Papaschase First Nation Band 136 Association (PFNB) Input on the Canada Energy Regulator's Rules of Practice and Procedure Review (Rules Review)

I. Overview

[1] These are the *amended* submissions to the Canada Energy Regulator ("*CER*") of the Papaschase First Nation Band 136 Association (the "*PFNB*") regarding the *Rules of Practice and Procedure Review (Rules Review)*, Phase I – Early Engagement on the Rules of Practice and Procedure.

[2] The PFNB are a corporation incorporated under the laws of Alberta. Their membership trace their ancestry to the 19th Century Band of Chief Papaschase and the Edmonton Stragglers who were noted on the Treaty Pay Lists of the Papaschase Indian Band between 1876 and 1887 and whose ancestry are verified by a reputable genealogist.

[3] Since the submissions on the Onshore Pipeline Regulation, the PFNB have implemented three significant changes at the direction of membership:

i. Change of name from Papaschase First Nation #136 Association to Papaschase First Nation Band 136 Association.
ii. Assertion of band status;
iii. Renaming of the PFNB Operations Manual to the *Government of the Papaschase nêhiyawak Peoples* (24-09-22 Special Resolution).

[4] Pursuant to s. 2(1) of the *Indian Act*,[1] the applicable provision for band designation is:

> ***band*** means a body of Indians
> **(a)** for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951.
>
> ***Indian*** means a person who pursuant to this Act is registered as an Indian *or is entitled to be registered as an Indian*;
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> [emphasis added]

To be clear, the membership of the PFNB comprises a spectrum of "Indians" as understood by s. 91(24) of the *Constitution Act, 1982.* Some are currently status Indian, some are entitled to be registered as Indian, and some are currently not entitled to be registered as Indian.

[5] The Papaschase Indian Band was a signatory to adhesion to Treaty Six on August 21, 1877

[1] *Indian Act,* R.S.C., 1985, c. I-5 (*Indian Act*)

and had a reserve set apart for them currently occupied by the City of Edmonton and surveyed boundaries to the north (51 Avenue), east (17 Street NW), south (30th Avenue SW) and west (119 Street). But the Papaschase Indian Band was deprived of their reserve and denied aid and agricultural assistance during famine which pressured them into taking Scrip. This caused the Indigenous nation to become a diaspora – an Indigenous nation scattered from their homeland to places across the globe.

[6] The descendants of the Papaschase Indian Band and the Edmonton Stragglers noted on the Papaschase Indian Band Treaty Pay Lists have reconstituted and are an organized, assertive Indigenous peoples. In particular, Article 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*[2] of which Canada is a signatory, states:

> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, **and to designate and retain their own names for communities, places and persons**.
> 2. States shall take effective measures to ensure that this right is protected and also **to ensure that indigenous peoples can understand and be understood** in political, legal and administrative proceedings, where necessary through the provision of interpretation **or by other appropriate means**.
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> [emphasis added]

[7] This opportunity to provide input to the Canada Energy Regulator (*CER*) by the PFNB upholds Article 13 (1). However, it does not go far enough to uphold Article 13(2). Albeit a positive effort by the *CER* to uphold Article 13(2) is made, it is our position – and because our position is unique as compared to registered Bands under the *Indian Act* – that the task for Canada is to do more to ensure that this right to be understood in political, legal and administrative proceedings is protected. It is incumbent upon Canada to take proactive steps to ensure that our right to participate in this process – as genuine descendants of the Papaschase Indian Band – is protected from other "groups" who purport to represent the interests of the descendants of the Papaschase Indian Band. These proactive steps to address Indigenous identity fraud will protect those who are legitimate rights-holders and must be implemented in the Rules to ensure that funding intended for an Indigenous governing body or Indigenous organization of descendants of a particular Nation such as the Papaschase Band is actually going to a legitimate Indigenous governing body or Indigenous organization of descendants of the Papaschase Indian Band.

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[2] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61st Sess, UN DOC A/RES/61/95 (2007) [*UNDRIP*].

[8] The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council (NSERC) and the Social Sciences and Humanities Research Council (SSHRC) are developing a new policy to ensure that funding provided to Indigenous peoples is in fact conducted by the applicable Indigenous peoples.

[9] The PFNB proposes that the CER takes steps in the future to ensure that all unregistered Indigenous and landless bands/communities qualify for participation. This can be done by seeking a copy of the identity verification policies and procedures of that band. An additional step is that the CER request and obtain the genealogical verification of descendancy of the Chief and Council. This sampling should provide satisfactory confirmation of the application of the identification policy and procedures of that band. The PFNB is aware of other purported representative groups who do not ensure verification of descendancy of both their governance and their membership yet are receiving significant public funds to tout the interests of peoples and communities they do not descend from.

[10] Organized descendants of the Papaschase Indian Band have evolved from the mid-1990's from being "declared" descendants ("the Papaschase") to being verified descendants, as is the case of the present day PFNB. The availability of historic civil and ecclesiastic records, combined with voluntary atDNA testing if necessary and forensic genealogy makes verification of descendancy achievable in modern day Indigenous identity assertions. Both the public and Indigenous peoples have a right to know who is receiving public funding to represent interests of import that will have an impact on the regulatory process and it is incumbent upon Canada to evolve with this process.

[11] The predecessor of the PFNB, the Papaschase First Nation Association, were involved with issues in cultural heritage resources and energy since the late 1990s. When EPCOR began their Rossdale Flats expansion, this project led to the unearthing of an historic grave site despite organized efforts by declared descendants of the Papaschase First Nation Association to protect their sacred sites.[3] The Papaschase First Nation Association represented the interests of the descendants of the Papaschase Indian Band in the Alberta Utilities Board hearings (as it was then known as).

[12] As a result of the EPCOR project, the Papaschase have a unique perspective that they can bring to ensure that the *CER* can contribute to advancing Reconciliation, protecting heritage resources and using Indigenous knowledge.

[13] The PFNB submits that in order to properly align the *CER* with the *UNDRIP,* the enabling

[3] Page 1 of a letter dated August 16, 2001 from the Alberta Energy and Utilities Board addressed to the Papaschase First Nation Association, attached as Schedule 1.

statute, being the *Canadian Energy Regulator Act*,[4] must require the Free, Prior and Informed Consent ("FPIC") of affected Indigenous peoples, and its corresponding Rules of Practice and Procedure ("*Rules"*) must outline ways in which to fulfil this requirement.

[14] The current regulatory framework does not explicitly incorporate FPIC. The CER should look to amend the *Canadian Energy Regulator Act* explicitly stating that FPIC will be obtained, and the principals of FPIC in practice and procedure should be reflected in the Rules of Practice and Procedure. Consent and consensus must be sought throughout the process from affected Indigenous communities. To uphold such a standard, identity verification of the community whose participation is being sought is necessary. This is meaningful Reconciliation and upholds Art. 13(2) of the *UNDRIP*.

[15] Section 4(1) of the current *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208, states:

> **4(1)** At any time in a proceeding, where considerations of public interest and fairness so require, the Board may
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> **(a)** dispense with or vary these Rules or any part thereof; or
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> …
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> **(2)** Where the Board dispense with or varies the Rules or extends or abridges the time fixed by the Rules or by the Board under subsection (1), the Board shall forthwith notify all parties and any interested persons and shall issue directions in respect of the procedure appropriate to the proceedings or fix the time in which to conduct the proceedings.

The PFNB recommends that Indigenous identification verification and FPIC by affected Indigenous communities be added and made explicit in this provision as equal to considerations of public interest and fairness.

[16] The Truth and Reconciliation Commission (TRC) Call to Action No. 92(i) states:

> *Business and Reconciliation 92.*
> *We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:*
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> *i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.*
>
> [emphasis added]

[4] SC 2019, c 28, s 10 [*Canadian Energy Regulator Act*].

[17] The PFNB submits that the Supreme Court has acknowledged that engagement in existing environmental review and regulatory processes may fulfill the duty to consult.[5] However, consultation processes should be *specific* to aboriginal communities[6] and implementing procedures that vet purported Indigenous governing bodies and Indigenous organizations prior to engagement is a fundamental obligation and the exercise of due diligence as a component of its duty to consult that Canada cannot ignore.

II. The Papaschase Indian Band

1. Origins

[18] The Papaschase trace their ancestry to the 19th-century Band of Chief Papaschase (also known as Passpasschase, Papastew, Pahpastayo and John Quinn-Gladu). The Quinn-Gladu family which comprised the leadership of the Band originated from Lesser Slave Lake and prior to that, the matriarch of the Band, Lisette Gladieu, her husband John Gladien Quin dit Kwenis and her sister Rosalie Gladieu, came from Manitoba. The birthplace of the Papaschase community was at what was known as the "Two Hills" – an area which was once comprised of a large lake surrounded by two hills and eventually developed into Edmonton's Strathcona district and the south side of Edmonton's River Valley in 1850.

[19] On August 21, 1877, Chief Papaschase and his brother, Takootch, signed Treaty Six in Fort Edmonton. Treaty Six asserted that the Crown would provide the Indigenous parties with the following:

a. Reserves;
b. A one-time payment of $12.00;
c. Annual payments for ammunition and twine;
d. A fixed annuity of $5.00;
e. Necessary and sufficient relief for the Indigenous parties if they suffered famine or pestilence; and
f. Aid to the Indigenous parties to develop their agricultural capacity along with alternative means of subsistence.

[20] In exchange, the Indigenous parties had to surrender their land; however, the Indigenous parties would retain the right to continue using the surrendered land for hunting, trapping and fishing.

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[5] "Overview of the Duty to Consult", *Aboriginal Energy Partnerships*, Alberta Law Conference 2015, Canadian Bar Association – Alberta Branch, by Garry Appelt, James Blackman, Greg Brady and JoAnn Jamieson ("Witten LLP"), at p. 7 citing *Behn v. Moulton Contracting Ltd.,* [2013] 2 SCR 227 ("Behn") at para. 30.
[6] *Ibid*.

[21] The Papaschase received the Papaschase Reserve IR 136 (the “Reserve”). The Reserve is located in southeast Edmonton. The process of creating a reserve for the Papaschase took three years, and the lack of reasonable diligence in creating the Reserve hindered the Papaschase's agricultural capacity. This lack of capacity led to hardship for the members of Papaschase.

[22] The Reserve was smaller than what the formula, based on the band member size, required. It would continue to be diminished by the Federal Government. On August 3, 1880, the reserve was shrunk by 9.8 square miles in retaliation for the Papaschase demands for famine relief under Treaty Six. Many excluded from the formulaic calculation were known as the Edmonton Stragglers.

[23] Famine forced many Papaschase members to leave the Reserve. The eradication of the Bison populations, along with the government's denial of adequate aid for food and assistance with agriculture, in breach of Treaty Six, left the members of the Papaschase famished and impoverished. Many members of the Papaschase, therefore, left to other reserves or took Scrip. Both diminished the membership in the Papaschase and resulted in individuals' connection and knowledge of their heritage disappearing. Many contemporary Papaschase members are or were unaware of their ancestry because of circumstances like these.

[24] Many decided to take Scrip without being aware that doing so would entail losing their reserve lands and their residences on the reserve. The Papaschase were presented with Scrip documents in English legalese, which many Papaschase members could not understand; they did not have an opportunity to receive legal advice about Scrip when they took it during the years 1885-1886; and children were automatically included in the scrip-taking of their parents as heads of household, despite the *Indian Act* not specifically legislating the automatic inclusion of the Treaty children until 1888 and despite most of these children falling under the definition of “Indian” and not “half-breed”, which was a qualifying factor for the taking of Scrip.

[25] Due to impoverishment, the state's failure to explain the consequences of taking Scrip, and the legislative manipulation of removing individuals from the Crown’s eternal promises under Treaty made with the First Nations peoples of this land, Papaschase members were enticed, cajoled and manipulated to erase their Nation and compromise their Indigenous identity in order to stay alive.

[26] Due to the shrinking numbers of official Papaschase members, the Government of Canada sought to eliminate the Reserve or merge it with Enoch Nation. The Reserve was surrendered on October 12, 1889. The Papaschase assert that this surrender process was done improperly for three reasons:

a. The Papaschase members were not given timely notice of the upcoming Band meeting to vote on surrender. At least seven qualified electors never received notice of the meeting;

b. The three Papaschase members who attended the surrender meeting were not properly informed of the consequences of their decision; and

c. The surrender meeting did not comply with the procedures set in the *Indian Act,* RSC 1886, c 43, as amended. The meeting was neither open to all male adult "treaty Indians" living in or near a reserve nor carried out in accord with the rules of the Papaschase as required by the *Indian Act,* RSC 1886, c 43, as amended.[7]

[27] Although the Supreme Court of Canada upheld the lower Court decision of Justice Slatter that all collective efforts to try the issue of the legality of the surrender of the reserve was out of time due to the application of the provincial limitation period,[8] the PFNB asserts that the Treaty Land Entitlement (TLE) remains an outstanding Treaty obligation.

[28] The PFNB further asserts that it was a breach of the Honour of the Crown to include minor Treaty children of the Papaschase Indian Band and the Edmonton Stragglers who were on the Treaty Pay Lists of the Papaschase Indian Band into scrip-taking. The descendants of these children remain band members of the Papaschase Band. To be clear, it is the position of the PFNB that these descendants are entitled to be registered as Indians albeit this is not the current state of the law.

2. Current Constitution of the Papaschase Community of Descendants

[29] During most of the 20th century, the Papaschase were scattered to the winds, and many of their members were unaware of their ancestry. However, over the century, as knowledge of the Papaschase's history became more available through the Elders, Knowledge Keepers and advocate descendants such as Jerry Quinn, pipe carrier of Chief Papaschase's pipe and grandson, a strong identity was recovered.

[30] Papaschase identity was never a thing of the past. Sparks of life flared up in 1974 when a lawyer, James Robb, notified the Department of Indian and Northern Affairs on behalf of a group of descendants led by Kay Anderson that they intended to bring a land claim as a distinct Nation. However, nothing more came from this correspondence.

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[7] *Indian Act,* RSC 1886, c-43, s 39(a).

[8] *Canada (Attorney General)* v. *Lameman*, 2008 SCC 14

[31] The Band truly began to regroup during the late 20th century when Papaschase activists once more publicly asserted their Nation's rights and land claims. The Papaschase filed a claim in 1995, which was denied because the group was not a band. On March 6, 1996, the Papaschase got a resolution of support for state-funded research into their land claims from the Confederacy of Treaty 6 led by Frances Doreen Wabasca and Violet Andres of the Papaschase First Nation Association (the predecessor to the current PFNB).

[32] The protection of hallowed burial grounds became a focal point for Papaschase activism sparked by the proposed development of a pipeline. On July 9, 1996, several Band members asked the City of Edmonton for a memorial at the Papaschase's sacred burial grounds located under the intersection of 115th street and 23rd Ave NW. Settlers had formerly removed thirty Papaschase bodies from these burial grounds and dumped them into an unidentified mass grave. By September 1996, a dozen Papaschase protestors would march in front of the Edmonton City Hall in support of their cause. By October 18, 1996, the City of Edmonton's Parks and Recreation Department met with various Papaschase First Nation Association members to discuss the placing of a cairn at the place where it was believed that a mass grave was located.

[33] In the late 20th century, the Papaschase First Nation Association was formed in 1995, along with another unincorporated group in 1999 claiming to represent the Papaschase people purportedly led by Rose Lameman (albeit controversy exists as to who was elected to be Chief of this unincorporated group in 1999) called the Papaschase IR 136 Descendants Council, and after the 1999 election the group became known as the Papaschase Descendants Council ("PDC"). A reclaimed version of the PDC occurred in 2011 led by a declared descendant, Calvin Bruneau prev. Desjarlais and his family, claiming continuity of existence since 1999 and other nationhood claims, but there is no proof to substantiate these claims. Albeit the factual narrative of the burgeoning reclamation of Papaschase identity is not straightforward or simplistic, is fraught with conflict and misinformation, the fact is that the diasporic communal identity of the Papaschase peoples is emerging as a consistent whole and due diligence on behalf of all stakeholders must be exercised in dealing with this emergent identity.

[34] The PFNB was incorporated in October, 2019 after obtaining direction from four sacred Pipe Ceremonies held with the Pipe Carrier of Chief Papaschase's pipe, the great grandson of Chief Papaschase and son of Jerry Quinn, Floyd Quinn, with declared descendants of the Papaschase Indian Band. The mandate and direction after the Pipe Ceremonies was that the PFNB provide accountable governance, accurate information, and ensure verification of descendancy. The PFNB holds exclusive representation of its membership and asserts governance in accordance with the *wâhkôhtowin*, the seven sacred teachings of the Cree law. The Chief and Council of the PFNB are chosen in accordance with the custom of the Papaschase band ("council of the band"). To be clear, the Pipe is our

Constitution,[9] and the custom of the band is the practice of Pipe Ceremonies. When the PFNB bylaws were registered under the *Societies Act*[10] on October 28, 2019, they came about as a result of the Pipe Ceremonies held throughout September and October of that year with the Pipe Carrier of Chief Papaschase's pipe, the late Floyd Quinn.

3. Papaschase Involvement in Energy Projects

[35] The Papaschase has been involved and the PFNB is actively involved with heritage resource protection in the face of energy projects. In 2001, the Papaschase First Nation Association obtained an injunction to protect its sacred burial grounds during EPCOR's planned expansion of the Rossdale Flats Powerplant in Edmonton and on the Papaschase Band's traditional territory.

[36] The PFNB's current Chief successfully applied for an injunction under the *Cemeteries Act* when she was a student-at-law. The injunction was, however, eventually overturned, and the Papaschase were denied the ability to protect their sacred sites.

[37] The PFNB is able to bring a fresh, unique perspective to the *Rules Review* and represent an important faction of Indigenous people in Canada who are often overlooked. It understands the importance of heritage resource protection during construction and the importance of a collaborative approach to dealing with these issues as they arise in the Energy context.

III. Input on the Rules

[38] The PFNB has reviewed the *National Energy Board Rules of Practice and Procedure, 1995* and are providing input on the following questions:

1. **Question 3:** Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?
2. **Question 4:** 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?
3. **Question 5:** 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?
4. **Question 10:** Are there processes that you would like to see written into the Rules?

[9] Jimmy O'Chiese, Pipe Ceremony held in Strathcona County and organized by the Beaver Hills Biosphere Association, June 2023.
[10] *Societies Act*, RSA 2000 c. S-14.

1. **Question 3:** Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?

[39] The PFNB recommends that a preliminary and fundamental process step for *providing* Indigenous knowledge within hearings is the explicit implementation of proper policy in the Rules to vet Indigenous identity of organizations that are not registered under the *Indian Act*. A qualification process to achieve standing would ask questions such as confirmation of verification of identity processes implemented within the organization from the community in which the members claim to belong to and a sampling provided by governance of the organization of genealogical heritage. This reasonable practice would uphold Canada's commitment to Article 13(2) of the *UNDRIP*, enhance the exercise of due diligence, and uphold the duty of care.

2. **Question 4:** 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?

[40] The implementation of a vetting policy into the Rules would also uphold section 91(24) of the *Constitution Act, 1982*.[11] The *UNDRIP* defines Indigenous peoples according to section 35(2) of the *Constitution Act, 1982.* Courts have interpreted section 35(2) broadly as including non-status Indians. The Supreme Court held in *Daniels*[12] that section 91(24) of the *Constitution Act, 1867* includes non-status Indigenous People under "Indians." The Supreme Court noted at paragraph 34 that, while section 35 of the *Constitution Act, 1982* "does not define the scope of s. 91(24)" of the *Constitution Act, 1867*, "[t]he term 'Indian' or 'Indians' in the constitutional context has "a meaning" used in s. 91(24) that … can be equated with the term 'aboriginal peoples of Canada' used in s. 35."

[41] Indeed, *Daniels* has been interpreted to suggest that the term "Indians" in section 35 of the *Constitution Act, 1982* includes non-status Indians.[13] Therefore, the CER should ensure

[11] Section 35, being Schedule B to *Canada Act 1982* (UK), 1982, c 11.

[12] *Daniels v Canada (Indian Affairs and northern Development)*, 2016 SCC 12 at paras 20, 35.

[13] The Saskatchewan Court of Appeal noted in *R v Broyle*, 2022 SKCA 62 at para 73 ["*Broyle*"] that Daniels confirms that non-status Indians possess section 35 rights: "The effect of [*Daniels*] is that the federal government has a constitutional responsibility for [Métis and non-status Indians] in equal measure with all Indigenous peoples." A contextual reading of this passage shows that the "constitutional responsibilities" from the prior passage are section 35 entitlements. For one, *Broyle* was a pure section 35 case with no federalism elements. The SKCA would not have invoked *Daniels* if it did not bear on their aboriginal rights analysis. What is more, the excerpted passage is located under the heading "Approach to assessing the appellants' assertion of a constitutional right to harvest": *Broyle* at para 63. The bottom line of *Broyle* is that *Daniels* renders non-status Indians full beneficiaries of section 35.

that it recognizes these groups and allows them the same participatory rights in the regulatory process.

[42] Encouraging broad participation of various diverse Indigenous communities promotes Reconciliation but comes with added obligations of due diligence. Many of the reasons for different 'Indian' statuses under the *Indian Act* are rooted in the history of colonialism that persisted in Canada. Indeed, the Papaschase Band was nearly decimated. Including them in participatory regimes is an opportunity for which they are thankful and the PFNB considers this participation as a meaningful stepping-stone. The PFNB wishes to continue to walk down the path of Reconciliation with the Canadian Government. To arbitrarily exclude communities who are defined as "Peoples" under Art. 1 of the *UNDRIP* that may suffer adverse impacts from the decisions of the CER and its business partners would, in the PFNB's submission, run contrary to advancing Reconciliation with Indigenous Peoples.

[43] Likewise, arbitrarily opening the flood gates to every claimed Indigenous group without proper vetting is also contrary to advancing true Reconciliation with Indigenous Peoples.

[44] The Crown Consultation Coordinator would prepare an accommodation report inclusive of the PFNB on energy projects that fall within its reserve and traditional territory once proper vetting has been exercised at the preliminary stages of entry into the process. If affected, the Crown Consultation Coordinator would examine the issue of accommodation to the band in further detail.

[45] This may entail an examination of overlapping territories and jurisdiction with the Metis and recognized bands under the *Indian Act.* The Papaschase Band is a part of the Beaver Hills Plains Cree – *amiskwaciyiniwak* – which group appeared in the Beaver Hills (present day Edmonton) around 1830,[14] and our law is *wâhkôhtowin*.[15]

[46] The Papaschase Indian Band's traditional territory includes Edmonton, the Beaver Hills in their entirety stretching to the north side of the hills of present day Tofield to the Nose in the Neutral Hills far to the east of Edmonton, and as far south as Drumheller and the Hand Hills.

[47] "Beaver Mountain," or "the other side of the Beaver Mountains" was a prominence southeast of Beaverhill Lake which coincides with the Schultz homestead, the origin of most of the artifacts held at the Tofield museum. "Cree Camp" is marked at that spot on numerous historical maps. A deconstruction of the Treaty Pay Lists on a family-by-family

[14] According to research conducted by Dylan Reade, documentary film maker, December 2022 combined with research conducted by Irene Gladue, Randy Lawrence and Margaret McGilvery in 1995.

[15] The Cree Law is based on the Seven Grandfather Teachings of Respect, Love, Courage, Wisdom, Truth, Honesty and Humility.

basis concludes that the entirety of Treaty 6 territory and even some territory outside of it would be covered.

[48] From the PFNB's perspective, Indigenous Peoples, including "non-status Indians" ought to be afforded the right to participate in the CER approval process. Any definition, threshold or limiting language ought to ensure that the Rules are consistent with the definition of Indians in section 91(24) of the *Constitution Act, 1867*, and Section 35 of the *Constitution Act, 1982,* as these are the groups that Federal entities have a fiduciary obligation to. In that vein, and consistent with views that section 35(2) includes non-status Indians, the PFNB would submit that the CER ought to explicitly include "non-status Indians."

[49] The Papaschase involvement in the EPCOR project provides an apt example. The burial sites, in that matter, were of significant cultural significance to the Papaschase. It would be contrary to Reconciliation and FPIC to develop a regulatory framework that would exclude the Indigenous people affected due to status. It is also the PFNB's submission that it would be extraordinary to constrain an international instrument that is remedial in nature to exclude Indigenous people that the federal government is responsible for under section 91(24) of the *Constitution Act, 1867* on the basis of section 35(2) of the *Constitution Act, 1982.*

3. **Question 5:** 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?

[50] FPIC is a cornerstone principle of *UNDRIP.* Any attempts by state actors to implement *UNDRIP* through the *United Nations Declaration on the Rights of Indigenous Peoples Act* must seek to implement FPIC. It is important to note that FPIC and consultation are not the same, and that FPIC "can never be replaced by or undermined through the notion of "consultation."[16] Any framework including consultation must properly situate it as a procedural right that should be there to enhance an Indigenous nation's substantive right, in this case, to give or withhold consent. Consultation is meant to lead to obtaining FPIC, not replace it. Any revisions to the Rules must recognize these differences and develop a framework that outlines these differences and ensures that the Rules are consistent with articles 1, 13, 18, 19, 29, 32 and 40 of *UNDRIP*.

[51] Working definitions of "Free" "Prior" and "Informed" are:

> "Free" implies consent must be obtained without any form of coercion, intimidation,

[16] Permanent Forum on Indigenous Issues, *Report on the Tenth Session*, UNESCOR, 10th Sess, Supp no 23, UN DOC e/c.19/2011/14 at para 36.

> manipulation, or application of force by government or non-governmental parties seeking consent. "Prior" implies that Indigenous peoples must be engaged early in the planning process, be given sufficient time to adequately consider proposed measures, and continue to be engaged through the process. "Informed" implies that Indigenous peoples must have an adequate understanding of the full range of issues and potential impacts of any decision.[17]

Any use of FPIC must bear these definitions in mind. The Rules should look to encourage these forms "Free" "Prior" and "Informed" as it incorporates FPIC.

Can the Current Regulatory Framework Incorporate FPIC?

[52] Sections 56 to 59 of the *Canadian Energy Regulator Act* sets out the "Rights and Interest of the Indigenous Peoples of Canada." Section 56 sets out a duty to "consider" the adverse effects on Indigenous peoples when making a decision on the Commission. A duty to consider could not be construed as containing a requirement to obtain FPIC. Moreover, the current construction of these sections is problematic as it leaves absolute decision-making power with the Commission with little room for collaboration.

[53] Section 183(2) of the *Canadian Energy Regulator Act* sets out that the Commission must consider the following factors concerning Indigenous interests:

> (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
>
> (e) the effects on the rights of Indigenous peoples of Canada, including with respect to their current use.

[54] One could argue that FPIC is required to satisfy 183(2)(d) and (e); however, this argument is unsatisfactory. Indeed, it is difficult to see how these subsections could require FPIC as they list Indigenous interests as one factor among others without any special weight given to the rights of Indigenous people. This leaves little room for FPIC or compliance with *UNDRIP*.

[55] Either the *Canadian Energy Regulator Act* or the Rules must explicitly reference FPIC.[18] Given that both the Rules and its enabling statute do not currently statutorily mandate FPIC, the PFNB submit that some amendments, at the very least, must be considered to

[17] Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada" (2017) 7:1 W J Legal Stud 1 at 3.

[18] Permanent Forum on Indigenous Issues, *Report on the Tenth Session*, UNESCOR, 10th Sess, Supp no 23, UN DOC e/c.19/2011/14 at para 36.

incorporate statutory language that requires FPIC and encourages collaboration between the Regulator, Indigenous peoples and business partners.

Potential Other Regulatory Frameworks to Consider

[56] Mindful of the requirements of FPIC, inspiration may be drawn from British Columbia's *Environmental Assessment Act*.[19] The *BCEA* expressly includes the aim of implementing *UNDRIP* and operationalizing it. The operationalization of *UNDRIP* was achieved in two ways: 1) in the process of drafting the legislation and 2) in the language of the statute itself.[20] The PFNB's submissions will focus on the latter. The PFNB submits that by incorporating FPIC into either the enabling statute or the Rules, the CER can better protect heritage resources in alignment with the *UNDRIP* and the Truth and Reconciliation Call to Action No. 92.

[57] Secondly, the *BCEA* sets out when consent and consensus are required. Throughout the regulatory process, consensus with participating Indigenous people is required. For example, section 16(1) of the *BCEA* requires consensus before beginning the environmental assessment process. Having numerous stages where consensus is required will help mitigate adverse impacts on heritage resources from the outset.[21] Moreover, the *BCEA* aims to address FPIC as noted in the Alberta Law Review article "*UNDRIP* as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" the *BCEA* states that it addresses FPIC as:

> Seeking consensus from participating Indigenous nations with respect to process orders related to an assessment ensures that Indigenous participation will be "free" and will be incorporated into an assessment process in accordance with the needs of participating Indigenous nations. The "prior" aspect of FPIC is addressed by requiring consensus with participating Indigenous nations prior to EAO decisions or orders throughout the process. Any consent or consensus received from participating Indigenous nations will be "informed" by virtue of the fact that Indigenous nations are able to identify their information needs and may work with the EAO to ensure these needs are met by the assessment process. Participating Indigenous nations may also access capacity funding under the *EA Act* to ensure they have the capacity and resources to both determine their information needs and then to assess the information they receive. Finally, "consent" is addressed by requiring the minister to consider the consent, or lack of consent, of any participating Indigenous nation prior to issuing an environmental assessment certificate.[22]

[19] SBC 2018, c 51 [*BCEA*].

[20] Sam Adkins *et al*, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020) 58:2 ALR 339 at 356.

[21] *Ibid* at s 16(1).

[22] Sam Adkins et al, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020) 58:2 ALR 339 at 358.

[58] The only critique of the PFNB to this approach would be that it be made explicit that participating Indigenous nations also be properly vetted from the onset of the process.

[59] The CER should also consider requiring corporations to provide a culturally appropriate framework for remediation when a corporate partner or business enterprise identifies that they have caused or contributed to adverse impacts on a heritage resource of Indigenous peoples.[23] This redress standard should be in line with *UNDRIP* articles 1, 27, 28, 32 and 40.[24] Requiring business partners to take on social responsibility for their projects would further foster a collaborative process. Moreover, this would provide another layer of redress for Indigenous peoples during the operations and maintenance activities. Having some form of redress that goes through the business partners would offer the opportunity to resolve the matter early on in a manner that could fashion collaboration.

[60] If the CER provides a framework for requiring business partners to redress matters, it would also make oversight easier for the CER. The Rules could have clear reporting requirements for the redress or resolution framework with a requirement that the business partner provides reasons for its conclusion on the remediation. Having reasons requires the business partner to be transparent with the regulator and requires less of an inquisitorial process from the CER.

Question 10: Are there processes that you would like to see written into the Rules?

[61] Adopting a framework similar to the *BCEA* is that consensus and consent would give participating Indigenous peoples the opportunity to follow their distinct cultural practices and laws.[25] For the PFNB, this means the *wâhkôhtowin.* Focusing on the "free" component of FPIC requires that Indigenous groups be given the latitude to utilize their decision-making processes. This process is encouraged by strong compliance with *FPIC* as contemplated by *UNDRIP*.

[62] Capacity funding must be consistently available. Section 75 of the *Canadian Energy Regulator Act* does allow for funding for participation in public hearings. However, the PFNB submits that this is inadequate as it does not permit funding for capacity building

[23] Human Rights Council, *Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, With a Focus on Extractive Industries*, UNHRCOR, 21th Sess, UN DOC A/HRC/21/55 at para 27(f).
[24] *Ibid*.
[25] Sam Adkins et al, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020) 58:2 ALR 339 at 358.

and throughout the construction, operation and maintenance of energy projects. The "Informed" process of FPIC requires that Indigenous peoples be able to access resources to assist them in becoming informed. Indeed, any meaningful implementation of FPIC must account for the vast differences in resources between the CER, business partners and Indigenous peoples to balance that disparity and ensure a fair and balanced process throughout. Capacity funding is crucial; however, non-financial capacity in the form of training and education related to the Rules should be provided to allow for Indigenous knowledge and perspectives to be meaningfully provided.

[63] Indigenous-led reviews should also be incorporated into the Rules. A working definition of Indigenous-led reviews can be stated as:

> A process that is completed prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous parties – on their own terms and with their approval. The Indigenous parties are involved in the scoping, data collection, assessment, management planning, and decision-making about a project.[26]

[64] This definition is taken from the environmental assessment realm. However, the following principles can be taken to properly allow for Indigenous knowledge to be addressed in the Rules:

a. There must be meaningful input from Indigenous peoples;
b. Indigenous Peoples must exercise some control over the process;
c. Indigenous peoples must be able to utilize their methods and conduct reviews on their terms; and
d. Indigenous peoples must be involved throughout.

[65] These are four important principles that should be utilized to inform Indigenous participation throughout the entirety of the regulatory approval process. Crucial is allowing Indigenous Peoples to exercise some control over the process. Indeed, allowing Indigenous peoples to operate through their own institutions is a key to FPIC.[27] As noted by the Human Rights Council:

> [T]he right to indigenous peoples to [FPIC] forms an integral element of their right to self-determination. Hence, the right shall first and foremost be exercised through their own

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[26] Ginger Gibson *et al*, *Impact Assessments in the Arctic: Emerging Practices of Indigenous-Led Review* (April 2018) at 10, online(pdf): *Gwich'in Council* < Firelight Gwich'in Indigenous led review_FINAL_web_0.pdf (gwichincouncil.com)>.

[27] Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent Canada through Indigenous Legal Traditions" (2017) 50:1 UBC L Rev 95 at 119.

decision-making mechanisms.[28]

[66] Therefore, to comply with FPIC and *UNDRIP,* the Rules should have a mechanism "whereby Indigenous peoples make their own independent and collective decision on matters that affect them."[29]

[67] Ultimately, to fully realize FPIC is to encourage the use of Indigenous knowledge, which requires Indigenous control over some of the processes:

> The right to FPIC ensures participation of Indigenous peoples in decision making, reinforces the right to self-determination, and protects other substantive human rights. To fully realize those benefits and to protect bottom-up, internal decision-making processes from top-down state interventions, each Indigenous community should be empowered to formulate its own consent procedures by drawing on its Indigenous legal traditions.[30]

[68] The incorporation of Indigenous knowledge is unduly stifled if the process is overly directed by Government Bodies or business partners, as it is those bodies who set the parameters and narrow the range of input Indigenous peoples can give. Ultimately, this restricts the ability of Indigenous knowledge to be truly expressed and incorporated as it is only made accessible through the prism of the other parties, not the Indigenous peoples.

[69] The PFNB also submits that the Rules should mandate the use of Indigenous knowledge, where available, rather than solely mandating that it should be taken into account by the Commission.[31] The Rules should also acknowledge that the "Informed" of FPIC "includes the right inclusion of knowledge of traditional elders and traditional knowledge holders in decision-making."[32]

IV. Conclusions

[70] In summary, the PFNB submits that the Rules require appropriate vetting mechanisms to ensure the discharge of Canada's obligations under *UNDRIP,* the TRC Recommendations, and the *Constitution* with the appropriate Indigenous bodies of peoples at the onset. To be

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[28] *Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UNHRC, 15th Sess, UN Doc A/HRC/15/35 (2010) at 12.
[29] Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent Canada through Indigenous Legal Traditions" (2017) 50:1 UBC L Rev 95 at 153.
[30] *Ibid.*
[31] Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada" (2017) 7:1 W J Legal Stud 1 at 11.
[32] *Ibid.*

clear, the PFNB requests that their legal team be invited to meaningfully participate in this task at the ground level of drafting the necessary vetting policies as they are at the front-lines of burgeoning assertions of Indigenous nation-identity and it is submitted that more asserted Indigenous identities will be emerging throughout Canada seeking meaningful participation.

[71] The PFNB further submits that the enabling legislation be amended to ensure FPIC throughout the entirety of the regulatory process. FPIC advances Reconciliation when it permits broad participation by the diverse Indigenous peoples that may be affected by a project. It also is the best mechanism for protecting and mitigating the adverse impacts on heritage resources. The proper implementation of FPIC also permits the use of Indigenous knowledge by making Indigenous peoples meaningful partners in planning, construction and maintenance. Finally, FPIC, by necessity, requires Indigenous participation. It develops a collaborative process that focuses on participation and meaningful partnerships between the CER, business partners and Indigenous Peoples.

EUB Alberta Energy and Utilities Board

Calgary Office 640 – 5 Avenue SW Calgary, Alberta Canada T2P 3G4 Tel 403 297-8311 Fax 403 297-7336

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August 16, 2001

Calvin Desjarlais
First People-First Settlers
408 Cricket Court
Edmonton, AB T5T 2B2
Fax: (780) 421-4760

Duane Good Striker
First People-First Settlers
405, 10128 - 105th Avenue
Edmonton, AB T5H 0K2
Fax: (780) 990-1959

Metis Nation of Alberta
Attention: Phillip Coutu
100, 11738 Kingsway Avenue
Edmonton, AB T5G 0X5
Fax: (780) 432-0368

Sally Ulsfsten
General Delivery
Ardmore, AB T0A 0B0
Fax: (780) 433-5827

Tom Hill
10115 - 88th Avenue
Edmonton, AB T6E 2R8
Fax: (780) 433-5827

Liliane Coutu Maisonneuve
8702 Strathearn Drive
Edmonton, AB T6C 4C7
Fax: (780) 468-4179

Western Canada Wilderness Committee
Attention: Gray Jones
#310, 10168 - 100A Street
Edmonton, AB T5J 0R6
Fax: (780) 420-1475

Association Canadienne Franciase
Attention: Denis Magnan
8627 - 91st Street
Edmonton, AB T6c 3N1
Fax: (780) 465-6773

Papasschase First Nation Association
c/o Darlene M. St. Jean
Suite 204, 10171 Saskatchewan Drive
Edmonton, AB T6E 4R5
Fax: (780) 431-1663

Rossdale Community League
c/o Bryan & Company
Attention: A. Bryan
2600, 10180 - 101st Street
Edmonton, AB T5J 3Y2
Fax: (780) 428-6324

Confederacy of Treaty 6 First Nations
c/o Graves Engineering Corporation
Attention: Jim Graves
11461 University Avenue
Edmonton, AB T6G 1Y9
Fax: (780) 430-9315

CACCL & EFCL
c/o Rooney Prentice
Attention: Gavin Fitch
501, 407 - 8th Avenue SW
Calgary, AB T2P 1E6
Fax: 266-6109