

Submission re: *Bill 4, Cap & Trade Cancellation Act, 2018*

Cap and Trade – Help Desk
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cc. CThelp@ontario.ca

cc. Environmental Commissioner of Ontario, Dr. Dianne Saxe, commissioner@eco.on.ca

October 11, 2018

Dear Sir or Madam

Re: *Bill 4, Cap and Trade Cancellation Act, 2018, Posted September 11, 2018 to the Environmental Registry, ERO 013-3738*

Introduction

We are taking this opportunity to comment on *Bill 4, Cap and Trade Cancellation Act, 2018, Posted September 11, 2018 to the Environmental Registry, ERO 013-3738*. A number of environmental lawyers, policy experts and other Ontario residents endorse the views of this submission (Appendix 1). Carissa Wong and David McRobert are the primary authors of this submission (Appendix 2).

Bill 4 proposes to retire and cancel clearly established cap and trade instruments without proposing legislation and regulation to: a) fill the void of process and timelines in meeting the sustainable development goals that these mechanisms were designed to achieve; b) reduce uncertainty to business and future investors; and c) allow problems that result to be resolved through the legal process.

In our submission below, we articulate recommendations on how to improve Bill 4. Overall, we support the creation of climate change law, regulation and policy in Ontario that ensures regulatory clarity, transparency and consistency for all stakeholders and affected economic sectors, and moreover makes the reductions in greenhouse gas emissions to “avoid dangerous climate change by limiting global warming to well below 2°C.”¹ We support public consultation to ensure that governments, Indigenous communities, and the public view climate laws, regulations and policies as fair and reasonable.

¹ *United Nations Framework Convention on Climate Change, Paris Agreement*, 12 December 2015, entered into force 4 November 2016. Online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en&clang=_en

I. Fully Apply the Consultation Process and Statement of Environmental Values enshrined in the Environmental Bill Rights to Improve Bill 4

Consultation

The purposes of the Environmental Bill of Rights (“EBR”) include the protection of the public right to participate “in the making of environmentally significant decisions by the Government of Ontario.”² Further the EBR states that the Minister of the Environment, Conservation and Parks (the “Minister”) “should do everything in his/her power to give notice of the proposal at least thirty days before the proposal is implemented”³. Posting Bill 4 for public comment on September 11, 2018, forty-eight days after the First Reading in the Ontario Legislature and providing only the minimum 30-day comment period does not allow sufficient opportunity for public comment on a matter as environmentally significant as climate change⁴ and which repeals the main mechanism to implement reductions in greenhouse gas emissions in Ontario.

This concern is further underscored by the Minister’s decision to repeal O. Reg. 144/16 the Cap and Trade Program Regulation, the central regulation of the *Climate Change Mitigation and Low Carbon Economy Act*, without providing an opportunity for public comment on this regulatory change through the EBR Registry. In doing so, the Minister relied on the exception in EBR section 30, with the view that the electoral process is substantially equivalent to the public comment process under the EBR. This exception however requires that “the **environmentally significant aspects** of a proposal for ... a regulation... have already been considered in a process of public participation” that was substantially equivalent to the process required” (emphasis added).⁵ Participating in a provincial election is not substantially the same as participating in an EBR process. Nor was the election a referendum on this particular issue. Further, although the political or financial impacts of removing cap and trade may have been considered in the election, it remains completely unclear whether the environmentally significant aspects of repealing the Cap and Trade Program were considered, as required by the EBR.

Given the significance of the impacts of climate change on human health, economic and social well-being, the breadth of the Ontario public affected, the fact that Bill 4 surprisingly received a First Reading in the Legislature before being posted for comment, as well as the lack of public comment allowed on the environmentally significant aspects of the repeal of the Cap and Trade Program regulation, we suggest that the Minister use his power to give a longer period of public notice and extend the 30-day comment period on Bill 4.

² s.3(a) *Environmental Bill of Rights* S.O.1993 Chapter 28

³ s.15 *Environmental Bill of Rights* S.O.1993 Chapter 28

⁴ <https://www.ontario.ca/page/why-we-need-address-climate-change>;
http://www.climateontario.ca/doc/RACII/National_Assessment_Syntheses/SummarySheets/Chapter3-Energy_Sector.pdf; <https://zizzostrategy.com/climate-risk-corporate-canadas-blind-stop/>

⁵ s.30(1)(a) *Environmental Bill of Rights* S.O.1993 Chapter 28

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Statement of Environmental Values

The EBR requires that the Minister “shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.”⁶ We recommend that any decisions that the Minister makes through Bill 4 apply the entirety of these values.⁷

II. Clarify the Targets, Plan and Progress Reports

While stating that the “Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise them from time to time,”⁸ Bill 4 does not explain how these targets will be identified and what purpose they will serve. This lack of specificity does not provide sufficient opportunity for public comment (since there is no substance to comment on) and leaves incredible discretion to the Minister.

Further, by proposing a “climate change plan”⁹ without proposing the development of accompanying regulations to implement the plan, Bill 4 does not explain how the targets and plan will be regulated, monitored, and enforced.

To improve Bill 4, we recommend that it provide details on:

- i) how climate targets will be identified;
- ii) what the schedule is for their identification;
- iii) what the goals and objectives are that these targets aim to achieve;
- iv) what regulations, monitoring and enforcement will be prescribed to implement the targets and climate plan; and
- v) how the quantification, reporting and verification of greenhouse gases will be regulated *after* the wind-down of cap and trade.¹⁰

As well, to address the ambiguities, we recommend, as required by the EBR¹¹ that Bill 4 enunciate that the Minister will ensure that any legislation and regulation arising out of

⁶ s.11 *Environmental Bill of Rights* S.O.1993 Chapter 28

⁷ http://www.ebr.gov.on.ca/ERS-WEB-External/content/index2.jsp?f0=aboutTheRegistry.statement&f1=aboutTheRegistry.statement.value&menuIndex=0_3; <https://www.ebr.gov.on.ca/ERS-WEB-External/content/sev.jsp?pageName=sevList&subPageName=10001>

⁸ s.3(1) *Bill 4, Cap and Trade Cancellation Act, 2018*

⁹ s. 4(1) *Bill 4, Cap and Trade Cancellation Act, 2018*

¹⁰ Ontario filed a new reporting regulation, Greenhouse Gas Emissions: Quantification, Reporting and Verification (O. Reg. 390/18), under the *Environmental Protection Act*, effective August 1, 2018. Under EBR Registry Number 013-3382, this regulation announces “changes to the existing greenhouse gas emissions reporting framework to clarify the reporting requirements as part of the orderly wind down of the cap and trade program”. It is unclear, however, what reporting regulations will continue after the cap and trade program has ended. Online: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTM1NzA4&statusId=MjA2NjI2>

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Bill 4 is prescribed under the Environmental Bill of Rights' regulation (O. Reg. 73/94) such that its targets and/or climate change plans are subject to EBR Registry notice and comment.

Finally, we request that the Minister consider whether Bill 4's amendments to regulation-making are required for the Government to achieve the goals of its climate change plan.

III. Reconsider Legislated No Cause of Action

While we do not take a position on the legal authority of the Government to enact sections 9 and 10 of Bill 4, we ask that the Government carefully consider the impact that these provisions would have on the administration of justice and the goal of promoting access to justice. We are also concerned that these provisions send a negative signal to potential investors in this jurisdiction.

Conclusion

We appreciate the opportunity to provide input in the public consultation process on Bill 4. We also look forward to providing more specific comments on climate change targets, plans, instruments and regulations proposed and made available for review and comment pursuant to the EBR.

Yours truly,

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¹¹ s.16 (1) *Environmental Bill of Rights* S.O.1993 Chapter 28

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Appendix 1

Supporters of this Submission as of October 11, 2018

Ms. Kristi Ross, Barrister and Solicitor

Ms. Saba Ahmad, Barrister and Solicitor

Ms. Burgandy Dunn, Barrister and Solicitor

Ms. Regan Dow, P. Eng., Energy and Environment Engineer, Peterborough

Dorothy Goldin Rosenberg, MES, PhD, Toronto, Ontario, M5R 2X5

Dr. Chad Walker, Post-doctoral Fellow, Queens University

Dr. Margaret (Meg) Sears, P. Eng., Ph.D. Ottawa, Ontario

Professor Danny Harvey, University of Toronto, Geography and Planning

Professor Miriam Diamond, Department of Earth Sciences, University of Toronto

Professor Catherine Bush, University of Guelph-Humber College, and Author

Ms. Meghan Robinson, 4th Year Environmental Studies Student, Trent University

Ms. Bianca Salive, 2nd Year Law Student, University of Ottawa

Ms. Bev Macleod, Peterborough

Appendix 2

Background and Expertise of Submission Drafters

Carissa Koshman Wong

Carissa Wong has written, spoken, and advised in the environmental field for over fifteen years domestically and internationally, with numerous peer-reviewed law publications and policy papers. Between 2005-2009, she served as a Freshwater Programme Officer for the World Wildlife Fund in Washington DC. Her Toronto legal practice facilitates early engagement in environmental impact assessment and provides collaborative processes in environmental and water resource dispute resolution. As well, she is an Associate Fellow at the Centre for International Sustainable Development Law. In addition to her law degree from the University of Ottawa, she holds an Honours Bachelor of Science from the University of Toronto and a Masters in Environmental Management from Duke University.

David McRobert

David S. McRobert is an Ontario environmental lawyer, author and university lecturer. Between October 1994 and June 2010, he was In-House Counsel and Senior Policy Advisor at the Environmental Commissioner of Ontario and was involved in the establishment of the office. Before that McRobert was a senior policy advisor in the Waste Reduction Office in the Ontario Ministry of the Environment. From 1989 to 1991 he coordinated research and advocacy on waste management and global warming at Pollution Probe. He also has worked for the Workplace Health and Safety Agency in Toronto, the Ontario Round Table on Environment and Economy, the Ministry of Labour and the Ministry of the Attorney General.