

Ontario Calls It Quits: Implications of Ontario's Decision to Cancel Cap-and-Trade

By [John Georgakopoulos](#), Partner and Certified Environmental Law Specialist, [Giselle Davidian](#), Associate. © Willms & Shier Environmental Lawyers LLP.

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The Ontario government has committed to ending the cap and trade program in Ontario, fulfilling a campaign pledge made by Premier Ford earlier this year.

Ontario's cap and trade program was linked to California and Quebec under the Western Climate Initiative. Pursuant to the joint carbon market, the three governments set emissions caps on their energy distributors and industrial emitters, and sold allowances that companies could purchase to comply with the regulations from 2017 to 2020. The program also established a secondary market through which regulated companies and speculators could buy and sell allowances.

The cap and trade program was the primary tool to help Ontario achieve its greenhouse gas (GHG) emissions reduction targets of 15% below 1990 levels by 2020, 37% by 2030, and 80% by 2050.

Repealed Law

As of July 3, 2018, the Ontario government repealed the cap and trade program regulation O. Reg. 144/16 and filed O. Reg. 386/18: Prohibition against the Purchase, Sale and Other Dealings with Emission Allowances and Credits. O. Reg. 386/18 sets out that no registered participant shall, on and after July 3, 2018, purchase, sell, trade or otherwise deal with emission allowances and credits.

On July 25, 2018, Bill 4, *Cap and Trade Cancellation Act, 2018* was introduced into the Ontario Legislature. Bill 4, if passed, will repeal the *Climate Change Mitigation and Low-carbon Economy Act, 2016* and wind down Ontario's cap and trade program.

Key elements and effects of the *Cap and Trade Cancellation Act, 2018* include

- ♦ repeal of the Climate Change Mitigation and Low-carbon Economy Act, 2016
- ♦ cancellation of the cap and trade “eligible instruments”, including allowances, held by participants on July 3, 2018, as well as undistributed instruments
- ♦ potential compensation of participants who hold more “eligible instruments” as of July 3, 2018 than would be necessary to meet that participant's compliance obligation over the prescribed time period. The potential compensation is to be determined in accordance with yet to be published regulations. Bill 4 sets out which participants will not be entitled to compensation, including
 - non-emitting market participants who acquired instruments for resale

- natural gas and petroleum distributors, who are expected to have recovered their costs from consumers
 - other compensation claims against the Government of Ontario related to cancelled compliance instruments and the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*
- ◆ prohibition of any compensation claims, causes of action, or proceedings against the Crown as a result of various steps implemented to cancel Ontario's cap and trade program and compliance instruments. Bill 4 also extinguishes existing proceedings, regardless of when the cause of action arose.

On August 1, 2018, the new O. Reg. 390/18: Greenhouse Gas Emissions: Quantification, Reporting and Verification came into force under the *Environmental Protection Act*.¹ The new reporting requirements require that capped participants provide, no later than October 1, 2018, a report and verification statement about the specified GHG activities at a facility, and the electricity importation, natural gas distribution or petroleum product supply, for the period beginning on January 1, 2018 and ending on July 3, 2018. GHG emissions reported through this regulation will be used to determine the number of cap and trade instruments to be retired for the participants under the winding down of the cap and trade program.

With the proposed repeal of the *Climate Change Mitigation and Low-Carbon Economy Act, 2016* and its regulations, there remains much uncertainty about what will become of the credits many Ontario companies had purchased through auctions.

The Ontario government posted Bill 4 on the Environmental Registry of Ontario for public comment until October 11, 2018.²

Implications of Ontario's Pullout

Since March 2017, there have been six joint auctions, through which Ontario's government had sold \$2.8 billion in allowances. Ontario's auction proceeds went towards the operation of the Green Ontario Fund to pay for climate-friendly programs, rebates for home upgrades, and clean-technology pilot projects.

As a result of the cancellation of the cap and trade program in Ontario, several green initiative programs funded by the Greenhouse Gas Reduction Account have been cancelled. This includes

- ◆ The GreenON Industries Program, which provided financial support for eligible clean technology projects and large-scale technology deployment and facility modernization, and
- ◆ The GreenON Small and Medium Businesses Program, which offered financial incentives for capital retro-fits and energy saving projects.

¹ RSO 1990, c E19.

² <https://ero.ontario.ca/notice/013-3738>

Since the announcement, California and Quebec have locked Ontario out of the secondary market to prevent companies from dumping \$2.8 billion in emissions credits and depressing prices in future auctions.

Ontario's repealed laws and regulations may create uncertainty and fear in the market, potentially resulting in negative impacts to the success of the California and Quebec programs.

What's Ahead?

On July 11, 2018, one week after repealing the cap and trade program, the Ontario government canceled the province's Electric and Hydrogen Vehicle Incentive Program (EHVIP). The EHVIP offered rebates of up to \$14,000 to those buying qualifying electrical vehicles. The program was funded by the profits from Ontario's cap and trade program.

On August 10, 2018, Tesla Inc. filed a lawsuit in Ontario's Superior Court of Justice (ONSC) against the Ontario government over the government's cancellation of electric vehicle rebates.³ Tesla claimed that the province "deliberately and arbitrarily" targeted Tesla by excluding Tesla's customers from the incentive while allowing purchasers of other brands to receive the rebate during a transition period.⁴

On August 27, 2018, the ONSC ruled that the provincial government's decision to exclude Tesla from a grace period for an electric vehicle rebate program was arbitrary and had singled out Tesla for harm.⁵ Myers, J. quashed and set aside the "Minister's unlawful exercises of discretion to implement the transition program announced July 11, 2018."⁶

The Ontario government subsequently expanded the program to include Tesla. The Ontario government has announced that it will not appeal the ONSC decision.

It will be interesting to see what other legal challenges the Ontario government will face, from corporations and Ontario citizens alike, as a result of the province's cancellation of the cap and trade program and the green programs it funded.

³ Tesla applied to the court under the *Judicial Review Procedure Act*, s.6 (2). That provision allowed Tesla to bring its case before a single judge of the Ontario Superior Court of Justice, rather than the Divisional Court, on an urgent basis.

⁴ Tesla and its customers who bought cars before July 11, 2018 and had them delivered by September 10, 2018 were excluded from a two-month extension of government subsidies that electric car buyers of other brands received.

⁵ *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062.

⁶ *Ibid* at 65.

[John Georgakopoulos](#) is a partner and Certified Environmental Law Specialist by the Law Society of Ontario at Willms & Shier Environmental Lawyers LLP in Toronto. John may be reached at 416-862-4826 or by e-mail at jgeorgakopoulos@willmsshier.com.

[Giselle Davidian](#) is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Giselle may be reached at 416-646-4894 or by e-mail at gdauidian@willmsshier.com.

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