



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND PROCEDURAL ORDER NO. 4

EB-2018-0331

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

ENBRIDGE GAS INC.

**EPCOR NATURAL GAS LIMITED
PARTNERSHIP**

BEFORE: Susan Frank
Presiding Member

Michael Janigan
Member

April 25, 2019

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1 INTRODUCTION AND SUMMARY

On December 7, 2018, the Ontario Energy Board (OEB) issued a Notice of Hearing and Procedural Order No. 1 for a combined hearing to review the cap and trade-related variance and deferral account balances for Enbridge Gas Inc. (formerly Enbridge Gas Distribution Inc. and Union Gas Limited) and EPCOR Natural Gas Limited Partnership (EPCOR Gas) (collectively, the Gas Utilities). While the applications in this proceeding were filed prior to the completion of the amalgamation of Enbridge Gas Distribution Inc. and Union Gas Limited, this decision and order will use Enbridge Gas Inc. (Enbridge Gas) for ease of reference.

In Notice and Procedural Order No. 1, the OEB directed the Gas Utilities to file supplemental evidence. In doing so, the OEB indicated that information that has been previously identified as strictly confidential should be identified and not placed on the public record or made available to other parties.

Several intervenors¹ in this proceeding 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, *The Cap and Trade Program* (Cap and Trade Regulation). 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.²

By way of procedural order, the OEB provided for the Gas Utilities, intervenors and OEB staff to file submissions on the following issues: (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.³

The Gas Utilities, OEB staff and several intervenors filed written submissions.

For the reasons that follow, the OEB has made the following determinations:

¹ Association of Power Producers of Ontario's letters dated December 19 and 28, 2018; Industrial Gas Users Association's letters dated December 13, 2018 and January 11, 2019; and School Energy Coalition's letters dated December 13, 2018 and January 11, 2019.

² Enbridge Gas letter dated December 27, 2018.

³ EB-2018-0331, Procedural Order No. 3, February 12, 2019.

1. The OEB finds that the auction confidential information as defined by the *Report of the Board Regulatory Framework for the Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities* (Cap and Trade Framework)⁴, treated as strictly confidential by the OEB in the previous cap and trade compliance plan proceedings⁵ pursuant to the Cap and Trade Framework, will remain strictly confidential in this proceeding.
2. The OEB also finds that market sensitive information as defined by the OEB's Cap and Trade Framework will remain strictly confidential. This information will be subject to the limited disclosure as provided for in previous cap and trade compliance plan proceedings.

⁴ EB-2015-0363.

⁵ EB-2016-0296 / EB-2016-0300 / EB-2016-0330 and EB-2017-0224/0255/0275.

2 STRUCTURE OF THE DECISION

This Decision and Order is structured into the following sections: Introduction and Summary; Structure; Decision on the Legal Effect of Repealing Legislation; and Order.

3 DECISION ON LEGAL EFFECT OF REPEALING LEGISLATION

Background

In May 2016, the Ontario government enacted the Climate Change Act and the related Cap and Trade Regulation. The Climate Change Act and the Cap and Trade Regulation established the details of a cap and trade program for the purposes of reducing greenhouse gas (GHG) emissions in Ontario. To comply with this new program, the Gas Utilities were required to develop compliance plans to meet their Climate Change Act compliance obligations.

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

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.⁶

In the Cap and Trade Framework, the OEB outlined how it would assess the cost consequences of the Gas Utilities' compliance plans to meet their GHG obligations under the Climate Change Act. 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 confidential⁷ and market sensitive⁸ information.

Strictly confidential treatment was based, in part, on concerns that disclosure of such information would (or could) lead to contravention of the Climate Change Act. Strictly confidential information was only to be disclosed to the OEB panel and OEB staff.

The Gas Utilities applied for approval of the costs of their 2017 cap and trade compliance plans on November 15, 2016. By Procedural Order 1 in that proceeding,⁹ the OEB confirmed its intention to follow the Cap and Trade Framework in the treatment of both auction confidential information and market sensitive information. The OEB Decision concerning approval of the 2017 costs referenced the application of the Cap and Trade Framework with respect to the limited disclosure of information classified as strictly confidential. The Decision also provided for two new variance accounts for each of the Gas Utilities to track variances in customer-related and facility-related costs and

⁶ The Cap and Trade Regulation, section 65(1) permitted disclosure of auction related information to the OEB.

⁷ Auction confidential refers to information related to participation at auctions for emissions allowances that is prohibited from disclosure.

⁸ 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.

⁹ EB-2016-0296, EB-2016-0300, EB-2016-0330, January 27, 2017.

set out terms for the Greenhouse Gas Emissions Impact Deferral Accounts (GGEIDA) that was to be set out in an accounting order.¹⁰

The Gas Utilities subsequently applied for approval of the forecast costs arising from their 2018 Cap and Trade Compliance plans. The OEB in Procedural Order 1, once again applied the provisions of the Cap and Trade Framework arising out of the Climate Change Act and the Cap and Trade Regulation. This included the treatment of auction confidential information as strictly confidential in accordance with section 32 of the Climate Change Act referenced above.

On July 3, 2018, the Cap and Trade Regulation was repealed.¹¹

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.¹²

Submissions

The following parties filed written submissions as did OEB staff: the Gas Utilities, Association of Power Producers of Ontario (APPRO), School Energy Coalition (SEC), Canadian Manufacturers & Exporters (CME), Industrial Gas Users Association (IGUA), and Building Owners and Managers Association (BOMA).

Enbridge Gas argued that the prohibition against public disclosure continues to apply in relation to information submitted during or relating to the time when the Climate Change Act was in force. Enbridge Gas stated that there is a strong presumption that legislation is not intended to be retroactive unless this is expressly or necessarily implied by the language of the statute.¹³ In Enbridge Gas' view, repealed legislation does not apply to new events but will generally be taken to continue to apply to events that occurred during the currency of the legislation.

¹⁰Decision and Order, EB-2016-0296 / EB-2016-0300 / EB-2016-0330, at page 42.

¹¹ Ontario Regulation 386/18, *Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits*, section 2.

¹² S.O. 2018, c. 13, section 16.

¹³ Enbridge Gas referenced *Re. Estate of Joseph Paul Grieco, deceased*, 2013 ONSC 2465, at para. 5, citing Halsbury's Laws of Canada (Legislation, retroactivity) and *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271, at page 279.

Enbridge Gas cited section 51(1) of the *Legislation Act, 2006* (Legislation Act) 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).

In Enbridge Gas' view, section 51(1) of the Legislation Act directs that the prohibitions against disclosure of auction confidential and market sensitive information continue to apply where such information relates to and dates from the time while the Climate Change Act was in force and effect. Enbridge Gas cited cases that it argued demonstrate that where parties were governed by and acted in accordance with statutory law as it existed at the time of their transactions, then that law will continue to apply post-repeal to a review or determination related to those transactions. For example, Enbridge Gas noted in *Re. Estate of Joseph Paul Grieco, deceased*, Justice Salmers stated "...the *Legislation Act, 2006* provides for the continued application of repealed legislation to facts that occurred prior to repeal".¹⁴

Enbridge Gas further submitted that there is potential harm that may result from the disclosure of information about its plans and transactions involving compliance instruments as its affiliate, Gazifère, is an active participant in the Western Climate Initiative (WCI) market. Enbridge Gas indicated that market participants in the WCI market would benefit from knowing the strategies employed by Gazifère's affiliates in Ontario. Enbridge Gas also stated that disclosure of auction confidential or market sensitive information may result in the OEB inadvertently breaching obligations of the

¹⁴ *Re. Estate of Joseph Paul Grieco, deceased*, supra, at para. 5; see also *Township of Nepean v. Leikin*, 1971 CanLII 642 (ON CA) and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2005 ABCA 122 cases referenced in Enbridge Gas' submission.

Ontario government set out in an agreement¹⁵ between the Province of Ontario, the Province of Québec and the State of California.

Enbridge Gas expressed concern about retroactively disclosing the proprietary work of the consultants retained to support the development of compliance and procurement strategies. In Enbridge Gas' view certain consultants would be reluctant to provide the same level of assistance in the future, ultimately disadvantaging ratepayers.

EPCOR Gas raised a concern that revealing auction confidential and market sensitive information could possibly reveal compliance strategies that may be relevant to the federal *Greenhouse Gas Pollution Pricing Act* or other market-based carbon pricing systems in the future.

Intervenors, with one exception, argued that with the repeal of the Climate Change Act, there is no longer any prohibition on the disclosure of auction confidential information, regardless of when the auction took place.¹⁶ Most intervenors further argued that any confidentiality concerns arising from the information should be addressed using the OEB's *Practice Direction on Confidential Filings*.¹⁷

APPrO and BOMA submitted that when a provision that repeals legislation comes into force, the repealed legislation ceases to be part of the law and it ceases to have legal effect. Further, BOMA argued that if the Legislature intended for the confidentiality obligation to continue, it had the option to include a provision in the *Cap and Trade Cancellation Act, 2018* to that effect but did not do so. BOMA also argued that the repeal of the Climate Change Act and Cap and Trade Regulation removes the legal foundation for the Cap and Trade Framework and renders the Cap and Trade Framework inoperable.

The submissions of a number of intervenors also referenced section 51(1) of the Legislation Act. However, they had a different view of this section than Enbridge Gas. IGUA, SEC and APPrO argued that none of the exceptions set out in section 51(1) limit disclosure of information in this proceeding.

¹⁵ Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions Between The Gouvernement du Québec, The Government of California and The Government of Ontario, September 22, 2017 (the Agreement).

¹⁶ The submissions of CME did not specifically address the legal effect of the Climate Change Act post repeal.

¹⁷ <https://www.oeb.ca/industry/rules-codes-and-requirements/practice-direction-confidential-filings>

SEC further argued that the Gas Utilities did not acquire any legal new rights or obligations as a result of the disclosure prohibitions. Rather, 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. SEC stated that a finding that the repeal of the Climate Change Act has no impact on the confidentiality requirements of previous auction information would mean that the OEB itself is now prohibited from receiving the information as the Cap and Trade Regulation that allowed for the OEB's access to this information has been repealed.¹⁸

APPrO submitted that the confidentiality provisions in the Climate Change Act did not create a vested right that would allow the continuation of the application of the Climate Change Act to the present situation. Instead of bestowing a right of confidentiality on participants in the cap and trade program, these provisions instituted prohibitions to govern their conduct.

IGUA also addressed the concept of vested rights. In doing so, it referenced a Supreme Court of Canada decision where it was explained that vested rights are designed as protection against interference by the state with the liberty or property and that a vested right cannot exist if the juridical situation under consideration is not tangible, concrete and distinctive.¹⁹ IGUA argued that the now repealed prohibitions are 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”. IGUA submitted that the legal doctrine of vested rights does not apply to auction confidential information, nor does section 51 of the Legislation Act.

SEC and IGUA submitted that market sensitive information as outlined in the Cap and Trade Framework is different from auction confidential information, as there was never a legal requirement to treat this information as strictly confidential. As a result, they stated that the OEB should no longer treat market sensitive information as strictly confidential regardless of the OEB's determination of the legal effect of the repeal of the Climate Change Act. They indicated that the rationale for treating this information as strictly confidential identified by the OEB (such as the integrity of Ontario's cap and trade market) no longer exists.

¹⁸ Section 65(1) of the Cap and Trade Regulation permitted the OEB to review confidential information from section 32 of the Climate Change Act.

¹⁹ *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, at paras. 32, 39.

CME did not address the specific questions posed by the OEB but argued that with no more Ontario cap and trade program, the reasoning for strictly confidential treatment is no longer fully applicable and the OEB should revisit what information is designated as strictly confidential noting that confidentiality is the exception not the rule.

OEB staff outlined similar arguments to many of the intervenors and submitted that the repeal of the Climate Change Act removes the statutory prohibitions on the disclosure of strictly confidential information. In particular, OEB staff focused on section 51(1)(b) of the Legislation Act and the question of whether the repeal affected an obligation that came into existence under the Climate Change Act. On this question, OEB staff submitted that the preferred interpretation is that the non-disclosure provisions of the Climate Change Act are not “obligations” within the meaning of section 51(1)(b) of the Legislation Act.

However, OEB staff submitted that there remains valid grounds for the OEB to restrict the disclosure of strictly confidential information given that cap and trade programs in Québec and California under the WCI remain and Enbridge Gas’ affiliate, Gazifère, operating in the province of Québec is an active participant in this market.

Further, OEB staff noted that providing intervenors with access to the strictly confidential information filed in this proceeding would 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 compliance plan proceedings.²⁰ Given the nature and limited scope of this proceeding, OEB staff submitted 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 compliance plan proceedings. Also, there is an active cap and trade market in other jurisdictions and therefore, OEB staff submitted that 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.

OEB Findings

The OEB finds that the auction confidential information as defined by the OEB’s Cap and Trade Framework, treated as strictly confidential by the OEB in previous cap and trade compliance plan proceedings²¹ pursuant to the Cap and Trade Framework, will remain strictly confidential in this proceeding.

²⁰ EB-2016-0296/0300/0330 and EB-2017-0224/0255/0275.

²¹ *Ibid.*

The OEB also finds that market sensitive information, as defined by the OEB's Cap and Trade Framework, will remain strictly confidential. This information will be subject to the limited disclosure as provided for in the previous cap and trade compliance plan proceedings.

As most parties have noted, as a general principle, the repeal of legislation means that it no longer has legal effect. However, the Legislation Act provides that the repeal of an Act or the revocation of a regulation does not affect:

- The previous operation of the repealed Act or revoked Act or regulation
- A right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation

The prohibition against disclosure of auction confidential information set out in section 32 of the Climate Change Act was incorporated into the Cap and Trade Framework. The Cap and Trade Framework governed the proceedings that provided for the approval of costs incurred by the cap and trade compliance plans and the recording of costs in deferral and variance accounts that are to be disposed of in this proceeding. Intervenors opposing the continuation of the strictly confidential status largely rejected the conclusion that the prohibitions against disclosure provided for actual vesting of the rights to such confidentiality – rights that were not eradicated by the repeal of the statute.

The case law supports the proposition that a previous right to obtain a remedy under a repealed statute does not provide a vested right to obtain such remedy, following the repeal. The Supreme Court of Canada has stated that no one has a right to continuance of the law as it stood in the past.²² It is argued by intervenors that the repeal of the Climate Change Act eliminated any prohibitions against disclosure largely on the basis that there was now no vested right to obtain such a remedy on the part of auction participants.

However, the problem with this approach is that it ignores the fact that the OEB already applied the provisions of section 32 of the Climate Change Act preventing disclosure of auction confidential information when the Climate Change Act was operational. The Climate Change Act mandated the requirements for strictly confidential treatment for auction confidential information as set out in the Cap and Trade Framework. This Framework governed the decisions and process of the OEB in the proceedings to approve compliance plan costs and to record costs in the deferral and variance accounts at issue in this proceeding.

²² *Gustavson Drilling 1964 Limited v. MNR* [1977] 1 SCR 271, at page 282.

There is a strong presumption that legislation is not intended to be retroactive.²³ The Legislation Act provides in section 51(1)(a) that repeal does not affect the previous operation of a repealed Act. There is also confirmation in relevant case law, that where specific rights and obligations have been established before repeal of an Act, they will not be retrospectively eliminated unless such elimination is specifically provided for in the repeal.²⁴ Here the OEB devised a regime protecting the disclosure of auction confidential information in conformance its Cap and Trade Framework that itself followed section 32 of the repealed Climate Change Act. The auction participants must be presumed to have ordered their conduct in reliance upon those protections. The OEB finds that the protection of auction confidential information in accordance with the Cap and Trade Framework continues to apply despite the repeal of the Climate Change Act and the Cap and Trade Regulation.

SEC submitted that the maintenance of strictly confidential status for auction confidential information as determined herein would mean that the OEB would also be prohibited from reviewing auction confidential information pursuant to section 65(1) of the Cap and Trade Regulation, because the OEB exemption was revoked by its repeal. Once again, the continued strictly confidential status of this information is based on the determinations of the OEB when the Climate Change Act and the Cap and Trade Regulation were operational. At that time, the OEB exemption was also in force, and thus continues for the purpose of the information at issue. The repeal of the regulation cannot enlarge the ambit of the strictly confidential treatment that was afforded.

In the absence of the statutory prohibitions in the Climate Change Act, it would still be appropriate for auction information at issue in this proceeding to be treated as strictly confidential based on the factors outlined below.

Market sensitive information was also treated as strictly confidential in the OEB's Cap and Trade Framework and in the OEB's consideration of the 2017 and 2018 compliance plans.²⁵ This was a departure from the OEB's usual approach of providing intervenors with access to confidential information upon signing a Declaration and Undertaking to not disclose the information. The OEB has decided to continue that approach to market sensitive information in this proceeding. In arriving at this decision, the OEB balanced

²³ Sullivan, Ruth, *Sullivan on the Construction of Statutes* (LexisNexis Canada Inc., 2014, 6th Edition), at page 771.

²⁴ *Re. Estate of Joseph Paul Grieco, deceased*, 2013 ONSC 2465, *Township of Nepean v. Leikin*, 1971 CanLII 642 (ON CA).

²⁵ EB-2017-0224/EB-2017-0255/EB-2017-0275, Procedural Order No. 6 the OEB suspended its review of the Gas Utilities' cap and trade compliance plans.

the objective of transparency vs. the potential risks and consequences of disclosure. The strictly confidential designation was based on the following factors:

1. Enbridge Gas' Québec affiliate, Gazifère, continues to be a participant in the WCI. Gazifère may employ purchasing strategies associated or developed from the evidence in future auctions or future compliance programs.
2. There is uncertainty concerning the form and course of future efforts to constrain GHG emissions that may make use of similar mechanisms and put Ontario participating Gas Utilities at a disadvantage.
3. There is concern that disclosure may involve unintentional infringement of the agreement between Ontario, Québec and California to protect confidential information about auctions.

4 ORDER

THE OEB ORDERS THAT:

1. OEB staff and intervenors may request any relevant information and documentation on evidence from each of the Gas Utilities that is in addition to the supplemental evidence already filed, by written interrogatories filed with the OEB and served on all parties by **May 10, 2019**.
2. OEB staff interrogatories that reference strictly confidential information shall be clearly identified as such and served only on the gas utility to which the interrogatories are directed by **May 10, 2019**.
3. Each of the Gas Utilities shall file with the OEB complete written responses to all interrogatories and serve them on all intervenors and OEB staff by **May 31, 2019**. Responses to strictly confidential interrogatories shall be filed only with the OEB and shall be clearly identified as strictly confidential.
4. Intervenors and OEB staff may file written submissions related to the public evidence of the Gas Utilities with the OEB and deliver them to all parties by **June 21, 2019**.
5. OEB staff may file written submissions related to the strictly confidential evidence of the Gas Utilities that are to be clearly identified as strictly confidential and served only on the gas utility to which the written submission is directed by **June 21, 2019**.
6. Each of the Gas Utilities may file written reply submissions related to the public evidence of the Compliance Plans with the OEB and deliver them on to all parties by **July 19, 2019**.
7. Each of the Gas Utilities may file written reply submissions to the strictly confidential evidence that are to be clearly identified as strictly confidential and filed only with the OEB by **July 19, 2019**.

All filings to the OEB must quote the file numbers **EB-2018-0331**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.oeb.ca/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not

have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Laurie Klein at Laurie.Klein@oeb.ca and OEB Counsel, Lawren Murray, at Lawren.murray@oeb.ca.

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DATED at Toronto April 25, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary