



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

July 29, 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. (the Applicant)
2020 Federal Carbon Pricing Program (FCCP) Application
OEB File No.: EB-2019-0247

We are counsel to Anwaatin Inc. (**Anwaatin**). Please find attached an amendment to Anwaatin's submissions (the **Amendment**) reflecting new information, which is submitted in accordance with Rule 11 of the Board's *Rules of Practice and Procedure* (the **Rules**). Anwaatin hereby requests that the Board accept the Amendment in accordance with section 11.01(a) of the Rules.

The Amendment is necessitated by the issuance yesterday of an Order (the **Order**) by the Chief Justice of the Supreme Court of Canada (**SCC**) effectively confirming that issues related to the application of s. 87 of the *Indian Act* to charges imposed by the *Greenhouse Gas Pollution Pricing Act* (**GGPPA**) are not before the SCC in the GGPPA appeals. Anwaatin respectfully submits that the Order represents new information that is clearly material to the Board's refusal to hear issues raised by Anwaatin until after the SCC renders its decision in the GGPPA appeals.

Sincerely,

A handwritten signature in black ink, appearing to be "Lisa", with a long, sweeping horizontal line extending to the right.

Lisa (Elisabeth) DeMarco

c. Adam Stiers and Tania Persad, Enbridge Gas Inc.
Larry Sault, Anwaatin Inc.
Don Richardson

Encl.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an application by Enbridge Gas Inc. (**Enbridge Gas**), for an order or orders for gas distribution rate changes and clearing certain non-commodity deferral and variance accounts related to compliance obligations under the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186. (the **Application**).

EB-2019-0247

SUBMISSIONS

OF

ANWAATIN INC.

AMENDMENT

July 9 29, 2020

1. We are counsel to Anwaatin Inc. (**Anwaatin**) in the matter of Enbridge Gas' application to the Ontario Energy Board (the **Board** or the **OEB**), for (a) a **final** order allowing it to charge customers a Federal Carbon Charge under the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (the **GGPPA**), **effective April 1, 2020**; (b) a **final** order approving or fixing just and reasonable rates for all Enbridge Gas rate zones (EGD, Union North and Union South), **effective April 1, 2020**, to allow Enbridge Gas to recover other costs (including Facility Carbon Charge costs) in compliance with the GGPPA; and (c) approval of 2019 balances for all FCPP-related deferral and variance accounts, for all Enbridge Gas rate zones and for an **order to dispose of those balances effective October 1, 2020** (the **Application**).
2. Anwaatin is a collective of Indigenous communities including Aroland First Nation, Animbiigoo Zaagi'igan Anishinaabek Nation, and Ginoogaming First Nation (the **Anwaatin First Nations**) and has full intervenor status in this proceeding. The Anwaatin First Nations each have traditional territory, and associated Aboriginal rights and interests protected by the *Constitution Act, 1982*, that may be impacted by the outcomes of this proceeding.
3. Anwaatin and the Board have had several interchanges regarding the express scope of Anwaatin's intervention and the Board's intent to defer the constitutional and indigenous taxation issues raised by Anwaatin and the Chiefs of Ontario (**COO**), without creating a deferral and variance account for such charges. They are summarized below:

Procedural History	Impact or Outcome
<p>Jan. 27, 2020: Anwaatin's Notice of Intervention indicated it may make submissions on:</p> <ul style="list-style-type: none">• constitutional and section 35 dimensions of Application and related First Nations rights; and• disproportionate number of Indigenous communities currently living in energy poverty in Ontario and stakeholder views on differential	<p>Feb. 6: Board granted Anwaatin intervenor status (and cost eligibility) in Procedural Order No. 1, noted that "OEB Panel hearing this application will make a determination on the extent to which the issues that COO and Anwaatin have raised will be considered as part of the current proceeding."³</p>

³ Procedural Order No. 1 (February 6, 2020) at pp. 4-5, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/667101/File/document>.

<p>impact of natural gas rates on remote and near-remote communities.¹</p> <p>Jan. 23: COO application for intervenor status noted concerns with respect to application of ss. 87 and 89 of <i>Indian Act</i> to charges imposed by the GGPPA.²</p>	
<p>Mar. 19: Board decision to:</p> <ul style="list-style-type: none"> • proceed on basis that Court of Appeal for Ontario (ONCA) has rendered opinion (currently on appeal to Supreme Court of Canada (SCC)) that GGPPA, and therefore charges imposed by GGPPA, are constitutional;⁴ • defer consideration of Deferred Issues raised by COO and Anwaatin until SCC decision;⁵ and • exclude from scope of proceeding issues raised by Anwaatin associated with energy poverty in indigenous communities and differential impact of natural gas rates on remote and near remote communities.⁶ <p>Board stated that “should the SCC uphold the constitutionality of the GGPPA and of the charges thereunder such that the concerns raised by the COO and Anwaatin remain, these matters can be considered at that time and be informed by the SCC’s views.”⁷ Board</p>	<p>Anwaatin intervenor status effectively revoked by exclusion of Deferred Issues.</p> <p>Mar. 27: Anwaatin response noted that:</p> <ul style="list-style-type: none"> • applicability of GGPPA charges falls within Board’s jurisdiction; Board’s failure to consider Deferred Issues effectively fetters Board’s discretion and results in <i>de facto</i> decision that GGPPA charges are, in fact, applicable to indigenous and reserve communities without due consideration, reasons, or procedural protections afforded by rules of natural justice;⁹ • neither ONCA nor SCC was, or is, seized of <i>applicability</i> of GGPPA; appeals to SCC are instead confined to sole issue of whether the GGPPA is constitutionally <i>valid</i>.¹⁰ <p>Attorney General of Canada noted in recent SCC submissions (attached as Exhibit A) that issues under s. 87 of <i>Indian Act</i> concern GGPPA’s <i>application, not its validity</i>.¹¹ <u>The</u></p>

¹ Anwaatin Inc., Notice of Intervention (January 27, 2020) at para 6, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/666152/File/document>.

² Chiefs of Ontario, Application for Intervenor Status (January 23, 2020), available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/665912/File/document>.

⁴ Decision on Updated Intervention Requests and Scope of Proceeding (March 19, 2020) at p. 6, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/671414/File/document>. The opinion of the Court of Appeal for Ontario in question (2019 ONCA 544) is currently on appeal to the Supreme Court of Canada, as are two related opinions of the Court of Appeal for Saskatchewan (2019 SKCA 40) and the Court of Appeal of Alberta (2020 ABCA 74).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁹ Anwaatin Inc., Letter (March 27, 2019) at p. 1, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/672965/File/document>.

¹⁰ *Ibid.*

¹¹ See Exhibit A, Letter (June 29, 2020), Attorney General of Canada, Court File Nos., 38663, 38781 and 39116 [emphasis added].

also stated that “the issue of whether the charges imposed by the GGPPA are taxes has been raised in the SCC proceedings.” ⁸	<u>Chief Justice of Canada confirmed by Order dated July 28, 2020 (attached as Exhibit B) that an intervener seeking to make submissions on s. 87 of the <i>Indian Act</i> is not entitled to raise such new issues. The Order effectively confirms that the Deferred Issues are not before the SCC in the GGPPA appeals.</u>
Apr. 3: Board reiterated deferral of Deferred Issues until SCC has rendered decision and restated that scope of proceeding does not include issues raised by Anwaatin associated with energy poverty in indigenous communities and differential impact of natural gas rates on remote and near remote communities. ¹²	Apr. 15: Anwaatin reiterated that SCC is seized of the constitutional <i>validity</i> of the GGPPA, and not its applicability. Anwaatin requested that Board clarify its intended procedures to consider Deferred Issues and ensure that all GGPPA charges affected by the Deferred Issues be placed in a deferral and variance account pending Board’s due consideration. ¹³
Apr. 21: Board replied indicating that it remains of view that all consideration of the Deferred Issues is postponed and no further action is required at this time. ¹⁴ Board stated that such postponement “does not limit the OEB’s ability to address this issue at a future date.” ¹⁵	Board refused Anwaatin’s request to establish deferral and variance account for GGPPA charges affected by Deferred Issues. Charges affected by Deferred Issues imposed on the Anwaatin First Nations and other First Nation and Métis communities without due consideration, reasons, or procedural protections afforded by rules of natural justice.

4. Specifically, the Board has refused to hear Anwaatin’s issues on energy poverty in indigenous communities and the differential impact of natural gas rates on remote and near remote communities and deferred any Board consideration of Anwaatin issues related to the application of sections 87 and 89 of the *Indian Act* and section 35 of the *Constitution Act, 1982* to the charges imposed by the GGPPA (the **Deferred Issues**) and in doing so has predetermined that such charges will apply to the Anwaatin communities without hearing from Anwaatin.

⁸ *Ibid.*

¹² Board Secretary, Letter (April 3, 2020) at p. 1, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/673587/File/document>.

¹³ Anwaatin Inc., Letter (April 15, 2020) at pp. 1-2, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/674327/File/document>.

¹⁴ Board Secretary, Letter (April 21, 2020) at p. 1, available online at: <http://www.rds.oeb.ca/HPECMWebDrawer/Record/675039/File/document>.

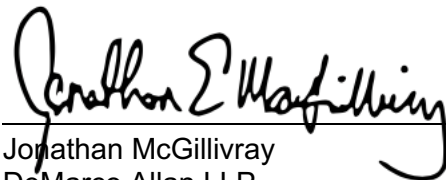
¹⁵ *Ibid.*

5. The Board has therefore effectively silenced Anwaatin and denied its members of their legislative, constitutional, and common law right to be heard contrary to each and all of: sections 2, 19, 20, and 36 of the *Ontario Energy Board Act, 1998*; sections 87 and 89 of the *Indian Act*; section 35 of the *Constitution Act, 1982*; and the common law as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9; *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817; *United States v Lake*, 2008 SCC 23; *NLNU v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62; *Burke v NAPE*, 2010 NLCA 12; and *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS
9 29th day of July, 2020



Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
Counsel for Anwaatin



Jonathan McGillivray
DeMarco Allan LLP
Counsel for Anwaatin

EXHIBIT A



**Department of Justice
Canada**

**Ministère de la Justice
Canada**

Security Classification/
Classification de sécurité :

PROTECTED B

Prairie Region
301 - 310 Broadway
Winnipeg MB R3C 0S6

Région des Prairies
310, Broadway, bureau 301
Winnipeg MB R3C 0S6

Telephone/Téléphone: (204) 983-0862
Facsimile/Télocopieur: (204) 984-8495
Email/Courriel: Sharlene.Telles-Langdon@justice.gc.ca

Our File/Notre dossier: 500002615 / 500005032
Your file/Votre dossier: 38663 / 38781

June 29, 2020

VIA EMAIL

Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

Attention: Mr. Roger Bilodeau, Q.C., Registrar

Dear Sir:

**Re: Attorney General of Saskatchewan v. Attorney General of Canada; File No. 38663
Attorney General of Ontario v. Attorney General of Canada; File No. 38781
Attorney General of British Columbia v. Attorney General of Alberta; File No. 39116**

This is the Attorney General of Canada's (Canada) response to Thunderchild First Nation's motion for an extension of time and for leave to intervene in the Saskatchewan (38663) and Ontario (38781) appeals in which Canada is a party.

Canada does not oppose Thunderchild First Nation's motion for an extension of time. Further, Canada does not oppose Thunderchild First Nation's motion for leave to intervene. However, Canada asks that this Court limit Thunderchild First Nation's intervention to arguments addressing the issues before the Court in these appeals.

Specifically, Canada accepts that Thunderchild First Nation has an interest in the issues in these appeals. Further, Canada agrees that s. 35 of the Constitution is relevant to this Court's consideration of the constitutional validity of the *Greenhouse Gas Pollution Pricing Act (Act)*. However, Thunderchild First Nation's proposed submissions on whether the exemption available to Indians and Indian bands under s. 87 of the *Indian Act*, 1985 c. I-5, should exempt the Band or its members from some or all applications (direct or indirect) of the fuel charge under the *Act* concern the *Act*'s application, not its validity. Further, this is a new and complex issue that is not before this Court in the current appeals. Thus, Thunderchild First Nation should not be permitted to advance arguments regarding the tax exemption provided under s. 87 of the *Indian Act*.

Yours truly,

Sharlene Telles-Langdon
Senior General Counsel
Prairie Region
Department of Justice Canada

cc. *via* email

Marie-France Major, Agent for:
The Attorney General of Ontario
Canadian Taxpayers Federation
(mfmajor@supremeadvocacy.ca)

D. Lynne Watt, Agent for:
The Attorneys General of Saskatchewan, Manitoba and New Brunswick;
Saskatchewan Power Corporation and SaskEnergy Incorporated
(lynne.watt@gowlingwlg.com)

Alyssa Tomkins, Agent for:
The Attorney General of Alberta
(atomkins@plaideurs.ca)

Michael Sobkin, Agent for:
The Attorney General of British Columbia
(msobkin@sympatico.ca)

Pierre Landry, Correspondant pour:
les avocats de la Procureure générale du Québec
(p.landry@noelassocies.com)

David Taylor, Agent for:
Amnesty International Canada
(dtaylor@conway.pro)

Genevieve Boulay, Agent for:
Anishinabek Nation and the United Chiefs and Councils of Mnidoo Mnising
(genevieve@westawaylaw.ca)

Amir Attaran, Counsel for:
Athabasca Chipewyan First Nation
(aattaran@ecojustice.ca)

Matt Hulse, Counsel for:
Athabasca Chipewyan First Nation
(mhulse@woodwardandcompany.com)

Maxine Vincelette, Agent for:
Assembly of Manitoba Chiefs;
The City of Richmond, City of Victoria, City of Nelson, District of Squamish and City of Vancouver;
Équiterre / Quebec Environmental Law Center - Centre québécois du droit de l'environnement
(mvincelette@powerlaw.ca)

Bijon Roy, Agent for:
Canada's Ecofiscal Commission
(broy@champlaw.ca)

Jeffrey W. Beedell, Agent for:
Canadian Environmental Law Association, Environmental Defence Canada Inc. and Sisters of
Providence of St. Vincent de Paul;
Canadian Public Health Association
(jeff.beedell@gowlingwlg.com)

Colleen Bauman, Agent for:
Canadian Labour Congress
(cbauman@goldblattpartners.com)

Joshua Ginsberg and Randy Christensen, Counsel for:
David Suzuki Foundation
(jginsberg@ecojustice.ca, rchristensen@ecojustice.ca)

Lisa DeMarco and Jonathan McGillivray, Counsel for:
International Emissions Trading Association
(lisa@demarcoallan.com, jonathan@demarcoallan.com)

Darius Bosse, Agent for:
Intergenerational Climate Coalition
(dbosse@juristespower.ca)

Marion Sandilands, Agent for:
National Association of Women and the Law and Friends of the Earth
(msandilands@conway.pro)

Moirra Dillon, Agent for:
Oceans North;
Assembly of First Nations;
Climate Justice, et al.
(mdillon@supremelawgroup.ca)

Dylan McGuinty, Jr., Agent for:
Progress Alberta Communications Limited
(dylanjr@mcguintylaw.ca)

Guy Regimbald, Agent for:
Smart Prosperity Institute
(guy.regimbals@gowlingwlg.com)

EXHIBIT B



July 28, 2020

Le 28 juillet 2020

ORDER
MOTION

ORDONNANCE
REQUÊTE

**ATTORNEY GENERAL OF
SASKATCHEWAN
v.
ATTORNEY GENERAL OF CANADA
(Sask.) (38663)**

and

**ATTORNEY GENERAL OF ONTARIO
v.
ATTORNEY GENERAL OF CANADA
(Ont.) (38781)**

and

**ATTORNEY GENERAL OF BRITISH
COLUMBIA
v.
ATTORNEY GENERAL OF ALBERTA
(Alta.) (39116)**

THE CHIEF JUSTICE:

UPON APPLICATION by Thunderchild First Nation for leave to intervene in the above appeals;

AND UPON APPLICATION by Thunderchild First Nation for an order extending the time to

**PROCUREUR GÉNÉRAL DE LA
SASKATCHEWAN
c.
PROCUREUR GÉNÉRAL DU CANADA
(Sask.) (38663)**

et

**PROCUREUR GÉNÉRAL DE L'ONTARIO
c.
PROCUREUR GÉNÉRAL DU CANADA
(Ont.) (38781)**

et

**PROCUREUR GÉNÉRAL DE LA
COLOMBIE-BRITANNIQUE
c.
PROCUREUR GÉNÉRAL DE L'ALBERTA
(Alb.) (39116)**

LE JUGE EN CHEF:

À LA SUITE DE LA DEMANDE présentée par Thunderchild First Nation en vue d'obtenir la permission d'intervenir dans les appels;

ET À LA SUITE DE LA DEMANDE présentée par Thunderchild First Nation en vue d'obtenir la

serve and file its motion for leave to intervene in the appeals *Attorney General of Saskatchewan v. Attorney General of Canada* (38663) and *Attorney General of Ontario v. Attorney General of Canada* (38781);

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT:

The motions are granted.

The said intervener shall be entitled to serve and file a single factum not to exceed five (5) pages in length, and a book of authorities, if any, on or before August 12, 2020.

The said intervener is granted permission to present oral argument not exceeding five (5) minutes at the hearing of the appeals.

The intervener is not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 59(1)(a) of the *Rules of the Supreme Court of Canada*, the intervener shall pay to the appellants and the respondents any additional disbursements resulting from its intervention.

prorogation du délai de signification et de dépôt de sa requête en autorisation d'intervention dans les pourvois *Procureur général de la Saskatchewan c. Procureur général du Canada* (38663) et *Procureur général de l'Ontario c. Procureur général du Canada* (38781);

ET APRÈS EXAMEN des documents déposés;

IL EST ORDONNÉ CE QUI SUIT :

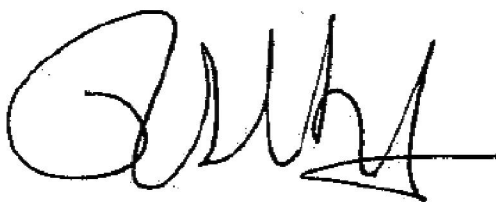
Les requêtes sont accueillies.

Cette intervenante est autorisée à signifier et à déposer un mémoire d'au plus cinq (5) pages, ainsi qu'un recueil de sources, au plus tard le 12 août 2020.

L'intervenante est autorisée à présenter une plaidoirie orale d'au plus cinq (5) minutes lors de l'audition des appels.

L'intervenante n'a pas le droit de soulever de nouvelles questions, de produire d'autres éléments de preuve ni de compléter de quelque autre façon le dossier des parties.

Conformément à l'alinéa 59(1)a) des *Règles de la Cour suprême du Canada*, l'intervenante paiera aux appelants et aux intimés tous débours supplémentaires résultant de son intervention.



C.J.C.
J.C.C.