A Better PACE for Alberta:

Eliminating Barriers to Private Financing of Alberta's Property Assessed Clean Energy (PACE) Programs

Environmental Law Centre

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The Environmental Law Centre (Alberta) Society

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Introduction

In recent years, there has been growing momentum for Property Assessed Clean Energy (PACE) programs. PACE programming is "an innovative tool that provides access to long-term financing for energy efficiency, water conservation, renewable energy, and resiliency measures for owners and developers of commercial, industrial, institutional, and multifamily properties".[1] The intention of PACE programs is to provide easy access to financing for retrofitting existing buildings to reduce energy use and emissions and to create more resilient buildings, thereby contributing to climate change mitigation and adaptation targets. This is done by allowing property owners to obtain a loan to fund clean energy improvements to their property. That loan runs with the property (i.e. it is transferred to any new owners of the property) and is repaid via a charge on property taxes.

Since 2018, Alberta has had legislation which supports PACE programming in the province via the *Clean Energy Improvements Regulation* (CEIP Regulation) and amendments to the *Municipal Government Act* (MGA).[2] The amendments to the MGA grant municipalities authority to impose a "clean energy improvement tax" and the CEIP Regulation sets out the framework for PACE programs in Alberta.

> Alberta's version of PACE programming is known as the **Clean Energy Improvements Program (CEIP)**. However, throughout this report, we use the term PACE to describe the program in Alberta and elsewhere. The relevant Alberta legislation is the ***Municipal Government Act* (MGA)** and the ***Clean Energy Improvements Regulation* (CEIP Regulation)**.

While extensive experience in the United States has shown that PACE programs are most effective when "economies of scale can be leveraged to gain access to private capital and to third-party administrators who can deliver programs at the regional [or] provincial... scale",[3] the PACE programs in Alberta are currently tied to public funding and operate on a municipality by municipality basis.

The limitations in Alberta's PACE programs may be tied to the use of "tax" language which potentially leads to confusion around municipal jurisdiction in relation to PACE program financing and administration, and may have influenced the framing of Alberta's PACE legislation. Although called a "tax", the PACE program charges are not taxes but are actually loan payments. Municipal taxation is merely the mechanism for collection of the loan payments (which are then flowed through to the lender).

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[1] Madi Kennedy, Tom-Pierre Frappé-Sénéclauze, and Betsy Agar, *Property Assessed Clean Energy in Canada: Design considerations for PACE programs and enabling legislation* (Calgary: 2020, The Pembina Institute) at 3 [Kennedy et al.].

[2] *Clean Energy Improvements Regulation*, AR 212/2018 [PACE Regulation] and the *Municipal Government Act*, RSA 2000, ch. M-26 [MGA].

[3] Kennedy et al., *supra.* note 1 at 20.

The use of "tax" language seems to have led to a presumption that municipal debt is required in order to collect PACE charges via property taxes. Following this presumption, this means financing can only be provided by the municipality to the program participant rather than directly by private investors to program participants. This interpretation creates limitations on the financing and administration of PACE programming in Alberta. Furthermore, it may lead to a municipality by municipality approach rather than a more effective provincial approach to PACE financing. In framing PACE legislation and programming in this way, the flexibility and nimbleness of private financing and administration will be lost with the result that PACE programming in Alberta will not be as effective as it could be.

There is potential that the full deployment and scaling of PACE as a tool for climate change mitigation is being impeded by characterization of PACE charges as a form of tax which can creates constraints on how PACE programming is financed and administered. In order to support the efforts to develop and grow PACE programs in Alberta, this project undertakes a legal review related to the characterization of PACE charges (i.e. as a tax, regulatory charge, or something else).

This report looks at legislation, caselaw and relevant literature to scope federal, provincial and municipal jurisdiction vis a vis taxation, and clarifies the characterization of PACE charges. Through enabling better understanding of PACE legislation and its implications on planning and management in Alberta's municipalities, this report will, in turn, support property owners and developers to undertake and implement residential and commercial renewable energy and efficiency improvements.

Energy efficiency is a pivotal tool for reducing energy costs which is key to affordability and sustainability, as well as, taking steps towards addressing climate change. With diversification of capital sources for PACE programs, this will open opportunities to use public funds to create grants or programs for low income persons who would benefit from improved energy efficiency but should not be burdened by additional debt (especially house-secured debt).

Elements key to the success of PACE programs

It has been recommended by Madi Kennedy et al. that legislation to successfully support a PACE program should have several elements.[4] Namely, it is recommended that PACE legislation address:[5]

- the public benefits expected from PACE, including climate action, economic development, and equity;
- local government authority to establish PACE programs on a voluntary basis;
- eligible buildings types;
- qualifying measures (should include energy efficiency, low carbon energy retrofits, renewable energy, water conservation, climate adaptation, EV charging and seismic resiliency);
- funding for 100% of both hard and soft costs;
- assessments transferable from one building owner to the next with sale of the property;

[4] *Ibid.*
[5] *Ibid.*

- primary lien status only for the delinquent portion of the PACE assessment (i.e. municipalities can only collect delinquent amounts not the whole assessment upon default or foreclosure);
- repayment of the assessment shall not be accelerated automatically or extinguished in the case of default or foreclosure;
- provisions that address consumer protection mechanisms in program design (to protect homeowners from questionable or even fraudulent contractor activity);
- access project capital from private and public sources;
- can impose fees to offset administrative costs;
- contracts for program administrative services can be provided by a third party; and
- PACE financing is not counted towards the municipal debt ceiling.

Madi Kennedy et al. and others have pointed out that, because public funds are inherently limited, access to capital markets is necessary for successful PACE programs.[6] Greg Leventis et al. have identified three broad approaches to accessing private capital:[7]

- **Program administrator acts as warehouser**. In this approach, the program administrator uses public capital to initially fund PACE assessments which are then warehoused until there is a sufficiency pool of assessments aggregated to sell to private investors. That is, PACE assessments are packaged and re-sold to private investors.
- **Private program administrator funds assessments**. In this approach, the private program administrator secures a line of credit or other investment capital to fund PACE assessments. The private program administrator may either hold these assessments as an investment or re-sell them in a secondary market transaction.
- **Open market model**. In this approach, one or more financial institutions invest in individual PACE assessments with property owners. This means multiple financial institutions could be interacting with program administrators.

Madi Kennedy et al. have also recommended that use of a third-party administrator is the best way to achieve the necessary economies of scale for a successful PACE program.[8]

[6] *Ibid.,* see also Dianne Saxe, "Canada's buildings are a climate drag – can they pick up the pace?" (June 7, 2021) Corporate Knights, online: https://www.corporateknights.com/built-environment/canadas-buildings-are-a-climate-drag-can-they-pick-up-the-pace/; and Canadian Home Builders' Association, "Keys to developing a successful PACE financing program", online: https://www.chba.ca/CHBA/Housing_in_Canada/Net_Zero_Energy_Program/PACE.aspx [Saxe].

[7] Greg Leventis et al., *Current Practices in Efficiency Financing: An Overview for State and Local Governments* (Berkeley, CA: 2016, Ernest Orlando Lawrence Berkeley National Laboratory) at 46 to 47.

[8] Kennedy et al., *supra.* note 1 and Saxe, *supra.* note 6.

Implementation of PACE Programs in Alberta

Alberta's PACE legislation has been in place since 2018. Division 6.1 of Part 10 of the MGA sets out the framework for PACE programs in Alberta. A clean energy improvement is defined as a "renovation, adaptation or installation on eligible private property that (a) will increase energy efficiency or the use of renewable energy on that property, and (b) will be paid for in whole or in part by a tax imposed under this Division".[9] The amount required to recover the clean energy improvement can include the capital cost of the improvement, the cost of professional services needed for the improvement, a proportionate share of the costs associated with the administration of a PACE program, the cost of financing the improvement, and other incidental expenses.[10] Eligible properties must be private property that is residential, non-residential or farmland; it cannot be designated as industrial property.[11]

A municipality can put a clean energy improvement program into place by passing a bylaw that establishes the program, authorizes the municipality to borrow money to finance the program (notwithstanding section 251 of the MGA which requires a specific borrowing bylaw), and to enable clean energy improvements to be made to eligible properties.[12] The clean energy improvement bylaw must:

(a) set out
  (i) the types of private property that are eligible for a clean energy improvement, and
  (ii) eligible clean energy improvements,
(b) set out
  (i) the amount of money to be borrowed for the purpose of financing clean energy improvements,
  (ii) the maximum rate of interest, the term and the terms of repayment of the borrowing, and
  (iii) the source or sources of money to be used to pay the principal and interest owing under the borrowing,
(c) indicate that, where a municipality has entered into a clean energy improvement agreement with the owner of a property, a clean energy improvement tax will be charged based on the clean energy improvement agreement,
(d) identify the period over which the cost of each eligible clean energy improvement will be spread, which period may vary from improvement to improvement, but the period shall not exceed the probable lifetime of the improvement,
(e) indicate the process by which the owner of a property can apply to the municipality for a clean energy improvement,
(f) include any other information the council considers necessary or advisable, and
(g) include any requirements imposed by the regulations.[13]

[9] MGA at 390.1.
[10] MGA at 390.1.
[11] MGA at 390.2.
[12] MGA at 390.3.
[13] MGA at 390.3(4).

Before a clean energy improvement is made, the property owner and the municipality must enter into an agreement.[14] The person liable to pay the clean energy improvement tax is the property owner, and the tax may be paid off at any time.[15]

More detail about requirements for clean energy improvement programs is found in the CEIP Regulation. The CEIP Regulation requires the program administrator to address matters such as maintaining a list of qualified contractors, code of conduct for contractors, and marketing guidelines.[16] Initially, an agency called Energy Efficiency Alberta was designated by the PACE Regulation as administrator for clean energy improvement programs. In 2020, amendments were made to the PACE Regulation to remove Energy Efficiency Alberta as the program administrator because that agency was ended by the GOA. In 2021, a Ministerial Order designated the Alberta Municipal Services Corporation as program administrator for the purposes of the CEIP Regulation.[17]

As well, the CEIP Regulation sets out requirements for clean energy improvement bylaws (in addition to those enumerated in the Act).[18] There are also provisions addressing applications, agreements with property owners and contractors, and reporting and monitoring.[19] As well, there are provisions which set out how authorized taxes can be calculated, limiting proportionate share of administrative costs and incidental costs (5% and 15% of total capital cost, respectively), and setting a minimum and maximum for value of capital costs (at least $3,000, and not exceeding $50,000 for residential properties, $1,000,000 for non-residential properties and $300,000 for farm land).[20]

It is important to note that the MGA also sets out the general authority and limits on municipal financial administration in Part 8 (which may impact on PACE programming). For example, municipalities are required to adopt an operating budget on an annual basis which must include the estimated amount of revenues and transfers from clean energy improvement taxes.[21] An operating budget must be balanced in that estimated revenue and transfers are at least sufficient to pay the estimated expenditures and transfers.[22] Municipalities must also adopt an annual capital budget which estimates the amounts needed to acquire, construct, remove or improve capital property, and anticipated sources and amounts of money to pay those costs.[23]

[14] MGA at 390.4.
[15] MGA at 390.5 and 390.6.
[16] CEIP Regulation at 4.
[17] Ministerial Order, 34/2021. The act that created the Energy Efficiency Alberta agency (the *Energy Efficiency Alberta Act*, S.A. 2016, c. E-9.7) was repealed via the *Red Tape Reduction Implementation Act, 2020*, S.A. 2020, c. 25. See also Dean Bennett, "Alberta Government officially ends agency created to handle green rebates and programs" (June 11, 2020) The Canadian Press, online: https://globalnews.ca/news/7056892/ucp-government-kenney-energy-efficiency-alberta/.
[18] CEIP Regulation at 5.
[19] CEIP Regulation at 6 to 12.
[20] CEIP Regulation at 10.
[21] MGA at 243(2)(e.1).
[22] MGA at 243(3).
[23] MGA at 246.

Municipalities are permitted to borrow money but only in accordance with a bylaw passed for that purpose[24] and within its debt limit.[25] However, the borrowing made by a municipality to pay for cost associated with clean energy improvements does not count against the debt limit or debt service limit of that municipality.[26] Municipalities also have limited authority to make loans or to guarantee repayment of loans: it must be made to one of its controlled corporations or a non-profit organization for a purpose that will benefit the municipality.[27] Such a loan or loan guarantee cannot cause the municipality to exceed its debt limit.[28]

Part 10 of the MGA deals with municipal taxation. It should be noted that the provisions delineating the clean energy improvement tax are found in Division 6.1 of this part of the MGA. Because the MGA definition of **tax** includes clean energy improvement taxes,[29] the provisions governing taxes and their recovery are applicable to clean energy improvement taxes.[30] This includes provisions which establish that taxes owing are a debt to the municipality and that clean energy improvement tax amounts (as well as other land-based taxes) are a special lien on land and any improvements to the land.[31]

Characterization of PACE Charges: A Barrier to Successful Implementation

As previously mentioned, PACE programs are more likely to be successful when "economies of scale can be leveraged to gain access to private capital and to third-party administrators who can deliver programs at the regional [or] provincial... scale".[32] To date, Alberta's PACE programs have been limited to the use of public funding and on a municipality by municipality basis. These limitations may arise from framing PACE charges as a municipal "tax" and as a line item on municipal operating budgets.

The authority of municipalities is limited in two ways. Firstly, municipalities are creatures of statute and as such can only operate in the bounds outlined in statute (in Alberta, primarily the MGA). Secondly, municipalities have no constitutional status of their own, their power derives from provincial constitutional authority. This means if a province lacks jurisdiction to do something, so does a municipality.

[24] MGA at 251.
[25] MGA at 252.
[26] MGA at 252(2).
[27] MGA at 264. A municipality may also make a loan or guarantee to a designated seller as part of the capitalization of that designated seller by its shareholders, where it intends to purchase gas from and become a shareholder of that designated seller.
[28] MGA at 268.
[29] MGA at 1(1)(aa)(v.1) and 410.
[30] MGA at 410(e).
[31] MGA at 348.
[32] Madi Kennedy et al., *supra.* note 1 at 20.

Because PACE programs are being implemented pursuant to provincial jurisdiction (i.e. by municipalities under authority granted by the MGA), they must fall into a provincial head of power under the *Constitution Act, 1867*. Provinces have jurisdictional authority over municipal institutions, property and civil rights, and local matters within the province.[33] PACE programs are municipal (or provincial) level programs designed to address energy consumption on a local level thereby achieving broader climate change goals. These programs do so by providing access to capital (i.e. loans) for energy efficient retrofits. PACE programs are typically one of many tools used to address climate change goals on a municipal or provincial level.

While provinces have broad constitutional authority to address climate change arising from jurisdiction over property and civil rights, and local matters within the province; their taxation powers are more constrained by the constitution. A province may only impose direct taxes within the province (usually land or income tax).[34] Municipalities are further constrained by having only the taxation authority granted by the province in legislation. So, if PACE charges are a form of taxation, then these constraints apply.

Why does it matter if PACE charges are a tax or a regulatory charge?

The MGA and CEIP Regulation both contain language which suggests that PACE charges are a form of tax (or at least were considered such by the framers of the PACE legislation). For instance, throughout the MGA and CEIP Regulation, a PACE charge is referred to as a "Clean Energy Improvement Tax".[35]

The role granted to municipalities with respect to PACE programs also suggests that it was seen as critical that the PACE agreement be made between a property owner and the municipality, which in turn seems to reflect an assumption that the municipality must be the lender in order to collect the PACE charge via the property tax roll. The role of the municipality is delineated in the provisions requiring a Clean Energy Improvement Tax Bylaw which, among other things, must:[36]

- authorize the municipality to *make a borrowing* for the purpose of financing clean energy improvements;
- indicate that, *where a municipality has entered into a clean energy improvement agreement with a property owner*, a clean energy improvement tax will be charged; and
- set out the process by which a property owner can *apply to the municipality* for a clean energy improvement.

[33] *Constitution Act, 1867* (UK), 30 & 31Vict., c 3, reprinted in RSC 1985, Appendix II, no 5 [*Constitution Act, 1867*] at 91(8), 91(13), and 91(16).
[34] *Ibid.* at s. 92(2). See also Lindsay M. Teddys and Kelly I.E. Farish, "User Fee Design by Canadian Municipalities: Considerations Arising from Case Law" (2014) Muni Personal RePEc Archive Paper No. 96914.
[35] MGA at 1(1)(aa)(v.1), 243(2)(e.1), 348(d)(i), 410(e) and Part 10, Division 6.1. CEIP Regulation at s.5.
[36] MGA at 390.3.

Other provisions in the MGA and the CEIP Regulation make it clear that a clean energy improvement agreement (i.e. a PACE agreement) must be between the municipality and a property owner.[37] However, under the CEIP Regulation, the program administrator also plays a role in PACE agreements by receiving and approving a property owner's application for PACE funding. Once an application is approved by the program administrator, it is forwarded to the municipality (which then enters into a PACE agreement with the property owner).[38]

While neither the MGA nor the CEIP Regulation limits the source of municipal borrowing, and borrowing for the purposes of clean energy improvements is exempt from municipal debt limits, it is clear that it is the *municipality* that must undertake the borrowing. There is no clear mechanism established in either the MGA or CEIP Regulation to allow lending by a third-party or the program administrator directly to a property owner – all financing must flow through the municipality. Again, this seems to reflect an assumption that because PACE charges are being collected as a "tax", the municipality must be recovering costs which it incurred (i.e. a municipality borrowing which was used to pay for the clean energy improvements).

Distinguishing between taxes, regulatory charges and other types of levies

All levels of government – federal, provincial and municipal – have authority to impose and collect monies (i.e. levies) albeit with varying capacity. Under the *Constitution Act,* the federal government has authority to levy indirect or direct taxes.[39] A province may only impose direct taxes within the province.[40] A direct tax is designed to be paid by the person who is taxed (usually land or income tax) whereas an indirect tax is typically passed on to another person (for example, an export or manufacturing tax).[41]

Non-tax levies may also be imposed as fees for government services or for costs incidental to regulation.[42] Since a municipality's authority is delegated from the province, it can only impose levies as allowed in its originating legislation (in Alberta, the MGA) and cannot do anything that is outside provincial jurisdiction.

Non-tax levies can be categorized as follows:[43]

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[37] MGA at 390.4. See also CEIP Regulation at 10.
[38] CEIP Regulation at 7, 9 and 10.
[39] *Constitution Act, 1867* at 91(3).
[40] *Ibid.* at s. 92(2). See also Lindsay M. Teddys and Kelly I.E. Farish, "User Fee Design by Canadian Municipalities: Considerations Arising from Case Law" (2014) Munich Personal RePEc Archive Paper No. 96914.
[41] *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371; and *National Steel Car Ltd. v Independent Electricity System Operator*, 2022 ONSC 2567 (CanLii).
[42] *Constitution Act, 1867* at ss. 91(3) and 92(9). For very brief overview, see Centre for Constitutional Studies, *Taxation Power* (July 4, 2019), online: https://www.constitutionalstudies.ca/2019/07/taxation-power/.
[43] Barbara McIssac, Benjamin Mills and David Porter, "Distinguishing between a tax and a regulatory charge and the return of improperly collected money" (July 16, 2008) Mondaq, online: https://www.mondaq.com/canada/tax-authorities/63566/distinguishing-between-a-tax-and-a-regulatory-charge-and-the-return-of-improperly-collected-money.

- **Regulatory charges** are levies imposed in relation to rights or privileges awarded or granted by the Crown. These can be used to finance a regulatory scheme or to alter individual behaviour.
- **User fees** are fees charged by the Crown for the use of government services or facilities. There must be a clear connection between quantum charged and the cost to government in providing the service or facilities.
- **Proprietary charges** are levies charged for goods or services supplied by the Crown in a commercial context, such as oil and gas royalties.

There is a significant amount of caselaw setting out the tests to distinguish between taxes (direct and indirect) and non-tax levies. Essentially, there is a two step process for distinguishing a tax from a regulatory charge: firstly, determine if the levy has the characteristics of a tax and secondly, determine if the levy is connected to a regulatory scheme. This process has been expressed by the SCC in *Westbank First Nation* as follows:

> In order to determine whether the impugned charge is a "tax" or a "regulatory charge"… several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) leveled by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.[44]

In that same case, the SCC also stated that a tax is distinguishable from a levy imposed primarily for regulatory purposes or as necessarily incidental to a broader regulatory scheme.[45] Some factors to consider in order to identify a regulatory scheme are whether there is a complete and detailed code of regulation; a specific regulatory purpose which seeks to affect the behaviour of individuals; actual or estimated costs of regulations and a relationship between the regulation and person being regulated. The SCC noted that not all these factors need to be present to find a regulatory scheme (nor is the list exhaustive).

A more recent decision of the SCC – *620 Connaught Ltd*. – clarified that determining whether a levy is connected to a regulatory scheme is done by (1) identifying the existence of a relevant regulatory scheme and (2) confirming a relationship between the levy and the regulatory scheme.[46] In that decision, the SCC further clarified the distinction between user fees and regulatory charges:

> It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, "courts will not insist that fees correspond precisely to the cost of the relevant

[44] *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para. 43.
[45] *Ibid.* at para. 23.
[46] *620 Connaught Ltd. v Canada (Attorney General)*, [2008] 1 SCR 131.

> services. As long as reasonable connection is shown between the costs of the service provided and the amount charged, that will suffice" [reference omitted].
> …
>
> By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour.[47]

The SCC has indicated that, in determining whether a levy is a tax or a regulatory charge, the primary purpose of the law is determinative.[48] A tax is designed to raise revenue for general purposes, a regulatory charge is used to finance or constitute a regulatory scheme, and a user fee is a charge for services rendered.[49]

Most recently, this question was considered by the SCC in the context of fuel and excess emission charges imposed under the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186.[50] The Court found the charges to be regulatory charges and not taxes, noting that:

- there was a sufficient nexus with regulatory scheme to be considered constitutionally valid regulatory charges;
- influencing behaviour is a valid purpose for a regulatory charge;
- regulatory charges with the purpose of altering behaviour can be set at a level to proscribe, prohibit, or lend preference to a behaviour which means they do not need to reflect the cost of the scheme (to limit such a regulatory charge to the recovery of costs would be incompatible with the regulatory scheme); and
- the revenues collected do not need further the purposes of the regulatory scheme because the required nexus is met where the charges themselves have a regulatory purpose.

The SCC confirmed that "[i]n every case, the court must scrutinize the scheme in order to identify the primary purpose of the levy on the basis of *Westbank*."[51]

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[47] *Ibid.* at paras. 19 and 20.
[48] *Westbank First Nation, supra.* note *; *620 Connaught Ltd., supra.* note *; *National Steel Car Ltd. v Independent Electricity System Operator*, 2022 ONSC 2567 (CanLii); and *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371.
[49] *Ibid.*
[50] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
[51] *Ibid.* at para. 218.

Legal Characterization of PACE Charges in Alberta

PACE charges have not been considered by Canadian courts. At first blush, it may appear that PACE charges are a form of tax. They are referred to as "clean energy improvement taxes", and they are treated and collected in the same manner as municipal property taxes. But is this a fair characterization?

As discussed, the basic characteristics of a tax are that a levy must be (1) enforceable by law (2) enacted under the authority of Legislature or Parliament (3) levied by a public body and (4) intended for a public purpose.[52]

There is an argument that because PACE charges arise, at least initially, from agreement between the landowner and the lender that they lack the element of compulsion necessary for a tax. A similar argument was considered and accepted by the Alberta Energy and Utilities Board in *Grande Prairie (City), Re* in the context of a negotiated utilities franchise fee.[53] An individual (not related to the City or utilities company) argued that the franchise fee was an indirect tax which was *ultra vires* the province and therefore invalid. The City and the utilities company both argued that the franchise fee was not a tax at all but rather was a charge levied by a government in the exercise of proprietary rights over public property. The franchise fee was paid pursuant to a contract which was freely and voluntarily negotiated. While the franchise fee is authorized by legislation, it is not imposed by statute. The Board agreed with the City and utilities company. It found that the franchise fee did not meet the first two criteria of being a tax: it is not enforceable by law or compulsory in the sense that it is charged pursuant to a freely negotiated agreement and secondly while permitted by statute, the enabling legislation does not necessitate that the City to impose a franchise fee.

The compulsory element of a tax was also discussed by the Ontario Supreme Court in *Carson's Camp Ltd.*[54] In this case, a municipality sought to impose a site levy on campgrounds which the campground owner argued was an indirect tax based on the use of land (which is not permissible under the relevant legislation) whereas the municipality argued it was a direct tax that could be further justified as being part of a regulatory scheme of businesses operating in the municipality. The Court concluded that the site levy was not permissible under the legislation because it was an indirect tax and not a fee or charge.

In making its decision, the Court stated that:

> [15] Another element of a fee or charge, not inherent in a tax, is that of choice. With the former the citizen may choose to purchase the service or commodity or benefit, or he may choose not to, in which case he need not pay the fee or charge. A tax is obligatory or mandatory imposition requiring payment, without choice. Further it is imposed for purposes of raising money for general revenues. The payer receives no special benefit or service not enjoyed by all other citizens in the community.[55]

[52] *National Steel Car Ltd. v Independent Electricity System Operator*, 2022 ONSC 2567 (CanLii).
[53] *Grande Prairie (City), Re,* 2003 CarswellAlta 2132 (Alta. EUB).
[54] *Carson's Camp Ltd. v Amabel*, 1998 CanLii 14817 (ON SC).
[55] *Ibid.* at para. 15.

Because PACE charges are voluntary there is a good argument that PACE charges do not meet the four characteristics necessary to be considered a tax. However, assuming that PACE charges do actually meet the four characteristics of tax (including being compulsory), the question arises as to whether there is a connection to a regulatory scheme that make PACE charges a form of regulatory charge (and not a tax).

A levy similar, albeit not identical, to PACE charges for was considered in *Ontario Home Builders Association.*[56] In that case, pursuant to provincial legislation called the *Development Charges Act*, school boards passed a bylaw requiring persons seeking a building permit to pay a Educational Development Charge (EDC) as a condition of obtaining a permit. The Court of Appeal considered whether the EDCs were *ultra vires* the province because it was an indirect tax contrary to the *Constitution Act, 1867*. The Court of Appeal found that the charge was an indirect tax but that it was ancillary to a regulatory scheme within provincial jurisdiction and justifiable within several provincial heads of power. The SCC dismissed the appeal with 5 justices agreeing with the Court of Appeal (the other 4 justices found the EDCs to be a direct tax and thus *intra vires* the province). The majority of the SCC stated:[57]

> In the case at bar, an EDC may at first blush seem to bear the characteristics of a land tax in that it is, in the words of the enabling legislation, imposed on "land undergoing residential and commercial development". Further, the failure to pay the EDC results in the charge being placed on the tax roll in respect of a specific parcel of land. In many respects, the EDC scheme is a novel scheme of taxation which involves features of both direct and indirect taxation.
>
> However, in my view, EDCs are not true land taxes in the traditional sense. The purpose of the EDC scheme is not taxation of land, but rather, taxation imposed in order to defray the costs of infrastructure necessitated by new residential development. As McKeown J. of the Divisional Court noted at p. 510, "[t]he land can sit forever without attracting tax if no development is undertaken". While the EDC collection mechanism is linked to land, it is not the ownership of land *qua* land that is the object and purpose of the tax, but rather, the costs of infrastructure associated with new development upon land. The assessment of the tax is not based upon the value of the land, but rather, is based on the impact development will have in terms of creating a need for educational services. Although the "categories approach" articulated in *Fairbanks* may be of some relevance on other facts, it is my view that in the instant appeal, it is of no application. Rather, the incidence of the EDCs must be determined according to Mill's formulation, as discussed above.

The majority of the SCC found the EDCs to be an indirect tax because it was likely to be passed along to the consumer as part of the house sale price and, as such, was *ultra vires* the province. However, the SCC concluded that the EDC scheme was saved as being ancillary to a valid regulatory scheme to provide educational facilities as a component of land use planning. As the majority stated:[58]

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[56] *Ontario Home Builders Association v York Region Board of Education,* [1996] 2 SCR 929.
[57] *Ibid.* at page 977.
[58] *Ibid.* at page 987.

> The construction of schools is a legitimate and crucial component of modern land use planning, schools being an essential element in the creation of successful, dynamic and democratic communities. The legislature of Ontario clearly takes the view that the cost of educational facilities made necessary by new land development should be taken into account in the land development approval process. … The Act itself authorizes municipalities to impose development charges not only for education but also for water mains, sewers, roads, libraries, parks and recreational facilities. The common theme is that new development should bear the costs of infrastructure necessitated by the new development. Further, just as the gravel excavators in *Allard* benefitted from the regulatory scheme in terms of road improvement, so too do the developers receive a considerable benefit from the EDC scheme: a development with adequate amenities. The presence of adequate school facilities clearly contributes to the marketability of a new home.

In an addendum to its decision, the majority of the SCC stated that EDCs are "novel and unlike any known form of taxation" and further that "the EDCs are simply not true land taxes in the traditional sense. Rather, the EDC scheme is indirect taxation which is ancillary to a constitutionally valid provincial regulatory regime."[59] This addendum was in response to the minority SCC decision which found that EDCs were not regulatory charges but rather a direct tax on land that was meant to raise revenue and was imposed on landowners.

Following the majority decision in *Ontario Home Builders Association,* it is clear that merely imposing a charge on land and including it on a municipal property tax roll does not mean it is a traditional land tax. Such charges can be found to be "novel and unlike any known form of taxation" and "ancillary to a regulatory scheme".[60] So the mere fact that PACE charges are imposed on land and collected via municipal property tax rolls does not make them traditional land taxes.

Where a charge meets the basic characteristics of a tax (enforceable by law; enacted under the authority of Legislature or Parliament; levied by a public body; and intended for a public purpose[61]), further examination is needed to determine the primary purpose of the charge. It is the primary purpose of a charge that determines whether it is a tax, regulatory charge or user fee. As discussed above, a tax is designed to raise revenue for general purposes whereas a regulatory charge is used to finance or constitute a regulatory scheme. [62]

Unlike a tax, PACE charges are not designed to generate revenue for general purposes. Rather, PACE charges are imposed on a property as a means to recover loan repayments. And the property owner voluntarily enters into the PACE arrangement (although PACE charges run with the property, subsequent owners are either aware of the charges they will be assuming or can request that the charges be paid off before transferring ownership).

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[59] *Ibid.* at pages 997 to 998.
[60] *Ibid.* at pages 997 to 998.
[61] *National Steel Car Ltd. v Independent Electricity System Operator*, 2022 ONSC 2567 (CanLii).
[62] *Ibid.*

Nor do PACE charges fit into the category of a user fee or proprietary charge. User fees are fees charged by the Crown for the use of government services or facilities which does not describe PACE charges. Proprietary charges are levies charged for goods or services supplied by the Crown in a commercial context which, again, does not describe PACE charges. PACE charges are best described as a form of regulatory charge, albeit a novel form, arising in connection to a climate change regulatory scheme (albeit incurred voluntarily).

What needs to change in Alberta to improve PACE implementation?

The scale of PACE program implementation in Alberta has been impeded by the reliance on public funds and a municipality by municipality approach. As stated before, "economies of scale can be leveraged to gain access to private capital and to third-party administrators who can deliver programs at the regional [or] provincial... scale".[63] Program scale is unnecessarily limited when there is sole reliance on public funds (or by requiring all funding flow from municipalities); opening access to private capital will allow Alberta's PACE programs to expand and achieve economies of scale. Furthermore, efficiencies will be achieved by creating a dedicated third-party non-governmental program administrator that can carry the bulk of administrative burden for all municipalities in Alberta thereby reducing transaction costs.

It is recommended that the role of the program administrator be expanded in the implementation of Alberta's PACE programs. The program administrator should be empowered in a manner similar to the Green Bank of Connecticut's role in that state's PACE program (see Appendix 1 for discussion). This will require legislative amendments, both to the MGA and the CEIP Regulation.

Essentially, the program administrator would be responsible for all aspects of the PACE program including entering agreements and arranging financing with property owners. The program administrator should be granted express power to seek financing from both public and private sources. Ideally, the role of program administrator would be fulfilled by a dedicated arms-length, non-governmental body as opposed to Alberta Municipal Services Corporation (as is the current situation).

The municipality's role would be limited to passing a PACE bylaw (to opt-in to the program) and collection of PACE charges through the property tax roll (which would, in turn, be remitted to the program administrator). The municipality would be enabled to charge an administrative fee for collection of PACE charges.

Under the proposed approach, the program administrator would accept, review and approve (or reject) applications for PACE projects submitted by property owners. If accepted, the program administrator would enter into a financing agreement with the property owner – financing would flow from the program administrator to the property owner. The program administrator would, in turn, advise the relevant municipality to place a PACE charge on the appropriate property roll to be collected in the same manner as property taxes, protected by lien. Upon collecting the PACE charges, the municipality would remit these to the program administrator (subject to withholding an administrative fee). Liens placed

[63] *Ibid*. at 20.

on the property by the municipality for associated PACE charges would be assigned to the program administrator for enforcement purposes.

Recommended Amendments to MGA and CEIP Regulation

In order to implement this approach, amendments to the MGA and the CEIP Regulation are required:

1. Amend all references to Clean Energy Improvement Tax in the MGA and CEIP Regulation to **Clean Energy Improvement Charges**.

Renaming the Clean Energy Improvement Tax to **Clean Energy Improvement Charge**, clarifies that CEIP charges are not a form of tax. CEIP charges are more like a regulatory charge associated with a regulatory scheme designed to address climate change (as opposed to a tax).

2. Amend sections 1(1)(a)(e.1), 348(d)(i) and 410(e) to remove references to Clean Energy Improvement Taxes. In Part 10, Division 6.1 of the MGA, add a provision stating that Clean Energy Improvement Charges are to be collected in the same manner as taxes, and are collectable at the same time and by the same proceedings as taxes.

Rather than incorporating CEIP charges as another form of tax, it should be clarified that CEIP charges are merely collectable in the same manner as taxes, and are collectable at the same time and by the same proceedings as property taxes. This enables collection of CEIP charges by municipalities via the property tax system and maintains the lien priority. At the same time, this clarifies that CEIP charges are not taxes and do not require recovery of funds only provided directly by the municipality.

3. Amend section 390.3 of the MGA to reflect the role of the program administrator and its relationship to the municipality. The revised provision should read as follows:

390.3(1) Each council may pass a clean energy improvement bylaw imposing, fixing and providing methods of enforcing payment of charges for the financing and installation of clean energy improvements on private property with the consent of the owner of property.

(2) Before a clean energy improvement is made to any property, a council must pass a clean energy improvement charge bylaw.

(3) A clean energy improvement charge bylaw must, subject to the regulations,

(a) set out

(i) the types of private property that are eligible for a clean energy improvement, and

(ii) eligible clean energy improvements,

(b) indicate the terms of the clean energy improvement program agreement between the municipality and the program administrator,

(c) indicate that, where the program administrator and the owner of a property have entered into a clean energy improvement agreement, a clean energy improvement charge will be charged based on that clean energy improvement agreement,

(d) clean energy improvement charges are first liens on the real property and may be collected in the same manner as taxes,

(d) identify the period over which the cost of each eligible clean energy improvement will be spread, which period may vary from improvement to improvement, but the period shall not exceed the probable lifetime of the improvement,

(e) include any other information the council considers necessary or advisable, and

(f) include any requirements imposed by the regulations.

(5) Before giving second reading to a proposed clean energy improvement charge bylaw, the council must hold a public hearing with respect to the proposed bylaw in accordance with section 216.4 after giving notice of it in accordance with section 606.

4. Amend section 390.4 of the MGA so that a clean energy improvement agreement is made between the property owner and the CEIP program administrator (not the municipality as the provision currently reads). The revised provision should read as follows:

390.4 (1) The program administrator and the owner of a property shall enter into a clean energy improvement agreement before a clean energy improvement is made to that property.

(2) A clean energy improvement agreement must, subject to the regulations,

(a) describe the proposed clean energy improvement,
(b) identify the property in respect of which the clean energy improvement charge will be imposed,
(c) indicate that the owner of the property will be liable to pay the clean energy improvement charge,
(d) include the amount required to recover the costs of the clean energy improvement and the method of calculation used to determine that amount,
(e) state the period over which the amount required to recover the costs of the clean energy improvement will be paid,
(f) describe how the clean energy improvement charge will be revised in the event of a subdivision of the property or consolidation of the property with any other property, and
(g) include any other information the program administrator considers necessary or advisable.

5. Rescind section 390.7 which addresses refinancing of debt by council (since the municipality will not be incurring debt for the purposes of the clean energy improvement program).

In addition to the amendments to the MGA, the CEIP Regulation requires amendments to implement the recommended approach.

6. Amend section 2 of the CEIP Regulation to appoint a dedicated third-party, non-governmental program administrator. Additional legislation to establish that program administrator will be required (similar to the now rescinded *Energy Efficiency Alberta Act*).

7. Expressly indicate that financing for a PACE program will flow from the program administrator, using public or private funds, with the municipal role being limited to collection of CEIP charges which are remitted back to the program administrator. The CEIP Regulation should outline process to be administered by the program administrator wherein:

    i. The program administrator enters into clean energy improvement program agreements with interested municipalities. The municipal passes a bylaw in accordance with the MGA.
    ii. Interested property owners submit clean energy improvement project proposals to the program administrator. The program administrator is responsible for review and approval of proposed clean energy improvement projects. The program administrator provides financing to the property owner (using either public or private funds).
    iii. Once the project is approved and financing confirmed, the program administrator advises the municipality which will levy a clean energy improvement charge on the property which is secured by lien.
    iv. The municipality collects payments in the same manner as property taxes and those payments are remitted to the program administrator (who reimburses the third-party capital provider if applicable).
    v. The program administrator is responsible for enforcing unpaid liens. This is accomplished by the municipality assigning the lien to the program administrator.

    To accomplish this, section 10 of the CEIP Regulation should be amended to indicate the clean energy improvement agreement is made between the program administrator and the owner of property. Further, rescind section 10(4)(e) which addresses refinancing of debt by council (since the municipality will not be incurring debt for the purposes of the clean energy improvement program).

Consider a shift in focus to Commercial PACE programs

To date, the focus in Alberta has been on residential PACE (R-PACE) programs rather than commercial PACE (C-PACE) programs. There are arguments to shift the focus to C-PACE programs in Alberta. There have been significant concerns in some jurisdictions – notably California – with inadequate consumer

protection and fraudulent activities.[64] Certainly, as R-PACE continues to grow in Alberta, consumer protection is a matter to be addressed in program design. This may include the addition of "means to pay" underwriting criteria especially in light of the fact that, in a single family home, cost benefit ratios may not exceed one (i.e. energy savings may not exceed the upgrade costs).

C-PACE, which deals with more sophisticated parties is less prone to concerns around consumer protection and fraud. Furthermore, the "off balance sheet" loan nature of PACE financing is likely more beneficial and attractive to commercial property owners than to individual residential home-owners.[65] Not to mention that an investment in a single commercial property will typically have greater climate change mitigation impacts that an investment in a single residential property.

To accommodate a shift to C-PACE, it is recommended that section 8 of the CEIP Regulation be amended to create an application fee for multi-family and mixed-use properties commensurate with non-residential properties. The provisions should be amended to read as follows:

> 8(1) The program administrator may charge an application fee in relation to applications for clean energy improvements.
>
> (2) If the program administrator charges an application fee in relation to applications for clean energy improvements, the fee must not exceed the following:
>
> (a) for applications relating to residential properties containing 5 or fewer units, $100;
> (b) for applications relating to multi-family residential properties containing more than 5 units, $500;
> (c) for applications relating to mixed-use properties, $500;
> (d) for applications relating to non-residential properties, $500; and
> (e) for applications relating to farm land, $200.

[64] See for example: Claudia Polska et al., *The Dark Side of the Sun: How PACE Financing Has Under-Delivered Green Benefits and Harmed Low-Income Homeowners* (Berkeley, CA: 2021, Berkeley Law Environmental Law Clinic).
[65] For more discussion of the benefits of an "off balance sheet" loan, see Help Cities Lead, *Briefing Note: Property Assessed Clean Energy Financing* (2020).

Appendix I: Implementation of PACE Programs in Other Jurisdictions

As mentioned in 2018, amendments were made to the MGA which enabled the implementation of PACE programs in Alberta (known as Clean Energy Improvement Programs). By 2022, 15 municipalities had passed clean energy improvement tax bylaws with Alberta Municipal Services Corporation acting as the sole administrator.[66] Most of the programs are focused on residential clean energy improvements although Edmonton launched the first commercial program in mid-2022.[67]

Alberta's PACE programs are relatively new, mostly still in pilot stages. As such, it is helpful to look to other jurisdictions in Canada and the US to draw from their experiences in implementing PACE programs.

PACE Programs in Canada

The Green Municipal Fund is a program funded by the Government of Canada and administered by the Federation of Canadian Municipalities (FCM).[68] One of their initiatives is helping municipalities to deliver energy financing programs for residential properties using a variety of funding models including PACE. Aside from those in Alberta, there are currently PACE programs in Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

Nova Scotia

In Nova Scotia, the first PACE program was the City of Halifax's Solar City program.[69] This program was first enabled in 2010 by amending the *Halifax Regional Municipality Charter.*[70] Under the current language of the *Charter* allows the City of Halifax to make bylaws "imposing, fixing and providing methods of enforcing payment of charges for the financing and installation of any of the following on private property with the consent of the property owner … (b) energy-efficiency equipment ... (c) renewable energy equipment". [71] The City of Halifax has passed an *Energy Equipment Bylaw.* [72]

In 2012, changes were made to the *Municipal Government Act* to allow other Nova Scotia municipalities to create PACE programs.[73] Now, numerous municipalities in Nova Scotia have PACE programs and these programs apply to a range of improvements from insulation to heat pumps to solar panels. Some of these programs are administered by the Clean Foundation, which is a not-for-profit third-party

[66] Alberta Municipalities, *Clean Energy Improvement Program, Annual Report 2021 with update on Q1 & Q2 2022* (Edmonton: 2022, Government of Alberta).
[67] *Ibid.*
[68] Green Municipal Fund website, online: https://greenmunicipalfund.ca.
[69] See the Solar City website at http://www.halifax.ca/solarcity/.
[70] *Halifax Regional Municipality Charter*, NSA 2008, c. 39 [*Halifax Charter*].
[71] *Halifax Charter* at 104A(1)(b).
[72] Halifax Regional Municipality, *By-Law Number S-500 Respecting Charges for Energy Equipment.*
[73] *Municipal Government Act*, SNS 1998, c. 18, s. 81A [*Municipal Government Act*].

administrator, and others are administered directly by the municipalities or their own program administrator.[74] The majority of PACE programs in Nova Scotia are focused on residential properties although there is a commercial PACE program in Berwick.[75]

Section 81A of the *Municipal Government Act* allows municipalities to make bylaws for clean energy equipment programs: [76]

> 81A (1) The council may make by-laws imposing, fixing and providing methods of enforcing payment of charges for the financing and installation of any of the following on private property with the consent of the property owner:
> (a) energy-efficiency equipment;
> (b) renewable energy equipment;
> (c) equipment for the supply, use, storage or conservation of water; and
> (d) on-site sewage disposal equipment.
>
> (2) A by-law passed pursuant to this Section may provide
> (a) that the charges fixed by, or determined pursuant to, the by-law may be chargeable according to a plan or method set out in the by-law;
> (b) that the charges may be different for different classes of development and may be different in different areas of the municipality;
> (c) when the charges are payable;
> (d) that the charges are first liens on the real property and may be collected in the same manner as other taxes;
> (e) that the charges be collectable in the same manner as taxes and, at the option of the treasurer, be collectable at the same time, and by the same proceedings, as taxes;
> (f) a means of determining when the lien becomes effective or when the charges become due and payable;
> (g) that the amount payable may, at the option of the owner of the property, be paid in the number of annual instalments set out in the by-law and, upon default of payment of any instalment, the balance becomes due and payable; and
> (h) that interest is payable annually on the entire amount outstanding and unpaid, whether or not the owner has elected to pay by instalments, at a rate and beginning on a date fixed by the by-law.

Part IV of both the *Halifax Charter* and the *Municipal Government* Act, address municipal financial matters. As in Alberta, a municipality must adopt an operating and a capital budget.[77] Municipalities have the power to borrow money "to carry out an authority to expend funds for capital purposes conferred by" legislation.[78] Section 107 of the *Halifax Charter* and section 84 of the *Municipal*

[74] Kennedy et al., *supra.* note 1.
[75] *Ibid.*
[76] *Municipal Government Act* at s.81A.
[77] *Halifax Charter* at 79 and *Municipal Government Act* at 65.
[78] *Halifax Charter* at 83 and *Municipal Government Act* at 66.

Government Act sets borrowing limits on municipalities: borrowing cannot exceed 50% of the combined total of taxes levied but the municipality for the previous fiscal year and the amounts received (or to be received) from the federal or provincial government or governmental agency. As well, the Minister may establish borrowing limits for a municipality.[79] While Nova Scotia municipalities are subject to debt limits and other restrictions on financing, there does not appear to be a restriction on the provision of loans similar to that in Alberta.[80]

While noting there are numerous PACE programs in Nova Scotia, legislative limitations have been noted by the province's Standing Committee on Natural Resources and Economic Development.[81] The limitations noted are that:

- Municipalities are not able to borrow from private or non-profit sources which limits access to investment dollars;
- municipalities' ability to borrow is limited by calculation of debt service coverage such that PACE loans should be excluded from municipal debt service coverage ratios; and
- there is a need for specific provincial tools to de-risk municipal lending through PACE such as a revolving PACE loan fund where dollars are loaned by the province to municipalities and then returned to province, or a loan guarantee program.

It should be noted that in Alberta, the second concern was addressed with amendments to the MGA in 2018 which exclude money borrowed to pay for the costs associated with clean energy improvements from being included in the calculation of the debt limit.[82]

Ontario

Several municipalities in Ontario have adopted PACE programs. In Ontario, the *City of Toronto Act, 2006* governs the City of Toronto whereas other municipalities are governed by the *Municipal Act, 2001*.[83] All municipalities in Ontario are granted natural person powers and broad authority to "provide any service or thing that the city considers necessary or desirable".[84] All Ontario municipalities are subject to debt limits and other restrictions on financing; however, there does not appear to be a restriction on the provision of loans similar to that in Alberta.[85]

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[79] *Halifax Charter* at 109 and *Municipal Government Act* at 86.
[80] *Halifax Charter* at Part IV and *Municipal Government Act* at Part IV.
[81] Hansard, Nova Scotia House of Assembly, Standing Committee on Natural Resources and Economic Development (January 28, 2020).
[82] MGA at 252(2).
[83] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Schedule A [*City of Toronto Act*], and *Municipal Act, 2001*, S.O. 2001, c. 25 [*Municipal Act, 2001*]. For history of amendments to these pieces of legislation to enable PACE programs see Sonja Persram, *Property-Assessed Payments for Energy Retrofits: Recommendations for Regulatory Changes and Optimal Program Features* (2011, David Suzuki Foundation and Sustainable Alternatives Consulting Inc.); and Bill Johnston, Peter Love, David McRobert and Sonja Persram, *Request for a Review of Local Improvement Charges and Related Regulations and Legislation* (January 11, 2012).
[84] *City of Toronto Act* at 7 and 8; and *Municipal Act, 2007* at 9, 10 and 11.
[85] *City of Toronto Act* at Sch. A, Part VIII; and *Municipal Act, 2001* at Part VII.

The legislation enabling PACE programs is established in separate regulations - both entitled *Local Improvement Charges – Priority Lien Status* - under each municipal act.[86] These regulations allow municipalities to undertake works as local improvements and to impose local improvement charges to recover the associated costs. A "work" may include construction of energy efficiency works or renewable energy works.[87] Furthermore, a municipality may "undertake work as a local work for the benefit of a single lot".[88] The cost of the work may be recovered via a special charge added to the property tax bill.[89]

Prince Edward Island

Prince Edward Island has a residential home heating loan program to support upgraded air source heat pumps or energy star certified heating equipment in homes. Provisions supporting PACE programs within the province are found in the *Municipal Government Act*:[90]

> **206. "Service" defined**
> (1) In this Division, "service" includes a program or initiative of a council.
>
> **Ancillary product may be provided**
> (2) Where a council is authorized to provide a service in the municipality, the council may, if it determines that it is in the best interests of the municipality to do so, make available to the residents of the municipality a product which is ancillary to or compatible with the service provided.
>
> **Revenue generation**
> (3) Council may authorize the municipality to charge a fee for a product that it has directed or authorized the municipality to provide under subsection (2).
>
> **207. Funds may be advanced**
> (1) A council that provides a service or product that is ancillary to or compatible with a service provided to property owners in the municipality may by bylaw
> (a) offer a program to advance funds to property owners in relation to the product or service; and
> (b) impose charges, and fix or provide a means for determining the charges, for the product or service provided.
>
> **Contents of bylaw**
> (2) A bylaw passed pursuant to subsection (1) may provide

[86] O. Reg 596/06 pursuant to the *City of Toronto Act* and O. Reg 586/06 pursuant to the *Municipal Act, 2001.*
[87] O. Reg 596/06 at s. 1; and O. Reg. 586/06 at s. 1.
[88] O. Reg 596/06 at s. 2; and O. Reg. 586/06 at s. 2.
[89] O. Reg 596/06 at s. 5; and O. Reg 586/06 at s. 5.
[90] *Municipal Government Act*, RSPEI 1988, c. M-12.1 [PEI *Municipal Government Act*] at 206 and 207.

(a) that only an improved property owned by a taxpayer is eligible;
(b) that the charges fixed by, or determined pursuant to, the bylaw may be chargeable according to a plan or method set out in the bylaw;
(c) that the charges may be different for different classes of development and in different areas of the municipality;
(d) when the charges are due and payable;
(e) that the amount borrowed by a taxpayer in respect of each property shall not exceed 25 per cent of the assessed value of the property as determined in accordance with the Real Property Assessment Act, less any local improvement charge or fee payable by the taxpayer in respect of the property;
(f) that the charges are liens on the real property in accordance with subsection 162(4) and may be collected in the same manner as other municipal charges and levies;
(g) a means of determining when the lien becomes effective or when the charges become due and payable;
(h) that the amount payable may, pursuant to a written agreement between the owner of the real property and the municipality, be paid in the number of instalments specified in the bylaw and that, on default in payment of any instalment, the balance immediately becomes due and payable; and
(i) that interest is payable on the entire amount outstanding, whether or not the [91]owner has elected to pay by instalments pursuant to the agreement referred to in clause (h), at the rate and beginning on the date specified in the bylaw.

The municipalities of Charlottetown and Stratford have passed bylaws to enable PACE programs that support installation of heat pumps, solar systems and insulation (known as the Switch Program). The bylaws set out the types of installations that qualify for the program (to a maximum of 15% of the property's tax assessed value), and conditions for approval (including that the installation must strive to achieve an overall savings-to-debt ratio of 1:1 or greater). The bylaws also establish that payment of the PACE charges will be collected in the same manner as other municipal charges and levies, and unpaid amounts will be a lien on the relevant property.

More generally, as in Alberta, the PEI *Municipal Government Act* places limits on the financial activities of municipalities.[92] Municipalities may lend money or guarantee repayment of a loan subject to certain conditions: the loan will be used for a purpose that will benefit the municipality, the loan is made to a non-profit organization or controlled corporation, the loan is specifically authorized by bylaw, and the amount of the loan, together with the unpaid principal of any other loan, is within the borrowing limits set in the Act. [93] The Act provides that borrowing is allowed for capital expenditures but, except with Cabinet approval, the amount borrowed cannot increase the total capital debt of the municipality to an amount in excess of 10% of the current value of real property in the municipality.[94] Short-term

[91] Town of Stratford, *Switch Program Bylaw, Bylaw Number 52* and City of Charlottetown, *Switch Program Bylaw, Bylaw #2021-Switch-01.*
[92] PEI *Municipal Government Act* at Part 6.
[93] *Ibid.* at 158.
[94] *Ibid.* at 164.

borrowing may be used to finance operating expenditures but it cannot exceed 50% of total estimated revenues of the municipality.[95]

Saskatchewan

In Saskatchewan, municipalities are governed by *The Cities Act*.[96] Part IX of the Act addresses financial administration by municipalities. Similar to provisions in Alberta's MGA, in Saskatchewan a city may only lend money or guarantee repayment of a loan to a non-profit organization if the money will be used for a purpose that will benefit the city, or to one of its controlled corporations or business improvement districts.[97] As well, *The Cities Act* sets debt limits which impact upon the amount of borrowing and lending that can be done by a municipality.[98]

Specific provisions for financing environmental improvements are found in section 281.3:

> (1) A council may, by bylaw, establish a program designed to encourage energy efficient, renewable energy and other environmental improvements for properties in the city.
> (2) A program mentioned in subsection (1) may provide for the city and property owner to agree that the cost of improvements will be added to the owner's property taxes.
> (3) The amount due with respect to subsection (2) is a lien on the land on which the improvement was made.
> (4) The agreement mentioned in subsection (2):
> (a) is not to be considered a loan or guarantee; and
> (b) may provide for any of the matters set out in sections 249 to 252.
> (5) The Lieutenant Governor in Council may make regulations respecting a program bylaw or any other matter necessary to facilitate or meet the purposes of this section.

Pursuant to the *Cities Act*, the City of Saskatoon has passed the *Home Energy Loan Program Bylaw*.[99] The purpose of the bylaw is to establish the Home Energy Loan Program to encourage energy efficiency renovations, renewable energy installations, water conservation improvements, EV charging stations, battery storage technology and other environmental improvements for properties in the City. The bylaw sets out application requirements, eligibility criteria, and eligible projects. Some highlights include:

- The requirement for a preliminary energy efficiency home evaluation.
- The maximum amount that can be added to tax roll is $40,000.00. Although if it can be demonstrated that there is at least a 50% decrease in energy consumption, then additional amounts up to $60,000 may be added to the tax roll.

[95] *Ibid.* at 166.
[96] *The Cities Act*, S.S. 2002, ch. C-11.1 [*Cities Act*].
[97] *The Cities Act* at 151. See also sections 152 and 153 which require bylaws for loans or loan guarantees.
[98] *The Cities Act* at 133.
[99] City of Saskatoon, *Bylaw No. 9762, The Home Energy Loan Program Bylaw, 2021*.

- The loan amount (referred to as "deferred taxes") may be paid over a 5, 10 or 20 year period but certain events trigger repayment of the total outstanding amount (for example, falling into tax arrears, failure to pay the deferred taxes, and conviction of an offence under the bylaw).
- If the property is sold, the new owner may pay the outstanding loan amount in full or enter into a deferral agreement with the City.

There do not appear to be PACE programs operated by other Saskatchewan municipalities at this time.

PACE Programs in the United States

There are significantly more, and larger scale, PACE programs in operation in the United States as compared to Canada. Residential PACE programs operate in California, Missouri and Florida, and more than 37 states have commercial PACE (C-PACE) enabling legislation in place.[100]

Connecticut

The State of Connecticut has developed a C-PACE program, adopted by multiple local governments, using a single, statewide platform.[101] The C-PACE program operates through the Connecticut Green Bank which "supports the Governor's and Legislature's energy strategy to achieve cleaner, less expensive, and more reliable sources of energy while creating jobs and supporting local economic development".[102] One of several Green Bank programs is the C-PACE Program which pairs businesses and nonprofits with contractors and financiers to make green upgrades and additions.

The Green Bank is established by *Connecticut General Statutes, Title 16, Ch. 283*, §16-245n as a "body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut… [but] shall not be construed to be a department, institution or agency of the state".[103] The mandate of the Bank is to develop separate programs to finance and support clean energy investment in residential, municipal, business and larger commercial projects; to support financing or other expenditures that promote investment in clean energy sources in accordance with a comprehensive plan (developed by the Bank) to foster the growth, development and commercializations of clean energy sources; and to stimulate demand for clean energy and to deploy of clean energy sources.[104]

[100] U.S. Department of Energy website, online: https://www.energy.gov/scep/slsc/property-assessed-clean-energy-programs.
[101] Erin L. Deady, "Property assessed clean energy: is there finally a clear path to success?" (2016) 90:6 Envi & Land Use Law 114.
[102] Connecticut Quasi-Public Organizations website, online: https://openquasi.ct.gov/checkbook/Connecticut%20Green%20Bank.
[103] *C.G.S.A. Title 16, Ch. 283,* § 16-245n(d)(1)(A).
[104] *C.G.S.A. Title 16, Ch. 283,* § 16-245n(d)(1)(B).

This Chapter and Title of the *Connecticut General Statutes* expressly allows the Green Bank to enter into contracts with private sources to raise capital.[105] It also establishes the Clean Energy Fund which is within the Green Bank and is to be used to promote investment in clean energy including providing low-cost financing for clean energy projects and technologies.[106]

PACE enabling legislation is found in *Connecticut General Statutes, Title 16a, Ch. 298, §16a-40g: Commercial Sustainable Energy Program* (C-PACE legislation). The C-PACE legislation defines key terms such as energy improvements, qualifying commercial real property, and third-party capital provider (which is an entity, other than the Connecticut Green Bank, that provides financing directly to property owners for energy improvements).[107] The C-PACE program is limited to commercial or industrial property which means any real property other than a residential dwelling containing less that five dwelling units.[108]

The C-PACE legislation sets out the basic process for PACE loans which is administered by the Connecticut Green Bank regardless of whether it or a third party provides the financing:

- An energy audit or renewable energy system feasibility analysis is required to assess the expected energy or resilience cost savings of the improvements.
- If financing approved, then the municipality is required to level a benefit assessment on the property.
- The Connecticut Green Bank may impose requirements and criteria to ensure proposed improvements are consistent with the purpose of the commercial sustainable energy program. It may also impose requirements and conditions on the financing to ensure timely repayment including the procedures for placing a benefit assessment lien on a property as security for repayment of the benefit assessment.
- Once a financing agreement is entered into, the Connecticut Green Bank notifies the municipality and the municipality places a caveat on the land records indicating that a benefit assessment and benefit assessment lien are anticipated upon completed of the energy improvements or levies the benefit assessment and files a benefit assessment lien on the land records based on estimated costs of the energy improvements prior to or upon completion of the improvements.
- Benefit assessment liens are to be collected in instalments in the same manner as property tax liens. To the extent that any instalment is not paid when due, the lien may be foreclosed in accordance with chapter 204 (which governs foreclosure for unpaid property tax liens).
- The municipality may assign to the Connecticut Green Bank any benefit assessment liens it has filed as provided in the agreement between the Connecticut Green Bank and the municipality. The Bank, in turn, can sell or assign any and all benefit assessment liens received from the municipality, and the assignee of such benefit assessment liens have the same powers and rights

[105] *C.G.S.A. Title 16, Ch. 283,* § 16-245n(d)(1)(E)(2)(C)(vi).
[106] *C.G.S.A. Title 16, Ch. 283*, § 16-245n(c).
[107] *C.G.S.A. Title 16, Ch. 283,* § 16a-40g(a).
[108] *C.G.S.A Title 16, Ch. 283,* § 16a-40g(a).

as the bank and municipality and its tax collector in terms of precedence and priority of the lien, in terms of enforcement (including foreclosure and suit on the debt).

Additional detail about Connecticut's C-PACE program can be found in the *C-PACE Program Guidelines*.[109] The Guidelines include several appendices. Many of the appendices provide standard form or model documents such as model municipal ordinance for local adoption of PACE programming. Others set out technical standards for certain improvements.

The Guidelines clarify that multi-family properties of 5 or more units qualify for C-PACE financing, as may some mixed-use, not-for-profit or agricultural properties. Otherwise, C-PACE financing is limited to non-residential buildings. As well, the Guidelines provide that to be approved for financing, an improvement must have a savings to investment ratio greater than 1 (i.e. projected lifetime savings must exceed the total investment, inclusive of financing costs). Because the C-PACE liens are granted priority to other encumbrances (other than municipal property tax liens), the Connecticut Green Bank requires that a mortgage lender's written consent be obtained.

The Guidelines indicate that the Connecticut Green Bank bills, collects and remits funds as a program administrator. Although the Connecticut Green Bank maintains dedicated capital to finance C-PACE projects, third-party capital providers are encouraged to be the primary financiers of qualifying projects. Third-party capital providers must be approved to directly offer financing to building owners, the process for which is set out in the Guidelines:

- Either the approved capital provider (ACP) or the property owner submits a completed C-PACE application, along with necessary documentation to demonstrate compliance with the Program Guidelines and with the Third-Party Capital Provider Terms and Conditions.
- The Connecticut Green Bank reviews the documents for compliance and, in its sole discretion, provides approval of the project.
- The ACP enters into financing agreement with the benefited property owner and into an administration agreement with the Connecticut Green Bank. The filing and assignment of the lien to the ACP is facilitated by the Connecticut Green Bank.
- The Connecticut Green Bank works with the ACP to collect any payments received pursuant to the lien and remits those payments to the ACP.

Throughout the C-PACE process, the ACP maintains its own financial underwriting and financing terms and conditions for the transaction.

Florida

[109] Connecticut Green Bank, *C-PACE Program Guidelines* (Hartford, CT: 2022, Connecticut Green Bank).

There is no state PACE program or administrator in place in Florida.[110] However, almost all the PACE programs within Florida operate under interlocal agreements involving multiple local governments.[111] Third-party administrators operate the various PACE programs.[112]

This approach is enabled by FS 163.01 - *Florida Interlocal Cooperation Act of 1969* - which allows for interlocal cooperation. Common debts are allowed by FS 163.01(7)(b):

> A separate legal or administrative entity created by an interlocal agreement shall possess the common power specified in the agreement and may exercise it in the manner or according to the method provided in the agreement. The entity may, in addition to its other powers, be authorized in its own name to make and enter into contracts; to employ agencies or employees; to acquire, construct, manage, maintain, or operate buildings, works, or improvements; to acquire, hold, or dispose of property; and to incur debts, liabilities, or obligations which do not constitute the debts, liabilities, or obligations of any of the parties to the agreement.

Other provisions in the *Florida Interlocal Cooperation Act of 1969* specifically enable PACE programming in Florida:

> **163.08 Supplemental authority for improvements to real property.—**
> (1)(a) In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. That act also declared it the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases. In addition to establishing policies to promote the use of renewable energy, the Legislature provided for a schedule of increases in energy performance of buildings subject to the Florida Energy Efficiency Code for Building Construction. In chapter 2008-191, Laws of Florida, the Legislature adopted new energy conservation and greenhouse gas reduction comprehensive planning requirements for local governments. In the 2008 general election, the voters of this state approved a constitutional amendment authorizing the Legislature, by general law, to prohibit consideration of any change or improvement made for the purpose of improving a property's resistance to wind damage or the installation of a renewable energy source device in the determination of the assessed value of residential real property.
> (b) The Legislature finds that all energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel energy production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption. All improved properties not protected from wind damage by wind

[110] Erin L. Deady, Property assessed clean energy: is there finally a clear path to success?" (2016) 90:6 *Florida Bar J.* 114.
[111] *Ibid.*
[112] *Ibid.*

resistance qualifying improvements contribute to the burden affecting all improved property resulting from potential wind damage. Improved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage. Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance.

(c) The Legislature determines that the actions authorized under this section, including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants.

(2) As used in this section, the term:

(a) "Local government" means a county, a municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7).

(b) "Qualifying improvement" includes any:

1. Energy conservation and efficiency improvement, which is a measure to reduce consumption through conservation or a more efficient use of electricity, natural gas, propane, or other forms of energy on the property, including, but not limited to, air sealing; installation of insulation; installation of energy-efficient heating, cooling, or ventilation systems; building modifications to increase the use of daylight; replacement of windows; installation of energy controls or energy recovery systems; installation of electric vehicle charging equipment; and installation of efficient lighting equipment.

2. Renewable energy improvement, which is the installation of any system in which the electrical, mechanical, or thermal energy is produced from a method that uses one or more of the following fuels or energy sources: hydrogen, solar energy, geothermal energy, bioenergy, and wind energy.

3. Wind resistance improvement, which includes, but is not limited to:

   a. Improving the strength of the roof deck attachment;
   b. Creating a secondary water barrier to prevent water intrusion;
   c. Installing wind-resistant shingles;
   d. Installing gable-end bracing;
   e. Reinforcing roof-to-wall connections;
   f. Installing storm shutters; or
   g. Installing opening protections.

(3) A local government may levy non-ad valorem assessments to fund qualifying improvements.

(4) Subject to local government ordinance or resolution, a property owner may apply to the local government for funding to finance a qualifying improvement and enter into a financing

agreement with the local government. Costs incurred by the local government for such purpose may be collected as a non-ad valorem assessment. A non-ad valorem assessment shall be collected pursuant to s. 197.3632 and, notwithstanding s. 197.3632(8)(a), shall not be subject to discount for early payment. However, the notice and adoption requirements of s. 197.3632(4) do not apply if this section is used and complied with, and the intent resolution, publication of notice, and mailed notices to the property appraiser, tax collector, and Department of Revenue required by s. 197.3632(3)(a) may be provided on or before August 15 in conjunction with any non-ad valorem assessment authorized by this section, if the property appraiser, tax collector, and local government agree.

(5) Pursuant to this section or as otherwise provided by law or pursuant to a local government's home rule power, a local government may enter into a partnership with one or more local governments for the purpose of providing and financing qualifying improvements.

(6) A qualifying improvement program may be administered by a for-profit entity or a not-for-profit organization on behalf of and at the discretion of the local government.

(7) A local government may incur debt for the purpose of providing such improvements, payable from revenues received from the improved property, or any other available revenue source authorized by law.

(8) A local government may enter into a financing agreement only with the record owner of the affected property. Any financing agreement entered into pursuant to this section or a summary memorandum of such agreement shall be recorded in the public records of the county within which the property is located by the sponsoring unit of local government within 5 days after execution of the agreement. The recorded agreement shall provide constructive notice that the assessment to be levied on the property constitutes a lien of equal dignity to county taxes and assessments from the date of recordation.

(9) Before entering into a financing agreement, the local government shall reasonably determine that all property taxes and any other assessments levied on the same bill as property taxes are paid and have not been delinquent for the preceding 3 years or the property owner's period of ownership, whichever is less; that there are no involuntary liens, including, but not limited to, construction liens on the property; that no notices of default or other evidence of property-based debt delinquency have been recorded during the preceding 3 years or the property owner's period of ownership, whichever is less; and that the property owner is current on all mortgage debt on the property.

(10) A qualifying improvement shall be affixed to a building or facility that is part of the property and shall constitute an improvement to the building or facility or a fixture attached to the building or facility. An agreement between a local government and a qualifying property owner may not cover wind-resistance improvements in buildings or facilities under new construction or construction for which a certificate of occupancy or similar evidence of substantial completion of new construction or improvement has not been issued.

(11) Any work requiring a license under any applicable law to make a qualifying improvement shall be performed by a contractor properly certified or registered pursuant to part I or part II of chapter 489.

(12)(a) Without the consent of the holders or loan servicers of any mortgage encumbering or otherwise secured by the property, the total amount of any non-ad valorem assessment for a property under this section may not exceed 20 percent of the just value of the property as determined by the county property appraiser.

(b) Notwithstanding paragraph (a), a non-ad valorem assessment for a qualifying improvement defined in subparagraph (2)(b)1. or subparagraph (2)(b)2. that is supported by an energy audit is not subject to the limits in this subsection if the audit demonstrates that the annual energy savings from the qualified improvement equals or exceeds the annual repayment amount of the non-ad valorem assessment.

(13) At least 30 days before entering into a financing agreement, the property owner shall provide to the holders or loan servicers of any existing mortgages encumbering or otherwise secured by the property a notice of the owner's intent to enter into a financing agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. A verified copy or other proof of such notice shall be provided to the local government. A provision in any agreement between a mortgagee or other lienholder and a property owner, or otherwise now or hereafter binding upon a property owner, which allows for acceleration of payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in this section is not enforceable. This subsection does not limit the authority of the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment.

(14) At or before the time a purchaser executes a contract for the sale and purchase of any property for which a non-ad valorem assessment has been levied under this section and has an unpaid balance due, the seller shall give the prospective purchaser a written disclosure statement in the following form, which shall be set forth in the contract or in a separate writing:

> QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE.—The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

(15) A provision in any agreement between a local government and a public or private power or energy provider or other utility provider is not enforceable to limit or prohibit any local government from exercising its authority under this section.

(16) This section is additional and supplemental to county and municipal home rule authority and not in derogation of such authority or a limitation upon such authority.

An example of a body created by interlocal agreement for the purposes of a PACE program is the Florida PACE Funding Agency (FPFA) which was created and established as a a separate legal entity, public body and unit of government pursuant to the *Florida Interlocal Cooperation Act of 1969.*[113] The FPFA is funded by selling bonds into the private market – repayment is made through assessment on property taxes. The FPFA provides a local tax collector with necessary information to place the assessment on the property tax bill, this secured collection method is then used to repay bonds that were sold to private investors. FPFA is partnered with Alliance NRG and Counterpoint SRE as its capital providers.[114] Three other bodies are created by interlocal agreements in Florida: Florida Resiliency and Energy District,[115] Florida Green Finance Authority,[116] and the Green Corridor PACE District. Each of these bodies partners with capital providers – also known as program administrators.[117]

Washington State

Washington state has a voluntary statewide Commercial Property Assessed Clean Energy and Resiliency (C-PACER) program which is enabled by Chapter 36.165 of the Revised Code of Washington.[118] This legislation sets out program criteria, requirements and administration. It also addresses key aspects of the program including the use of liens, the role of capital providers and other financing matters.

The legislation is clear that while C-PACER loan obligations appear on regular property tax billings, the actual loan payments and debt collection are handled by the C-PACER lender not the county government:

[113] See the FPFA Charter agreement here: https://floridapace.gov/Amended_Restated_Interlocal_Agreement_02_20_2017.pdf. An example of an additional local government entering into agreement with FPFA is available here: https://www.miamidade.gov/economy/library/pace-ila-funding-agreements.pdf. There are also court decisions validating the Agency and authorizing its contemplated services: https://floridapace.gov/wp-content/uploads/2020/05/Judicial-Validation2.pdf and https://floridapace.gov/wp-content/uploads/2022/12/CERTIFIED-COPY-OF-FINAL-JUDGMENT-FROM-LEON-COUNTY-compressed.pdf.

[114] Alliance NRG online: https://www.alliancenrg.com/retail/ and Counterpoint SRE online: https://counterpointees.com.

[115] https://www.fdfcbonds.com/florida-resiliency-and-energy-distr.

[116] https://flgfa.org.

[117] Florida Resiliency and Energy District is partnered with Florida Development Finance Corp.; Florida Green Finance Authority is partnered with RenewPACE; Green Corridor PACE District was partnered with Ygrene Energy Fund which abruptly left the market in 2022 and is under investigation (https://www.miamiherald.com/news/local/environment/climate-change/article271377742.html).

[118] R.C.W. Ch. 36.165, Commercial Property Assessed Clean Energy and Resiliency (C-PACER) Program, online: https://app.leg.wa.gov/rcw/default.aspx?cite=36.165&full=true.

- The legislation states that public funds may not be used to fund or repay any loan between a capital provider and a property owner.[119]
- The legislation states that the county may not enforce any privately financed debt under this chapter of the legislation.[120]
- The purposes section of the legislation expressly states that "[a]fter the adoption of a C-PACER program, a county's role is limited to the approval of an assessment and recordation of a C-PACER lien, and administration of the C-PACER program which may be contracted out to a private third party."[121]

In other words, the C-PACER financing occurs as a transaction between the lender and the property owner with the county government's role being limited to recording the agreement on its property tax rolls.

Aside from the role of the county in C-PACER programs, the legislation also defines the roles of capital providers and program administrators. The legislation defines a capital provider as "any private entity, their designee, successor, and assigns that makes or funds C-PACER financing under this chapter".[122] A C-PACER program administrator may be "designated by a county or the department of commerce to administer a C-PACER program. This may be the department of commerce, the county itself, or a third party, provided that the administration procedures used conform to the requirements of [the legislation]."[123]

The C-PACER loan is secured by a lien which runs with the land and has priority over all other liens and encumbrances except over taxes imposed by the state or municipalities.[124] Before a capital provider enters into a financing agreement, it must obtain the written consent of any lien-holder, mortgage or security interest in the real property.[125] The county attaches the lien, then assigns the assessment and the lien to capital provider at the close of the approved C-PACER financing. Billing, collection and enforcement of delinquent C-PACER liens or assessment instalments are the responsibility of the capital providers.

A few counties in Washington State have adopted C-PACER programs. For example, the Whatcom County Code, Chapter 16.50 adopts a C-PACER program in that county.[126] The County Code confirms that the program administrator reviews and approves a C-PACER application. Once approved, the property owner or the capital provider submits completed forms to the planning and development services department, and documents are executed by the county executive. The county auditor then records the assessment agreement, notice of assessment interest and C-PACER lien, and the assignment

[119] R.C.W. §36.165.110.
[120] R.C.W. §36.165.110.
[121] R.C.W. §36.165.005.
[122] R.C.W. §36.165.010.
[123] R.C.W. §36.165.010.
[124] R.C.W. §36.165.060.
[125] R.C.W. §36.165.070.
[126] Whatcom County Code, Ch. 16.50, online: https://www.codepublishing.com/WA/WhatcomCounty/#!/WhatcomCounty16/WhatcomCounty1650.html#16.50.

of notice of assessment and assessment agreement. The amount is repaid by a voluntary assessment on property taxes but billing, collection and enforcement is the capital provider's responsibility.

Appendix II: MGA, Part 10, Division 6.1

Division 6.1
Clean Energy Improvement Tax

Interpretation

390.1(1) In this Division, "clean energy improvement" means, subject to the regulations, a renovation, adaptation or installation on eligible private property that

(a) will increase energy efficiency or the use of renewable energy on that property, and

(b) will be paid for in whole or in part by a tax imposed under this Division, but does not include improvements referred to in section 284(1)(j)(iii), (iii.1) or (iv).

(2) For the purposes of this Division, the amount required to recover the costs of a clean energy improvement may include

(a) the capital cost of undertaking the clean energy improvement,

(b) the cost of professional services needed for the clean energy improvement,

(c) a proportionate share of the costs associated with the administration of a clean energy improvement program,

(d) the cost of financing the clean energy improvement, and

(e) other expenses incidental to the undertaking of the clean energy improvement and to the raising of revenue to pay for it.

Eligibility of properties for clean energy improvements

390.2 Subject to section 390.3(4)(a), property is eligible for a clean energy improvement if the property is

(a) located in a municipality that has passed a clean energy improvement tax bylaw,

(b) one of the following types of private property:

(i) residential;

(ii) non-residential;

(iii) farm land,

and

(c) not designated industrial property.

Clean energy improvement tax bylaw

390.3(1) Each council may pass a clean energy improvement tax bylaw

(a) to establish a clean energy improvement program,

(b) notwithstanding section 251, to authorize the municipality to make a borrowing for the purpose of financing clean energy improvements, and

(c) to enable clean energy improvements to be made to eligible properties.

(2) Before a clean energy improvement is made to any property, a council must pass a clean energy improvement tax bylaw.

(3) A clean energy improvement tax bylaw authorizes the council to impose a clean energy improvement tax in respect of each clean energy improvement made to a property to raise revenue to pay the amount required to recover the costs of those clean energy improvements.

(4) A clean energy improvement tax bylaw must, subject to the regulations,

(a) set out

(i) the types of private property that are eligible for a clean energy improvement, and

(ii) eligible clean energy improvements,

(b) set out

(i) the amount of money to be borrowed for the purpose of financing clean energy improvements,

(ii) the maximum rate of interest, the term and the terms of repayment of the borrowing, and

(iii) the source or sources of money to be used to pay the principal and interest owing under the borrowing,

(c) indicate that, where a municipality has entered into a clean energy improvement agreement with the owner of a property, a clean energy improvement tax will be charged based on the clean energy improvement agreement,

(d) identify the period over which the cost of each eligible clean energy improvement will be spread, which period may vary from improvement to improvement, but the period shall not exceed the probable lifetime of the improvement,

(e) indicate the process by which the owner of a property can apply to the municipality for a clean energy improvement,

(f) include any other information the council considers necessary or advisable, and

(g) include any requirements imposed by the regulations.

(5) Before giving second reading to a proposed clean energy improvement tax bylaw, the council must hold a public hearing with respect to the proposed bylaw in accordance with section 216.4 after giving notice of it in accordance with section 606.

Clean energy improvement agreement

390.4(1) A municipality and the owner of a property shall enter into a clean energy improvement agreement before a clean energy improvement is made to that property.

(2) A clean energy improvement agreement must, subject to the regulations,

(a) describe the proposed clean energy improvement,

(b) identify the property in respect of which the clean energy improvement tax will be imposed,

(c) indicate that the owner of the property will be liable to pay the clean energy improvement tax,

(d) include the amount required to recover the costs of the clean energy improvement and the method of calculation used to determine that amount,

(e) state the period over which the amount required to recover the costs of the clean energy improvement will be paid,

(f) state the portion of the amount required to recover the costs of the clean energy improvement to be paid

(i) by the municipality,

(ii) from revenue raised by the clean energy improvement tax, and

(iii) from other sources of revenue,

(g) describe how the clean energy improvement tax will be revised in the event of a subdivision of the property or a consolidation of the property with any other property, and

(h) include any other information the municipality considers necessary or advisable.

Person liable to pay clean energy improvement tax

390.5(1) The person liable to pay a tax imposed in accordance with a clean energy improvement tax bylaw is the owner of the property in respect of which the tax is imposed.

(2) A complaint about a tax imposed in accordance with a clean energy improvement tax bylaw must be made within one year after the tax is first imposed.

Paying off a clean energy improvement tax

390.6 The owner of a property in respect of which a clean energy improvement tax is imposed may pay the tax at any time.

Refinancing of debt by council

390.7 If, after a clean energy improvement agreement has been made, the council refinances the debt created to pay for the clean energy improvement that is the subject of that agreement at an interest rate other than the rate estimated when the clean energy improvement agreement was made, the council, with respect to future years, may revise the amount required to recover the costs of the clean energy improvement included in that agreement to reflect the change in the interest rate.

Petitions

390.8(1) Notwithstanding section 232(2), electors of a municipality may petition the municipality to

(a) pass a clean energy improvement tax bylaw, or

(b) amend or repeal a clean energy improvement tax bylaw.

(2) For greater certainty, the amendment or repeal of a clean energy improvement tax bylaw does not affect clean energy improvement agreements entered into prior to the passage of that bylaw or the imposition of a clean energy improvement tax in relation to a property where a clean energy improvement has been made.

390.9 The Minister may make regulations respecting clean energy improvements, including, without limitation, regulations

(a) respecting eligibility requirements for clean energy improvements;

(b) respecting clean energy improvement agreements;

(c) respecting clean energy improvement tax bylaws;

(d) respecting which types of renovations, adaptation or installations for which clean energy improvement agreements may be made and types of renovations, adaptations or installations for which clean energy improvement agreements may not be made;
(e) respecting the disclosure of clean energy improvement agreements to prospective purchasers of property;
(f) respecting limits on the number of improvements to a single property or a type of eligible property for which a tax may be imposed under this Division;
(g) respecting limits on the capital costs of undertaking clean energy improvements on a single property or a type of eligible property under this Divisions;
(h) respecting clean energy improvement programs, including the administration of clean energy improvement programs.

Appendix III: CEIP Regulation

ALBERTA REGULATION 212/2018

Municipal Government Act

CLEAN ENERGY IMPROVEMENTS REGULATION

Table of Contents

Definitions

1 In this Regulation,

(a) "administration fee" means the proportionate share of the costs associated with the administration of the clean energy improvement program included in the cost of a clean energy improvement;

(b) repealed AR 153/2020 s2;

(c) "incidental cost" means an amount expended on preparation or upgrading of a property that is incidental to the clean energy improvement;

(d) "Minister" means the Minister responsible for the *Emissions Management and Climate Resilience Act*;

(e) "program administrator" means the program administrator referred to in section 2;

(f) "qualified contractor" means a person included on the list referred to in section 4(1).

AR 212/2018 s1;153/2020

Program administrator

2(1) Repealed AR 153/2020 s3.

(2) The Minister may, by order, designate an entity or entities as program administrator for the purposes of this Regulation.

(3) The order referred to in subsection (2) may specify sections of this Regulation to which the designation applies.

AR 212/2018 s2;153/2020

Eligible improvements

3(1) The program administrator must establish and update a list of types of renovations, adaptations or installations for which clean energy improvement agreements may be made and publish the list on the program administrator's website.

(2) The list referred to in subsection (1)

(a) must include information with respect to

(i) the anticipated lifespan of the renovation, adaptation or installation, and

(ii) the energy savings estimated to be the result of the renovation, adaptation or installation,

and

(b) may include information that is not referred to in clause (a).

Qualified contractors

4(1) The program administrator must establish and update a list of persons who may provide services relating to clean energy improvements and publish the list on the program administrator's website.

(2) The program administrator must establish and publish on the program administrator's website

(a) a code of conduct for qualified contractors,

(b) marketing guidelines for qualified contractors, and

(c) a policy for when qualified contractors will be removed from the list referred to in subsection (1) for failure to comply with the code of conduct or marketing guidelines.

(3) The code of conduct referred to in subsection (2) must address, without limitation, the following:

(a) the safety and welfare of individuals on worksites;

(b) licensing and qualifications;

(c) adherence to policies, procedures and bylaws;

(d) appropriate and respectful interactions with property owners;

(e) confidential information;

(f) conflicts of interest;

(g) acting in good faith.

(4) The marketing guidelines referred to in subsection (2) must address, without limitation, the following:

(a) unfair, misleading and deceptive marketing practices;

(b) the provision of information about the clean energy improvement program as established in the Act, this Regulation, and the clean energy improvement bylaw enacted in the municipality in which an owner's property is located;

(c) the soliciting of consumers for the purpose of marketing services relating to clean energy improvements.

(5) No person shall provide services relating to the installation of a clean energy improvement unless that person is a qualified contractor.

(6) Qualified contractors

(a) must comply with the code of conduct and marketing guidelines established by the program administrator,

(b) must meet all federal, provincial and municipal licensing and certification requirements established for that person's trade or profession,

(c) must obtain any permits required by law when providing services relating to clean energy improvements, and

(d) shall not enter into an agreement for the provision of services relating to the installation of a clean energy improvement other than an agreement referred to in section 11.

(7) If a person who is a qualified contractor fails to comply with subsection (4), the program administrator may remove the person from the list referred to in subsection (1) in accordance with the policy referred to in subsection (2)(c).

Clean energy improvement tax bylaws

5(1) In addition to meeting the requirements referred to in section 390.3 of the Act, a clean energy improvement tax bylaw must

(a) indicate that a clean energy improvement tax may be imposed on a property that is subject to a clean energy improvement agreement at any time following the signing of the clean energy improvement agreement, and

(b) identify the program administrator, if any, designated by the Minister.

(2) A municipality must not set out an eligible improvement in a clean energy improvement tax bylaw under section 390.3(4) of the Act unless the eligible improvement is included in the list referred to in section 3(1).

(3) A clean energy improvement tax bylaw may specify amounts for the purposes of section 10(1)(b)(ii) that are lower than the amounts provided in that section.

Agreement with program administrator

6(1) A municipality that has passed a clean energy improvement tax bylaw must enter into an agreement with the program administrator relating to the administration of the municipality's clean energy improvement program.

(2) The agreement referred to in subsection (1) must determine how the administration fee will be divided between the program administrator and the municipality.

Applications for clean energy improvements

7(1) The owner of a property that is located in a municipality that has passed a clean energy improvement tax bylaw may apply to the program administrator for a clean energy improvement.

(2) An application for a clean energy improvement must include

(a) evidence satisfactory to the program administrator that the applicant is the owner of the property,

(b) evidence satisfactory to the program administrator that the property is insured,

(c) if the property is a unit described in a condominium plan under the *Condominium Property Act* and the clean energy improvement will affect common property or managed property as defined in that Act, the written approval of the condominium board, and

(d) if the property is located in a building that includes shared facilities and the clean energy improvement will affect any of those shared facilities, the written approval of the owner of the building.

(3) If requested to do so by the program administrator, an applicant must

(a) participate in a technical assessment or an energy audit, as defined by the program administrator, or

(b) allow the program administrator to, at a reasonable time and after giving reasonable notice, inspect the property for the purpose of assessing the application.

(4) The applicant must provide the program administrator with a sworn statement in the form required by the program administrator that the applicant is in good standing with respect to the payment of taxes imposed under the Act in the 5-year period before the applicant submitted the application.

(5) An application for a clean energy improvement must be signed by all owners of the property.

Application fees

8(1) The program administrator may charge an application fee in relation to applications for clean energy improvements.

(2) If the program administrator charges an application fee in relation to applications for clean energy improvements, the fee must not exceed the following:

(a) for applications relating to residential properties, $100;

(b) for applications relating to non-residential properties, $500;

(c) for applications relating to farm land, $200.

Approval of application

9(1) Before approving an application for a clean energy improvement, the program administrator must provide the applicant with the form of agreement for the clean energy improvement agreement and obtain the signed acknowledgement of the applicant that the applicant has received this information.

(2) The program administrator may approve an application for a clean energy improvement only if the proposed clean energy improvement is eligible under the clean energy improvement bylaw enacted in the municipality in which the property that is the subject of the application is located.

(3) If the program administrator is satisfied that the requirements of the Act relating to clean energy improvements, this Regulation and the clean energy improvement bylaw enacted in the municipality in which the property that is the subject of the application is located have been met, the program administrator may approve the application.

(4) If the application is approved, the program administrator must provide a copy of the approved application to the applicant and to the municipality in which the property that is the subject of the application is located.

Clean energy improvement agreements

10(1) A municipality may enter into a clean energy improvement agreement with the owner of a property only if

(a) the program administrator has approved the owner's application for a clean energy improvement in accordance with section 9,

(b) the value of the capital costs of undertaking all clean energy improvements to the property

(i) is not less than $3000, and

(ii) subject to section 5(3), does not exceed

(A) for residential property, $50 000,

(B) for non-residential property, $1 000 000 or a greater amount if that amount is approved by the Minister and by resolution of council, and

(C) for farm land, $300 000 or a greater amount if that amount is approved by the Minister and by resolution of council,

and

(c) subject to subsection (2), the amount of the tax authorized by a bylaw passed under section 353 of the Act most recently imposed on the property is greater than or equal to the annual payment calculated in accordance with the following formula:

$$\frac{A + B + C}{D}$$

where

A is the capital cost of undertaking the clean energy improvement;

B is the total cost of professional services needed for the clean energy improvement;

C is the total of all incidental costs;

D is the probable lifetime, calculated in years, of the improvement.

(2) The requirement in subsection (1)(c) does not apply to farm land or a property that is exempt from taxation under Part 10 of the Act.

(3) Nothing in this Regulation requires a municipality to enter into a clean energy improvement agreement with any owner of a property.

(4) In addition to meeting the requirements referred to in section 390.4 of the Act, a clean energy improvement agreement must include

(a) the estimated date of completion of the clean energy improvement,

(b) the estimated cost of the clean energy improvement,

(c) the administration fee,

(d) the manner in which a cost overrun or underrun is to be dealt with if the actual cost of the clean energy improvement differs from the estimated cost,

(e) that the costs of the clean energy improvement may be revised if the council refinances the debt created to pay for the clean energy improvement at an interest rate other than the rate estimated when the clean energy improvement agreement was made and the manner by which the costs would be revised,

(f) that the clean energy improvement tax may be imposed at any time following the signing of the clean energy improvement agreement,

(g) that the amount that may be expended on incidental costs must not exceed 15% of the total capital cost of undertaking the clean energy improvement, and

(h) that the agreement may be rescinded during the period of 10 days following the date when the agreement is signed.

(5) The proportionate share of the costs associated with the administration of the clean energy improvement program must not exceed 5% of the total capital cost of undertaking the clean energy improvement.

(6) In addition to meeting the requirements referred to in section 390.4 of the Act, a clean energy improvement agreement must require the owner of the property

(a) to allow the program administrator, at a reasonable time and after giving reasonable notice, access to the property that is the subject of the clean energy improvement agreement in order to monitor the progress of the clean energy improvement or to verify that the clean energy improvement has been completed,

(b) if the property is offered for sale, to disclose the existence and the contents of the agreement to

(i) prospective purchasers of the property, and

(ii) if the owner engages the services of a realtor, to the realtor,

(c) if the property is sold, to ensure that the clean energy improvement agreement is appended to the contract of sale, and

(d) if the property is transferred other than by sale, to ensure that the clean energy improvement agreement is provided to the person to whom the property is transferred.

(7) A clean energy improvement agreement must be signed by all owners of the property.

(8) The program administrator must review the terms and conditions of the clean energy improvement agreement with all owners of the property and obtain the signed acknowledgement of all owners that they understand the terms and conditions before the clean energy improvement agreement is signed.

Agreement with qualified contractors

11(1) If a municipality and a property owner have entered into a clean energy improvement agreement, the program administrator must enter into an agreement with the property owner and a qualified contractor for services relating to the clean energy improvement.

(2) The agreement referred to in subsection (1) must

(a) require that any product the qualified contractor installs or otherwise provides for the purpose of the clean energy improvement has a manufacturer's warranty

(i) with a warranty period that is consistent with the industry standard, provided that the warranty period is not less than one year beginning on the date of completion of services, and

(ii) that is transferrable to the property owner and any subsequent owner of the property,

(b) require that the qualified contractor provide a warranty for defects in materials and labour for a reasonable period of time, provided that the warranty period is not less than one year beginning on the date of completion of services, and

(c) establish a dispute resolution process.

Monitoring and reporting

12(1) The program administrator must monitor clean energy improvement programs established by municipalities for cost savings and emission reductions.

(2) The program administrator must, on an annual basis beginning in 2020, prepare and publish, in a form and manner that is accessible to the public, an annual report respecting clean energy improvement programs on or before September 1.

(3) The program administrator must provide a copy of the report referred to in subsection (2) to each municipality that has passed a clean energy improvement tax bylaw.

Coming into force

13 This Regulation comes into force on the coming into force of section 6 of *An Act to Enable Clean Energy Improvements*.