# McMurray Métis – Feedback on CER Rules of Practice and Procedure

McMurray Métis welcomes the Canada Energy Regulator's (CER) initiative to update its Rules of Practice and Procedure (as well the Onshore Pipeline Regulations and related Filing Manuals). These are overdue initiatives to bring the CER into alignment with federal law and current best practices with respect to the relationship between the Crown, regulatory authorities, and Indigenous Nations and communities. Please find below our responses to the questions posed by the CER in the *Commission of the CER Rules of Practice and Procedure Review – Discussion Paper*.

**Q. Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?**

At present, the Rules contain practically no formal consideration for Indigenous knowledge, while the CER Act focusses primarily upon the question of confidentiality. The matter of confidentiality, while important, is only one issue with respect to the integration of Indigenous knowledge into the CER's hearing procedures. Below we offer several suggestions, either for immediate incorporate of to trigger future consultation initiatives:

- ***Recommendation 1***: One underlying issue is the consideration of the weight to be given to Indigenous knowledge, and particularly from oral Indigenous knowledge. The preamble to the Act states that Canada should take into consideration "the best available scientific information and data as well as Indigenous knowledge". There are nowhere instructions, however, on how this information is to be considered. The *Rules* should be modified to make

it clear that the Commission must grant *equal consideration* to all Indigenous and non-Indigenous knowledge, information, and data;

- ***Recommendation 2:*** The CER should develop a formal procedure for the provision of oral Indigenous knowledge. At present, the CER reaches out to Indigenous communities to request information on proper protocol, i.e., tobacco offering, but leaves many of the underlying obstacles unaddressed. The CER should modify its rules to address the following issues, among other potential ones:
  - Oral Indigenous knowledge should be allowed to be provided directly to the Commission without the presence of the public or proponent lawyers. While we recognize the importance of procedural fairness, this must be balanced with a consideration of the colonial legacy and how intimidating formal, colonial environments and expensive lawyers can be. The provision of evidence could be recorded and transcribed and the proponent's legal representatives could be provided an opportunity to submit written questions in relation to the oral evidence. In our experience, much of the 'scientific data' produced in proponent ESAs is of little real value, since the categories used change, the metrics change, and thus ESA produce no real, usable baseline information over time. The most reliable baseline information a Commission is likely to receive is from Indigenous knowledge holders, and, as such, the Commission should take the greatest effort to ensure this knowledge is fully provided and considered;
  - The Commission should provide the opportunity to oral Indigenous knowledge providers to hold a pipe, smudge, or other ceremony prior to the provision of oral Indigenous knowledge;
  - The rules should require the presence of an Indigenous language translator for the proceedings, should an oral Indigenous knowledge provider choose to provide evidence in their mother tongue;
- ***Recommendation 3***: No Indigenous knowledge submitted to the CER for a hearing should be made public on its registry. There is no value to be gained from the process, and it undermines Indigenous peoples. For example, proponents often scour websites like the CER

to scrape Indigenous knowledge from its public documents, for use in other proceedings, despite clear warnings on most documents submitted by Indigenous peoples that the information submitted should not be used by any other party for any other purpose. Instead, there should be a record of what was submitted, and all information should be made available to the proponent, but only with the signing of a knowledge-sharing and confidentiality protocol with the Indigenous Nation or community in question. If an individual wishes to access the information submitted under a FOIP request, then that can be addressed directly with the Indigenous Nation or community at the time the information is requested;

**Q. Do you have other feedback related to how the Commission can align the Rules with the CER Act, including the objectives outlined in the Act's preamble, such as the commitment to Reconciliation, and the UN Declaration?**

- ***Recommendation 3:*** Given recent court rulings re: the integration of the UN Declaration into Canadian law, the rules should be revised to explicitly require that the Commission consider and make a recommendation on whether the Crown has taken adequate steps to secure Free, Prior, and Information Consent (FPIC) from all participating Indigenous Nations and communities. Where a Nation does not explicitly provide its consent to the proposed application, the Commission should provide an explanation as to why and what issues remain outstanding with the Nation/community in question;
- ***Recommendation 4***: In our experience, the Crown Consultation Coordinator (CCC) acts for all intents and purposes as the recording secretary for the Crown. In our opinion, this limited, "neutral" role for the CCC eliminates most of its potential usefulness. To be of greater utility, the CCC should explicitly be empowered to represent the Crown in its operations, rather than as a 'neutral' third party. For instance, the CCC should be empowered to work directly with potentially affected Indigenous Nations and communities to develop potential mitigation, offset, and accommodation measures to recommend to the proponent and the Commission. These should be recommendations from the CCC, and not simply recorded input. This would make the role of the Crown

much more active and constructive in the attempt to secure Free, Prior, and Informed Consent from Indigenous participants in any proceeding;

- ***Recommendation 5***: In carrying out its efforts, the CCC should be empowered to contact other Departments of the Government of Canada, such as Natural Resources Canada (NRCAN) or the Department of Fisheries and Oceans (DFO) to bring representatives from other departments of the Government of Canada in the discussion and development of potential mitigation, offset, and accommodation measures;
- ***Recommendation 6***: The CCC should be explicitly mandated to develop recommendations to address the potential cumulative effects of applications that are before the Commission in hearings. At present, cumulative effects are barely addressed in the hearing process and are mostly addressed sporadically in the form of conditions. Having the CCC explicitly mandated with making recommendations with regards to cumulative effects would address a major information gap in the proceedings and provide the Commission with a much better foundation from which to develop conditions to address potential cumulative effects;

## Conclusion

McMurray Métis would like to thank the CER for the opportunity to provide input on potential revisions to the *Rules of Practice and Procedure*, as well as for the capacity funding to carry out this review. We hope the information we have provided will prove useful in your endeavours. We would be happy to discuss any other these recommendations directly with the CER, and we look forward to continuing to engage with the CER to align its rules and practices with Canadian and international law.