

Government Cap and Trade Revenues Not Available for Adaptation: Should Ontario Amend the Environmental Protection Act?

December 27, 2015

Ontario published its Climate Change Strategy on November 24, 2015 which sets out the part Ontario proposes to play in the global effort to slow, eliminate, or reverse the harmful effects of greenhouse gas (GHG) emissions. A cornerstone will be a cap and trade program which will be linked with California and Québec's systems, an approach designed to "put a price on carbon", primarily through the auction and sale of allowances (as they are called in California and will be called here) or emission units (as they are referred to in Québec's legislation). A corollary is that significant government revenues will be generated in Ontario – estimated to be over \$1 billion per year – and available to be deployed commencing in 2017 (2017 is the year in which the first auction of allowances will be held if current plans are implemented).

One use for that revenue that has been proposed by some is to direct a significant proportion towards 'adaptation'. Adaptation has been defined as "anticipating the adverse effects of climate change and taking appropriate action to prevent or minimize the damage they can cause, or taking advantage of opportunities that may arise."¹

There has been significant and increasing recognition at the international level that adaptation measures are of great importance in dealing with climate change. The Paris Agreement adopted by the 21st Conference of the Parties to the Framework Convention on Climate Change (COP21) on December 12, 2015 includes numerous references to the importance and need for adaptation planning and implementation, including the provision of finance, particularly for developing countries. In paragraph 4 of Article 9 of the Paris Agreement, the goal of a "balance between support for mitigation and adaptation" in providing finance to developing countries is set out Agreement and the thought is repeated in paragraph 6 of Article 10 of the same agreement. This concept has been part of the history of the development of international climate change agreements and documents, including an appearance of adaptation in the Copenhagen Accords in 2009. At the United Nations' 2010 Climate Change Conference in Cancun, Mexico (COP16), parties adopted the Cancun Adaptation Framework calling for enhanced action on adaptation and which affirmed, in part, that "Adaptation must be addressed with the same priority as mitigation and requires appropriate institutional arrangements to enhance adaptation action and support."² COP16 also saw the establishment of the 'Green Climate Fund', a fund within the framework of the UNFCCC which aims to drive climate finance to developing countries to aid in both mitigation and adaptation efforts.

While it may be the case that mitigation in developed countries is a higher priority, it is unlikely that it is appropriate for adaptation efforts to be ignored. Moreover, in the context of payments to permit the discharge of greenhouse gases where there is clearly "damage" to the planet and the ecological systems on it, allocating some of the proceeds to pay for the losses caused seems sensible. Thus it is worth considering whether revenues collected from Ontario's cap and trade auctions can be put towards adaptation measures. In its 2015 budget, the government announced that revenue would be directed "towards key priorities that will help lower greenhouse gas emissions and help businesses remain competitive, which could include public transit; research and development of new and innovative green technology solutions; and increased energy efficiency in homes, buildings and automobiles."³ The failure to mention adaptation is likely a direct result of the wording of Ontario's existing legislation which does not appear to permit such use.

¹ European Commission. http://ec.europa.eu/clima/policies/adaptation/index_en.htm

² United Nations Framework Convention on Climate Change. *Cancun Adaptation Agreement*. <http://cancun.unfccc.int/adaptation/> section 2(b)

³ Ministry of Finance, *Building Ontario Up: Ontario Budget 2015*, Government of Ontario, 127.

Ontario contemplated a cap and trade system as early as 2008, when the province signed an agreement to participate in the Western Climate Initiative. The following year, the government passed the *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading)*, which re-enacted section 176.1 of the *Environmental Protection Act* (EPA). The legislation received Royal Assent on December 15, 2009 and the portions dealing with the proceeds from the cap and trade program were made effective in 2015.

Section 176.1(6) of the EPA creates the “Greenhouse Gas Reduction Account” (referred to here as the “GGRA”) into which all proceeds of the sale of “instruments” in the cap and trade system (ie allowances) are to be deposited. Sections 176.1(6) and (7) in effect provide that, beyond reimbursing the Crown for costs incurred in administering the cap and trade program, monies in the GGRA are to be allocated exclusively to “carrying out or supporting greenhouse gas reduction initiatives, particularly initiatives that relate to the sectors of the Ontario economy to which the regulations apply.”⁴ Section 176.1(9) then clarifies, without limiting that general provision, that money in the GGRA may be paid out in respect to the following: 1) costs of research into or the development or deployment of lower GHG emitting technologies in a sector of the Ontario economy that is affected by the cap and trade program; 2) costs of programs to reduce GHG emissions in sectors covered by the program; 3) costs of infrastructure or equipment to reduce GHG emissions in sectors covered by the program; 4) if the electricity sector is covered by the cap and trade system (which current plans contemplate), costs of any GHG reduction initiatives that would otherwise be borne by electricity consumers.

It appears that it is unlikely that any revenues from the cap and trade program will be earmarked towards adaptation efforts. This of course does not preclude the government from making non-cap and trade funds available for minimizing the adverse effects of climate change, given sufficient justification in the existing laws of Ontario. As it is not clear that such exists, it would arguably be prudent for Ontario’s majority government to pass legislation dealing with the issue and perhaps, in addition to prioritizing adaptation expenditures generally, permit the use of revenues from the cap and trade program for that purpose. In that light, the promise of the Ontario government in its Climate Change Strategy to introduce legislation that, if passed, would establish a long-term framework for action perhaps provides the needed opportunity.

Gray Taylor
Barrister and Solicitor
GRAY TAYLOR LAW
130 King Street West, Exchange Tower,
Suite 3670
Toronto, ON, Canada, M5X 1E2
+1 416 786 5533
gray@graytaylorlaw.com

⁴ Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), s. 2(8).

