

Ontario adopts cap-and-trade system

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The Government of Ontario is implementing a cap-and-trade system to regulate carbon emissions in the province.

On April 13, 2015, the Government of Ontario announced that it will implement a cap-and-trade system to regulate carbon emissions in the province. In this respect, Ontario is following in the footsteps of Québec and California.

Its announcement comes seven years after Ontario first signed on to the Western Climate Initiative, a cross-border initiative and multi-sector program focused on reducing global greenhouse gas ("GHG") emissions, and of which Québec and California are also members.

Permits auction

Although the exact details of the plan have yet to be announced (and are likely still being ironed out), the system will impose a quota on GHG emissions for businesses. Permits (or credits) to emit within these quotas will be auctioned off by the Government of Ontario.

Businesses emitting beyond their quotas will be required to purchase additional credits from businesses with credits to spare. This "trade" element of the system seeks to reward businesses for their efficiency.

Sectors

The system will likely be applied on a sector-by-sector basis, meaning that different rules (most significantly, quotas) will apply to different industries. It is therefore difficult to determine which industries or businesses will be most significantly impacted, whether as a result of their purchases of credits or their implementation of new processes to curb emissions.

Québec partnership

Ontario will be partnering with Québec, which was the first province to implement a cap-and-trade system. As a result, and significantly, Ontario companies can buy or sell credits not only with other Ontario companies, but also with Québec companies, and vice versa.

Further, Québec is currently partnered with California; this leaves open the possibility that Ontario may collaborate with California, thus opening up a significant market.

Carbon tax system

British Columbia currently has what is referred to as a "carbon tax system" whereby the government sets a price for carbon emissions. All who emit must pay that set price. Under this system, the only way that businesses can protect their bottom line is by reducing emissions.

Unlike cap and trade, there is no mechanism to allow businesses to profit from their efficiency by selling emissions credits to those who are less efficient. Some argue that the cap-and-trade system is effectively a tax for those who have to buy carbon credits; however, for those who are able to sell credits, it is more of a subsidy.

Overall, the Government of Ontario views the cap-and-trade system as a more flexible and dynamic approach to combatting climate change than a pure carbon tax system. Time, as they say, will tell.

Criticism of cap-and-trade

Skeptics of the cap-and-trade system argue that it will cause increased prices of near essential products, carbon leakage and the creation of a competitive disadvantage for domestic industries.

With respect to rising prices, the greatest focus is on gasoline, with predictions of price hikes ranging

anywhere from two to three-and-a-half cents per litre of fuel.

Meanwhile, proponents of the system highlight that the carbon tax or cap-and-trade systems will undoubtedly result in reduced reliance on fossil fuels, arguing that increased prices are a form of short-term pain and therefore deserve less attention.

Both views may have merit; while there may well be reduced reliance on these fuels, businesses currently relying on them will nevertheless be exposed to increased costs for what is now an unknown amount of time.

Carbon leakage

As for carbon leakage, this occurs where one jurisdiction unilaterally implements carbon pricing legislation (carbon tax or cap-and-trade) and businesses consequently relocate to a jurisdiction where no such legislation exists. In the result, there may be no net reduction in greenhouse gases.

As time passes, so the argument goes, there will be fewer and fewer jurisdictions which lack either a cap-and-trade or a carbon tax system such that carbon leakage will become a moot issue.

Protection

Proponents of carbon pricing cite the government's provision of free allowances to businesses which might otherwise flee as a means of preventing this carbon leakage phenomenon.

For industries that are vulnerable to competition — especially competition from jurisdictions without a cap-and-trade or carbon tax system — it is anticipated that the Government of Ontario will provide free allowances to protect such industries.

In Québec, for example, the aluminum industry is given free allowances due to its serious market competition from around the world. Oil refiners in Québec also receive free allowances to cover the GHGs emitted during the processing of crude oil into petroleum products.

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Although these free allowances are granted, it is nevertheless understood that over time, these industries, like other industries, will be required to reduce their emissions or to purchase credits on the carbon market.

Significance

Undoubtedly, complications will arise from Ontario's transition to a

low carbon economy; however, with Ontario as an early adopter of carbon pricing, its industries will be better prepared for a future when a national or even international climate change policy may be implemented.

Notably, the Government of Ontario intends to reinvest the proceeds of the cap-and-trade system (projected to be between \$1 billion

and \$2 billion annually) into green technology and infrastructure that assist in reducing the province's carbon footprint. As a result, Ontario will be able to reap what it sows.

Innovators and those businesses who embrace carbon reduction and clean technology are poised to benefit in this new, low carbon economy.

TECHNOLOGY LAW

Interim guidance on patent subject matter eligibility

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The U.S. Patent and Trademark Office has published its interim guidance on subject matter eligibility requirements under the *Patent Act*.

On December 16, 2014, the United States Patent and Trademark Office ("USPTO") published its *2014 Interim Eligibility Guidance of Subject Matter Eligibility* ("Guidance") for use by USPTO personnel in determining subject matter eligibility under 35 U.S.C. 101 of the United States *Patent Act*.

Guidance and case law

The Guidance does not have the force and effect of law. Rather, it sets out the USPTO's interpretation of the subject matter eligibility requirements in light of recent decisions by the United States Supreme Court ("Supreme Court") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

The Guidance also advises the public and USPTO personnel on how these court decisions impact the subject matter eligibility requirements of 35 U.S.C. 101. It supplements the June 25, 2014 Preliminary

Instructions in light of the Supreme Court decision in *Alice Corporation Pty. Ltd. v. CLS Bank International, et al.* ("Alice").

The Guidance supersedes the March 4, 2014 "Procedure For Subject Matter Eligibility Analysis Of Claims Reciting Or Involving Laws Of Nature/Natural Principles, Natural Phenomena, And/Or Natural Products" ("Procedure") that was issued in view of the Supreme Court decisions in *Association for Molecular Pathology v. Myriad Genetics, Inc.* ("Myriad") and *Mayo Collaborative Services v. Prometheus Laboratories Inc.* ("Mayo").

The Guidance intends to offer a comprehensive view of subject matter eligibility in line with the decisions in *Alice*, *Myriad*, *Mayo*, and the related body of case law. It is responsive to the public comments received pertaining to the March, 2014 Procedure and the June, 2014 Preliminary Instructions.

Flowchart

The Guidance includes a decision-making flowchart which asks the following questions:

- (1) Is the claim "directed to" one of the four statutory categories?
- (2) Is the claim "directed to" a judicial exception?
- (3) Does the claim recite additional elements that amount to "signif-

icantly more" than the judicial exception?

Statutory categories

The four statutory categories are: a process, machine, manufacture and composition of matter. The subject matter of the claim must be directed to one of these four subject matter categories.

If the claim is not directed to one of the four statutory categories, the claim is not eligible for patent protection and should be rejected under 35 U.S.C. 101 for at least this reason. If the claim is directed to one of the four subject matter categories, then the eligibility analysis may proceed further.

Judicial exception

The judicially recognized exceptions include a law of nature, a natural phenomenon and an abstract idea. A determination must be made as to what the applicant has invented by reviewing the entire application disclosure and construing the claims in accordance with their broadest reasonable interpretation.

A claim to a process, machine, manufacture or composition of matter that is not directed to any of the judicial exceptions is eligible and needs no further eligibility analysis.

A claim that is directed to at least one exception requires further analysis to determine whether the claim

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