Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

July 5, 2021

Ms. Christine E. Long
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Registrar@oeb.ca

Dear Ms. Long:

Re: Ontario Energy Board (OEB) Staff Submission on the Deferred Issues
Enbridge Gas Inc. – 2020 Federal Carbon Pricing Program Application
OEB File Number: EB-2019-0247

In accordance with Procedural Order No. 4, please find attached the OEB staff submission on the Deferred Issues in Enbridge Gas Inc.'s 2020 Federal Carbon Pricing Program application. The attached document has been forwarded to Enbridge Gas Inc. and to all other parties to this proceeding.

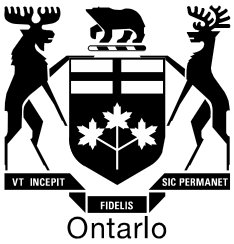
Yours truly,

Michael Parkes
Digitally signed by Michael Parkes
Date: 2021.07.05 16:42:13 -04'00'

Michael Parkes
Project Advisor, Application Policy & Conservation

Encl.

cc: All parties in EB-2019-0247



ONTARIO ENERGY BOARD

OEB Staff Submission on the Deferred Issues

Enbridge Gas Inc.

2020 Federal Carbon Pricing Program Application

EB-2019-0247

July 5, 2021

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1 Background

On November 18, 2019, Enbridge Gas Inc. (Enbridge Gas) applied to the OEB for approval, under section 36(1) of the *Ontario Energy Board Act*, *1998* (OEB Act), 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 related deferral and variance accounts (DVAs).

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 as a separate line item on customer bills to recover the amount of the Fuel Charge it pays to the Government of Canada for each customer's emissions. The Facility Carbon Charge, to recover the costs of Enbridge Gas's own emissions, is included as part of the delivery line item on customer bills.

On February 11, 2020, the OEB approved Enbridge Gas's proposed rates for the Federal Carbon Charge and Facility Carbon Charge (collectively, the FCPP Charge) on an interim basis, effective April 1, 2020.

On March 19, 2020, the OEB indicated that it would defer consideration of issues raised by Anwaatin Inc. (Anwaatin) and the Chiefs of Ontario (COO) as to whether the FCPP Charge is constitutionally applicable in light of the *Indian Act*, relevant treaties, and section 35 of the *Constitution Act, 1982*, (Deferred Issues), until such time as the Supreme Court of Canada (SCC) had rendered its decision on two appeals concerning the constitutionality of the GGPPA. The OEB also indicated that the issues of energy poverty in indigenous communities and the differential impact of natural gas rates on remote and near remote communities were not within the scope of the proceeding.

On August 13, 2020, the OEB approved, on a final basis effective April 1, 2020, the FCPP Charge proposed by Enbridge Gas that was previously approved by the OEB on an interim basis. The OEB also approved the disposition of the balances in the DVAs. As part of that decision, Enbridge Gas's Federal Carbon Charge rates and the disposition unit rates for the DVAs related to the Federal Carbon Charge (i.e. Federal Carbon Charge – Customer Variance Account) were left interim for First Nations on-reserve customers, pending the OEB's determination of the Deferred Issues. However, the OEB approved rates for the Facility Carbon Charge on a final basis for all customers, including First Nations on-reserve customers, concluding that the costs Enbridge Gas incurs for its own emissions are costs of doing business as a natural gas

distributor to be borne by all customers, even those that are potentially exempt from the Federal Carbon Charge.

The SCC's decision upholding the constitutionality of the GGPPA was issued on March 25, 2021. As part of that decision, the majority of the SCC held that the charges imposed under the GGPPA "cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the GGPPA's regulatory purpose by altering behaviour."[1]

On April 20, 2021, the OEB advised parties that it needed to make a final determination of the applicability of Enbridge Gas's rates related to the Federal Carbon Charge for First Nations on-reserve customers, including addressing the Deferred Issues as needed. Anwaatin and the COO were provided with the opportunity to file letters with the OEB to indicate whether, having regard to the SCC decision on the constitutionality of the GGPPA, they still requested the OEB to adjudicate the Deferred Issues. Both Anwaatin and the COO subsequently filed letters requesting the OEB to adjudicate the Deferred Issues.

On May 10, 2021, the OEB established a schedule for the filing of submissions on the Deferred Issues.

On May 21, 2021, the COO and Anwaatin filed a Joint Notice of Constitutional Question of their intent to question the constitutional applicability of the GGPPA charges to Enbridge's First Nation customers.

On June 7, 2021, the COO filed and Anwaatin filed submissions on the Deferred Issues, and each adopted the submissions of the other in certain respects. In the aggregate, the submissions argue that the FCPP Charge is prohibited by sections 87 (S. 87) and 89 (S. 89) of the Indian Act and inapplicable to Indigenous customers by reason of section 35 of the Constitution Act, 1982 (S. 35) and the honour of the Crown.

On July 2, 2021, the OEB was advised that the Attorneys General of Canada and Ontario did not intend to intervene in this proceeding.

[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 219.

2 Summary of Submission

The submissions of Anwaatin and the COO principally raise three issues:

(a) Does S. 87 preclude the FCPP Charge from being applied to First Nations Members[2] on reserve lands?

(b) Does S. 89 preclude the FCPP Charge from being applied to First Nations Members on reserve lands?

(c) Does S. 35's protection of Aboriginal and treaty rights or the constitutional principle of the honour of the Crown preclude the application of the FCPP Charge to First Nations and Indigenous[3] peoples more generally?

For these issues, OEB staff submits:

(a) The FCPP Charge is a regulatory charge, which appears to be distinct from a "tax" for the purpose of S. 87. As a consequence, S. 87 does not appear to prevent the application of the FCPP Charge to First Nations Members on reserve lands.

(b) While the terms "charge" and "levy" can both refer to either the imposition of a cost or tax or to processes associated with encumbering, securing, or seizing property (Security Process), [4] the prohibition against a "charge" or "levy" on reserve lands under S. 89 is best understood as referring to a Security Process, rather than to a cost or tax. As a consequence, S. 89 does not appear to prevent the application of the FCPP Charge (which is a cost but is not associated with a Security Process) to First Nations Members on reserve lands.

(c) Neither Anwaatin nor the COO have clearly articulated the S. 35 right(s) that will be impacted by the FCPP Charge, nor have they explained the impact of the FCPP Charge on such right(s). On that basis, and in light of the current jurisprudence and the limited assertions provided by Anwaatin

[2] "First Nations" and "First Nations Member" are used in place of "Indian band" and "Indian" except where quoting from jurisprudence and legislation.
[3] "Indigenous" is used to refer to those peoples who are defined as the "aboriginal peoples of Canada" in S. 35 except when referring to legislation or jurisprudence.
[4] "Security Process" should be read as inclusive of the processes described in the Personal Property Security Act, RSO 1990 c., p.10.

> and the COO, neither S. 35 nor the constitutional principle of the honour of the Crown appear to prevent the application of the FCPP Charge to Indigenous customers.

Given the above, OEB staff submits that Enbridge Gas's rates related to the Federal Carbon Charge and the disposition unit rates for the Federal Carbon Charge – Customer Variance Account, approved on an interim basis for on-reserve customers, should made final for these customers.

3 OEB Staff Submission

3.1 Interpreting provisions of the Indian Act

The *Indian Act* regulates many aspects of First Nations Members' lives. It was first enacted in the 1800s and has been amended multiple times. The *Indian Act* has been described as "a mix of paternalism and assimilation." It contains various rights and restrictions applicable to First Nations. It also protects "a small amount of Canada's land base for the exclusive use and benefit of Indians."[5]

Based upon guidance of the SCC, OEB staff submits that the OEB should look to the objectives of Parliament and apply a liberal interpretation in furtherance of those objectives where any ambiguity arises.

In *Nowegijick v The Queen*, Dickson J. stated:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In Jones v. Meehan, 175 U.S. 1 (1899) it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".[6](emphasis added)

[5] Thomas Isaac, Aboriginal Law, 5th ed (Toronto: Thomson Reuters Canada, 2016), pp. 209-10.
[6] *Nowegijick v The Queen*, [1983] 1 SCR 29, p. 36.

Subsequently, in *Mitchell v Peguis Indian Band,* La Forest J. outlined that the approach to interpreting legislation, such as the Indian Act, is different than the approach taken when interpreting treaties. While treaties may be understood by looking to the Indigenous understanding of text, where Parliament has passed legislation the focus must be on understanding *what Parliament wished to effect.* In doing so, La Forest J. rejected the view that any ambiguity must automatically be resolved in favour of the interpretation advanced by an Indigenous party:

> I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.
>
> But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an

> interpretation that has the effect of negating commitments undertaken by the Crown see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.[7] (emphasis added)

The SCC's deference to Parliament's intentions was again evident in the decision of *McDiarmid Lumber Ltd v God's Lake First Nation*, where McLachlin C.J. held that provisions in the Indian Act should not be read more broadly than as necessary to give intention to Parliament's purposes:

> The wording of the provisions makes clear that Parliament did not seek to exempt Indian property in a broad sense. Instead, specific criteria were set out to describe the features of property that Parliament wanted to exclude from the credit regimes established by the provinces. Given the importance of access to the credit economy, and given Parliament's choice to create only limited exceptions to its application, it is not for the courts to adopt a reading of the statute that distorts that choice. Courts should be hesitant to find exceptions where they are not explicit, particularly when their effect is to materially affect the rights of citizens under statute or common law. The exceptional effect of the provisions at issue here is limited by the precise wording Parliament used and the underlying purpose that the provision serves. It should not be read more broadly than necessary to give meaning to the words and to give effect to Parliament's purpose.[8] (emphasis added)

As a result, OEB staff submits that the OEB should look to the legislative purpose underlying S. 87 and S. 89, and consider the arguments advanced by the COO and

[7] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, pp. 142-143.
[8] *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, para 39.

Anwaatin in that light and in light of other applicable principles of statutory interpretation and relevant decisions of the courts.

3.2 Does S. 87 preclude the FCPP Charge from being applied to First Nations Members on reserve lands?

Section 87 of the Indian Act is comprised of three subsections. S. 87(1) and S. 87(2) restrict the imposition of taxes, while S. 87(3) deals specifically with the inheritance of estate resulting from the death of a First Nations member.

S. 87(1) provides express protection for certain First Nation property from taxation:

> Property exempt from taxation
>
> **87 (1)** 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.[9]

S. 87(2), under the header "*Idem"* (i.e, the same) reiterates the concept in 87(1) and reinforces that the protections against taxation protect First Nations themselves from taxation on their property:

> Idem
>
> **(2)** No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.[10]

Anwaatin and the COO argue that S. 87 prohibits the FCPP Charge from being applied to certain Indigenous customers. Their arguments focus primarily on the issue of whether natural gas is "personal property" as those words appear in S. 87. Neither

[9] Indian Act, RSC 1985, c I-5, s. 87(1).
[10] Indian Act, RSC 1985, c I-5, s. 87(2).

Anwaatin nor the COO explain how the FCPP Charge can be considered "taxation" under S. 87.

OEB staff submits that there is significant judicial and legislative interpretative support for the view that the FCPP Charge is a regulatory charge and not a tax, and as a consequence it is not captured by S. 87. This conclusion is based upon consideration of the purpose of S. 87, as well as jurisprudence that differentiates between "regulatory charges" and "taxes".

Purpose of S. 87

On a plain reading, S. 87(1) and S. 87(2) protect specific assets, in specific locations, from acts of taxation. This reading is consistent with the SCC's guidance in *Union of New Brunswick Indians v New Brunswick (Minister of Finance)* where McLachlin J. (as she was then) wrote that S. 87 is intended to address a specific legislative objective:

> The purpose of the s. 87 exemption was to "preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize". It "was not to confer a general economic benefit upon the Indians": see Williams, supra, at p. 885.[11] (emphasis added)

In that same decision, McLachlin J. further cautioned against interpreting S. 87 beyond its limited purpose:

> The first difficulty with this argument is that it takes the purpose of s. 87 far beyond that articulated by this Court in Williams — to prevent Indian property on Indian reserves from being eroded by taxation or claimed by creditors. No support has been offered for the proposed extension, except that this would economically benefit Indians. But that, this Court has stated, is not the purpose of s. 87: see Mitchell and Williams. La Forest J. in Mitchell (at p.

[11] *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161, p. 1171.

> 133) specifically cautioned against attributing an expansive scope to the s. 87 exemption:
>
> > . . . one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.[12] (emphasis added)

The above jurisprudence indicates that purpose of S. 87 is to prevent First Nation property from being eroded by the ability of government to tax or creditors to seize, and is not intended to provide a general economic benefit.

Distinguishing a regulatory charge and a tax for the purposes of S. 87

The SCC has held, in contexts outside the *Indian Act*, that a regulatory charge is not a tax. A regulatory charge includes charges that encourage behavioural preferences or fund the cost of the regulatory scheme, while a tax is predominantly focused on generating revenues.

In *620 Connaught Ltd v Canada* (*Connaught*), Rothstein J. explained regulatory charges as follows:

> By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-

[12] Union of New Brunswick Indians v. New Brunswick (Minister of Finance), [1998] 1 SCR 1161, p. 1183.

> refund charge on bottles may encourage recycling of glass or plastic bottles"[13] (emphasis added)

Rothstein J. then went on to explain that a "levy" will be a regulatory charge and not a tax if there is a relationship between the levy and the regulatory scheme.

> In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme?[14] (emphasis added)

Within the context of S. 87*,* courts have recognized that licenses, fees or levies are not necessarily taxes, and that whether something is a "tax" for the purpose of S. 87 will depend on its purpose. These examples include:

(a) **Export license fees**: In *R v Frank*, a First Nations Member was charged with failing to produce a Canadian Wheat Board export licence for exporting wheat across the Canadian border.

Although decided on other grounds, the court held that a license fee was not a tax for purposes of S. 87, and that if it *were* considered a "charge", it still would not be a tax because it was not collected for public revenue, nor for a public purpose. In applying the principles in *Connaught*, the license fee considered in the decision could be reasonably characterized as a "regulatory charge."[15]

(a) **Business licensing fees**: In *Quebec (Procureur General) v Williams*, a First Nations Member was charged with selling tobacco without a business license. The court considered whether the fee associated with obtaining the license was a "tax."

[13] *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7, para 20.
[14] *620 Connaught Ltd v Canada (Attorney General),* 2008 SCC 7, para 28.
[15] *R v Frank*, 1999 ABPC 81, para 128.

The court found that a business licensing fee that is collected for a non-public purpose, and not collected for the purpose of general revenue, is not considered a tax:

> "[I]f a license seems to be imposed solely to assure revenue for the State, such permit is no longer a license but a tax, whatever the word used in the text of the [legislation]."[16]

Both *Frank* and *Williams* support the proposition that First Nations members are not exempt under S. 87 from paying regulatory fees, including licensing fees, which are distinguished from taxes as they are not being collected for the purpose of general revenue.

(b) **Gambling licensing fees**: In *R v Bob*, First Nations Members were charged with operating bingo games on reserve without a provincial license.

The court characterized the license fee (the fee being determined on a percentage basis of the value of property awarded as prizes) as a "tax" designed to generate revenue. The First Nations Members were, accordingly, exempt from the fee because it was a tax for the purposes of S. 87. Within the context of *Connaught*, this charge could be reasonably characterized as a tax.[17]

Each of the above examples supports, within the context of S. 87, the distinction between regulatory charges (as a type of levy) and taxes as contemplated in *Connaught*.

As a consequence, and informed by both specific Indian Act jurisprudence and broader jurisprudence, OEB staff submits that:

(a) a "levy" for the purposes of generating public revenue is generally a tax, both in the context of S. 87 and in the broader *Connaught* context

(b) a "levy" imposed for the purposes of meeting a regulatory objective and not for generating public revenues is not a tax, both in the context of S. 87 and in the broader *Connaught* context

[16] *Quebec (Procureur General) v Williams*, [1944] 4 DLR 488 (Q CSP), paras 29-30.
[17] *R v Bob*, [1991] 2 CNLR 104 (SK CA), paras 12-14.

(c) a "regulatory charge" (being a levy imposed for the purposes of meeting a regulatory objective) can include charges intended to influence preferences and behaviour

Is the FCPP Charge a regulatory charge or a tax for purpose of S. 87?

In *Reference re Greenhouse Gas Pollution Pricing Act*, the SCC considered the constitutionality of Parts 1 and 2 of the GGPPA. The SCC examined the charges contemplated under the *GGPPA* and found that the *GGPPA* was intended by Parliament to establish minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions.[18]

The SCC went on to find that the charges imposed under Parts 1 and 2 of the GGPPA do not have a purpose of generating or raising revenue. Rather these charges are instead designed to alter behaviour to advance the GGPPA's regulatory purpose and are thus properly characterized as regulatory charges not taxes. On behalf of the majority, Wagner C.J. wrote:

> In the instant case, there is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the GGPPA have a regulatory purpose. Ontario does not assert, nor would such an assertion be supportable, that the levies in this case amount to disguised taxation. The GGPPA as a whole is directed to establishing minimum national standards of GHG price stringency to reduce GHG emissions, not to the generation of revenue. As Richards C.J.S. aptly observed, the GGPPA "could fully accomplish its objectives . . . without raising a cent": para. 87. This is true of both Part 1 and Part 2. The levies imposed by Parts 1 and 2 of the GGPPA cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the GGPPA's regulatory purpose by altering behaviour. The levies are constitutionally valid regulatory charges.[19] (emphasis added)

OEB staff submits that as the levies imposed by Parts 1 and 2 of the GGPPA have been

[18] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 69.
[19] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 219.

imposed to achieve a regulatory purpose rather than to generate public revenues and are therefore regulatory charges, the same conclusion should extend to the FCPP Charge (which recovers, from Enbridge Gas's customers, the amounts of the GGPPA levies paid by Enbridge Gas to the Government of Canada).

3.3 Does S. 89 preclude the FCPP Charge from being applied to First Nations Members on reserve lands?

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.[20]

Anwaatin and the COO argue that S. 89 restricts the imposition of the FCPP Charge on the basis that S. 89 prohibits a "charge" or "levy" for personal property situated on a reserve. In doing so, they place heavy reliance on the fact that the SCC used the words "levy" and "regulatory charge" to describe amounts that must be paid to the Government of Canada under the GGPPA.

In their submission, Anwaatin states that '[t]he SCC has affirmed that statutes are to be interpreted 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'"[21] This principle, known as the modern rule of statutory interpretation, recognizes that statutory interpretation cannot take place in a vacuum. However, despite acknowledging the application of the modern rule to this circumstance, Anwaatin's submission on S. 89 is based largely on what it asserts to be the grammatical and ordinary meaning of the terms "levy" or "charge".[22]

Anwaatin's analysis fails to acknowledge that the terms "charge" and "levy" are susceptible of more than one potential meaning, and for that reason the analysis is, in OEB staff's view, incomplete. When examining the specific context of S. 89, there is substantial support for interpreting the terms "levy" and "charge" within the context of the Security Process based on: (i) the legislative intent, (ii) principles of statutory interpretation, specifically the principle of associated meaning and the principle against

[20] Indian Act, RSC 1985, c I-5, s. 89(1).
[21] Anwaatin Submission, para 17.
[22] Anwaatin Submission, paras 16-17.

tautology, and (iii) interpretations of "charge" and "levy" in the common law. This interpretation, in turn, supports the conclusion that S. 89 does not prevent the FCPP Charge from being applied to First Nations Members on reserve lands.

Purpose of S. 89

Jurisprudence of the SCC has held that the purpose of S. 89 is the protection of certain real and personal property from seizure in the context of a creditor/debtor relationship. In *Mitchell v Peguis Indian Band,* La Forest J. outlined the purpose of S. 89 as protecting personal property from being subjected to a Security Process, including through security "attachments" and "charges":

> Section 89 weaves another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process. In terms that call to mind the present day section, Parliament in 1876 stated in s. 66 of the first *Indian Act*:
>
> > 66. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian within Canada, except on real or personal property subject to taxation under section sixty-four of this Act: Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid.[23] (emphasis added)

In that same decision, La Forest J. reinforced the distinct purpose of S. 89 as protecting certain assets from a Security Process (including with respect to a "charge"):

> If any additional evidence is needed to confirm this conclusion, it may be found in an examination of s. 89(2). By the terms of this provision, personal property sold to an Indian may still be subject to attachment, even when situated on a reserve, in that a person who sells to an Indian purchaser under a conditional sales agreement retains his right to the

[23] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, p. 128.

> property pending completion of the agreement. There could be no clearer illustration of the fact that s. 89 is not meant to arm Indians with privileges they can exercise in acquiring and dealing with property in the general marketplace, but, rather, is simply limited in its purpose to preventing non-natives from interfering with the ability of Indians to enjoy such duly acquired property as they hold on their reserve lands. That, of course, is why s. 89 places no constraints on the ability of Indians to charge, pledge, or mortgage property among themselves.[24] (emphasis added)

More recently, in *McDiarmid Lumber Ltd v God's Lake First Nation*, McLachlin C.J. held that the intent of S. 89 is to suspend for First Nations the rights of creditors and debtors and to protect First Nation personal property from seizure.[25]

The SCC has also recognized that S. 87 and S. 89 have different purposes: S. 87 goes to the protection of First Nations property from tax, while S. 89 goes to protection of First Nations property from seizure by creditors:

> This exemption from taxation under s. 87 with respect to on-reserve property is part of a larger scheme of protections. Under s. 89, real and personal property of an Indian (or band) situated on a reserve is not subject to attachment or seizure.[26] (emphasis added)

Interpreting S. 89 using the "principle of associated meaning"

OEB staff submits that the "principle of associated meaning" provides support for the proposition that the words "charge" and "levy" within the context of S. 89 refer to a Security Process.

The "principle of associated meaning" can be used to interpret two or more words linked by "or" by viewing them with a view to their common features.[27]

In S. 89, "charge, pledge, mortgage, attachment, levy, seizure, distress or execution" are linked by "or." The principle of associated meaning can thus be used to understand

[24] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, p. 131.
[25] *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, paras 1, 11, 47.
[26] *Bastien Estate v Canada*, 2011 SCC 38, para 4.
[27] *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, para 30.

the context of "charge" and "levy" in S. 89.[28]

The terms "charges" and "levies" can each refer to (i) a cost or tax; or (ii) a Security Process. Definitions of "charge" and "levy" are reproduced below for ease of reference:

(a) "Charge" means, *inter alia*, "5. An encumbrance, lien, or claim… 7. Price, cost or expense."[29]

(b) "Levy" means, *inter alia*, "1. The imposition of a fine or tax; the fine or tax so imposed. – Also termed *tax levy*…. 3. The legally sanctioned seizure or sale of property; the money obtained from such a sale. – Also termed *levy of execution*."[30]

S. 89 also refers to the terms pledge, mortgage, attachment, seizure, distress and execution:

(a) "Pledge" means, *inter alia*, "2. The act of providing something as security for a debt or obligation. 3. A bailment or other deposit of personal property to a creditor for a debt or obligation."[31]

(b) "Mortgage" means, *inter alia*, "1. [a] conveyance of title to property that is given as security for the payment of a debt or a performance of a duty and that will become void upon payment or performance according to the stipulated terms. – Also termed (archaically) *dead pledge*…. 6. Loosely, any real-property security transaction…."[32]

(c) "Attachment" means, *inter alia*, "4. The creation of a security interest in property, occurring when the debtor agrees to the security, receives value from the secured party, and obtains rights in the collateral."[33]

[28] Indian Act, RSC 1985, c I-5, s. 89(1).
[29] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "charge".
[30] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "levy".
[31] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "pledge".
[32] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "mortgage".
[33] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "attachment".

(d) "Seizure" means "[t]he act or an instance of taking possession of a person or property by legal right or process."[34]

(e) "Distress" means, *inter alia*, "1. The seizure of another's property to secure the performance of a duty, such as the payment of overdue rent."[35]

(f) "Execution" means, *inter alia*, "3. Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property…. 4. A court order directing a sheriff or other officer to enforce a judgment, usu. by seizing and selling the judgment debtor's property."[36]

Each of the terms used in S. 89 have multiple definitions depending on the usage of the word, but the commonality with all of the terms is the creditor/debtor relationship and associated Security Process.

In determining which interpretation of "charge" or "levy" to apply in the context of S. 89, OEB staff submits that it is reasonable to assume that the terms would be used in a manner consistent with the other terms used in tandem, even if they are otherwise susceptible of another meaning. Other than "charge" and "levy", the other terms appear focused on the Security Process, including securing and realizing on secured property, and would appear together to represent an attempt to by Parliament to provide an exhaustive listing of such related principles, rather than a collection of disparate concepts.

Based on the principle of associated meaning, OEB staff submits that "charge" and "levy" in S. 89 are best understood to refer to a Security Process. OEB staff notes that this interpretation is consistent with the guidance of the SCC, noted above, regarding the intent of S. 89 to protect First Nations' property from seizure by creditors.

<u>The "assumption against tautology" supports a purpose for S. 89 distinct from S. 87</u>

In *McDiarmid Lumber Ltd v God's Lake First Nation*, McLachlin C.J. set out that in interpreting legislation, it is presumed the legislature does not add superfluous or meaningless words or "pointlessly repeat itself." This is the "assumption against

[34] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "seizure".
[35] Bryan A Garner, ed, Black's Law Dictionary, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "distress".
[36] Bryan A Garner, ed, Black's Law Dictionary, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "execution".

tautology."[37]

In OEB staff's view, accepting Anwaatin's and the COO's argument that the terms "charge" and "levy" within S. 89 capture the FCPP Charge would appear to result in a duplication of the purpose of s. 87 (particularly in the context of the term "levy"), contrary to the assumption against tautology. In contrast, the "assumption against tautology" supports the proposition that S. 89 fulfills a separate purpose from S. 87 and that the terms "charge" and "levy" should be interpreted in a manner that gives them a distinct purpose from that advanced by S. 87.

Applying the assumption against tautology, if a "charge" or "levy" were synonymous with "tax", OEB staff submits that there would be no purpose to including those words in S. 89 as they are already covered in S. 87. In interpreting these two terms, the assumption against tautology would suggest that "charge" and "levy" have a meaning other than a "tax" as such term is used in S. 87. This is particularly relevant for understanding the term "levy", which can mean either a tax or fine, or the seizing of property.

While it is possible that the term "charge" and "levy" could refer to an expense other than a tax, it is not clear why Parliament would not have included "charges" and "levies" within S. 87 if the intent was to impose a restriction on all forms of expenses, given S. 87 already deals with statutorily imposed liabilities in the form of taxes.

Considering "charge" and "levy" in the context of jurisprudence.

The common law appears to support the interpretation of "charge" and "levy" in S. 89 in the context of a creditor/debtor relationship (or an associated Security Process).

It is noteworthy that the case law discussed above in the context of S. 87 generally addressed license fees and levies that could be understood as referring to an expense or a tax (i.e., the alternate interpretation of "charge" or "levy"). The courts in those instances did not consider them in the context of S. 89(1) despite the language being similar to that of a "charge." If there was appreciable uncertainty regarding the terms "charge" and "levy" in S. 89, it would be expected that S. 89 would have been raised in respect of those other regulatory charges that were challenged.

The term "levy" has been considered in the common law to have a meaning in the context of seizure:

(a) *Chambers v Louis* held that the use of **"**levy**"** in a statute "implies a

[37] *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, para 36.

seizure of goods for the purposes of extracting payment…. in practice it means a seizure."[38] (emphasis added)

(b) *Re Bayview Estates Ltd* held that "[e]ach of the terms, levy, seizure and execution are synonymous in that each signifies the action of the sheriff in carrying out the duty imposed upon him, to seize and sell the property and satisfy the judgment with the money realized." (emphasis added) There are parallels in the sentence structure of "levy, seizure and execution" to the sentence structure in S. 89(1).[39]

(c) *Benjamin Moore & Co v Finnie* held that in the debtor/creditor relationship, "a levy in its legal meaning seems to me to be where goods are seized and money is obtained by the compulsion of seizure…. There is a 'levy' when anything is obtained by the compulsion of seizure… levy means to collect or exact or obtain moneys as a result of seizure."[40] (emphasis added)

The term "charge" has also been considered in the common law to have a meaning associated with the Security Process:

(a) *Bank of Hamilton v Hartery* discussed "charge" in the context of mortgages (both of which are referred to in S. 89), stating "[t]hat section gives priority to charges… could there possibly by any doubt as to the meaning and effect of that section in a dispute between two charges of the same kind, e.g., mortgages…?"[41] (emphasis added)

(b) In *Re West*, the court stated that, with reference to land titles legislation, "I have spoken throughout as though a "charge" could be regarded as mortgage."[42] (emphasis added)

(c) *Re Home Assurance Co of Canada (No 2)* held that in the context of Canadian bankruptcy legislation, statutory provisions "operate as 'charges' upon the property of the company and that it is the right to be paid as a

[38] *Chambers v Louis*, [1943] 1 WWR 497 (Sask CA) at para 11, citing Stroud's Judicial Dictionary, 2nd ed (London: Sweet and Maxwell, 1903), p. 1058.
[39] *Bayview Estates Ltd* (1980), 28 Nfld & PEIR 225 (Nfld TD), para 45.
[40] *Benjamin Moore & Co v Finnie*, [1955] 1 DLR 557 (Ont Co Ct), paras 5-6, citing *Badiuk v Moore*, [1929] 3 WWR 115 (Alta Dist Ct), para 6.
[41] *Bank of Hamilton v Hartery*, [1919] 1 WWR 868 (SCC).
[42] *Re West*, [1928] 1 DLR 937 (Ont SC).

creditor out of the debtors property.[43]

The above cases interpreted "charge" in the context of seizure, in the creditor/debtor relationship.

OEB staff also notes that the Ontario *Personal Property Security Act*, which deals specifically with the Security Process, refers consistently to certain forms of interest in property as "charges" on both real and personal property.[44]

3.4 Does S. 35's protection of Aboriginal and treaty rights or the constitutional principle of the honour of the Crown preclude the application of the FCPP Charge to Indigenous customers?

Both Anwaatin and the COO submit that:

- section 35 of the Constitution Act, 1982 prevents the imposition of the FCPP Charge to First Nation customers, whether on or off reserve; and
- the imposition of the FCPP Charge to First Nation customers is inconsistent with the honour of the Crown and the objective of reconciliation.

Anwaatin's submission extends these arguments to all Indigenous customers, and further argues that the imposition of the FCPP Charge to Indigenous customers is inconsistent with the recommendations of the Truth and Reconciliation Commission of Canada and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Both Anwaatin and the COO also argue that applying the FCPP Charge to Indigenous customers would not result in "just and reasonable" rates under section 36 of the OEB Act.

Protection of Aboriginal and Treaty Rights under *S. 35*

Section 35(1) of the *Constitution Act, 1982* states:

[43] *Re Home Assurance Co of Canada (No 2)*, [1949] 2 DLR 382 (Alta SC).
[44] Personal Property Security Act, RSO 1990, c P10.

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

OEB staff acknowledges and agrees that S. 35 protects both Aboriginal and treaty rights. Treaty rights are those expressly provided for in treaties and agreements with the Crown, while Aboriginal rights are common law rights established through the courts:

> In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313.*[45]

(a) Establishing *S. 35 Rights is a Fact-Dependent Process*

Establishing the existence of a S. 35 right is a fact-dependent process that considers a connection between (i) a historic practice which was "integral" to Indigenous[46] ancestral activities to (ii) a modern claimed right.

This requires an evidence-based assessment:

> The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.[47]
>
> ---
>
> I conclude that the evidence supports the trial judges' conclusion that the commercial logging that formed the basis of the charges against the respondents was not the logical evolution of traditional Mi'kmaq trading activity protected by the treaties of 1760-61. The trial judge in each case applied the correct test to findings of fact supported by the evidence. It follows that there is no ground upon which an appellate court can properly interfere with their conclusion on this branch of the case.[48]

[45] *R v Van der Peet*, [1996] 2 SCR 507, para 28.
[46] "Indigenous" is used to refer to those peoples who are defined as the "aboriginal peoples of Canada" in S. 35 except when referring to legislation or jurisprudence.
[47] *R v Van der Peet*, [1996] 2 SCR 507, para 51.
[48] *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, para 35.

The requisite evidence-based assessment is conducted using a 3-part test:

> …the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was "integral" to his or her pre-contact society in the sense it marked it as distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim. I will consider each of these elements in turn. First, however, it is necessary to consider the evidence upon which claims may be proved, and the approach courts should adopt in interpreting such evidence.[49]

OEB staff submits that neither Anwaatin nor the COO have clearly identified the S. 35 right(s) that they allege would be affected or infringed by the FCPP Charge, nor the nature and extent of the impact of the FCPP Charge on those right(s).

(b) The Applicability of Taxation Laws in the Context of *S. 35*

The FCPP Charge is not a tax, but rather a regulatory charge. However, within the context of S. 35, there does not appear to be a basis for distinguishing the right to avoid a tax and the right to avoid a regulatory charge. For that reason, OEB staff submits that it is instructive to consider the jurisprudence regarding the applicability of taxation laws within the context of S. 35.

OEB staff submits that the presumption in Canadian law is that, absent the finding of a specific S. 35 right, Indigenous peoples[50] are subject to the same responsibilities as other Canadians.

> Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, <u>they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.</u>**[51]** (emphasis added)

OEB staff also notes that, to date, there has not yet been an Aboriginal right established in respect of an Indigenous group's right to tax or not to be taxed. Governments have typically only recognized arguments for exemption from tax based on S. 87, not

[49] *Mitchell v Minister of National Revenue*, 2001 SCC 33, para 26.
[50] "Indigenous" is used to refer to those peoples who are defined as the "aboriginal peoples of Canada" in S. 35 except when referring to legislation or jurisprudence.
[51] *Nowegijick v The Queen*, [1983] 1 SCR 29, p. 36.

arguments based on S. 35 rights.[52]

In *Sackaney v R,* the Tax Court of Canada considered an assertion that the Crown did not have jurisdiction to tax Indigenous peoples. In reaching its conclusion, the court noted that no right to avoid taxation could be found based on the information provided, and that consequently there was no basis for finding that S. 35 rights were breached as a result of the tax:

> Since the appellants have not set out any facts that would support a finding that tax immunity existed for aboriginal people in Canada prior to the coming into force of section 25 of the Charter and subsection 35(1) of the Constitution Act, 1982 and since the appellants do not refer to any land claim agreement in their pleadings there can be no basis for finding that those provisions were breached by imposing tax on the income of an aboriginal person.[53] (emphasis added)

In *Girard v R*, the Tax Court of Canada considered a similar assertion that "Aboriginal people benefit from a general immunity from taxation in Canada". The court noted that, as with *Sackaney,* there was a lack of evidence to support the asserted right.[54]

In *Mitchell v Minister of National Revenue*, McLachlin CJ considered an asserted Aboriginal right that would allow a member of a First Nation to enter into Canada with personal and community goods, without paying customs or duties. McLachlin concluded that evidence had not been presented to demonstrate a right to avoid duties.[55]

OEB staff acknowledges that it may be possible for an Aboriginal right to be established in the future that restricts certain forms of taxation or expense. However, until such a finding, the above jurisprudence is the most relevant guidance on the matter.

As discussed above, the establishment of any S. 35 right to avoid taxation would depend on an evidence-based 3-part analysis focusing on the historic activity, its "integral" connection to the historic community, and its modern-day asserted form. OEB staff submits that neither Anwaatin nor the COO have demonstrated a right to avoid taxes or similar expenses such as regulatory charges. Nor do Anwaatin or the COO clearly articulate the nature of an asserted S. 35 right to avoid taxes or regulatory

[52] Thomas Isaac, Aboriginal Law, 5th ed (Toronto: Thomson Reuters Canada, 2016), p. 247.
[53] *Sackaney v R*, 2013 TCC 303, para 20.
[54] *Girard c R*, 2014 TCC 107, paras 34, 42.
[55] *Mitchell v Minister of National Revenue*, 2001 SCC 33, paras 16, 60.

charges.

OEB staff submits that the presumption that responsibilities on Canadians (including, for example, the payment of taxes) apply to Indigenous peoples has not been displaced.

(c) OEB Staff Conclusions and Further Observations Regarding *S. 35*

OEB staff acknowledges that rights protected by S. 35 continue to be established through the courts through the provision and testing of evidence.

As noted above, however, neither Anwaatin nor the COO have clearly identified the S. 35 rights that they allege would be affected or infringed by the FCPP Charge, nor the nature and extent of the impact of the FCPP Charge on those rights.

On that basis, and in light of current jurisprudence, OEB staff submits that S. 35 does not appear to prevent the application of the FCPP Charge to Indigenous customers.

In case they are of assistance to the Panel, OEB staff makes the following further observations:

- The SCC has clearly stated that provincial laws can be applied to First Nations, even where they impact S. 35 Aboriginal and treaty rights.[56]

- Where S. 35 rights are *asserted but not proven*, the Crown may have a duty to consult where its conduct has an appreciable (i.e., material) impact on the ability to exercise the asserted Aboriginal rights at issue.[57] Where the duty to consult is triggered, it will require a consultation process and, where warranted, accommodation. Whether accommodation is provided, and whether the Crown can undertake conduct that adversely impacts an

[56] *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*, 2014 SCC 48 at para 53, and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, where the SCC stated as follows at paras 101 and 151, respectively: "Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition."… "Provincial laws of general application, including the Forest Act, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province. In addition, section 88 of the Indian Act sets out that provincial laws of general application will apply with respect to First Nations except where they are inconsistent with federal legislation."

[57] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 36. On the issue of the meaning of "appreciable", see *Mi'kmaq of PEI v Province of PEI et al*, 2019 PECA 26 at para 98 and *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215, para 90.

asserted S. 35 right, will depend on balancing Indigenous concerns against broader societal interests.[58]

- The Crown *may be* constrained from taking certain actions if those actions *infringe* on *proven* S. 35 rights. Whether an impact amounts to an infringement will depend on the specific circumstances, including whether there is undue hardship, and a meaningful diminution of the exercise of the S. 35 right.[59] Simply because a Crown action amounts to an infringement does not mean that it cannot be undertaken. Governments are not restricted from infringing S. 35 rights where they seek to further a compelling and substantial purpose.[60] This is often referred to as a "justifiable infringement." Justifiable infringements are an important part of reconciliation: they allow for S. 35 rights to be impacted in furtherance of broader societal objectives.[61] Environmental regulations impacting S. 35 rights have been routinely identified as being justifiable infringements.[62]

- The fact that Indigenous communities may be disproportionately impacted by climate change does not alter the assessment above. The FCPP Charge is designed to reduce greenhouse gas emissions by creating incentives for behavioural change. As such, the purpose is to discourage

[58] "Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (Haida, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights.": *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, para 59.
[59] *R v Gladstone*, [1996] 2 SCR 723, para 43.
[60] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, para 18.
[61] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, para 16.
[62] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, where the SCC stated at para 105: "It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right." See also *R v Sparrow*, [1990] 1 SCR 1075 where the SCC stated at p. 1113: "If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial."

consumption. Both the GGPPA and the SCC have recognized that Indigenous peoples are impacted by climate change along with others. However, simply because Indigenous peoples are impacted by an environmental effect does not suggest that they should be exempt from regulatory mechanisms intended to address that effect.

- While any impact on S. 35 from the FCPP Charge appears distinct from the Indigenous right to fish for food considered in *R v Sparrow*, they share a consistent theme in that rights may be limited by conservation regulations which, if effective, will ultimately promote Indigenous peoples' ability to exercise their S. 35 rights.[63]

Arguments pertaining to the Honour of the Crown

(a) Context of the Honour of the Crown

OEB staff submits that the honour of the Crown is not an obligation in and of itself. Rather, it informs other obligations that may attract the honor of the Crown:

> *The honour of the Crown "*is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": Haida Nation, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled.[64] (emphasis added)

OEB staff acknowledges that the honour of the Crown is always at stake in its dealings with Indigenous people. However, OEB staff submits that not all interactions between the Crown and Indigenous people *engage* the honour of the Crown, and further that the content and duty that flow in respect of the honour of the Crown depend on the specific situation in which it is engaged:

> The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people **engage it**. In the past, it has been found to be engaged in

[63] *R v Sparrow*, [1990] 1 SCR 1075 where the SCC stated at p. 1114: "Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights."
[64] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 73.

> situations involving reconciliation of Aboriginal rights with Crown sovereignty.[65] (emphasis added)
>
> "While the honour of the Crown is always at stake in its dealings with Aboriginal peoples, it is not **engaged** by every interaction: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511 [Haida Nation]; Mikisew 2018 at para 23; Manitoba Metis at para 68."[66] (emphasis added)
>
> "Thus, the duty that flows from the honour of the Crown varies with the situation in which it is **engaged**. What constitutes honourable conduct will vary with the circumstances."[67] (emphasis added)
>
> "While great care must be taken to ensure that the Crown act honourably and with respect in the context of its interactions or agreements with Indigenous groups, it is important to also acknowledge that the honour of the Crown is not **engaged** by all interactions or agreements between the Crown and Indigenous groups. See MMF SCC 2013, supra, at para. 68. The honour of the Crown as mentioned is a "narrow and circumscribed" (at para. 81) doctrine that clearly attaches to the Crown's solemn constitutional obligations. (See also paras. 67 and 69.) When it does apply or is triggered, the concept of the honour of the Crown gives rise to requirements that may vary in each case. The concept and what is now a cumulative body of jurisprudence, speaks to how certain obligations must be fulfilled."[68] (emphasis added)

The SCC has identified four situations that engage the honour of the Crown, only one of which appears to be potentially relevant to this proceeding; namely, that "the honour of the Crown informs the purposive interpretation of section 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that

[65] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 68.
[66] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163, para 54.
[67] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 73.
[68] *Manitoba Metis Federation Inc v Brian Pallister et al*, 2020 MBQB 49, para 108.

will affect a claimed but as yet unproven Aboriginal interest".[69]

OEB staff submits that, if the Crown's duty to consult was triggered in respect of implementing the FCPP Charge, the honour of the Crown would not create a new obligation, but rather inform how the Crown's duty to consult was to be engaged.

(b) OEB *staff's submission on the arguments made by Anwaatin and the COO*

In their submission, Anwaatin makes the following arguments:

- The FCPP Charge will erode Indigenous property and thereby impair treaty rights, "Aboriginal economic rights" and other Aboriginal rights and is therefore inconsistent with the honour of the Crown

- It is incompatible with the honour of the Crown to impose the FCPP Charge on those who are most affected and least responsible for climate change

As outlined earlier in this submission, neither Anwaatin nor the COO have clearly articulated the S. 35 right(s) that will be impacted by the FCPP Charge, or how such right(s) will be impacted. OEB staff submits that while this information, if it was provided, would have informed the Crown's duty to consult, no stand-alone obligation would arise outside of that duty.

OEB staff submits that Anwaatin's submission does not recognize that implication of the honour of the Crown would not create a new obligation on the OEB, but instead would simply inform the Crown's duty to consult or the justification of infringements, if and to the extent that either apply.

OEB staff is not aware of jurisprudence that supports the proposition that because a party is particularly exposed to the risk intended to be addressed through regulation, it should be excluded from regulation. As noted earlier in this submission in the discussion of *R v Sparrow*, the SCC has found that the reasonableness of regulatory regimes can be supported where they seek, through conservation, to advance the exercise of Indigenous rights overall.

In their submission, the COO makes a number of arguments regarding the honour of

[69] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 73. The other situations are: (i) when the Crown assumes discretionary control over a specific Aboriginal interest; (ii) treaty-making and implementation; and (iii) accomplishing the intended purposes of treaty and statutory grants to Aboriginal peoples.

the Crown.

The COO submits that in all instances the OEB must act honourably, including with respect to the interpretation of statutes. The COO further submits that the SCC "has made it very clear that the Honour of the Crown is required when interpreting and implementing statues that affect Indigenous peoples" and in this case the OEB is interpreting the OEB Act and the GGPPA.[70]

OEB staff submits that the jurisprudence cited by the COO does not support these submissions. As noted earlier, the jurisprudence indicates that the honour of the Crown is not engaged in all circumstances, and that the honour of the Crown does not arise in every circumstance but rather is associated with constitutional matters. Except where the OEB Act or the GGPPA impact constitutional matters associated with S. 35, the honour of the Crown is not engaged.

The COO also submits that, even when weighing competing interests, "the Honour of the Crown is a public interest that supersedes all other considerations before a decision maker."[71]

In asserting that the honour of the Crown supersedes all other considerations, OEB staff understands the COO to be invoking a reference to how a regulator considers "public interest" within the context of the Crown's duty to consult. In the paragraph immediately following that which is cited by the COO, the court notes that even where the duty consult arises (and thereby engages the honour of the Crown):

> [the e]ngagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligation on the matter and approach of government.[72]

OEB staff submits that the effect of the sources cited by the COO in this regard simply suggest that, where the Crown's duty to consult is triggered, the OEB would need to discharge its duty within the context of the honour of the Crown.

The COO also submits that the honour of the Crown should be "governed or guided" by (i) the GGPPA's stated acknowledgement of the disproportionate impact of climate

[70] The COO Submission, paras 28, 29.
[71] The COO Submission, para 30.
[72] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2014 SCC 40, para 41.

change on the lives of the Indigenous peoples, low-income people, and northern, coastal and remote communities; (ii) the OEB Act requires that rates be "just and reasonable"; and (iii) the profound effects of climate change on the environment, which would interference with the exercise of Aboriginal and treaty rights and would adversely and disproportionately impact First Nations. The COO further submits that imposing a financial burden on First Nations or their members does not meet the honour of the Crown.

OEB staff understands the COO to be suggesting that the honour of the Crown is an action on its own, which can be informed by factors such the OEB Act and the impacts of climate change. However, as noted above, the honour of the Crown is not a cause of action itself; rather, it informs other constitutional obligations based on the circumstances. The COO has suggested that the imposition of taxes or the disproportionate impacts of climate change are not honourable, without connecting their concerns to a S. 35 right. OEB staff submits that, to the extent that the honour of the Crown could apply to the OEB's decision, it would require a clear assertion of the right(s) at issue and on how such right(s) will be adversely impacted, following which the honour of the Crown would help inform the Crown's duty to consult (if it arises) and an assessment of whether an infringement (if one existed) is justified.

As noted above in respect of Anwaatin's submission, OEB staff is not aware of jurisprudence that supports the proposition that because a party is particularly exposed to the risk intended to be addressed through regulation, it should be excluded from regulation.

The United Nations Declaration on the Rights of Indigenous Peoples

In their submission, Anwaatin argues that UNDRIP should prevent the imposition of the FCPP Charge.

OEB staff is not aware of any article within UNDRIP that expressly restricts the imposition of taxes, fines, regulatory charges, or the other burdens of citizens. The articles from UNDRIP cited by Anwaatin speak to preserving lands and resources and the enjoyment of their own means of subsistence, none of which suggest that Indigenous peoples should be excluded from the common burdens of citizens.

OEB staff understands Anwaatin to be suggesting that UNDRIP restricts any state burden that could have any impact on Indigenous assets. OEB staff submits that this approach would come into direct conflict with the principle of state sovereignty, as noted by the Federal Court of Canada:

> Indeed, we must not lose sight of the fact that the purpose of subsection 35(1) of the Constitution Act, 1982 is to reconcile the past occupation of Canada by Aboriginal societies and the affirmation of Crown sovereignty, not to ignore that sovereignty. Were the appellant's submission accepted, there would be an inconsistency with the intent of the framers of the Constitution and, without any agreements with the federal and provincial governments, would amount to creating a statute-free zone or enclave in Canada in which only tax measures decreed by the Montagnais would apply.[73] (emphasis added)

OEB staff also notes that UNDRIP is not presently binding law in Ontario, is not binding on any of the parties to the proceeding, and does not give rise to any substantive rights in Canada.[74]

Just and Reasonable Rates

Anwaatin and the COO submit that applying the FCPP Charge to Indigenous customers would not result in "just and reasonable" rates under section 36 of the OEB Act. This submission appears to be tied to their arguments that the FCPP Charge interferes with S. 35 rights and the honour of the Crown.[75] The COO also links their submission to the economic circumstances of Indigenous communities, including much higher poverty rates.[76]

As discussed above, neither S. 35 nor the honour of the Crown appear to prevent the application of the FCPP Charge to Indigenous customers. Moreover, on the issue of energy poverty, the OEB has already determined that this issue is outside the scope of this proceeding.[77]

OEB staff further notes that there are exemptions, or partial exemptions, from the Fuel Charge under Part 1 of the GGPPA including for farmers, fishers, and remote power

[73] *Robertson v Canada*, 2017 FCA 168, para 42.
[74] *Sackaney v R*, 2013 TCC 303, para 35; *Smerek v Areva Resources Canada Inc*, 2014 SKQB 282 at para 16. OEB staff notes that Bill C-15, which provides a framework for the Government of Canada's implementation of UNDRIP, received Royal Assent on June 21, 2021.
[75] See the COO submission at para 43; see also Anwaatin submission, para 12 (where Anwaatin adopts the COO's submissions as they relate to S. 35 and the honour of the Crown) and 31 (which appears under a section titled "Inconsistent with Indigenous rights enshrined in section 35 of the Constitution").
[76] The COO submission, paras 41-42.
[77] EB-2019-0247, Decision and Order, August 13, 2020 p. 19.

plant operators. The question of whether someone should be exempt from the Fuel Charge is a decision for Parliament, not the OEB. Absent an exemption from the Fuel Charge under Part 1 of the GGPPA, Enbridge Gas is required to pay the Fuel Charge related to emissions arising from natural gas usage by its customers, including Indigenous customers. Given the intent of the GGPPA to incent behavioural change, OEB staff submits that it is reasonable for non-exempt customers to pay amounts for emissions arising from their own natural gas usage.

3.5 Determinations Regarding Enbridge Gas's FCPP-Related Rates

For the reasons discussed in prior sections, OEB staff submits that Enbridge Gas's Federal Carbon Charge rate and the disposition unit rates for the Federal Carbon Charge – Customer Variance Account, approved on an interim basis for First Nations on-reserve customers, effective April 1, 2020, should made final for these customers. For the Federal Carbon Charge, the updated rate that became effective April 1, 2021, which was also left interim for First Nations on-reserve customers, should also be made final.[78] As these rates have already been charged on an interim basis, no debit or credit to these customers will be required.

The OEB required Enbridge Gas to separately track the Federal Carbon Charges (including disposition of the balances in the Customer Variance Accounts) for First Nations on-reserve customers until the final determination of the Deferred Issues. OEB staff submits that, if the OEB determines that these rates should be made final at the same level (as OEB staff has recommended), then Enbridge Gas should no longer be required to separately track these amounts for First Nations on-reserve customers.

For the reasons discussed in prior sections, OEB staff also submits that no action is necessary regarding other FCPP-related rates that have already been made final (e.g. the Facility Carbon Charge for First Nations on-reserve customers, and the Facility Carbon Charge and Federal Carbon Charge for Indigenous off-reserve customers).

3.5.1 From whom should the Fuel Charge be recovered if the OEB finds that Indigenous customers should not pay for such usage?

In the event that the OEB finds that the Fuel Charge should not be paid, either by all Indigenous customers or the subset of on reserve First Nations customers, it will be necessary for the OEB to determine the treatment of the costs associated with such usage. Neither the COO nor Anwaatin have identified from whom the Fuel Charge

[78] EB-2020-0212, Decision and Order, February 11, 2021

should be recovered in respect of such usage. OEB staff submits that in the event the Fuel Charge for gas usage by all Indigenous customers or on-reserve First Nations customers must continue to be paid by Enbridge Gas to the Government of Canada, the costs should be borne by all other Enbridge Gas ratepayers. There is no basis, in OEB staff's view, for the shareholder to pick up this cost. Costs associated with such usage could be allocated to all other customers based on class-specific historical volumes.

~All of which is respectfully submitted~