

Goodmans^{LLP} Update

Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction

In a [News Release](#) issued on Friday, June 15, 2018, Premier-designate Doug Ford announced that the first act of his newly formed government will be to cancel Ontario's Cap and Trade Program. He also said he will challenge the federal government's authority to impose its backstop carbon tax regime: "in Ontario, the carbon tax's days are numbered." In the News Release the Premier-designate also confirmed he directed officials to immediately take steps to withdraw Ontario from future auctions for cap and trade allowances.

In response, California and Quebec (Ontario's partners in the Western Climate Initiative (WCI)) immediately blocked cap and trade participants in those jurisdictions from trading greenhouse gas (GHG) allowances under their respective cap and trade programs with Ontario entities, and issued the [Auction Notice](#) for the upcoming August 2018 joint auction of GHG allowances, which excluded Ontario.

On June 11, 2018, Ontario's share of proceeds from the most recent auction of GHG allowances (held jointly with Quebec and California) was confirmed to be just over \$472 million, bringing the total provincial revenues to date to \$2.88 billion. Unless replacement funding is provided from other sources, the termination of this funding, which was committed to energy conservation and innovation, will set back the development of Ontario's cleantech industry.

Shortly after these announcements, the Premier-designate announced the closure of the [GreenON](#) rebate programs, which support solar energy installations and a variety of energy efficient renovations. These "Green Rebates" were among the programs funded by the Ontario Cap and Trade Program, and the termination is expected to reduce the levels of solar installations and energy renovations in Ontario. It is also rumoured that the [incoming provincial government may cancel the incentive programs for electric vehicles](#) and charging infrastructure.

Challenging the Federal Carbon Tax Backstop

The federal *Greenhouse Gas Pollution Pricing Act* (the "[Pricing Act](#)"), which received Royal Assent on Thursday, June 21, 2018 as a Part of [Bill C-74 \(the Budget Implementation Act, 2018\)](#), provides for the pan-Canadian application of pricing mechanisms to GHG emissions across Canada. As discussed in our January 23, 2018 Update, [Feds Announce Proposed Carbon Pricing System as Part of Pan-Canadian Clean Growth Plan](#), the federal backstop regime under the *Pricing Act* will impose, starting in January 2019, a federal price on GHG emissions in any province which is not then implementing a compliant provincial carbon pricing regime (such as the Ontario Cap and Trade Program). The price on GHG emissions, under the *Pricing Act*, is expected to be somewhat higher than the price under the Ontario Cap and Trade Program.

While there would not appear to be a solid legal basis to challenge the constitutional authority of the federal government to impose and collect a national tax on GHG emissions¹, the Province of Saskatchewan has commenced a reference case in the Saskatchewan Court of Appeal challenging the constitutionality of the federal carbon tax regime under the *Pricing Act* (primarily on the basis of varying approaches to carbon pricing which may be used to satisfy the requirements of that *Pricing Act* in different provinces). Premier-designate Doug Ford has similarly pledged to fight the federal carbon tax through the courts "all the way to the Supreme Court of Canada" but has not identified the specific legal basis for such a challenge.

Issues for Consideration and What's Next

The cancellation by Premier-designate Ford of the Ontario Cap and Trade Program did not comply with the withdrawal procedure under Ontario's WCI agreement with Quebec and California², which specifies that a "Party that intends to withdraw from this Agreement shall

endeavour to give 12 months notice ... to the other Parties” and “... shall endeavour to match the effective date of withdrawal with the end of a compliance period”. The Province of Ontario’s abrupt withdrawal resulted in the immediate cessation of the trading of allowances with Ontario entities and has created considerable uncertainty, including with respect to the following issues:

- For what time period will compliance by the Ontario participants with the Ontario Cap and Trade Program be or have been required?
- Will past non-compliance with the Ontario Cap and Trade Program be forgiven?
- What is the status and value of unused GHG allowances held by entities in Ontario?
- Could any claims be asserted in respect of purchases of (now unused) GHG allowances made in reliance on the Ontario Cap and Trade Program and the inter-jurisdictional GHG allowance trading arrangements under the WCI Agreement?
- Could any claims be asserted by emitters who made expenditures to achieve emissions reductions in reliance on the Ontario Cap and Trade Program?
- Could any claims be asserted under the WCI Agreement by California and Quebec as a result of the manner in which the Ontario Cap and Trade Program was cancelled, or by any cap and trade participants in those markets?
- As the costs to consumers of their GHG emissions fall, what GHG emissions reduction program will be put in place to enable the Province of Ontario to meet its GHG commitments, and how will such a program impact industries and businesses in the province?

With respect to the implementation of the federal carbon tax in Ontario, possible questions include:

- How will the Province of Ontario seek to challenge the federal carbon tax and on what basis? (E.g., launch a new reference case in the Court of Appeal of Ontario, join in the case in the Saskatchewan Court of Appeal or an appeal of that case to the Supreme Court of Canada, or seek to persuade the federal government to refer an agreed constitutional question directly to the Supreme Court of Canada?)
- How long will it take to fully resolve the matter?
- Will the Province of Ontario seek to implement its own compliant carbon tax regime (to better control the proceeds of such a tax) during the litigation of the constitutional carbon tax questions?
- What can be done to mitigate the impacts on industry and businesses of the uncertainty about the pricing and/or other regulatory regimes which is (or are) to apply in the province to reduce GHG emissions during and after these legal proceedings?

For further information on Ontario’s Cap and Trade Program and the *Pricing Act*, please contact any member of our [Environmental Law](#) and [Cleantech](#) Practice Groups.

¹ For example, see: Schwartz, Bryan P. “[Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals](#)” Prepared for: The Government of Manitoba, October 6, 2017; and Hogg, Peter W. “[Constitutional Authority over Greenhouse Gas Emissions](#).” *Alberta Law Review* 46.2 (2009): 507-520.

² Section 17 of the [Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions Between The Gouvernement du Québec, The Government of California and The Government of Ontario, September 22, 2017](#) (the “**WCI Agreement**”).

Authors



Richard Corley
rcorley@goodmans.ca
416.597.4197



Kate Lyons
clyons@goodmans.ca
416.597.4183



Dan Gormley
dgormley@goodmans.ca
416.597.4111



Jesse-Ross Cohen
jcohen@goodmans.ca
416.849.6903



Sophie Langlois
slanglois@goodmans.ca
416.849.6925

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