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Aug 4, 2021

BY RESS AND EMAIL

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

Dear Christine Long:

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

On July 27, 2021, Anwaatin Inc. (Anwaatin) filed a submission addressing the Federal Court's *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* decision. Enclosed please find Enbridge Gas's response to Anwaatin's submission.

If you have any questions, please contact the undersigned.

Sincerely,

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 ADDENDUM TO SUBMISSIONS OF
ANWAATIN INC.**

OEB File No. EB-2019-0247

August 4 , 2021

1 **1. INTRODUCTION**

2 Enbridge Gas Inc. (“**Enbridge Gas**”) makes brief submissions in response to the
3 addendum to submissions filed by Anwaatin Inc. (“**Anwaatin**”) on July 27, 2021
4 addressing the Federal Court’s *Ermineskin Cree Nation v. Canada (Environment*
5 *and Climate Change)* decision.¹ That decision does not set a precedent for this
6 proceeding; it addresses a different context that is distinguished from this case.

7 **2. THE *ERMINESKIN* DECISION**

8 The *Ermineskin* decision arises from an impact benefit agreement (“**IBA**”) that
9 was executed to compensate for acknowledged *non-economic* impacts on s. 35
10 Treaty rights arising from a mining expansion project. The Court found that the
11 IBA, as compensation for those non-economic impacts on s. 35 rights, therefore
12 created economic rights “closely related to and derivative from Aboriginal and
13 Treaty rights.”²

14 On that basis, *Ermineskin* alleged, and the Court agreed, that a duty to consult
15 arose in respect of the decision of the Minister of the Environment and Climate
16 Change to designate the mine expansion project for an impact assessment under
17 the federal *Impact Assessment Act*, on the basis that it would “delay, lessen or
18 eliminate *Ermineskin*’s economic interest” in the expansion.³ The Court held that
19 the lack of notice to, or consultation with, *Ermineskin* in that context constituted a
20 failure to discharge the duty to consult.⁴

21 The Court *did not* determine that a government decision potentially impacting the
22 economic interests of an Indigenous community gives rise to the duty to consult.
23 The duty to consult arose because the economic interest in the IBA was closely
24 linked to and derivative from recognized non-economic s. 35 rights. Further, no

¹ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758
[“*Ermineskin*”]

² *Ermineskin* at paras. 8, 127.

³ *Ermineskin* at para. 6.

⁴ *Ermineskin* at para. 132.

determination was made that any substantive outcome was required from the consultation process.

3. NO DUTY TO CONSULT ARISES

In this proceeding, there is no Aboriginal or Treaty right to the purchase and use of natural gas at a given price, as discussed in section 4.1 of the Responding Submission of Enbridge Gas, dated July 5, 2021 (“**Enbridge Gas Responding Submission**”). In contrast to *Ermineskin*, Anwaatin has not demonstrated that there are any “economic rights and benefits closely related to and derivative from Aboriginal rights”.

Anwaatin alleges that s. 35 “economic rights” or “economic interests” arise “in and around their Reserve lands and on-Reserve personal property”.⁵ In contrast to *Ermineskin*, in this proceeding, there is no IBA, agreement or other form of economic undertaking setting out concrete economic rights for Indigenous peoples in respect of natural gas, as accommodation for the potential impacts of another project or measure on Aboriginal or Treaty Rights. The “economic right” asserted by Anwaatin is not accommodation for other potential impacts on Aboriginal and Treaty rights. Anwaatin has not articulated any such impacts in its submissions. What is at issue is simply the pricing of a service – the delivery of natural gas. No “economic right” arises in respect of natural gas pricing merely because natural gas is used on or near Reserve.

The broad reading of *Ermineskin* advanced by Anwaatin is not supported by the decision itself. It would mean that every government decision that affects the price of any good used or service provided on or around Reserve lands is subject to the duty to consult. The duty to consult is not triggered in this circumstance.

4. NO SIGNIFICANT IMPACT

In any event, even if the duty to consult is triggered, it is discharged through this proceeding. The consultation defect at the core of the *Ermineskin* decision is not

⁵ Anwaatin Addendum Submission.

1 present here. This proceeding has included substantial submissions from
2 Anwaatin and the COO, and the OEB's decision will undoubtedly address those
3 submissions.

4 The Court in *Ermineskin* did not find that a specific substantive outcome was
5 required in respect of the economic rights set out in the IBA, which flow from the
6 underlying s. 35 rights. The Court only held that notice and consultation was
7 necessary in light of these rights. Similarly, in this proceeding, if the duty to
8 consult is triggered, Enbridge Gas submits that consultation has occurred, but no
9 particular substantive outcome is required.

10 If the duty to consult is triggered, this proceeding has not revealed a significant
11 impact on Aboriginal or Treaty rights, as set out in section 4.2 of the Enbridge
12 Gas Responding Submission. Moreover, in practice, any effect of the Federal
13 Fuel Charge is addressed by the Climate Action Incentive rebate payments and
14 other funds that flow directly to Indigenous Communities through this program.
15 The federal government is best placed to consider what, if any, other mitigation
16 measures may be implemented in respect of this complex environmental
17 regulatory regime.