



Cap-and-Trade Program Design Options Consultation

Submitted to: Ministry of Environment and
Climate Change

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (the “OBA”) appreciates the opportunity to provide a submission to the Ministry of the Environment and Climate Change (the “Ministry”) with respect to the *Cap and Trade Program Design Options Paper* (the “Options Paper”), EBR Registry Number 012-5666, describing the Ministry’s proposed Cap and Trade Program (the “Program”)

As set out in earlier submissions with respect to previous greenhouse gas (“GHG”) emission reduction consultation documents, the OBA supports the Ministry in its efforts to move forward with a GHG reduction regime, including a price on carbon and other measures to support reducing GHGs and adapting to climate change. If appropriately implemented, these measures should support the Province’s stated environmental goals while providing clarity for industry and facilitating the process of de-carbonizing our economy.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government with dozens of legislative and policy initiatives each year - in the interest of the public, the profession and the administration of justice.

This submission was prepared by the OBA’s Natural Resources and Energy Law and Environmental Law Sections, along with the Securities Sub-Committee of the Business Law Section, each of which include the leading practitioners in their respective fields. Collectively, these sections have approximately 2,000 members, who would count among their clients a wide variety of stakeholders interested in effective and efficient environmental regulation in this province, including energy importers and generators, industrial and large commercial operators, institutions, and fuel importers and distributors who will be regulated under the proposed Program, as well as municipalities, corporations, residents groups, and environmental non-governmental organizations.

Comments

The OBA supports the development of a climate change policy and program design that is fair across all economic sectors and provides regulatory clarity, consistency and transparency.

We have provided similar comments related to previous GHG emission reduction consultation documents. The comments in this submission build on the OBA’s previous submissions related to



EBR Registry Number 012-3452 submitted in March 2015, EBR Registry Number 011-7940 submitted in 2013, and EBR Registry Number 010-6740 and 010-6467 submitted in 2009.

Timing

The OBA believes that an important objective of Ontario's GHG emission reduction policy must be to promote rapid movement toward a low-carbon economy. Mitigation of GHG emissions and adaptation to climate change is urgent.

We agree that achieving Ontario's 2020 GHG reduction target should be a provincial priority and that delaying implementation of the Program would make achieving this target more difficult. We support the January 2017 start date (assuming that the draft regulations are circulated in the first quarter, and finalized before the end of the third quarter, of 2016) and Ontario's plan to provide extensive training and outreach to assist emitters with understanding their compliance obligations.

Program Scope

In previous submissions, we emphasized the importance of consistency with other North American jurisdictions and a broad scope of coverage. We agree that the cap should cover all emissions that can reliably be measured or estimated and support the proposed broad sector coverage which is consistent with Quebec and California.

In assessing whether to broaden the scope of the Program to include additional sectors, the Ministry should consider whether the proposed coverage would allow for effective, efficient and fair reductions across the economy and consistency with other jurisdictions. The Ministry should also apply these considerations when determining the appropriate point of regulation and the appropriate treatment of fixed process versus combustion emissions and new and expanding facilities under the Program.

Market Design Features

We are pleased that the Ministry has adopted the market design features developed by the Western Climate Initiative ("WCI") to mitigate market manipulation, reduce administrative costs, support market certainty, and promote transparency. As we have set out in previous submissions, we support consistency between Ontario's program design and the WCI.

The OBA has specialized expertise in legal issues related to trade law and securities law and we look forward to considering the details of the Ministry's proposal when the draft cap and trade regulations are released for comment. We encourage the Ministry to ensure that any requirement to disclose consultants and advisors as part of the registration requirements fully protects solicitor-client privilege.



Mitigating Carbon Leakage

(i) Distributing Allowances

The distribution of free emissions allowances needs to appropriately balance a variety of factors, including trade competitiveness and early action. Free emissions allowances should not be based on historical emissions to the extent that this rewards inefficiency, the use of carbon-intensive fuels and shrinking markets. We believe that allowances should be auctioned to the greatest extent possible (while ensuring an appropriate balancing of interests).

In setting the cap decline factors, the Ministry should take into account available technology in the regulated sectors. The cap decline factors should be regularly reviewed to take into account new technological developments.

We encourage the Ministry to provide notice of the process to allocate free allowances in post-2020 compliance periods as early as possible. In particular, the Ministry should signal when, and by how much, the assistance factor will decrease for each leakage category to provide greater certainty to regulated emitters.

(ii) Flexibility Mechanisms

Flexibility mechanisms are crucial in achieving compliance. We agree with the Ministry's proposal that banking allowances should be permitted, subject to the holding limit, and that borrowing allowances should not be permitted. Borrowing can create substantial compliance and enforcement problems and could delay action to reduce GHG emissions. The flexibility objectives of allowance borrowing can be achieved through the multi-year compliance period.

(iii) Use of Offset Credits

Where possible, given the integration with Quebec and California, the Ministry should encourage the growth of Ontario's new green economy through domestic offsets.

(iv) Border Carbon Adjustments

The OBA agrees that border carbon adjustments are required in some circumstances, such as, example, to ensure that Ontario renewable power generators are not prejudiced. We look forward to providing more detailed comments when the Ministry has identified which sectors, in addition to electricity and fuels, may be subject to a border carbon adjustment.

Recognizing Early Reductions

We agree that early action to reduce GHG emissions should be recognized and rewarded.



Compliance Requirements, Enforcement and Penalties

Compliance and reporting requirements should be simple, effective and transparent, and should harmonize with Quebec and California. We encourage the Ministry to ensure that compliance and enforcement measures support, rather than undermine, market certainty, particularly with regard to offset validation.

In the series of questions on page 29, the Options Paper raises issues around compliance and enforcement of the proposed program. To that end, the Ontario government might be advised to consider the interaction of the proposed cap and trade regime with the securities regulator regime in Ontario.

The Options Paper contemplates auctioning of allowances to emitters, as well as other participants in the system, by the Ontario provincial government, as well as the banking and re-sale of those allowances prior to the allowances being surrendered for compliance purposes. It also contemplates the use by emitters of offset credits to meet reduction targets, and the trading of those offset credits. The trading is contemplated within Ontario, Canada and North America (at a minimum).

The trading in allowances and offset credits, whether on a spot or forward basis OTC and in an organized trading process, the participation of non-emitters in trading allowances, the trading of offset credits OTC, and in an organized auction process raises issues about the extent to which these trades should be subject to the Ontario *Commodity Futures Act* or the *Ontario Securities Act* (the "OSA"). In order to ensure the integrity of the cap and trade system and its participants, the Ontario government should consider the extent to which the current securities regulatory regime covers the trading under the proposed cap and trade system, and, where there are gaps in coverage, consider amendments to the OSA and its rules to address those gaps.

Conclusion

The OBA applauds the province for the leadership it has shown in developing a cap and trade program that will join in a North American carbon market. We fully support measures to meet the challenge of climate change, and welcome the opportunity to keep our members apprised of all developments directed to this important goal.

Once again, we appreciate the opportunity to provide comments to the Ministry on the Options Paper and look forward to providing a more detailed analysis of the draft cap and trade regulations in 2016.