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January 31, 2025

Via E-Mail rppr@cer-rec.gc.ca

Canada Energy Regulator
210-517 10 Ave SW
Calgary AB T2R 0A8

Attention: Commission

Re: Rules of Practice and Procedure Review – Phase 1 Early Engagement
Input on the Commission of the Canada Energy Regulator Rules of Practice and Procedure Review Discussion Paper

Cold Lake First Nations (CLFN) is a Denesųłine Nation and a signatory to Treaty No. 6 which specifically protects our rights to hunt, fish, trap, gather and generally carry on our livelihood after Treaty as before. In addition to our Treaty Rights, our members hold Aboriginal Rights to practice, protect, and preserve their spiritual and cultural practices, including, but not limited to protection of historic resources, conservation and stewardship of *Denne Ni Nennè* (our Homeland) and locations of spiritual and cultural significance. These inherent and legal rights are protected, recognized, and affirmed by the *Natural Resources Transfer Agreement*, s. 35 of the *Constitution Act, 1982*, and the United Nations Declaration on the Rights of Indigenous Peoples.

Thank you for providing Cold Lake First Nations ("**CLFN**") the opportunity to provide input on the discussion paper entitled "Commission of the Canada Energy Regulator Rules of Practice and Procedure Review – Discussion Paper" and dated September 9, 2024 (the "**Discussion Paper**").

CLFN looks forward to continue contributing to the Commission as it moves forward with this critically important work.

I. Background

The National Energy Board Rules of Practice and Procedure, 1995 (the "**Rules**") set out the mechanisms for complaints, the conduct of public hearings, and the manner in which applications are to be assessed by the Commission pursuant to the *Canadian Energy Regulator Act* (the "**Act**").

CLFN understands that the Commission has identified three objectives for its Phase I review, including (1) aligning the Rules with the Act, (2) enhancing competitiveness through predictable and timely processes, and (c) modernizing practices and procedures.

Below are CLFN's comments on the Commission's objectives.

II. Input on Aligning the Rules with the Act

Following extensive work conducted by an Expert Panel on the Modernization of the National Energy Board, Canada replaced the NEB with the Canada Energy Regulator ("**CER**" or "**Regulator**") through the Act, which came into force in 2019.

Arguably, the Act's single most important change to the overarching federal framework, for matters set out at Section 6 therein, is the recognition of the important relationship and role that First Nations have vis-à-vis the Regulator and CER processes. The CER, which includes both the Commission and the Organization, is explicitly mandated to achieve reconciliation, implement the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"), and enter into agreements with First Nations to maximize cooperation, coordination, and in the interim, collaboration. Although the implementation of the Act is now well underway, the Rules have not yet been updated to reflect these significant legislative objectives. CLFN submits that it is imperative that the Commission completes this work.

In order to address this gap, the Commission is now considering what changes may be needed to ensure that the Rules are aligned with the Act's objectives and vision statements (i.e. recitals) vis-à-vis (1) achieving Reconciliation, and (2) implementing UNDRIP. CLFN comments on the matters are as follows.

(a) Reconciliation and Implementing UNDRIP

The CER has made reconciliation a Strategic Priority within its 2024-2027 Strategic Plan. The CER has stated that in order to work differently with Indigenous communities, that it must deepen its understanding. Respectfully, this basic principle is not reflected in the Commission's Phase I: Early Engagement process, as the Commission was limited to providing $6,000 grants to First Nations to participate in this significant and highly technical engagement. In light of the CER's Strategic Priority, the scale of this engagement, and the nature of the work, CLFN would have expected a greater investment and more thought put into the process.

Regarding the substance of the Commission's Discussion Paper, at a high-level, CLFN submits that updates to the Commission's Rules need to reflect the evolving legal standards set by Canadian law and UNDRIP, as domestic law, relating to reconciliation. For example, prior to the Commission exercising any of its powers, duties and functions under the Act, including the Rules, the Commission must consider the impact of its conduct on reconciliation between the Crown and First Nations. This standard was clarified by the Court in *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, whereby the Court concluded that the principle of reconciliation is a constitutionally-required consideration that must inform the exercise of governmental discretion, and acts as a legal limitation on that discretion. CLFN submits that the Rules must be adaptable to further direction that Courts may provide on this nuanced area of law.

CLFN further submits that when it comes to shaping reconciliation in the context of the Rules, deference to First Nations is productive and, more often than not, necessary. In support of this input, CLFN directs the Commission to Chief Justice Lance S.G. Finch and Chief Justice J. Robert Bauman papers entitled "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" and "A Duty to Act", respectively. In the former, Chief Finch, as he then was, commented on respecting Indigenous perspectives during the pursuit of reconciliation at paras. 5 - 6:

> … One might argue that if those individuals presently involved in identifying, presenting and analyzing Indigenous legal issues—that is, counsel and judges—find themselves ill-

> equipped for the task, better, perhaps, to leave well alone, rather than risk the consequences of misinterpretation and misapplication. But this would be to evade the courts' existing legal responsibilities, or worse still, to pay lip service to the principles involved while perpetrating a legal paradigm which has done little, thus far, to effect meaningful reconciliation between the Crown and Indigenous peoples in Canada. As a result, **it is a precondition for the principled application of Indigenous laws that these laws be viewed, as far as may be possible, through the lens of the Indigenous culture in question**.
>
> In this light, it is as important to address questions of perceptual and ideological readiness within the Canadian legal community, as it is to discuss the theoretical and substantive means by which Indigenous legal orders may be incorporated into Canadian law (or vice versa). Ability, in other words, is a precondition to application. Before space can be made in the Canadian legal landscape for Indigenous law, the participants in the process—judges, lawyers, and lawmakers, as well as academics—must be able to conceptualize and recognize what they are making space for, or the exercise will be futile. A profound change in perspective is needed.

Chief Justice Bauman, as he then was, followed up on this call to the legal profession and emphasized the need for Indigenous perspectives to lead the way:

> Almost a decade ago, Chief Justice Lance Finch presented a paper to CLEBC on Indigenous legal orders and the common law. It was entitled, "A Duty to Learn". Today, it is still required reading in law courses, and its message is even more relevant today. Chief Justice Finch called on members of the largely non-Indigenous legal profession to admit uncertainty and to hold ourselves ready to learn about Indigenous legal orders, to divest ourselves of our pre-existing certainties as to the nature of the law. He encouraged us to protect the interests of all Canadians by making space for a pluralistic legal and cultural landscape. Most importantly, Chief Justice Finch reminded people like myself that it is we, as strangers and newcomers, who must find our role within the Indigenous legal orders themselves.
>
> Our duty to learn is an obligation that we will continue to carry throughout our personal and professional lives. Now, after ten years, it is time for us to embrace our "Duty to Act." While much good has been done in recent decades by tireless advocates within the existing system, and there are shining examples of legal victories for Indigenous peoples, we also know that the adversarial litigation process has in many cases failed Indigenous peoples as a suitable forum for reconciliation. For Indigenous peoples, the court system has often been a barrier to justice, rather than a critical tool in the pursuit of it. The Truth and Reconciliation Commission tells us that Canadian law has suppressed truth and deterred reconciliation. It is this history, and current reality, that gives urgency to our duty to act.
>
> Adding to that urgency is the development and acceptance of the United Nations Declaration on the Rights of Indigenous Peoples—an Indigenous instrument built by decades of bold work by Indigenous advocates and their allies. The affirmation of the applicability of UNDRIP to British Columbia and Canadian law and the government's commitment to its implementation requires all elements of the state to engage with and

> implement its principles. Thus, in a concrete way through this new legislation, a duty to act has been layered on top of our duty to learn.
>
> At the forefront of this effort is self-determination of Indigenous peoples. And in this reference to self-determination I note that the Supreme Court of Canada has recognized self-determination as a right of a people to pursue its "political, economic, social and cultural development" albeit within the framework of an existing state.7 It may mean more than that to you, and in the context of UNDRIP, the UN Special Rapporteur on the Rights of Indigenous Peoples has emphasized the importance of not assimilating Indigenous self-government within the existing state. Preservation of distinctive Indigenous culture and government is crucial, not only for the survival, dignity, and well-being of Indigenous peoples, but also as a valuable part of state identity.
>
> As we find space for Indigenous legal orders, we must look to Indigenous peoples to determine what that space will look like. Senator Murray Sinclair has said that a process of reconciliation, including legal reconciliation, that does not include an Aboriginal perspective and approach will be doomed to fail. I couldn't agree more. And, if I may, I would add that beyond inclusion, the Indigenous perspective should be prioritized and centered.

CLFN calls on the Commission to ensure that its Rules are adaptable in a manner that maximizes Indigenous participation and/or coordinate with Indigenous-led processes. As the Modernization Report highlights, Canadians want the CER processes to reflect a nation-to-nation relationship. Canada itself has mandated the CER, including the Commission, to make space for cooperating and coordinating and collaborating, as an interim step, with First Nations. For example, Sections 76 and 77 of the Act, empower the CER to enter into agreements with First Nations that enhance participation and create space of Indigenous-led processes. In order to align with the Act, it is important that incidental changes are made to the subordinate Rules that adapt to Section 76 or 77 arrangements.

(b) Indigenous Knowledge and Crown Consultation

CLFN has reviewed the Commission's Discussion Paper relating to these subject-topics. These are welcome developments, although we would emphasize the need for flexibility and ongoing engagement. There cannot be a one-size-fits-all approach to weaving Indigenous knowledge into CER processes. Rather, the process should be designed based on community-specific knowledge, wherever possible, and in a culturally appropriate manner. The CER must also commit to continuous and sustained engagement with First Nations, as part of UNDRIP. Building trust is going to take ongoing work and actual adoption of Cold Lake First Nations Knowledge.

II. Enhancing Competitiveness

The second objective is enhancing competitiveness through predictable and timely processes focusses on coherence with the new statute, as well as streamlining processes to enhance competitiveness.

- ***Updating Processes***: The Commission intends to update the Rules so that they are reflective of current processes, which have changed since the Rules were first in effect. For example, the current Rules do not include specific provisions that apply to hearings under legislation other

than the CER Act, so the Rules Review is an opportunity to clarify the processes used in those situations. The Commission intends to address these inconsistencies through the Rules Review.

- ***Enhancing competitiveness***: The Commission is also considering what changes could be made to improve and streamline processes and further enhance competitiveness. "For example, the Commission will examine all timelines set in the Rules and consider whether new time limits should be added. In certain instances, timelines may be shortened and in others they may be extended. For example, the CER has received feedback that same day service is not always feasible when filing right of entry applications (Rules, s. 55(2)). The Commission is also considering changes to the approach for computation of time (Rules, s. 5-7), as the utilization of "business days" as opposed to "calendar days" may be clearer for participants."

- They are also considering (the following is quoted from the Discussion Paper):

    - making changes to modernize the notice of motion procedure (Rules, s. 35) to support efficiency, including the use of oral notice of motion processes where appropriate;

    - Whether the existing process for fixing costs related to detailed route hearings (Rules, s. 53-54) requires updates and if it can be applied to other instances where parties require a Commission decision on costs.

    - If there are processes that have become standardized enough that they could be written into the Rules to create continuity, efficiency, and certainty for interested parties.

    - Whether specific changes could be made to the information request process (Rules, s. 32-33) to clarify how it is used and to support efficiency.

    - Where learnings can be applied from other regulators and tribunals, for example where there are particular rules at other regulators of tribunals that support efficient processes.

CLFN respectfully submits that the framing of this subject-topic misses a huge opportunity that is "low hanging fruit". In particular, when considering ways to enhance competitiveness, the Commission should consider leveraging Section 76 and 77 of the Act to increase certainty of process, enhance procedural fairness, create regulatory streamlines, and ensure timely processes, all to the extent possible.

Lastly, CLFN supports the idea that there should be Rules that dictate the steps and timelines for all hearing processes contemplated under the Act. Currently, there is a lack of clarity around certain steps and procedures that lead to slippage in timely processes.

III. Modernize Practices and Procedures

The third objective is modernizing practices and procedures is focussed on electronic filing and service, access to project applications, publication of notices, and accessibility.

- ***Electronic filing/ service***: The Commission intends to make changes to the Rules that will allow for the modernization of various practices and procedures. One example of this would be to remove the requirement for people to follow up on their filing with an original hard copy document or providing a hard copy as part of service (Rules, s. 9(8); 8(9)). But these changes

would not apply to instances where personal service is required (s. 8(8)). (Note, for accessibility, hard copies could still be an option for accessibility, but not always required).

- ***Access to project applications***: The Commission is also considering removing the current requirement for the company/applicant and the CER to have a hard copy of project applications on site for public inspection (Rules, s. 24). Instead, interested parties could request this on a case-by-case basis.

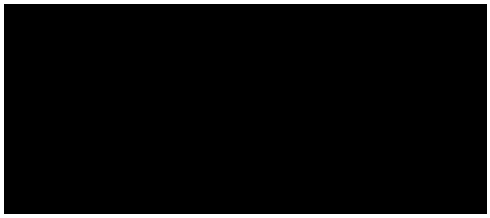
- ***Publication of notices***: Currently, there are certain requirements for applicants to publish notices (e.g. ss. 23(2), s. 50). Through the Rules Review, consideration will be given to what type of publication requirements are appropriate in a digital age, where Commission approval is necessary for notices, and whether amendments should be made to the current requirements or supporting guidance.

- ***Accessibility***: They are seeking to understand whether there are accessibility issues with the rules.

CLFN has no comments on these proposed changes in the Discussion Paper, and although greater detail will be required, all seem sensible.

Again, thank you for providing the opportunity to review the discussion paper entitled “Commission of the Canada Energy Regulator Rules of Practice and Procedure Review – Discussion Paper”. If you need further clarification on any of our responses or would like to continue this conversation, please contact Nicole Nicholls @ consultation@clfns.com.

Sincerely,



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