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Our File No. 185543

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

**Re: EB-2018-0331: Enbridge Gas Distribution Inc., 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**

BOMA makes this submission in response to the Board's invitation in Procedural Order No. 3 in this proceeding. BOMA apologizes for the lateness of this document. Unfortunately, my assistant was ill yesterday and we were unable to produce this document.

In Procedural Order No. 3 (p2), the Board stated that:

"Several intervenors in this proceeding have filed letters asking the OEB to reconsider whether strictly confidential treatment should be applied to certain information in this proceeding, given the repeal of the Climate Change Mitigation and Low-carbon Economy Act, 2016 (Climate Change Act) and Ontario Regulation 144/16. In response, Enbridge Gas and Union 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.

The OEB has considered the various letters on this issue. The OEB notes that the parties' letters did not cite precedents to support their views. The OEB seeks written submissions from the Gas Utilities, OEB staff and intervenors on the legal effect of a repeal of

legislation including where the repealing act is silent as to the effect of the repeal on specific provisions that had been in force (our emphasis). In particular, the submissions should address the required treatment of strictly confidential evidence in this proceeding that follows from the determination of the legal effect of the repeal of the Climate Change Act."

In BOMA's view, the legal effect of the repeal of the Act is to nullify the confidentiality provision in that Act; to remove it as if it never existed.

As the Board notes, the Cap and Trade Cancellation Act, 2018, S.O. 2018, c. 13 (the "Act") makes no reference to the confidentiality provisions of the Climate Change Mitigation and Low-Carbon Economy Act, 2016 ("Climate Change Act"). The Act does, however, deal with the wind-down of other aspects of the activities that took place while the Climate Change Act was in force, including the treatment of cap and trade instruments generally, which participants in the Cap and Trade regime were eligible for compensation, and the amount of that compensation. The Act also provides that the LGIC could make regulations on a wide variety of matters. Had the legislature wished to stipulate that the confidentiality provisions of the Climate Change Act would remain in effect, it would have included provisions to that effect in either the Act, or in a regulation under the Act. It did neither. It must have concluded that the need for such confidentiality requirements ended with the repeal of the Act.

There is strong precedent for this conclusion. The effect of a repeal at common law is to treat the legislation as removed entirely as if it never existed. There are two seminal cases that are cited in *The Interpretation of Legislation in Canada* that stand for this proposition: *Surtees v Ellison* (1829) and *Kay v Goodwin* (1830).¹ These cases have been cited internationally, and by the Ontario Supreme Court and the Ontario Land Compensation Board.² The treatment of a repeal at common law is that because the repealed statute no longer has effect, institutions created within its purview such as corporations cease to exist.³

The principle of statutory interpretation that is relevant for our purposes is what Ruth Sullivan refers to as the assumption of drafting competence in her text *Statutory Interpretation*.⁴ The assumption of drafting competence is that a skilful drafter of legislation has the ability to produce effective legislative schemes and draft them in a way that will provide adequate guidance to those that must apply and obey the law. This assumption also provides that competent drafters are assumed to be aware of the principles of statutory interpretation and as such, draft with those principles in mind. If the legislature wanted the confidentiality provisions

¹ Pierre-André Côté, *The Interpretation of Legislation in Canada* 4th ed (Carswell, 2011) at 109.

² *Cosburn Properties Ltd v Toronto (Metropolitan)*, 1972 CarswellOnt 1338 (OLCB) at para 9; *R v Lyons Fuel Hardware & Supplies Ltd*, [1961] OR 860 (Ontario Supreme Court) at para 7;

³ Pierre-André Côté, *The Interpretation of Legislation in Canada* 4th ed (Carswell, 2011) at 110; *Regie des alcools du Quebec v Dandurand*, [1972] Quec CA 420.

⁴ Ruth Sullivan, *Statutory Interpretation* 3rd ed (Toronto, Irwin Law, 2016) at 41.

to continue, they had the option of continuing these provisions in the *Cap and Trade Cancellation Act*, 2018, and knowingly decided against it.

The same assumption (of drafting competence) applies to an argument made in a letter from EGD dated December 27, 2018, in which counsel highlights that Article 17 of the agreement (among Ontario, Quebec, and California) provides that "withdrawal from this Agreement does not end a Party's obligations under article 15 regarding confidentiality of information, which continue to remain in effect". This ongoing confidentiality obligation does not survive the repeal of the *Climate Change Act* because if the legislatures intended for the obligation to continue, they had the option to include a provision similar to that in Article 17 in the *Cap and Trade Cancellation Act*, 2018 but chose not to. They also had the option to include transitional provisions in the new legislation to address the treatment of the confidentiality obligations during the winding down of the regime but chose against it. Their decision not to use any such transitional provisions suggests that they consciously decided to eliminate the application of the confidentiality obligations under the repealed *Climate Change Act*.

The Report of the Board – Regulatory Framework for Assessment of the Costs of Natural Gas Utilities Cap and Trade Activities (the "Framework") is rendered inoperable by the repeal of the Act for the reasons outlined above. The repeal of the Climate Change Act and Ontario Regulation 144/16 also removes the legal foundation from the Board's Framework, which, therefore, cannot continue to operate. The Board must, therefore, order the utilities to file their prudency evidence on the public record, or at least on a normal confidential basis, available to counsel and advisors that have executed confidentiality agreements.

Yours truly,

FOGLER, RUBINOFF LLP



Thomas Brett

TB/dd

cc: All Parties (*via email*)