

ONTARIO ENERGY BOARD

Enbridge Gas Inc. and EPCOR Natural Gas Limited Partnership

Applications for the disposition of Cap & Trade-Related Deferral  
and Variance Accounts for the period 2016-2018

Written Submissions of the Industrial Gas Users Association (IGUA)  
on Confidential Treatment of Filings

1. The Board has provided an opportunity for submissions on the legal effect of the repeal of the *Climate Change Act (CC Act)* on the treatment of the strictly confidential auction and market sensitive information in this proceeding.
2. The September, 2016 *Report of the Board: Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities (Cap & Trade Framework)* commences its discussion of confidentiality of cap & trade information by reiterating that<sup>1</sup>:

*As a general rule, the OEB places materials it receives in the course of the exercise of its authority under the Ontario Energy Board Act, 1998 and other legislation on the public record so that all interested parties can have equal access to those materials. ...the placing of materials on the public record is the rule and confidentiality is the exception.*

3. It is important to remember that what the Board is considering now is the need for continuation of an exceptional "Strictly Confidential" exception to this rule.
4. This submission focusses on the "legal effect" question posed in Procedural Order No. 3 herein. We provided more general comments on Enbridge Gas' (EG) arguments in favour of "strictly confidential" treatment of filings herein in our letter dated January 11, 2018 and will not repeat them here, but we do continue to rely on them.

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<sup>1</sup> Page 9, paragraph 2.

## The Information and Categorizations in Issue

5. In the context of the *CC Act*, the *Cap & Trade Framework* defined 3 exceptions to the basic regulatory principle on public disclosure. One of these exceptions – referred to as “*other confidential commercial information*” – was for information the disclosure of which could potentially negatively impact a utility’s competitive position and its customers.<sup>2</sup> To this exception the Board applied its standard policy on confidential treatment. This exception, which always exists in respect of filings with the OEB, is not the subject of the current inquiry and need not be further examined here.
6. At issue are the other two exceptions, both of which were accorded “strictly confidential” treatment under the *CC Framework*. “Strictly confidential” treatment meant that the subject information would be provided to, and reviewed by, only the Board (i.e. OEB members and staff), and would not be made accessible to representatives of other parties under the Board’s standard confidentiality protocols.
7. These two “strictly confidential” exceptions to the Board’s standard practice of public disclosure of filings were;
  - (a) “Auction Confidential Information”; and
  - (b) “Market Sensitive Information”.
8. “Auction Confidential Information” was defined<sup>3</sup> in accord with section 32(7) of the *CC Act* which specified that (subject to the exception for disclosure to the Board provided for in the *CC Act* regulation):

*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.*
9. In designating Auction Confidential Information as subject to “strictly confidential” treatment the Board was codifying in the *Cap & Trade Framework* the legislative prohibition on disclosure to anyone (except the Board) of this information.

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<sup>2</sup> *Cap & Trade Framework*, page 13, bottom.

<sup>3</sup> *Cap & Trade Framework*, pages 11-12.

10. "Market Sensitive Information" was defined<sup>4</sup> not in direct reference to the legislation as was the case with "Auction Sensitive Information", but rather with reference to the OEB Staff Discussion Paper that preceded, and informed, the promulgation by the Board of the *Cap & Trade Framework*. "Market Sensitive Information" was defined as;

*...information that may be filed with the OEB related to a Utility's Compliance Plans involving primary market activity, other than auctions, as well as secondary and tertiary market activity (including bilateral agreements and other transactions and instruments).*

11. It was suggested by OEB Staff, and accepted by the Board in the *Cap & Trade Framework*, that such information "*could have an impact on cap and trade markets if disclosed and such disclosure could be contrary to sections 28(5) and (6) of the Climate Change Act*".<sup>5</sup>
12. Sections 28(5) and (6) of the CC Act reference by Staff in discussion of "Market Sensitive Information" precluded "tipping"; i.e. "*informing 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 credit*".
13. In adopting Staff's suggestion that "Market Sensitive Information" be received as "Strictly Confidential" the Board concluded that<sup>6</sup>;

*... information about past trading activities which could reveal bidding strategies in future market activities and compromise the integrity of the markets contrary to the provisions of the Climate Change Act will be treated as Market Sensitive Information.*

#### **"Market Sensitive Information"**

14. As detailed above, "Market Sensitive Information" as defined in the *Cap & Trade Framework* is not information that was legislatively required to be kept "Strictly Confidential". The treatment of this type of information as "Strictly Confidential" was a discretionary decision by the OEB, made in reference to preserving the integrity of Ontario's cap & trade market.
15. No issue of regarding the impact of the repeal of a legislative requirement for strict confidentiality applies in respect of "Market Sensitive Information", because the

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<sup>4</sup> *Cap & Trade Framework*, page 11, bottom.

<sup>5</sup> *Cap & Trade Framework*, page 13, top.

<sup>6</sup> *Cap & Trade Framework*, page 13, 2<sup>nd</sup> full paragraph.

requirement was not a legislative one. Rather it was a requirement developed by the Board in consideration of the expected Ontario cap & trade market.

16. With the repeal of the *CC Act* there is no Ontario cap & trade market. Accordingly, the rationale for the Board's determination that "Market Sensitive Information" should be retained as "Strictly Confidential" no longer exists.
17. The Board should thus review, and in IGUA's submission abandon, the previously prescribed (by the Board) treatment of this category of information, and instead apply its general practice regarding making the record in its proceedings public, subject to demonstration by a filer of information that such information merits confidential treatment under the Board's standard confidentiality guidelines.

#### **"Auction Confidential Information"**

18. The definition by the Board of "Auction Confidential Information" was adopted directly from section 32(7) of the *CC Act*. It is in respect of this category of information that the issue of the effect of repeal of the *CC Act* arises.
19. The Ontario *Legislation Act, 2006* provides<sup>7</sup> that;  
  
*The repeal of an Act or the revocation of a regulation does not,*  
  
*...*  
  
*affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;*
20. Case law has restricted the application of this legislated principle to substantive rights that have already "vested" or "crystallized".<sup>8</sup>
21. In *Dikranian v. Quebec (Attorney General)*<sup>9</sup> the Supreme Court of Canada (through Mr. Justice Bastarache) addressed the concept of such rights;

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<sup>7</sup> Section 51.

<sup>8</sup> *Sisualk v. Ontario*, 2011 ONSC 1486 at 42.

<sup>9</sup> 2005 SCC 73, paras. 30, 32.



*Vested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future.*

....

*The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E.A. Driedger states in Construction of Statutes (2<sup>nd</sup> ed. 1983), at p. 183, these presumptions*

*...were designed as protection against interference by the state with the liberty or property of the subject. Hence it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.*

22. In his reasons for decision in *Dikranian* Mr. Justice Bastarache goes on to elaborate on the applicable legal concepts;<sup>10</sup>

*The leading case on this presumption is Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629 (S.C.C.) at p.638, where this Court stated the principle in the following terms:*

*A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status"... unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" ..., meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.*

*The principle has since been codified in interpretation statutes. The Interpretation Act [of Quebec] is no exception:*

*12. The repeal of an act or of regulations made under its authority shall not affect rights acquired... and the acquired rights may be exercised... notwithstanding such repeal.*

23. Following consideration of these legal authorities Mr. Justice Bastarache applies the law to the case before him, and in so doing finds;<sup>11</sup>

*A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists.*

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<sup>10</sup> Paragraphs 33, 34.

<sup>11</sup> Paragraph 39.

24. Consideration of these judicial formulations indicates that the confidential treatment accorded to "Auction Confidential Information" by the now repealed CC Act was not in the nature of the sorts of "vested rights" which the common law recognizes as surviving such a repeal and the Ontario *Legislation Act, 2006* expressly preserves despite such a repeal.
25. The now repealed legislative requirement to maintain "Auction Confidential Information" in strict confidence, including from intervenors even under the Board's *Practice Direction on Confidential Filings*, is simply not "a juridical situation" that is "tangible, concrete and distinctive" and which impacts the rights of a subject of the state to "liberty" or "property".
26. The legal doctrine of "vested rights" does not apply to Auction Confidential Information, nor does section 51 of the *Ontario Legislation Act, 2006*. There is no legal basis for continuation of "strictly confidential" treatment of "Auction Confidential Information", and the Board should henceforth apply its *Practice Direction on Confidential Filings* to such information.
27. In any event, what the Board is now considering is disclosure obligations and limitations going forward, not disposition of historical disclosures (to the Board only). There is now no legislative basis for "strictly confidential" treatment of any new filings of "Auction Confidential Information".
28. The Board should henceforth apply its more general, and more appropriate, *Practice Direction on Confidential Filings* to this category of information.
29. If and when either of the utilities apply for confidential treatment of filings pursuant to the Board's *Practice Direction on Confidential Filings*, IGUA will make submissions on such an application in reference to the justifications provided for such treatment by the utilities at the time.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED by:**

*Emily Aulic*

**GOWLING WLG (CANADA) LLP, per:**

*per:* Ian A. Mondrow  
Counsel to IGUA

March 5, 2019