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

CONFIDENTIAL and SOLICITOR-CLIENT PRIVILEGED

Subject: **Electricity Price Mitigation Strategy**

Issue: **Costs of Conservation Programs and Initiatives**

Background:

You asked us to consider whether the costs associated with certain conservation programs and initiatives could be paid out of the cap and trade auction proceeds. The conservation costs (~$420 to $520 million annually) are currently borne by residential and commercial electricity ratepayers through the global adjustment mechanism. Paying them instead out of proceeds deposited in the Greenhouse Gas Reduction Account (the "GGRA") would result in a price reduction for ratepayers in an amount of $2-3 per month.

Opinion:

- Subject to the qualification below, there should be only a low risk if the government used cap and trade auction proceeds to defray the ongoing costs of conservation programs currently funded out of the global adjustment mechanism. You indicated that the conservation programs and initiatives are collectively expected to reduce CO_2 emissions by hundreds of thousands of tonnes each year. Assuming that there is credible evidence to support this expectation, the costs associated with the conservation programs would seem to fit squarely within the regulatory purpose of the CCMLcE Act.

- It is, however, difficult to quantify the legal risk associated with a single initiative in isolation. The legal risk of a successful constitutional challenge to the cap and trade program would depend on a holistic assessment of the amount of money deposited into the GGRA and the character of all initiatives supported by cap and trade auction proceeds. However, initiatives which provide a rebate on electricity will attract particular scrutiny as, absent other considerations, they tend to incent consumers to use more rather than less electricity which may frustrate the purpose of the CCMLcE Act. It would not be ideal if one of the signature initiatives funded out of the GGRA involves an electricity rebate. To the extent that funding conservation costs out of the GGRA, at the amounts currently proposed, constitutes a substantial portion of total GGRA spending, it will invite further scrutiny and will increase the legal risk of a successful challenge.

- There would be a higher legal risk associated with any proposal to retroactively reimburse ratepayers for conservation costs paid in 2015 and 2016. Any GHG reduction benefits associated with the programs and initiatives funded through those charges already exist and no additional benefit would be realized through reimbursements to ratepayers. It is difficult to precisely quantify this increased legal risk, but we are of the view that it would generally be prudent to limit GGRA funding to the ongoing costs of GHG reduction programs and initiatives.

Analysis:

In his legal opinion dated September 2, 2015 (the "September 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 more tenuous the linkages between the government initiatives paid out of the GGRA and the regulatory purpose of GHG reduction, the greater the risk that the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (the "CCMLcE Act") could be characterized as involving the imposition of an unconstitutional tax.

This aspect of Justice Binnie's advice is reflected in the provisions of the CCMLcE Act. Section 71(2)2 of the Act makes it clear that cap and trade auction funds may be used only to "fund, directly or indirectly, costs relating to initiatives…that are reasonably likely to reduce, or support the reduction of, greenhouse gas".

Applying these principles to this case, there should, in principle, be only a low risk if the government used cap and trade auction proceeds to defray the ongoing costs of conservation programs currently funded out of the global adjustment mechanism. You indicated that the conservation programs and initiatives are collectively expected to reduce CO_2 emissions by hundreds of thousands of tonnes each year. Assuming that there is credible evidence to support this expectation, the costs associated with the conservation programs would seem to fit squarely within the regulatory purpose of the CCMLcE Act.

We note that Justice Binnie took the view that any use of cap and trade auction proceeds to provide rebates to electricity consumers would be inherently problematic. He observed that discounting the price of electricity would, absent other considerations, likely be perceived by a reviewing court as contrary to the purposes of the cap and trade program because it creates an incentive for increased consumption and GHG emissions. However, in this case, the economic value of the proposed consumer rebate is relatively trivial and the GHG reduction benefits are quite substantial. As a result, the proposal does not have the appearance of a colourable attempt to use cap and trade auction proceeds to advance objectives unrelated to GHG reduction.

We recognize that the conservation programs were established in 2015 and predate the enactment of the CCMLcE Act. However, we are of the view that this consideration is not a significant impediment to the use of cap and trade auction proceeds to defray the conservation costs on a going forward basis. In the September Opinion, Justice Binnie indicated that he was satisfied that the government could reasonably use cap and trade auction proceeds to defray the costs of existing GHG reduction initiatives (at page 13). He accepted that the fact that a GHG reduction program was established prior to the enactment of the CCMLcE Act does not prevent the government from using cap and trade auction proceeds to support the continuing delivery of programs.

There would be a higher legal risk associated with any proposal to retroactively reimburse ratepayers for conservation costs paid in 2015 and 2016. Any GHG reduction benefits associated with the programs and initiatives funded through those charges already exist and no additional benefit would be realized through reimbursements to ratepayers. It is difficult to quantify this increased risk precisely, but we are of the view that it would generally be prudent to limit GGRA funding to the ongoing costs of GHG reduction programs and initiatives.

The other complicating feature of the current proposal is the large size of the proposed payment out of the GGRA. Although it is not entirely clear how much money the government will raise through the cap and trade auction, the conservation costs (~$420 to $520 million annually) are likely to appear substantial relative to the total amount deposited into the GGRA each year. The relative amount of the expenditure is potentially significant because of the inherent difficulty associated with funding electricity rebates out of the GGRA. In light of the legal uncertainty in this area, Justice Binnie recommended a conservative approach to the use of cap and trade auction proceeds. He suggested that "the Province should begin by investing in Projects which are very clearly related to the regulatory goal of reducing GHG emissions" (at page 13). Electricity rebates will likely attract particular scrutiny and therefore, it would not be ideal if one of the signature initiatives funded out of the GGRA involves an electricity rebate.

However, the legal risks associated with this concern are hard to precisely quantify on the basis of a single initiative in isolation. The overall legal risks would depend on the amount of money deposited into the GGRA and the character of the other initiatives supported by cap and trade auction proceeds. A reviewing court would no doubt take a holistic view of all of the various initiatives funded out of the GGRA in considering this component of the constitutional justification of the cap and trade program.

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