-related harms' where a 'globally detectable level' of greenhouse gas emissions can be attributed to that producer. In determining a producer's level of greenhouse gas emissions, the bill provides that emissions resulting from both the production and use of fossil fuels will be attributed to the producer.

Climate-related harms


'Climate-related harms' are defined broadly in Bill 21 and include: economic loss associated with the impacts of climate change; costs to monitor climate change; costs relating to risk mitigation; physical or psychological harms arising from climate change; and prospective costs to mitigate potential future climate change harm.

Causation

Typically, a significant barrier to recovery in climate change litigation is causation; to be successful, the plaintiff must prove that the producer's emissions caused, or materially contributed to, climate change-related harms. However, Bill 21 attempts to circumvent the causation hurdle through the strict imposition of liability for climate change-related harms in circumstances where a globally detectable level of emissions can be attributed to a particular producer. Furthermore, the bill provides that a court must presume that a weather event was caused by climate change where evidence indicates that its likelihood of occurrence has doubled due to climate change.

Conclusion

The introduction of Bill 21 reflects a bellwether for future efforts by government to impose liability for climate change-related harms on companies engaged in fossil fuel production. For companies involved in oil and gas production in Canada, this bill reinforces the importance of taking adequate steps to plan and prepare for future climate change litigation.

 **About the authors:** Maureen Killoran, QC, Colin Feasby, and Matthew Huys practice in the Calgary office of Osler, Hoskin & Harcourt LLP. Maureen is the former Managing Partner of Osler's Calgary office (2011-2017) and a trusted advisor to many major commercial clients. Her litigation practice is devoted to complex commercial disputes with particular emphasis on the resource industry. Colin is the current Managing Partner of the Calgary office and represents clients in corporate and securities litigation, energy industry disputes, insolvency/restructuring litigation, and constitutional matters. Matthew's litigation practice focuses on oil and gas, construction, insurance, and securities litigation.