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July 5, 2021

BY RESS AND EMAIL

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

Dear Ms. Long:

Re: Enbridge Gas Inc. (Enbridge Gas)
Ontario Energy Board (OEB) File No.: EB-2019-0247
2020 Federal Carbon Pricing Program Application
Submission on Deferred Issues

In accordance with the Ontario Energy Board's (OEB) Procedural Order No. 4 dated May 10, 2021 for the above noted proceeding, enclosed please find Enbridge Gas's Submissions regarding the applicability of the Federal Carbon Charge to Enbridge Gas's First Nations on-reserve customers. Also attached is a book of authorities containing the relevant case law, etc. cited in Enbridge Gas's submissions.

If you have any questions, please contact the undersigned.

Sincerely,

Adam Stiers
Digitally signed by Adam Stiers
Date: 2021.07.05 20:34:42 -04'00'

Adam Stiers
Manager, Regulatory Applications – Leave to Construct

cc: T. Persad (Enbridge Gas Counsel)
T. Dyck (Torys)
M. Parkes (OEB Staff)
L. Murray (OEB Counsel)
EB-2019-0247 (Intervenors)

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application for 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**).

ENBRIDGE GAS INC.

RESPONDING SUBMISSION TO THE CHIEFS OF ONTARIO AND ANWAATIN INC.

OEB File No. EB-2019-0247

July 5, 2021

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1. INTRODUCTION

Pursuant to Procedural Order No. 4 issued by the Ontario Energy Board ("**OEB**") on May 10, 2021, Enbridge Gas Inc. ("**Enbridge Gas**") makes these submissions in response to the submissions filed by the Chiefs of Ontario ("**COO**") and Anwaatin Inc. ("**Anwaatin**") on June 7, 2021.

At the outset, Enbridge Gas thanks the COO and Anwaatin for their respective submissions. As outlined in its *Indigenous Peoples Policy*, Enbridge Gas recognizes the importance of reconciliation between Indigenous communities and broader society. Enbridge Gas is committed to working with Indigenous communities in a manner that respects the legal and constitutional rights of those communities, and that ensures that Enbridge Gas's projects and operations are carried out in an environmentally responsible manner.

As Ontario's largest natural gas distributor, Enbridge Gas also plays an important role in the Government of Canada's efforts to address climate change. Under Part I of the *Greenhouse Gas Pollution Pricing Act* ("**GGPPA**"), Enbridge Gas and other fuel distributors in listed provinces must remit a charge (the "**federal fuel charge**") to the Canada Revenue Agency in respect of the fuel they supply to end-use customers. As a price signal that is designed to influence behavioural change, this charge is a cornerstone of the Government of Canada's legislative scheme to mitigate greenhouse gas emissions for the benefit of all Canadians, and "in particular the Indigenous peoples of Canada"[1], many of whom acutely experience the impacts of climate change.

Enbridge Gas and other registered distributors must pay the federal fuel charge. The GGPPA requires them to do so, but with the anticipation, according to the Supreme Court of Canada ("**SCC**"), that this price signal will be passed through to customers. Enbridge Gas has no control over the charge, as the rate is set by legislation and the total amount is determined by customers' natural gas usage. If Enbridge Gas cannot pass through the charge to those customers, it has no alternative way to recover this cost, and the price signal will not reach its intended recipients. That result would undermine the purpose of the

[1] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, preamble [GGPPA].

legislation. Therefore, in practice, natural gas distributors in all of the listed provinces – Ontario, Saskatchewan, Manitoba and Alberta – are permitted to pass through the federal fuel charge to their customers, including their Indigenous customers on and off Reserve lands.

Although end users are intended to feel the price signal in respect of their fuel use, the Government of Canada has also recognized the importance of ensuring that individuals are not unduly burdened by the charge. The Government of Canada therefore returns all of the proceeds collected under the GGPPA to the provinces of origin. It does so mainly through the Climate Action Incentive, which provides annual rebates to individuals and households in Ontario, Saskatchewan, Manitoba and Alberta, to offset the cost imposed by the federal fuel charge. The Government of Canada also directs a portion of the proceeds collected under the GGPPA directly to Indigenous communities.

The issues raised by Anwaatin and the COO do not constitute grounds to prevent the GGPPA from functioning as it was intended. The ability of registered distributors to pass through the federal fuel charge to their customers is consistent not only with the purposes of the GGPPA, but also with the *Indian Act* and constitutional law principles. As discussed further below, contrary to the submissions of Anwaatin and the COO:

- Although s. 87 of the *Indian Act* provides relief in respect of taxation, the SCC has determined that the federal fuel charge is not a tax but rather a regulatory charge.
- Courts have repeatedly held that s. 89(1) of the *Indian Act* is intended to shield real and personal property from seizure, not to provide an exemption from regulatory charges. It is a protection from creditors, not environmental laws.
- Anwaatin and the COO have not articulated any Aboriginal or Treaty right to the purchase and use of natural gas at a specific price. The use of natural gas for residential, industrial and commercial uses is a modern practice. As a result, there is no breach of s. 35 Aboriginal or Treaty rights resulting from the pass through of the federal fuel charge to Indigenous customers.

- The principle of the honour of the Crown has not previously been applied in the manner that Anwaatin and the COO argue that it should be applied – that is, to mandate an exemption from a broad-based regulatory measure that does not directly impact Aboriginal or Treaty rights. The case law does not support this argument.
- Similarly, the case law does not support the argument that the pass through of the federal fuel charge implicates the Crown's fiduciary duty to Indigenous peoples. In this case, no fiduciary duty arises.
- None of the other arguments raised by Anwaatin or the COO bar the pass through of the federal fuel charge to Indigenous peoples on or off Reserve lands.

Ultimately, the issues raised in the COO and Anwaatin's submissions are important matters of public policy relating to the activities of Indigenous peoples across the country. As such, it would be more appropriate for the Government of Canada to address them in a clear and comprehensive manner than for the OEB to attempt to address them in relation to one gas distributor's GGPPA obligations, particularly because the law does not support the relief that the COO and Anwaatin are requesting in this proceeding.

Enbridge Gas therefore respectfully requests the OEB deny the relief requested by the COO and Anwaatin and establish as final the Enbridge Gas Federal Carbon Charge[2] for First Nations on-Reserve customers.

2. GREENHOUSE GAS POLLUTION PRICING ACT ESTABLISHES THE FEDERAL FUEL CHARGE TO INCENTIVIZE BEHAVIOUR

2.1 Fuel distributors must comply with Part I of the GGPPA

Part I of the GGPPA requires that registered distributors, producers and importers of natural gas and certain other fuels pay a charge to the Government of Canada in respect of the fuel they supply to end use customers in listed provinces, such as Ontario.[3] The GGPPA

[2] The Federal Carbon Charge is as described in Enbridge Gas' applications to and approved by the OEB in EB-2018-0205, EB-2019-0247 and EB-2020-0212.
[3] GGPPA, s. 17(1).

prescribes the amount of the federal fuel charge that is payable to the Canada Revenue Agency ("**CRA**") in respect of the covered fuels.[4]

This statutory obligation was imposed on fuel distributors for administrative efficiency. It is simpler for the Minister of National Revenue, acting through the CRA, to collect the federal fuel charge from a discrete number of registered distributors across Canada than from millions of individual end users. That said, according to the SCC, "[a]lthough the fuel charge is paid by fuel producers, distributors and importers, and not directly by consumers, it is anticipated that retailers will pass the fuel charge on to consumers in the form of higher energy prices." [5]

The expectation that the federal fuel charge will be passed on to consumers is consistent with the purposes of the GGPPA. As stated in its preamble, the GGPPA's carbon pricing scheme reflects the "polluter pays" principle.[6] It seeks to influence behaviour by sending a price signal to those persons who create greenhouse gas ("**GHG**") emissions, including the end users who burn natural gas and other fuels in their homes and vehicles. In this regard, the SCC acknowledges that the GGPPA implements "stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change".[7]

In practice, energy regulators have allowed natural gas distributors in provinces in which Part I of the GGPPA applies – Ontario, Manitoba, Saskatchewan and Alberta – to pass that charge on to their customers.[8] There are certain exemptions, but mostly they only apply in respect of the supply of fuel that is not subject to the federal fuel charge. For example, the supply of fuel to facilities that are subject to Part II of the GGPPA – that is, to the Output Based Pricing System or an equivalent provincial regime – is exempt from the application

[4] GGPPA, s. 40(1) and Schedule 2.
[5] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 30 [*Reference re GGPPA*].
[6] GGPPA, preamble.
[7] *Reference re GGPPA* at para 27.
[8] SaskEnergy, Manitoba Hydro and ATCO, among other distributors, each pass through these charges to their customers, including their Indigenous customers. See, for example, Centra Gas Manitoba Inc. 2019/20 General Rate Application PUB/CENTRA I-141a-b-Attachment 1 at page 27 of 35.

of the federal fuel charge.[9] The GHG emissions of those facilities are subject to a separate GHG pricing mechanism.

No such exemptions apply in respect of individuals. Natural gas distributors must remit the federal fuel charge in respect of gas supplied to those individuals, with the anticipation, according to the SCC, that the charge will be passed through to those individuals. If the charge cannot be passed through to these individuals, it will not create an economic incentive for them to change their behaviour. Preventing distributors from recovering the federal fuel charge they remitted in respect of fuel supplied to individual customers would therefore undermine the purpose of the GGPPA.

2.2 Indigenous customers are eligible to receive the Climate Action Incentive

Although the GGPPA was designed for the federal fuel charge to be passed through to end users of covered fuels, the legislation also ensures that certain individuals and communities are not unduly burdened by the regulatory regime. In particular, pursuant to section 165 of the GGPPA, the federal government has created a "Climate Action Incentive", which the SCC describes as follows:

> Section 165(2) provides that the Minister of National Revenue must distribute the amount collected in respect of the fuel charge in any listed province less amounts that are rebated, refunded or remitted in respect of those charges, but that the Minister of National Revenue has discretion whether to distribute the net amount to the province itself, other prescribed persons or classes of persons or a combination of the two. The federal government's present policy is to give 90 percent of the proceeds of the fuel charge directly to residents of the province of origin in the form of "Climate Action Incentive" payments under the *Income Tax Act* …. The Climate Action Incentive is a rebate under the *GGPPA* that reduces the amount that must be distributed under s. 165. The remaining 10 percent of the proceeds is paid out to schools, hospitals, colleges and universities, municipalities, not-for-profit organizations, Indigenous communities and small and medium-sized businesses in the province of origin. Simply put, the net

[9] GGPPA, s. 18.

> amount collected from a listed province is returned to persons and entities in that province.[10]

In practice, the Climate Action Incentive rebates are expected to significantly exceed the cost per household of the GGPPA. For example, for the calendar year 2021, the Minister of Finance estimates the average cost of the GGPPA in Ontario to be $439 whereas the average Climate Action Incentive Payment per household will be $592.[11] Therefore, while the pass through of the federal fuel charge creates a behavioural incentive for individuals by increasing the price of gas, individuals and households are entitled to receive the Climate Action Incentive payments which can more than fully reimburse them for the increased cost.

In their submissions, neither Anwaatin nor COO acknowledge that Indigenous persons (and other individuals) are eligible to receive the Climate Action Incentive. In practice, the Department of Finance has taken steps to assist individuals, including those in remote and northern Indigenous communities, in accessing the Climate Action Incentive by implementing two initiatives.[12] The first initiative is the Community Volunteer Income Tax Program, which offers free tax preparation clinics and arranges for volunteers to prepare tax and benefits returns for low and modest income individuals, including Indigenous persons. The second initiative, run by Service Canada, is expanding the provision of in person support for tax filing and benefit applications to all on-Reserve, remote and northern Indigenous communities, and is planning outreach activities for urban Indigenous communities.[13] In addition to these initiatives, Indigenous persons (and other individuals) living in small and rural communities are eligible for a 10% supplement in

[10] *Reference re GGPPA* at para 31.
[11] *Climate Action Incentive Payment Amounts for 2021* (December 2020), online: Department of Finance Canada <https://www.canada.ca/en/department-finance/news/2020/12/climate-action-incentive-payment-amounts-for-2021.html>.
[12] *Backgrounder: Climate Action and Indigenous Peoples* (October 2018), online: Department of Finance Canada <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-climate-action-and-indigenous-peoples.html>.
[13] *Backgrounder: Climate Action and Indigenous Peoples* (October 2018), online: Department of Finance Canada <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-climate-action-and-indigenous-peoples.html>.

addition to the base Climate Action Incentive payment in recognition of their increased energy needs and reduced access to clean transportation options.[14]

Moreover, as discussed above, a percentage of the proceeds of the federal fuel charge is paid directly to Indigenous communities through funding of programs such as the Indigenous Community-Based Climate Monitoring Program ("**ICCMP**"), the Capital Facilities and Maintenance Program ("**CFMP**"), the First Nations Infrastructure Fund ("**FNIF**") and the Clean Energy for Rural and Remote Communities program ("**CERRC**"). In 2019-2020, ICCMP received $1,192,455 in funding from the proceeds of the federal fuel charge to enhance support for Métis Nation Governing Members to plan and implement monitoring of climate and climate impacts within their jurisdictions. Further, FNIF and CFMP were given $1.64 million to support First Nations recipients seeking to reduce energy costs and consumption, and to reduce GHG emissions through alternative energy options. Natural Resources Canada also received $4.45 million in funding from the proceeds of the federal fuel charge for the years 2019-2020 and 2020-2021 to help transition Indigenous communities onto clean energy through CERRC.[15]

2.3 Federal fuel charge is a regulatory charge and not a tax

In their GGPPA reference cases, the Courts of Appeal in Saskatchewan and Ontario both characterized the federal fuel charge as a regulatory charge rather than a tax.[16,17] The Alberta Court of Appeal did not need to address this issue.[18]As summarized by the Ontario and Saskatchewan courts, the main indicator of whether a given charge is a tax is the purpose for which the money is collected. Charges designed to be revenue generating schemes for the state are typically held to be taxes. In contrast, the Ontario and Saskatchewan Courts of Appeal found that the purpose of the federal fuel charge is to

[14] *Backgrounder: Climate Action and Indigenous Peoples* (October 2018), online: Department of Finance Canada <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-climate-action-and-indigenous-peoples.html>.
[15] *Greenhouse Gas Pollution Pricing Act: Annual Report for 2019* (2020), online: Environment and Climate Change Canada <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/greenhouse-gas-pollution-pricing-act-annual-report-2019.pdf>.
[16] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 89 and 97.
[17] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 163.
[18] *Reference re Greenhouse Gas Pollution Pricing Act,* 2020 ABCA 74.

incentivize behavioral change and implement a complex regulatory scheme. Both courts therefore found that the federal fuel charge is a regulatory charge and not a tax.

The SCC accepted the findings of the Ontario and Saskatchewan Courts of Appeal that the federal fuel charge is a regulatory charge and not a tax. The SCC used the two-part test set out in *Westbank First Nation v. British Columbia Hydro and Power* to determine if a government levy is a regulatory charge, as opposed to a tax.[19] The first step is to identify the existence of a regulatory scheme and the second step is to find a connection between the charge and the scheme. In the context of the GGPPA, there was no dispute regarding the existence of a regulatory scheme. The SCC also held that "[t]he 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."[20]

3. SECTIONS 87 AND 89 OF THE INDIAN ACT DO NOT PREVENT THE PASS THROUGH OF THE FEDERAL FUEL CHARGE TO INDIGENOUS PEOPLES

Anwaatin and COO incorrectly allege that ss. 87 and 89 of the *Indian Act* (the "**Act**") prohibit the pass through of the federal fuel charge to Indigenous peoples.[21] No such prohibition applies to the federal fuel charge. Section 87 of the Act provides an exemption for *taxation* of Indigenous peoples on Reserve land, and s. 89 of the Act provides protection to Indigenous peoples on Reserve from encumbrances under a credit regime, including "charges" and "levies" imposed by creditors. As the federal fuel charge is neither a form of "taxation" nor an enforcement mechanism under a credit regime, it is not captured by ss. 87 and 89 of the Act.

3.1 Section 87 of the Act does not create an exemption from regulatory charges

Subsections 87(1) and 87(2) of the Act provide that:

[19] *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at paras 21-30.
[20] *Reference re GGPPA* at para 214.
[21] *Indian Act*, RSC, 1985, c. I-5.

> (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.
>
> (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.

A regulatory charge is not a form of "taxation"

In its submissions, adopted by COO, Anwaatin argues that s. 87 of the Act exempts Indigenous customers from the flow through of the federal fuel charge. That is incorrect. Section 87 of the Act only applies in respect of taxes, which the SCC has held the federal fuel charge is not.

As discussed above, the SCC has characterized the federal fuel charge as a regulatory charge, a characterization that Anwaatin accepts in its submissions.[22] The SCC found that the federal fuel charge is not imposed for the purpose of generating revenue, but rather as part of a regulatory scheme designed to achieve a valid regulatory purpose. According to the SCC, "[t]he 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 [...]."[23] As such, the SCC concluded that the federal fuel charge cannot be characterized as a tax: "while "carbon tax" is the term used among policy experts to describe GHG pricing approaches that directly price GHG emissions, it has no connection to the concept of taxation as understood in the constitutional context."[24]

Section 87 of the Act is only intended to create an exemption in respect of taxes. It does not capture charges collected for purposes other than revenue generation. Section 87 of the

[22] See section 2.3.
[23] *Reference re GGPPA* at para 219.
[24] *Reference re GGPPA* at para 16.

Act is intended to protect the entitlement of "Indians" (as that term is used in the Act)[25] to Reserve lands and ensure that the use of Reserve lands by Indigenous peoples is not eroded by the ability of governments to tax. Section 87 is not intended to "remedy the economically disadvantaged position of Indians" or "confer a general economic benefit upon the Indians".[26,27]

Courts have found that charges such as licence fees and premiums on employment insurance, which are not intended as a means of revenue generation, do not qualify as taxes for the purposes of s. 87 of the Act.[28] For example, in *R v Bob*, the Saskatchewan Court of Appeal considered whether six "Indian" bands were exempted from paying a 2% charge imposed by the Lottery Licensing Provisions, on prizes awarded as part of a lottery. The court distinguished licence fees from licence taxes and found that licence fees do not fall within the exemption provided by s. 87: "[t]he first issue, therefore, that needs to be settled is whether the 2 per cent charge is a tax. If it is not a tax, that would end the matter …."[29]

Similarly, in *Quebec (Procureur Général) v. Williams*[30], the Quebec Superior Court found that the one-dollar fee to obtain a license to sell tobacco did not qualify as a tax. Since the license was not imposed for the purpose of collecting revenue for the state, it was not a tax within the "legal and constitutional meaning of the word".

The SCC's finding that the federal fuel charge is a regulatory charge – and not a tax – is conclusive and binding. As the SCC found, the GGPPA establishes the federal fuel charge for the purpose of implementing a complex regulatory scheme aimed at behaviour modification, not for the purpose of collecting revenue. In fact, the GGPPA requires that all of the proceeds of the federal fuel charge be returned to the province of origin, and at

[25] Where the term "Indian" is used in these submissions it is because it is a defined term in the *Indian Act,* affording certain Indigenous peoples in Canada with rights and entitlements under the *Indian Act*.
[26] *Mitchell v Sandy Bay Indian Band*, [1990] 3 CNLR 46 (SCC) at paras 85-87.
[27] *Williams v Canada*, [1992] 1 SCR 877 at para 16.
[28] *Quebec (Procureur général) v Williams,* [1944] 4 DLR 488 (Que CSP) at paras 29-30 [*Quebec*]. Also followed in *R v Frank* (1999), 74 Alta LR (3d) 157 (Alta Prov Ct) in the context of export license fees.
[29] *R v Bob*, [1991] 2 CNLR 104 (SKCA) at paras 11-12.
[30] *Quebec* at para 30.

the end of the day the proceeds have been rebated to individuals at rates in excess of the federal fuel charge.

COO and Anwaatin rely on several distinguishable cases. The *Brown v R* decision does not apply to this context. The "charge" at issue in Brown was clearly a tax imposed for the purpose of revenue generation under the *Social Services Tax Act*.[31] The decision does not establish a precedent for whether s. 87 of the Act applies in respect of a regulatory charge like the federal fuel charge.

COO relies on *Danes v British Columbia* to assert that the federal fuel charge is deemed to take place "on Reserve", within the meaning of s. 87 of the Act. That is incorrect. The GGPPA imposes the charge upstream on distributors. In any event, as in *Brown*, the issue in *Danes* concerned a revenue generating tax under the *Social Services Tax Act*, not a regulatory charge or incentive. Therefore, regardless of whether the federal fuel charge is considered to be located "on Reserve", it still falls outside s. 87 of the Act.

Section 87 does not capture indirect taxes

In the alternative, even if the federal fuel charge were characterized as "taxation" for the purposes of the Act, which is denied, s. 87 would not capture this type of taxation.

As discussed above, the GGPPA requires that registered distributors remit the federal fuel charge to the CRA. It does not directly impose the federal fuel charge on end users. It only anticipates "that retailers will pass the fuel charge on to consumers in the form of higher energy prices."[32] Energy regulators have therefore permitted natural gas distributors in Alberta, Saskatchewan, Manitoba and Ontario to add this charge to customer rates.[33] As a result, even if it were incorrectly considered to be a form of taxation, the federal fuel charge would, at most, be an indirect tax, akin to an excise tax or a customs tax.

Courts have repeatedly held that s. 87 of the Act does not provide relief from indirect taxes. In *Saugeen Indian Band v. Canada*, the Federal Court of Appeal considered whether taxes

[31] *Brown v R*, [1979] 3 CNLR 67 (BCCA) [*Brown*].
[32] *Reference re GGPPA* at para 30.
[33] See footnote 8 above.

paid pursuant to subsection 27(1) of the *Excise Tax Act*, which imposed a sales tax on the price of all goods produced or manufactured in Canada, imported into Canada, sold by a licensed wholesaler or retained by a licensed wholesaler for his own use or for rental by him to others, were inapplicable to an "Indian" living on a Reserve.[34] The court held that the excise tax was not captured by s. 87 of the Act because it was an indirect tax that was paid by the vendor and passed on to the customers as part of the price of the product:

> [T]he appellant cannot be said to be taxed by the Excise Tax Act, even though the burden of the tax is undoubtedly passed on to it, as several of the invoices made explicit. What the appellant paid was not the tax as such, but commodity prices which included the tax. This is sufficient, for constitutional purposes, to make the tax indirect. But it is not enough, for tax purposes, to establish the appellant as the real taxpayer.[35]

Further, in *Delisle v. Shawinigan Water & Power Co.*, the Quebec Superior Court found that a tax imposed on the distributors of electricity and passed on to the consumer did not qualify for exemption under s. 87 of the Act:

> It is of that tax, as of the Customs Taxes or Excise Taxes — all those indirect taxes are imposed on the importer or on the manufacturer. In the end, it is the consumer or buyer who must pay for the increase of the cost of the goods imported or manufactured. Indians, when they buy imported goods subject to Customs or Excise duties, must, like the others, pay higher prices; so they must do for this indirect tax on their electricity, and they cannot pretend that any tax is being imposed on their real or personal property.[36]

Thus, even if the federal fuel charge were incorrectly considered a form of taxation for the purposes of the Act, it would not be the type of taxation subject to exemption under s. 87.

3.2 Section 89 of the Act does not create an exemption from regulatory charges

Section 89(1) of the Act provides that "[s]ubject 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,

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[34] *Saugeen Indian Band v. Canada*, [1990] 1 FC 403 (FCA), leave to appeal refused (1990), [1990] 3 CNLR v (SCC) [*Saugeen*]. See also: *9007-7876 Quebec Inc. v Henry Sztern & Associates*, [2001] RJQ 180, JE 2001-216 at para 27.
[35] *Saugeen* at para 18.
[36] *Delisle v Shawinigan Water & Power Co.*, [1941] 4 DLR 556 (Que SC) at para 27.

attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."

Anwaatin and COO assert that s. 89(1) exempts Indigenous customers from the pass through of the federal fuel charge. That is not correct. Courts have repeatedly held that s. 89(1) of the Act is intended to shield real and personal property from seizure, not to create an exemption from regulatory charges. The SCC and the Ontario Court of Appeal have emphasized that s. 89: "protect[s] all real and personal property on reserve from being used as collateral or security for a loan made by anyone other than an Indian…"[37] and "[shields] the real and personal property of an Indian or a band situated on a reserve from ordinary civil process."[38]

Anwaatin and COO allege that the federal fuel charge falls expressly within the wording of s. 89 because of the inclusion of the words "charge" and "levy". Anwaatin submits that this is consistent with s. 12 of the *Interpretation Act*, which provides that statutes "shall be deemed to be remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." That submission does not account for the different uses of the terms "charge" and "levy" in different contexts: enforcement mechanisms in credit regimes, on the one hand, and environmental and economic regulation, on the other.

In *McDiarmid Lumber Ltd. v God's Lake First Nation*, the SCC cautioned against a broad interpretation of s. 89 of the Act. The SCC held that ss. 89 and 90 of the Act should be interpreted narrowly because the effect otherwise is to exclude "Indians" from the credit economy:

> The provisions at issue in the case at bar serve to interfere with that scope. They act to carve out certain forms of Indian property from under the applicable credit regime, but leave others in. In short, they establish specific exceptions to the general rule that the provincial credit regime will apply to Indian property […] In the absence of express language, it is not the place

[37] *Benedict v Ohwistha Capital Corp*., 2014 ONCA 80 at para 14.
[38] *Mitchell v Peguis Indian Band,* [1990] 2 SCR 85 (SCC) at para 81. See also: *Taylor's Towing v Intact Insurance Company,* 2017 ONCA 992 at para 8 [*Taylor's Towing*] and *Bastien (Succession de) c. R*., 2011 SCC 38, (sub nom. *Bastien Estate v Canada*) [2011] 3 CNLR 61 (SCC) at para 18.

> of courts to read the *Indian Act* exceptions in such a way that would transform them into significant forms of interference with the applicable provincial regime and rights thereunder.[39]

Other courts have also limited the s. 89(1) exemption to encumbrances under a credit regime. For example, in *Taylor's Towing*, the Ontario Court of Appeal accepted "that s. 89(1) of the Indian Act only protects against seizure from creditors or the Crown."[40] The Court of Appeal also confirmed that the purpose of s. 89(1) was to protect all real and personal property on Reserve from being used as collateral or security for a loan made by anyone other than an "Indian".[41]

Furthermore, as submitted by Anwaatin, the 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."[42] According to the SCC, "[t]he preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article 'Statute Interpretation in a Nutshell'… 'words, like people, take their colour from their surroundings'".[43]

In s. 89 of the Act, the words "charge" and "levy" are used alongside "pledge", "mortgage", "attachment", "seizure", "distress" and "execution", all of which describe enforcement mechanisms in a credit regime, and have no bearing on economic or environmental regulation. In the context of s. 89 of the Act, the words "charge" and "levy" describe methods used by creditors to obtain security on a loan; they are not intended generically to include any and all things that may be called a charge or a levy. The federal fuel charge is a regulatory charge clearly unrelated to the enforcement of a credit regime.

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[39] *McDiarmid Lumber Ltd. v God's Lake First Nation,* 2006 SCC 58 at para 1.
[40] *Taylor's Towing* at para 8.
[41] *Benedict v Ohwistha Capital Corp.,* 2014 ONCA 80 at para 14.
[42] E. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87, as quoted in *Rizzo v Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21.
[43] *Bell ExpressVu Ltd. Partnership v Rex*, 2002 SCC 42 at para 27.

4. THE FEDERAL FUEL CHARGE IS CONSISTENT WITH CONSTITUTIONAL OBLIGATIONS

Anwaatin and COO have alleged: (a) broad impacts of the federal fuel charge on the s. 35 Aboriginal and Treaty rights of all Indigenous peoples in Ontario, on and off Reserve; and (b) a breach of the honour of the Crown. None of these impacts or breaches arise.

In any event, the federal fuel charge is consistent with s. 35 Aboriginal and Treaty rights, and the honour of the Crown. The application of the federal fuel charge to all Canadians is an important mechanism through which climate change is combatted, an objective that COO and Anwaatin's submission suggest is in the interest of Indigenous peoples.[44]

4.1 No breach of section 35 Aboriginal and Treaty rights

No section 35 right to purchase and use natural gas

Section 35 of the *Constitution Act, 1982* protects the "Aboriginal and Treaty rights" that were "existing" as of 1982. Section 35 "does not promise immunity from government regulation in a society that, in the 20th century [and the 21st century], is increasingly more complex, interdependent and sophisticated".[45] "The purpose of s. 35(1) is to protect [A]boriginal rights. It is not to enable [A]boriginal peoples to avoid the regulatory regimes and laws of general application in Canada and the Provinces".[46]

The Supreme Court has emphasized that "in order to be an [A]boriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right".[47] Aboriginal rights are founded in "the defining and central attributes of the [A]boriginal society in question."[48] An Aboriginal right is demonstrated by a practice continuously exercised since before contact with Europeans, since "time immemorial".[49] Treaty rights are set out in Treaties with the Crown.

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[44] Written Submissions of the Chiefs of Ontario (June 7, 2021), EB-2019-0247 at para 45.
[45] *R v Sparrow*, [1990] 1 SCR 1075 (SCC) at para 66.
[46] *Wasauksing First Nation v Wasausink Lands Inc.*, [2002] OJ No 164 at para 287 (upheld in [2004] OJ No 810 (ONCA)).
[47] *R v Van der Peet* (1996), [1996] 2 SCR 507 (SCC) at para 46 [*Van der Peet*].
[48] *R v Sappier*, 2006 SCC 54 at para 37.
[49] *Van der Peet* at paras 46, 60-65.

Anwaatin and the COO have not argued that the purchase or use of natural gas at a specific price is an Indigenous practice that has existed since "time immemorial". No Aboriginal right to the purchase and use of natural gas at a specific price arises. The use of natural gas for residential, industrial and commercial purposes is a modern practice.

Similarly, Anwaatin and the COO have not argued that any Treaty provision provides a right to the purchase and use of natural gas at a specific price. No Treaty right to the purchase and use of natural gas at a specific price arises.

No indirect section 35 right to purchase and use natural gas

Instead, Anwaatin and the COO have alleged that the pass through of the federal fuel charge impacts the exercise of other Aboriginal and Treaty rights. They have raised that allegation without explaining:

(a) the particular Aboriginal and Treaty rights at issue;
(b) the precise nature of the potential impact on Aboriginal and Treaty rights;
(c) why natural gas is essential to the exercise of that right;
(d) how the application of the federal fuel charge (*i.e.* a change in price, which is ultimately eligible for rebate, not an end of natural gas supplies) will change the exercise of that right; or
(e) whether other measures, including other government programs, may be implemented to lessen the impact of the federal fuel charge on any Aboriginal or Treaty rights while still achieving the desirable goals of the federal fuel charge.

No claim of impact or infringement of an Aboriginal or Treaty right can be established without specifically invoking a right and providing specific explanation of impact, so that the nature of the underlying right can be understood, the nature of the impact can be assessed, and any appropriate and targeted mitigation measures can be developed, if warranted.[50]

[50] *Van der Peet* at paras 50-51.

In any event, no claim for infringement of an Aboriginal or Treaty right could succeed in this circumstance. The use of natural gas is a modern practice, not subject to Aboriginal or Treaty rights. Courts have recognized that the manner in which an Aboriginal or Treaty right is exercised may evolve over time, and modern methods may be used in exercising s. 35 rights.[51] However, those modern methods, and the pricing of those modern methods, do not themselves become subject to s. 35 on the basis that they are desirable methods of exercising the right, or the pricing of those methods of exercising the right is desirable.

Further, although the federal fuel charge serves as a behavioural incentive, Indigenous peoples (and other individuals) are eligible to receive the Climate Action Incentive payment, discussed above, which can reimburse them for the cost imposed by the federal fuel charge. Therefore, while the federal fuel charge incentivizes individuals to make different choices about their energy use, it does not prohibit fuel use, and at the end of the day individual end users can be made financially whole. No impact on Aboriginal or Treaty rights exists in that circumstance.

In any event, if the manner in which a s. 35 right is exercised evolves, it naturally follows that the process of that evolution, or the pricing of that modern method of exercising a right, does not become frozen at any single modern point in time. The current pricing changes flowing from the federal fuel charge are a natural evolution to the pricing of a modern practice – use of natural gas – that is being implemented in order to address the modern challenge of climate change. No right to natural gas at a particular price, frozen at a particular point in time, arises.

4.2 At most the honour of the Crown requires consultation

Anwaatin and COO have alleged that the principle of the honour of the Crown requires that Indigenous peoples on- and off-Reserve be exempt from the pass through of the federal fuel charge. That is a novel interpretation of the principle of the honour of the Crown. It has not previously been applied in this manner, to mandate an exemption from a broad-

[51] *Van der Peet* at para 64**;** *R v Marshall*, 2005 SCC 43 at paras 25-26; in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at paras 50-51.

based regulatory measure that does not directly impact Aboriginal or Treaty rights. Anwaatin and COO cite no cases demonstrating this application of the honour of the Crown.

Honour of the Crown applies where Aboriginal and Treaty rights are at issue

The honour of the Crown has not been interpreted to apply to broad economic administrative or regulatory decisions that the Crown may take under laws of general application, unless claimed or established Aboriginal or Treaty rights are potentially impacted by the decision or measure. The SCC has emphasized: "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 situations involving reconciliation of Aboriginal rights with Crown sovereignty."[52] The Federal Court in *Native Council of Nova Scotia v. Canada* similarly stated:

> In order to demonstrate a violation of s. 35 of the Constitution Act, 1982, the applicants must demonstrate that there is an [A]boriginal or [T]reaty right at stake. They have not done so. The applicants have not suggested that there is any [T]reaty right at issue and they have failed to point to a possible [A]boriginal right that has been infringed. Instead, they rely on the general duty of the "honour of the Crown" to ground their claim that there has been a violation of a constitutional right…
>
> In my view, the Supreme Court's decision [in Haida Nation], properly interpreted, does not assert that the honour of the Crown arises whenever the Crown takes an action that may indirectly impact [A]boriginal peoples. Rather, in Haida Nation and other decisions, courts have observed that the honour of the Crown arises when there is a specific [A]boriginal interest or right at stake in the Crown's dealing.[53]

As discussed above, no specific Aboriginal or Treaty rights have been invoked in this context, and no impacts on Aboriginal or Treaty rights can therefore be analyzed.

The honour of the Crown has been applied in four ways. It:

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[52] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 17 [*Haida Nation*].
[53] *Native Council of Nova Scotia v Canada*, 2011 FC 72 at para 37-39.

(a) gives rise to a fiduciary duty when the Crown assumes direct discretionary control over a "specific Aboriginal interest";
(b) requires honourable conduct in Treaty-making and implementation;
(c) requires the Crown to act in a way that accomplishes the intended purposes of Treaty and statutory grants to Indigenous peoples; and
(d) gives rise to a duty to consult when the Crown contemplates an action that will affect an Aboriginal or Treaty right.[54]

In all of these circumstances, the Crown is required to act honourably. What is honourable in a given circumstance differs, depending on the context. The purpose of the honour of the Crown is to reconcile pre-existing Aboriginal rights with Crown sovereignty. The honour of the Crown does not dictate a particular outcome or result. No recognized aspect of the honour of the Crown requires an exemption from a broad based regulatory regime.

No fiduciary duty, Treaty-making, or Treaty or statutory grants at issue

The Crown's fiduciary duty only arises in cases where the Crown has assumed direct discretionary control over a specific Aboriginal interest, either under statute or on an *ad hoc* basis.[55] An example of that context is where the Crown acts pursuant to its powers under the *Indian Act*, when taking various acts in respect of Reserve lands, including Reserve creation, surrender, expropriation, and grant of natural resource rights, among other things.[56] In that circumstance, the purpose of the Crown's action is to act on behalf of the Indigenous group and in its best interests, not as a regulator balancing various interests and considerations. This context is different. Here, the Crown is acting as independent environmental regulator, and there has been no undertaking to act in furtherance of a specific interest of an Indigenous group. No fiduciary duty arises.

Other recognized aspects of the honour of the Crown also clearly do not apply in this context. This is not an exercise of making or implementing a Treaty, and no issues of

[54] *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 26 [*Manitoba Metis*]. See also Woodward, *Native Law* (2021), Chapter 3, paras 3-1830, 3-1840, 3-1900 [Woodward].
[55] Woodward, Chapter 3, paras 3-1280, 3-1360, 3-1420, 3-1590 to 3-1592, 3-1670; *Haida Nation* at para 18; *Wewaykum Indian Band v Canada,* 2002 SCC 79 at paras 81-83.
[56] Woodward, Chapter 3, paras 3-1360, 3-1370.

implementing Treaty or statutory grants to Indigenous peoples are at issue (ss. 87 and 89 of the Act do not apply for the reasons discussed above).

No duty to consult or accommodate

If any specific Aboriginal or Treaty rights are potentially-affected by the federal fuel charge, which has not been established, the honour of the Crown would not dictate a particular outcome. Instead, the honour of the Crown would give rise to a duty to consult, which the Crown discharges through this regulatory process.[57] In the context of consultation, Indigenous representatives have a duty to "bring forward" and "constructively furnish relevant information" and to do so "in a clear and focused way".[58] The government "cannot respond without hearing what specific Aboriginal interests... are at risk."[59]

Where clear and focused information from Indigenous representatives reveals that the government measure "may adversely affect the [Aboriginal or Treaty] right in a significant way," the Indigenous group's clear and focused concerns can be "balanced against 'competing societal interests'", which is the role of accommodation.[60] Accommodation also does not guarantee a particular result, but is a "give and take process."[61]

The cases relied on by COO to argue that even when weighing many factors in the public interest, "the Honour of the Crown is a public interest that supersedes all other considerations"[62] do not imply an exemption from the federal fuel charge. These cases relate to the duty to consult. For example, in *Clyde River*, a specific Aboriginal right to harvest marine mammals was at issue, and the honour of the Crown gave rise to a "duty to consult" prior to authorizing an activity that might impact marine mammals.[63] In *Clyde*

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[57] *Manitoba Metis* at para 26.
[58] *Pimicikamak v Manitoba*, 2016 MBQB 128, para. 44, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 66; *Halfway River,* 1999 BCCA 470, para. 161; *Haida*, 2004 SCC 73 at para 42.
[59] *Louis v British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070 at para 227; see also *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 56 [*Coldwater*].
[60] *Coldwater* at paras 57-59; *Haida* at para 47.
[61] *Coldwater* at para 58.
[62] Written Submissions of the Chiefs of Ontario (June 7, 2021), EB-2019-0247 at para 30.
[63] *Clyde River (Hamlet) v Petroleum Geo-Services,* 2017 SCC 40 at para 40.

River, the honour of the Crown did not dictate any particular result in the public interest balance following consultation, consistent with the principles set out above.

In this circumstance, there is no Aboriginal or Treaty right to purchase natural gas at a specific price. No impacts on any Aboriginal or Treaty right have been clearly or specifically articulated. No significant impact on an Aboriginal or Treaty right has been identified with a degree of particularity sufficient to allow the parties to understand the nature and scale of the of the impact and the various ways in which it may be mitigated. As a result, no duty to consult arises, and even if it does, there is no duty to accommodate because no adverse impact on an Aboriginal or Treaty right has been revealed. In practice, no adverse impact occurs in light of the Climate Action Incentive rebate payments, discussed above, which can fully mitigate any potential impacts of the federal fuel charge.

In any event, in developing the GGPPA and listing Ontario as a jurisdiction to which the federal fuel charge would apply in place of a provincial program, the federal government consulted broadly, including with Indigenous groups. This engagement is ongoing. The Regulatory Impact Analysis Statement applying the federal fuel charge to Ontario further commits that the "federal government will… continue to engage with Indigenous peoples with respect to pricing carbon pollution" and the "Pan-Canadian Approach to Pricing Carbon Pollution will be reviewed by early 2022 to confirm the overall path forward."[64]

4.3 Federal fuel charge is consistent with the honour of the Crown

In any event, the application of the federal fuel charge to all Canadians, including Indigenous peoples, is consistent with the honour of the Crown. Anwaatin and the COO have both emphasized that Indigenous peoples in Canada may experience the effects of climate change to a greater degree than other Canadians.[65] The federal fuel charge is a mechanism through which Canada is attempting to reduce carbon emissions, thereby helping to slow or reduce the effects of climate change. As discussed above, as a

[64] *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*: SOR/2018-212, online: Canada Gazette, Part II, Vol 152, No 22 <https://gazette.gc.ca/rp-pr/p2/2018/2018-10-31/html/sor-dors212-eng.html>.
[65] Written Submissions of the Chiefs of Ontario (June 7, 2021), EB-2019-0247 at paras 21 and 31.

behavioural incentive, the federal fuel charge only works if it is passed through to end users. As changing behavior is necessary to address climate change, passing the federal fuel charge through to end users is therefore consistent with the honour of the Crown.

Furthermore, as discussed above, the Government of Canada has implemented measures so that the federal fuel charge does not impose an undue burden on any individual users of natural gas or other covered fuels. Individuals (including Indigenous customers) are eligible to receive a rebate in the form of the Climate Action Incentive, which in practice can reimburse such individuals for the amount of federal fuel charge that on average would be passed through to them based on their annual fuel usage. Moreover, the Government has dedicated a portion of the proceeds collected under the GGPPA for Indigenous communities.

5. NO OTHER LEGAL OBLIGATIONS BAR APPLICATION OF FEDERAL FUEL CHARGE TO INDIGENOUS PEOPLES

5.1 No contravention of section 36 of the OEB Act

In their submissions, the COO argue that section 36(1) of the *Ontario Energy Board Act, 1998* ("**OEB Act**") requires the OEB to take into account the special economic circumstances for First Nations customers on and off Reserve in considering whether natural gas rates are just and reasonable.

It is just and reasonable for Enbridge Gas to recover the cost of the federal fuel charge as a prudently incurred cost for providing regulated service. The SCC has considered the meaning of just and reasonable rates, finding the phrase requires a balance between the utility and consumers. It requires that rates, on one hand, be fair to the consumer and, on the other, secure to the regulated entity a fair return for the capital invested.[66]

In the circumstances, this balance requires Enbridge Gas to recover the federal fuel charge by passing it through to customers. The federal fuel charge is mandated by the GGPPA.

[66] *Ontario (Energy Board) v Ontario Power Generation Inc.* at para 15, citing *Northwestern Utilities Ltd. v City of Edmonton*, [1929] SCR 186 at pp 192-193.

Enbridge Gas must remit the charge to CRA, the applicable rate is set by the GGPPA and the total charge payable is determined by the volume of a customer's fuel use. These factors are outside Enbridge Gas's control. Enbridge Gas simply seeks to recover a cost that is the product of a customer's gas use and a statutory rate.

If Enbridge Gas cannot pass through this charge to customers, it will result in a cost to Enbridge Gas's shareholder which cannot be recovered. In contrast, if Enbridge Gas can pass through this charge as the GGPPA intends it to do, it will not impose any undue economic burden on Enbridge Gas's customers particularly in light of the Climate Action Incentive. Therefore, on balance, it is just and reasonable for Enbridge Gas to recover the federal fuel charge it remits to CRA. Further, if Enbridge Gas cannot pass through the federal fuel charge to Indigenous customers, this will impact economic feasibility of gas distribution projects particularly on Reserve lands and may act as a disincentive for Enbridge Gas and other potential distributors to pursue such projects.

5.2 Environmental Bill of Rights does not create Aboriginal or Treaty rights

In its submissions, the COO suggest that Ontario's *Environmental Bill of Rights, 1993* ("**EBR**") is a "quasi-constitutional law" that somewhat creates Aboriginal or Treaty rights. This is incorrect. The EBR is a provincial statute that prescribes certain procedural requirements in connection with provincial environmental laws. It does not have constitutional authority and does not purport to establish any Aboriginal or Treaty rights.

5.3 No violation of reconciliation objectives or UNDRIP

Anwaatin submits that the federal fuel charge is inconsistent with the objective of reconciliation, and the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**"). That is not the case.

First, neither reconciliation nor UNDRIP form part of Ontario law, in the sense that neither are legal principles that are justiciable. "Reconciliation" is defined by the Truth and Reconciliation Commission of Canada as "an ongoing process of establishing and

maintaining respectful relationships".[67] The Federal Court of Appeal has described the principle of reconciliation as focused on relationship, grounded in an understanding of history and looking forwards in the aim of healing the relationship.[68] How that principle applies in any context is not defined, and may vary widely: "reconciliation does not dictate any particular substantive outcome."[69]

UNDRIP is a declaration of the United Nations General Assembly. In contrast to a treaty, once ratified, a Declaration is not binding on Canada or Ontario. UNDRIP has not been implemented into the law of Canada or Ontario. The federal government recently passed legislation that will set in motion a process to develop legislation to align existing and future federal laws with the 46 articles outlined in UNDRIP, in consultation with Indigenous groups and others. The result of that process is not yet known, and therefore it would be premature to speculate and apply the principles set out in UNDRIP before they are implemented into federal law. No similar process exists to implement UNDRIP into Ontario law at this time.

In any event, the application of the federal fuel charge to all Canadians, including Indigenous peoples, is consistent with these principles, for the same reasons that it is consistent with the honour of the Crown, discussed above. Anwaatin and COO have noted that addressing climate change is in the interest of Indigenous peoples. According to the SCC, it is also expected that the federal fuel charge be passed through to end users in order for it to be effective. No negative effects arise from the federal fuel charge, which is ultimately rebated to individuals. In any event, the federal government, which has jurisdiction over "Indians" and "Lands Reserved for Indians" is best-placed to consider any impacts and develop targeted responses to them. Indeed it has done so through the rebates and funding that it returns to Indigenous peoples and communities under the GGPPA.

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[67] Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Winnipeg, MB: The Truth and Reconciliation Commission of Canada, 2015) at p 16.
[68] *Coldwater* at paras 49-53.
[69] *Coldwater* at paras 49-53.

5.4 Federal fuel charge is consistent with Enbridge Inc.'s Indigenous Peoples Policy

Anwaatin alleges that the federal fuel charge is inconsistent with Enbridge Inc.'s *Indigenous Peoples Policy* ("**IPP**").[70]

The flow through of the federal fuel charge to Indigenous customers is not inconsistent with the IPP. The IPP specifies that "Enbridge recognizes the importance of reconciliation between Indigenous communities and broader society" and "the legal and constitutional rights possessed by Indigenous Peoples in Canada and in the U.S., and the importance of the relationship between Indigenous Peoples and their traditional lands and resources. [Enbridge] commits to working with Indigenous communities in a manner that recognizes and respects those legal and constitutional rights and the traditional lands and resources to which they apply, and we commit to ensuring that our projects and operations are carried out in an environmentally responsible manner."

Flowing through a regulatory charge to Indigenous peoples does not mean a party is acting contrary to the reconciliation of Indigenous peoples and non-Indigenous peoples. Reconciliation aims to foster a "mutually respectful long-term relationship"[71], "it does not dictate any particular substantive outcome."[72] As such, reconciliation does not require that Indigenous customers be exempt from the federal fuel charge. Further, the application of the federal fuel charge is in line with Enbridge Gas's commitment to ensure their operations are carried out in an environmentally responsible manner and with respect for the traditional lands and resources of Indigenous communities.

6. CONCLUSION

Enbridge Gas respectfully requests the OEB deny the relief sought by the COO and Anwaatin. Further, Enbridge Gas requests the OEB issue an order establishing as final the Enbridge Gas Federal Carbon Charge for First Nations on-Reserve customers. As

[70] *Indigenous Peoples Policy* (May 2018), online: Enbridge Inc. <https://www.enbridge.com/~/media/Enb/Documents/About%20Us/indigenous_peoples_policy.pdf?la=en>
[71] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10.
[72] *Coldwater* at para 53.

discussed in Section 5.1 above, it is just and reasonable for Enbridge Gas to recover this charge. Enbridge Gas simply seeks to recover a cost that is the product of a customer's gas use and a statutory rate – factors that are outside of Enbridge Gas's control.

The law does not support a decision to grant the relief requested by the COO and Anwaatin. Neither section 87 nor 89 of the Act provide any protection in respect of the pass through of the federal fuel charge to Indigenous customers. Furthermore, the pass through of this charge does not infringe upon section 35 Aboriginal or Treaty rights or implicate the Crown's fiduciary duty. As a means to address the impacts of climate change for the benefit of all Canadians, including the Indigenous peoples of Canada, the GGPPA is consistent with the honour of the Crown.

Although the arguments of Anwaatin and the COO do not justify the relief they request, they still raise important questions of public policy. It would be appropriate for the Government of Canada to address these questions in a clear and comprehensive manner with regard to the purposes of the GGPPA and the circumstances of Indigenous peoples.