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BY EMAIL

March 5, 2019

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Applications for the Disposition of Cap and Trade-Related Deferral and
Variance Accounts for the period 2016-2018
OEB Staff Submission
Enbridge Gas Inc. (formerly Enbridge Gas Distribution Inc. and Union Gas
Limited) and EPCOR Natural Gas Limited Partnership
File No: EB-2018-0331**

In accordance with Procedural Order No. 3, please find attached OEB staff's submission in the above noted proceeding.

Sincerely,

Original Signed By

Laurie Klein

Attachment



ONTARIO ENERGY BOARD

OEB STAFF SUBMISSION March 5, 2019

**Enbridge Gas Inc. (formerly Enbridge Gas Distribution Inc. and Union
Gas Limited)**

EPCOR Natural Gas Limited Partnership

**Applications for the Disposition of Cap and Trade-Related Deferral
and Variance Accounts for the period 2016-2018**

EB-2018-0331

Introduction

In this submission, Ontario Energy Board (OEB) staff addresses the treatment of the strictly confidential information in this proceeding. OEB staff submits that the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (Climate Change Act) removes the statutory prohibitions on the disclosure of strictly confidential information. As a result, the disclosure of such information is no longer prohibited by legislation. That being said, the removal of a statutory prohibition against disclosure should not automatically entail the public disclosure of such information. In this proceeding, there remain valid grounds for the OEB to restrict the disclosure of strictly confidential information.

Background

In 2016, the Ontario government enacted the Climate Change Act and the related Ontario Regulation 144/16, *The Cap and Trade Program* (Cap and Trade Regulation). The Climate Change Act and the Cap and Trade Regulation established a Cap and Trade program for the purposes of reducing greenhouse gas emissions in Ontario. To comply with this new program, gas distributors were required to undertake activities that resulted in additional costs.

The Climate Change Act included specific provisions that prohibited the public disclosure of certain information related to the Cap and Trade program:

Trading where undisclosed change

29 (5) No person shall purchase, sell, trade or otherwise deal with emission allowances or credits if the person has knowledge of information that has not been generally disclosed and that could reasonably be expected to have a significant effect on the price or value of an allowance or credit.

Tipping

29 (6) No person shall, other than in the necessary course of business, inform another person of information that has not generally been disclosed and that could reasonably be expected to have a significant effect on the price or value of an emission allowance or credit.

.....

Auction or sale of Ontario emission allowances

Prohibition re: disclosure

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

Same

32(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

32(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

32(9) Subsections (6), (7) and (8) do not apply with respect to a disclosure to such persons as may be prescribed.¹

In its Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities (Cap and Trade Framework)², the OEB outlined how it would review natural gas utilities' plans for complying with the Cap and Trade program. The Cap and Trade Framework noted that the Climate Change Act included statutory prohibitions on the disclosure of certain information and provided for strictly confidential treatment for two types of information: auction confidential³ and market sensitive⁴ information. Strictly confidential treatment was based, in part, on concerns that disclosure of such information would (or could lead to) contravention of the Climate

¹ The Cap and Trade Regulation, section 65(1) permitted disclosure of auction related information to the OEB.

² EB-2015-0363, *Report of the Board - Regulatory Framework for Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities*.

³ Auction confidential refers to information related to participation at auctions for emissions allowances that is prohibited from disclosure (Cap and Trade Framework, page 10).

⁴ Market sensitive refers to information relating to (i) transactions of emissions units on secondary or tertiary markets or offset credits; and (ii) compliance instruments used by a natural gas utility to meet its greenhouse gas obligations.

Change Act. Strictly confidential information was only to be disclosed to the OEB and OEB staff.

On July 3, 2018, the Cap and Trade Regulation was repealed.⁵

On November 14, 2018, the *Cap and Trade Cancellation Act, 2018* repealed the Climate Change Act and provided for various matters related to the winding down of the Cap and Trade program.⁶

This Proceeding

On December 7, 2018, the OEB issued Notice and Procedural Order No.1 in this proceeding that, among other things, directed Enbridge Gas Inc. (Enbridge Gas)⁷ and EPCOR Natural Gas Limited Partnership (collectively the Gas Utilities) to file supplemental evidence on their Cap and Trade Deferral and Variance account balances. In doing so, the OEB indicated that information that has been previously identified as strictly confidential should not be placed on the public record or made available to other parties.

In response to Notice and Procedural Order No.1, several intervenors filed letters asking the OEB to reconsider whether strictly confidential treatment should be applied to information in this proceeding, given the repeal of both the Climate Change Act and the Cap and Trade Regulation.⁸ In response, Enbridge Gas argued that the revocation of the Climate Change Act does not extinguish the effect of its statutory prohibitions against the release of strictly confidential information.⁹

On February 12, 2019, the OEB issued a procedural order seeking written submissions from parties on: (i) the legal effect of the repeal of the Climate Change Act; and (ii) specifically, the treatment of the strictly confidential auction and market sensitive information in this proceeding resulting from the repeal of the Climate Change Act.¹⁰

⁵ Ontario Regulation 386/18, *Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits*, section 2.

⁶ S.O. 2018, c. 13, section 16.

⁷ The amalgamation of Enbridge Gas Distribution Inc. and Union Gas Limited into Enbridge Gas Inc. took effect January 1, 2019. For ease of reference, this OEB staff submission uses the current name.

⁸ APPRO's letters dated December 19 and 28, 2018; IGUA's letters dated December 13, 2018 and January 11, 2019; and SEC's letters dated December 13, 2018 and January 11, 2019.

⁹ Enbridge Gas's letter dated December 27, 2018.

¹⁰ Procedural Order No. 3 dated February 12, 2019. The OEB also released a Procedural Order No. 2 (January 18, 2019) which addressed a request to extend the time to file supplementary evidence.

OEB Staff Submission

OEB staff submits that the repeal of the Climate Change Act removes the statutory prohibition on the disclosure of strictly confidential information. As a result, the disclosure of such information is no longer prohibited by legislation.

When a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects.¹¹ In fact, at common law, the presumption is that when a statute is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.¹² As noted by the Supreme Court of Canada in *Gustavson Drilling (1964) Ltd. v. M.N.R.*: “No one has a vested right to continuance of the law as it stood in the past...”.¹³

When dealing with Ontario legislation, consideration must also be given to the relevant provisions in Ontario’s *Legislation Act, 2006*.¹⁴ Section 9(3) of the *Legislation Act, 2006* states that, unless otherwise provided, the repeal of a statute takes effect at the first instant of the day of repeal. In this case, the repeal of the Climate Change Act took effect on November 14, 2018.

The effect of a repeal is dealt with in section 51(1) of the *Legislation Act, 2006*, which states:

- 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).

Section 51(a) modifies the common law presumption that when a statute is repealed, it must be considered as if it had never existed.

¹¹ *University Health Network v. Ontario (Minister of Finance)*, 2001 CanLII 8618 (ON CA), para. 26 citing Ruth Sullivan, *Driedger on the Construction of Statutes* 3rd ed. (Toronto: Butterworths, 1994).

¹² Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed. (Markham: LexisNexis, 2014), pages 732-733.

¹³ [1977] 1 S.C.R. 271, page 282.

¹⁴ S.O. 2006, c. 21, Sched. F.

Section 51(b) states that the repeal of a statute does not affect a right, privilege, obligation or liability that came into existence under the repealed Act (often referred to as a “vested” right, privilege, obligation or liability). This section modifies the common law presumption that repealed legislation ceases to be binding or to produce legal effects.¹⁵ In order for the provisions of the Climate Change Act to have any enduring legal effects, they must fit within the ambit of section 51(b).

The terms “right, privilege, obligation or liability” are not defined in the *Legislation Act, 2006*. There is also limited jurisprudence that has judicially considered this statutory provision. Most jurisprudence that has considered this provision or similar provisions in other Canadian jurisdictions focuses on whether a person had a vested “right” under the repealed legislation at issue.

In the context of the provisions of the Climate Change Act that are at issue, the question is whether these provisions are “obligations” within the meaning of section 51(b) of the *Legislation Act, 2006*.

OEB staff has identified one case which has judicially considered the term “obligation” in a predecessor to the *Legislation Act, 2006*.¹⁶ In that case, which dealt with a family law issue, the court stated that “right” and “privilege” have meanings which correspond to “obligation” and “liability” –they are opposite sides of the same coin.¹⁷ The court also stated that the terms “obligation” and “liability” import the concept of being subject to the claim of another.¹⁸

Applying that interpretation, in order to conclude that the non-disclosure provisions of the Climate Change Act are obligations it would be necessary to identify the corresponding right that is owed to someone. It is unclear what that corresponding right would be in this case and to whom the obligation would be owed.

OEB staff submits that the preferred interpretation is that the non-disclosure provisions of the Climate Change Act are not “obligations” within the meaning of section 51(b) of the *Legislation Act, 2006*. As such, the disclosure of auction confidential or market

¹⁵ OEB staff notes that there can be exceptions to the common law, for example, the presumption against interference with vested rights.

¹⁶ That case considered section 14(1)(c) of the *Interpretation Act*, R.S.O. 1980, c. 219 which stated “Where an Act is repealed ... the repeal... does not, except as in this Act otherwise provided...(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act... so repealed.”

¹⁷ *Re Saylor*, 1983 CanLII 1752 (ON SC), para. 8.

¹⁸ *Re Saylor*, 1983 CanLII 1752 (ON SC), para. 9.

sensitive information, even if the information relates to periods when the Climate Change Act was in effect, is not prohibited by legislation at this point in time.

The presumptive starting point under the common law is that after legislation is repealed, conduct that was formerly prohibited is now lawful.¹⁹ The limited jurisprudence in this area does not appear to support an expansive definition of “obligation”. OEB staff notes that the relevant provisions in the Climate Change Act are worded as prohibitions rather than positive obligations. Moreover, OEB staff notes that if an obligation were to be found in this case, it would also mean that someone could potentially be investigated for breaching the Climate Change Act if that person was to disclose information related to past allowance auctions in the future.²⁰

Sections 51(c) and 51(d) of the *Legislation Act, 2006* speak to investigations and offences and, among other things, make clear that the repeal of a statute does not erase a previous contravention of a now repealed statute.

Even if there is no legal prohibition on the disclosure of strictly confidential information, the OEB must still resolve how this information should be treated in this proceeding.

The Cap and Trade Framework indicated that auction confidential and market sensitive information would remain strictly confidential. In the Cap and Trade Framework, the OEB expressed its belief that:

...in the early stages of the [cap and trade] market’s development, the appropriate approach [for the disclosure of information] must not only comply with the *Climate Change Act* and associated regulations, it should also 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.”²¹

From the above, it is apparent that the Climate Change Act was part, but not all, of the concern that led to the strictly confidential treatment of auction confidential and market sensitive information. OEB staff submits that prior to any disclosure of strictly confidential information to intervenors the OEB should also consider the implications of such disclosure.

¹⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed. (Markham: LexisNexis, 2014), pages 732-733.

²⁰ Section 51(1)(d) of the *Legislation Act, 2006*.

²¹ The Cap and Trade Framework, page 9.

As outlined by Enbridge Gas, potential concerns remain with the disclosure of this information given that Cap and Trade programs in Québec and California under the WCI remain. Moreover, Enbridge Gas has an affiliate, Gazifère, operating in the province of Québec who is an active participant in the WCI.

OEB staff further notes that providing intervenors with access to the strictly confidential information filed in this proceeding will not enable those parties to make submissions that assist the OEB, unless access is also provided to the strictly confidential information filed in the previous Cap and Trade proceedings. That access would raise the same concerns as discussed above. Given the nature and limited scope of this proceeding, OEB staff submits that it is not necessary for a proper determination of the issues by the OEB to re-open the treatment of strictly confidential information filed in the previous Cap and Trade proceedings.

OEB staff acknowledges that the OEB's general practice is to provide intervenors access to confidential information upon signing a Declaration and Undertaking to not disclose that information.²² However, such access is not guaranteed under the OEB's *Practice Direction on Confidential Filings*.²³ Given the continuing operation of the Cap and Trade market in other jurisdictions, this may be a unique circumstance where intervenors should not be permitted to review the strictly confidential information even upon signing a Declaration and Undertaking.

- All of which is respectfully submitted -

²² See section 6.1.1 of the Ontario Energy Board *Practice Direction on Confidential Filings*, Revised October 28, 2016 for a description of what Declaration & Undertaking is to contain.

²³ Ontario Energy Board *Practice Direction on Confidential Filings*, Revised October 28, 2016, sections 6.1.2, 6.1.4.