ONTARIO ENERGY BOARD

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

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

EB-2019-0247

REPLY SUBMISSIONS OF

CHIEFS OF ONTARIO

JULY 19, 2021

A. SUMMARY

1. Both the Ontario Energy Board staff ("OEB") and Enbridge (together, "Respondents") make the argument that the *Indian Act* section 87 and 89 do not exempt the federal carbon pricing charge ("Charge") under the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") from applying on reserve because:

    a. Section 87 is about taxes not being applied on reserves, and the Charge is not a tax because:

        i. The Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*[1] ("Reference") says a tax is to raise public revenue and a charge is not a public revenue generator but to support a regulatory regime such as to pay for its costs or to effect changes in behaviour, and the *GGPPA* Charge is a charge and not a tax;

        ii. Cases on section 87 that are cited say that a tax is for public revenue or other public purpose and in those cases the courts found that the Indigenous persons seeking to claim a tax exemption under section 87 could not do so as the charges in those situations were not taxes by this definition.

    b. Section 89 says that charges and levies cannot be applied to property on reserve, but these are the charges and levies that are aspects of the Security Process (as the OEB defines it in its submissions) and not the Charge, because:

        i. Cases cited say that this section is about the Security Process;

        ii. The rules of statutory interpretation lead to the interpretation as everything else in that list is about aspects of the Security Process.

2. The Respondents both make the argument that the Honour of the Crown ("HOC") is not applicable in this case at all because the HOC only applies or is triggered when a Constitution section 35 Aboriginal or Treaty right is at issue, and since no such right (such as hunting, fishing, trapping, gathering, etc.) is impacted by the Charge, then the HOC is not invoked.

3. Enbridge makes other arguments about or emanating from the *GGPPA*:

    a. The OEB should not decide this issue as it applies to too many people, and this is just one little application.

    b. Exempting reserves and First Nations from the Charge is against or in conflict with or not allowed by the GGPPA – because the main or sole purpose of the *GGPPA* is to effect change in end consumer behaviour.

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[1] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 213-216.

c. Unless *all* consumers (of the fuel in the province) pay the Charge, the purpose of the *GGPPA* cannot be met.

d. First Nations and Indigenous persons on reserve should pay the Charge because they get it returned through rebates and the Climate Action Initiative anyway; in other words, even if the law says the Charge cannot apply, First Nations and Indigenous persons are being paid back under this law for the Charge anyway, so there is no need to exempt them.

4. COO replies as follows:

a. This case must be decided on what the Constitution and its principles direct be done. One must begin with this inquiry, and determine what interpretations and applications of the *GGPPA*, the *Ontario Energy Board Act* ("*OEB Act*" and the *Indian Act* most support the Constitution and its principles; rather than start with statutory language and precedent that is no longer in keeping with developing constitutional law.

b. The Respondents appear to have completely misunderstood COO's submissions and/or the law in this regard and thus COO's reply addresses these errors.

c. The Constitution is a living tree[2] and its application is meant to change as society, understanding and circumstances change.[3] One of the biggest changes in constitutional application in the last decade has been and no doubt will continue to be in regard to section 35. Its purpose is to effect reconciliation, and this has been known for some time,[4] but as time moves on, it becomes ever more apparent just how much harm has been done from colonialism and how much reconciliation is required.

d. In this case, for instance, if the Charge is allowed to apply on reserve and to First Nations, they will be hit by a *one two three punch* – three times harder than others in Canada:

i. It is acknowledged in the *GGPPA* that Indigenous peoples suffer greater harm from climate change;[5]

ii. The Charge would be disproportionately costly to Indigenous people on reserves due to poor conditions of homes and extreme poverty,

iii. The rebate would alleviate the cost to others at the expense of Indigenous people on reserve and First Nations since it is unlikely to be accessed or applicable to them (they do not pay income tax or file returns in many cases) – meaning everyone else but First Nations and on reserve Indigenous persons will be rewarded,

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[2] *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 94.
[3] *Ibid*.
[4] *R v Desautel*, 2021 SCC 17 at para 31.
[5] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, preamble.

all of which exacerbates the effects of colonialism and reduces the chance of reconciliation.

e. One of the growing developments in section 35 jurisprudence is the application of the Honour of the Crown as a requirement to achieve reconciliation. The Respondents' submissions misstate this law and have misunderstood or misrepresented COO's submissions in this regard. It is not correct that Aboriginal and Treaty rights must be at issue for the HOC to be invoked. The Respondents correctly cite the *Manitoba Metis Federation* case[6] but then fail to follow it: it states that one of the instances in which the HOC is invoked, is in regard to statutory grants to Indigenous peoples/persons.[7] No additional requirement, in this instance, for Aboriginal or Treaty rights, exists. We are talking about *statutory* rights or grants.[8]

f. The HOC does not arise from section 35 of the Constitution – it was not created in 1982. It is not an obligation of the Crown's to act in a certain way in regard to section 35 rights; it is an obligation to act in certain ways *with Indigenous peoples* – it arises from the Crown asserting sovereignty over such peoples when they had their own sovereignty. It is a nation-to-nation obligation. That is why is not hinged on section 35 rights.

g. In this case, we have three statutes at issue, to be read together: the *OEB Act* under which this Application is made and decided; about the application of a Charge under the *GGPPA*; and whether the Charge is exempt to Indigenous peoples/persons including under the *Indian Act*. The constitutional imperative of HOC, as interpreted by the Supreme Court of Canada, mandates that when deciding on whether and how to apply a statutory grant, it must be done in a way that best effects reconciliation.

h. By interpreting and applying the statutory law in this case the way urged by Enbridge and OEB staff, would effect a disproportionately harmful result to Indigenous persons on reserve and First Nations which under no circumstances can be seen as reconciliatory and thus in accord with the purpose of section 35 or the HOC which are constitutional imperatives.

i. The case law on the HOC has been developing due to the urgent mandate to effect reconciliation and end the ongoing damage from colonialism. As a result, older cases cited by the Respondents on interpreting the *Indian Act* as relates to the Charge under the GGPPA and the *OEB Act*, is no longer good law to the extent it fails to apply the Honour of the Crown as has been developed in *Manitoba Metis Federation*[9] and

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[6] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 21 lines 1-7; Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 27-28.
[7] *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14 at para 73.
[8] *Manitoba Metis Federation Inc v Brian Pallister et al*, 2021 MBCA 47 at paras 55-67 where the court found the Honour of the Crown was engaged after Manitoba entered into agreements and created a directive with the MMF regarding hydro projects. The agreement was not a modern-day treaty, but it was an important agreement with the underlying purpose of resolving outstanding claims by the Metis. Given the potential for the agreement and directive to adversely affect the accommodation of Metis rights, the honour of the Crown was engaged.
[9] *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14.

Mikisew[10] and results in narrow and semantical applications that clearly worsen Indigenous peoples' situations at the hands of the Crown.

j. In any event, the Respondents do not cite any case law that precludes the interpretation or application sought by COO anyway. Much case law exists distinguishing between a tax and a regulatory charge *in the general context*. Case law also exists that confirms a distinction is drawn between the two in respect of section 87 of the *Indian Act*. However, the distinction between the two in regard to section 87 is *different* than that in the general context. In section 87, a tax is something imposed for public revenue *and for a public purpose*. It is a broader definition than in the general context because the *purpose of section 87 is to protect Indigenous persons on reserve from having to pay for the Crown and its public purposes*. The Charge fits fully within a "public purpose" and thus is exempt as a "tax" under section 87. The general context case law is about tax in the constitutional division of powers situation – as between different levels of Crown governments. The *Indian Act* section 87 case law is about tax rights as between the Crown and Indigenous peoples (which have their own governments). They ought not be read the same way.

k. Further, case law exists that describes section 89 protections as pertaining to the Security Process. But none of these cases definitively states that that is its *only* purpose in all circumstances. Likewise, cases such as *Mitchell v Peguis* cited by the OEB,[11] decided well before the HOC jurisprudence, are neither helpful nor harmful here. While the cases state that parliament's intentions must be understood in order to interpret statutes as they apply to Indigenous peoples and persons, it is also the case that parliament must be presumed to act in accordance with the constitution[12] (and this includes today, the HOC). Thus, an interpretation that effects reconciliation – which, per *Mikisew*,[13] is what the HOC must do – must be chosen over one that impedes reconciliation.

l. In regard to Enbridge's arguments about the *GGPPA*:

    i. Case law is clear that it is not allowable for the OEB to fetter its discretion and refuse to determine this case simply because it is one application about one gas company.

    ii. The main purpose of the *GGPPA* is not to affect consumer behaviour, but rather the behaviour of producers, distributors, and importers to which the statute is directed. There is nothing in the statute that mandates or even speaks to the Charge being passed on to consumers. The Supreme Court in the Reference merely acknowledges or accepts that it was expected that companies would pass the Charge on, as companies pass on most costs to consumers.

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[10] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
[11] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 5-6, 14-15.
[12] *R v Ahmad*, 2011 SCC 6 at para 32; see also *R v Williams*, [1998] 1 SCR 1128 at para 44.
[13] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22.

iii. Whether or not the main purpose of the *GGPPA* is to affect consumer behaviour, the entire regime is not going to crumble, as Enbridge alleges, if a population comprising about 2.8% of the province (Indigenous population) was exempted from the Charge. The sky is not about to fall.

iv. The rebate will not be available to First Nations or Indigenous persons on reserve in many cases, as they do not pay taxes (and it is through income tax returns that such rebate would be issued), and the grants mentioned by Enbridge do not come close to matching what the Charge would be.

v. Most important, none of these points made by Enbridge matter at all, when applying the constitutional law and its imperative of HOC to the *GGPPA*, *OEB Act* and *Indian Act*, which mandate that the Charge as a matter of law cannot be applied to Indigenous persons on reserve, and we submit should not be applied to First Nations anywhere.

B. THE CONSTITUTION AND HONOUR OF THE CROWN

5. The HOC does not arise from section 35 of the Constitution – it was not created in 1982. It is not an obligation of the Crown's to act in a certain way in regard to section 35 rights; it is an obligation to act in certain ways *with Indigenous peoples* – it arises from the Crown asserting sovereignty over such peoples when they had their own sovereignty. It is a nation-to-nation obligation. It has become constitutionalized.

> The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" and goes back to the *Royal Proclamation* of 1763 (*Haida Nation*, at para. 32; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 66). It recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (*Manitoba Metis*, at para. 67; B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 436).
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> The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests (*Manitoba Metis*, at paras. 66-67). ….
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> The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis*, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1110 and 1114; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 231, per McLachlin J., as she then was, dissenting; *Haida Nation*; *Manitoba Metis*, at

para. 69).

> …Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a "constitutional principle" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42).[14]

6. The Honour of the Crown is a constitutional imperative effected by specific Crown duties. It is owed in many circumstances and Enbridge cites the Supreme Court case of *Manitoba Metis Federation* for a list of four such circumstances which includes: "requir[ing] the Crown to act in a way that accomplishes the intended purposes of Treaty and statutory grants to Indigenous peoples".[15]

7. It is the *Indian Act*, the *GGPPA*, and the *OEB Act* together in this application that determine the statutory grant and mandate that the HOC must be applied – meaning applying these grants in a way the best effects reconciliation.[16] The *GGPPA* is a regime intended to combat climate change and with First Nations and their members disproportionately negatively affected by climate change, this statutory grant is of particular interest to First Nations. But this grant cannot be applied in such a way – as Enbridge and OEB argue – that turns the grant into a grab and takes more from Indigenous persons on reserve and First Nations than it provides. This would be the precise outcome if the Charge is applied thereto. That would be an application that would create a perverse result, something that was clearly not intended and thus that the rules of statutory interpretation dictate ought not be preferred.[17]

8. No Aboriginal or Treaty right need be at issue or pleaded (as Enbridge misconstrues at p. 20, and the OEB at p. 22[18] for the Honour of the Crown to be required. The list of situations where the Honour is required is quoted by Enbridge and only two of four situations in that list require such a right to be at issue.[19]

9. COO's submissions on the *Environmental Bill of Rights* ("*EBR*")[20] are not as represented by Enbridge[21] (Enbridge states that COO uses the *EBR* to create Aboriginal and Treaty rights) but to explain that such rights, being largely to harvest on and use the land and resources, depend heavily on a viable environment to be exercised and that when the EBR was enacted it was done so in part to reverse and protect First Nations from further atrocities they had suffered from environmental injustices. This is to demonstrate that the Ontario legislature has recognized that Indigenous peoples are extremely vulnerable to environmental impacts (which of course include climate change) which have been caused

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[14] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 21-24.
[15] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73.
[16] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22; see also *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73.
[17] Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 375; referring to *Municipal Enterprises Ltd v Nova Scotia (Attorney General)*, 2001 NSSC 192 at paras 47-48.
[18] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 20 lines 5-8, Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 22.
[19] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73.
[20] Written Submissions of Chiefs of Ontario (June 7, 2021), EB 2019-0247 at para 44.
[21] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 25 lines 15-19.

by others. This is context for how to apply the HOC here. The *GGPPA* is a climate change abatement regime. It is important to apply it. But not in a way that forces Indigenous people to pay more for climate change (caused by others); not in a way that will likely result in a net negative impact on them – by forcing the Charge on them.

C. INDIAN ACT SECTIONS 87 AND 89

10. The case law in the general context on the difference between a tax and charge is not disputed by COO but is not ad idem with this case.

11. The cases about section 87 of the *Indian Act* define taxes more broadly than the cases in the general context. They stipulate that a tax is for public revenue *or a public purpose*.[22] "The distinction between a license fee and a license tax is that a fee bears some relationship to the service provided, whereas a tax merely generates revenue for the government."[23] The definition of "tax" under section 89 is applicable to and in conformity with COO's position.

12. But these same cases are distinguishable on the *facts*. *R v Frank* found that an individual expert licence fee was a tax – it was an individual fee and not a public purpose.[24] *Quebec (Procureur General) v Williams* found the same, and in this case it was an individual business licence.[25] In *R v Bob* the court found that the gaming 'fee" was a tax as it was for public revenue.[26] It was calculated and charged based on the volume or value of gaming, similar to the Charge being calculated based on volume of use.

13. These cases thus support COO's position. The Charge is a public purpose. It is not a licence fee or something akin to that designed to pay for or offset the costs of the regulatory regime or an individual's use of it. As the Supreme Court found in the Reference, the *GGPPA's* purpose is to affect behaviour generally for the purpose of reducing climate change.[27]

14. Cases cited by the Respondents state that statutes affecting Indigenous people do not have to be interpreted in favour of Indigenous people in the event of ambiguity.[28]

15. First, that law is no longer good law *to the extent that any such interpretation would render the statute inconsistent with the HOC*, which is a constitutional imperative, since legislatures are presumed to pass constitutional legislation.[29] COO is not stating that all older law is not good law for any purpose or in any way, but only to the extent is not consistent with law on the HOC and reconciliation, which are now constitutional imperatives.

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[22] *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 at paras 20, 28; see also *R v Frank*, 1999 ABPC 81 at para 128; see also *Quebec (Procureur General) v Williams*, [1944] 4 DLR 488 (Q CSP), at paras 29-30; *R v Bob*, [1991] 2 CNLR 104 (SK CA) at paras 12-14.
[23] *R v Bob*, [1991] 2 CNLR 104 (SK CA) at para 12.
[24] *R v Frank*, 1999 ABPC 81 at para 128.
[25] *Quebec (Procureur General) v Williams*, [1944] 4 DLR 488 (Q CSP).
[26] *R v Bob*, [1991] 2 CNLR 104 (SK CA) at para 12.
[27] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 28, 76.
[28] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 5-6; citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 142-143.
[29] *R v Ahmad*, 2011 SCC 6 at para 32; see also *R v Williams*, [1998] 1 SCR 1128 at para 44.

16. The *Nowegijick* case cited by the OEB[30] is consistent with the HOC and reconciliation and it states that "If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption."[31]

17. Yet the OEB goes on to favour and apply a highly technical construction to urge that the exemption of the Charge should be denied.

18. The OEB refers to *Mitchell*, quoting a paragraph saying statutory ambiguities should be resolved based on parliament's intention.[32] The OEB also refers to *Union of New Brunswick Indians* for a similar purpose.[33] Mitchell was decided in 1990 and *Union* in 1998, both well before HOC jurisprudence was developed. They are good law only so far as parliament's intention must be presumed to be constitutional and this includes in accordance with the HOC.

19. Second, nonetheless, it has been held the intention of these sections 87 and 89 together is protecting Indigenous persons on reserve from the erosion[34] of their precarious financial position.

20. Applying that intention and that interpretation, the Charge should be deemed a tax under section 87 or a charge under section 89 such that Indigenous persons on reserve are protected from it.

21. In regard to section 89, COO does not dispute that cases cited by the Respondents apply this section in the Security Process. But none of these cases *preclude* the application of "charge" or "levy" as referenced in this section, in ways beyond the Security Process.

22. Where one viable interpretation of section 89 is in keeping with the HOC, and another is not, then the one that is in accord with the HOC and that promotes reconciliation ought to be chosen.

23. *Mitchell* holds that section 89 is to prevent non-natives from interfering with the ability of Indians to enjoy such duly acquired property as they hold on their reserve lands.[35] This was cited by the OEB. It is a viable interpretation of section 89, that the Charge is a "charge", as it is an interference from the Crown through the *GGPPA* and from Enbridge in billing it. It is an interference with income, which is property on reserve.

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[30] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 4, 22; citing *Nowegijick v The Queen*, [1983] 1 SCR 29.
[31] *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36.
[32] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 6; citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 142-143.
[33] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 6; citing *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161 at para 38.
[34] *Canada v Monias*, 2001 FCA 239 at para 23.
[35] Written Submissions of the Ontario Energy Board, EB 2019-0247 (July 5, 2021) at 15; citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, at 131.

24. It is a semantical and highly technical construction to find that physical seizure by the sheriff and other related aspects of the Security process is substantively different than monetary seizure by an Act and a bill which is not paid could lead to the discontinuance of that supply of fuel. From the perspective of Indigenous consumers on reserve, there is likely no difference.

D. GGPPA ISSUES

25. Enbridge states that the OEB should not rule on this application, by saying that it would be more appropriate for Canada to deal with the issues of application of the Charge on reserves rather than the OEB deal with it in regard one natural gas company in one application.[36] That kind of statement could apply to any case before any court and is not a valid reason for a court or tribunal to defer and deflect decisions on the law because a policy decision could or might be (and might not be) made more broadly by a government at some future time. There is no authority for the OEB to refuse to rule on a matter within its jurisdiction (which Enbridge does not deny) where such refusal to rule or decide would effectively result in a decision to allow the status quo.[37]

> A tribunal, upon whom discretion is conferred, may not refuse to exercise that discretion. It may not refuse to deal with the matters over which it has a power of decision. It may not thwart the intention of the statute by failing to carry out the statutory purposes. A tribunal has a duty to exercise the power conferred upon it and does not have a discretion as to whether it will perform that duty. It must perform it; otherwise the statutory scheme is rendered useless.[38]

26. Enbridge makes arguments that amount to saying that it is contrary to the *GGPPA* itself to recognize that the Charge does not apply to First Nations or on reserves. This argument is the construction of a chain with many links. Commencing on page 5 line 22 to page 7 line 9, Enbridge makes arguments that the purpose of the *GGPPA* is to change consumer behaviour to use less GHG-causing fuel (such as natural gas) in their homes and cars, by making such fuels more costly. Thus, the Charge was meant to be passed on to consumers for this purpose – that is the entire purpose of the *GGPPA*. And if it cannot be passed on to *all* consumers of the fuel, this defeats the purpose. As such, it is contrary to the *GGPPA* itself to allow Indigenous consumers on reserve to be exempt. This is not only an extreme reach, but it is incorrect.

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[36] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 5 lines 10-15

[37] Sara Blake, *Administrative Law in Canada*, 4th ed (Markham: LexisNexis Butterworth, 2006) at 100-101 [*Blake*]; see also *Padfield v Minister of Agriculture, Fisheries & Food*, [1968] AC 997 at 1053 (HL), "It is quite clear from the Act in question that the Minister is intended to have some duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) 'I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation'. To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes."

[38] *Blake, ibid*.

27. First, it is *not* a requirement or primary or only purpose of the *GGPPA* to effect individual consumer behaviour change. Nothing in the *GGPPA* states this. Nothing in the *GGPPA* mandates that fuel producers, distributors and importers must pass on the Charge to consumers. The *GGPPA* states nothing about passing the Charge on to end individual consumers. The word consumer or any other reasonable synonym of it is not found in the *GGPPA* (except one reference to "consumer" in the definition of "distribution system").[39] Had a key purpose of the *GGPPA* been to make behavioural change at the individual consumer level, the language of the Act would have mandated passing the Charge on to consumers and not simply allowing it. Permissive language leaves the door open for a number of options and this kind of flexibility of choice does not optimize the fast attainment of a singular purpose.

28. Enbridge says the recitals of the *GGPPA* support Enbridge's arguments that the *GGPPA's* purpose is to effect changes at the consumer level, including the recital that the Act reflects the polluter pays principle.[40] The relevant recitals are:

> Whereas behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;
>
> Whereas the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change;
>
> Whereas greenhouse gas emissions pricing reflects the "polluter pays" principle;
>
> Whereas some provinces are developing or have implemented greenhouse gas emissions pricing systems;[41]

29. "Polluter pays" is widely applied to industry and not to consumers.[42] Prime Minister Trudeau said in announcing the carbon pricing plan that, "It has been proven that it (carbon pricing) is a good way to prevent heavy polluters from emitting greenhouse gases that fuel climate change and threaten the entire planet."[43] He also said, "Climate change is real and it's a real challenge to our world ... The question is, what is the best way to take real action on this? The idea, it's fairly well accepted, is we should make the companies that are polluting responsible for their pollution — by paying."[44]

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[39] *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12, s 186, s 3.
[40] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 6 lines 10-16.
[41] *Greenhouse Gas Pollution Pricing Act*, SC 2018 c 12, preamble.
[42] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, preamble, "Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle"; see also BC Government News, "Factsheet: Polluter-pay principle" (16 January 2017), online: <https://news.gov.bc.ca/factsheets/polluter-pay-principle>, "The polluter-pay principle ensures those who are responsible for spills are also responsible for cleaning them up and is designed to keep the cost of response off of taxpayers."
[43] Government of Canada, "Prime Minister Justin Trudeau delivers a speech on pricing carbon pollution" (3 October 2016), online: <https://pm.gc.ca/en/news/speeches/2016/10/03/prime-minister-justin-trudeau-delivers-speech-pricing-carbon-pollution>.
[44] John Paul Tasker, "Trudeau defends 'price on pollution' in anti-carbon-tax heartland", CBC News (13 September, 2018) online: <https://www.cbc.ca/news/politics/trudeau-price-on-carbon-saskatchewan-1.4823098>.

30. There is nothing in the Recitals or the *GGPPA* as a whole that states or even implies that this behavioural change is meant to occur primarily, if at all, at the individual consumer level. The *GGPPA* is directed to producers, distributors and importers and it would be more reasonable to conclude that the behavioural change being referenced is at *their* level. Industry players have much more power, research and development knowledge and expertise and capacity to effect change than do consumers.

31. Even acknowledging that one could expect that industry would pass the Charge on to consumers, is not to say that the end goal is to change consumer behaviour. If consumers find the fuel too expensive to keep using at current levels, then consumers will use less, and *industry will make less*. Logically, it is industry and not consumers that will be far more motivated to change, by developing alternative fuels and systems that produce less GHG emission so that consumers will again increase their usage leading to increases in industry revenue.

32. Second, the SCC in the *Reference* also does not state this is the purpose or requirement of the *GGPPA*. The quotes provided by Enbridge from this case[45] simply reflect that the SCC *acknowledges* that it was to be expected that producers would pass on the Charge, as with other costs of doing business, to consumers, not that this was mandated by or is the purpose of the *GGPPA*.[46]

33. Finally, Enbridge points out that in reality, individual consumers who get rebates (for reasons explained below, these will tend to not include First Nations and Indigenous persons on reserve), will end up with more money in pocket from the *GGPPA* scheme rebates than they had to pay in *GGPPA* Charges,[47] and as such, this is a financial benefit to consumers that directly conflicts with Enbridge's assertions that financial cost of the Charge is what incentivizes change in consumer behaviour. It cannot be both. This contradiction we submit thus reveals that the Charge (the extra cost) is not meant to affect consumer behaviour; rather, industry behaviour.

34. In summary, there is nothing explicit or implied in the *GGPPA* that prevents or discourages the relief COO is seeking here – the determination that the Charge does not apply to First Nations or to Indigenous persons on reserve.

35. As stated, it is not the entire or primary or even likely any purpose of mandate of the *GGPPA* that consumers alter their behaviour as the end goal of itself. Even if it were, it is ludicrous to posit that a population comprising approximately 2.8% of Ontario's population (all Indigenous people, and only 23% of First Nations live on reserve in Ontario),[48] by not paying this Charge, threaten to topple the entire scheme.

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[45] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 6, lines 6-9.
[46] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 30.
[47] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 8, lines 3-10.
[48] Government of Ontario, "Indigenous peoples in Ontario", online: <https://www.ontario.ca/document/spirit-reconciliation-ministry-indigenous-relations-and-reconciliation-first-10-years/indigenous-peoples-ontario#:~:text=Ontario%20has%20the%20largest%20Indigenous,in%20British%20Columbia%20(270%2C580).>.

36. There are many statutory schemes with broad purposes and broad application from which certain classes of persons are exempt, which exemption is in keeping with and does not defeat the entire scheme. These include: The *Income Tax Act* and the exemption for municipalities and First Nations performing the function of public government[49] (rationale for exemption is that governments themselves need money (including tax money) and it would be contradictory to charge tax against governments). Another example includes the broad ranges of employees being exempt from certain provisions from employment standards legislation.[50] People that are employed in certain professions are ineligible to serve as jurors.[51] The Lieutenant Governor in Council may make regulations exempting First Nations from the *Tobacco Tax Act*.[52] The *Smoke-Free Ontario Act* exempts the traditional use of tobacco by Indigenous people.[53]

37. Here, an exemption for Indigenous persons and First Nations is in keeping with and does not defeat the *GGPPA* scheme. As the Recitals of the *GGPPA* state, Indigenous peoples are disproportionately affected by climate change.[54] They bear an extra burden. Since they are already more negatively affected than most other Canadians, having to further burden Indigenous peoples with a Charge would increase the disproportionate effect and not alleviate it.

38. The rebate will not fix this. The arguments made by Enbridge in this regard[55] are misguided and reflect a severe lack of understanding of the First Nations reality.

39. If First Nations and Indigenous persons on reserve pay the Charge, those consumers are unlikely to receive anything back by way of rebates or Climate Action Incentive (CAI) payments.

40. If 90% of the CAI rebate is paid back to individual consumers in the province, then almost none of that will be rebated to Indigenous persons on reserve or First Nations because they do not pay income tax by virtue of section 87 of the *Indian Act* and section 149 of the *Income Tax Act*. The offer to assist persons on reserve with filling out and filing tax returns, when they have never done so, is a gloss on the icing on the cake, where the cake has been eaten and is not there. The Community Volunteer Income Tax Program is offered in certain communities only,[56] excluding many Indigenous communities, and while there is a virtual option in certain instances, about 76% of Indigenous homes do not have access to high-speed internet.[57]

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[49] *Income Tax Act*, RSC 1985, c 1, 5th Supp, s 149(1)(c).
[50] See for example, *O Reg 285/01*: When Work Deemed to be Performed, Exemptions and Special Rules, s 2.
[51] *Juries Act*, RSO 1990, c J 3, s 3(1)1-6.
[52] *Tobacco Tax Act*, RSO 1990, c T 10, s 13.5(5)(b).
[53] *Smoke-Free Ontario Act 2017*, SO 2017 c 26, Sched 3, s 19(3)(a)-(b).
[54] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, Preamble.
[55] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 7 line 10 to p 9 line 15.
[56] Government of Canada, "Free tax clinics", online: <https://www.canada.ca/en/revenue-agency/services/tax/individuals/community-volunteer-income-tax-program.html>.
[57] Government of Canada, "High-Speed Access for All: Canada's Connectivity Strategy", online: <https://www.ic.gc.ca/eic/site/139.nsf/eng/h_00002.html>.

41. If some large proportion of the 90% of the rebate is paid to consumers *other than* First Nations and Indigenous persons on reserve, then the latter will be bearing a disproportionate share of the net Charge. In addition, First Nations and Indigenous persons on reserve would bear a disproportionate share of the Charge to begin with, without factoring in any rebate. First Nations reserve housing is well below the standards of others in Canada in terms of energy efficiency – heating and electricity bills are many times higher. "The government recognizes Canada's northern, remote and isolated communities face unique housing and infrastructure needs given the challenges presented by geography, climate change, limited infrastructure, location, and historic underfunding."[58] Marc Miller, Minister of Indigenous Services Canada said, "There are longstanding and unacceptable housing gaps that exist in Indigenous communities; we have seen this especially in the North."[59]

42. A high percentage (24.2%) of First Nations on reserve live in a dwelling in need of major repairs.[60] As such, imposing the Charge poses a disproportionately high burden in Indigenous persons and the skewed allocation of the rebate would simply exacerbate this. The 10% supplement referenced by Enbridge in its submissions,[61] if allocated the same way as the rest of the rebate, will result in little to no offsetting of this disadvantage. If First Nations persons are not paying tax and do not file tax returns, then no rebate will be provided through this mechanism. 10% of nothing is nothing.

43. According to Enbridge's submissions quoting the Supreme Court,[62] the remaining 10% of the CAI rebate 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." So Indigenous communities writ large would be entitled as one of 9 categories of recipients to perhaps 1 or 2% of this rebate, and the rebate would not be matched to the Charge payors. The various grants referred to by Enbridge at page 9,[63] if funded from Charges paid by First Nations people, would merely be robbing poor Peter to pay poor brother Paul.

E. FROM WHOM SHOULD THE CHARGE BE RECOVERED?

44. If successful, COO leaves it to the OEB to determine how the Charge not paid by First Nations and on reserve Indigenous persons is to be paid for (shareholders of Enbridge or Enbridge's other customers) and have no issue with OEB's submissions on this.

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[58] Government of Canada, "Minister Vandal and Minister Miller highlight Northern housing and infrastructure investments in Budget 2021", online: <https://www.canada.ca/en/indigenous-services-canada/news/2021/04/minister-vandal-and-minister-miller-highlight-northern-housing-and-infrastructure-investments-in-budget-2021.html>.
[59] *Ibid*.
[60] Statistics Canada, "The housing conditions of Aboriginal people in Canada" (25 October, 2017), online: <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016021/98-200-x2016021-eng.cfm>.
[61] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 8 lines 21-22 to p 9 lines 1-2.
[62] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 8 lines 1-2; citing *Reference re GGPPA*, 2021 SCC 11 at para 31.
[63] Written Submissions of Enbridge Gas (July 5, 2021), EB 2019-0247 at p 9 lines 3-7.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS

19th day of July, 2021

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