

2023 OSLER LEGAL OUTLOOK

## Proposed clean electricity regulations: is Canada staying in its lane?



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In support of international efforts to limit climate change, the Government of Canada is endeavouring to achieve a net-zero emissions national economy by 2050. To achieve this goal, Canada has set an initial target of reducing economy-wide emissions to a level below 55%-60% of 2005 emissions by 2030. A critical component of Canada's energy transition plan is the early development of additional low- or non-emitting electricity generation.

To mandate the development of low- or non-emitting electricity generation, in 2024 Canada plans to enact the *Clean Electricity Regulations (CER)*, under the *Canadian Environmental Protection Act, 1999 (CEPA)*, with an effective date of January 1, 2025. Initially, the CER would only require subject electricity generation owners to register with the Minister of Environment and Climate Change and submit annual emissions reports. However, beginning January 1, 2035, subject to available exemptions, the CER would effectively prohibit electricity generation that is not low- or non-emitting.

The federal government's proposal to directly regulate the generation of electricity – a matter that falls under provincial jurisdiction according to Canada's constitution – has raised the ire of a number of provincial governments. Given the competing interests and visions of the federal government and various provincial governments, and the recent decision of the Supreme Court of Canada (SCC) in *Reference re Impact Assessment Act*, further challenges and disputes are likely.

While the future of the CER appears uncertain, investments in low- or non-emitting electricity generation are progressing at a significant pace from coast to coast to coast. Projects range from renewable generation procurements in British Columbia, Nova Scotia and Québec, to utility-scale battery storage procurements in Ontario, to small modular (nuclear) reactor developments in Alberta, New Brunswick, Ontario and Saskatchewan, to carbon capture and storage projects in Alberta. In addition, evolving corporate power purchases continue to accelerate renewable energy developments, particularly in Alberta.

The federal government and certain provincial governments are currently divided on the necessary pace and technological direction of the transition from emitting to low- or non-

emitting electricity generation. However, it is clear that both levels of government will be focused on shaping the direction of the electricity sector – and resolving the broader and evolving jurisdictional standoff between Ottawa and the provinces over climate policy – in the year that lies ahead.

## Electricity supply mix

Section 92A(c) of the *Constitution Act, 1867* provides provincial legislatures with the exclusive jurisdiction to make laws related to the generation of electricity. This delegation, combined with the differing availability of natural resources for generating electricity in Canadian provinces, has resulted in the electricity supply mix varying widely across the country. Some provinces, including British Columbia, Newfoundland and Labrador, Ontario and Québec, primarily rely on non-emitting electricity generation, such as waterpower, nuclear, wind and solar. Other jurisdictions, including Alberta, Nova Scotia and Saskatchewan, rely heavily on emitting electricity generators, such as natural gas.

In 2020, although low- or non-emitting electricity generators produced 84% of the 575,000 gigawatt hours (GWh) of electricity generated in Canada, the 62,100 kilotonnes of annual carbon dioxide (CO<sub>2</sub>) emitted from Canadian electricity generators accounted for 9.2% of Canada's total emissions. Since Canadian electricity generation capacity is forecast to increase by approximately 40% between 2030 and 2050, further investments in non-emitting electricity generators will be required if the total emissions from Canadian electricity generation are to be reduced.

## Proposed clean electricity regulations

The new CER will prohibit electricity generating units that are subject to the regulations from emitting more than 30 tonnes of CO<sub>2</sub> per GWh of electricity generated on average in a calendar year (the Emission Prohibition). Although the registration and reporting requirements of the CER come into effect on January 1, 2025, the Emission Prohibition will not apply to any units until January 1, 2035. Additional time is provided for the application of the Emission Prohibition to certain existing units, up to a maximum of 20 years after a unit's commissioning date.

Once in effect, the CER will apply to any electricity generating unit that has a generating capacity of 25 megawatts (MW) or more, that produces electricity using fossil fuel and that is connected to an electricity system subject to North American Electric Reliability Corporation (NERC) standards. For purposes of the CER, fossil fuel is specified to include hydrogen gas and exclude both biomass and biogas.

Canada has indicated that the application criteria were designed to exclude generating units for which a suitable non-emitting alternative is not expected to exist by 2035. The application criteria exclude generating units with a capacity of less than 25 MW, which are often used to supply hospitals, campuses and other institutions with both electricity and heat. Also excluded are off-grid generating units – namely, those units that are not connected to an electricity system subject to NERC standards, and which primarily include diesel generating units supplying remote communities and larger industrial complexes.

The CER reflect Canada's expectation that natural gas generation that is being newly developed today will be capable of 95% carbon capture and storage by 2035. Assuming this occurs, these units would be in compliance with the Emission Prohibition when it comes into force. However, the nascent state of carbon capture and storage technology in Canada and its reliance on long-term carbon pricing certainty creates a significant degree

of unpredictability for owners of emitting electricity generation units. This is particularly the case for owners that may be facing significant stranded asset costs if the useful life of their units, which is typically in the range of 45 years, is curtailed to 20 years due to the CER, or an even shorter period in the case of gas-fired generators being developed now.

The Emission Prohibition is subject to a variety of exemptions. These include behind-the-meter generating units with net exports of 0 GWh in a calendar year, generating units not combusting coal that operate less than 450 hours in a calendar year and emit no more than 150 kilotonnes of CO<sub>2</sub> in a calendar year, and generating units required to operate during emergencies. Additional details regarding the CER can be found in our [blog post](#).

Where an electricity generating unit is not exempt, non-compliance with the Emission Prohibition is an offence under the CEPA and may be punishable by fines ranging from \$100,000 to \$12 million.

## Expected court challenge

The CER has not been well received by the governments of Alberta and Saskatchewan, the two provinces that rely most heavily on fossil fuels to generate electricity.

Notwithstanding significant growth in recent years in Alberta's renewable generation capacity, in 2022 natural gas generation still accounted for approximately 64% of its electricity generation. In a statement released on August 10, 2023, Alberta Premier Danielle Smith challenged the constitutionality of the CER. Further, she has indicated that she intends to use the as-yet untested *Alberta Sovereignty within a United Canada Act (Sovereignty Act)* to bar enforcement of the CER's deadlines. The federal government has since responded by stating that, while adjustments to the CER may result from consultation, exemptions will not be carved out for particular provinces.

On November 27, 2023, Alberta Premier Danielle Smith introduced a motion in Alberta's legislative assembly for a resolution under the *Sovereignty Act*. Among other things, the resolution requested that Alberta's cabinet order all provincial entities not to recognize the constitutional validity of the CER and not enforce the CER or cooperate in its implementation in any manner "to the extent legally permissible". Alberta should also use all legal means necessary to oppose the CER, including legal challenges. While Alberta has not yet commenced such a legal challenge, it remains to be seen how far the Alberta government will press.

The resolution also suggests the government establish a provincial Crown corporation to ensure reliable and affordable electricity supply. Such a project could entail either building new generation or purchasing and de-risking existing generation assets held by private industry that would otherwise be subject to the CER. The resolution is likely to pass given that Smith's United Conservative Party holds a majority of seats in the Alberta legislature.

The SCC decision in the *Reference re Impact Assessment Act* (the IAA Reference) may have implications for the constitutionality of the CER, making Smith's resolution under the *Sovereignty Act* unnecessary. The SCC found that the "designated projects" component of the *Impact Assessment Act (IAA)* is unconstitutional. The SCC based its decision principally on two factors. First, the IAA is not in pith and substance directed at regulating "effects within federal jurisdiction" because those effects do not drive the decision making under the IAA. Second, the "effects within federal jurisdiction" as set out in the IAA do not align with actual federal legislative jurisdiction. The SCC determined that the "designated projects" component of the IAA was, in pith and substance, about regulating potential adverse environmental, health, social and economic impacts, which exceeds the bounds of federal jurisdiction and is,

therefore, unconstitutional.

The SCC further stated that the matter of national concern upheld as constitutional in the *Reference re Greenhouse Gas Pollution Pricing Act* did not mean that the federal government had the unconstrained constitutional authority to comprehensively regulate greenhouse gas emissions.

Notably, the SCC in the IAA Reference found that the consideration of “effects within federal jurisdiction” gave decision makers “a practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety.” The breadth of this power resulted in the SCC’s conclusion that it exceeded federal jurisdiction.

As suggested by the Alberta government, there may be a case for one or more provinces to challenge the CER based on the effective prohibition on the operation of electricity generation that is not low- or non-emitting, such as unabated natural gas or coal. The CER could be found to be an attempt by the federal government to directly regulate greenhouse gas emissions from electricity generation in a manner that is more analogous to its approach in the unconstitutional IAA than its approach in the constitutional *Greenhouse Gas Pollution Pricing Act*.

The CER seeks to directly regulate all fossil fuel electricity generating units, regardless of whether they affect any of the traditionally recognized federal heads of power. The breadth of the CER is such that the regulations would cover an electricity generating unit located wholly within a province that does not impact federal lands, fisheries, migratory birds or Indigenous Peoples. The powers under the CER also encompass the entire lifecycle of the electricity generating unit. These factors would seem to support the parallels between the unconstitutional portions of the IAA and the CER.

While no challenge to the CER has yet been commenced and the CER are not yet in force, industry participants will want to monitor the results of the consultations on the CER and the next moves in the ongoing challenges between Ottawa and the provinces over climate policy in the year that lies ahead.