Great expectations: Change-of-law risk for Canada's clean economy investment tax credits

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The introduction of new investment tax credits (ITCs) has been a core element of the Canadian federal government's climate change policy. These "clean economy" ITCs (summarized here) respond to America's *Inflation Reduction Act* by offering tens of billions of dollars of financial incentives to encourage businesses to make capital investments that will reduce carbon intensity. As of January 2025, four of these six ITCs have been enacted into law (although certain proposed amendments remain outstanding), with revised draft legislation for a fifth (the Clean Electricity ITC) expected imminently and a first draft of legislation for the sixth (the EV Supply Chain ITC) due later in 2025.

In general terms, Canada's clean economy ITCs effectively subsidize taxpayers that acquire ITC-eligible property within a specified timeframe and use it within Canada in a qualifying manner. The amount of the ITC granted is a percentage of the taxpayer's cost of the eligible property, *viz.*, the cheque the taxpayer receives is based on the amount of qualifying property expenditures.

Canada's constitutional division of powers allocates the regulation of electricity generation, transmission and distribution to the provinces with some overlapping federal jurisdiction over activities that cross provincial and national borders, as well as nuclear safety. In general, each province controls its own electricity market and how that market is structured, regulates its own electricity grid and is responsible for formulating its own laws, regulations and policies over all such activities within its sphere of control. For example, certain provinces procure new electricity generation through bilateral power purchase agreements or control the development and construction of large-scale energy infrastructure projects through a regulatory framework (e.g., a regulator that approves the construction of a new transmission line). The federal government's ability to influence provincial electricity markets and provincial law and policy decisions in respect thereof is in large part limited to incentive and disincentive-based economic policy (colloquially referred to as "carrots and sticks") and, most recently through income tax policy with clean economy ITCs.

Large-scale generation, transmission and distribution projects are long-lead projects that require significant time to develop and permit, are capital-intensive and complex, and frequently involve major equity and debt commitments to finance, build and operate over a period of decades. Such projects require significant up-front and legally binding

commitments (often in the hundreds of millions or billions of dollars), which must be made based on initial cost and revenue projections.

The electricity sector is a particular focus of ITCs, including nuclear, hydro-electric, battery, wind and solar generation facilities. No one will finance or build such facilities on a purely speculative basis in Canada, which means that energy developers must secure legally binding obligations from investors, lenders, contractors, suppliers and offtakers long before construction begins.

In the context of a power purchase agreement, the power producer is effectively bidding and committing to selling electricity at a price based on various assumptions and remains at risk if those assumptions prove to be incorrect. One such assumption is the quantum of clean economy ITCs the project will generate, which works into the developer's overall economic model and affects the amount of risk that a developer and other stakeholders may be willing to take.

Change-of-law risk and taxes

The current federal government's precarious position is leading to uncertainty, including raising questions around the risk of a new government taking a less favourable view of the clean economy ITCs, i.e., reducing, changing or outright repealing them. While the Conservative party has not expressed any public position on the clean economy ITCs nor indicated any intention of ending or reversing them, an observer could fairly conclude that the Conservatives would approach climate change differently than the Liberals.

Change of law risk in Canada's parliamentary system of government, where the legislative and executive branches are fused together, is different than the division of powers in the United States when a party achieves a majority of seats. America's 47th President may not support the green elements of the *Inflation Reduction Act*; however, repealing them requires an act of Congress as an independent (and fractious) legislative body.

The risk of Canada's clean economy ITCs being reduced, changed or repealed is a political one in terms of a change in government producing a change in tax policy as to what should be supported with federal tax incentives and to what degree. Change-of-law risk always exists: governments can change the rules at any time and in almost any way, even if doing so has retrospective (or in rare cases even retroactive) effect that adversely impacts taxpayers.[1] While there is no indication what a potential new Conservative government would do with respect to Canada's clean economy ITCs, the absence of any positive statement supporting them creates uncertainty in this sector of the economy, on a very large-dollar issue.

Changes in energy law and policy can be equally as volatile or uncertain when a government changes at the provincial level and especially when a change in incumbency occurs after a relatively long period of time. The Province of Ontario experienced such changes in 2018 when the Conservatives replaced a long-running Liberal administration that held power for the previous 15-year period. The new Conservative government in the Province of Ontario moved to repeal legislation and unwound significant portions of the prior government's energy policy at a pace that reminded the market how fast the legal and regulatory landscape can change.

In the current context, clean economy participants may be delivering binding legal commitments (or may be incurring significant expenditures) in good faith reliance on existing tax law but before meeting all of the eligibility requirements for entitlement to the resulting clean economy ITCs. For example, while the rules from ITC to ITC differ somewhat, as a general principle a taxpayer is not entitled to claim a clean economy ITC on expenditures for a particular eligible property until that property is acquired and becomes "available for use", i.e., installed and capable of operating in the manner for which it was acquired which, in the context of a generation facility, may be a period of years. What happens if federal law changes in the interim?

For obvious reasons, taxpayers are not entitled to a permanent state of law. For example, a business that was started in one year that becomes less profitable because of a subsequent increase in the general rate of tax in a later year has been disadvantaged but cannot expect any relief on a legal basis. General changes in law (tax and otherwise) are simply a risk that everyone bears.

However, whenever tax changes (in particular adverse ones) are being made, the government must always consider when and to whom those changes will apply. Such choices are generally known as "coming into force" (CIF) rules. For example, changes might apply from the date of the announcement, from the date they are formally enacted (i.e., Royal Assent to legislation), to taxation years beginning after either of those dates, or some other date. The choice is ultimately one of tax policy and what is perceived as "fair" in the circumstances.

Grandfathering

What constitutes a "fair" change in tax law (in terms of to whom it applies and starting when) depends on both the circumstances and the eye of the beholder. Put simply, some taxpayer expectations are more legitimate (and more deserving of respect) than others, and in some cases disregard of those expectations will be especially injurious to Canada, to taxpayer respect for the tax system, and to the economic activity the government is trying to promote. As the Department of Finance has itself said on one occasion:

> It would be inappropriate and unfair to tell taxpayers that their past actions will now be retroactively taxed under a set of rules that they couldn't have known about before today. The changes announced today reflect a new policy—one that taxpayers will have to take into account in their future affairs.[2]

In appropriate circumstances, a government making tax law changes has provided some degree of relief to taxpayers who would otherwise be adversely affected in a manner the government accepts as rising to the level of either "unfair" or likely to result in future taxpayers remembering what happened and acting in a way inconsistent with the objectives the government is trying to achieve (i.e., governmental self-interest). Such decision is usually made by those in charge of tax policy within the Department of Finance, or in some cases by the political staff within Finance (if nothing else, 2024 demonstrated the impact that politics can have on taxes).

Where the government wishes to provide relief to certain taxpayers who have acted in reliance on existing law, they may be "grandfathered" to some extent from the impact of the adverse change in tax law otherwise applicable. While perhaps not routine, such

“grandfathering” has occurred many times in the past, and it is instructive to consider examples of what has occurred previously.

The experience in the Province of Ontario in 2018 resulted in fundamental changes to energy project development on a go-forward basis. In general, projects that were developed and connected to the provincial power grid prior to 2018 were permitted to rely on their existing permits and contracts with the Independent Electricity System Operator through grandfathering provisions even after the provincial government eviscerated the prior government’s legislative framework. However, the province did target and cancel certain projects under development at that time as well as certain contracts that were awarded but had not yet commenced construction through legislation or through ministerial directives.

Previous tax examples

Where the government has offered grandfathering, it usually has drawn a distinction between those who have already acted in some meaningful way in reliance on the existing rules (and who are therefore most disadvantaged by a change in law), and those who might be considering it but have not yet so acted. A very recent example can be found in Bill C-59, which received Royal Assent in June 2024. That bill included new (adverse) rules applicable to so-called “substantive CCPCs”, which included the following CIF provisions:

> (14) Subsections (5) and (10) apply to
>
> - (a) taxation years of a corporation that begin on or after April 7, 2022, if
>
> - (i) the corporation’s first taxation year that ends on or after April 7, 2022 ends due to a loss restriction event caused by a sale of all or substantially all of the shares of a corporation to a purchaser before 2023,
> - (ii) the purchaser deals at arm’s length (determined without reference to a right referred to in paragraph 251(5)(b) of the Act) with the corporation immediately prior to the loss restriction event, and
> - (iii) the sale occurs pursuant to a written purchase and sale agreement entered into before April 7, 2022; and
>
> - (b) taxation years that end on or after April 7, 2022, in any other case.

In this case, adverse rules that would otherwise have applied were excluded from applying in particular circumstances, being the acquisition of a corporation under an arm’s-length written sale agreement entered into before the relevant announcement date, where the sale did not close until on or after that date. Essentially, where arm’s-length parties had contractually committed themselves to a transaction before the tax policy change was announced, the new (adverse) rule did not apply for taxation years otherwise caught even though the actual sale (i.e., closing) occurred on or after the announcement date (but before 2023).

Another relatively recent example can be found with respect to a different ITC, being one for childcare expenses. The 2007 federal budget created an ITC for employers that created childcare spaces for their employees. This measure was repealed in the 2017

federal budget, but again transitional relief was provided in the CIF provisions contained in the implementing legislation:[3]

> (19) Subsections (1) to (7) and (10) to (18) apply in respect of expenditures incurred after March 21, 2017, except that they do not apply in respect of expenditures incurred before 2020 under a written agreement entered into before March 22, 2017.

In this instance, relief was provided to employers who had relied in good faith on the existing legislation by virtue of having contractually committed *before* the announcement date to incur relevant expenditures that would continue after that date, subject to an outer limit of December 31, 2019.

Many other examples exist. For present purposes, the point is simply that where the government feels the case is strong enough to warrant doing so, it can and has provided relief from adverse changes in tax laws for those who have relied in good faith upon the existing state of the law and would be unduly disadvantaged from an unfavourable change in a way the government believes is unfair and/or contrary to its own objectives.

Conclusion

Should any adverse change in the clean economy ITCs occur (and again, there is no specific indication that a new Conservative government would do so – this risk is entirely speculative), it would certainly meet this standard, judging from past practice. Where the government creates specific incentives to encourage taxpayers to act, it thereby actively creates specific and legitimate expectations: do this and receive that. This is readily distinguishable from more general situations such as present tax rates applicable to all taxpayers or other rules that do not include a particular tax policy incentive, and do not create the same level of expectations or actively encourage taxpayers to make an investment in reliance on them.

Moreover, as a matter of self-interest any government hoping to use tax policy to encourage particular activity would be shooting itself in the foot by changing the rules in a way that does not respect *bona fide* pre-existing commitments made by taxpayers. Businesses that see tax laws being changed in such a high-handed manner simply will not make the investments the government's tax policy wants them to make. Even if such a change is made in a sector unrelated to a particular business, all taxpayers will take note of it and rightfully assume that a government willing to disregard legitimate expectations of taxpayers in one area who have gone out on a limb in reliance on express government incentives to the point of being left holding the bag via a change in law without appropriate grandfathering relief will be willing to do so again in other sectors that are relevant to them. A G-7 economy simply cannot be run in this manner.

It is difficult to imagine that an incoming Conservative government presenting itself as pro-business and prioritizing economic development would even conceive of doing something as contrary to that objective as curtailing the clean economy ITCs without extensive and generous grandfathering that protects taxpayers who have signed long-term commitments premised on receiving the tax incentives they were promised by Parliament. Were it to do so, the uproar from both this sector and the business community should be deafening. Much like Ontario experienced in 2018, it is also not

outside the realm of possibility that a project (or a subset of projects within a sector) has earned, or will earn, a prospective Conservative government's ire. While the risk of this occurring is not zero, the precedent for providing grandfathering relief that suitably protects clean economy participants from adverse legislative change in circumstances such as these is certainly well-established, and such taxpayers should reasonably expect similar relief in the event of an adverse change in law on these tax incentives.

[1] Those wishing to read more on coming-into-force provisions for tax legislation should see Tim Wach, "Legislating Change: Differing Approaches," in *Report of Proceedings of Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002) 35:1-17.

[2] "Questions and Answers on Proposed Changes," accompanying Canada, Department of Finance, "Taxpayer Migration Rules To Be Tightened," *Release*, no. 96-066, October 2, 1996.

[3] Budget Implementation Act, 2017, No. 1, SC 2017, c 20, s. 23(19).

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