Ministry of the Attorney General
Briefing Note
Civil Law Division
Crown Law Office - Civil

CONFIDENTIAL and SOLICITOR-CLIENT PRIVILEGED

Subject: ***Climate Change Mitigation and Low-carbon Economy Act, 2016* (CLOC File – Cap and Trade Analysis, 52632)**

Issue: **Use of Proceeds**

Background:

We have been asked to evaluate the constitutional risk associated with options for using proceeds in the Greenhouse Gas Reduction Account (the "GGRA") created under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* to offset costs to electricity consumers. What follows is our advice regarding Options 1, 2 and 3 prepared by the Ministry of Energy for the use of these proceeds. Options 4 and 5 are hybrid options which consist of a combination of Options 1, 2 and 3 and therefore we have not attempted to separately consider the legal risks associated with these options.

Analysis:

In his September 2, 2015 legal opinion, Justice Ian Binnie advised that "[t]he way in which the proceeds [in the GGRA] are used is a significant component of how the entire program will be characterized" (at page 11). The argument advanced by Justice Binnie was that charges levied for the purpose of modifying behaviour could fairly be construed as regulatory fees, rather than taxes. However, he took the view that the money raised by the government through the cap and trade charges needed to be devoted to purposes that are "directly" and "obviously" connected to the regulatory objectives of the program (at page 12). He observed that: "[t]he more tenuous the linkages between the expenditure and the regulatory purpose, the greater the risk of the legislation being characterized as an unconstitutional tax" (at page 12).

The behaviour modification objective of the government's cap and trade program is the reduction of greenhouse gas. As a result, any expenditure out of the GGRA must be as "directly" and "obviously" linked as practicable to that objective in order to ensure the constitutional validity of the scheme.

Justice Binnie has specifically cautioned against the use of GGRA proceeds to subsidize rebates in the electricity sector. Discounting the price of electricity would, absent other considerations, seem to create an incentive on consumers to increase their consumption, which might be seen by a reviewing court as likely to increase, rather than reduce, greenhouse gas emissions. Any use of the GGRA proceeds that would have the effect of increasing greenhouse gas emissions, directly or indirectly, would seem to be fundamentally inconsistent with the regulatory purposes of the program. For this reason, any use of the GGRA proceeds to offer rebates would need to incorporate features that demonstrate clear linkages to the reduction of greenhouse gas.

Option 3

The option with the lowest legal risk is Option 3.

As we understand it, the proposed rebate for commercial and industrial consumers in Option 3 is intended to incent users to shift their electricity consumption to "off-peak" hours. We understand that during off-peak hours, a higher proportion of Ontario's electricity capacity is produced by hydro and nuclear generators, which emit little or no greenhouse gases. As a result, shifting commercial and industrial consumption to this time of day would have a beneficial effect on the province's overall greenhouse gas emissions.

Assuming that there is evidence to support the beneficial effect of shifting consumption to off-peak hours, we are of the opinion that Option 3 would be consistent with the advice in Justice Binnie's opinion. This proposal seems to us to reflect a legitimate attempt to reduce greenhouse gas emissions, rather than a colourable attempt to subsidize electricity consumption. As a result, there would seem to be only a low legal risk associated with this option.

Option 2

The option with the highest legal risk is Option 2.

As we understand it, the proposed rebate consists of reducing the price of electricity (or providing direct rate relief) for industrial and commercial consumers at all hours of the day, irrespective of the makeup of Ontario's electricity generation at various times.

In our view, this option is likely to be seen by a reviewing court as a rebate or subsidy whose sole purpose is to reduce the price of electricity. Reducing the price of electricity may have the effect of increasing demand for electricity such that more electricity is consumed. In the absence of any evidence that increased electricity consumption will reduce greenhouse gas emissions, we are unable to conclude that this option will be viewed by a reviewing court as a legitimate use of GGRA proceeds which furthers the regulatory purpose of changing behaviour. In our view, there is likely a high legal risk associated with this option.

Option 1

It is difficult to quantify the precise legal risk associated with Option 1 on the basis of the information provided in the deck outlining the options.

Like Option 2, Option 1 could be characterized by a reviewing court as a rebate or subsidy to defray the costs of electricity consumption. It is not entirely clear that tying the rebate to the Global Adjustment Mechanism ("GAM") would link these expenditures directly and obviously to greenhouse gas reduction initiatives. We understand that many of the costs included in the GAM relate to longstanding hydro and nuclear generation facilities as well as natural gas plants. It is not clear to us that subsidizing the costs associated with long term generating capacity, even where that generating capacity has low or no greenhouse gas footprint (e.g. hydro and nuclear), necessarily constitutes a greenhouse gas reduction initiative. The greenhouse gas reduction benefits of historic facilities is already incorporated into Ontario's greenhouse gas footprint and subsidizing consumption could, perversely, have the effect of increasing greenhouse gas emissions going forward.

If the costs of any subsidy could be directly and obviously linked to specific greenhouse gas reduction programs, funded through the GAM, this would lower the legal risks associated with this option. However, there would need to be clear evidence to support this linkage and the ties would, in our view, need to be more than speculative.

Even if such a linkage existed, the legal risk associated with Option 1 would likely be higher than Option 3 because, from the perspective of an electricity consumer, the rebate would not incent them to reduce consumption and may dissuade them from making investments intended to reduce consumption. All of the regulatory benefit from this option would be obtained indirectly through the GAM.

CLOC FILE NAME: *Cap and Trade Analysis*

Prepared by:

Tom McKinlay
General Counsel
Crown Law Office – Civil
416-212-4626

Brent Kettles
Counsel
Crown Law Office – Civil
416-314-2040

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Approved by:

Director: ______________________________
Troy Harrison, Director, Crown Law Office - Civil

ADAG: ______________________________
Irwin Glassberg, Assistant Deputy Attorney General (Acting)
Civil Law Division

Deputy Minister: ______________________________
Patrick Monahan, Deputy Attorney General

Minister: ______________________________
The Honourable Yasir Naqvi, Attorney General