

Goodmans^{LLP} Update

Ontario Introduces Bill to Cancel Cap and Trade and Launches Carbon Tax Case

On July 25, the Honourable Rod Phillips, Minister of Environment, Conservation and Parks (the “**Minister**”), introduced Bill 4: *Cap and Trade Cancellation Act, 2018*, (the “**Proposed Act**”). The Proposed Act will repeal the cap and trade regime enacted under the previous government’s *Climate Change Mitigation and Low-carbon Economy Act, 2016* (the “**CCM Act**”) and will retire or cancel the various cap and trade instruments (i.e., emissions allowances and offset credits, the “**Instruments**”) currently held by Ontario participants (“**Participants**”) under the cap and trade regime. The Proposed Act was introduced in the wake of then Premier-designate’s June 15, 2018 [announcement](#)¹, that the first act of his newly formed government will be to cancel Ontario’s Cap and Trade Program, and the enactment, as of July 3, 2018, [O. Reg. 386/18](#) which terminates the [Cap and Trade Program regulation](#) and prohibits Participants from purchasing, selling, trading or otherwise dealing with Instruments.

Under the Proposed Act, a limited group of approximately 250 capped Participants may be entitled to compensation for certain current unused Instruments, on terms which are to be detailed in regulations under the Proposed Act (the “**Regulations**”). Other Participants, in particular market Participants and holders of 2021 vintage Instruments are not intended to qualify for compensation under the Proposed Act.

Participants should carefully review the expected impacts of the Proposed Act for any Instruments they hold and may wish to assess their options, including possibly making representations to the government concerning the expected impacts of the Proposed Act and/or with respect to the Regulations.

Key Elements of the Proposed Act

Retirement and Cancellation of Instruments

The Proposed Act will repeal the CCM Act and retire or cancel all Instruments held by Participants, including those authorized under the CCM Act and those purchased by Participants through the Ontario-Quebec-California carbon market, which Ontario joined in January 2018. Based on statements made by the Minister at the second reading of the Proposed Act, Instruments corresponding to the greenhouse gas emissions attributed to Participants in respect of the period ending on July 3, 2018 are to be retired, and all other Instruments held by Participants and any undistributed cap and trade instruments will be cancelled.

Limits on Compensation for Instruments and Other Claims

The Proposed Act contemplates that possible claims for compensation for Instruments held by Participants on July 3, 2018 will be resolved under one of three different regimes, with further details to be prescribed in the Regulations.

First, based on statements made by the Minister at the second reading of the Proposed Act, the government expects the costs of Instruments held by Participants which are electricity importers, natural gas distributors, petroleum products suppliers or transmission system operators, to be largely recovered from consumers in the coming months. As a result the Ontario Energy Board should be in a position to remove the carbon cost from its approved rates for natural gas at its next hearing in October, and the cost of gasoline and diesel should be lowered by 4.5 cents and 5.5 cents a litre, respectively, in 2019. Unless otherwise provided by the Regulations, these Participants are not eligible for any form of compensation under the Proposed Act for their Instruments.

Second, with respect to capped Participants (excluding market Participants and those referred to above), the Proposed Act sets out a formula for determining whether any Instruments they hold may qualify for compensation. Subject to the Regulations, the Instruments which may

qualify for compensation would equal the number of Instruments held on July 3, 2018 minus: (i) the number of Instruments retired in respect of the period ending on July 3, 2018; (ii) the number of Instruments that were distributed free of charge to the Participant under the CCM Act; and (iii) the number of Instruments having a 2021 vintage year. Since such capped Participants were, in most or all cases, provided with a high percentage of free Instruments, and would likely have retired a significant number of Instruments prior to July 3, 2018, they will be unlikely to qualify for much, if any, compensation under this formula.

Third, with respect to market Participants (non-emitting holders of Instruments), other Participants with Instruments having a 2021 vintage year, or any other person having a claim with respect to cancelled Instruments or otherwise with respect to the repeal of the CCM Act, no compensation or damages may be claimed.

Restrictions on Claims Against the Ontario Government

With the exception of possible claims by capped Participants seeking compensation for unused Instruments (under the regime described above), the Proposed Act purports to bar, among other things: (i) any cause of action arising against the Government of Ontario and related persons as a result of various matters, including, the enactment, operation or administration of the Proposed Act and the retirement or cancellation of cap and trade instruments in accordance with the Proposed Act and (ii) any claims for damages or compensation in respect of the value of cap and trade instruments retired or cancelled by the Proposed Act.

Whether the provisions of the Proposed Act which purport to exclude or limit claims for compensation or damages, or causes of action relating to the Proposed Act or the CCM Act can be successfully challenged under international trade agreements or otherwise remains to be determined.

Targets, Plans and Progress Reports

The Proposed Act requires the Government to establish targets for the reduction of greenhouse gas emissions in Ontario, but does not specify the timeframe within which the targets are to be established and also permits revisions to the targets from time-to-time.

It also requires that the Minister prepare and publish a climate change plan, which may be revised from time-to-time, and report regularly to the public on the climate change plan.

Challenges to Federal Carbon Tax

On August 2, 2018 the Minister and the Attorney General, Caroline Mulroney, announced that the Government of Ontario will challenge the constitutionality of the federal government's carbon tax (applicable in Ontario on January 1, 2019) before the Ontario Court of Appeal. This proceeding is in addition to the previously announced decision to intervene in the Government of Saskatchewan's reference case against the federal carbon tax.

Uncertain Times for Cleantech

The introduction of the Proposed Act, the challenges to the federal carbon tax and other recent developments in the Province of Ontario, including decisions to wind down 758 renewable energy contracts and the various green programs funded by the cap and trade system, have increased the level of uncertainty facing cleantech companies and other companies doing business in the Province. Effective risk assessment and mitigation is particularly critical with respect to businesses and contracts which may be affected by changes to the cap and trade regime or the price of carbon.

For further information and guidance on the cancellation of Ontario's cap and trade program, or other cleantech matters, 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.

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¹ Discussed in Goodmans' Update: [Going, Going, Gone – Ontario Premier-Designate Announces Cancellation of Cap and Trade; Pulls Ontario Out of August GHG Auction.](#)

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