The Papaschase First Nation #136 Input on the Canada Energy Regulator's Discussion Paper on the Onshore Pipeline Regulation

I. Overview

[1] These are the submissions to the Canada Energy Regulator ("CER") of the Papaschase First Nation #136 (the "Papaschase") regarding the *Onshore Pipeline Regulations* ("*OPR*") Discussion Paper.

[2] The Papaschase are a corporation incorporated under the laws of Alberta. They trace their ancestry to the 19th Century Band of Chief Papaschase. The Papaschase are signatories to Treaty Six. But the Papaschase were deprived of their reserve and denied aid and agricultural assistance during famine which pressured them into taking Scrip.

[3] The Papaschase have reconstituted and are a strong, thriving nation. The Papaschase has been involved with issues in heritage resources and energy. In the late 1990s, EPCOR began their Rossdale flats expansion. This project led to the unearthing of a Papaschase grave site despite the efforts of the Papaschase to protect their sacred sites.

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

[5] The Papaschase submit that in order to properly align the *OPR* with the *United Nations Declaration on the Rights of Indigenous Peoples*[1] , the *OPR* or its enabling statute must require the Free, Prior and Informed Consent ("FPIC") of affected Indigenous peoples.

[6] The current regulatory framework does not incorporate FPIC and likely could not be interpreted to incorporate FPIC. As such, the CER should look to amend either the *Canadian Energy Regulator Act*[2] or the *OPR* in order to incorporate FPIC. The CER should do so by ensuring that there is a low threshold for Indigenous peoples to participate in the regulatory process, that consent and consensus is sought throughout the process and that Indigenous peoples are given meaningful participation and control within the *OPR* framework.

[1] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61st Sess, UN DOC A/RES/61/95 (2007) [*UNDRIP*].
[2] SC 2019, c 28, s 10 [*Canadian Energy Regulator Act*].

II. The Papaschase

1. Origins of the Papaschase

[7] The Papaschase trace their ancestry to the 19th-century Band of Chief Papaschase (also known as Passpasschase, Papastew, Pahpastayo and John Gladieu-Quinn). The Gladieu-Quinn 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.

[8] 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.

[9] 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.

[10] 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.

[11] 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. The Papaschase First Nation #136 organization includes members who are descendants of the Edmonton Stragglers

[12] 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.

[13] 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.

[14] Due to famine, impoverishment and the state's failure to explain the consequences of taking Scrip, Papaschase members were driven to erase their Nation in order to stay alive.

[15] 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.[3]

2. Current Constitution of the Papaschase

[16] 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.

[17] 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.

[18] 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 of the Papaschase First Nation Association.

[19] 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 members to discuss the placing of a cairn at the place where the Papaschase believed the mass grave was located.

[20] In the late 20th century, the Papaschase was formed, along with another group pertaining to represent the Papaschase people, led by Rose Lameman, the "Papaschase Indian Reserve 136 First Nation" (Also known as the Papaschase Descendants Council).

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

3. Papaschase Involvement in Energy Projects

[21] The Papaschase has been involved with heritage resource protection in the face of energy projects. In 2001, the Papaschase 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's traditional territory.

[22] The Papaschase'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 as the expansion was not halted.

[23] As such, the Papaschase are able to bring a fresh, unique perspective to the *OPR* discussion paper and represent an important faction of Indigenous people in Canada. 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 Discussion Paper

[24] The Papaschase are providing input on the following questions:

1. **Question 2:** How can the *OPR* contribute to the advancement of Reconciliation with Indigenous People?
2. **Question 3:** How can the *OPR* contribute to the protection of heritage resources on a pipeline right-of-way during construction, and operation and maintenance activities?
3. **Question 5:** How can the use of Indigenous knowledge be addressed in the OPR?

1. **Question 2:** How can the *OPR* contribute to the advancement of Reconciliation with Indigenous People?

[25] The *United Nations Declaration on the Rights of Indigenous Peoples Act*[4] defines Indigenous peoples according to section 35(2) of the *Constitution Act, 1982.*[5] Courts have interpreted section 35(2) broadly as including non-status Indians. The Supreme Court held in *Daniels*[6] that section 91(24) of the *Constitution Act, 1867* includes non-status

[4] SC 2021, c 14 [*UNDRIPA*].
[5] Section 35, being Schedule B to *Canada Act 1982* (UK), 1982, c 11.
[6] *Daniels v Canada (Indian Affairs and northern Development)*, 2016 SCC 12 at paras 20, 35.

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."

[26] Indeed, *Daniels* has been interpreted to suggest that the term "Indians" in section 35 of the *Constitution Act, 1982* includes non-status Indians.[7] Therefore, the *OPR* should ensure that it recognizes these groups and allows them the same participatory rights in the *OPR* process.

[27] Encouraging broad participation of various diverse Indigenous communities promotes Reconciliation. Many of the reasons for different 'Indian' statuses under the *Indian Act*[8] are rooted in the history of colonialism that persisted in Canada. Indeed, the Papaschase community was nearly decimated. Including them in participatory regimes, such as with the *OPR,* is an opportunity for which they are thankful and a meaningful stepping-stone as the Papaschase 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 Papaschase's submission, run contrary to advancing Reconciliation with Indigenous People.

2. **Question 3:** How can the *OPR* contribute to the protection of heritage resources on a pipeline right-of-way during construction and operation and maintenance activities.

[28] In order to properly protect heritage resources during the approval, construction or operation and maintenance activities on the pipeline right-of-way, the Papaschase submits that the CER must develop a legal framework at the strategic and application level for ensuring collaborative decision-making that is consistent with the Free, Prior and Informed Consent ("FPIC") portions of *UNDRIP*.

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[7] 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.

[8] RSC, 1985, c. I-5.

[29] 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."[9] 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 *OPR* must recognize these differences and develop a framework that outlines these differences and ensures that the *OPR* is consistent with articles 1, 18, 19, 29, 32 and 40 of *UNDRIP*.

[30] Generally speaking, working definitions of "Free" "Prior" and "Informed" are:

> "Free" implies consent must be obtained without any form of coercion, intimidation, 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.[10]

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

<u>Can the Current Regulatory Framework Incorporate FPIC?</u>

[31] 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 power with the Commission with little room for collaboration.

[32] 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;

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[9] 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.

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

(e) the effects on the rights of Indigenous peoples of Canada, including with respect to their current use.

[33] 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*.

[34] The *OPR* is currently silent on how it must consider Indigenous peoples and does not mention FPIC.

[35] Either the *Canadian Energy Regulator Act* or the *OPR* must reference FPIC.[11] Given that both the *OPR* and its enabling statute do not currently statutorily mandate FPIC, the Papaschase submit that some amendments, at the very least, must be considered to incorporate statutory language that requires FPIC and encourages collaboration between the Regulator, Indigenous peoples and business partners.

Potential Other Regulatory Frameworks to Consider

[36] Mindful of the requirements of FPIC, inspiration may be drawn from British Columbia's *Environmental Assessment Act*.[12] 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.[13] The Papaschase's submissions will focus on the latter. The Papaschase submit that by incorporating FPIC into either the enabling statute or *OPR*, the CER can better protect heritage resources on a pipeline right-of-way.

[37] Firstly, the *BCEA* sets out a standard for Indigenous Participation: Indigenous nations are presumed to be entitled to participate. The Environmental Assessment Officer may only deny an Indigenous Nation participation if "there is no reasonable possibility the Indigenous nation or its rights recognized and affirmed by section 35 of the *Constitution Act, 1982* will be adversely affected by the project."[14]

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[11] Assembly of First Nations, "Submission to the House of Commons Standing Committee on the Environment and Sustainable Development" (November 28, 2011)m online: (pdf) *AFN* <https://www.afn.ca/uploads/files/parliamentary/ceaa.pdf> at 12.
[12] SBC 2018, c 51 [*BCEA*].
[13] 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.
[14] *BCEA, supra* note 7 at s 14(2).

[38] While the *BCEA* sets this threshold, the Papaschase would like to ensure that any definition utilized in the *OPR* is not unduly restrictive. From the Papaschase's perspective, Indigenous Peoples, including "non-status Indians" ought to be afforded the right to participate in the *OPR* process. Any definition, threshold or limiting language ought to ensure that the OPR is 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 Papaschase would submit that the *OPR* ought to include "non-status Indians."

[39] 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 Papaschase'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.*

[40] 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.[15] 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

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

participating Indigenous nation prior to issuing an environmental assessment certificate.[16]

[41] 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.[17] This redress standard should be in line with *UNDRIP* articles 1, 27, 28, 32 and 40.[18] 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.

[42] If the CER provides a framework for requiring business partners to redress matters, it would also make oversight easier for the CPR. The *OPR* 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.

3. **Question 5:** How can the use of Indigenous knowledge be addressed in the *OPR*?

[43] 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.[19] 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*.

[44] Capacity funding must be easily and consistently available. Section 75 of the *Canadian Energy Regulator Act* does allow for funding for participation in public hearings. However, the Papaschase submit that this is inadequate as it does not permit funding throughout

[16] 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.
[17] 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).
[18] *Ibid*.
[19] 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.

the construction, operation and maintenance of pipelines. 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 the *OPR*. Capacity funding is crucial; however, non-financial capacity in the form of training and education related to the *OPR* should be provided to allow for Indigenous knowledge and perspectives to be meaningfully provided.

[45] Indigenous-led reviews should also be incorporated into the *OPR*. 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.[20]

[46] 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 *OPR*:

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.

These are four important principles that should be utilized to inform Indigenous participation throughout the entirety of the *OPR*. 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.[21] As noted by Human Rights Council:

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[20] 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)>.

[21] 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.

> [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 decision-making mechanisms.[22]

Therefore, to comply with FPIC and *UNDRIP,* the *OPR* should have a mechanism "whereby indigenous peoples make their own independent and collective decision on matters that affect them."[23]

[47] 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 form top-down state interventions, each Indigenous community should be empowered to formulate its own consent procedures by drawing on its Indigenous legal traditions.[24]

[48] 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.

[49] The Papaschase also submits that the *OPR* should mandate the use of Indigenous knowledge, where available, rather than solely mandating that it should be taken into account by the Commission.[25] The *OPR* should also acknowledge that the "Informed" of FPIC "includes the right inclusion of knowledge of traditional elders and traditional knowledge holders in decision-making."[26]

IV. Conclusions

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[22] *Report of the Expert Mechanism on the Rights of Indigenous Peoples,* UNHRC, 15th Sess, UN Doc A/HRC/15/35 (2010) at 12.

[23] 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.

[24] *Ibid*.

[25] Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada" (2017) 7:1 W J Legal Stud 1 at 11.

[26] *Ibid*.

[50] In summary, the Papaschase submits that the *OPR* or its enabling statute should be amended to require 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 pipeline 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.