

Goodmans^{LLP} Update

Federal and Ontario Updates on Climate Change and Clean Growth Plans

Beginning this month (January 2019), the federal Output-Based Pricing System (OBPS) for large emitters will apply in Ontario and other jurisdictions that had not met the federal carbon pricing benchmark as of September 2018. The federal fuel charge will also apply in Ontario beginning in April 2019. The application of the federal regime in Ontario comes as a result of Ontario's decision, in the latter part of 2018, to cancel its cap and trade regime. The province has since (i) introduced its proposed environmental plan, which includes greenhouse gas (GHG) emissions reduction targets that are less onerous than the reduction targets mandated by the previous government, and (ii) announced it will soon release its proposed approach to reduce GHG emissions for large industrial emitters in the province (the "**Proposal**"). This Update considers the implications of the recent developments in overlapping federal and provincial climate change laws and initiatives for businesses in Ontario.

Climate Action Considerations for Ontario Businesses

1. Large emitters should monitor the continuing development of and comply with the requirements of the federal OBPS under the *Greenhouse Gas Pollution Pricing Act* (the "**Federal GHG Act**").
2. Large emitters should review the Proposal and may wish to encourage the federal and Ontario governments to settle on a common set of output-based standards for large emitters in the province.
3. All businesses, and especially cleantech businesses, should closely monitor the development of and changes to the different climate action and clean technology support programs offered by the federal and Ontario governments.
4. Cleantech businesses may also want to monitor the judicial and other challenges to the Federal GHG Act and encourage the relevant political actors to resolve their differences with a view to achieving certainty regarding the price on carbon pollution.

Background

In the latter part of 2018, the Ontario government cancelled the cap and trade regime, joined the judicial proceedings initiated by Saskatchewan to challenge the constitutionality of the Federal GHG Act, and initiated similar proceedings in Ontario.¹ In the wake of these developments, Ontario adopted GHG emissions reduction targets which are less onerous than those previously in place and outlined, in general terms, proposed climate change initiatives in its [Made-in-Ontario Environment Plan](#) (the "**Plan**").²

Since the Plan neither puts a price on the carbon pollution caused by the consumption of fossil fuels by consumers, nor sets out a detailed regime for reducing the GHG emissions of large emitters³, the federal government withdrew funding for certain climate change initiatives previously allocated to Ontario provincial programs and stated it is fully implementing the Federal GHG Act in the province. For its part, Ontario is seeking to control the regulatory regime applicable to both carbon pricing and large emitters and would also like to regain control of the funding for climate change initiatives which was withdrawn by the federal government.

The Federal Second Annual Synthesis Report

Toward the end of 2018, the federal government released its Second Annual Synthesis Report on the Status of Implementation (the "**Report**") of the Pan-Canadian Framework on Clean Growth and Climate Change (the "**PCF**"). The PCF was adopted by most of Canada's First Ministers on December 9, 2016⁴ and set out an agreed roadmap for: (i) the pricing of carbon pollution; (ii) other steps to reduce GHG emissions; (iii) climate change adaptation; and (iv) the development of clean technologies, innovation, and jobs. The Report is the second annual update on the implementation of the PCF and the actions being taken by Canada, the provinces, the territories and First Nations to position Canada to

meet its Paris Agreement GHG emissions reduction target of 30% below 2005 levels by 2030. The Report summarizes the development and implementation of the Federal GHG Act during 2018, the ongoing development of the regulations detailing the applicability and operation of the carbon pollution levy on fossil fuels and the federal OBPS⁵ and also documents the progress being made with respect to the other three pillars of the PCF.

Carbon Pollution Pricing

With respect to the pricing of carbon pollution, the Federal GHG Act is to apply to those jurisdictions and sectors not found to have met the federal carbon pricing benchmark as of September 1, 2018. As a result, the federal OBPS for large emitters will apply, starting in January 2019, in Ontario, Manitoba, New Brunswick, Prince Edward Island, and, partially, in Saskatchewan; the federal fuel charge will apply, starting in April 2019, in Saskatchewan, Ontario, Manitoba, and New Brunswick, and starting on July 1, 2019 in Yukon and Nunavut. All other provinces and territories have either implemented, or committed to implement, carbon pollution pricing regimes which satisfy the federal benchmark.

In Ontario, large emitters are currently subject to the regimes under: (i) the federal OBPS (which is to be further detailed after review of comments); and (ii) the output-based performance standards described in the Plan and the News Release (which are to be further detailed in the Proposal, in January 2019, and after review of comments and other input from stakeholders). However, since both the federal OBPS and the Ontario output-based performance standards: (i) are to be based upon “factors such as trade-exposure, competitiveness and process-emissions”; (ii) remain open for comments; and (iii) will not be finalized until later this spring, there would appear to be no reason for the two regimes to diverge. Further, insofar as the province intends to adopt an approach to the output-based performance standards which will be similar to that taken in Saskatchewan (which was found, where applicable, to satisfy the federal benchmark), a similar outcome for Ontario should be achievable and stakeholders may wish to encourage this.

Complementary Actions to Reduce Emissions

To complement carbon pollution pricing, the PCF includes a variety of other activities designed to reduce emissions and provide other benefits, such as improved health outcomes (e.g., by reducing harmful air pollution), lower costs for Canadians (e.g., by improving energy and fuel efficiency), reduced traffic congestion (e.g., by improving public transit), and use of cleaner and more effective technologies (e.g., digital energy management systems).

The complementary activities described in the Report include regulations, programs and funding in the areas of electricity, the built environment, transportation, industry, forestry, agriculture and government leadership, all of which are designed to support the transition towards a better, low carbon future.

To support green infrastructure and public transit projects, all provinces and territories have finalized integrated bilateral agreements with the federal government for the Investing in Canada Infrastructure Program, under which \$9.2 billion has been allocated for green infrastructure and \$20.1 billion has been allocated for public transportation.

The Report indicates the Low Carbon Economy Leadership Fund (the “**Leadership Fund**”) is providing \$1.4 billion to provinces and territories to leverage investments in projects that will generate clean growth and reduce GHG emissions to support the PCF, but notes Saskatchewan is not eligible for the Leadership Fund portion of the broader \$2 billion Low Carbon Economy Fund as it did not adopt the PCF. The federal government similarly stated the Ontario government would not receive the \$420 million in funding from the Leadership Fund that was withdrawn when the province cancelled its cap and trade program last summer. The federal government will instead provide the funding directly to communities and organizations in Ontario to assist them to combat climate change.⁶

Adaptation and Resilience

The Report also outlines the actions being taken in support of the adaptation and resilience commitments made in the PCF, to respond to the risks climate change poses to the safety, security, health and well-being, economy and natural environment of Canada. This work includes continuing efforts to ensure Canadians have the information, expertise and capacity to effectively address climate change in their planning;

improving the climate resilience of infrastructure through project and changes to codes, and standards; and other steps to protect the health and well-being of Canadians, particularly those in vulnerable regions and communities.

Clean Technology, Innovation and Jobs

The PCF's carbon pollution pricing and other complementary activities to reduce GHG emissions provide incentives for Canadian businesses and consumers to adopt clean technologies to save money and reduce their environmental impacts. Countries around the world, including Canada, are pursuing the economic opportunities in clean technologies. Globally, the clean technology market has the potential to be worth in excess of \$2.5 trillion by 2022 and provide US\$26 trillion in economic benefits (compared to business-as-usual) through a global shift to a low carbon economy between 2018 and 2030.

As detailed in the Report, clean technology activity in Canada continues to grow, and is becoming an increasingly important part of the Canadian economy. To help facilitate the development of international markets, the Government of Canada has announced a targeted export strategy for the clean technology industry through the Trade Commissioner Service, launched the Clean Growth Hub, Clean Growth Program, and Impact Canada Initiative, as well as the BDC clean technology practice.

The amounts provided by the Ontario government for carbon reduction initiatives under the Plan, namely the \$350-million emission reduction fund and the \$50-million fund for reverse auctions of proposals for emissions reduction projects, are expected to further encourage private investments in clean technology solutions in the province.

What This Means For Industry

Ontario is home to 35% of Canada's innovative clean technology companies and has the largest and fastest-growing cleantech sector in Canada, with over 5,000 companies employing 130,000 people and \$19.8 billion in annual revenues. The Report and the Plan recognize the capital, capability and know-how of the Ontario clean technology sector and detail a number of programs and other supports for the industry.

Next Steps

The federal government has published the [draft OBPS regulations](#) and [proposed cost-benefit analysis framework](#) for public comment before finalizing the regulations. The draft regulations provide the proposed output-based standards, rules for compliance and compensation, criteria respecting covered facilities and amended quantification, reporting and verification requirements. Comments can be submitted until February 15, 2019 at ec.tarificationducarbonatecarbonpricing.ec@canada.ca.

As described in the News Release, the Government of Ontario will release the Proposal for public comment on the [Environmental Registry](#) in January 2019. The Government of Ontario will also consult with a number of key industry stakeholders on the emission performance standard before and after the Proposal is released. As part of the consultation process, the Government of Ontario will explore methods to recycle any funding collected back to industry to finance technologies that will result in further GHG reductions.

The Province of Ontario is also continuing to solicit input from the public on the Plan until January 28, 2019. Those wishing to provide comments or suggestions are encouraged to do so on the [Environmental Registry](#).

For further information on the Proposal or the Plan or opportunities for public comment, 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.

Goodmans^{LLP} Update

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.

Authors



Richard Corley
rcorley@goodmans.ca
416.597.4197



Niki Kermani
nkermani@goodmans.ca
416.849.6005



Sophie Langlois
slanglois@goodmans.ca
416.849.6925



Kate Lyons
clyons@goodmans.ca
416.597.4183

¹ See our November 12, 2018 Update, *Cap and Trade Formally Cancelled in Ontario – Federal Carbon Pricing Regime Clarified*, our October 3, 2018 Update, *Ontario's Environmental Commissioner Calls for Strong Replacement Climate Law*, and our June 27, 2018 Update, *Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction*.

² Discussed in our December 7, 2018 Update: *Ontario Government Releases "Made-in-Ontario" Environment Plan*.

³ As reported in: *Feds Say No to Ontario's Request for Climate Cash*.

⁴ Saskatchewan and Manitoba did not adopt the PCF at that time, but Manitoba subsequently joined and Saskatchewan, while not joining, continues to contribute to the annual Report.

⁵ See our January 23, 2018 Update, *Feds Announce Proposed Carbon Pricing System as Part of Pan-Canadian Clean Growth Plan* and our November 12, 2018 Update, *Cap and Trade Formally Cancelled in Ontario – Federal Carbon Pricing Regime Clarified*.

⁶ See *supra* note 3.

All Updates are available at www.goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice. © Goodmans LLP, 2019.