

Goodmans^{LLP} Update

Cap and Trade Formally Cancelled in Ontario – Federal Carbon Pricing Regime Clarified

With the passage of *Bill 4, The Cap and Trade Cancellation Act* (the “**Cap and Trade Cancellation Act**”) on October 31, 2018, the Government of Ontario formally repealed the Ontario cap and trade regime¹ and brought Ontarians, and Ontario businesses, into the federal carbon pollution pricing regime (the “**Federal Carbon Pricing Regime**”) introduced in the *Greenhouse Gas Pollution Pricing Act* (the “**Federal Pricing Act**”).

The Government of Canada recently provided further details about the Federal Carbon Pricing Regime, including how the proceeds from carbon pollution pricing will be returned to the province or territory of origin.² The proposed payments to the residents of certain provinces (the “**Climate Action Incentive Payments**”), together with incentives to save the price on carbon pollution, are intended to encourage and assist residents to take steps to reduce their carbon pollution. Together with other climate action and cleantech initiatives, the Federal Carbon Pricing Regime and the Climate Action Incentive Payments create opportunities for cleantech businesses in Canada to provide the products and services required for Canadians to reduce their greenhouse gas (GHG) emissions.

Cap and Trade Formally Cancelled

The Cap and Trade Cancellation Act formally repealed the cap and trade regime enacted under the previous government’s *Climate Change Mitigation and Low-carbon Economy Act, 2016* and retired or cancelled the emissions allowances and offset credits held by Ontario participants under that regime (the “**Provincial Cap and Trade System**”). As discussed in our June 27, 2018 Update, *Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction*, a number of important legal issues remain to be resolved by the Regulations of the Cap and Trade Cancellation Act, which have not yet been released. Peter Weltman, the Financial Accountability Officer of Ontario reported that the cancellation of the Provincial Cap and Trade System will result in \$3 billion in lost revenue over the next four years.³

Implementation of the Federal Carbon Pricing Regime

The Federal Pricing Act contains a backstop system composed of two components:

- A charge on fossil fuels, which will be administered by the Canada Revenue Agency starting in April 2019.
- An output-based pricing system (OBPS) for emissions-intensive, trade-exposed industrial facilities, which will be administered by Environment and Climate Change Canada (ECCC) starting in January 2019.⁴

Any provincial carbon pricing system must be determined by the federal government to be compliant with the federal carbon price requirements, namely, a minimum carbon price of \$20/tonne of carbon dioxide equivalent (“tCO₂e”) by January 1, 2019 and incremental \$10 increases each year to \$50/tCO₂e for 2022 (the “**Federal Carbon Pricing Standard**”).

On October 31, 2018, the federal government published regulatory instruments on the OBPS, which outline which industrial facilities are required to register in the OBPS and set out the quantification, reporting and verification requirements.⁵ As of November 1, 2018, the owner and operator of a facility subject to the OBPS (such as a facility for a natural gas pipeline transmission system transmitting natural gas and for a petroleum refinery processing of crude oil, each a “**Covered Facility**”) must register that Covered Facility with ECCC.⁶ Successful applicants will receive a covered facility certificate.

The Federal Carbon Pricing Regime will apply in provinces that have not implemented a provincial carbon pricing system which meets the Federal Carbon Pricing Standard by January 1, 2019. Now that the Cap and Trade Cancellation Act passed, the Federal Carbon Pricing Regime will apply in Ontario. The Federal Carbon Pricing Regime will also apply in Manitoba, New Brunswick and Saskatchewan.

Implications for Ontarians and the Cleantech Industry

The Federal Carbon Pricing Regime is intended to support clean growth and stimulate innovation in the cleantech industry, helping to position Canada's private cleantech sector to lead in the development of global solutions. The Federal Carbon Pricing Regime should help transition Canada to a low-carbon economy by incentivizing citizens to limit their GHG emissions and invest in cleantech solutions. All of the money collected from the Federal Carbon Pricing Regime is to be returned to the province in which it was collected; 90% will be returned to citizens as household rebates and 10% will be returned to businesses and the public sector including schools, hospitals, municipalities, non-profits, and Indigenous communities, and may be used by them to invest in technologies which reduce GHG emissions.⁷

While the cancellation of the Ontario Cap and Trade Program is expected to limit provincial funding for climate change solutions in Ontario, the federal government has a number of programs that are supportive of cleantech including:

- [Green Infrastructure programs such as Clean Energy for Rural and Remote Communities: BioHeat, Demonstration & Deployment Program Streams and Electric Vehicle Infrastructure Demonstrations;](#)
- [Clean Energy Innovation;](#)
- [Clean Growth Program;](#)
- [Program of Energy Research and Development;](#) and
- [Sustainable Development Technology Canada.](#)

These federal programs create the opportunity for the developers and sellers of low emissions products – ranging from electric or hybrid vehicles to windows, insulation, air exchangers, heat pumps, and other transportation and building innovations – to build successful and prosperous businesses based upon the sale of such products to Canadians. The Federal Carbon Pricing Standard provides for incremental increases in the per tonne carbon price intended to give industry an opportunity to adapt to the carbon pricing system and make necessary adjustments and investments in cleantech or otherwise over time.

Jurisdictional Challenge – The Saskatchewan and Ontario References and Manitoba Opposition

While some scholars believe the Federal Carbon Pricing Regime would be *intra vires* the federal government (see, for example, the [legal opinion by Dr. Bryan Schwartz of the University of Manitoba](#), which found a “strong likelihood that the Supreme Court of Canada would uphold the proposed carbon tax/levy” and earlier publications such as “[Constitutional Authority Over Greenhouse Gas Emissions](#)” by Peter W. Hogg), on April 25, 2018, the Government of Saskatchewan announced it commenced a reference case in the Saskatchewan Court of Appeal to challenge the constitutionality of the Federal Carbon Pricing Regime (the “**Saskatchewan Reference**”). The primary basis of the Saskatchewan Reference is that varying approaches to carbon pricing may be used in different provinces to satisfy the requirements of the Federal Pricing Act based on the federal government's evaluation of provincial climate change plans, which the province believes is an “uneven” application of the tax.

The federal government, on the other hand, is taking the position that GHG emissions are a matter of national concern because:

Failure by one province to reduce GHG emissions will harm other provinces and territories, harm Canada's relations with other countries, and impede international efforts to mitigate climate change.

As it is a matter of national concern, the federal government maintains that Parliament has jurisdiction to legislate under the “peace, order, and good government” of the *Constitution Act, 1867* and notes that the “polluter pays” principle is entrenched in environment law in Canada. The Saskatchewan Reference is scheduled to be heard in February 2019. The Government of Ontario will intervene in support of Saskatchewan's challenge in the Saskatchewan Reference.

On October 3, 2018, the Government of Manitoba abandoned its plans to impose a provincial carbon tax that was to come into effect in December 2018 and announced it opposed the Federal Carbon Pricing Regime.

On October 14, 2018, the Government of Ontario announced it filed a reference in the Ontario Court of Appeal to challenge the constitutionality of the Federal Carbon Pricing Regime (the “**Ontario Reference**”). Again, while some question whether there is a valid legal basis for this challenge, the province is arguing that (1) the federal government does not have the power to put a price on GHG emissions because provinces can regulate them and (2) the Federal Carbon Pricing Regime imposes unconstitutional taxes because there is no legislated requirement that funds obtained as a result of the Federal Carbon Pricing Regime be used to reduce GHG emissions and therefore, a sufficient link does not exist to the stated regulatory purpose. The Ontario Reference is scheduled to be heard from April 15-18, 2019.

Next Steps

The Province of Ontario is soliciting input from the public on a new climate action plan for the province (the “**Anticipated Provincial Climate Action Plan**”) until November 16, 2018, which it expects to release later this fall. Those wishing to provide comments or suggestions regarding the Anticipated Provincial Climate Action Plan are encouraged to do so using [this Government of Ontario website](#).

The federal government is also seeking input with respect to a number of aspects of the Federal Carbon Pricing Regime, including with respect to [the proposed relief for greenhouse operators and power plant operators that generate electricity for remote communities](#) (until November 23, 2018).

The regulations with respect to the Cap and Trade Cancellation Act are expected to be published later this fall. The draft regulations on the OBPS will also be published for public comment later this fall and the final version of the regulations on the OBPS will be published in spring 2019. Goodmans will publish additional updates as these documents are released.

For further information on the Cap and Trade Cancellation Act, the implementation of the Federal Carbon Pricing Regime or other recent government announcements, please contact any member of our [Cleantech Practice Group](#).

Goodmans Cleantech Practice Group

Goodmans Cleantech Group consists of lawyers who understand the connection between business, technology and energy innovation. Our cleantech practice focuses on entrepreneurs, operating companies, and investors who are looking for value-added legal advice regarding clean technology transactions.

Successful cleantech ventures often bring together different industry and professional sectors. We collaborate in interdisciplinary teams to provide more cost-efficient and extraordinarily effective counsel. Our internal team assists clients with private equity financing transactions and to secure their valuable intellectual property rights. We guide clients through M&A transactions and other financing transactions. We also assist clients with joint ventures and financings of clean technology manufacturing facilities and renewable energy power generation projects.

Goodmans is a leader in working with investors and entrepreneurs who are developing new materials and technologies, partnering with them to bring their ideas to market. We are committed to addressing our clients’ needs at every stage: from the earliest discovery or concept; through development, funding, partnerships, and large-scale utility operations; to public offerings and other capital events.

¹ See our previous Updates on the cancellation of the Provincial Cap and Trade System: [Ontario’s Environmental Commissioner Calls for Strong Replacement Climate Law](#), [Ontario Introduces Bill to Cancel Cap and Trade and Launches Carbon Tax Case](#) and [Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction](#).

² See: [Department of Finance Announcing Climate Action Incentive Payments and Launch of Fuel Charge Consultations](#) and [Government of Canada Fighting Climate Change with Price on Pollution](#).

³ Financial Accountability Office of Ontario, “Cap and Trade: A Financial Review of the Decision to Cancel the Cap and Trade Program” (October 16, 2018).

⁴ For more information, see our previous Updates on the Federal Carbon Pricing Regime: *Feds Announce Proposed Carbon Pricing System as Part of Pan-Canadian Clean Growth Plan, Pricing Carbon to Support the Clean Energy Transition*.

⁵ See: *Registering a Facility to the Output-Based Pricing System*.

⁶ For an enumerated list of facilities subject to the OBPS, see Section 3 of the *Registration Notice*.

⁷ See: *Pricing Pollution: How it will Work and Implementing Canada's Plan to Address Climate Change and Grow the Economy: Putting a Price on Carbon Pollution*.

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