



**Enbridge Gas Inc.**  
**2020 Federal Carbon Pricing Program Application**  
**PROCEDURAL ORDER NO. 3**

**April 20, 2021**

Enbridge Gas Inc. applied to the OEB on November 18, 2019 for approval under section 36(1) of the *Ontario Energy Board Act, 1998* to increase rates effective April 1, 2020 to recover costs associated with meeting its obligations under the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA). Enbridge Gas also applied to recover from customers the 2019 balances in the related deferral and variance accounts.

The GGPPA established a carbon pricing program, the Federal Carbon Pricing Program (FCPP), under which a natural gas utility in Ontario, such as Enbridge Gas, is required to pay a Fuel Charge to the Government of Canada, for emissions from the natural gas that it delivers to its customers, and for its own emissions. Enbridge Gas includes a Federal Carbon Charge on customer bills to recover the amount of the Fuel Charge it pays to the Government of Canada for its customers' emissions.

A Decision and Order was issued in this 2020 FCPP proceeding on August 13, 2020. As part of that decision, Enbridge Gas's rates related to the Federal Carbon Charge were left interim for First Nations on-reserve customers, pending the OEB's consideration of issues related to the constitutionality of the GGPPA Fuel Charge and the requirements of the federal *Indian Act* (the Deferred Issues). The OEB indicated consideration of the Deferred Issues would occur after the Supreme Court of Canada (SCC) had issued a decision regarding the constitutionality of the GGPPA. The SCC's [decision](#) on this matter was issued on March 25, 2021.

Given that Enbridge Gas's rates related to the Federal Carbon Charge remain interim for First Nations on-reserve customers, the OEB needs to make a final determination of the applicability of those rates for First Nations on-reserve customers, including addressing the Deferred Issues as needed.

This Procedural Order provides background and sets out next steps in this proceeding.

## Background on Deferred Issues

In their requests for intervenor status in this proceeding, the Chiefs of Ontario (COO) and Anwaatin Inc. (Anwaatin) raised issues related to the constitutionality of the GGPPA Fuel Charge and the requirements of the *Indian Act*. The COO commented that permission from Enbridge Gas to recover the costs of the GGPPA Fuel Charge from its customers is subject to sections 87 or 89 of the *Indian Act*, which COO stated recognized “First Nation immunity from taxes or charges on any property situated on a reserve”.<sup>1</sup> COO also stated that “Canada (“the Crown”) as the fiduciary, for First Nations people is obligated to insure the treaty and s. 35 rights of First Nations people are not ignored”.<sup>2</sup> Anwaatin also indicated that it may make submissions on the constitutional and section 35 dimensions of Enbridge Gas’s application and related First Nations rights.

[Procedural Order No. 1](#), issued February 6, 2020, approved the intervention requests of COO and Anwaatin, and indicated that the OEB Panel hearing this application would make a determination on the extent to which the issues that COO and Anwaatin have raised would be considered as part of the proceeding.

In its March 19, 2020 [Decision on Updated Intervention Requests and Scope of Proceeding](#), the OEB noted that the SCC was scheduled to hear appeals on the constitutionality of the GGPPA later in 2020. The OEB therefore determined that it would defer consideration of these issues until the SCC rendered its decision on those appeals. The OEB also determined that issues raised by Anwaatin associated with energy poverty in indigenous communities were out of scope of the 2020 FCPP proceeding.

On August 13, 2020, the OEB issued a [Decision and Order](#) in the 2020 FCPP proceeding. At that time, the appeals before the SCC had not been heard. The OEB determined that the Federal Carbon Charge rates, and associated rate riders for disposition of the 2019 balances in the Customer Variance Accounts, approved in the Decision and Order, would apply on an interim basis for Enbridge Gas’s First Nations

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<sup>1</sup> Section 87(1) of the *Indian Act* states: “Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal Management Act, the following property is exempt from taxation: (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve”. Section 89(1) of the *Indian Act* states: “Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.”

<sup>2</sup> Section 35 (1) of the federal *Constitution Act, 1982* recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada.

on-reserve customers until the OEB's determination on the Deferred Issues.<sup>3</sup> The OEB also established a tracking account to record the Federal Carbon Charge payments (including disposition of the balances in the Customer Variance Accounts) collected by Enbridge Gas from First Nations on-reserve customers, until the final determination of the Deferred Issues.

### **Supreme Court of Canada Decision on Constitutionality of GGPPA**

On March 25, 2021, the SCC issued its decision regarding the constitutionality of the GGPPA. The Majority of the SCC found that the GGPPA sets minimum national standards of greenhouse gases price stringency to reduce greenhouse gas emissions and falls within federal jurisdiction as it is a matter of national concern under the "peace, order, and good government" clause of section 91 of the *Constitution Act, 1867*.<sup>4</sup> In doing so, the Majority concluded, among other things, that the Fuel Charge and excess emission charge imposed by the GGPPA are not taxes, but rather constitutionally valid regulatory charges.<sup>5</sup>

### **Next Steps**

Having regard to the SCC decision, Anwaatin and COO are being provided an opportunity to file letters with the OEB indicating whether they are requesting the OEB to proceed to adjudicate the Deferred Issues, and intend to file submissions on those issues.

If letters are filed, the OEB will then determine subsequent steps in this proceeding, including the schedule for any submissions. In the absence of letters, the OEB will proceed to make a determination on final rates for Enbridge Gas.

### **THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Anwaatin and the Chiefs of Ontario may file letters indicating whether they are requesting the OEB to adjudicate the Deferred Issues, and are intending to file submissions on those issues, by May 3, 2021.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, do not include personal information (as that phrase is

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<sup>3</sup> Decision and Order, p. 18.

<sup>4</sup> [References re: Greenhouse Gas Pollution Pricing Act](#), 2021 SCC 11, paras 207, 221.

<sup>5</sup> [References re: Greenhouse Gas Pollution Pricing Act](#), 2021 SCC 11, para. 219; see also para. 16.

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defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's *Rules of Practice and Procedure*.

All materials filed with the OEB must quote the file number **EB-2019-0247** and be submitted in a searchable/unrestricted PDF format with a digital signature through the OEB's web portal at <https://p-pes.ontarioenergyboard.ca/PivotalUX/>. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at [www.oeb.ca/industry](http://www.oeb.ca/industry). We encourage the use of RESS; however, parties who have not yet [set up an account](#), may email their documents to [registrar@oeb.ca](mailto:registrar@oeb.ca).

All communications should be directed to the attention of the Registrar 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, Michael Parkes at [Michael.Parkes@oeb.ca](mailto:Michael.Parkes@oeb.ca) and OEB Counsel, Lawren Murray at [Lawren.Murray@oeb.ca](mailto:Lawren.Murray@oeb.ca).

Email: [registrar@oeb.ca](mailto:registrar@oeb.ca)

Tel: 1-877-632-2727 (Toll free)

**DATED** at Toronto, **April 20, 2021**

**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long  
Registrar