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Energy | de l'énergie
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DECISION AND ORDER

EB-2019-0247

ENBRIDGE GAS INC.

**2020 Federal Carbon Pricing Program Application –
Applicability of Charges to Indigenous Customers**

BEFORE: Lynne Anderson
Presiding and Chief Commissioner

Susan Frank
Commissioner

Michael Janigan
Commissioner

September 23, 2021

TABLE OF CONTENTS

1	OVERVIEW	2
2	CONTEXT AND PROCESS.....	4
2.1	BACKGROUND ON GREENHOUSE GAS POLLUTION PRICING ACT AND RELATED ENBRIDGE GAS CHARGES.....	4
2.2	PROCESS.....	6
3	DECISION	9
3.1	DECISION OUTLINE.....	9
3.2	INTERPRETATIVE APPROACH FOR THE INDIAN ACT	9
3.3	SECTIONS 87 AND 89 OF THE INDIAN ACT	11
3.4	SECTION 35 OF THE CONSTITUTION ACT, 1982	18
3.5	HONOUR OF THE CROWN	22
3.6	UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES.....	25
3.7	JUST AND REASONABLE RATES.....	27
4	CONCLUSION AND IMPLEMENTATION	30
5	ORDER.....	31

1 OVERVIEW

As part of the Federal Carbon Pricing Program, the federal government's *Greenhouse Gas Pollution Pricing Act* (GGPPA) established a Fuel Charge payable by Enbridge Gas on a volumetric basis based on the amount of natural gas delivered to its customers, as well as carbon pricing obligations related to Enbridge Gas's own use of natural gas. The intent of the GGPPA is to provide the appropriate price signals to reduce greenhouse gas emissions from the consumption of natural gas.

The OEB ordered that Enbridge Gas customers are billed a Federal Carbon Charge based on the volume of their gas consumption starting in 2019. This charge coincides with the amount of the Fuel Charge paid by Enbridge Gas for the gas consumed by its customers. The OEB also established a Facility Carbon Charge to recover the carbon pricing costs associated with Enbridge Gas's use of natural gas. Collectively, these two charges on customer bills are referred to as the Federal Carbon Pricing Program Charges (FCPP Charges).

In 2020, two groups representing Indigenous interests, the Chiefs of Ontario and Anwaatin Inc., challenged the application of the FCPP Charges to Indigenous customers, including but not limited to First Nations on-reserve customers.¹ These challenges raised issues based on the provisions of the *Indian Act*, and section 35 of the *Constitution Act, 1982*. The OEB deferred ruling on the challenges until the decision of the Supreme Court of Canada on the constitutionality of the *Greenhouse Gas Pollution Pricing Act* ("*References Decision*") was released on March 25, 2021.²

The OEB approved the FCPP Charges proposed by Enbridge Gas in rates effective April 1, 2020 for all customers, making certain rates interim for First Nations on-reserve customers, pending the OEB's determination on the issues raised by the Chiefs of Ontario and Anwaatin Inc. Following the Supreme Court decision, this proceeding was resumed by the OEB to decide those issues.

The OEB does not accept the position of Anwaatin Inc. and the Chiefs of Ontario in this proceeding that Indigenous customers, or the subset of First Nations on-reserve

¹ "Indigenous" is used (except where quoting from jurisprudence and legislation) to refer to those peoples who are defined as the "aboriginal peoples of Canada" in section 35 of the *Constitution Act, 1982*, which includes Indian (First Nations), Inuit and Métis peoples of Canada. "First Nations" and "First Nations member" (or customer) are used with reference to the *Indian Act*, in place of "Indian band" and "Indian", except where quoting from jurisprudence and legislation.

² *References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11

customers, should be exempt from the payment of the FCPP Charges. In general, the OEB does not find support for those submissions on either constitutional or legislative grounds.

The OEB concludes that the FCPP Charges are not taxes, but are regulatory charges. This conclusion is supported by the majority decision of the Supreme Court of Canada (*References Decision*) that the Fuel Charge and other GGPPA Levies are regulatory charges. The assertion that the FCPP Charges are taxes pursuant to section 87 of the Indian Act cannot therefore provide grounds for the exemption of First Nations on-reserve customers from payment.

The OEB also finds that Anwaatin Inc. and the Chiefs of Ontario have failed to establish an existing treaty or Aboriginal right that is infringed by the collection of the FCPP Charges from Indigenous customers. The modern practice of receipt of natural gas service from a regulated utility is not an ancestral practice or tradition, and neither is the receipt of such service at a particular price.

The OEB also concludes that additional arguments raised by the Chiefs of Ontario and Anwaatin Inc., related to section 89 of the Indian Act, the honour of the Crown, the United Nations Declaration of the Rights of Indigenous Peoples, and the OEB's mandate to fix just and reasonable rates, do not support the exemption of Indigenous customers or First Nations on-reserve customers from the payment of the FCPP Charges.

In accordance with these findings, the OEB has determined that the FCPP Charges can be billed and collected on the natural gas bills of Indigenous customers, including First Nations on-reserve customers. The FCPP-related rates previously approved on an interim basis for First Nations on-reserve customers are final for these customers.

2 CONTEXT AND PROCESS

2.1 Background on Greenhouse Gas Pollution Pricing Act and Related Enbridge Gas Charges

Greenhouse Gas Pollution Pricing Act

The federal *Greenhouse Gas Pollution Pricing Act* (GGPPA) established a Federal Carbon Pricing Program (FCPP). Under the GGPPA, a natural gas utility in Ontario, such as Enbridge Gas, is required to pay a Fuel Charge to the Government of Canada for greenhouse gas emissions resulting from customer use of the natural gas that the utility has delivered to its customers.³ The Fuel Charge is a volumetric charge that is applied to each cubic metre (m³) of natural gas delivered to customers for final use, based on the greenhouse gas emissions intensity of natural gas.

The GGPPA includes exemptions such that Enbridge Gas does not need to pay the Fuel Charge to the Government of Canada for emissions due to natural gas use from registered emitters (who are primarily large industrial facilities that incur their own carbon pricing obligations to the Government of Canada under Part 2 of the GGPPA), or for power plant operators that use natural gas to produce electricity in remote communities not connected to the broader electricity grid.⁴ Enbridge Gas also pays a reduced Fuel Charge (80% reduction) for natural gas used by commercial greenhouse operators.⁵ Exemptions in the GGPPA from the Fuel Charge are also in place for fuels used for farming and fishing; however, these apply only to liquid fuels and not natural gas.⁶

The GGPPA does not specify how the carbon pricing proceeds collected by the Government of Canada should be used. Currently, approximately 90% of the Fuel Charge proceeds collected are returned to individuals and households through Climate Action Incentive payments, delivered through personal tax returns. Payments are based on household size, with a 10% supplement for households living in small and rural communities (outside a census metropolitan area). The remaining 10% of Fuel Charge

³ S. 17(1) of the [GGPPA](#).

⁴ S. 17(2) of the GGPPA. Details on the carbon pricing obligations for registered emitters are in the [Output-Based Pricing System Regulations](#) (SOR/2019-266). Part 6 of the [Fuel Charge Regulations](#) (SOR-2018-12187) provides more details on the exemption for remote power plant operators.

⁵ S. 17(2) of the GGPPA; S. 8-9 of Fuel Charge Regulations (2018, c. 12, s.187) made under the GGPPA.

⁶ S. 3 of the GGPPA provides definitions of eligible farming and fishing activities, and qualifying farming and fishing fuels that are exempt from the Fuel Charge when used for these activities.

proceeds are used by the Government of Canada for other federal programs, including the Climate Action Incentive Fund which funds projects that reduce energy use and greenhouse gas emissions, and several programs that support Indigenous peoples and communities.⁷

The GGPPA also established carbon pricing obligations for Enbridge Gas requiring payments to the Government of Canada for greenhouse gas emissions from Enbridge Gas's own use of natural gas.⁸ Some of Enbridge Gas's own emissions are subject to the Fuel Charge; others are covered by an alternative carbon pricing mechanism in the GGPPA, the Output-Based Pricing System.

The term "GGPPA Levies" is used in this Decision to refer to all obligations incurred by Enbridge Gas to the Government of Canada under the GGPPA, including the Fuel Charge it pays for its customers' emissions, the Fuel Charge it pays for its own covered emissions, and the Output-Based Pricing System obligations it incurs for its own covered emissions.

Enbridge Gas FCPP Charges

In a previous proceeding, the OEB determined that Enbridge Gas could recover the costs of the GGPPA Levies it pays to the Government of Canada from its customers.⁹

The OEB approved:

- a Federal Carbon Charge as a separate line item on customer bills to recover the amount of the Fuel Charge that Enbridge Gas pays to the Government of Canada for each customer's emissions
- a Facility Carbon Charge to recover the carbon pricing costs incurred from Enbridge Gas's own emissions (through the Fuel Charge or the Output-Based Pricing System), which is included as part of the delivery line item on customer bills.

The OEB also established related deferral and variance accounts (DVAs) to enable Enbridge Gas to record the difference between actual FCPP-related costs and amounts

⁷ "[How carbon pricing works](#)", Government of Canada. Listed programs that would support Indigenous peoples and communities are the Indigenous Community-Based Climate Monitoring Program, the Capital Facilities and Maintenance Program/First Nations Infrastructure Fund, and the Clean Energy for Rural and Remote Communities Program.

⁸ S. 18 (1)

⁹ EB-2018-0205, [Decision and Order, 2019 Federal Carbon Pricing Program Application](#), July 4, 2019.

collected from customers, for future disposition.¹⁰ The Federal Carbon Charge and Facility Carbon Charge (collectively, the FCPP Charges) became effective for Enbridge Gas customers as of August 1, 2019, and have been modified in subsequent proceedings to match scheduled changes to the level of the GGPPA Fuel Charge and to reflect Enbridge Gas's FCPP-related costs for its own emissions.¹¹

The Federal Carbon Charge is set at the same volumetric rate as the GGPPA Fuel Charge and is thus treated as a pass-through cost. The total amount that Enbridge Gas customers will pay is proportional to their natural gas use. Customers whose emissions are fully or partially exempt from the GGPPA Fuel Charge are exempt from paying the Federal Carbon Charge on their natural gas bills. However, the Facility Carbon Charge is recovered from all Enbridge Gas customers, including those exempt from paying the Federal Carbon Charge.

2.2 Process

On November 18, 2019, Enbridge Gas Inc. (Enbridge Gas) applied to the OEB for approval under section 36(1) of the *Ontario Energy Board Act, 1998* (OEB Act) to increase rates effective April 1, 2020 to recover costs associated with meeting its obligations under the GGPPA. Enbridge Gas also applied to recover from customers the 2019 balances in related DVAs.

The Chiefs of Ontario (COO) and Anwaatin Inc. (Anwaatin), among other parties, applied for intervenor status in this proceeding.¹² In their intervention requests, COO and Anwaatin raised issues as to whether the FCPP Charges approved by the OEB are constitutionally applicable to Indigenous customers, including but not limited to First Nations on-reserve customers, in light of the *Indian Act*, and section 35 of the *Constitution Act, 1982*. These issues had not been previously raised in the proceeding where the OEB originally approved the establishment of Enbridge Gas's FCPP Charges.¹³

¹⁰ These also include deferral accounts for Enbridge Gas to track and seek recovery of its administrative costs associated with the FCPP.

¹¹ EB-2019-0247, EB-2020-0212

¹² Other intervenors in this proceeding were Building Owners and Managers Association, Energy Probe Research Foundation, London Property Management Association, and School Energy Coalition. None of these intervenors participated in the latter phases of this proceeding that addressed the application of the FCPP Charges to Indigenous and First Nations customers.

¹³ EB-2018-0205

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

On March 19, 2020, the OEB indicated that it would defer consideration of the issues raised by Anwaatin and COO (the Deferred Issues) until such time as the Supreme Court of Canada (SCC) had rendered its decision on two appeals concerning the constitutionality of the GGPPA, which were before the SCC at that time. The OEB also indicated that the issues of energy poverty in Indigenous communities and the differential impact of natural gas rates on remote and near remote communities were not within the scope of the proceeding because it was largely mechanistic.

On August 13, 2020, the OEB issued a [Decision and Order](#), approving, on a final basis effective April 1, 2020, the Federal Carbon Charge proposed by Enbridge Gas that was previously approved by the OEB on an interim basis, for all customers except First Nations on-reserve customers. The OEB also approved the disposition of the balances in the related DVAs. Enbridge Gas's Federal Carbon Charge rate and the disposition unit rates for the DVAs related to the Federal Carbon Charge (the Federal Carbon Charge – Customer Variance Accounts) were left interim for First Nations on-reserve customers, pending the OEB's determination (at a future date) on the Deferred Issues. However, the OEB approved rates for the Facility Carbon Charge on a final basis for all customers, including First Nations on-reserve customers, concluding that the costs Enbridge Gas incurs for its own emissions are costs of doing business as a natural gas distributor to be borne by all customers, even those that could potentially be exempt from the Federal Carbon Charge.

The SCC's [decision](#) in *References re Greenhouse Gas Pollution Pricing Act*¹⁴ (*References Decision*) regarding the constitutionality of the GGPPA was issued on March 25, 2021. The decision upheld the constitutionality of the GGPPA. As part of that decision, the majority of the SCC held that the charges imposed under the GGPPA “cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the GGPPA's regulatory purpose by altering behaviour.”¹⁵

On April 20, 2021, the OEB advised parties that it would proceed to make a final determination of the applicability of Enbridge Gas's rates related to the Federal Carbon Charge for First Nations on-reserve customers, including addressing the Deferred

¹⁴ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

¹⁵ *Ibid* at para 219.

Issues as needed. Anwaatin and the COO were provided with the opportunity to file letters with the OEB to indicate whether, having regard to the SCC decision on the constitutionality of the GGPPA, they still requested the OEB to adjudicate the Deferred Issues. Both Anwaatin and the COO subsequently filed letters requesting the OEB to adjudicate the Deferred Issues.

On May 10, 2021, the OEB established a schedule for the filing of submissions on the Deferred Issues. The OEB subsequently received submissions and reply submissions from Anwaatin, COO, Enbridge Gas and OEB Staff.

On July 27, 2021, following the close of the record, Anwaatin filed an addendum to reference a new Federal Court of Canada decision¹⁶ that it believed to be relevant to this OEB proceeding. On August 4, 2021, Enbridge Gas filed a response to the issues raised by Anwaatin in its addendum.

¹⁶ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758.

3 DECISION

3.1 Decision Outline

In this proceeding, multiple issues were raised by Anwaatin and COO to support their contention that Indigenous customers (including, but not limited to First Nations on-reserve customers) should be exempt from paying the FCPP Charges on their natural gas bills. While the individual issues were not always isolated from each other in the arguments submitted, this Decision will address them under the following headings:

- The Interpretative Approach for the *Indian Act*
- Sections 87 and 89 of the *Indian Act*
- Section 35 of the *Constitution Act, 1982*
- The honour of the Crown
- United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)
- Just and Reasonable Rates

The issues related to the *Indian Act* are relevant specifically for First Nations on-reserve customers, while the other issues are potentially relevant to a broader spectrum of Indigenous customers.

Chapter 4 (Conclusion and Implementation) summarizes the OEB's overall determination regarding the application of the FCPP Charges to Indigenous customers and First Nations on-reserve customers.

3.2 Interpretative Approach for the Indian Act

Anwaatin urged that the *Indian Act* provisions in issue in this proceeding require a “liberal purposive approach” to their interpretation. This approach requires that statutes 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.”¹⁷ Further, Anwaatin submitted that the existing jurisprudence required that legislation relating to Indigenous peoples should be interpreted liberally with any doubtful expressions to be interpreted in favour of Indigenous peoples.¹⁸ Anwaatin noted the judicial support of an approach that interpreted the *Indian Act* in a broad

¹⁷ E. Driedger Construction of Statutes (2nd ed. 1983), p. 87, as quoted in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para 21

¹⁸ *Nowegijick v. The Queen*, [1983] 1 SCR 29, at p. 36

manner where the provisions were aimed at maintaining Indian rights and in a narrow manner for those provisions aimed at limiting or abrogating them.¹⁹

OEB staff agreed that the OEB should look to the objectives of Parliament in interpreting the provisions of the *Indian Act* and apply a liberal interpretation in furtherance of those objectives, where ambiguity arises. However, OEB staff submitted that this did not mean that any ambiguity should automatically be resolved in favour of the interpretation advanced by an Indigenous party, citing the SCC case of *Mitchell v Peguis Indian Band*.²⁰

OEB staff further submitted that provisions in the *Indian Act* should not be interpreted more broadly than as necessary to give intention to Parliament's purposes, citing *McDiarmid Lumber Ltd v God's Lake First Nation*.²¹

Findings

The OEB agrees with submissions, based on the SCC decision in *Nowegijick v. The Queen*, that have urged that a liberal interpretation of the *Indian Act* is necessary where there is ambiguous language that could reasonably support an exemption for First Nations on-reserve customers. However, the OEB also is mindful of the limitations that the governing jurisprudence has provided to guide this approach. The SCC has cautioned against "automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation" and that "it is also necessary to reconcile any given interpretation with the policies the Act seeks to promote".²² Further, the OEB must follow the guidance that the wording used in the statute "should not be read more broadly than necessary to give meaning to the words and to give effect to Parliament's purpose".²³

¹⁹ *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at p.143

²⁰ *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at p.143

²¹ *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, para 39

²² *Mitchell v. Peguis Indian Band* [1990] 2 SCR 85 at p. 143

²³ *McDiarmid Lumber Ltd. V. God's Lake First Nation*, 2006 SCC 58, para 39

3.3 Sections 87 and 89 of the Indian Act

Sections 87 and 89 of the *Indian Act* provide as follows:

87 (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal Management Act, the following property is exempt from taxation:

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.²⁴

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

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.²⁵

Section 89(1) of the *Indian Act* states:

Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.²⁶

Property Protection

Anwaatin submitted that the SCC had determined that the combined purpose of the exemptions in sections 87 and 89 was to preserve the entitlements of First Nations to their reserve lands, and to ensure that the use of their property on their reserve lands is not eroded by the ability of governments to charge, or otherwise tax it.²⁷ COO submitted

²⁴ Indian Act, RSC 1985, c I-5, s. 87(1).

²⁵ Indian Act, RSC 1985, c I-5, s. 87(2).

²⁶ Indian Act, RSC 1985, c I-5, s. 89(1).

²⁷ Anwaatin submission, pp. 7-8, June 7, 2021, referencing *Bastien Estate v. Canada*, 2011 SCC 38 at para 23.

that these sections are part of a legislative package judicially recognized as being in fulfillment of the obligation of the Crown to shield Indians from the dispossession of their property by non-Indians.²⁸

Anwaatin and COO submitted that “personal property” has been recognized by courts to include intangible personal property on reserve including energy for the purpose of protection or exemption under the provisions of sections 87 and 89.²⁹ COO noted that, with regards to the FCPP Charges applied to Enbridge Gas customers, the delivery of natural gas, the sales transaction, and the invoicing of natural gas delivery from Enbridge Gas all occur on reserve.

Effect of Section 87

OEB staff submitted that section 87 did not provide an exemption from the FCPP Charges and that the charges should not be considered a tax under this section. OEB staff submitted that the SCC had indicated that the purpose of the section 87 exemption was to “preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize. It was not to confer a general economic benefit upon the Indians”.³⁰

OEB staff further noted the judicial precedents that have differentiated between a regulatory charge and a tax. The SCC has found that a regulatory charge includes charges that encourage behavioural preferences or fund the cost of the regulatory scheme, while a tax is predominantly focused on generating revenues.³¹

OEB staff cited the majority opinion in the *References* Decision, that determined that the charges under the GGPPA were regulatory charges not taxes as these charges did not have the purpose of raising revenue, and were designed to reduce greenhouse gas emissions to meet minimum national standards. The intent of the charges was to meet a regulatory purpose by altering behavior.

OEB staff submitted that as the levies imposed by Parts 1 and 2 of the GGPPA have been imposed to achieve a regulatory purpose rather than to generate public revenues and are therefore regulatory charges, the same conclusion should extend to the FCPP

²⁸ COO submission, p. 4, June 7, 2021, referencing *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at p. 131

²⁹ *Brown v. The Queen in Right of British Columbia* (1979), 3 CNLR 67 (BCCA)

³⁰ *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161, p. 1171.

³¹ *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para 20

Charges (which recover, from Enbridge Gas's customers, the amounts of the GGPPA Levies paid by Enbridge Gas to the Government of Canada).

Enbridge Gas made similar arguments to OEB staff, and submitted that even if the GGPPA Levies imposed on Enbridge Gas were (incorrectly, in Enbridge Gas's view) determined by the OEB to be a form of taxation, they would be considered an indirect tax on end users (including First Nations customers), akin to an excise tax or customs tax. Enbridge Gas noted several precedents where courts held that section 87 of the *Indian Act* does not provide relief from indirect taxes, including excise taxes imposed on vendors, and taxes imposed on electricity distributors.³²

Anwaatin disagreed with this interpretation for the FCPP Charges, stating that the FCPP Charges approved by the OEB (as distinct from the GGPPA Levies imposed on Enbridge Gas) attach at the time of purchase, which occurs on-reserve.

In its reply submission, COO submitted that the definition of "tax" is broader in respect to section 87 of the *Indian Act* than in the general context and is "something imposed for public revenue *and for a public purpose*" [emphasis in COO submission].³³ COO submitted that section 87 is intended to protect First Nations persons on reserve from having to pay for the Crown and its public purposes, and that the GGPPA Levies are imposed for a public purpose.

Effect of Section 89

Anwaatin (supported by COO) submitted that, in the *References* Decision, the SCC has expressly ruled that the GGPPA Levies are "levies" taking the form of a "regulatory charge". As the FCPP Charges pass on the GGPPA Levies imposed on Enbridge Gas to Enbridge Gas's customers, Anwaatin argued that by applying the grammatical and ordinary meaning of these terms in section 89 (in combination with the legal precedents for interpreting the definitions of "personal property" and "on reserve" to encompass natural gas delivered to a reserve), it follows that the FCPP Charges are captured under the wording of the section 89 exemption.

OEB staff submitted that, based on the legislative intent of section 89, principles of statutory interpretation, and case law, the words "charge" and "levy" in section 89 should be interpreted to be associated with a Security Process (processes associated

³² *Saugeen Indian Band v. Canada*, [1990] 1 FC 403 (FCA), leave to appeal refused (1990), [1990] 3 CNLR v (SCC); *Delisle v Shawinigan Water & Power Co.*, [1941] 4 DLR 556 (Que SC) at para 27.

³³ COO reply submission, July 19, 2021, p.5, see also p.8.

with encumbering, securing, or seizing property, in the context of a creditor/debtor relationship). As the FCPP Charges are not associated with a Security Process, section 89 would therefore not prevent the FCPP Charges from being applied to on-reserve customers. Enbridge Gas made similar arguments.

OEB staff noted that the terms “charges” and “levies” are not included in section 87 and that the SCC has held, in several decisions, that the purpose of section 89 is distinct from section 87 and is the protection of certain real and personal property from seizure in the context of a creditor/debtor relationship.³⁴

Enbridge Gas noted that the SCC and the Ontario Court of Appeal have emphasized that section 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...”³⁵ and “[shields] the real and personal property of an Indian or a band situated on a reserve from ordinary civil process.”³⁶ Regarding the full list of terms “charge, pledge, mortgage, attachment, levy, seizure, distress or execution” used in section 89, OEB staff noted that “each of the terms used in S. 89 have multiple definitions depending on the usage of the word, but the commonality with all of the terms is the creditor/debtor relationship and associated Security Process.”³⁷ OEB staff indicated that the “principle of associated meaning” could be used to interpret two or more words linked by “or”, by viewing them with a view to their common features.³⁸ Based on the principle of associated meaning, OEB staff submitted that “charge” and “levy” in section 89 are best understood to refer to a Security Process.

With regards to case law, OEB staff noted that there were many cases where the terms “charge” and “levy” had been considered with reference to the Security Process.³⁹ OEB staff also noted that the case law for the *Indian Act* had generally addressed license fees and levies that could be understood as referring to an expense or a tax (i.e., the alternate interpretation of “charge” or “levy”) within the context of section 87, not section 89(1), despite the language being similar to that of a “charge.”

³⁴ *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, p. 128, 131; *McDiarmid Lumber Ltd v God’s Lake First Nation*, 2006 SCC 58, paras 1, 11, 47; *Bastien Estate v Canada*, 2011 SCC 38, para 4

³⁵ *Benedict v Ohwistha Capital Corp.*, 2014 ONCA 80, para 14.

³⁶ *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, p. 122.

³⁷ OEB Staff Submission, p. 17

³⁸ *McDiarmid Lumber Ltd v God’s Lake First Nation*, 2006 SCC 58, para 30.

³⁹ OEB Staff Submission, pp. 18-20

In their reply submissions, both Anwaatin and COO submitted that limiting section 89 exemptions to the Security Process was unduly restrictive and incompatible with the liberal interpretative method that is required.

Findings

An exemption under section 87 requires that the FCPP Charges be a tax. A tax is directed primarily at raising revenues, while a regulatory charge may fund a regulatory scheme and/or be designed to influence or lend preference to a behavior.⁴⁰

The OEB finds that the *References* Decision supports the conclusion that GGPPA Levies imposed on Enbridge Gas, recovered from its customers by the FCPP Charges, are regulatory charges and not taxes. In the *References* Decision, the SCC continued the use of a two-part test in making the determination that the GGPPA charge was not a tax.⁴¹ First, there must be a regulatory scheme in place and second, there must be a connection between the charge and the scheme. The GGPA clearly put in place a regulatory scheme whose purpose was to reduce GHG emissions using pricing imposed to reduce consumption of GHG producing fossil fuels:

In the instant case, there is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the GGPPA have a regulatory purpose... Ontario does not assert, nor would such an assertion be supportable, that the levies in this case amount to disguised taxation. The GGPPA is directed to establishing minimum national standards of GHG price stringency to reduce GHG emissions, not to the generation of revenue. As Richards C.J.S. aptly observed, the GGPPA “could fully accomplish its objectives . . . without raising a cent”: para. 87. This is true of both Part 1 and Part 2. The levies imposed by Parts 1 and 2 of the GGPPA cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the GGPPA’s regulatory purpose by altering behaviour. The levies are constitutionally valid regulatory charges.⁴²

⁴⁰ *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7 at para 20

⁴¹ *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999], 3 SCR 134 at paras 43-44 cited in *References re Greenhouse Gas Pollution Pricing*, 2021 SCC 11 at para 213. See also paras 21-30 of *Westbank*.

⁴² *References re Greenhouse Gas Pollution Pricing*, 2021 SCC 11 at para 219

While as COO notes, a tax will have a public purpose as set out in the 1930 SCC decision in *Lawson*⁴³, its classification as a tax and not a regulatory charge depends on its connection to a regulatory scheme. As explained by the SCC in *620 Connaught Ltd. v. Canada (Attorney General)*:

The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J. in *Westbank* added a fifth consideration to those articulated by Duff J. in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" This fifth consideration provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.⁴⁴

Further the majority of the Court in the *References* Decision found that the charge itself (the GGPPA Levies) furthered the necessary objective:

Where, as in the instant case, the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective, the nexus between the scheme and the levy inheres in the charge itself.⁴⁵

The *References* Decision dismissed the challenge by Ontario to the constitutionality of the GGPPA, by determining that the GGPPA Levies were regulatory charges and not taxes, finding that such Levies had a connection with the advancement of a regulatory purpose of reducing GHG emissions. The *References* Decision did not address the issue of the application of the section 87 exemption from taxation in the context of the GGPPA levies. However, the language of section 87 specifically limits the application of the exemption to taxation and the SCC has distinguished the GGPPA Levies from taxation by finding them to be constitutionally valid regulatory charges.

The *References* Decision anticipated that the Fuel Charge put in place by the GGPPA would be passed from distributors such as Enbridge Gas to its customers:

⁴³ *Lawson v. British Columbia (Interior Tree Fruit & Vegetable Committee of Direction)*, [1931] SCR 357, referenced in *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para 22

⁴⁴ *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para 24

⁴⁵ *References re Greenhouse Gas Pollution Pricing*, 2021 SCC 11 at para 216

Although 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.⁴⁶

The pass-through of the GGPPA-directed Fuel Charge on Enbridge Gas for its customers' emissions is accomplished by the Federal Carbon Charge collected from its customers. The Federal Carbon Charge does not become a tax when so levied. A similar logic applies to the Facility Carbon Charge (the other element of the FCPP Charges that recovers the cost of the GGPPA Levies for Enbridge Gas's own emissions), which the OEB has previously determined is a cost of doing business as a natural gas distributor that is borne by all customers.⁴⁷

The OEB also finds that the recovery from First Nations on-reserve customers of the GGPPA Levies assessed to Enbridge Gas, through the FCPP Charges, cannot be termed a charge or levy within the meaning of section 89. A central tenet of the argument advanced by Anwaatin and COO for exemption under this section is that energy falls within the definition of personal property.⁴⁸ As such, it is contended that the personal property of First Nations on-reserve customers cannot be subject to the FCPP Charges by the provisions of section 89(1) that prevent it from being subject to a "charge".

However, the classification of energy as personal property does not assist in the determination of whether the FCPP Charges are "charges" within the meaning of section 89. The OEB finds that they are not. Following a review of the existing case law, the OEB has concluded that the intent of section 89 is to protect real and personal property on-reserve being used as collateral or security and/or be subject to seizure. The OEB agrees that the terms "charge" and "levy" in this section must be considered in the context of the other terms in the section. That context compels an interpretation of their meaning as being associated with the enforcement of security provided in credit relationships and the protection of First Nations property from seizure, not exemption from a regulatory charge.⁴⁹

Of additional importance is an analysis of the method of operation of the charges themselves. The GGPPA Levies, including the Fuel Charge associated with the consumption of gas by Enbridge Gas franchise customers, are assessed to, and paid

⁴⁶ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 30

⁴⁷ EB-2019-0247, Decision and Order, August 13, 2020, p.20

⁴⁸ *Brown v. The Queen in Right of British Columbia* (1979), 3 CNLR 67 (BCCA)

⁴⁹ *McDiarmid Lumber v. God's Lake First Nation*, 2006 SCC 58

by, Enbridge Gas. Enbridge Gas then recovers those expenses in the form of the FCPP Charges to those customers based on their individual consumption. A finding that First Nations on-reserve customers are exempt from the payment of the FCPP Charges would not eliminate the requirement under the GGPPA for Enbridge Gas to remit to the Government of Canada the Fuel Charge amounts for natural gas volumes delivered to First Nations on-reserve customers. The assessment of the GGPPA Levies to Enbridge Gas and its subsequent recovery from customers through the FCPP Charges is similar to the recovery of any utility expense to provide service.

3.4 Section 35 of the Constitution Act, 1982

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

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

Anwaatin submitted that the SCC had established that legislation and regulations are constitutionally inapplicable when they interfere unjustifiably with the exercise of any existing Aboriginal or treaty rights.⁵⁰ COO noted that the OEB has the jurisdiction and authority, as well as the requirement, to ensure that its decisions are in accord with the Constitution, and that applying a constitutional lens is a requirement for all administrative tribunals, including the OEB.

OEB staff acknowledged and agreed that section 35 protects Aboriginal and treaty rights. However, OEB staff also noted that, if the OEB determined that the FCPP Charges did have an impact on a section 35 right, this would not necessarily mean the FCPP Charges could not be applied. This would depend on the specific circumstances, including whether there is undue hardship and a meaningful diminution of the section 35 right. OEB staff noted that environmental regulations impacting section 35 rights have been previously identified as being justifiable infringements:

It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either

⁵⁰ *R v. Nikal*, [1996] 1 S.C.R. 1013; *R v. Adams*, [1996] 3 S.C.R. 101; *R v. Côté*, [1996] 3 S.C.R. 139; *R v. Badger*, [1996] 1 S.C.R. 771; *R v. Marshall*, [1999] 3 S.C.R. 533.

directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right.⁵¹

Anwaatin and COO submitted that the FCPP Charges do impact section 35 rights, and should prevent the imposition of the FCPP Charges to any of Enbridge Gas's Indigenous customers, including but not limited to First Nations on-reserve customers.

Anwaatin indicated that Aboriginal rights under section 35 are generally those held by Aboriginal peoples that relate to activities that are an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming such rights,⁵² while treaty rights include rights to and protection of reserves and livelihoods on reserves, as well as harvesting and other rights. Anwaatin submitted that they have also been held to include economic rights.⁵³ In its reply submission, Anwaatin submitted that there is a recognized Aboriginal right to use traditional and reserve land without diminishment and restriction.⁵⁴

COO indicated that the Aboriginal and treaty rights protected by section 35 should be interpreted as being predominantly rights to use the land and its resources, or the environment, and stated that the profound effects of climate change on the environment would interfere with the exercise of these rights.⁵⁵

In an addendum filed after its reply submission,⁵⁶ Anwaatin noted a recent FCC decision, *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*⁵⁷ to support Anwaatin's position that economic rights and benefits are closely related to or derivative of Aboriginal and treaty rights and are recognized and affirmed pursuant to section 35.

Enbridge Gas argued that the Ermineskin decision was based on potential harm to an economic impact benefit agreement that had been executed to compensate for acknowledged non-economic impacts on section 35 treaty rights arising from a mining expansion project, thereby giving rise to the economic rights referenced in the

⁵¹ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, para 105.

⁵² *R v. Van der Peet*, [1996] 2 S.C.R. 507.

⁵³ *R v. Gladstone*, [1996] 2 SCR 723

⁵⁴ Anwaatin reply submission, p. 11

⁵⁵ COO submission, p.6.

⁵⁶ Anwaatin addendum, July 27, 2021. The addendum was filled after the record closed for this proceeding.

⁵⁷ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758

Ermineskin decision.⁵⁸ In contrast, Enbridge Gas argued that, with reference to the FCPP Charges in the current proceeding, Anwaatin had not demonstrated that there are any economic rights and benefits closely related to and derivative from section 35 Aboriginal rights impacted by the FCPP Charges.

OEB staff indicated that “the existence of a S. 35 right is a fact-dependent process that considers a connection between (i) a historic practice which was “integral” to Indigenous ancestral activities to (ii) a modern claimed right.”⁵⁹ OEB staff noted that the SCC had discussed a three-part test to establish section 35 rights:

...the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was “integral” to his or her pre-contact society in the sense it marked it as distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim.⁶⁰

Both OEB staff and Enbridge Gas submitted that Anwaatin and COO had not explained which specific section 35 Aboriginal and treaty rights were being impacted or infringed, and what the impact of the FCPP Charges on these rights was. Enbridge Gas argued that there was no direct section 35 right regarding the purchase and use of natural gas, stating that “the use of natural gas is a modern practice, not subject to Aboriginal or treaty rights.”⁶¹ OEB staff also noted that no right to avoid taxes or regulatory charges has been established by the courts based on section 35.

Findings

The OEB finds that Anwaatin and COO have failed to establish an infringement of existing treaty or Aboriginal rights caused by the collection of the FCPP Charges on the natural gas bills of Indigenous customers.

Section 35 of the *Constitution Act, 1982* establishes that treaty and existing Aboriginal rights that were in existence in 1982 are protected from infringement. However, section 35 has been interpreted as limited to the protection of such existing rights, not the

⁵⁸ Enbridge Gas reply submission, August 4, 2021.

⁵⁹ OEB staff submission, p. 21

⁶⁰ *Mitchell v Minister of National Revenue*, 2001 SCC 33, para 26.

⁶¹ Enbridge Gas submission, p. 19, July 5, 2021.

avoidance of regulatory regimes or laws of general application in Canada and in the Provinces.⁶²

The determination of whether the billing of Indigenous customers for the FCPP Charges by Enbridge Gas contravenes such rights must be based on a finding of a specific treaty right or interference with an activity that “must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right”.⁶³ A treaty right can only be provided in treaties with the Crown. And while an Aboriginal right may continue to be exercised using modern methods to carry on such activity, it must be a practice that has continuity with practices that existed prior to contact between Aboriginal and European societies.⁶⁴

There is no evidence that the modern practice of purchase of natural gas and its use at a specific price is linked to the exercise of a treaty right or an ancestral Aboriginal right. Nor do the FCPP Charges restrict the provision of natural gas service itself; rather, they are intended to put in place price signals that provide incentives for desired consumer behavior.⁶⁵

Both Anwaatin and COO assert that the imposition of the FCPP Charges erodes traditional Aboriginal economic rights arising from the practice, custom and tradition of Aboriginal peoples. This visits financial hardship on Indigenous communities that are already disproportionately affected by climate change.

Anwaatin filed an addendum,⁶⁶ setting out an argument that the recent Ermineskin decision reinforced the principle that economic rights are taken into account by the courts when they are closely related to or derivative from Aboriginal right or title or an underlying territorial right.⁶⁷ In Anwaatin’s view, this finding accords with a conclusion that the FCPP Charges infringes those rights and the honour of the Crown and thus requires their protection.

⁶² *Wasauksing First Nation v Wasausink Lands Inc.*, [2002] OJ No 164 at para 287 (upheld in [2004] OJ No 810 (ONCA))

⁶³ *R. v. Van der Peet*, [1996] 2 SCR 507 para 46

⁶⁴ *Ibid* at paras 46, 60-65

⁶⁵ “Justifiable infringement” of section 35 rights may be allowed in certain circumstances in furtherance of broader social objectives, see *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 para 16

⁶⁶ The addendum was filed after the closing of the record for this proceeding. Nevertheless, the OEB has addressed it in these findings.

⁶⁷ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC758 (CanLII) paras 109-110

The *Ermineskin* decision cited by Anwaatin in its addendum does not establish the existence of stand-alone economic rights upon which an exemption from the FCPP Charges could be based. The infringement of economic rights in that case was anchored by its connection to existing treaty or Aboriginal rights. In the *Ermineskin* decision, the honour of the Crown was engaged to mandate consultation because of an economic threat of loss to benefits from a commercial agreement executed by the band. That agreement stemmed from possible impairment to treaty rights by mining operations.

Absent evidence of a similar connection to treaty or Aboriginal rights, a constitutionally based exemption from a broad-based regulatory regime based on the potential adverse economic effects of an environmentally directed policy cannot be established.

3.5 Honour of the Crown

Anwaatin submitted that imposing the FCPP Charges on all Indigenous natural gas customers is inconsistent with the honour of the Crown. Anwaatin stated that the honour of the Crown has become an obligation of the highest order applicable to all dealings between the Crown and Indigenous peoples, now enshrined as part of section 35 of the *Constitution Act, 1982*.⁶⁸

COO stated that the OEB is the Crown for the purposes of a decision to impose (or not) the FCPP Charges on First Nations, and as such, must uphold the honour of the Crown in this proceeding. COO referenced *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, which indicated that the Crown's duty to consult (one aspect of honour of the Crown) is triggered when a regulatory body has knowledge that its decision could impact Aboriginal or treaty rights.⁶⁹

COO submitted that when the honour of the Crown arises from rights guaranteed by section 35 of the *Constitution Act 1982*, it is necessary to determine what is necessary to maintain the honour and effect reconciliation between the Crown and Aboriginal peoples.⁷⁰

⁶⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Manitoba Metis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765

⁶⁹ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 29

⁷⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 32, 45

COO submitted that the disproportionate effects of climate change impact Aboriginal and treaty rights to use and enjoy land and resources protected by section 35 of the *Constitution Act, 1982* and thus engage the honour of the Crown when they are addressed.

Enbridge Gas submitted that the honour of the Crown is not engaged in all interactions between the Crown and Indigenous peoples, and has been applied in four circumstances, only one of which, when the Crown contemplates an action that will affect an Aboriginal or treaty right, may be relevant to this proceeding.⁷¹

Enbridge Gas submitted that it had not been established that any specific Aboriginal or treaty rights were affected by the FCPP Charges; however, if it was determined that the honour of the Crown was engaged, the consequence would be that the OEB would have a duty to consult. Enbridge Gas emphasized that the duty to consult, and the subsequent potential for accommodation to address impacts on Aboriginal or treaty rights, did not guarantee a specific outcome, but would require weighing many factors in the public interest.

OEB staff submitted that the honour of the Crown is not an obligation in and of itself but informs other obligations. OEB staff submitted that the honour of the Crown is not engaged in all interactions between the Crown and Indigenous peoples, and that the duty that flows from the honour of the Crown will depend on the specific situation in which it is engaged. OEB staff agreed with Enbridge Gas that, of the four situations identified by the SCC that engage the honour of the Crown, only the impact on Aboriginal and treaty rights is potentially relevant to this proceeding.

In reply, COO stated that the honour of the Crown is not an obligation of the Crown to act in a certain way regarding section 35 rights, but an obligation to act in certain ways with Indigenous peoples. COO indicated that one of the four circumstances identified by the SCC where the honour of the Crown is engaged is acting in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples, and that, in this proceeding, the *Indian Act*, the GGPPA, and the OEB Act

⁷¹ *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 73(2): “The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest.” The other circumstances mentioned where honour of the Crown applies are: when the Crown assumes direct discretionary control over a specific Aboriginal interest, during treaty-making and implementation, and implementing treaty or statutory grants to Indigenous peoples.

together determine the statutory grant and mandate to which the honour of the Crown must be applied.⁷²

Findings

The OEB concludes that no circumstances as set out in the SCC's *Manitoba Metis Federation Inc.* decision have been presented that would engage the honour of the Crown in the OEB's determination that FCPP Charges will apply to the natural gas bills of Indigenous customers and First Nations on-reserve customers.

Both Anwaatin and COO advance the proposition that the recovery of the FCPP Charges by Enbridge Gas from Indigenous customers is inconsistent with the honour of the Crown because of its infringement of Aboriginal and treaty rights.

The SCC in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*⁷³ explained the rationale for an invocation of the principle of the honour of the Crown in the determination of Aboriginal rights:

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:

The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982* which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably in accordance with its historical and future relationship with the Aboriginal peoples in question.⁷⁴

However, not all interactions between the Crown and Aboriginal groups engage the honour of the Crown. The principle of honour of the Crown is "narrow and circumscribed" to be applied in circumstances that engage the Crown's solemn constitutional obligations.⁷⁵ It is not a cause of action itself; rather, it speaks

⁷² COO reply submission, July 19, 2021, pp. 6-7

⁷³ *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14

⁷⁴ *Manitoba Metis Federation v. Canada (Attorney General)* 2013 SCC 14, para. 66

⁷⁵ *Manitoba Metis Federation v Brian Pallister et al.* 2020 MBQB para 108 citing *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC14

to *how* obligations that attract it must be fulfilled.⁷⁶ The obligations themselves arise only where a specific Aboriginal interest or right is at stake in the Crown's dealing.⁷⁷

As section 3.4 of this Decision has concluded in the findings concerning rights referenced in section 35 of the *Constitution Act 1982*, no infringement of treaty or Aboriginal Rights by the recovery of FCPP charges from Indigenous customers has been established by Anwaatin and COO in their submissions. Nor is there evidence of other circumstances as set out by the SCC in *Manitoba Metis Federation v. Canada (Attorney General)*⁷⁸ that would engage the honour of the Crown in the determination of this issue.

3.6 United Nations Declaration on the Rights of Indigenous Peoples

Anwaatin submitted that applying the FCPP Charges to Indigenous peoples is inconsistent with the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). UNDRIP has been adopted by the United Nations General Assembly and “establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.”⁷⁹

Anwaatin submits that the inclusion of the FCPP Charges on the natural gas bills of Indigenous peoples contravenes the rights set out in the UNDRIP Articles. This contravention would be contrary to the UNDRIP Articles that *inter alia* require respect of treaty rights and protection of traditional Indigenous lands, territories, and resources as well as their engagement in traditional economic activities.

Within Canada, on June 21, 2021, the [United Nations Declaration on the Rights of Indigenous Peoples Act](#) received Royal Assent and immediately came into force. The Government of Canada has stated that “the purpose of this Act is to affirm the Declaration as an international human rights instrument that can help interpret and

⁷⁶ *Manitoba Metis Federation v. Canada (Attorney General)* 2013 SCC 14, para 73

⁷⁷ *Native Council of Nova Scotia v. Canada*, 2011 1 FC 72 at paras 37-39

⁷⁸ *Ibid* at Footnote 73

⁷⁹ <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

apply Canadian law. It also provides a framework to advance implementation of the Declaration at the federal level.”⁸⁰

OEB staff stated that no article within UNDRIP expressly restricts the imposition of taxes, fines, regulatory charges, or the other burdens of citizens, and that it would conflict with the principle of state sovereignty to interpret UNDRIP as restricting any state burden. OEB staff also submitted that UNDRIP is not presently binding law in Ontario, is not binding on any of the parties to the proceeding and does not give rise to any substantive rights in Canada.⁸¹

Enbridge Gas similarly submitted that UNDRIP has not been implemented into the law of Canada or Ontario. Enbridge Gas also submitted that the application of the FCPP Charges to Indigenous customers would be consistent with the principles of UNDRIP, and with Enbridge Inc.’s Indigenous Peoples Policy.⁸²

In its reply submission, Anwaatin submitted that UNDRIP is applicable in Canadian law, referencing subsections 2(3) and 4(1) of the *United Nations Declaration on the Rights of Indigenous Peoples Act*.⁸³

Anwaatin also submitted that the UNDRIP articles established substantive rights, contrary to the submissions made by OEB staff.

Findings

The OEB finds that the provisions of the GGPPA and the recovery of Enbridge Gas’s GGPPA costs from all customers through the FCPP Charges cannot be characterized as inconsistent with UNDRIP’s principles. Anwaatin and COO have not established that the FCPP Charges cause damage to, or deprivation of the property rights and interests of Indigenous peoples as described in the Articles of UNDRIP. The OEB finds that the impact of a regulatory charge on all natural gas users intended to mitigate the effects of climate change is not a breach of the rights, institutions, and cultural values of Indigenous peoples. The OEB notes that this measure has been accompanied by a

⁸⁰ Government of Canada, Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act. <https://www.justice.gc.ca/eng/declaration/about-afropos.html>

⁸¹ OEB Staff submission, July 5, 2021, p.31. OEB staff referenced *Sackaney v R*, 2013 TCC 303, para 35; *Smerek v Areva Resources Canada Inc*, 2014 SKQB 282 at para 16, OEB staff also noted that the *United Nations Declaration on the Rights of Indigenous Peoples Act* had received Royal Assent on June 21, 2021.

⁸² Enbridge Gas submission, July 5, 2021, pp. 26-27.

⁸³ Anwaatin reply submission, July 19, 2021, pp. 11-13.

Climate Action Incentive designed to insulate affected individuals and households from an undue economic burden. The OEB finds that the provisions of UNDRIP have no legal or instructive application to the determination of the constitutionality of the operation of the FCPP Charges with respect to Indigenous peoples.

3.7 Just and Reasonable Rates

COO noted that First Nations members, living on or off reserve, have much higher rates of poverty than in the general population, and submitted that the FCPP Charges would contribute to the poverty already experienced by many Indigenous peoples in Ontario. COO also noted that the OEB's objectives for natural gas (which the OEB must take into account when determining whether rates are just and reasonable) include:

To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.⁸⁴ [emphasis added]

OEB staff noted that the GGPPA includes exemptions, or partial exemptions, from the GGPPA Levies and submitted that the question of exemption from the GGPPA Levies is a decision for Parliament, not the OEB. OEB staff also submitted that the OEB had already determined that the issue of energy poverty is outside of the scope of this proceeding.⁸⁵

Enbridge Gas submitted that, while end users are intended to receive the carbon 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. Enbridge Gas noted that roughly 90% of the proceeds collected through the GGPPA Fuel Charge are returned to individuals and households through the Climate Action Incentive (claimed as part of an income tax return), which Indigenous customers are eligible to receive, and that some of the other 10% of proceeds are used to fund programs that support Indigenous communities.⁸⁶

COO noted that many on-reserve customers may not receive the Climate Action Incentive, because they do not file tax returns, as they do not pay income tax by virtue

⁸⁴ OEB Act, s. 2(5)

⁸⁵ EB-2019-0247, Decision and Order, August 13, 2020, p. 19.

⁸⁶ Enbridge Gas submission, p.9. Enbridge Gas noted the Indigenous Community-Based Climate Monitoring Program, the Capital Facilities and Maintenance Program, the First Nations Infrastructure Fund and the Clean Energy for Rural and Remote Communities program.

of section 87 of the *Indian Act* and section 149 of the *Income Tax Act*.⁸⁷ However, Enbridge Gas noted that the federal Department of Finance has taken steps to assist individuals, including those in remote and northern Indigenous communities, in filing tax returns and accessing the Climate Action Incentive.⁸⁸ COO also suggests that Enbridge Gas should be styled as the polluter and their shareholders be responsible for the payment of the charge, not its customers.

Findings

The OEB is not indifferent to the effects of increasing customer natural gas bills, particularly on Indigenous customers both on and off reserves. However, where it has not been established that treaty or Aboriginal rights are specifically affected, the alleviation of the financial burdens of rate increases that raise affordability concerns for customers should be addressed in the general context of an examination of energy poverty. This issue is not in scope in this proceeding, nor is there an evidentiary record sufficient for the OEB's consideration.

The OEB notes that exemptions from the GGPPA Levies have been addressed in the GGPPA statute. The GGPPA includes exemptions such that Enbridge Gas is not required to pay the GGPPA Levies for natural gas use from registered emitters (who are primarily large industrial facilities that incur their own carbon pricing obligations to the Government of Canada under Part 2 of the GGPPA), or for power plant operators that use natural gas to produce electricity in remote communities not connected to the broader electricity grid. Enbridge Gas also pays a reduced Fuel Charge (80% reduction) for natural gas used by commercial greenhouse operators. These exemptions or reductions have been reflected by the OEB in its application of the FCPP Charges to Enbridge Gas customers. The GGPPA does not include an exemption for Indigenous customers.

The OEB notes that the GGPPA is designed to send price signals to users of fossil fuels to curb consumption. It is difficult to ascertain what advantage would be obtained in achieving that goal by restricting the impact of the GGPPA Levies to only Enbridge Gas and its shareholders. In that case, no price signal would be sent to consumers to reduce consumption of GHG-emitting natural gas contrary to the intent of the GGPPA.

⁸⁷ COO reply submission, July 19, 2021, p. 13

⁸⁸ Backgrounder: Climate Action and Indigenous Peoples (October 2018), Department of Finance Canada, <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-climate-action-and-indigenous-peoples.html>

Based on these factors, the OEB concludes that the existing approach of applying the FCPP Charges to Enbridge Gas customers, including Indigenous customers, is consistent with the OEB's mandate to approve rates that are just and reasonable.

4 CONCLUSION AND IMPLEMENTATION

For the reasons set out in this Decision, the OEB finds that the FCPP Charges that recover the cost of the GGPPA Levies paid by Enbridge Gas can be billed and collected on the natural gas bills of Indigenous customers, including First Nations on-reserve customers.

Enbridge Gas's Federal Carbon Charge rate and the disposition unit rates for the Federal Carbon Charge – Customer Variance Account, approved on an interim basis for First Nations on-reserve customers, effective April 1, 2020, and the updated rate that became effective April 1, 2021, are therefore made final for these customers.⁸⁹ As these rates have already been charged on an interim basis, no debit or credit to these customers will be required. Enbridge Gas will no longer be required to separately track these amounts for First Nations on-reserve customers, which the OEB had previously required while these rates were interim. There will be no change to other FCPP-related rates that have already been made final (e.g. the Facility Carbon Charge for First Nations on-reserve customers, and the Facility Carbon Charge and Federal Carbon Charge for other Indigenous customers).

The OEB has scheduled a process for intervenor costs for Anwaatin (COO did not request cost eligibility in this proceeding). The OEB will apply the principles set out in section 5 of its [Practice Direction on Cost Awards](#) when awarding costs. The OEB notes its previously stated expectation that Anwaatin's cost claims for this stage of the proceeding should not duplicate work for which Anwaatin has already received cost awards.⁹⁰

⁸⁹ EB-2019-0247, Decision and Order, August 13, 2020; EB-2020-0212, Decision and Order, February 11, 2021

⁹⁰ EB-2019-0247, [Decision and Order on Cost Awards](#), September 21, 2020, p.3

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas Inc.'s Federal Carbon Charge rate and the disposition unit rates for the Federal Carbon Charge – Customer Variance Account, previously approved on an interim basis for First Nations on-reserve customers in the OEB's Decision and Order of August 13, 2020 (EB-2019-0247), are approved on a final basis for these customers, effective April 1, 2020.
2. Enbridge Gas Inc.'s updated Federal Carbon Charge rate, previously approved on an interim basis for First Nations on-reserve customers in the OEB's Decision and Order of February 11, 2021 (EB-2020-0212), is approved on a final basis for these customers, effective April 1, 2021.
3. Anwaatin Inc. shall file with the OEB, and forward to Enbridge Gas Inc., its cost claim by **October 7, 2021**.
4. Enbridge Gas Inc. shall file with the OEB, and forward to Anwaatin Inc., any objections to the claimed costs by **October 21, 2021**.
5. Anwaatin Inc. shall file with the OEB, and forward to Enbridge Gas Inc., any response to objections for claimed costs by **October 28, 2021**.
6. Enbridge Gas Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

How to File Materials

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2019-0247** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address

- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [Filing Systems page](#) on the OEB's website
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Michael Parkes at michael.parkes@oeb.ca and OEB Counsel, Lawren Murray at lawren.murray@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto **September 23, 2021**

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar