CELA Submission on Bill 172 (Climate Change Mitigation and Low-carbon Economy Act, 2016)

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1. Introduction

Strong action to immediately reduce greenhouse gas ("GHG") emissions is absolutely essential. CELA has been advocating for a GHG emissions price for many years. We support the government of Ontario's decision to introduce a cap and trade system. Bill 172 has the potential to be a key piece of environmental legislation.

The success of Ontario's cap and trade system in assisting Ontario in meeting its long-term GHG emission reduction targets is contingent on the system being stringent and fair. These comments suggest amendments to Bill 172 which will help it to achieve its purpose "to reduce greenhouse gas in order to respond to climate change" and to "protect the environment and to assist Ontarians to transition to a low-carbon economy."[1]

In a cap and trade system, GHG emission reductions are incentivized through two interrelated mechanisms, the price per tonne of CO_2 equivalent ("CO_2e") and the declining cap on emissions. We suggest amendments to both of these features as proposed in Bill 172 to better incentivize the "change to behaviour of everyone across the province, including spurring low-carbon innovation", as envisioned by the preamble.

Broad public acceptance of the program also depends on ensuring that (1) First Nation and Métis communities are given an appropriate role in the transition to a decarbonized economy, (2) low-income and vulnerable communities are assisted in the transition to a decarbonized economy, (3) the decisions on the use of revenue from the Greenhouse Gas Reduction Account ("GGRA") are transparent and the revenue is only used for new, additional initiatives or expanding existing initiatives that are likely to reduce GHG emissions, and (4) important public powers are not delegated to unaccountable third parties, particularly powers for inspection and enforcement.

2. The cap and trade system is not stringent enough to incentivize a true, lasting shift to a decarbonized economy

A. The price of GHG emissions is too low

The cap and trade scheme, as proposed, does not establish a price for GHG emissions that would incentivize a transition to a decarbonized economy. Ontario should ensure that its GHG pricing mechanism is effective by establishing a high price early on. A strong GHG regulatory scheme based around a high GHG price will discourage Ontario's emitters from locking into GHG intensive projects.[2]

[1] Bill 172, s 2(1)(a).
[2] Bataille, Chris et al, "Pathways to deep decarbonization in Canada, SDSN - IDDRI" (2015) online: Deep Decarbonization Pathways Project <http://deepdecarbonization.org/wp-content/uploads/2015/09/DDPP_CAN.pdf> [*Bataille 2015*], at 38.

The Green Budget Coalition calls for a nation-wide carbon price of at least $50 by 2020 in its 2016 Federal Budget recommendations.[3] Policy models examining the feasibility of a national GHG reduction target of 20% from a 2006 baseline by 2020 found that a price of $100 per tonne in 2020 was inadequate to meet that goal, despite an accompanying full suite of complementary measures.[4]

The price for an emissions allowance under the current Ontario proposal is estimated to be $17 or $18 per tonne of CO_2e.[5] This is much lower than the British Columbia $30 per tonne tax, or Alberta's 30$ per tonne tax to be established after January 2018. Ontario faces a further risk of low GHG prices if it joins the Western Climate Initiative ("WCI") because there are already surplus emission allowances in the WCI, which will drive down the price per allowance.[6]

The low price of GHGs also highlights the importance of effective complementary measures for emissions reduction. California and Québec do not expect their cap and trade programs to deliver all necessary emissions reductions to meet their targets. In fact, California's climate change strategy expects 85% of its reductions by 2020 to come from complementary measures.[7] It is essential that Ontario's other environmental policies, including initiatives funded by the GGRA, be adequately funded and well administered in order to meet the reduction targets.

Recommendation

Recommendation 1: The cap and trade scheme should establish a price of CO_2e that is at least $50 by 2020.

B. The strength of the cap

Because the expected price of CO_2e in Ontario's cap and trade scheme is so low, the strictness of the hard cap on emissions and the steepness of its decline will be the only true incentive for changes to carbon-emitting behaviour.

[3] Green Budget Coalition, *Recommendations for Budget 2016*, online: Green Budget Coalition <http://greenbudget.ca/wp-content/uploads/2016/01/Full-Recommendations-Budget-2016.pdf> at 21.
[4] Bataille, Chris et al, "Final report: Exploration of two Canadian greenhouse gas emissions targets: 25% below 1990 and 20% below 2006 levels by 2020" (2009) online: David Suzuki Foundation <http://www.davidsuzuki.org/publications/downloads/2009/MK_Jaccard_GOV_and_ENGO_Climate_Targets_Report_-_Oct_18_2009.pdf> at 4. One of the models examined was a national emission target of approximately 600 Mt CO_2e by 2020, a 20% reduction from a 2006 baseline. For comparison, using 2005 as a baseline, Ontario's emissions reduction goal is 27% by 2020.
[5] Shawn McCarthy, "Ontario cap-and-trade plan cuts big polluters some slack" (23 February 2016) online: Globe and Mail <http://www.theglobeandmail.com/news/national/ontario-cap-and-trade-plan-cuts-big-polluters-some-slack/article28862887/>.
[6] Rotherham, Duncan, "Ontario Cap and Trade: Overview and Scope of the Challenge" ICF International, presentation to Ontario Energy Association (18 February 2016), p 8.
[7] Purdon, Mark, David Houle and Eric Lachapelle, "The Political Economy of California and Québec's Cap-and-Trade Systems" (Ottawa: Sustainable Prosperity, 2014), at 31, online: Sustainable Prosperity <http://www.sustainableprosperity.ca/sites/default/files/publications/files/QuebecCalifornia%20FINAL.pdf>.

Subsection 29(2) provides that the regulations "may prescribe" the maximum number of Ontario emission allowances to be created during a period, and that the maximum will be determined "with reference" to the targets established in section 6. Ontario should consider other factors that will affect its ability to meet the section 6 targets in establishing the maximum number of emission allowances:

- Canada's international commitments relating to GHG reductions;
- Evaluation of Ontario's other environmental policies to reduce GHG emissions, including initiatives funded by the GGRA;
- 8% of each emitter's compliance obligation can be met by offsets;[8]
- Early reduction credits are available;[9]
- New entrants in capped sectors are not required to comply with Bill 172 for two years;[10]
- If Ontario links with other WCI jurisdictions, those jurisdictions may set less stringent GHG reduction targets over time;
- There may be excess allowances available in other WCI markets.

Further detail about setting the cap is laid out in the proposed regulations and will be examined in CELA's response to EBR Registry Number: 012-6837.

Recommendation

Recommendation 2: Subsection 29(2) should be amended as follows:

> **The regulations <u>shall</u> prescribe the maximum number of Ontario emission allowances that may be created during a period, and the maximum number shall be determined to enable Ontario to meet the targets established under section 6(1) for the reduction of greenhouse gas emissions, or more stringent greenhouse gas emission reduction targets as prescribed, by considering the following factors:**
>
> **(i) Canada's international commitments relating to GHG reductions;**
>
> **(ii) Evaluation of Ontario's other environmental policies to reduce GHG emissions, including initiatives funded by the Greenhouse Gas Reduction Account;**

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[8] Bill 172, s 34; Appendix to the Draft Cap and Trade Regulation, s 9(2)1.
[9] Bill 172, s 34(3), Appendix to the Draft Cap and Trade Regulation, s A.4.
[10] Appendix to the Draft Cap and Trade Regulation, s A.2.8.

(iii) The amount of offsets used by capped emitters to meet their compliance obligations;

(iv) The amount of early reduction credits used by capped emitters to meet their compliance obligations;

(v) Any new mandatory participants in the cap and trade program that are not yet required to comply with the Act;

(vi) The stringency of emissions reduction targets in other jurisdictions, where Ontario has entered into agreements with those jurisdictions under section 73;

(vii) The number of excess allowances available in other jurisdictions, where Ontario has entered into agreements with those jurisdictions under section 73; and

(viii) Any other factor that will impact on Ontario's ability to meet its section 6 GHG reduction targets.

C. The MOECC has not justified its decision to allocate a considerable number of allowances for free

CELA does not support the free allocation of emission allowances. The MOECC's plan to allocate free allowances to cover most industrial emissions bears no apparent relationship to leakage concerns because even industrial emitters with low leakage risk are eligible to receive free allowances. The current proposal for free allowances is better understood as a program-wide subsidy for industrial emitters.

The risk of carbon leakage is unsubstantiated. Carbon leakage is not likely to affect a large proportion of Ontario's economy and the significance of leakage for Ontario has likely been overstated.[11] A report from the Ecofiscal Commission estimates that at a price of $30 per tonne of CO_2e, producers amounting to only 2% of Ontario's GDP are at risk of leakage.[12]

[11] Chris Bastille, Benjamin Dachis and Nic Rivers, "Pricing Greenhouse Gas Emissions: Impact on Canada's Competitiveness" (February 2009) 280 CD Howe Institute Commentary 1, online: CD Howe Institute <https://www.cdhowe.org/pdf/commentary_280.pdf>. See also Daniel A Farber, "Pollution Markets and Social Equity: Analyzing the Fairness of Cap and Trade" (2012) 39:1 Ecology LQ, online: Berkeley Law at <http://scholarship.law.berkeley.edu/facpubs/2047>.

[12] Elizabeth Beale et al., "Provincial Carbon pricing and Competitiveness Pressures: Guidelines for Business and Policymakers" (Canada's Ecofiscal Commission: 2015) online: Canada's Ecofiscal Commission <http://ecofiscal.ca/wp-content/uploads/2015/11/Ecofiscal-Commission-Carbon-Pricing-Competitiveness-Report-November-2015.pdf>.

Free allowances distort market signals about the carbon intensity of a process or product which would otherwise be communicated to consumers.[13] By distributing free allowances to all capped facilities, the MOECC has also foregone considerable revenue that should be used to fund initiatives contemplated by section 68 and schedule 1.

If allowances are to be distributed for free, Bill 172 should be amended to include the following key principles:

a) Free allowances should be targeted only to producers who prove that they are vulnerable to leakage.

b) The MOECC's approach to determining which producers are vulnerable must be transparent.

c) Any assistance should be temporary. There should be clear phase-out timelines in subsection 30(2) to provide certainty to covered industries and to incentivize emissions reductions in covered industries.

Recommendations

Recommendation 3: Ontario should not distribute free allowances.

Recommendation 4: If the Ontario government distributes free allowances to industrial emitters in the first compliance period, subsection 30(2) should be amended to include a clear phase-out timeline.

Recommendation 5: If the Ontario government distributes free allowances to industrial emitters in the first compliance period, they must be targeted, transparent, and temporary.

3. <u>Amendments to Bill 172 to improve public acceptance of the cap and trade program</u>

A. Engagement with First Nation and Métis communities

It is critical that Indigenous peoples play a significant role in responding to and preventing the worst effects of climate change.[14] The preamble and other Bill 172 language should be amended to better reflect the government-to-government relationship and the process of reconciliation between the province and Aboriginal communities. The Minister should specifically commit to consultation and accommodation of First Nation and Métis communities at the strategic level

[13] Bill 172, s 2(2).
[14] *A Statement from the Indigenous People Gathered at the Mississaugas of the New Credit First Nation in Ontario, Canada*, October, 2015, at 3-4

when preparing climate change action plans, alongside the commitment to respect section 35 rights.[15]

Subsection 7(2) should be amended to require the Minister to incorporate the traditional ecological knowledge placed before him, instead of requiring only consideration of the *role* of such knowledge. Furthermore, the Minister should incorporate any relevant information a First Nation or Métis community brings to the Minister's attention, regardless of whether it constitutes traditional ecological knowledge.

Recommendations

Recommendation 6: The preamble to Bill 172 should be amended as follows:

> **First Nation and Métis communities have extensive experience and knowledge relating to environment protection in Ontario. The government of Ontario shall incorporate the traditional ecological knowledge and other information provided by First Nation and Métis communities in its strategic level planning and in its development of specific actions.**

Recommendation 7: Section 7 should be amended to require strategic level consultation with First Nation and Métis communities on the government of Ontario's climate change action plans.

Recommendation 8: Subsection 7(2) should be amended as follows:

> **If a First Nation or Métis community provides the Minister with any traditional ecological knowledge or other information relevant to preparing climate change action plans or specific actions under Bill 172, the Minister shall incorporate that traditional ecological knowledge or other information into its decisions.**

B. Greenhouse Gas Reduction Account

(i) Low-income and vulnerable communities

It is critical that the government of Ontario amend Bill 172 to assist low-income communities in the transition to a decarbonized economy. Low-income communities contribute least to GHG emissions but face the most serious impacts from climate change.[16] It is standard for cap and

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[15] Bill 172, ss 3 and 7; *Kwakiutl First Nation v British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345 at para 71; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139 at para 186; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 77; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 25, 42, 45-46.

[16] Marc Lee, *Fair and Effective Carbon Pricing: Lessons from BC* (Vancouver: Canadian Centre for Policy Alternatives, February 2011) [*Fair and Effective Carbon Pricing*] Online: CCPA <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2011/02/CCPABC_Fair_Effective_Carbon_FULL_2.pdf>.

trade and other CO_2e pricing schemes to address inequalities faced by low-income and vulnerable communities.

The California Greenhouse Gas Reduction Fund is required by statute to allocate a minimum of 25% of funding to projects that benefit disadvantaged communities. A minimum of 10% of funding is allocated to projects located within these communities.[17] The California legislation provides:

- "[The Act] recognizes the disproportionate impacts climate change will have on disadvantaged and low-income communities in California, which already face disproportionate impacts from substandard air quality in the form of higher rates of respiratory illness, hospitalizations, and premature death."

- "[The Act] recognizes the potential vulnerability of California's low-income and disadvantaged population to efforts to reduce greenhouse gas emissions and requires that activities taken to comply with [the Act] do not disproportionately impact those communities."

- The Act requires that investment "be directed toward the most disadvantaged communities in California to provide an opportunity for small businesses, schools, affordable housing associations, and other community institutions to participate in and benefit from statewide efforts to reduce greenhouse gas emissions."

- The implementation of the Act is to be done by "directing resources to the state's most impacted and disadvantaged communities to ensure activities taken pursuant to that authority will provide economic and health benefits to these communities"[18]

The Act further empowers the California Environmental Protection Agency ("CalEPA") to identify the disadvantaged communities to be targeted by these investments.[19] Following a series of public consultations, CalEPA produced a list of communities that qualify for benefits, based on geographical areas disproportionately affected by environmental pollution that may cause negative public health effects, areas with concentrations of low-income people, high unemployment or low levels of home ownership, and otherwise sensitive and vulnerable communities.[20]

[17] SB-535 California Global Warming Solutions Act of 2006: Greenhouse Gas Reduction Fund (2012), online: California Legislative Information <http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201120120SB535> [California SB-535], s 3.
[18] *Ibid*, s 1.
[19] *Ibid*, s 2.
[20] California Environmental Protection Agency, "Greenhouse Gas-Reduction Investments to Benefit Disadvantaged Communities" (2016) online: CalEPA <http://www.calepa.ca.gov/EnvJustice/GHGInvest/>.

Québec's Green Fund distributes revenue collected under its cap and trade scheme. One of the legislated priorities of the Fund is to finance "the mitigation of the economic and social impact of emission reduction efforts."[21]

The British Columbia GHG tax scheme includes a "Low Income Climate Action Tax Credit" in recognition of the disproportionate impact of GHG taxes on low-income individuals and families.[22]

The Climate Change Advisory Panel in Alberta recommended as one of five overarching principles of GHG pricing that revenue be used to protect vulnerable communities.[23] While the details of Alberta's policies have not yet been finalized, the Panel's report recommends a direct consumer rebate to offset the negative effect that GHG pricing will have on vulnerable communities.[24] The Panel also recommends Alberta provide support for workers transitioning out of GHG-intensive industries.[25]

Bill 172 should be amended to explicitly empower the MOECC to enact provisions and fund initiatives under the GGRA that address the disproportionate impact of a transition to a decarbonized economy on low-income and vulnerable communities. CELA recommends that Ontario adopt California's model and legislate that at least 25% of GGRA revenue be dedicated to assisting low-income and vulnerable communities.

CELA recognizes Ontario's existing assistance programs aimed at household electricity prices.[26] We support the launch of the Ontario Electricity Support Program ("OESP"), which targets low-income households likely to suffer energy poverty. CELA recommends broadening the coverage of the program and improving its accessibility in order to facilitate a higher participation rate among qualified Ontarians.

Ontario also recently announced a $92 million investment in social housing retrofits.[27] CELA strongly supports healthy retrofit programs to reduce GHG emissions and make energy more affordable for low-income communities. The government should provide more funding for this program under the GGRA and expand the scope of its coverage.

Relying only on targeted programs such as the OESP and the social housing retrofit investment will inevitably result in many vulnerable people still bearing a disproportionate burden from the

[21] *Environment Quality Act*, CQLR c Q-2, <http://canlii.ca/t/52l2m>, at s 46.16.
[22] British Columbia, "Low Income Climate Action Tax Credit" online: Government of British Columbia < http://www2.gov.bc.ca/gov/content/taxes/income-taxes/personal/credits/climate-action>.
[23] Climate Change Advisory Panel (Alberta), "Climate Leadership: Report to Minister" (2015) online: Government of Alberta <http://www.alberta.ca/documents/climate/climate-leadership-report-to-minister.pdf>, at 32, 42-43.
[24] *Ibid* at 43.
[25] *Ibid*.
[26] Government of Ontario, "Cap and trade (How it affects consumers)" (26 February 2016) online: Government of Ontario <https://www.ontario.ca/page/cap-and-trade>.
[27] Ministry of Municipal Affairs and Housing, "Newsroom: Ontario Investing $92 Million to Create Jobs and Retrofit Social Housing" (12 February 2016) online: Government of Ontario <https://news.ontario.ca/mah/en/2016/02/ontario-investing-92-million-to-create-jobs-and-retrofit-social-housing.html>.

cap and trade program. CELA recommends that MOECC also implement a direct credit or rebate for targeted communities.

Recommendations

Recommendation 9: Subsection 2(1) should be amended by adding the following paragraph:

> **Paragraph 2(1)(c): to recognize the disproportionate impact of climate change on low-income and vulnerable communities and to assist low-income and vulnerable communities in their transition to a decarbonized economy**

Recommendation 10: Section 68 should be amended to add the purpose of assisting low-income and vulnerable communities as one of the authorized expenditures under the GGRA.[28]

Recommendation 11: Schedule 1, subsection 1(1) should be amended to reflect Ontario's commitment to a just transition to a decarbonized economy which will not disproportionately burden low-income and vulnerable communities.[29]

(ii) The Greenhouse Gas Reduction Account should be a special purpose account

Public acceptance of the cap and trade program requires clear, transparent rules for the use of revenue raised by the program. The funds must be entirely separate from the general government budget. Subsection 68(1) converts the GGRA from a "separate account in the Consolidated Revenue Fund", with a "special purpose", to an account "in the Public Accounts to be known as the Greenhouse Gas Reduction Account" in which amounts "shall be recorded".[30] The MOECC should explain its decision not to establish the GGRA as a special purpose account. If the MOECC's decision is based on new public accounting principles, the MOECC should explain which accounting principles are served by the proposed approach and why a special purpose account would not meet public accounting requirements.

Recommendation

Recommendation 12: The GGRA should be maintained as a special purpose account.

(iii) Section 68 should be strengthened

Cap and trade revenue should only be used for new, additional environmental initiatives, or for the expansion of existing environmental initiatives, that will likely reduce GHG emissions. The

[28] Please see recommendation 13 for wording that incorporates all proposed amendments to section 68, below.
[29] Please see recommendation 15 for wording that incorporates all proposed amendments to schedule 1, below.
[30] Bill 172, s 68(1); *Environmental Protection Act,* ss 176.1(6) and (8).

credibility of the cap and trade scheme would be severely undermined if cap and trade revenues could fund existing or budgeted for environmental initiatives, or other government initiatives not related to reducing GHG emissions. The Financial Accountability Office of Ontario noted that Bill 172 does not make it clear to what extent existing initiatives may be funded.[31]

Section 68 should require direct funding of initiatives that are likely to reduce GHG emissions. The language that allows "direct or indirect" funding to initiatives that are "reasonably likely" to reduce or "support the reduction" of GHG emissions is too weak. The allowance for funding for "costs relating to any other initiatives that are reasonably likely" to reduce GHG emissions is very vague and should be removed.

Likewise, the term "directly or indirectly" should be removed and replaced with "directly" in paragraphs 68(2)(1) and 68(2)(3). It is unclear what an indirect cost incurred by the Crown, or an indirect expenditure incurred by the Crown, would entail.

Improper use of revenue raised by cap and trade schemes is an ongoing concern in other jurisdictions. For example, Québec's Green Fund has been criticized because it has been used to fund a Valero Energy pipeline and a new tail fin on an Air Canada Boeing-767, along with automated phone alert systems for people vulnerable to heat and smog and adaptations to taxis and buses for disabled persons.[32]

Recommendations

Recommendation 13: Subsection 68(2) should be amended as follows:

> **Paragraph 68(2)(2): To directly fund new and additional initiatives, or to expand existing initiatives, described in Schedule 1 to this Act, that are likely to reduce greenhouse gas emissions, ensuring that at least 25% of the GGRA revenue will be used to benefit low-income and vulnerable communities.[33]**

Recommendation 14: Paragraphs 68(2)(1) and 68(2)(3) should be amended to remove the words "or indirectly".

(iv) Schedule 1 should be strengthened

Schedule 1 details the categories of expenditures for GGRA funds. We support many of the program categories and look forward to details on program funding, including funds for renewable energy, geothermal solutions, net-zero buildings, and active and public transport.

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[31] Financial Accountability Office of Ontario, "Assessing Budget 2016's Fiscal Plan" (3 March 2016) online: FAO <http://www.fao-on.org/en/Blog/Publications/Budget_2016#_ftn2>.
[32] James Foster, "Green Fund used to help finance oil pipelines", CJAD News (3 February 2016). <http://www.cjad.com/cjad-news-quebec-beyond/2016/02/03/green-fund-used-to-help-finance-oil-pipeline>
[33] Please see recommendation 10 above for an explanation of the proposed wording with regards to low-income and vulnerable communities.

Subsection 1(1) of Schedule 1 should be amended to reflect the amendments to section 68. The wording should ensure that only new, additional initiatives, or the expansion of existing initiatives, are funded. The language should also be strengthened to include only initiatives likely to reduce GHG emissions, rather than including initiatives "reasonably likely" to reduce or "support the reduction of" greenhouse gas.[34]

CELA has particular concerns with the language in paragraph 1(1)(1) of Schedule 1, which contemplates funding for initiatives relating to energy sources and uses. The Act must be clear that nuclear refurbishments and other expenditures relating to nuclear power cannot be funded by the GGRA. There are very significant environmental and GHG emissions consequences from nuclear power. The Independent Electricity System Operator noted that the nuclear refurbishment plan will increase GHG emissions by raising the demand for natural gas.[35] Ontario Power Generation advised the Ontario Energy Board that the Darlington Nuclear Station's historic average annual time off-line is 16.66%. There is no reason to believe that a re-built Darlington will perform better over its lifetime than the original plant. Re-building Ontario's nuclear reactors means that approximately 17% of our base-load electricity needs will be met by natural gas-fired generation, locking in substantial GHG emissions for the life of the re-built nuclear generators. It would be contrary to the purpose of Bill 172 and the requirements of section 68 and schedule 1 to fund any nuclear power related projects.

We oppose using GGRA funds to assist industrial emitters when those emitters are already being subsidized with free allowances. Subsection 1(4) should be amended to allow funding for industry only when free allowances are no longer being offered to industrial emitters.

Recommendations

Recommendation 15: Schedule 1, subsection 1(1) should be amended as follows:

> **Any of the following types of new, additional initiatives, or the expansion of existing initiatives, may be funded, in whole or in part, from the Greenhouse Gas Reduction Account in accordance with section 68 of the Act, but only if the particular initiative is likely to reduce greenhouse gas emissions, including initiatives which are likely to assist low-income and vulnerable communities in reducing greenhouse gas emissions, or if the initiative is likely to address the disproportionate impact of the cap and trade program on low-income and vulnerable communities.**
>
> > **1a(i) Any initiatives which are likely to address the disproportionate impact of the cap and trade program on low-income and vulnerable communities.**

[34] Bill 172, schedule 1, s 1(1).
[35] Independent Electricity System Operator (IESO), "IESO Business Update to Stakeholder Advisory Committee: Quebec and Newfoundland & Labrador Trade Discussions" (1 October 2015) online: IESO <http://www.ieso.ca/Documents/consult/sac/SAC-20151001-Ontario-Quebec-Capacity-Sharing.pdf>.

(ii) Any initiatives which are likely to assist low-income and vulnerable communities with the reduction of greenhouse gas.[36]

Recommendation 16: Schedule 1, paragraph 1(1)(1) should be amended to make it clear that no nuclear power projects, including nuclear refurbishments, can be funded by GGRA funds.

(v) Review and Evaluation of GGRA expenditures

There should be more transparency and accountability for the spending of GGRA funds in section 68. The MOECC's review in subsection 68(3) should be strengthened by requiring:

- Mandatory consideration by the Minister of the factors listed in subsection 68(3);
- Explicit consideration of vulnerable and low-income communities;
- The Minister's report to the Treasury Board should be made public before any decisions on the use of the funds are made; and
- The Minister's report should detail a plan for funds not used each year.

The current language does not constrain the Treasury Board in its decision on the use of GGRA funds once it receives the Minister's report. Subsection 68(3) should be amended to require the Treasury Board to incorporate the Minister's review into its decisions on the use of the GGRA funds and to publicly justify its spending decisions. It should either accept the Minister's proposals or explain why those recommendations were not followed in a public report.

The Minister's report under subsection 68(6) should provide more detail. In particular, the Minister should consider all of the factors listed in subsection 68(3), the amount of money spent on each specific initiative, and the actual GHG reductions achieved by the funded initiatives.

Recommendations

Recommendation 17: Subsection 68(3) should be amended to make it mandatory for the Minister to consider each factor listed in subsection 68(3) and the impact of the cap and trade program on vulnerable and low-income communities.

Recommendation 18: The Minister's report should be made public before any final decisions by Treasury Board on the disposition of GGRA funds.

[36] Please see recommendation 11 above for an explanation of the proposed wording with regards to low-income and vulnerable communities.

Recommendation 19: The Treasury Board should be required by law to incorporate the Minister's recommendations into its decisions on expenditure of the funds. It should justify its decisions to accept or reject the Minister's proposals in a public report.

Recommendation 20: The Minister's report under subsection 68(6) should include consideration of each factor listed under subsection 68(3), the impact of the program on low-income and vulnerable communities, the amount of money spent on each specific initiative, and the actual GHG reductions achieved by each initiative.

(vi) Funding of Enforcement Activities

CELA opposes Bill 172's funding of enforcement activities through revenue raised by the cap and trade program.[37]

The ECO expressed significant concerns in 2007 about the ability of the MOECC and Ministry of Natural Resources and Forestry to fulfill their mandates due to low operating budgets.[38] Likewise, the ECO found in its 2013/2014 report that MOECC relied too heavily on soft approaches to enforcement, and that mandatory abatement and enforcement actions were rarely applied.[39] The MOECC's problematic enforcement record will be exacerbated if sufficient resources are not set aside to enforce the new cap and trade program.

Bill 172 incentivizes enforcement through administrative monetary penalties ("AMPs") rather than criminal penalties because AMP penalties are paid into the GGRA, which funds enforcement, whereas criminal penalties are not.

It is problematic for penalties paid under the AMP regime to fund enforcement activities. Enforcement penalties should not be paid into the GGRA and funding for enforcement should be separate from the GGRA. MOECC staff, or delegated third parties, should not have an incentive to pursue enforcement to address any budgetary shortfall.

CELA recommends that MOECC publish a policy guide that provides clear criteria on when enforcement should be pursued through a criminal prosecution and when it should be pursued through the AMP regime.

[37] Bill 172, s 68(2)(1).
[38] Environmental Commissioner of Ontario, *Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR, ECO Special Report to the Legislative Assembly of Ontario* (Toronto: Office of the Environmental Commissioner of Ontario, 2007).
[39] Environmental Commissioner of Ontario, "Part 4: MOE: Weak Responses to Increasing Challenges," in *Managing New Challenges: Annual Report 2013/2014,* (Toronto: Office of the Environmental Commissioner of Ontario, 2014) at 105-114.

Recommendations

Recommendation 21: The government of Ontario must set aside sufficient, stable funding for enforcement of the cap and trade program.

Recommendation 22: MOECC should publish a policy guide that provides clear criteria on when enforcement should be pursued through a criminal prosecution and when it should be pursued through the AMP regime.

C. Delegation of Authority

CELA opposes the broad power to delegate any of the Minister's or Director's powers to private third parties under the Act. In particular, CELA strongly recommends that all law enforcement activities be conducted by MOECC inspection and enforcement staff. Law enforcement powers are a core government function that should remain within government transparency and accountability structures.

Bill 172 provides extremely broad authority to the Minister to delegate administrative, inspection and enforcement powers created under the Act to private third parties:

- A Minister may appoint "public servants <u>or other persons</u>" as Directors;[40]
- A Director may delegate any of his or her duties or powers to a "public servant <u>or other person</u>";[41]
- The Minister may designate "public servants <u>or other persons</u>" as provincial officers;[42]
- The Minister may designate "public servants <u>or other persons</u>" as analysts;[43]
- The Minister may delegate any of his powers or duties under this Act to a "public servant <u>or other person</u>" and may impose restrictions on this delegation;[44] and
- The Minister may enter into one or more agreements with <u>persons</u> to provide for such matters relating to the administration and enforcement of this Act.[45]

Subsection 71(2) provides that restrictions may be placed on delegation of some powers to private actors by regulation.[46] The agreements authorized by subsection 74(1) may also be

[40] Bill 172, s 69(1).
[41] Bill 172, s 69(3).
[42] Bill 172, s 70(1).
[43] Bill 172, s 70(2).
[44] Bill 172, s 71(1).
[45] Bill 172, s. 74(1).
[46] Bill 172, s 71(2).

restricted by regulation.[47] As of yet, no such restrictions have been placed on the Minister's delegation authority.

Bill 172 does not address the key issue of how the Minister will hold third parties to account. The experience in Ontario with the transfer of inspection and enforcement powers to delegated administrative authorities has been problematic. The Auditor General of Ontario in his 2003 Annual Report questioned the effectiveness of the procedures of the Ministry of Government Services (formerly the Ministry of Consumer and Commercial Relations) to oversee the Technical Standards and Safety Authority ("TSSA"), and ensure public safety and consumer protection.[48] CELA notes that the 2008 explosion at the Sunrise Propane Facility raises serious concerns about the effectiveness of TSSA's inspection and enforcement procedures.

Bill 172 improperly provides that a person with whom the Minister enters into an agreement under subsection 74(1) is not a Crown agent for any purpose, unless otherwise prescribed or agreed.[49] The public therefore may not hold private actors who may be yielding important public powers, including law enforcement powers, to account through the *Freedom of Information and Protection of Privacy Act*[50], the *Audit Act*[51], the *Ombudsman Act*[52], the *Lobbyists Registration Act*, *1998*[53], the *Environmental Bill of Rights, 1993*[54], and the *Charter of Rights and Freedoms*[55]. If Bill 172 maintains broad delegation authority, it should make it clear that these core government accountability mechanisms apply to all delegated authorities.

Furthermore, the MOECC's Legal Services Branch reports to the Attorney General of Ontario, not to the MOECC. The Attorney General of Ontario is accountable to the Legislature for the administration of justice in the province. This reporting structure is designed to avoid political interference with prosecutions. Delegated authorities would report to the MOECC, not the Attorney General of Ontario, circumventing this framework.

The MOECC has provided no evidence to demonstrate that delegation of enforcement powers will result in more timely or effective enforcement of the cap and trade program. Delegation needs to be carefully considered and no inspection or enforcement powers should be delegated to private third parties. If any powers are delegated to private third parties, Bill 172 should be amended to ensure that government accountability mechanisms apply to all delegated authorities.

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[47] Bill 172, s.74(2).
[48] Auditor General of Ontario, 2003 Annual Report, Chapter 3.04- Policy and Consumer Protection Services Division, pp 106-111.
[49] Bill 172, s 74(3).
[50] RSO 1990, c F31.
[51] RSO 1990, Ch A.35.
[52] RSO 1990, Ch O6.
[53] SO 1998, Ch 27.
[54] SO 1993, c 28.
[55] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Recommendations

Recommendation 23: Sections 69, 70, 71 and 74 should be amended to remove all open-ended delegation authority, in particular as it relates to inspection and law enforcement powers.

Recommendation 24: Public servants should exercise all law enforcement powers.

Recommendation 25: At the very least, Bill 172 should be amended to ensure that the *Freedom of Information and Protection of Privacy Act,* the *Audit Act,* the *Ombudsman Act,* the *Lobbyists Registration Act, 1998,* the *Environmental Bill of Rights, 1993* and the *Charter of Rights and Freedoms* apply to all delegated authorities.

4. Other environmental policy must support Ontario's GHG reduction goals

A. Emission reduction targets should only be strengthened

CELA supports the inclusion of Ontario's GHG reduction targets in subsection 6(1), although we note that there is no way to enforce those targets. Subsection 6(2) contemplates that the targets may be increased by regulation. We understand this subsection to mean that the GHG reduction targets can only be made more stringent by regulation and recommend clear language to that effect.

CELA also recommends that subsection 6(3) be amended to require the government to set more interim targets to ensure appropriate progress towards meeting Ontario's long-term GHG reduction goals.

Recommendations

Recommendation 26: Subsection 6(2) should be amended as follows:

> **The Lieutenant Governor in Council may, by regulation, set more stringent greenhouse gas reduction targets by reducing the total amount of greenhouse gas emissions allowed at each target date.**

Recommendation 27: Subsection 6(3) should be amended as follows:

> **The Lieutenant Governor in Council <u>shall</u>, by regulation, establish interim targets for the reduction of greenhouse gas emissions.**

B. All government approvals must support Ontario's efforts to meet GHG reduction targets

Ontario's commitment to meeting its GHG reduction targets must be reflected in all environmental and planning decisions. Proposals that are subject to approvals under the *Environmental Protection Act,*[56] *Environmental Assessment Act,*[57] and *Ontario Energy Board Act*[58] must demonstrate that they would not undermine the goals of Bill 172 and Ontario's capacity to meet its GHG reduction targets.

Recommendation

Recommendation 28: The *Environmental Protection Act,* the *Environmental Assessment Act,* and the *Ontario Energy Board Act* should be amended to include explicit consideration of how a project will impact on Ontario's ability to meet its GHG reduction targets.

5. Summary of Recommendations

CELA supports the introduction of a cap and trade scheme in Ontario. However, in order to improve Bill 172 and make it more stringent and fair, CELA makes the following recommendations.

Recommendation 1: The cap and trade scheme should establish a price of CO_2e that is at least $50 by 2020.

Recommendation 2: Subsection 29(2) should be amended as follows:

> **The regulations shall prescribe the maximum number of Ontario emission allowances that may be created during a period, and the maximum number shall be determined to enable Ontario to meet the targets established under section 6(1) for the reduction of greenhouse gas emissions, or more stringent greenhouse gas emission reduction targets as prescribed, by considering the following factors:**
>
> **(ix) Canada's international commitments relating to GHG reductions;**
>
> **(x) Evaluation of Ontario's other environmental policies to reduce GHG emissions, including initiatives funded by the Greenhouse Gas Reduction Account;**
>
> **(xi) The amount of offsets used by capped emitters to meet their compliance obligations;**

56 RSO 1990, c E19.
57 RSO 1990, c E18.
58 1998, SO 1998, c 15, Sched B.

(xii) The amount of early reduction credits used by capped emitters to meet their compliance obligations;

(xiii) Any new mandatory participants in the cap and trade program that are not yet required to comply with the Act;

(xiv) The stringency of emissions reduction targets in other jurisdictions, where Ontario has entered into agreements with those jurisdictions under section 73;

(xv) The number of excess allowances available in other jurisdictions, where Ontario has entered into agreements with those jurisdictions under section 73; and

(xvi) Any other factor that will impact on Ontario's ability to meet its section 6 GHG reduction targets.

Recommendation 3: Ontario should not distribute free allowances.

Recommendation 4: If the Ontario government distributes free allowances to industrial emitters in the first compliance period, subsection 30(2) should be amended to include a clear phase-out timeline.

Recommendation 5: If the Ontario government distributes free allowances to industrial emitters in the first compliance period, they must be targeted, transparent, and temporary.

Recommendation 6: The preamble to Bill 172 should be amended as follows:

> **First Nation and Métis communities have extensive experience and knowledge relating to environment protection in Ontario. The government of Ontario shall incorporate the traditional ecological knowledge and other information provided by First Nation and Métis communities in its strategic level planning and in its development of specific actions.**

Recommendation 7: Section 7 should be amended to require strategic level consultation with First Nation and Métis communities on the government of Ontario's climate change action plans.

Recommendation 8: Subsection 7(2) should be amended as follows:

> **If a First Nation or Métis community provides the Minister with any traditional ecological knowledge or other information relevant to preparing climate change action plans or specific actions under Bill 172, the Minister shall incorporate that traditional ecological knowledge or other information into its decisions.**

Recommendation 9: Subsection 2(1) should be amended by adding the following paragraph:

> **Paragraph 2(1)(c): to recognize the disproportionate impact of climate change on low-income and vulnerable communities and to assist low-income and vulnerable communities in their transition to a decarbonized economy**

Recommendation 10: Section 68 should be amended to add the purpose of assisting low-income and vulnerable communities as one of the authorized expenditures under the GGRA.

Recommendation 11: Schedule 1, subsection 1(1) should be amended to reflect Ontario's commitment to a just transition to a decarbonized economy which will not disproportionately burden low-income and vulnerable communities.

Recommendation 12: The GGRA should be maintained as a special purpose account.

Recommendation 13: Subsection 68(2) should be amended as follows:

> **Paragraph 68(2)(2): To directly fund new and additional initiatives, or to expand existing initiatives, described in Schedule 1 to this Act, that are likely to reduce greenhouse gas emissions, ensuring that at least 25% of the GGRA revenue will be used to benefit low-income and vulnerable communities.**

Recommendation 14: Paragraphs 68(2)(1) and 68(2)(3) should be amended to remove the words "or indirectly".

Recommendation 15: Schedule 1, subsection 1(1) should be amended as follows:

> **Any of the following types of new, additional initiatives, or the expansion of existing initiatives, may be funded, in whole or in part, from the Greenhouse Gas Reduction Account in accordance with section 68 of the Act, but only if the particular initiative is likely to reduce greenhouse gas emissions, including initiatives which are likely to assist low-income and vulnerable communities in reducing greenhouse gas emissions, or if the initiative is likely to address the disproportionate impact of the cap and trade program on low-income and vulnerable communities.**
>
> > **1a(i) Any initiatives which are likely to address the disproportionate impact of the cap and trade program on low-income and vulnerable communities.**
> >
> > **(ii) Any initiatives which are likely to assist low-income and vulnerable communities with the reduction of greenhouse gas.**

Recommendation 16: Schedule 1, paragraph 1(1)(1) should be amended to make it clear that no nuclear power projects, including nuclear refurbishments, can be funded by GGRA funds.

Recommendation 17: Subsection 68(3) should be amended to make it mandatory for the Minister to consider each factor listed in subsection 68(3) and the impact of the cap and trade program on vulnerable and low-income communities.

Recommendation 18: The Minister's report should be made public before any final decisions by Treasury Board on the disposition of GGRA funds.

Recommendation 19: The Treasury Board should be required by law to incorporate the Minister's recommendations into its decisions on expenditure of the funds. It should justify its decisions to accept or reject the Minister's proposals in a public report.

Recommendation 20: The Minister's report under subsection 68(6) should include consideration of each factor listed under subsection 68(3), the impact of the program on low-income and vulnerable communities, the amount of money spent on each specific initiative, and the actual GHG reductions achieved by each initiative.

Recommendation 21: The government of Ontario must set aside sufficient, stable funding for enforcement of the cap and trade program.

Recommendation 22: MOECC should publish a policy guide that provides clear criteria on when enforcement should be pursued through a criminal prosecution and when it should be pursued through the AMP regime.

Recommendation 23: Sections 69, 70, 71 and 74 should be amended to remove all open-ended delegation authority, in particular as it relates to inspection and law enforcement powers.

Recommendation 24: Public servants should exercise all law enforcement powers.

Recommendation 25: At the very least, Bill 172 should be amended to ensure that the *Freedom of Information and Protection of Privacy Act,* the *Audit Act,* the *Ombudsman Act,* the *Lobbyists Registration Act, 1998,* the *Environmental Bill of Rights, 1993* and the *Charter of Rights and Freedoms* apply to all delegated authorities.

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