



January 31, 2025

Attn: Rumu Sen
Regulatory Policy
Canada Energy Regulator

VIA EMAIL: rppr@cer-rec.gc.ca

Re: Indigenous Caucus of the IAMC-TMX Comments on CER Rules of Practice and Procedure Review

I write as Chair of the Indigenous Caucus of the Indigenous Advisory and Monitoring Committee for the Trans Mountain Expansion and Existing Pipeline (“**IAMC-TMX**”). The Indigenous Caucus is made up of the Indigenous committee representatives on the IAMC-TMX.

I write on behalf of the Indigenous Caucus regarding the review of the Canada Energy Regulator (“**CER**”) Rules of Practice and Procedure Review (the “**Rules**”). The Indigenous Caucus is aware of the substantial policy and regulatory reform that the Commission of the CER is undertaking, including:

- (a) this Rules review;
- (b) Onshore Pipeline Regulations and Filing Manuals Update;
- (c) Predictable and Efficient Processing and Assessment of Certain Negligible-Risk and Low-Risk Activities;
- (d) Indigenous Ministerial Arrangement Regulations; and
- (e) others.

We appreciate CER’s focused effort at improving its regulatory system and, more particularly, seeking to align their regulatory system with the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14¹ (the “**UNDRIP Act**”) and related Action Plan Measures.² The Indigenous Caucus has been engaged one-on-one with the CER on many of these changes, including facilitating time and space at our most recent Line-Wide Gathering for these topics, and we intend to play a substantial and meaningful role in the continued growth and development of the CER.

We acknowledge that the Rules are a primarily technical document focused on hearing procedures. It is therefore somewhat challenging to identify how the Rules can integrate the UNDRIP Act and Action Plan Measures – particularly those that seek to expand areas of Indigenous jurisdiction and Indigenous decision-making which is the Indigenous Caucus’ stated

¹ United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14.

² Government of Canada, United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan 2023-2028. [Link](#)

goal in the regulatory sphere. We understand that this is a multistep process that will also rely on revision and amendment to regulatory and legal instruments outside the scope of the Rules.

Throughout these submissions we will make recommendations to the Rules that will only be necessary and relevant once the CER amends other critical regulatory instruments, such as the Onshore Pipeline Regulations, Filing Manual, or the Indigenous Ministerial Arrangement Regulations. We request that the Commission, as noted in the Discussion Paper, consider these forward-looking comments as they will help align the full CER regulatory framework with the UNDRIP Act and Action Plan Measures.

In providing these comments, we highlight ways in which the on-the-ground reality for Indigenous participants in the CER regulatory system can be improved immediately. Improving upon the Rules is an incremental step towards advancing Indigenous participation in the CER regulatory system and will move the CER towards regulatory excellence.

2.0 INDIGENOUS CAUCUS COMMENTS

With the expertise held by the Indigenous Caucus, we will direct our comments primarily to the first objective – aligning the Rules with the CER Act - and focus on:

1. Reconciliation and Implementation of the United Nations Declaration on the Rights of Indigenous Peoples;
2. Integrating Indigenous Knowledge; and
3. Crown Consultation.

We look forward to engaging with you further about these comments.

2.1 Discussion Questions

No.	Topic Area
A.	Reconciliation and Implementation of the United Nations Declaration on the Rights of Indigenous Peoples
	Question: The CER is considering what changes may be needed to ensure the Rules align with CER Act’s objectives and preamble.
	<p>Response:</p> <p>A CER decision-maker cannot find a project that violates UNDRIP to be in the public interest. UNDRIP is a starting point. Article 43 clarifies that rights recognized herein “constitute the minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world.” It is intended to be a minimum threshold. Yet, it is treated in Canada as an impossible to navigate barrier. Simply put, every CER decision-maker should assess the public interest of the application against the criteria set in UNDRIP – and adopted in Canada as binding law.</p> <p>Article 31(1) of UNDRIP affirms that:</p>

Indigenous Peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports, and traditional games and visual performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 31(2) requires states to take effective measures to recognize and protect the exercise of these rights.

The primary long-term goal of applying UNDRIP in the regulatory system is the genuine, effective, and substantial protection of Indigenous rights as envisioned in section 35 of Canada's *Constitution Act*, 1982. Sharing and implementing that goal is the only means by which the CER process is to become a procedural mechanism by which Canada may seek First Nations' Free Prior and Informed Consent.

Protecting the exercise of Indigenous rights requires foundational hooks in enabling legislation and regulations. It is an excellent starting point that the preamble of the CER Act affirms Canada's commitment to "reconciliation" and implementing UNDRIP. The review of the Onshore Pipeline Regulations and Filing Manual can help improve the information available to decision-makers through the assessment of applications and other means (and we will be sure to expand on this in the engagement on those documents).

A decision that violates the *rights* provided to Indigenous groups and the *obligations* required of states under UNDRIP cannot be in the public interest. This would be an error of law subject to review. The Supreme Court of Canada in *Clyde River* tells us that when assessing effects on Aboriginal rights, the Crown must not look only at "environmental effects" but rather inquire into the "impact on the right".³ This mandates the courts to directly assess and address the impacts of proposed activities on Aboriginal and Treaty rights. In this same vein and given the commitments in the preamble of the CER Act, the Rules must reflect a binding requirement for the CER to review and assess an application's conformity with UNDRIP when making public interest determinations.

To ensure that decisions adhere to UNDRIP requires that CER decision-makers are equipped with the necessary legislative hooks, information, education, and rules to ensure they can and do look to UNDRIP as binding law.

This comment foreshadows a necessary change or clarification in the Onshore Pipeline Regulations or amendments to the CER Act, but we include it here to demonstrate how binding requirements can operationalize and kick-start the application of UNDRIP for decision-makers within the CER.

3 *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII), [2017] 1 SCR 1069 at para 45.

B.	Integrating Indigenous Knowledge
	<p>Discussion Question: Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?</p>
	<p>Response: One critical way to apply UNDRIP in the hearing context is to collect and meaningfully integrate better and more complete Indigenous knowledge into the process. We have identified three major barriers to the meaningful integration of Indigenous knowledge into the CER hearing process: (1) barriers to meaningful participation and testimony from Elders or knowledge keepers; (2) systemic barriers that prevent meaningful consideration of Indigenous knowledge when provided; and (3) lack of accountability/enforceability for CER Boards to integrate Indigenous knowledge into their decision-making.</p> <p>The recommendations below seek to address these barriers:</p> <ul style="list-style-type: none"> (a) Provide Sufficient Funding: The CER must provide early, advanced, and sufficient funding for gathering of Indigenous knowledge well in advance of the start of the hearing process. The process for funding application should be streamlined and simple and any foreseen costs for gathering Indigenous knowledge (among other critical tasks), in preparation for hearings, should be advanced at the earliest possible opportunity. (b) Work with Impacted Indigenous Groups to Develop Protocols for Inclusion of Indigenous Knowledge: Understanding Indigenous knowledge is, in some respects, analogous to learning a new language. Much can be lost in translation when the person receiving Indigenous knowledge is not sufficiently versed in the distinct worldview of the person imparting the Indigenous knowledge. Prior to a hearing, the groundwork must be laid to ensure common understandings between differing paradigms. <p>The Rules can help ensure that at the outset of each hearing the impacted Indigenous groups, regulator, and industry come together to develop a binding Indigenous protocol that operationalizes precisely how this hearing will integrate Indigenous knowledge throughout the course of the hearing and the decision-making process.⁴</p> <p>This could be supported by directly integrating Canada’s Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (the “IK Framework”)⁵ directly into the Rules.</p>

4 Note: The Special Claims Tribunal provides a helpful example for what a potential protocol document could look like; Special Claims Tribunal, Protocol for Elder Testimony and Oral History (Word Template). [Link](#)

5 Government of Canada, Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions. [Link](#)

Canada developed an IK Framework meant to guide how several federal departments, including the CER, incorporate Indigenous knowledge into their rules, policies, and guidance. The IK Framework lists five guiding principles:

1. Respect Indigenous Peoples and their knowledge;
2. Establish and maintain collaborative relationships with Indigenous Peoples;
3. Meaningfully Consider Indigenous Knowledge;
4. Respect the Confidentiality of Indigenous Knowledge; and
5. Support Capacity Building Related to Indigenous Knowledge.

These 5 principles could be hard-wired into the Rules as factors that must be considered in developing an Indigenous knowledge protocol.

(c) Direct Reviews to Independent Indigenous Advisory Committee:

Academic studies have shown that the use of the term “Indigenous knowledge” is increasingly used in public policy – domestically and globally; yet, upon review, the tangible integration of Indigenous knowledge into decision-making is not evident. The result is distrust. For any CER process to be legitimate in the view of Indigenous peoples, Indigenous people must be included in monitoring and compliance, especially as it relates to meaningfully incorporating Indigenous knowledge.

Section 69(1) of the CER Act provides the Commission with the authority to “review, vary or rescind any decision of order it makes and, if applicable, re-hear any applications before deciding it”. Part III of the Rules, establishes how an applicant may apply for review or rehearing of a decision or order of the Board. The decision in variance decision RH-005-2020 relating to the Keystone Pipeline, provides useful commentary, stating:

The Commission considers applications for review through a two-step process. In step one, the Commission considers, as a threshold test, whether the applicant has raised a doubt on a prima facie [citations omitted] basis as to the correctness of the decision. Grounds for a review application can include an error of law or of jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, or facts that were not placed in evidence in the original proceeding because they were not then discoverable by reasonable diligence.⁶

6 Review and Variance Application of TransCanada Keystone Pipeline GP Ltd. Concerning the Commission of the Canada Energy Regulator Decision in the RH-005-2020 Hearing Letter Decision At section D (PDF p 2) [Link](#)

If the Board does not take into account Indigenous knowledge they are violating section 298(3) of the Act and committing an error of law. The Rules provide broad powers to the Board to consider, dispose of, and decide on applications for review but they may not be the most equipped to deal with questions relating to Indigenous knowledge. We propose that the CER establish an independent Indigenous advisory committee and amend the Rules so that the Board can direct applications for reviews to this advisory committee.

(d) **Facilitating Evidence from Elders or Knowledge Keepers:** In our role as community representatives, Indigenous Caucus is aware of the challenging perceptions that community members have regarding the hearing process. There is legitimate concern that Indigenous knowledge keepers will be placed in a forum where they may be disrespected or discounted. Ensuring CER processes incorporate cultural protocols is important. A CER hearing is an alien and overly formal tribunal process that many Indigenous elders (i.e. those who possess Indigenous knowledge) are uncomfortable with. An uncomfortable process does not facilitate meaningful participation. To address this we recommend the following amendments to the Rules:

- a. **Section 4(1):** The Rules permit the Board to dispense with or vary rules “where consideration of public interest and fairness require”.⁷ We propose that the Rules should expressly permit the Board to vary the rules to facilitate Indigenous knowledge.
- b. **Section 36(1):** Section 36(1) of the Rules establishes the process for providing evidence at an oral hearing. There are no provisions that directly address how Indigenous knowledge will be provided and protected. We propose that this section should be updated and establish rules for how Indigenous knowledge, in the form of oral evidence provided by elders, will be provided for in the Rules. As a starting point, this section of the Rules should include:
 - i. special privacy considerations for individuals providing Indigenous knowledge;
 - ii. express permission for witnesses that provide Indigenous knowledge to attend and listen to the testimony of other witnesses (this can help facilitate comfort with the pacing and process of an administrative tribunal);⁸

⁷ Rules at 4(1).

⁸ Note: *In a recent unpublished order of the Specific Claims Tribunal, the tribunal concluded on the question of whether witnesses with overlapping evidence would be excluded from the hearing room during the testimony of other witnesses. The Tribunal emphasized that evidence from Elders and oral history is to be approached with sensitivity and respect, taking into account the norms and practices of the First Nation and the needs of Elders testifying. The Tribunal is cognizant of the history of Indigenous peoples in Canada, including residential schools and negative interactions with government. The Tribunal aims to ensure that witnesses who are testifying feel comfortable, and is persuaded that they will feel more comfortable if they are able to be in the hearing room prior to giving their*

	<ul style="list-style-type: none"> iii. flexibility and permissions to record oral testimony on audio or video in advance of the hearing, subject to reasonable limits, that could be played for the Board privately, or publicly with permission; iv. flexibility and permissions to enable live or pre-recorded oral evidence, subject to reasonable limits, from a location other than a CER hearing room; and v. hearing time and space set out for ceremony and the practice of necessary protocols. <p>c. Section 37(1): Section 37(1) of the Rules establishes the process for providing evidence at a written hearing. In many cases, Indigenous knowledge can only be provided verbally.</p> <ul style="list-style-type: none"> i. This section of the Rules should expressly allow pre-recorded audio or video evidence, subject to reasonable limits, to ensure the opportunity for the Board to hear Indigenous knowledge. <p>d. Expressly permit oral evidence to be provided in the first language of the Elder or knowledge keeper testifying. To facilitate this will require the use of an interpreter that may or may not have a relationship with the Elder or knowledge keeper. In this instance, the Board should expressly permit testimony through an interpreter, where necessary, and funding be set aside for the hiring of an interpreter and translator (for the written transcript of the oral evidence).</p> <p><i>*We note that Indigenous knowledge cannot and should not only come through at the hearing stage. There are important and meaningful revisions that can be made to the Onshore Pipeline Regulations and Filing Manual that can facilitate Indigenous groups providing the Commission with more substantial Indigenous knowledge as part of the applications they are reviewing.</i></p>
C.	Crown Consultation
	<p>Discussion Question: Would you like to see the role of the Crown Consultation Coordinator, and the nature of its participation in Commission hearings reflected in the Rules? If so, how?</p>
	<p>Response: While we acknowledge that the role of the Crown Consultation Coordinator (“CCC”) will continue to grow and evolve over time there will be clear benefits to enshrining details of the CCC role into the Rules.</p> <p>The CCC plays an important role as an intermediary between the Commission and impacted Indigenous groups. As such, the CCC will be an integral point of contact for</p>

testimony. The Tribunal explained that this is the general approach taken by the Tribunal and therefore will allow witnesses to be present in the hearing room prior to giving their testimony.

many impacted Indigenous groups in their interactions with the CER. Accordingly, the CCC has the responsibility of ensuring impacted Indigenous groups:

1. understand the process in which they are participating;
2. have the resources, capacity, and time to participate meaningfully; and
3. feel empowered that their submissions will influence decision-making.

Supporting these goals will help build trust in the CER's process and ensure that Indigenous consultation and participation is well-informed and meaningful. In our view, the CCC role should prioritize the following elements:

1. The CCC should facilitate Indigenous participation and ease the administrative burden for participating Indigenous groups. In practice, this means engaging with Indigenous groups about how to participate, where to access funding, supporting application processes and being an initial point of contact for questions and concerns.
2. The CCC should be informed, sensitive, and responsive to the issues faced by Indigenous communities, specifically within the context of resource development and the various socio-economic impacts that accompany such projects. Crown Consultation Coordinators can and should develop long-term and sustained relationships with Indigenous groups. This enables them to develop understanding of the impacted Indigenous groups and build trust, which in turn would lead to better regulatory decisions.
3. If CCCs are well-informed about the regional context of applications then they can be an important tool to support Crown understanding of cumulative impacts. The CCC should be responsible for coordinating and synthesizing regional information.
4. The CCC should coordinate between participating Indigenous groups to identify common concerns and anticipated impacts. This would improve assessment of cumulative impacts, information sharing, planning, and facilitate better accommodation and mitigation measures. In addition, regional perspectives may illustrate impacts that may otherwise be unidentified by individual groups.

By assisting Indigenous groups to navigate the CER process and understand the issues Indigenous groups are concerned about, the CCC can foster mutual trust and respect between the agency and participating Indigenous nations. The importance of continuing to engage with Indigenous groups after project approval will further bolster relationships between the CER and Indigenous groups. Regulatory confidence is critical to regulatory efficiency.

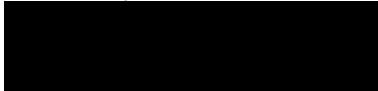
3.0 CONCLUDING REMARKS

The Indigenous Caucus is pleased to have presented these focused comments on the necessity of aligning the Rules with the CER Act's objectives, particularly regarding the implementation of UNDRIP, the integration of Indigenous knowledge, and the facilitation of Crown Consultation. We emphasize the importance of these areas in enhancing the regulatory framework to respect and protect Indigenous rights, and we urge the Commission of the CER to consider these

submissions carefully. We believe that through continued dialogue and collaboration, we can ensure that the Rules not only comply with legal requirements but also genuinely reflect the principles of reconciliation and respect for Indigenous Peoples. We request that the Commission remain engaged with us on these critical questions.

Should there be any inquiries or further discussions needed, please do not hesitate to contact the Chair of the Indigenous Caucus, Ray Cardinal, at raymond.cardinal@gmail.com. We look forward to contributing to the ongoing improvement of the CER's regulatory processes.

Sincerely,

A solid black rectangular box redacting the signature of Ray Cardinal.

Ray Cardinal, Chair of the Indigenous Caucus of the IAMC-TMX