resilient LLP

July 19, 2021

VIA RESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Registrar

Dear Ms. Long:

Re: Enbridge Gas Inc.
2020 Federal Carbon Pricing Program Applications
OEB File No: EB-2019-0247

We are counsel to Anwaatin Inc. (**Anwaatin**) in above-referenced proceeding. Please find attached Anwaatin's reply submissions on issues related to the constitutionality of the Greenhouse Gas Pollution Pricing Act Fuel Charge and the requirements of the federal *Indian Act* (the Deferred Issues), filed pursuant to the Board's Procedural Order No. 4.

Sincerely,

Lisa (Elisabeth) DeMarco

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

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ONTARIO ENERGY BOARD

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

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

EB-2019-0247

REPLY SUBMISSIONS

OF

ANWAATIN INC.

July 19, 2021

1 BACKGROUND

Anwaatin is a collective of Indigenous communities including Aroland First Nation, Animbiigoo Zaagi'igan Anishinaabek Nation, and Ginoogaming First Nation (the **Anwaatin First Nations**) that each have traditional territory and constitutionally protected Indigenous rights that may be impacted by the outcome of this proceeding. Anwaatin and the Chiefs of Ontario (**COO**) each independently raised issues regarding the constitutional applicability of Enbridge's FCPP charges under the GGPPA (**FCPP Charge**) being imposed on Indigenous customers in apparent contravention of sections 87 and 89 of the *Indian Act*, RSC, 1985, c I-5 (***Indian Act***) and section 35 of the *Constitution Act, 1982* (the **Constitution**) (collectively, the **Deferred Issues**) at the time of their intervention[1] and thereafter.[2]

On June 7, 2021, Anwaatin and COO each filed submissions on the Deferred Issues and on July 5, 2021 Board Staff and Enbridge each filed submissions on the Deferred Issues and the submissions of Anwaatin and COO. Pursuant to the Board's Procedural Order No. 4, dated May 10, 2021, Anwaatin makes these reply submissions to the July 5, 2021 submissions of Board Staff and Enbridge.

2 OVERVIEW OF REPLY SUBMISSIONS

These reply submissions are organized as follows:

(a) Constitutional and statutory interpretation of the *Indian Act*;
(b) Protecting rights enshrined in section 35 of the Constitution;
(c) Applicability of the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**); and
(d) Alternative to the pass through of the FCPP Charge to Indigenous customers.

In addition, Anwaatin adopts the submissions of COO as they relate to the honour of Crown and the inapplicability of Enbridge's FCPP Charge to Enbridge's on- and off-reserve Indigenous customers.

Anwaatin generally submits that the FCPP Charge is not applicable to Indigenous customers as it is inconsistent with:

(i) sections 87 and 89 of the *Indian Act*;
(ii) Indigenous rights enshrined in section 35 of the Constitution; and

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[1] Anwaatin Inc., Notice of Intervention (January 27, 2020) at para 6, available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/666152/File/document.
[2] Procedural Order No. 1 (February 6, 2020) at pp. 4-5, available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/667101/File/document.

(iii) reconciliation and the applicability of the rights protected and promoted by UNDRIP.

3 CONSTITUTIONAL AND STATUTORY INTERPRETATION OF THE *INDIAN ACT*

3.1 Brief historical context of the *Indian Act*

Anwaatin respectively submits Board Staff and Enbridge lack the historical context of the *Indian Act* in their interpretations. As such, assertions made by Board Staff and Enbridge that the principle of reconciliation is not applicable to the determination of the protection of on-reserve property must be rejected. The Board must advance reconciliation, as a necessary element of all actions with respect to the Crown and the rights of Indigenous peoples. The legal basis of the relationship between the Crown and the Indigenous peoples of Canada finds early articulation in the *Royal Proclamation of 1763*, which confirmed and provided for the "nature, extent and purpose of the unique relationship … between the British Empire and [Indigenous] nations."[3] The *Royal Proclamation of 1763* sets out competing understandings of this relationship and provides restrictions on non-Indigenous people and the Crown with respect to extinguishing the rights of Indigenous people.[4] The original purpose of the *Indian Act*, first enacted in 1876 as colonial legislation imposed on First Nations, was to "assimilate Indians into mainstream Canadian Society"; "control Indians' relationship with the federal Crown"; and, as Board Staff correctly noted, "protect a small amount of Canada's land base for the exclusive use and benefit of Indians".[5]

The *Indian Act* consolidated various pieces of pre-Confederation legislation such as the *Gradual Civilization Act*,[6] which had the primary purpose of "the gradual removal of all legal distinctions" between "Indian Tribes" and other Canadians as well as the *Gradual Enfranchisement Act*, giving the federal government and its agents considerable and unilateral power over the lives, entitlements, and rights of Indigenous peoples to continue the government policy of assimilation. The intent was clearly articulated by the first Prime Minister of Canada:

> "The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."[7]

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[3] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*: Looking Forward, Looking Back. Volume 1. (Ottawa: the Royal Commission on Aboriginal Peoples, 1996), p. 240.
[4] John Burrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government", in Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference, Michael Asch ed. (Vancouver: UBC Press 2002) 155 p. 160.
[5] Thomas Isaac, Aboriginal Law, 5th ed (Toronto: Thomason Reuters Canada, 2016), pp. 209-210.
[6] *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, 3rd Session, 5th Parliament, 1857.
[7] John A. Macdonald, 1887.

This historical and contemporary sense of racial and cultural superiority on behalf of the British and Canadian governments was weaved throughout the interpretation and application of all laws relating to and dealings with Canada's Indigenous peoples.

It is for the foregoing reasons that Anwaatin has placed strong emphasis on the need to understand and interpret the *Indian Act* in a manner that advances reconciliation and ensures that unduly restrictive interpretations of Indigenous rights and protections are avoided. As such, Board Staff's and Enbridge's assertions that the principles of reconciliation as to the inapplicability of the principles of reconciliation to a determination of the rights of Indigenous peoples to protect their reserve lands and on-reserve personal property must be rejected. Advancing reconciliation must flow through all actions of the Crown and those who have stepped into the shoes of the Crown to determine the rights and protections of Indigenous peoples.

Historically, agreements between the Crown and Indigenous peoples included certain rights and protections with respect to their lands and property to prevent further erosion as a result of increasing settlement by non-Indigenous people in Canada. Accordingly, in recognition of long-standing treaty rights, statutory rights, and promises made by the Crown,[8] pre- and post-Confederation, the *Indian Act* provides exemptions to taxation for certain on-reserve property of an "Indian" or "Indian band" as well as prohibiting*, inter alia*, charges and levies with respect to the on-reserve personal property of Indigenous peoples. Charges and levies should be interpreted in their literal and ordinary meaning and should not, as Enbridge suggested, be unduly limitable.

The *Indian Act* has gone through various amendments since first enacted but remains largely the same now as it was then. It is inconsistent with the principles of reconciliation that the *Indian Act* should *currently* be interpreted based on the colonial principles expounded at the time it was first enacted. A turning point in Indigenous relations occurred, under Canadian law, with the constitutional recognition of Indigenous rights under section 35 of the Constitution. The enactment of section 35, for the first time in Canadian law, placed strict constitutional limits on the power of the federal government and the Crown to unilaterally extinguish or change treaty and other rights of Indigenous peoples. The Supreme Court of Canada (**SCC**), in numerous decisions cited in Anwaatin's submissions — and, in fact, those of Board Staff and Enbridge — has attempted to refine and articulate the special relationship between Canada and Indigenous peoples in a manner that both advances reconciliation and protects that special relationship. The SCC jurisprudence should be respected and applied.

[8] The tax exemptions for Indigenous peoples pre-date Confederation and first appeared in the legislation of Upper Canada in the 1850s. See *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C., 1850, c. 74, s. IV, and *An Act to prevent trespasses to Public and Indian Lands*, C.S.U.C. 1859, c. 81, s. 23, as found in Thomas Isaac, *Pre-1868 Legislation Concerning Indians* (Saskatoon: University of Saskatchewan Native Law Centre, 1993) cited in T Isaac, Aboriginal Law, p. 275.

3.2 Interpreting the *Indian Act*

3.2.1 Liberal interpretive method required for interpreting the *Indian Act*

The *Indian* Act requires a broad, liberal, and purposive interpretation which should not be unduly limited as suggested by Board Staff and Enbridge.[9] Driedger's "modern principle" of statutory interpretation provides 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."[10] This alone is consistent with the interpretation advocated by both Anwaatin and COO. Enbridge and Board Staff attempt to limit the plain and ordinary meaning of the terms "charges" and "levies" by resorting only to an *ejusdem generis* consideration of the taxation terms that surround these two words. This is inconsistent with the "modern principle" as determined by Bastarache J. in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*:

> "This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading. I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms."[11] (emphasis added)

Importantly, interpreting the *Indian Act* attracts specific and nuanced interpretive tools and legal norms than would ordinarily be used to interpret federal legislation. Board Staff correctly identify *Nowegijick v. The Queen*[12] as the point of departure for the proper interpretive method for interpreting the *Indian Act*.[13]

In reference to the principles provided in *Nowegijick* for interpreting legislation relating to Indigenous peoples, Sullivan states that "[i]t is well-established that legislation relating to Aboriginal peoples should receive a large, liberal and purposive interpretation; doubts or ambiguities should be resolved in favour of the Aboriginal peoples".[14] (emphasis added) In addition, *Nowegijick* stands for another interpretive principle, as explained by Sullivan:

> "[L]egislation relating to Aboriginal peoples should be interpreted in a straightforward, non-technical manner. In particular, the technicalities of tax or

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[9] See OEB Staff Submission on Deferred Issues, pp. 4-6; EGI Submissions, p. 16.
[10] 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
[11] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140, at para. 48.
[12] *Nowegijick v. The Queen*, [1983] 1 SCR 29 (*Nowegijick*).
[13] OEB Staff Submission on Deferred Issues, p. 4.
[14] Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed, Chapter 20 at §20.3.

> property law are not to be invoked to defeat the rights of Aboriginal peoples."[15] (emphasis added)

This is a re-articulation of the principle as stated by in Dickson J. in *Nowegijick*, referring to the proper interpretation of the *Indian Act:*

> "We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section."[16] (emphasis added)

In quoting from *Mitchell v. Peguis Indian Band*,[17] Board Staff asserts that La Forest J. rejects the notion that ambiguities "must automatically be resolved in favour of the interpretation advanced by an Indigenous party".[18] However, Anwaatin has made no such assertion. Instead, Anwaatin's submissions are entirely consistent with the principle that ambiguities and doubts as to meaning are to be resolved in a manner that maintains the rights of Indigenous peoples. In *Mitchell*, La Forest J. does not deviate from the principles set out in *Nowegijick*, and in fact affirms Anwaatin's position:

> "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 in particular 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."[19] (emphasis added)

The liberal interpretive method, arising from the above, directs a liberal and purposive interpretation of the *Indian Act* by decision-makers tasked with interpreting the *Indian Act*. Derogating from this principle is not aligned with SCC jurisprudence, specifically as it relates to interpreting the *Indian Act* and provisions aimed at maintaining Indigenous rights.

Sections 87 and 89 are precisely the types of provisions that are captured by the liberal interpretive method: both provisions are aimed at maintaining Indigenous rights to reserve lands, property, and the personal property of on-reserve Indigenous peoples. Further, Dickson C.J.,

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[15] *Ibid*., at §20.6.
[16] *Nowegijick*, at p. 41.
[17] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 (*Mitchell*).
[18] OEB Staff Submission on the Deferred Issues, p. 4.
[19] *Mitchell*, at p. 143.

writing in dissent in *Mitchell*, cautioned against deviating from the principles laid down in *Nowegijick* and provided the rationale for the principles:

> "The Nowegijick principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. The above-quoted statement is clearly concerned with interpreting a statute or treaty with respect to the persons who are its subjects -- Indians -- not with interpreting a statute in favour of Indians simply because it is the State that is the other interested party. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation."[20] (emphasis added)

Dickson C.J., the author of the principles in *Nowegijick*, indicates that the rationale of the principles is remedying the disadvantage of Indigenous peoples and is commensurate with a large, liberal, and purposive interpretation of the *Indian Act* which protects, and does not diminish, the property of Indigenous peoples. In addition, he notes that:

> "[t]he only limitation to the principle articulated in *Nowegijick* was that the treaties or statutes must 'relat[e] to Indians' for the liberal interpretive principle to apply. The *Indian Act* is the quintessential Act relating to Indians and the interpretation of any provision in it is, therefore, subject to the *Nowegijick* principle."[21] (emphasis added)

Anwaatin submits that this must be the guiding and paramount interpretive method used by the OEB in its interpretation of whether the FCPP Charge is inapplicable pursuant to sections 87 and 89 of the *Indian Act*. "Charges" and "levies" in section 89 of the *Indian Act* must therefore include all charges and levies, including the FCPP Charge.

3.2.2 The purpose and proper interpretation of sections 87 and 89 demonstrate that the FCPP Charge is inapplicable to on-reserve property

Board Staff and Enbridge both attempt to read into section 89 of the *Indian Act* limitations on the possible meanings of "charge" and "levy" so as to prevent the prohibition of charges and levies on the personal property of Indigenous peoples with respect to the FCPP Charge.[22] Anwaatin

[20] *Mitchell*, at p 99.
[21] *Ibid*, at p. 100.
[22] OEB Staff Submission on the Deferred Issues, pp. 17-20; EGI Submissions pp. 14-16.

cautions against the use of American law dictionaries (such as Black's Law Dictionary, cited extensively by Board Staff) or provincial statutes to guide the interpretation of federal legislation such as the *Indian Act* and its unique position and purpose in Canadian law. Ambiguities or doubts as to the meaning of the text of a statute are to be interpreted in favour of the meaning that best protects the rights of Indigenous peoples. This follows from Driedger's modern principle and the liberal interpretive method.

The purpose of sections 89 and 87 "is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlement."[23]

It bears repeating the actual statutory language used in section 89(1):

> "the 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."

Nowhere in the *Indian Act* does it direct section 89 to be restrictively applied only within, as Board Staff submit, a "Security Process" or, as Enbridge asserts, a "civil process". To do so would be unnecessarily and unlawfully restricting the purpose and intent of section 89 and the *Indian Act*. Board Staff acknowledges that "charge" and "levy" have various potential meanings.[24] Such ambiguity and/or doubt with respect to whether the "charge" or "levy" referred to in section 89 includes the "charge" or "levy" used in the context of the GGPPA is the very reason that Anwaatin submits that reliance must be placed on the liberal interpretive method directed by the SCC in *Nowegijick*.

Any interpretation of section 89 must satisfy its purpose, which is the protection of on-reserve personal property from intrusion and interference. Using the liberal interpretive method, required by *Nowegijick*, supports interpreting "charge" and "levy", as used by the SCC to describe the FCPP Charge in *Reference re Greenhouse Gas Pollution Pricing Act*[25], as falling within the ambit of section 89. Determining that the FCPP Charge is subsumed under the meaning of "charge" and/or "levy" pursuant to section 89 supports Anwaatin's submissions as to the inapplicability of the FCPP Charge to the on-reserve property of Indigenous peoples, i.e., the natural gas and/or energy supplied by Enbridge to its Indigenous customers.[26]

Board Staff submits that the purpose of section 87 is to "protect specific assets, in specific locations, from acts of taxation"[27] and "prevent First Nation property from being eroded by the

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[23] *Mitchell*, at p. 133.
[24] OEB Staff Submissions on Deferred Issues, p. 13.
[25] *Reference re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11.
[26] See also *Brown v. R*, [1979] 3 CNLR 67 (BCCA).
[27] OEB Staff Submission on Deferred Issues, p. 8.

ability of government to tax or creditors to seize".[28] Enbridge submits that the purpose of section 87 is "to protect the entitlements of 'Indians' to Reserve lands and ensure that the use of Reserve lands by Indigenous peoples is not eroded by the ability of government to tax."[29] Instead, Dickson C.J., writing in dissent in *Mitchell*, provides the broad and permissive purpose of sections 87 and 89: "[b]oth provisions reflect the policy of the [Indian] Act that Indians should be protected from the operation of laws which otherwise might allow Indians to be disposed of their property."[30] (emphasis added) The GGPPA is such a law if its operation has the effect of dispossessing Indigenous people of their property.

Board Staff and Enbridge place heavy reliance on the alleged intention of the *Indian Act* to not "provide a general economic benefit" to Indigenous peoples.[31] However, La Forest J. states in *Mitchell v. Peguis Indian Band*, relied on by Gonthier J. in *Williams v. Canada*, that "[i]t must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve."[32] (emphasis added) The purpose and application of the *Indian Act* should not therefore be limited as advocated by Enbridge and Board Staff.

The purpose of sections 87 and 89 are not themselves meant to provide some abstract economic benefit to Indigenous peoples. Instead, they protect reserve lands and personal property from further erosion and dispossession by Canada and non-Indigenous Canadians. Charges and levies are examples of the means by which the property of Indigenous peoples is diminished and therefore should not be applied. A truly liberal and purposive understanding of the *Indian Act* requires that the FCPP Charge be understood as a means by which the property of Indigenous peoples is diminished. This is a result of the increasing burden and cost on Indigenous peoples and the diminishment of property as a result of the FCPP Charge being applied to their on-reserve personal property. A result of this interpretation is a determination that the FCPP Charge is conclusively inapplicable pursuant to sections 87 and 89 in order to protect Indigenous people from the operation of the GGPPA, to the extent it results in the dispossession of Indigenous property.

Enbridge compares the FCPP Charge to excise taxes, asserting that in the event the FCPP Charge is incorrectly considered a form of taxation it is an indirect tax of the type not covered by the section 87 exemption.[33] The analogy to excise taxes is distinguishable from the present case as the FCPP Charge, approved by the OEB on an interim basis, attaches at the time of purchase, which occurs on-reserve, thereby falling within the wording of section 87. In *Francis v. The*

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[28] *Ibid*., p. 9.
[29] EGI Submissions, p. 12.
[30] *Mitchell*, at p. 100.
[31] OEB Staff Submission on Deferred Issues, p. 9; EGI Submissions, p. 12. See also *Williams v. Canada* [1992] 1 SCR 877 and *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161, p. 1171.
[32] *Ibid*., at p. 139.
[33] EGI Submissions, p. 13.

Queen,[34] the SCC denied the application of section 87 to excise taxes because such taxes attached at the international border before the property attracting the excise tax can be said to be located on-reserve. Natural gas once delivered is situated on-reserve, in the same way that electricity was deemed to be on-reserve property in *Brown v. R*.[35]

Anwaatin therefore submits that the purpose of section 87 and 89 must be paramount in any interpretation of "charge" and/or "levy" with respect to the applicability of the FCPP Charge to on-reserve Indigenous customers of Enbridge, regardless of how the FCPP Charge is characterized, whether as a levy, charge, fee, licence, regulatory fee, regulatory charge, or otherwise. The prevention of the diminishment and erosion of Indigenous property, foundational to sections 87 and 89, is defeated by the removal of on-reserve property through the application of the FCPP Charge, in order to satisfy the carbon emissions reduction goals of the Government of Canada.

4 PROTECTING RIGHTS ENSHRINED IN SECTION 35 OF THE CONSTITUTION

Section 35 of the Constitution protects the "Aboriginal and Treaty rights" of Indigenous peoples in Canada. Anwaatin's position on the analogous nature of Aboriginal title and the interest in reserve lands and personal property of Indigenous peoples is supported by the SCC in *Guerin v. R.*, where Dickson J. states:

> "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases."[36]

Isaac suggests that "Indian bands may assert claims of Aboriginal title over reserve land … If a reserve is created within the original or ancestral territory of a First Nation, then this could indicate the existence of Aboriginal title."[37]

The "Aboriginal rights" concerned are the right to use and enjoyment of reserve lands and the protection from diminishment and interference of reserve lands and on-reserve personal property, rights recognised and protected by the *Indian Act*. In addition, such rights associated with reserve lands must be interpreted in accordance with section 18(1) of the *Indian Act*, which provides:

> 18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine

[34] [1956] S.C.R. 168, see also *Mitchell.*
[35] *Brown v. R*, [1979] 3 CNLR 67 (BCCA).
[36] See *A.G. Quebec v. A.G. Canada* [1921] 1 A.C. 401 at 410-11; cited in *Guerin v. R.* [1984] 2 S.C.R. 335 (SCC) at 349.
[37] T Isaac, Aboriginal Law, 5th ed., p 251.

> whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band. (emphasis added).

Anwaatin is not asserting a general tax exemption as suggested by Board Staff, but rather a recognized Aboriginal right to use traditional and reserve lands without diminishment or restriction, commensurate with those established and protected in and through sections 87 and 89 of the *Indian Act*, limited to reserve lands and the on-reserve property of Indigenous peoples. This finds support in *Nowegijick* where Dickson found that if matters are governed by the *Indian Act*, they shall not be subject to levies and charges.[38]

Board Staff assert that *Tsilhqot'in Nation v. British Columbia* and *R. v. Sparrow* support the assertion that environmental regulations may be a justifiable infringement of section 35 rights.[39] However, Board Staff neglects to indicate that none of the rights in *Tsilhqot'in* and *Sparrow* are expressly protected by sections 87 and 89 of the *Indian Act* as per the exemption from charges and levies and thereby the FCPP Charge. Anwaatin is not asserting a right to continue to emit greenhouse gases as an Aboriginal right, which would be the corollary of the rights asserted in the cases argued by Board Staff. It is, however, indicating that section 89 clearly exempts Indigenous peoples and particularly those on reserve from the FCPP Charge.

5 APPLICABILITY OF UNDRIP

5.1 Bill C-15 and UNDRIP support the inapplicability of the FCPP Charge to Indigenous peoples

Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (the ***UNDRIP Act***), received Royal Assent on June 21, 2021. The preamble to the *UNDRIP Act* makes the purpose of UNDRIP clear:

> "Whereas the [UNDRIP] provides a framework for reconciliation, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith"

Subsections 2(3) and 4(1) of Bill C-15 explicitly and contrary to submissions by Enbridge,[40] make clear that UNDRIP is applicable in Canada:

> 2(3) Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.
>
> 4 The purposes of this Act are to

[38] *Nowegijick*, para 24.
[39] OEB Staff Submission on the Deferred Issues, p. 24 and footnote 56.
[40] EGI Submissions, pp. 25-26.

(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law (emphasis added)

Anwaatin therefore submits that UNDRIP is applicable in Canadian law.

Both the *Indian Act* and the GGPPA are federal statutes, forming part of "Canadian law", and are to be interpreted in compliance with UNDRIP. UNDRIP has the purpose of supporting and advancing reconciliation. Enbridge correctly notes that reconciliation is "focused on relationship, grounded in an understanding of history and looking forwards in the aim of healing the relationship".[41] Protecting the rights and property of Indigenous peoples from erosion is aligned with the process of reconciliation and corresponds with the rights and protections set forth in UNDRIP.

Protecting the land base and personal property interests and rights of Indigenous peoples from diminishment and dispossession by non-Indigenous peoples is supported by Article 5, Article 8, and Article 26(1) of UNDRIP:

> Article 5
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."
>
> …
>
> Article 8
>
> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>   (b) Any action which as the aim or effect of dispossessing them of their lands, territories or resources;
>   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
>   (d) Any form of forced assimilation or integration;
>   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. (emphasis added)
>
> …
>
> Article 26

[41] *Ibid*., p. 26.

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied and otherwise used or acquired

These are substantive rights, contrary to submissions made by Board Staff,[42] that find articulation in Canadian law. Article 5 and 8(2)(b) parallel the SCC's interpretation of the *Indian Act* and sections 87 and 89, in the sense that they all seek to protect Indigenous land and property (resources) from erosion or dispossession by non-Indigenous peoples and the rights of Indigenous peoples to decide *for themselves* whether to enter the "economic mainstream" and "acquire and hold property outside lands reserved for their use".[43] This is not an aspirational goal but a firm recognition, to be respected, of the self-determination of Indigenous peoples and finds expression in the exemptions provided through sections 87 and 89 of the *Indian Act* and the recognition of Indigenous rights pursuant to section 35 of the Constitution. Article 26 further recognizes the unique property interests held by Indigenous peoples to their traditional land and, under the Canadian legal system, to lands acquired, inclusive of reserve lands.

Articles 5, 8, and 26 are explicit expressions that Indigenous peoples are in fact and in law excluded from the "common burdens of citizens" with respect to their lands, territories and resources which implicitly includes their on-reserve personal property. Denying this is at odds with an entire constitutional and legal framework developed since Europeans first began to colonize North America and, at the very least, is inconsistent with UNDRIP as *applicable* in Canadian law.

Enbridge submitted that if it "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."[44] Anwaatin submits, with respect, that this is a pass through cost and embracing Indigenous partnerships should in fact have the contrary impact of increasing the economic feasibility of economically viable projects to alleviate energy poverty on reserve lands. We also note that Enbridge's statement is also inconsistent with each and all of UNDRIP, the *UNDRIP Act*, Enbridge's own Indigenous Peoples Policy, and Canadian constitutional law. Anwaatin requests that the Board expressly reject this line of argument.

6 ALTERNATIVE TO THE PASS THROUGH OF THE FCPP CHARGE

Anwaatin supports Board Staff's position[45] that if the FCPP Charge is found inapplicable to the on-reserve Indigenous customers of Enbridge the costs of the FCPP Charge should be borne by all other non-Indigenous Enbridge ratepayers.

7 RELIEF REQUESTED

[42] OEB Staff Submission on the Deferred Issues, p. 31.
[43] *Mitchell*, at para 87.
[44] EGI Submissions, p. 25.
[45] OEB Staff Submission on the Deferred Issues, pp. 32-33.

7.1.1 Anwaatin respectfully requests the Board find that:

(i) Enbridge's Application for gas distribution rate changes and clearing certain non-commodity deferral and variance accounts related to compliance obligations under the GGPPA (termed the FCPP Charge) on natural gas sold is prohibited by sections 87 and 89 of the *Indian Act;*

(ii) The FCPP Charge is constitutionally inapplicable to all Indigenous customers pursuant to section 35 of the Constitution;

(iii) Enbridge's Application to impose the FCPP Charge on Indigenous customers be denied as in relation to Indigenous customers and the Deferred Issues;

(iv) The imposition of the FCPP Charge on Enbridge's Indigenous customers is inconsistent with the honour of the Crown, the objective of reconciliation, the recommendations of the TRC, and the UNDRIP;

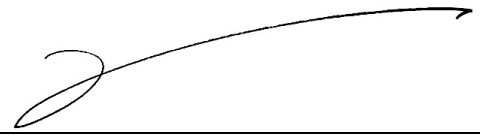
(v) The imposition of the FCPP Charge on Enbridge's Indigenous customers is contrary to the Board's obligation to set just and reasonable rates for natural gas pursuant to section 36 of the *Ontario Energy Board Act*, as amended;

(vi) Any and all deferral accounts held in relation to the FCPP Charge(s) applicable to Indigenous customers be cleared in their favour, through the most equitable and expedient measures ordered by the Board; and

(vii) Such further and other relief as counsel may advise, and this Board may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th

19th day of July, 2021



Lisa (Elisabeth) DeMarco
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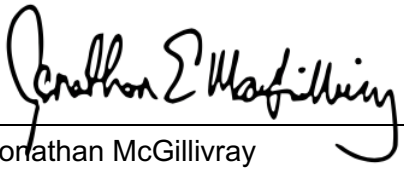

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