

Climate change regulation: New tensions between federal and provincial legislators

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Authors: [Elliot A. Smith](#), [Evan Barz](#)

Climate change regulation is once again making legal headlines this year as the Government of Canada enacted its federal carbon pricing plan and new tensions between the federal and provincial governments have emerged. Initially touted as having support from nearly all jurisdictions across Canada, a number of provinces have subsequently withdrawn from the federal plan, leaving the federal government without the strong cross-jurisdictional support it had hoped would buoy the regime's success. In Ontario and Saskatchewan, provincial governments have filed references with their respective courts of appeal to challenge the constitutionality of the federal carbon pricing plan. In other jurisdictions — including Alberta and New Brunswick — governments have instituted carbon-pricing regimes which the federal government has indicated do not satisfy the requirements of the federal plan.

The result of this shifting landscape is uncertainty for businesses in Canada. Businesses with operations in different Canadian provinces will be well-advised to continue to monitor this shifting regulatory landscape. It remains important for businesses with carbon-intensive operations to find the most efficient and cost-effective ways to comply with ever-changing regulations. For some businesses, the evolving legislative frameworks may offer incentives and other opportunities, including offset credits and emissions reduction funding, that can act as a catalyst for development and investment.

Federal carbon pricing regime is now in force

The *Greenhouse Gas Pollution Pricing Act* came into force as of June 21, 2018, and imposes the federal carbon pricing backstop on businesses and residents in provinces and territories without an approved carbon pricing system (the Backstop).

Beginning in 2019 with a carbon price of \$20 per tonne of carbon dioxide equivalent (CO₂e) and increasing by a price of \$10 per year to reach \$50 per tonne by 2022, the Backstop is comprised of two main elements: (i) a charge/tax on fuel consumption, which takes effect on April 1, 2019; and (ii) an output-based pricing system for certain covered facilities, which takes effect on January 1, 2019 (details of this system are not expected to be finalized until spring 2019). The output-based pricing system will apply to facilities that have reported emissions of 50,000 tonnes of CO₂e or more per year during any calendar year between 2014 to 2017.

When it was proposed, the Backstop was supported by all provinces with the exception of Saskatchewan. However, in recent months, Ontario, Alberta and Manitoba have withdrawn support for the plan. It is presently anticipated that the Backstop will apply in the provinces of Ontario, Saskatchewan, Manitoba, New Brunswick, and Prince Edward Island, as well as in Yukon and Nunavut.

Ontario cancels cap-and-trade and develops new carbon regime

Under the previous Liberal government, Ontario had in place the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, which, as of January 1, 2017, established a cap-and-trade system linked with Québec and California through the Western Climate Initiative.

On July 3, 2018, Doug Ford's newly-elected Progressive Conservative government revoked the regulation that created Ontario's cap-and-trade program. The government subsequently passed the *Cap and Trade Cancellation Act*, repealing the legislation underpinning Ontario's cap-and-trade program. In connection with the cancellation, the government also passed legislation barring any future or current action against the Crown for losses arising directly or indirectly from the cancellation of the cap-and-trade program and the repeal of the former legislation and regulations.

As a result of the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* and its regulations, Ontario currently has no price on carbon, no emissions targets, and no climate change plan. Therefore, as announced by the federal government on October 23, 2018, the Backstop will apply in Ontario.

Ontario's *Cap and Trade Cancellation Act* commits the government to establishing new emissions targets and to developing a new climate change plan. On November 29, 2018, Rod Phillips, Ontario's Minister of the Environment, Conservation and Parks, released details of this plan in a policy document, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan*. Among other things, the plan proposes that Ontario (i) reduce its emissions by 30% below 2005 levels by 2030 (aligning with Canada's target under the Paris Agreement), (ii) establish performance standards for large industrial emitters, and (iii) create the Ontario Carbon Trust, a fund that provides taxpayer-funded incentives to businesses to adopt emissions reduction practices and technologies.

Alberta and Manitoba withdraw support for the Backstop

Following a Federal Court of Appeal ruling that halted construction on the Trans Mountain Pipeline Expansion, Alberta has withdrawn its support for the Backstop. Under the Backstop, jurisdictions like Alberta that have implemented a price-based system are required to price carbon at a minimum of \$20 per tonne beginning in 2019, and to increase the cost by \$10 per year to reach \$50 per tonne by 2022. Alberta is presently charging \$30 per tonne of CO₂e, which satisfies the Backstop requirements until 2020. However, if the province fails to further increase the cost beyond that price by January 1, 2021 when the federal carbon price is expected to reach \$40 per tonne, Alberta's system will no longer comply with federal standards. At that point, the Backstop will likely take effect in Alberta.

Similarly, the Government of Manitoba has recently indicated that it does not support the application of the Backstop to Manitoba, after initially indicating that it would impose a flat \$25 per tonne charge, in addition to establishing an output-based pricing system for energy intensive and trade-exposed industries with emissions over 50,000 tonnes of CO₂e per year. Manitoba Premier Brian Pallister, who made the announcement withdrawing Manitoba's support for the federal plan, stated that the federal government has failed to respect the

province's right to develop its own plan. Pallister has indicated that Manitoba will instead focus its energies and resources on developing clean hydroelectric power, phasing out coal, and recycling. As a result of withdrawing its support for the federal plan, the Backstop will apply in Manitoba.

Ontario and Saskatchewan's constitutional challenges to the Backstop

Both Ontario and Saskatchewan have brought constitutional references challenging the Backstop in the Ontario Court of Appeal and Saskatchewan Court of Appeal, respectively. Additionally, Ontario has sought leave to intervene in Saskatchewan's challenge. Both references ask the respective courts whether the federal legislation is unconstitutional in whole or in part. The legal issue will likely involve both jurisdictional division of powers questions, including whether regulating greenhouse gas emissions falls within the federal government's power under the *Constitution Act, 1867* to legislate for the peace, order, and good government of Canada on matters of national concern, as well as more fact-specific questions about whether the provinces' plans meet the federal benchmark.

While Manitoba has not joined Saskatchewan and Ontario in their legal actions, the province did request that Professor Brian Schwartz of the University of Manitoba deliver a report to the Government of Manitoba on the constitutionality of the federal carbon pricing plan. In his report, Professor Schwartz concluded that there is a "strong likelihood that the Supreme Court of Canada would uphold the proposed carbon tax/levy" on the basis that the carbon tax falls within the federal government's taxation head of power. Professor Schwartz further indicated that "[t]he backstop measure, in and of itself, is unlikely to render an otherwise valid federal carbon tax/levy unconstitutional" and would likely be viewed as an exercise of "co-operative federalism."

Saskatchewan's constitutional reference case will be heard by the Saskatchewan Court of Appeal in February 2019. As yet, Ontario's Court of Appeal had not set a hearing date for Ontario's reference. In the meantime, the Backstop will apply in Ontario and Saskatchewan until the respective constitutional references have been ruled upon by the Courts. As a result, tensions between the federal government and the provinces that oppose the Backstop will likely continue to persist until there is a decision on the validity of the federal carbon plan.

Conclusion

The current uncertainties in climate change regulation in Canada and the tensions between the federal and provincial governments present both challenges and opportunities for businesses with operations in Canada. For example, businesses that have established baseline expectations for carbon pricing regimes may be forced to re-evaluate those expectations as the regulatory frameworks evolve. In particular, large industrial emitters in jurisdictions where the Backstop is anticipated to apply may wish to consider whether they will be able to comply with the federal plan. In other instances, businesses may be able to take advantage of potential profit opportunities which remain available under the federal and provincial carbon plans, including carbon offsets and saleable carbon credits.