



Lisa (Elisabeth) DeMarco
Senior Partner
Bay Adelaide Centre
333 Bay Street, Suite 625
Toronto, ON M5H 2R2
TEL +1.647.991.1190
FAX +1.888.734.9459
lisa@demarcoallan.com

March 27, 2020

VIA RESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Registrar

Dear Ms. Long:

**Re: Enbridge Gas Inc. 2020 Federal Carbon Pricing Program (FCPP) Application
Board File No.: EB-2019-0247 (the Proceeding)**

We are counsel to Anwaatin Inc. (**Anwaatin**) in the Proceeding and in receipt of the Board's March 19, 2020 decision revoking the intervenor status previously granted to Anwaatin and the Chiefs of Ontario (**COO**) on February 6, 2020 (the **Revocation Decision**). The Board made the Revocation Decision without notice or affected party submissions on the grounds that: (i) the Ontario Court of Appeal has upheld the constitutional validity of the federal *Greenhouse Gas Pollution Pricing Act* (**GGPPA**) in 2019 ONCA 544 (the **Ontario Reference**) and the Supreme Court of Canada is now seized of the constitutional validity, tax/regulatory charge issue; and (ii) neither Anwaatin nor COO raised the issue in Enbridge's EB-2018-0205 proceeding (the **2019 FCPP**). It is with respect that Anwaatin submits that neither of these grounds are valid.

Constitutional Applicability — not Validity. Anwaatin's notice of intervention does not challenge the constitutional *validity* of the GGPPA, nor does Anwaatin intend to make such a challenge. It asks the Board, as the most appropriate and relevant decision-making entity, to consider the *applicability* of Enbridge's proposed FCPP natural gas charges to indigenous and/or reserve communities in light of sections 87 and 89 of the *Indian Act*, treaty rights, and section 35 of the Constitution. The applicability of these additional charges falls squarely within the Board's jurisdiction and is incredibly important to indigenous communities. Anwaatin respectfully submits that the Board's failure to consider this issue effectively fetters the Board's discretion and results in a *de facto* decision that the FCPP charges are, in fact, applicable to indigenous and reserve communities without due consideration, reasons, or the procedural protections afforded by the rules of natural justice.¹ This is inconsistent with the Board's duty to exercise its discretion only after considering the particulars of each situation and making a decision on the merits of each case.²

¹ *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24 (Stratas, JA).

² Cartier, G (2013). "Administrative Discretion: Between Exercising Power and Conducting Dialogue." In CM Flood & L Sossin (eds.), *Administrative Law in Context* (Emond: 2nd ed.), p 393.

Further, neither the Ontario Court of Appeal nor the Supreme Court of Canada was, or is, seized of the issue of the *applicability* of the GGPPA in the Ontario Reference and the Ontario and Saskatchewan³ appeals now before the Supreme Court of Canada (the **SCC Appeals**), respectively. The Ontario Reference and the SCC Appeals are confined to the sole issue of whether the GGPPA is constitutionally valid, and do not include any consideration of whether the charges resulting from the GGPPA, when calculated by a natural gas distributor and included in natural gas charges, are constitutionally applicable in light of the *Indian Act*, relevant treaties, and section 35 of the Constitution. The issue of whether these charges are construed as a tax or a regulatory charge is also irrelevant to the Board's determination of the applicability of the charges given the breadth of section 87 and 89 of the *Indian Act*, which apply to, without limitation, any tax, charge, or levy.

Moreover, the Board's procedural approach in granting — and then revoking — intervenor status to the only two indigenous intervenors without further grounds or submissions is highly irregular and reflective of historical practices that are not consistent with its duties, reconciliation, and the honour of the Crown.⁴

The 2019 FCPP. Neither Anwaatin nor COO were intervenors of record participating in Enbridge's 2019 FCPP. Anwaatin was not seized of the issue in 2018 when that proceeding arose, and certainly cannot be faulted for not raising an issue in a proceeding in which it did not participate.

In light of the foregoing and Rule 40 of the Board's *Rules of Practice and Procedure*, Anwaatin respectfully requests that the Board reconsider its Revocation Decision, affirm Anwaatin's previously granted intervenor status and cost eligibility, and consider the applicability of the FCPP to indigenous and reserve communities as part of the Proceeding.

Sincerely,



Lisa (Elisabeth) DeMarco

- c. Adam Stiers and Tania Persad, Enbridge Gas Inc.
Kathleen Padulo, Chiefs of Ontario
Larry Sault, Anwaatin Inc.
Don Richardson
All Parties of Record

³ And Alberta and British Columbia.

⁴ The Board originally granted Anwaatin intervenor status and cost award eligibility in Procedural Order No. 1, issued on February 6, 2020.