

ALBERTA'S CARBON PRICING EMISSIONS TRADING SYSTEM: CRIMINAL CHARGES LAID

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On May 3, 2023, the Alberta Ministry of Environment and Protected Areas charged [\[1\]](#) Amberg Corp., a private environmental services company, and an individual director or officer, with 25 quasi-criminal offences under the *Emissions Management and Climate Resilience Act* (EMCRA) [\[2\]](#) and the *Technology Innovation and Emissions Reduction Regulation* (TIER Regulation) [\[3\]](#).

These charges relate to allegedly providing the functions of a third-party assurance provider without the required qualifications, and failing to comply with the rules and requirements set out by the Alberta Government in the validation, verification and audit requirements in respect of emissions calculated under the TIER Regulation, in addition to providing falsified and misleading information. [\[4\]](#)

To date, the enforcement by the Alberta Government of compliance with EMCRA and TIER has been limited to the issuance of an aggregate 16 compliance orders against regulated facilities, with these orders principally requiring the facilities to pay fees in an amount equal to the purchase price for TIER fund credits to offset the amount by which the facilities' regulated emissions exceeded the allowable emissions under the TIER Regulation, and to correct errors in compliance reports filed in respect of such emissions.

The decision to lay charges and prosecute reflects the critical importance of the measurement and reporting of emissions, emission offsets and emission performance credits (EPCs) and, in particular, the third-party verification process in respect of such measurement under the EMCRA and the TIER Regulation. The Alberta Government has signalled its commitment to maintain the integrity of the "Made in Alberta" carbon pricing and emissions trading system under the TIER Regulation.

This commitment is echoed by the leadership of the Canadian oil and gas industry to reduce emissions and commit to net-zero emissions from oil sands operations by 2050, in addition to leading carbon capture, utilization and storage (CCUS) initiatives and clean energy technology [\[5\]](#).

The next court date for the Amberg charges is set for August 15, 2023 in the Alberta Court of Justice, Calgary.

Background: Alberta's Carbon Pricing and Emissions Trading System

Federal Regime – GGPPA

In 2018, the Federal Government enacted the *Greenhouse Gas Pollution Pricing Act* (GGPPA)^[6] as one element of Canada's strategy to satisfy its commitments under the Paris Agreement, specifically to achieve a 40-45% reduction in greenhouse gas (GHG) emissions below 2005 levels by 2030, and achieve net-zero emissions by 2050.

The GGPPA establishes a fuel charge on the distribution of carbon-based fuels, and a carbon pricing mechanism for certain industrial GHG emissions that are not subject to the fuel charge. To the extent a province establishes an alternative scheme to reduce emissions that satisfies the “minimum national standards” set out in the GGPPA, such province is exempt from the GGPPA regime.

The Alberta TIER System

Alberta was the first province in Canada to implement legislation regulating GHG emissions and requiring large industrial emitters to report their emissions and take emissions reduction actions. The current regime consists of the TIER Regulation and EMCRA, which established a carbon pricing and emissions trading system, which is a “Made in Alberta” system that reflects Alberta's industry and efficiencies, and that satisfies the standards set out in the GGPPA.

The TIER system generally regulates facilities that emit 100,000 tonnes or more of GHG carbon dioxide equivalent (tonnes CO₂e) per year in 2016 or any subsequent year. Facilities can also elect to “opt-in” to the TIER Regulation if they compete against a TIER-regulated facility or if they emit 2,000 tonnes CO₂e or more of emissions and are in an emissions-intensive, trade-exposed sector such as oil and gas, landfills and food processing, or if they register multiple facilities as an aggregated facility. Facilities regulated by the TIER system are exempt from the federal fuel charge under the GGPPA.

A facility regulated under the TIER system is required to satisfy compliance obligations based on the facility's annual emissions benchmarks which are determined from historical emissions amounts or high performance of the most emissions-efficient facilities. There are four compliance obligation options:

1. Reduce on-site emissions. The facility may reduce its on-site emissions, such as implementing process changes to reduce the facility's energy consumption or converting a sequestration credit into a capture recognition tonne.
2. Emission offset credits. The facility may submit emission offset credits, which are generated by projects that have voluntarily reduced their GHG emissions under an approved emission offset protocol (there are currently 19 protocols in effect), and are verified by a qualified third party in accordance with the Standard for Validation, Verification and Audit. Alberta's *Standard for Greenhouse Gas Emission Offset*

Project Developers^[7] requires submission of project information and the credits can then be listed on the [Alberta Emission Offset Registry](#) for purchase by other regulated facilities. Each registered credit represents one tonne of CO₂e that a facility can purchase and use to effectively offset the number of excess tonnes of CO₂e it produces in a given year, relative to the applicable benchmark. Examples of projects generating emissions offsets include the capture, transportation and injection and ultimate sequestration of CO₂ into an enhanced oil recovery scheme and the capture and conservation of methane that is normally vented.

3. Emission performance credits (EPCs). The facility may submit EPCs, which are generated when the facility has reduced its GHGs emissions below the applicable emissions benchmark. EPCs are revocable licenses which can be banked, transferred or retired by a facility to meet its emissions reduction requirements (one tonne of CO₂e reduced is equal to one EPC). In order for a facility to generate EPCs, it must submit compliance reports and be issued EPCs from the Alberta Government on the [Alberta Emission Performance Credit Registry](#).
4. TIER fund credits. The facility may purchase TIER fund credits at a prescribed price in the amount of the “excess” emissions above the applicable benchmark (at a price of \$65/tonne for 2023, which will increase in \$15 increments until reaching \$170/tonne in 2030).

The effectiveness of the TIER system depends, in large part, upon compliance by regulated facilities with the obligations set out under EMCRA and the TIER Regulation, including in particular the accurate measurement and reporting of emissions. In this regard, the Alberta Government has established a comprehensive regime governing such measurement and reporting.

Compliance with the TIER System: Investigation and Enforcement Tools

The EMCRA and the TIER Regulation include broad regulatory investigative and enforcement tools to ensure compliance by regulated facilities, and the EMCRA may conduct investigations and audits, issue compliance orders, seek court orders, register charges against land, recover their enforcement costs, impose administrative penalties, and, in certain cases, pursue offences and penalties.

Under the EMCRA, anyone who knowingly provides false or misleading information; provides false or misleading information; fails to provide information required to be provided; knowingly contravenes a compliance order; contravenes a compliance order; fails to provide information or assistance to an inspector or investigator, or interferes with an inspector or investigator or the director exercising their powers and carrying out their statutory duties commits an offence. Upon conviction, an individual may be fined up to \$100,000 or face imprisonment for a period of not more than two years or both fine and imprisonment, and a corporation may be fined up to \$1,000,000. Penalties for subsequent convictions can be expected to be higher. Other than

in respect of the “knowingly” offences, anyone charged will be able to assert the defence of due diligence. The legislation also grants the Court the power upon conviction to impose a number of related orders such as restitution orders.

Similar to Alberta’s other environmental legislation, the EMCRA provides for liability of directors, officers, or agents of a corporation where the corporation commits an offence and such person authorized, assented to, acquiesced in or participated in the commission of the offence, whether or not the corporation is actually prosecuted for or convicted of the offence.

Key Takeaways

The charges laid under the EMCRA follow a trend of increased enforcement of environmental regulatory legislation, including in relation to misleading environmental and ESG claims and “greenwashing”. They also signal the importance of compliance with EMCRA and the TIER Regulation.

Entities owning or operating regulated facilities are advised to adopt a compliance program with the objective of ensuring compliance with EMCRA and the TIER Regulation. An effective compliance program reduces the risk of violations and contraventions, lessens the likelihood of reputational harm from them and assists in establishing a due diligence defence to any charges in court. Such a program is also typically be considered by regulators when considering whether to proceed against a corporation and/or its directors and officers, whether to propose resolution terms or a plea bargain and, if convicted, it would also assist in lessening the fine ultimately imposed.

Such a program should include among other the following elements:

- Know the Facility(ies): Assess facilities and the application of the TIER Regulation (which continue to evolve) to such facilities, including applicable quantification protocols and standards.
- Policies and Procedures: Implement a comprehensive or updated Environmental Management System with appropriate management oversight to reflect TIER obligations (including emissions reporting), which includes procedures and policies applicable to the facility, such as regular inspections of the facility, good record-keeping and housekeeping practices, and ongoing training for personnel, including directors, officers and agents.
- Reporting Obligations: Understand the TIER Regulation and reporting obligations based on the chosen compliance obligation option(s) and establish appropriate reporting structures and protocols.
- Third Party Assurance Providers: Verify the qualifications of third party assurance providers to ensure that the TIER Regulation’s technical qualification requirements are met. Importantly, the interim provisions which allowed someone to be eligible to be a third party assurance provider if they had technical knowledge and were recognized as a registered professional have now expired. As of June 30, 2023, only

verification bodies accredited to the ISO Standard 14065:2013 by the Standards Council of Canada, or another approved accreditation organization^[8] are eligible.

- Document Retention: Understand document retention requirements under the TIER Regulation, which requires that entities retain applications, records, reports and information associated with emission offsets, cost containment designation, opt-in facilities and forecasting.
- Inspections and Investigations: Retain a qualified environmental consultant and legal counsel to advise on the response to and the management of the investigation, inspection and risk management, including the formulation and assertion of legal defences such as due diligence and under the *Charter of Rights and Freedoms*.
- Public Statements: Ensure that all public statements relating to environment and sustainability matters, including emissions and compliance with the TIER system, are not misleading and are based on credible verifiable data and reporting under EMCRA and the TIER Regulation and in compliance with any applicable securities laws.

McMillan is authoring a number of articles to assist clients in navigating the quickly developing legal landscape surrounding ESG and Climate Change resilience. Among other developments, regulators have confirmed that regulating emissions, ESG-related matters and combatting greenwashing will be a top priority in 2023. For an overview on recent ESG litigation developments in Canada and the US, see our earlier bulletins in our ESG series, including: [Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance \(ESG\) Claims](#) and [ESG Class Actions and Other Lawsuits “Sustainable” into 2023](#).

For more information about these developments or compliance with the TIER system, or if you have any questions on the applicability of the TIER system, or if you are facing an actual or potential non-compliance or regulatory investigation under the TIER system please contact the authors of this bulletin or your regular McMillan contact.

[1] See the [Information on Behalf of His Majesty the King](#) setting out the charges laid on May 3, 2023.

[2] [Emissions Management and Climate Resilience Act](#), SA 2003, c. E-7.8.

[3] [Technology Innovation and Emissions Reduction Regulation](#), Alta Regulation 133/2019.

[4] Standard for Validation, Verification and Audit. See [Alberta Government](#) for the current version 5.

[5] For example, see: [online](#).

[6] [Greenhouse Gas Pollution Pricing Act](#), SC 2018, c. 12, s. 186.

[7] Standard for Greenhouse Gas Emission Offset Project Developers. See [Alberta Government](#) for the current version 3.

[8] [ISO Standard 14065:20](#) replaces ISO 14065:2013: General principles and requirements for bodies validating and verifying environmental information.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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