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

WRITTEN SUBMISSIONS OF

CHIEFS OF ONTARIO

JUNE 7, 2021

Introduction

1. I am counsel to the Chiefs of Ontario ("COO") in the matter of Enbridge Gas Inc's (the "Applicant's") 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 on a volumetric basis, in the amount of the federal carbon charge to be paid pursuant to the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 ("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 the Applicant 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. COO supports First Nations across Ontario in exercising their inherent Aboriginal and Treaty rights.

3. COO adopts the submissions of Anwaatin Inc. insofar as they support the inapplicability of the carbon pricing charge (the "Charge") to on- and off-reserve First Nations under sections 87 and 89 of the *Indian Act* and section 35 of the Constitution. COO also adopts the submissions of Anwaatin Inc. insofar as they relate to reconciliation and the United Nations Declarations on the Rights of Indigenous Peoples ("UNDRIP").

4. Generally, COO submits that the Charge that the Applicant seeks to levy to offset the cost of the Charge under the GGPPA:

   (a) is a violation of the *Indian Act* in respect of the levy of this Charge for delivery of Enbridge gas to on-reserve customers and should therefore *not be applied to First Nations or their members on-reserve*; and

   (b) is inconsistent with the Honour of the Crown, a legal principle that necessitates concrete actions to effect reconciliation with First Nations and which is part of section 35 of the Constitution, and is thus unconstitutional in respect of the levy of the Charge for delivery of Enbridge gas both on- and off-reserve to a First Nation and should *not be applied to First Nations (or their wholly owned assets or entities) anywhere, on- or off-reserve*.

On Reserve: Violation of the Indian Act Sections 87 and 89

5. The *Indian Act* states that the personal property of an Indian or a band (First Nation) situated on reserve is exempt from taxation.[1] "No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use" of any personal property of an Indian or a band situated on a reserve.[2]

6. In *Brown v R*, a First Nations woman living on reserve was supplied electricity from the provincial hydro-authority. The issue was whether she was liable to pay a tax imposed by the provincial *Social Services Tax Act*.[3] The court noted the "general exemption against taxes set out in the first part of the section refers to property of all kinds, both real and personal, of an Indian or a band situated on the reserve."[4] The court found that electricity fell within the scope of "personal property" as used in section 87 of the *Indian Act*, and was found to be "situated on reserve" within the same section's meaning.

7. In *Danes v British Columbia*, First Nations individuals bought motor vehicles located on their respective reserves, and were charged a tax on the ground that the vehicles were licensed by the province for use on and off reserve.[5] The Court of Appeal found that at the time the retail sales was levied, the vehicles were the personal property of the First Nation individuals and the vehicles were situated on-reserve at the time of sale. Accordingly, the plaintiffs were exempt from paying any tax on the vehicles.

8. Similarly, Enbridge is seeking to charge First Nations and their members on reserve to offset the cost of the Charge under the GGPPA. COO submits that this is analogous to *Brown* and applying the Charge would violate section 87 of the *Indian Act*. *Danes* supports the position that the Charge would be deemed in this circumstance to take place on reserve, as the delivery of gas and the corresponding sales transaction and invoicing all occur on reserve.

9. Section 89 of the *Indian Act* reads:

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[1] *Indian Act*, RSC 1985, c I-5, s 87(1)(b).
[2] *Indian Act*, RSC 1985, c I-5, s 87(2).
[3] *Brown v R*, [1979] 3 CNLR 67 (BCCA).
[4] *Brown v R*, [1979] 3 CNLR 67 (BCCA).
[5] *Danes v British Columbia*, [1985] BCJ No 16 (BCCA).

> 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.[6]

10. In *Mitchell v Peguis Indian Band,* Justice La Forest wrote:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.[7]

11. The Charge Enbridge seeks to pass to consumers is described as a charge rather than a tax; however, section 89 of the *Indian Act* exempts First Nations and their members from charges with respect to their on-reserve property.

On and Off Reserve: Violation of Section 35 of the Constitution and Honour of the Crown

12. Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights.[8]

13. The OEB has the jurisdiction and authority, as well as the requirement, to ensure that its decisions are in accord with the Constitution.

14. Applying a “constitutional lens” is a requirement for all administrative tribunals, including the OEB. In *Slaight Communications*, the Justice Beetz of the Supreme Court of Canada wrote:

> The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from

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[6] *Indian Act*, RSC 1985, c I-5, s 89(1).
[7] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 131, per La Forest J.
[8] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

> the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied.[9]

While *Slaight Communications* dealt expressly with the Charter, the Supreme Court of Canada ("SCC") has stated that the same principle applies with respect to section 35 of the Constitution.[10]

15. The OEB website states that its decisions about electricity and natural gas projects in the province carry the obligation to ensure that Indigenous peoples are consulted and accommodated.[11] In *CCSAGE Naturally Green v Director, Sec 47.5 EPA*, the court found the OEB had the power to determine all questions of facts and law through "an express grant of power that creates a presumption that the Board may determine constitutional matters."[12] This includes section 35 of the Constitution and the Honour of the Crown.

16. Furthermore, the OEB stands in the shoes of, or is, the Crown for the purposes of a decision to impose (or not) the Charge on First Nations. As such, the OEB that must uphold the Honour of the Crown in this proceeding.

17. In *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, the SCC stated when an independent regulatory body is tasked with a decision that could impact Aboriginal or Treaty rights:

> In these circumstances, the [regulatory body's] decision would itself be Crown conduct that implicates the Crown's duty to consult. A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge,

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[9] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at pp 1077-1078 [Beetz J, dissenting but not on this part].
[10] *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para 39.
[11] Ontario Energy Board, "Consultation with Indigenous Peoples", online: <https://www.oeb.ca/industry/applications-oeb/consultation-indigenous-peoples>.
[12] *CCSAGE Naturally Green v Director, Sec 47.5 EPA*, 2018 ONSC 237, at para 92; see also *Ontario Energy Board Act, 1998*, SO 1998 c 15, Sched B, s 19.

real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision.[13]

18. Since the Crown's duty to consult arises from and is grounded in the Honour of the Crown,[14] the finding from *Chippewas* equally applies to the OEB being the Crown. COO submits that the OEB must act in accordance with the Honour of the Crown for the purposes of determining whether or not the Charge should or can be applied to on First Nations on- or off-reserve customers of the Applicant.

19. Further, the *Ontario Energy Board Act, 1998* ("*OEB Act*") itself clearly states that the Board is an agent of Her Majesty in right of Ontario, and its powers may be exercised only as an agent of Her Majesty.[15]

20. In *all* dealings with First Nations, the Crown must act honourably, including in the interpretation and implementation of statutes (such as the GGPPA and the *OEB Act*). The measure of honourable dealing is whether it advances reconciliation.[16]

21. In this instance, the Honour of the Crown should be governed or guided by the following:

    (a) The GGPPA's stated acknowledgment of the disproportionate impact of climate change on the lives of Indigenous peoples, low-income and northern, coastal and remote communities;

    (b) The requirement under section 36(2) of the *OEB Act* that the rates approved or fixed by the OEB for "the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas" must be "just and reasonable";[17] and

    (c) The interpretation of Aboriginal and treaty rights protected by section 35 of the Constitution as being predominantly rights to use the land and its resources, or the environment, such that the profound effects of climate change on the environment

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[13] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2017 SCC 41 at para 29.
[14] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 16.
[15] *Ontario Energy Board Act, 1998,* SO 1998 c 15, Sched B, s 4(4).
[16] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at paras 16-17; *Manitoba Metis Federation v Canada (Attorney General),* 2013 SCC 14 at para 73.
[17] *Ontario Energy Board Act, 1998,* SO 1998 c 15, Sched B, s 36(2).

would interfere with the exercise of such rights, and would be experienced disproportionately by First Nations in the exercise of their rights.

Honour of the Crown

22. The Honour of the Crown was birthed from the assertion of Crown sovereignty over Indigenous peoples.[18] However, Indigenous peoples already had known lands, laws, governments, cultures, economies pre-existing the assertion of Crown sovereignty. Indigenous people were already here. Their rights were and are "inherent".[19]

23. The Crown did not in originate in the land that is now Canada. It came here. And then it asserted its sovereignty here. Under Canadian law, the act of asserting this supreme power and authority, when there was no conquest, and no discovery over lands *terra nullius*,[20] and then taking de facto control over the land,[21] is only made legitimate by a corresponding duty: the Honour of the Crown. This duty must match, or befit, the supreme level of power and authority asserted by the Crown and it is therefore a "heavy obligation" towards the Indigenous peoples of Canada.[22]

24. The Honour of the Crown is a constitutional principle and obligation; it has been constitutionalized as part of section 35.[23] It is a requirement, and not a mere objective or lofty ideal, nor a mere incantation. It must be evidenced in concrete practices.[24]

25. Section 35 has been explicitly *interpreted* as having the primary purpose of reconciliation.[25] Reconciliation means making space for two sets of worldviews and laws and peoples to co-exist, rather than one being allowed to continue to run roughshod over the other.[26]

26. In *Sparrow*, the SCC held that section 35(1) of the Constitution should be given a generous and liberal interpretation in favour of Aboriginal peoples.[27] The Honour of the Crown must be interpreted in a generous and liberal manner in favour of Aboriginal peoples, as constituting hard duties that must be directed toward facilitating reconciliation.

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[18] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32.
[19] *R v Van der Peet*, [1996] 2 SCR 507 at para 112.
[20] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25.
[21] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21.
[22] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24.
[23] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24.
[24] *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14 at para 73; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24.
[25] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17.
[26] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 27.
[27] *R v Sparrow*, [1990] 1 SCR 1075 at 1106.

27. The Honour of the Crown is evidenced as to whether it effects reconciliation:

> As the Supreme Court of Canada has stated: "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.
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> […]
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> The controlling question in all situations is what is required to maintain the honour of the Crown and **to effect reconciliation** between the Crown and the Aboriginal peoples with respect to the interests at stake.[28]

28. The Supreme Court has made it very clear that the Honour of the Crown is required when interpreting and implementing statutes that affect Indigenous peoples.[29]
29. Here, the OEB is interpreting and implementing the *OEB Act* and the GGPPA.
30. The SCC has found that even when applying statutes that require the weighing and consideration of many factors as part of the public interest, the Honour of the Crown is a public interest that supersedes all other considerations before a decision maker.[30]

The GGPPA and Disproportionate Effects of Climate Change on First Nations (and low income and remote communities which many First Nations are)

31. The *Greenhouse Gas Pollution Pricing Act's* preamble explicitly acknowledges that Indigenous people are disproportionately impacted by climate change:

> Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are

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[28] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at paras 32, 45.
[29] *Manitoba Metis Federation v Canada (Attorney General),* 2013 SCC 14 at para 73.
[30] *Clyde River Hamlet v Petroleum Geo-Services Inc,* 2017 SCC 40 at para 40; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43 at para 70.

> impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities.[31]

32. It is common knowledge that Indigenous peoples in Canada have been and continue to be severely affected by colonialism.[32]

33. The effects of colonialism have, *inter alia*, resulted in severe impoverishment and third world living conditions among many First Nations.[33]

34. COO submits that imposing an increased financial burden on First Nations and their members for carbon offsets for climate change that has already had a disproportionate effect on First Nations **does not** promote reconciliation, or meet the Honour of the Crown. COO further submits that Indigenous peoples are disproportionately harmed by climate change, in part, owing to their relationship to the lands; and harmed by the Charge more than many others because of the impoverishment of colonialism. COO submits that First Nations would bear a disproportionate burden should the Charge be approved to be applied to First Nations customer of the Applicant.

35. The Ontario Superior Court in *Platinex v Kitchenuhmaykoosib Inninuwug First Nation* stated:

> [T]he relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to

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[31] *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12, s 186, preamble.

[32] Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back, (1996), online: <http://data2.archives.ca/e/e448/e011188230-01.pdf>. Government of Canada, Statement of apology to former students of Indian Residential Schools, (11 June 2008), at para 40 online: < https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>; First Nations Representations on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci, (2013), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>; Truth and Reconciliation Commission, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada", (2015), online: < https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>; National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: Executive Summary of the Final Report" (2019), online: < https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf>.

[33] Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back, (1996), at 654-655, 666, online: http://data2.archives.ca/e/e448/e011188230-01.pdf; Truth and Reconciliation Commission, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada", (2015), at 138-139, 143, online: < https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>; National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: Executive Summary of the Final Report" (2019), at 18, 22, 24, online: < https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf>.

and arise from this relationship to the land.[34]

36. Low income and remote communities that are not First Nations do not have Constitutional section 35 rights, and do not have an identity and culture intimately tied to the environment that has been and stands to be so deeply harmed by climate change.

The OEB Act and Applying Just Rates, Including in Regard to Economic Circumstances

37. The Application is pursuant to section 36(1) of the *OEB Act* which provides that "No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract."[35]

38. Subsection (2) and (3) set out how the Board determines its order in terms of gas rates.[36] The term "may" in subsection (2) is not applicable to whether the rates "may" or "may not" be just and reasonable, as it is made clear in subsection (3) and other subsections of section 36, that the only option for rates is that they be "just and reasonable".

39. Determining what constitutes just and reasonable rates is guided by other provisions of the *OEB Act* and the *Electricity Act*.

> The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives: To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.[37]

40. The OEB, in exercising its powers, must be guided by the implementation of directives issued under subsection 25.30(2) of the *Electricity Act, 1998*.[38] In one directive, the Minister of Energy directed the OEB to submit an implementation plan regarding *Delivering Fairness and Choice*, and wrote in the directive:

> The implementation plan should also include, in keeping with the OEB's prescribed requirements for consultation, how the OEB will engage with relevant interested or

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[34] *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 CNLR 152 at para 80 (ONSC).
[35] *Ontario Energy Board Act, 1998*, SO 1998 c 15, Sched B, s 36(1).
[36] *Ontario Energy Board Act, 1998*, SO 1998 c 15, Sched B, s 36(2)-(3).
[37] *Ontario Energy Board Act, 1998*, SO 1998 c 15, Sched B, s 2(5).
[38] *Electricity Act, 1998*, SO 1998 c 15, Sched A, s 25.30(2).

affected parties including Indigenous communities, regulated entities and consumers.[39]

41. It is well documented that First Nations members have much higher rates of poverty than in the general population, whether they live on- or off-reserve. Approximately 30% of First Nations people living in urban areas live in poverty, compared to 13% of the non-Indigenous population in the same areas.[40] 53% of First Nations children living on-reserve and 41% of children off-reserve live in poverty.[41] The median income for a First Nations person on-reserve is $20,357, and $32,553 off-reserve. Compare this to the non-Indigenous median income of $42,930.[42] The Charge will only contribute to the poverty already experienced by many Indigenous peoples in Ontario. In his Report to Parliament, the Minister of Indigenous Services wrote:

> The provision of essential services to citizens is a core business of government. The term "essential or core services" often refers to services that are critical to the public's health and safety and can include services such as healthcare, social services, infrastructure, and emergency response. By definition, essential services must be available and accessible to all Canadians. Historically, there have been gaps in the availability and accessibility of some services for Indigenous peoples creating significant disadvantages. Ensuring that Indigenous peoples have access to services comparable to other Canadians is a core priority for Indigenous Services Canada and key to reducing socioeconomic gaps. However, this alone is not enough to redress decades of underfunding. Efforts must aim toward achieving substantive equality, which refers to the achievement of true equality in outcomes. It is achieved through equal access and opportunity and, most importantly, the provision of services and benefits in a manner and according to standards that meet unique needs and circumstances, such as cultural, social, economic and historical disadvantage, of the people that access them. Addressing gaps in access to essential services is the first step toward closing socioeconomic gaps between Indigenous and the non-Indigenous population.[43]

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[39] OC, 2122/2017, 25 October, 2017, online: <https://www.oeb.ca/sites/default/files/Directive_to_OEB_LTEP_Implementation_Plan_20171026.pdf>, for a discussion of engagement with First Nations, see online: <https://www.ontario.ca/page/2017-long-term-energy-plan-public-engagement-sessions#section-2>.

[40] Statistics Canada, "Indigenous people in urban areas: Vulnerabilities to the socioeconomic impacts of COVID-19", online: <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00023-eng.htm>.

[41] Assembly of First Nations, "Towards Justice: Tackling Indigenous Child Poverty in Canada" (2019), at 9, online: <https://www.afn.ca/wp-content/uploads/2019/07/Upstream_report_final_English_June-24-2019.pdf>.

[42] Indigenous Services Canada, "Annual Report to Parliament 2020" at Figure 3: Median income, 2015, Indigenous and non-Indigenous populations, aged 25-64, Canada, online: <https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711#chp6>.

[43] Indigenous Services Canada, "Annual Report to Parliament 2020" at Part 2: Addressing socioeconomic gaps through improved access to services, online: <https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711#chp9>.

42. In a letter dated June 27, 2016, the Minister of Energy at the time, Glenn Thibeault, wrote to the OEB and stated that on-reserve First Nations customers face unique challenges that impact electricity affordability, resulting in significantly higher electricity consumption levels and costs.[44] The Minister required the Board to examine and report back with advice on options for an appropriate electricity rate for on-reserve First Nations electricity consumers. The Minister expected the OEB to engage with First Nations communities. Subsequent to the Ministers direction, regulations were enacted that provide for a delivery credit to on-reserve customers. This explicitly recognizes the special economic circumstances of First Nations under the *OEB Act* and corresponding regulations.[45] Accordingly, COO submits that First Nations should not be negatively impacted by Applicant's greenhouse gas obligations; and therefore, should be exempted from paying the Charge.

43. COO submits that what is just and reasonable in terms of the *OEB Act* is what accords with the Honour of the Crown and section 35 of the Constitution, which is assessed on whether it effects reconciliation. COO further submits that reconciliation is not affected when First Nations must bear a double burden of climate change and paying for the effects of climate change through the application of the Charge to on- and off-reserve First Nations customers.

Aboriginal and Treaty Rights Linked to the Land and Dependent on the Land

44. In 1993, the Ontario Environmental Bill of Rights ("EBR"), a quasi-constitutional law, was enacted.[46] The EBR's sponsors explicitly referred to the environmental "atrocities" that had been visited on First Nations.[47] This is particularly germane when one considers that virtually all rights currently "defined" under Canadian law as being either Aboriginal (inherent) or treaty rights, are title to lands, or rights to use and harvest resources on the lands (hunting,

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[44] Glen Thibeault, "Letter to Ontario Energy Board", (June 27, 2016), online: <https://www.oeb.ca/oeb/_Documents/Documents/Letter_to_the_OEB_20160627_FN.pdf>.
[45] *Ontario Energy Board Act, 1998*, SO 1998 c 15, Sched B, s 97.4; O Reg 197/17: First Nations Delivery Credit (On-Reserve Consumers Under s 79.4 of the Act), s 2(1)-(5).
[46] *Environmental Bill of Rights, 1993*, SO 1993, c 28.
[47] Ontario, Legislative Assembly, *Ontario Legislative Assembly Debates*, 31-4 (9 October 1980) (James Fitzgerald McGuigan): "Every member of this House should pass this bill of rights to make sure that such unforgivable atrocities do not occur again. Development can proceed, but only after safety is proved."

fishing, trapping, gathering plants and medicines and the like). These are, effectively, environmental rights.[48]

45. These rights to use the environment are at risk of being rendered weak or meaningless through climate change. While all human beings depend on the environment, only Indigenous peoples in Canada have their very Constitutional rights as distinct peoples defined by the relationship with the environment. Thus, not only are First Nations more harmed by climate change from the perspective of daily life, but also from the perspective of fundamental legal rights.

46. Forcing First Nations to pay for that burden, through the Charge, would be grossly unjust.

47. Rights under section 35 of the Constitution are collective rights, belonging to the First Nation itself.[49] As such, when applying the Honour of the Crown as an obligation under section 35 of the Constitution, to the exemption of the Charge off-reserve, such an exemption should apply to First Nations and their assets and entities off-reserve (as well, of course, as on reserve).

Relief Requested

48. COO respectfully requests the OEB to:

(a) determine that the Charge is a violation of the *Indian Act* in respect of the levy of this Charge for delivery of Enbridge gas to on-reserve customers and should therefore *not be applied to First Nations or their members on-reserve*; and

(b) determine that the Charge is inconsistent with section 35 and the Honour of the Crown, a legal principle that necessitates concrete actions to effect reconciliation with First Nations, and is thus constitutionally inapplicable to both on- and off-reserve First Nations customers and should *not be applied to First Nations (or their wholly owned assets or entities) anywhere, on- or off-reserve*.

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[48] See e.g., *R v Sparrow*, [1990] 1 SCR 1075; *R v Van der Peet*, [1996] 2 SCR 507; *R v Sundown*, [1999] 1 SCR 393; *R v Horseman*, [1990] 1 SCR 901; *R v Adams;* [1990] 1 SCR 901; *R v Sappier* 2006 SCC 54; *R v Gladstone*, [1996] 2 SCR 723; *R v Côté*, [1996] 3 SCR 139; *R v Morris*, 2006 SCC 59; *R v Marshall*, [1999] 3 SCR 456; *R v Badger*, [1996] 1 SCR 771; *Sioui v Quebec (Attorney General)*, [1990] 1 SCR 1025; *R v Marshall; R v Bernard*, 2005 SCC 43; *R v Powley*, 2003 SCC 43; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *R v Desautel*, 2021 SCC 17; *R v Kapp*, 2008 SCC 41.

[49] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

(c) direct the Applicant to provide a means by which Indigenous peoples can realize their exemption rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS

7th day of June, 2021

Kate Kempton

Olthuis, Kleer, Townshend LLP

Counsel for Chiefs of Ontario