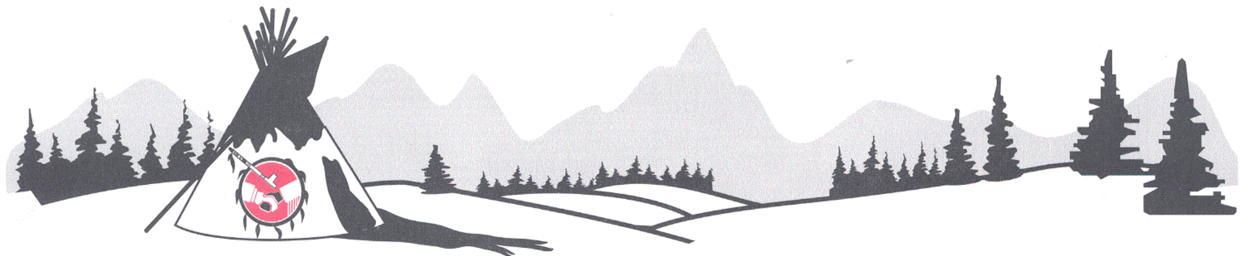

January 31, 2025

Delivered via email

Remu Sen
Regulatory Policy
Canada Energy Regulator
Email: rppr@cer-rec.gc.ca

RE: Stoney Nakoda Nations Review of the Rules of Practice and Procedure Discussion Paper and Associated Documents

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This letter is submitted to the Commission of the Canada Energy Regulator (CER) by the Stoney Consultation Office. The Stoney Consultation Office works with Stoney Tribal Administration on behalf of the Stoney Nakoda Nations ("Stoney"), comprising Bearspaw First Nation, Goodstoney First Nation, and Chiniki First Nation.

The Stoney Nakoda Nations are self-governing bodies under the authority of Treaty No. 7 and provide leadership and direction through the duly elected Chiefs and Councils of the member Nations, collectively known as the Stoney Tribal Council. The Stoney Nakoda have constitutionally recognized Treaty and Aboriginal rights and interests ("Section 35 rights" and/or "Inherent rights") within Îyãħé Nakoda Makoche (Stoney Traditional Territory). Stoney Nakoda reside mainly on Indian Reserve Lands at Mînî Thnî (Morley) Alberta (I.R. #142, #143, #144), Eden Valley (I.R. #216), Rabbit Lake (I.R. #142B), and Bighorn (I.R. #144A).

Background

Stoney understands the Commission of the CER is seeking feedback from Indigenous Peoples on, or relating to, potential amendments and improvements to the *National Energy Board Rules of Practice and Procedure, 1995* ("the Rules"). To support engagement and feedback, a Discussion Paper was posted on the CER Dialogue webpage describing the types and scope of amendments currently under consideration.

The Rules are meant to regulate procedures followed during both written and oral hearings of the Commission of the CER.[1] Procedures under the Rules can include how complaints can be filed, how hearings can be conducted, and how applications are assessed.

The Rules have not been updated since they were implemented in 1995. However, the CER has adapted processes and procedures, particularly in relation to Indigenous Peoples and their rights, through additions such as Indigenous knowledge sessions, and other ad hoc practices, processes, and terminologies that have evolved since the Rules were first in effect.

Stoney had the following understandings to guide completion of this review and preparation of feedback:

1. **This comprehensive review of the Rules is being undertaken by the Commission of the CER.** The Commission represents a core division within the CER, encompassing significant areas of responsibility. The Commission is responsible for making adjudicative decisions and operates as a

[1] Previously known as the National Energy Board until the implementation of the *Canadian Energy Regulator Act* in 2019.

quasi-judicial body, maintaining arm's length from other parts of the CER governance structure and Natural Resources Canada (NRCan).

2. **The comprehensive review of the Rules is being supported by CER staff,** but the review and development of draft Regulation is under the purview of the Commission.

Stoney's review relied on the Discussion Paper, as well as supporting websites and documents, including:

- Commission of the Canada Energy Regulator Rules of Practice and Procedure Review – Discussion Paper;
- Rules Review CER Dialogue webpage;
- National Energy Board Rules of Practice and Procedure, 1995, SOR/95-208;
- United Nations Declaration on the Rights of Indigenous Peoples; and
- *Canadian Energy Regulator Act*, 2019 S.C. 2019, c. 28, s. 10.

<u>Review</u>

The Discussion Paper prepared by the Commission of the CER includes various regulatory objectives, topics for discussion, and discussion questions. Stoney's review addresses the regulatory objectives and discussion questions; it also includes other feedback for equal consideration by the Commission during this early engagement process.

Overall, Stoney finds CER processes and hearings to be largely procedural and lacking depth for meaningful Indigenous consultation. In Stoney's experience, neither the individual hearing Commissions nor the CER adequately assess impacts on Indigenous rights or address how to accommodate them.

Our Elders and the Stoney Consultation Office put significant hours into participation in these hearings and regulatory processes and are regularly disappointed with how our information is considered and weighted. Processes often feel rushed, and our input never appears to be properly weighted against proponent provided information; this makes participation appear performative instead of substantive. In general, the outcome of most CER processes and hearings is that the project is approved. This is not fair, equitable, and does not include proper consideration of cumulative effects to cultural values and Stoney Section 35 rights and/or Inherent rights. Instead, processes and hearings are aligned with industry interests.

These issues reach beyond the scope and ability of the Rules to address; however, if the Commission, supported by the CER, is truly seeking reform for how oral and written hearings are governed, this, and the below noted issues must be discussed in depth with Stoney. Additionally, Stoney must be provided sufficient capacity funding for this continued engagement, and our input must be truly integrated in any future draft amended Rules or supporting processes/procedures.

If the CER and the Commission are unable or unwilling to address the deficiencies in considering Indigenous rights, there should be a separate process or governing body to do so. Constitutionally protected rights must be provided *greater* consideration and treated with increased discretion. Current CER processes and hearings do not do this. There is a lack of back-and-forth dialogue. There is no ability for Stoney to test the Commission's understanding of the evidence, Section 35 rights, or the impact assessment process as it applies to Indigenous rights. Further, there is no way for Stoney to ask why decisions are made, and no mechanism to seek justification for decisions made. The Commission is not compelled to give reasons for their findings with respect to Indigenous rights. A separate and distinct process or governing body to provide oversight of Indigenous specific issues, that is still connected to project processes, is recommended.

Further, the Discussion Paper notes that, in some cases, there are CER practices or rules dispensations applied on a case-by-case basis which are not codified in the Rules. It would be helpful for the Commission and the CER to provide details on CER practices influencing Indigenous involvement that have been applied on a case-by-case basis and are not systemized in the Rules. This would allow Stoney to evaluate whether those practices and/or formal dispensations should also be integrated in the Rules moving forward.

Regulatory Objectives and Discussion Questions

Topic: Reconciliation and the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration")

Per the Discussion Paper, the Commission is evaluating changes to align the Rules with *Canadian Energy Regulator Act* ("*CER Act*") requirements and the UN Declaration, which is outlined in the preambular sections of the *CER Act.*

In 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("*UNDRIP Act*"). This legislation mandates the federal government to align all federal laws with the principles outlined in the UN Declaration. An accompanying Action Plan supports the *UNDRIP Act*, including a specific measure (Action Plan Measure 34) that addresses the involvement of Indigenous Peoples in projects and issues overseen by the CER.[2]

Overall, the concept of CER processes promoting and supporting Reconciliation and better implementing the UN Declaration is positive. Stoney having increased autonomy and authority over projects within Îyãħé Nakoda Makoche is also viewed as beneficial. For changes to the Rules to achieve meaningful and transformative results for Stoney, it is essential for Stoney to have the financial capacity to guide the hearing process and make informed decisions and recommendations. Any Stoney recommendations must be genuinely considered by both the Commission and Natural Resources Canada. Furthermore, while any jointly made decisions can be based on Canadian Acts, regulations, or policies, they should also equally consider Stoney principles and cultural values.

As part of this review, Stoney also considered the specific UNDRIP Act Action Plan ("Action Plan"). In this Action Plan, Measure 34 specifies that the Government of Canada must:

> *"Work in consultation and cooperation with First Nation, Métis and Inuit communities, governments and organizations to (i) enhance the participation of Indigenous peoples in, and (ii) set the measures that could enable them to exercise federal regulatory authority in respect of, projects and matters that are currently regulated by the Canada Energy Regulator (CER)."*[3]

Further, the Action Plan describes steps to achieve the foregoing, including, but not limited to:

1. Developing regulations to enable Indigenous governing bodies to be authorized to exercise specific powers, duties, and functions under the CER Act,
2. Developing a systemic model to enhance Indigenous Peoples' involvement in compliance and oversight over the lifecycle of CER regulated infrastructure, and
3. Supporting Indigenous governing bodies and/or the potential establishment of new Indigenous decision-making institutions.

To address how changes to the Rules can implement principles of Reconciliation and the *UNDRIP Act*, Stoney has considered the above steps in contrast with the Rules.

Overall, Stoney requires the Commission and the CER to identify which UN articles are being addressed by changes to the Rules rather than focusing on the Government of Canada's Action Plan which is one step removed. Please provide specific detail on which UN articles will be satisfied by these potential changes. In order to show the Commission and the CER are serious about Reconciliation, the process must be shifted from a Canada-centric approach to one that truly implements the UN articles and addresses past concerns raised during hearings.

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[2] The Canada Energy Regulator, Commission of the Canada Energy Regulator Rules of Practice and Procedure Review – Discussion Paper, https://ehq-production-canada.s3.ca-central-1.amazonaws.com/03ab76bd5f795e0a7214634017506a96f1ab44b3/original/1725898273/fdb6ff78f80757149232103295b55bcc_Discussion_Paper.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKIOR7VAOP4%2F20241122%2Fca-central-1%2Fs3%2Faws4_request&X-Amz-Date=20241122T180414Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=00c7fa929184852172460a339fcaecd5b03142de663ace3aad4d9c91606006a3

[3] The United Nations Declaration on the Rights of Indigenous Peoples Act, Action Plan, https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf

In Stoney's view, there are no existing sections of the Rules which can support authorization of Indigenous governing bodies in exercising specific powers, duties, and functions; this potential regulation would lie upstream of the Rules, legislatively. Greater clarity is required on whether this Action Plan step is currently being satisfied through the development of regulations related to Indigenous Impact Assessment Co-Administration Agreements and how this could be implemented for CER processes and hearings. Further discussion between Stoney and the Commission and their CER support is required.

In relation to involvement in compliance and oversight over lifecycles for CER regulated infrastructure, it is Stoney's experience that timelines for the participation of Indigenous groups in any follow-up and monitoring compliance activities required by the CER in its conditions for project approval are typically rushed. With limited internal capacity, it is difficult for the Stoney Consultation Office to participate. Further, the current process does not provide sufficient time for us to retain experts, train and identify staff to assist, and secure necessary funding. This must be discussed further with Stoney and the Commission, and their CER supports to identify how the Rules can support improvement. Additionally, cumulative effects to Stoney Section 35 rights and/or Inherent rights are not properly or consistently considered through CER processes and hearings and are, therefore, not effectively monitored in post-approval phases. Stoney requires greater consideration of this in future processes moving forward.

Topic: Indigenous Knowledge

In reviewing the Rules, the Commission is evaluating whether they adequately facilitate a fair process for processing and protecting Indigenous knowledge, while also allowing for process evolution, as needed. This requirement is based on the formal legislative requirement that arose with the passing of the *CER Act,* whereas the Commission, when making recommendations, is to consider Indigenous knowledge provided to the Commission, alongside scientific information and data. Also added through section 58 of the *CER Act* were specific provisions to protect the confidentiality of Indigenous knowledge.

While these limited provisions exist within the *CER Act*, the Rules must be used to procedurally require *equal* consideration of Indigenous knowledge by the Commission when presented alongside applicant filed information. In Stoney's experience, Indigenous knowledge is given less credence and is not weighed in a similar fashion to information provided by the applicants. This contributes to participation fatigue and disillusionment, and failure to adequately identify and address impacts. To improve this, Indigenous knowledge must be accepted more readily by the Commission, and more importantly, understood. To accomplish this, the Commission must work with Stoney to understand what Indigenous knowledge is from Stoney's perspective, the numerous ways this knowledge can be shared, and how the Commission can collect the knowledge (keeping in mind ownership/control provisions), understand the knowledge, and work with it through an Indigenous lens. This work can also help the Commission understand any harmful data practices (e.g., misrepresentation of data, extractive relationships, or misappropriation of knowledge) they may have unknowingly implemented which result in inequitable data consideration of Indigenous knowledge.

Once this understanding of Indigenous knowledge is fostered, the Rules can also support ongoing equal consideration by requiring disaggregated data whenever filings are produced for hearing processes (and any other CER regulatory review process). This will ensure the unique perspectives of Indigenous governing bodies and/or intervenors are represented.

Further, it is important to note that if a project does not require a hearing, Indigenous knowledge may not be considered. In the case of pipelines, the necessity for a hearing is often determined by whether a pipeline is 40 km or longer, rather than based on the potential impact on rights or other factors. The length of a pipeline is just one metric and should not be the determining factor in whether Indigenous knowledge is adequately considered.

Topic: Crown Consultation

Typically, the CER, as Crown Consultation Coordinator, is responsible for consultation as a facet of the Commission's hearing processes. The Crown Consultation Coordinator works independently from the Commission, with the aim of understanding impacts on Indigenous rights and interests and discussing and developing potential mitigations and accommodations. Information from the Crown Consultation Coordinator's activities is filed for the Commission's consideration when assessing project applications.

In Stoney's experience, the Crown Consultation conducted through the Crown Consultation Coordinator creates a partitioned process, whereby there is limited direct consultation between Stoney and the Commission. This impedes and impairs a nation-to-nation dialogue as Stoney is removed from direct consultation with the approval recommender. Further, there is no rubric, system, or discussion on how the Crown Consultation Coordinator will address impacts on Stoney Section 35 rights and/or Inherent rights or how the impacts on those rights were evaluated to begin with, beyond the applicant's filed information. We feel that this gap between the Commission and Indigenous groups, with the Crown Consultation Coordinator in between, is, in part, responsible for the persistent lack of understanding of Stoney Section 35 rights and/or Inherent rights and how they are impacted by CER regulated projects. This must be addressed, if not by the Rules, through additional discussion and other legislative changes. Additionally, the Commission must be responsible for designing and implementing a rubric or system of understanding and assessing impacts to rights.

In addition to lack of understanding of Stoney rights, the Commission also lacks a depth of understanding of the Stoney Nakoda Nations themselves; the Commission does not include representation from Stoney and does not have adequate or specific cultural awareness training. This results in a gap between what regulators are attempting in relation to Reconciliation and the impacts Stoney continues to experience.

Further, for instances where there is no hearing, there is no real or constructive Crown consultation process and limited capacity funding. In the case of pipelines, this leads to strategic practices by applicants/proponents whereby, through project splitting or strategic development, they can ensure their pipeline is less than 40 km resulting in a less rigorous process. This must be considered by the CER.

Topic: Enhancing Competitiveness

Along with ensuring the Rules align with current procedures, the Commission is evaluating potential changes to refine and optimize processes, thereby further enhancing competitiveness.

The Discussion Paper identifies a key potential change to the information request process to clarify the use of information requests and improve efficiency. Stoney would like to see substantial changes to the information request process. Currently, it is burdensome, time consuming, and requires significant levels of external support (e.g., legal and technical). Some aspects which must be explored with Stoney include the fixed time limit for response, direction given for provision of responses, and the quasi-judicial format of the responses (e.g. numbered consecutively). Stoney, as a self-governing Nation, has its own ways of being, knowing, and doing. There must be greater collaboration on how to change the information request process so that it is reflective of Stoney's methods.

The Discussion Paper also includes an examination of timelines and whether they should be shortened or lengthened. Consideration is also being given to changing from calendar days to business days, which is purported to be clearer for participants. Overall, the consideration of timelines could result in changes supported by Stoney. Currently, hearing processes do not include enough consideration of Nations' competing priorities and potential conflicting cultural events -- timelines are compressed. The process of participating in a hearing has the potential to impact rights because hearings can be scheduled during cultural events or interrupt cultural activities. The issue of timelines must be explored in partnership with Stoney so that seasonal time constraints typically experienced by Stoney can be accounted for (e.g., spring ceremony season, etc.). In addition, a shift from calendar days to business days aligns with the overall operation of the Stoney Consultation Office and is more favorable to Stoney for future comment periods, etc.

The Discussion Paper also notes that the Commission is considering updating the notice of procedure process to, for example, include an oral notice of motion process where suitable. This is also viewed as positive by Stoney as it can support participation by Stoney Elders in an otherwise colonial system. Stoney looks forward to additional engagement on this with the Commission to clarify Stoney's positioning.

Topic: Electronic Filing and Service

The Commission plans to update the Rules to modernize various practices and procedures. For instance, subsection 9(8) of the Rules indicates that when an individual submits a document to the Commission electronically, they must subsequently provide an original hard copy of the document within a reasonable timeframe after the electronic submission. The Commission is evaluating the modernization of these requirements to permit electronic filing and service, eliminating the need for subsequent hard copies where appropriate. Considering the potential transition to electronic filing and service, the Commission is also evaluating the possibility of eliminating signature requirements in specific circumstances, such as physical signatures on applications and notices of motions.

This change could be supportive of a more streamlined process that removes some administrative burden from Stoney. The current process is administration heavy. In addition, navigating the CER website can be problematic and confusing. This must be considered by the Commission through direct consultation with Stoney.

Topic: Access to Project Applications

The Commission is also considering eliminating the requirement for companies or applicants to have a hard copy of the project application at the CER site for public inspection. While Stoney often prefers virtual inspection of project applications, it would be helpful to understand the demographics of those accessing the hard copy applications prior to making this decision. Are Indigenous groups or organizations typically accessing the applications virtually or in person? Decisions like this should not be made without consideration of how it can impact Indigenous groups comparably to other intervenors/participants.

Topic: Other Feedback

While Stoney appreciates the provision of the Discussion Paper to spur consideration of changes to the Rules, there are also other important items for consideration by the Commission and the supporting CER staff which must be taken into account.

First, the current hearing process does not include sufficient flexibility for consideration of Stoney Section 35 rights and/or Inherent rights. Rights are often discounted, mitigation for biophysical components is often identified as sufficient in addressing impacts to rights, and where impacts persist, the impacts are weighted less than the project's contribution to the greater public good. This contributes to disillusionment of Stoney with the process. The Elders and Stoney Consultation Office contribute significant work with little to no result. Further, participation in the quasi-judicial format of hearings in contravention of Stoney's traditional governance is, in and of itself, an impact on Stoney governance rights. How Stoney Section 35 rights and/or Inherent rights are considered must be top of mind for the Commission and the CER moving forward, particularly as the commitment to Reconciliation will allow for a greater level of Indigenous oversight through Indigenous governing bodies. The Commission must grapple with how it will account for divergent viewpoints with Indigenous groups in a way that will respect the Indigenous groups' autonomy and authority and support Reconciliation.

Second, funding for participation in hearing processes is insufficient and leaves Indigenous groups unable to participate adequately or fully. For example, funding often does not allow for staff time. The Stoney Consultation Office plays an integral role in organizing and planning hearing participation; without direct compensation, their additional efforts can be lost as staff are allocated to more pressing and paid tasks instead. Capacity funding must be considered and addressed in the Rules, where possible. Additionally, there are processes undertaken by the CER which are not funded adequately such as rapid approval processes. Stoney does not receive base levels of funding from the federal government to undertake participation in these lesser approval processes (e.g., section 214(1) applications). This means that Stoney must subsidize the CER for the majority of projects the CER regulates to ensure our rights and interests are protected. This must be further discussed to ensure adequate and ongoing capacity is provided. The current approach runs counter to the objectives of Reconciliation.

Third, the rapid approval process of section 214(1)(a) projects (i.e. those under 40 km) does not allow for the sufficient collection of information on the potential impacts to Section 35 rights. It does not allow for Indigenous knowledge to be shared with the Commission, the CER, or the proponent, and it does not allow for Crown Consultation. This must be evaluated by the CER moving forward. In addition, there must be

consideration of Indigenous rights prior to implementing a rapid approval process as pipeline length is a single metric that may or may not relate to the degree of impact to Stoney Section 35 rights. For example, if a pipeline intersects a gravesite, it would not matter whether the pipeline was 1 km or 40 km in length – the impact would still occur and the size and scope of the impact would be immense. Section 214(1) must be updated to reflect potential cultural impacts for consideration in rapid approvals.

Finally, exempting Indigenous knowledge from cross examination must be considered by the Commission and the CER. Instead, a more culturally appropriate method to promote understanding should be undertaken, particularly in dealing with Elders. Cross examination appears to question the provided knowledge in a combative and confrontational way, whereas Stoney's process for knowledge sharing is one of being on the land, storytelling, and sharing. Instead of a requiring adherence to the colonial cross examination process, the Commission and the CER should allow for more appropriate ways of understanding this shared knowledge. This could reduce the adversarial nature of hearings, improve the Commission, CER, and applicants' understanding, and allow for exertion of Stoney governance systems in a largely colonial process.

Conclusion and Next Steps

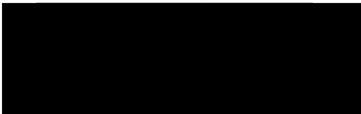
Based on the foregoing review and Stoney's experience with CER processes and hearings, Stoney would like to highlight the following:

- The Canadian Constitution does not stipulate that projects need to be designated for Indigenous rights to be protected. Indigenous rights exist regardless of project size or length (i.e. sections 214 and 182 vs. section 183); it is unclear why these rights are only of concern to the CER where projects meet a particular size threshold. Further, Stoney was never consulted on, and never consented to, the length thresholds for project designation.
- While the majority of CER-regulated projects fall under sections 214 and 182, full regulatory review and Crown consultation is limited to section 183 projects. This situation not only encourages proponents to divide projects to remain under the threshold for hearings and full Crown consultation, but also ensures that there is no comprehensive assessment of the impacts on Section 35 rights. This is due to a lack of capacity, overly compressed regulatory time frames, and the absence of meaningful Crown involvement.
- As all lands within Îyãħé Nakoda Makoche are extremely important to Stoney culture and identity, and the exercise of Stoney's Section 35 rights, Stoney should receive notification of all potential projects on Treaty 6 and Treaty 7 territory. Notification should come through the CER as a central point of contact to create communication efficiencies, rather than Stoney receiving multiple communications via various methods from a vast number of proponents.
- The current state of capacity funding is inadequate to ensure Stoney ability to consider all projects proposed within Îyãħé Nakoda Makoche. Stoney only receives capacity funding from the CER for CER-regulated projects that meet the threshold for designation (i.e. section 183). Where CER funding is not provided, Stoney is reliant on proponent funding, which is often limited or not provided at all. As Indigenous rights exist regardless of project size, the CER should provide capacity funding for consultation processes for all CER-regulated projects.
- The CER and Commission's lack of understanding of Stoney rights and culture impacts any efforts by the CER toward Reconciliation. Stoney requests further discussion with the CER on approaches that could be taken to ensure adequate awareness of Stoney rights and culture. Further, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) should have a greater role and responsibility in CER processes and hearings to support a nation-to-nation relationship between Canada and Stoney, modernization of Canadian government structures to support Stoney capacity, and protection of Indigenous rights.

- Stoney preservation of Ownership, Control, Access, and Possession (OCAP) of Stoney's information is extremely important to the Nations. To ensure protection of Stoney information shared during CER processes and hearings, an information sharing agreement should be enacted between the CER and Stoney. Further, the CER and Commission should receive training on the First Nations principles of OCAP[4] to ensure understanding of harmful data practices that may result in inequitable data consideration of Indigenous knowledge and prevent future implementation of such practices.

Stoney expects the information and feedback in this letter will inform future amendments to the Rules as well as future discussion with the Commission and CER. We look forward to your consideration of our suggestions and future dialogue directly with the Commission, supported by CER staff, to promote a greater understanding of Stoney's governance, Section 35 rights and Inherent rights, and interests to ensure the Rules can be updated to the best advantage of all parties.

Sincerely,



William Snow
Acting Director of Consultation
Stoney Tribal Administration

[4] https://fnigc.ca/ocap-training/take-the-course/