



**BY EMAIL and RESS**

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Our File: EB20180331

**Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re: EB-2018-0331 – Disposition of Cap and Trade Related Deferral and Variance Accounts – Legal Effect of Repeal of the Climate Change Act on Strictly Confidential Information**

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No. 3, these are SEC’s submission on the legal effect of the repeal of the *Climate Change Mitigation and Low-Carbon Economy Act, 2016* (“*Climate Change Act*”), as it relates to the treatment of strictly confidential auction and market sensitive information in this proceeding.

***Effect of Repeal***

Bill 4, the *Cap and Trade Cancellation Act, 2018* was given royal assent on October 31, 2018. The legislation repealed the previous *Climate Change Act*, which was the basis for the cap and trade program in full.<sup>1</sup> Even before passing Bill 4 in July 2018, the Ontario government revoked Ontario Regulation 144/16.<sup>2</sup>

As part of the *Climate Act Change*, subsections (6)(7) and (8) of section 32, prohibited what information persons who participate in cap and trade program allowance auctions could disclose to persons other than those prescribed by regulation.<sup>3</sup> Ontario Regulation 144/16 permitted disclosure to the Ontario Energy Board.<sup>4</sup>

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<sup>1</sup> *Cap and Trade Cancellation Act, 1998*, section 16. The section was proclaimed into force on November 14, 2018 (See Order in Council 1229/2018).

<sup>2</sup> O. Reg 144/16, *The Cap and Trade Program*, Revoked by section 2 of O.Reg 386/18

<sup>3</sup> *Climate Change Mitigation and Low-carbon Economy Act, 2016* [“*Climate Change Act*”], section 32:

**Prohibition re: disclosure**

(6) No person shall disclose whether or not the person is participating in an auction.

**Same**

(7) No person shall disclose whether or not the person is taking part in an auction or any other information relating to the person’s participation in an auction, including the person’s identity, bidding strategy, the amount of the person’s bids and the quantity of emission allowances concerned, and the financial information provided to the Director in connection with the auction.

**Same**

(8) If a prospective purchaser retains the services of another person in connection with an auction, the other person shall not disclose any of the information described in subsection (7) relating to the prospective purchaser.

**Exception**

The legal effect of repeal of the *Climate Change Act* is that as of the date of the repeal, there is no longer any prohibition on the disclosure of auction information, regardless of when the auction took place.

As a general proposition, when legislation is repealed, it ceases to be law and to be binding or have any legal effect.<sup>5</sup> There are exceptions to this common law and generally codified in section 51(1) of the *Legislation Act, 2006*, which governs the effect on the repealing of legislation in Ontario. None of the exceptions set out in section 51(1) limit disclosure of information in this proceeding.

Subsection (a) provides that the repeal of the act does not “affect the previous operation of the repealed...Act”. This means that the repeal of the *Climate Change Act* does not change the legal effect of the various provisions *at the time* they were in force.

Subsection (b) provides that the repeal does not “affect right, privilege, obligation or liability that came into existence under the repealed...Act.” This section is aimed at preventing interference with vested rights created under the repealed legislation.<sup>6</sup> The gas utilities did not acquire any legal new rights or obligations as a result of the disclosure prohibitions. The relevant provisions of the *Climate Change Act* simply governed what they could do with information used in the participation of an aspect of the cap and trade program.

Section (c) and (d) are related to offences and investigations related to the repealed legislation. These have no application to the current issue.

#### **Impact on Strictly Confidential Information**

The Board’s *Regulatory Framework for the Assessment of Costs of Natural Gas Utilities’ (“Cap and Trade Framework”)*<sup>7</sup> created two categories of strictly confidential information, auction confidential and market sensitive information. Each of these categories, are based on different concerns and are impacted differently regardless of the Board’s decision on the legal effect of the repeal of the *Climate Change Act*.

**Auction Confidential Information.** Auction confidential information is information that was prohibited from disclosure under relevant provisions in section 32 of the *Climate Change Act*.<sup>8</sup> It related only to certain information related to participation in cap and trade allowance auctions.

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(9) Subsections (6), (7) and (8) do not apply with respect to a disclosure to such persons as may be prescribed.

<sup>4</sup> O. Reg 144/16, *The Cap and Trade Program*, section 65(1)

<sup>5</sup> *University Health Network v. Ontario (Minister of Finance)*, 2001 CanLII 8618 (ON CA), para. 26

<sup>6</sup> *Legislation Act, 2006*:

#### **Effect of repeal and revocation**

**51 (1)** The repeal of an Act or the revocation of a regulation does not,

- (a) affect the previous operation of the repealed or revoked Act or regulation;
- (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;
- (c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;
- (d) affect an investigation, proceeding or remedy in respect of,

- (i) a right, privilege, obligation or liability described in clause (b), or
- (ii) a penalty, forfeiture or punishment described in clause (c).

<sup>7</sup> *Report of the Board: Regulatory Framework for the Assessment of Costs of Natural Gas Utilities’ Cap and Trade Activities* (EB-2015-0363), September 26 2016

<sup>8</sup> *Ibid*, p.11

SEC notes that one ramification of the Board determining that the repeal of the *Climate Change Act* has no impact on the confidentiality requirements of previous auction information, is that the Board itself is now prohibited from receiving the information. In previous Compliance Plan proceedings the gas utilities were able to provide, and the Board was able to review auction confidential information by virtue of the exemption to the disclosure prohibition provided by section 65(1) Ontario Regulation 144/16. The regulation has now been revoked and so there is no legal basis in this proceeding for the Board to have access to the information either.

**Market Sensitive Information.** Market sensitive information is different than auction confidential information. It is information about non-auction transactions that were undertaken in furtherance of the gas utilities cap and trade obligations such as those on the secondary, tertiary or offset market.<sup>9</sup> The Board decided to treat this information as strictly confidential, not because the *Climate Change Act* prohibited disclosure as with auction information, but because there were other potential harms that warranted similar rules. Specifically, that disclosing market sensitive information could result in 'selective disclosure' which could lead to tipping and trading on non-public information, which is legally prohibited under the *Climate Change Act*.<sup>10</sup> There was concern that since the expectation was that these carbon market activities would involve repeated and on-going transaction as the cap and trade program went on, there would be a risk that it would harm the utilities future market activities.<sup>11</sup> The Board decided it needed to be "cautious and have regard to market integrity in order to protect customers from undue costs while still making appropriate information publicly available where possible."<sup>12</sup> Because of that, it determined that certain market sensitive information would be held strictly confidential, as opposed to simply confidential under the *Practice Direction on Confidential Filings* ("*Practice Direction*").

Regardless of the Board's determination of the legal effect of the repeal of the *Climate Change Act*, the Board should no longer treat market sensitive information as strictly confidential. The cancellation of the cap and trade program has eliminated the harms which were identified by the Board so as to require this unprecedented treatment. There is no longer a market that requires such a level of protection on information of past activities, so ratepayers are unable to assess utilities performance with its compliance plans, to assess the prudence of the balances in the various deferral accounts at issue in this proceeding. There is no need to keep the information confidential from parties, as there are no ongoing or repeated transactions as the cap and trade program has been cancelled. Further, the relevant trading and tipping prohibitions under the *Climate Change Act* have been themselves repealed.

**Confidential Information.** In Enbridge's letter of December 27, 2018, and EPCOR's letter of March 1, 2018, they provide reasons for why they believe certain information should still be confidential. SEC has not addressed each of these arguments, at best, could be basis for why the Board should grant confidential treatment pursuant the Board's *Practice Direction*, not why it is legally required to treat the information as strictly confidential.

SEC is not opposed to confidential treatment under the *Practice Direction*, if on balance disclosure could harm the utilities and their customers. But with the cancellation of the cap and trade program there is no longer a need for the information to be considered strictly confidential, so as to avoid scrutiny by those who represent customers who bore the costs, unless it is legally required.

### **Summary**

SEC submits the Board should no longer treat any of the information contained in the cap and trade deferral and variance account clearing applications of the gas utilities as strictly confidential. With the

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<sup>9</sup> *Ibid*, p.12

<sup>10</sup> *Ibid*, p.10

<sup>11</sup> *Ibid*, p.13

<sup>12</sup> *ibid*, p.9



repeal of the *Climate Change Act*, auction confidential information is no longer required to be treated strictly confidentially. Since the market sensitive information was never legally required to be treated as strictly confidential, and the harms that led to the Board to do so no longer exist, the information should be provided to the public, or as needed to representatives of intervenors consistent with the *Practice Direction*.

Yours very truly,  
**Shepherd Rubenstein P.C.**

*Original signed by*

Mark Rubenstein

cc: Wayne McNally, SEC (by email)  
Interested parties (by email)