

**POTENTIAL IMPACTS OF THE FEDERAL
VERSUS PROVINCIAL LAWS ON THE
ENVIRONMENT AND CLIMATE CHANGE**

Environmental Law Wars

Presented By

Chidinma B. Thompson, Ph.D
Partner, Borden Ladner Gervais LLP
Calgary

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Federal Climate Change Legislation

- ***Canadian Environmental Protection Act, 1999***
- **Paris Agreement**
 - International commitment to reduce GHGs to 30% below 2005 levels by 2030.
- **The Pan-Canadian Framework on Clean Growth and Climate Change**
 - Established in 2016 to meet Paris commitment to reduce GHG emissions.
 - Gives provinces and territories the flexibility to design their own policies to meet emissions reductions targets.
 - **Main pillars and key commitments:** Carbon pricing and Complementary measures such as phasing out coal by 2030, increasingly stringent building codes by 2020, Clean Fuel Standard based on a full life-cycle analysis, continuing the phase down of hydrofluorocarbons (HFCs), implementing methane regulations with the goal of reducing methane emissions by 40-45% by 2025.

Pan-Canadian Framework on Clean Growth and Climate Change

- **Carbon pricing is the central initiative of the Pan-Canadian Framework.**
- **Provinces and territories develop equivalent carbon pricing policies by September 1, 2018, or be subject to the federal carbon pricing program.**
- **Two options: price-based system or a cap-and-trade system.**
- **Federal benchmark:**
 - For carbon pricing systems, charge must start at a minimum of \$10 per tonne in 2018 and rise by \$10 per year to \$50 per tonne in 2022.
 - For cap-and-trade systems, the 2030 emissions-reduction target must be equal or greater than 30%, and there must be declining annual caps to at least 2022 that correspond to projected emissions.

Provincial Participation in the Pan-Canadian Framework

- A majority of provinces and territories have established carbon pricing systems that meet the federal standard.
- Provinces that have not developed compliant carbon plans will be subject to the federal carbon system beginning in 2019.
 - Saskatchewan
 - Ontario
 - Manitoba
 - New Brunswick
 - **Soon Alberta???**

The *Greenhouse Gas Pollution Pricing Act*

- **Includes two carbon-pricing mechanisms that mirror the Pan-Canadian Framework requirements:**
 - A charge on fossil fuels across board (i.e., a price on carbon); and
 - For larger industrial emitters (50,000 tonnes), an output-based pricing system (“OBPS”). But 10,000 tonnes must report under GHGR Prog.
 - **Registered OBPS facilities will be able to access charge-free fuel from the time the charge starts to apply.**
- **Compliance Mechanisms: (a) federal emissions charge; (b) OBPS surplus credits; or (c) eligible offset credits.**
- **No cap on use of surplus credits and offset credits.**
- **Surplus credits and offset credits expire 5 years after issuance.**

Federal Environmental Assessment Legislation: Bill C-69

- Currently, *Canadian Environmental Assessment Act, 2012* (the “CEAA 2012”).
- “Responsible Authority” include the Canadian Nuclear Safety Commission, the National Energy Board, prescribed federal regulatory body, and the Agency.
- Bill C-69 (*An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*) in Senate Committee as of Dec. 12, 2018, to replace the CEAA 2012 with:
 - *Impact Assessment Act* - expand assessment to include health, social economic, Indigenous Peoples and gender-based impacts; increase public participation.
 - One review for designated projects by new Impact Assessment Agency of Canada.
 - *Canadian Energy Regulator Act* - replace the National Energy Board with a new body: the Canada Energy Regulator.

Other Federal Environmental Legislation

Bills C-68 and C-48

- **Bill C-68 (*An Act to amend the Fisheries Act and other Acts in consequence*)** in Senate Committee as of Dec. 11, 2018, among other things, to:
 - restore prohibitions against destroying fish “by any means other than fishing” and against carrying on “any work or undertaking that results in harmful alteration, disruption or destruction [HADD] of fish habitat”;
 - introduce a new regulatory framework for authorization of projects, creation of fish habitat banks by project proponents, and the establishment of a public registry.
- **Bill C-48 (*Oil Tanker Moratorium Act*)** (for bitumen, synthetic crude oil, petroleum pitch, bunker C fuel oil, etc.) in Senate Committee as of Dec. 11, 2018, to:
 - formalizes a crude oil tanker moratorium on the north coast of British Columbia and sets penalties for contravention of this moratorium (raised by Northern Gateway pipeline project);
 - complements the existing voluntary Tanker Exclusion Zone, which has been in place since a 1988 voluntary agreement between Canada and the US “to keep laden tankers west of the zone boundary in an effort to protect the shoreline and coastal waters from a potential risk of pollution,” as well as Government of Canada’s \$1.5 billion Oceans Protection Plan.

The Clean Fuel Standard Regs. (under CEPA 1999)

- In the long term to replace the *Renewable Fuels Regulations* (5% in gasoline, 2% in diesel) and complement the Pan-Canadian approach to pricing carbon to achieve 30 megatonnes of annual reductions in GHG emissions by 2030.
- Will set lifecycle (from raw material extraction through materials processing, manufacture, distribution, use, repair and maintenance, and disposal or recycling) carbon intensity performance-based requirements separately for liquid, gaseous and solid fuels combusted in transportation, industry and buildings sectors.
- To be expressed either as absolute values or as percent reductions from the relevant baselines. Will apply to fuel producers, importers, or in some cases distributors.
- Compliance by: increase in renewable fuel content, credits from process improvements, fuel switching and the deployment of energy sources and technologies that displace fossil fuels such as electric vehicles.
- Final regulations for the liquid fuel stream expected to be in force by 2022, and for the gaseous and solid fuel streams by 2023.

Co2 and Methane Reduction Regs. (under CEPA 1999)

- ***Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector) (SOR/2018-66)*** - coming into force on January 1, 2020.
- To ensure that fugitive or venting emissions of methane are reduced.
- ***Regulations Limiting Carbon Dioxide Emissions from Natural Gas-fired Generation of Electricity, SOR/2018-261*** – in force January 1, 2019.
- Establishes performance standards and sets emissions limits for new natural gas-fired combustion engines and converted boilers for electricity generation units.
- Other federal Air Emissions and Greenhouse Gases Proposed Regulatory Initiatives can be found under the Forward Regulatory Plan 2017 to 2019
<http://www.ec.gc.ca/default.asp?lang=En&n=DF9C1A4C-1&offset=1&toc=show%23X-2017022815060985>

Provincial Climate Change Legislation - Alberta

- The ***Environmental Protection and Enhancement Act*** (“EPEA”) is Alberta’s primary environmental statute. EPEA, ss. 108-109: Prohibits the release of substances in an amount that is in excess of the regulations.
- Alberta’s **Climate Leadership Plan is enabled and supported by:**
- the *Climate Leadership Implementation Act* (and its regulations);
- the *Oil Sands Emissions Limit Act* and the *Energy Efficiency Alberta Act*;
- the *Climate Change and Emissions Management Act* (and its regulations);
 - Carbon Competitiveness Incentive Regulation, Alta Reg 255/2017 (“CCIR”) replaced the *Specified Gas Emitters Regulation* (“SGER”) on January 1, 2018;
 - Specified Gas Reporting Regulation, Alta Reg 251/2004;
 - Renewable Fuels Standard Regulation, Alta Reg 29/2010; and
 - Climate Change and Emissions Management Fund Administration Regulation.

Provincial Climate Change Legislation - Alberta

- **Alberta's Climate Leadership Plan (post 2015) established:**
 - A full phasing out of pollution from coal-generated electricity by 2030 (with a goal to generate at least 30% of electricity from renewable sources by 2030);
 - A cap on oil sands emissions of 100 megatonnes per year with provisions excluding certain projects including certain cogeneration and new upgrading capacity;
 - A 45% reduction of methane emissions from upstream O&G production by 2025;
 - A \$30/tonne economy-wide carbon levy on all fuels that emit GHGs when combusted expressed as a price per volume of fuel purchased, imported, removed from facility, flared or vented in Alberta (with few exemptions and eligible rebates) expected to continue to increase in real terms, suggested to be inflation plus 2%, each year;
 - CCIR imposes an output-based benchmark on all competitors in the same emitting industry that are large emitters (100,000 tonnes or more), tightened by 1% per year, commencing in 2020. But 50,000 tonnes emitters must report.

Provincial Climate Change Legislation - Alberta

- **Four compliance options, the same as in SGER:**
 - pay into the Climate Change and Emissions Management fund \$30 for every tonne over a facility's reduction benchmark;
 - Improve operations;
 - Purchase Alberta-based carbon offset credits from unregulated activities (Offset Registry. Cost is market-driven); and
 - Purchase Emission Performance Credits from other regulated facilities (Emission Performance Credit Registry. Cost is market-driven).
- **The CCIR will cap the use of emission offsets and emission performance credits at 50% of the emitter's total compliance obligation, which cap will grow to 60% by 2020.**
- **It also puts a six-year expiration date on emission offsets and performance credits from 2014 and eight-year expiry for credits from 2017 and forward.**

Other Provincial Climate Change Legislation

○ Ontario

- Ontario repealed its carbon cap-and-trade program in 2018 and announced a made-in-Ontario Environment Plan in February 2019 that commits to reducing the province's emissions output to 30% below 2005 levels by 2030 **without imposing a carbon tax**.
- By sector or facility-level Emissions Performance Standards (“EPS”) for industrial facilities to be in place by summer 2019 and will regulate the same sectors covered by the federal Output-Based Pricing System.
- By removing policy or regulatory barriers that hinder ability to reduce emissions with new technologies or processes.
- A proposal to increase the renewable content in gasoline to 15 per cent as early as 2025.

○ Saskatchewan

- Has not implemented any carbon pricing initiatives.
- Will instead implement output-based performance standards on industrial facilities that emit 25,000 tonnes or more by January 1, 2019.

Other Provincial Climate Change Legislation

- **BC:** \$35/tonne carbon tax – higher than the federal standard.
- **Manitoba:** withdrew \$25/tonne carbon tax - below federal standard.
- **Quebec:** Implemented federally compliant cap-and-trade program.
- **Newfoundland and Labrador:** Implementing \$20/tonne carbon tax on January 1, 2019; If other provinces opt out of federal plan, will follow suit.
- **PEI:** Not subject to federal carbon pricing program – instead subject to fuel charge on gas and diesel.
- **Nova Scotia:** Implementing federally compliant cap-and-trade program on January 1, 2019.

Conflicts between Federal and Provincial Governments

- **The federal carbon backstop regulation applies in Saskatchewan, Ontario, Manitoba and New Brunswick (backstop provinces) in April 2019 and starting in July 2019 in Nunavut and Yukon.**
- **Provincial Court challenges to the *Greenhouse Gas Pollution Pricing Act***
 - Saskatchewan Court of Appeal - heard in February 2019.
 - Ontario Court of Appeal - heard in April 2019.
 - New Brunswick and Manitoba – intervened in support of Ontario and Sask., and proposed their own Court proceedings.
- **British Columbia intervened in Court proceedings in support of the federal carbon pricing plan.**

Legal Challenges to the *Greenhouse Gas Pollution Pricing Act*

- The Saskatchewan government launched a constitutional reference case in the Saskatchewan Court of Appeal opposing the GGPPA.
- Saskatchewan's key arguments:
 - Federal carbon tax is unconstitutional because it is not applied equally among the provinces.
 - The GGPPA violates principles of federalism and the sovereignty of the provinces.
 - The federal government does not have the jurisdiction to implement “local taxes”.
 - The GGPPA violates s. 53 of the Constitution (Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons).

Legal Challenges to the *Greenhouse Gas Pollution Pricing Act*

- Ontario launched a constitutional reference case in the Ontario Court of Appeal shortly after Saskatchewan.
- Ontario's key arguments in opposition to the GGPPA are as follows:
 - The federal government lacks the power to put a price on GHGs.
 - Provinces have the ability to regulate GHGs themselves.
 - The carbon levy is an unconstitutional tax – the legislation does not require that the funds be used for the reduction of GHGs.

Federal Response to SK's and ON's Challenges

- The federal government has put forth the following arguments to defend its constitutional right to implement a federal carbon pricing system:
 - The federal government does have jurisdiction, because climate change is a matter of national concern (under the constitutional “POGG” power).
 - There is no constitutional requirement for federal laws to operate equally throughout Canada.
 - The federal carbon levy is not a true “tax” – it is a regulatory action.
 - The federal carbon levy is not intended to raise federal revenues – all revenue generated will be returned back to the provinces.
 - 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.

More Conflicts between Federal and Provincial Governments

- **Alberta, Ontario and Saskatchewan’s Joint opposition to Bill C-69.**
 - The provinces state that it “effectively hinders natural resource related development within the country.”
 - Have also expressed concern that the new *Impact Assessment Act* will result in more complex, costly, and time-consuming project assessment processes, which could “ultimately erode Canada’s economic competitiveness.”
- **Alberta’s opposition to the federal Clean Fuel Standard.**
 - fears that the policy could harm the province’s economy, which relies heavily on fossil fuels.
 - withdrew from the Pan-Canadian Framework after the Federal Court of Appeal quashed the approval of the Trans-Mountain Pipeline expansion, and will not re-join until the project it is approved.
- **Ontario’s proposed *Federal Carbon Tax Transparency Act* - gas stations to display the sticker on each pump showing the federal carbon tax adding 4.4 cents per litre to the price of gas now, and rising to 11 cents a litre in 2022.**

What's in store for the future?

- Alberta Election: Jason Kenney's UCP won a majority government
- Federal Election: **Environmental Law Wars - Round 2 ???**



A new Climate Change Agenda in Alberta - Impacts?

- **First legislature sitting third week of May 2019.**
 - Bill 1 - the Carbon Tax Repeal Act.
 - Bill 2 - the Open For Business Act.
- **Federal Environment Minister vowed to impose carbon pricing on Alberta should Alberta repeal its Carbon Tax legislation.**
- **Alberta vows Court of Appeal challenge if Alberta is forced to comply with a federal carbon backstop.**
- **Federation of provinces and alliance of conservative leaders pushing back against the federal carbon backstop tax (Ontario, Saskatchewan, Manitoba, New Brunswick and Alberta).**
- **Constitute 5 of the 10 provinces with 60% of the population “could wield serious**
²²**power and influence in the carbon tax and pipeline battles” (Preston Manning)**

Looking Forward

- **The constitutionality of federal climate change legislation has been placed into question by several provinces, and this trend may continue.**
- **Concerns are mounting about how cumbersome climate change legislation may impact federal and provincial economies, and Canada’s overall competitiveness for foreign investment termed ESG (Environmental, Social and Governance).**
- **Interjurisdictional cooperation will be an asset, if not a requirement, for any national climate change approach to be successful.**
- In *Reference re Proposed Federal Tax on exported Natural Gas* [1982] 1 S.C.R. 1004, the Supreme Court of Canada held that if the primary purpose of the levy is raising revenue for general federal purposes, the immunity in s. 125 of the Constitution Act, 1867 which states that no lands or property belonging to Canada or any Province shall be liable to Taxation, is engaged. If the federal government imposes a levy primarily for regulatory purposes, or incidental to a broader regulatory scheme, then the levy is not in pith and substance “taxation” and s. 125 does not apply.



Questions?

Thank You

For more information, contact:

Chidinma B. Thompson, Ph.D
Partner, Borden Ladner Gervais LLP,
Calgary
403.232.9666
Cthompson@blg.com



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