

CROWN CONSULTATION AND ACCOMMODATION REPORT
for the
NOVA Gas Transmission Ltd. Edson Mainline Expansion Project
(GH-001-2019)

Prepared by Natural Resources Canada

Disclaimers

If there is any inconsistency or ambiguity between this Report and the Canada Energy Regulator Recommendation Report (GH-001-2019), the Canada Energy Regulator Recommendation Report (GH-001-2019) shall prevail.

This document (Section 6.0) contains confidential third party information that should not be disclosed without prior consultation with the Major Projects Management Office at Natural Resources Canada.

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1.0 Introduction and Overview

Canada is committed to advancing reconciliation and renewing its relationship with Indigenous peoples to one based on a recognition of rights, respect, cooperation, and partnership. This commitment places an emphasis on ensuring that the Crown fulfills its duty to consult and, where appropriate, accommodates Indigenous peoples in a manner that is reasonable and meaningful. This includes fostering two-way dialogue in a manner that upholds the Honour of the Crown.

With this commitment in mind, the Crown sought to work with potentially impacted Indigenous groups to better understand how Indigenous and Treaty rights, whether asserted or established, could potentially be impacted by the proposed NOVA Gas Transmission Ltd. (NGTL) Edson Mainline Expansion Project (Project). For the Project, the Major Projects Management Office (MPMO) at Natural Resources Canada (NRCan) served as Crown consultation coordinator and relied upon the Canada Energy Regulator (CER; formerly the National Energy Board or NEB) Hearing process, to the extent possible, to fulfil its duty to consult. Through supplemental consultations, the Crown consultation team sought to consult with Indigenous groups to understand any potential outstanding impacts to Section 35 (s.35) rights and Indigenous interests not otherwise addressed by the recommended conditions for the Project and mitigations and commitments of the proponent. The Crown consultation team sought to discuss with Indigenous groups how any outstanding impacts could reasonably be avoided, reduced, or mitigated.

Where the duty to consult did not exist, or there was insufficient information for the Crown to determine if the duty might exist, NRCan chose to engage with Indigenous groups, on a policy/good governance basis, to understand their concerns with the Project and how they might affect their Indigenous interests.

1.1 Purpose of the Crown Consultation and Accommodation Report

This Crown Consultation and Accommodation Report (CCAR), including the Indigenous group-specific annexes, describes the Crown's consultation and engagement processes with potentially impacted Indigenous groups with respect to the Project. This CCAR was developed based on consideration of all information obtained through the CER Hearing process and supplemental consultations between the Crown and potentially affected Indigenous groups.

This Report includes:

- Section 1: An overview of the Project and relevant legislation
- Section 2: A summary of NGTL's engagement with Indigenous groups and Indigenous involvement in the CER Hearing
- Section 3: An overview of the supplemental Crown consultation process
- Section 4: A summary of Project-related impacts to Indigenous rights and interests
- Section 5: The Crown consultation team's assessment and conclusions
- Section 6: Confidential Indigenous group-specific annexes

The CCAR plays an important role in informing the Governor in Council's (GiC) decision to direct the CER as to whether or not to issue a Certificate of Public Convenience and Necessity (Certificate) authorizing the construction and operation of the Project. The GiC also considers the Indigenous group-specific annexes, as well as independent submissions provided by Indigenous groups.

1.2 Project Description and Application

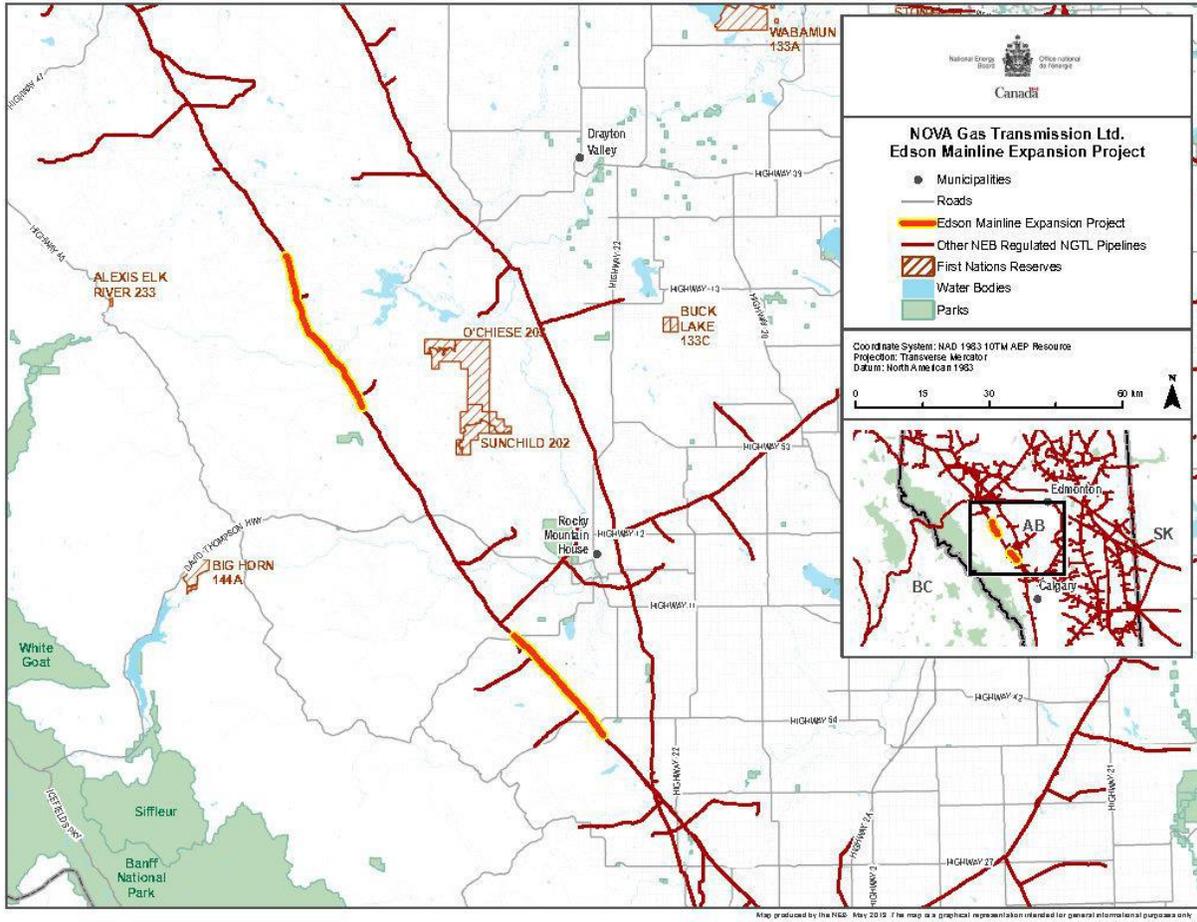
On April 3, 2019, NGTL, a wholly owned subsidiary of TC Energy Corporation (formerly TransCanada Corporation), filed an application with the CER for approval to construct and operate the NGTL Edson Mainline Expansion Project as part of its existing NGTL natural gas delivery system that spans much of Alberta and parts of British Columbia. In its application, NGTL stated that the Project is required to increase pipeline capacity to transport natural gas from the Peace River area to growing markets in central and southern Alberta. The current proposed in-service date for the Project is November 2022.

The Project consists of approximately eighty-five kilometres (km) of new natural gas pipeline in two sections, and related components and facilities. If approved, the Project would “loop” (add new pipeline parallel to and tied-in to the main gas pipeline) parts of the existing NGTL pipeline system in two areas: 1) the Alford Creek Section – approximately forty-five km; and, 2) the Elk River Section – approximately forty km.

Of the eighty-five km of proposed pipeline, NGTL has stated that approximately eighty-six percent (seventy-three km) would run parallel to existing NGTL right-of-way (RoW) or other existing linear disturbances (e.g., pipelines, roads, power lines). Approximately ninety-eight percent of the pipeline would cross provincial Crown lands and the remainder would cross private freehold lands. None of the new pipeline route would cross provincial parks, protected areas or ecological reserves, reserve lands, or federal Crown lands.

Figure 1 shows the location of the proposed NGTL Edson Mainline Expansion Project (next page).

Figure 1: Location of the Proposed NGTL Edson Mainline Expansion Project



1.3 Legislative Framework for the Project Review

NGTL filed the application for this Project before the *Canadian Energy Regulator Act* (CERA) came into force. As such, the Project included an application for a Certificate, filed under Section 52 (s.52) of the now repealed *National Energy Board Act* (NEB Act), and an application under Section 58 (s.58) of the NEB Act for several Project components, along with exemptions.

NGTL's s.52 application was assessed by the Commission of the CER (Commission) who provided a Recommendation Report to the Minister of Natural Resources Canada. Under the NEB Act, Canada has three months from the release of the CER Recommendation Report to make a decision. The GiC may extend the timeline to make a decision should it determine, for example, that more time is needed to ensure the duty to consult is meaningfully fulfilled. The GiC may approve or deny the CER recommendation or refer the recommendation, or any of the conditions, back to the Commission for reconsideration. As confirmed by recent Federal Court of Appeal decisions, the GiC may also add to or modify the conditions recommended by the CER in response to issues raised by Indigenous groups related to s.35 rights and Indigenous interests. Should the GiC approve this Project, the CER would subsequently

issue a Certificate authorizing the Project to be constructed and operated, in accordance with the conditions.

The Project is also a designated project under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). As a result, an environmental assessment (EA) was conducted by the CER, which was designated the responsible authority for conducting EAs on Certificate applications. The CER was also required to adhere to the requirements of the *Species at Risk Act* (SARA) when it considered the Project's implications for species listed under that Act. Finally, the Project was also assessed in accordance with the 2016 *Interim Measures for Major Projects* (the Interim Principles), described further below. The Project, therefore, had to be assessed and approved in accordance with the NEB Act, CEAA 2012, SARA, and the Interim Principles.

On November 19, 2020, the Commission of the CER issued its Report, recommending that the Project be approved having determined that the Project is in the public interest and is not likely to cause significant adverse environmental effects and, any impacts on the rights and interests of Indigenous groups, after mitigation and the Commission's recommended conditions, would not be significant and can be effectively addressed. This recommendation is subject to twenty-four conditions to the Certificate and additional conditions that would attach to the s.58 order, should the Project be approved. The conditions relate to, among other things, construction activities, safety measures and standards, environmental monitoring, and matters related to Indigenous groups.

If the GiC accepts the recommendation of the Commission to approve the Project, it will be regulated over its lifecycle by the CER, under the relevant legislation, regulations, and instruments.

Due to the timing of NGTL's application for the Project (April 2019), the Project was subject to the *Interim Measures for Major Projects*. In January 2016, as part of a longer-term plan to renew the federal environmental assessment process and modernize the NEB, the Government of Canada put in place interim measures.

The five principles and the assessment for this Project are outlined in Table 1.

Table 1 – Assessment of the Edson Mainline Expansion Project against the Principles included in the <i>Interim Measures for Major Projects</i> (2016)
Principle #1: No project proponent will be asked to return to the starting line — project reviews will continue within the current legislative framework and in accordance with Treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards.
<i>As the Project application was filed prior to the coming into force of the Canadian Energy Regulator Act (CER Act) and the Impact Assessment Act on August 28, 2019, the Project was considered under the NEB Act and CEAA 2012.</i>

Principle #2: Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.

The CER conducted a thorough review of the Project and based its decisions on scientific evidence and Indigenous traditional knowledge.

Principle #3: The views of the public and affected communities will be sought and considered.

The CER conducted a public Hearing for the Project. NRCan also hosted a public survey for the Project, which was posted on its website from January 14, 2021 to January 29, 2021, to gather the views of the public. NRCan sent the survey link to all parties of the proceeding and all Indigenous groups on the Crown list. No report was prepared, as only four replies to the survey were received.

Principle #4: Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated.

This CCAR provides an overview of the Crown consultation process for the Project. The Crown consulted with Indigenous groups from November 2020 to April 2021 and grappled with addressing outstanding impacts on s.35 rights and Indigenous interests. The Government also extended the timeline for making a decision on the Project to ensure the duty to consult with Indigenous groups would be meaningfully fulfilled in light of the impacts of the COVID-19 pandemic on Indigenous groups.

Principle #5: Direct and upstream greenhouse gas (GHG) emissions linked to the Project will be assessed.

An upstream GHG assessment was required for this Project.

TC Energy Corporation, (the owner of NGTL) completed an upstream GHG assessment in consideration of the methodology described by Environment and Climate Change Canada (ECCC) in the Canada Gazette on March 19, 2016.

TC Energy Corporation estimated that the annual upstream GHG emissions associated with the Project would range from 0.412 to 0.557 Mt CO₂ equivalent range for the first year of operation in 2022, and in the range of 0.443 to 0.561 Mt CO₂ equivalent by 2047. The variability in the estimates over time can be explained by the projected changes in gas supply over time, consideration for GHG and climate change policies, and differences in methodological approaches.

ECCC reviewed the Upstream GHG Emission Assessment report completed by TC Energy Corporation. The public comment period for both the TC Energy Corporation report and ECCC's report closed on March 26, 2021.

2.0 Indigenous Engagement with NGTL and Indigenous Involvement in the CER Hearing

The proponent's engagement with Indigenous groups is a critical part of the development of a project application and a key matter for consideration in the regulatory process. This is because the proponent is often in the best position to respond to questions and concerns related to its project design and development. Timely, accessible, and inclusive engagement between the proponent and Indigenous groups facilitates the exchange of information and provides opportunities for collaboration and Indigenous input early in the project planning phases. Early engagement with Indigenous groups allows for discussion to identify Indigenous interests and concerns and seeks to avoid or address concerns through project design phases, and by co-developing measures to avoid, reduce, or mitigate the impacts a project may have on s.35 rights and Indigenous interests.

In accordance with the CER Filing Manual, NGTL was required to identify, engage, and consult with potentially impacted Indigenous groups prior to filing an application for the Project. NGTL was also required to provide information on these activities, and provide a description of any issues or concerns raised by Indigenous groups as part of its application. In the CER Recommendation Report, the Commission provided its view that NGTL had designed and implemented appropriate engagement activities that met the requirements and expectations set out in the CER Filing Manual. The Commission's understanding and views on the various steps taken by NGTL to engage potentially impacted Indigenous groups on the Project is outlined in Section 7.1, pages 63-68 and Section 7.6.1, pages 167-169 of the CER Recommendation Report.

2.1 NGTL's Engagement with Indigenous Groups

NGTL stated that engagement with Indigenous groups on the Project began on July 4, 2018, and will continue throughout the Project lifecycle, should the Project be approved. NGTL's Aboriginal Engagement Program (AEP) for the Project was carried out according to a four-step process, which includes:

- identifying potentially affected Indigenous communities;
- establishing the engagement approach;
- implementing engagement program activities; and,
- responding to questions and concerns.

2.2 Indigenous Involvement in the CER Hearing Process

The CER is the independent regulator whose mandate includes making decisions and recommendations on energy transportation projects that fall under federal jurisdiction. The CER possesses the necessary technical and subject-matter expertise to assess proposed projects as well as the necessary authorities to regulate approved projects. The application for the Project was assessed by the CER, and if approved, the Project would be regulated by the CER over its lifecycle.

The CER identified a total of thirty Indigenous groups as being potentially affected or having an interest in the Project and invited these groups to participate in the Hearing process. Twenty Indigenous groups that applied to be Intervenor were granted Intervenor status in the Hearing. Eighteen Indigenous groups applied for and were offered participant funding from the CER to support their participation in the CER

Hearing process for the Project, as noted in the table below. Intervening in a CER Hearing is the most active way to participate. Intervenors are able to file evidence, share oral indigenous knowledge, ask questions of and respond to questions from the proponent, the CER, and other Intervenors, and file or present final argument.

Table 2. CER Participant Funding Amounts Available to Indigenous groups	
Applicant	Amount Available
Alexis Nakota Sioux Nation	\$80,000
Bearspaw First Nation (Stoney Nakoda Nations)	\$80,000
Chiniki First Nation (Stoney Nakoda Nations)	\$80,000
Driftpile Cree Nation	\$80,000
Ermineskin Cree Nation	\$80,000
Gift Lake Metis Settlement	\$80,000
Blood Tribe	\$80,000
Apetokosan (Kelly Lake Metis Settlement Society)	\$80,000
Louis Bull Tribe	\$80,000
Michel First Nation	\$80,000
O'Chiese First Nation	\$80,000
Papaschase Nation	\$80,000
Peavine Metis Settlement	\$80,000
Piikani Nation	\$80,000
Samson Cree Nation	\$80,000
Wesley First Nation (Stoney Nakoda Nations)	\$80,000
Whitefish (Goodfish) Lake First Nation #128	\$80,000
Whitefish Lake First Nation #459	\$80,000
Total	\$1,440,000

Through the CER Hearing process, potentially impacted Indigenous groups were provided with opportunities to:

- learn about the Project and its potential impacts;
- assess the Project in relation to their asserted or established rights and Indigenous interests;
- communicate their concerns directly to the CER and indirectly to the Crown; and,
- propose potential mitigation and accommodation measures.

On June 9, 2020, the CER released potential conditions which might apply to the Certificate, should the Project be approved, for comment by participants in the Hearing process. Eight Indigenous groups expressed concerns or proposed amendments to some of the potential conditions. The Commission subsequently modified nine potential conditions and recommended two additional conditions as part of its Recommendation Report.

The CER issued its Recommendation Report on the Project on November 19, 2020, and this marked the start of the supplemental Crown consultation process. As noted in the CER Report (pages 3-4), the Commission was of the view that any potential Project impacts on the rights and interests of affected

Indigenous groups would not likely be significant and could be effectively addressed with the implementation of the mitigation measures and commitments made by NGTL, and the conditions recommended by the Commission.

3.0 Supplemental Crown Consultation Process

The Government of Canada has a duty to consult and accommodate, as appropriate, Indigenous groups where the Crown contemplates conduct that might adversely affect asserted or established Aboriginal or Treaty rights recognized under s.35 of the *Constitution Act, 1982*.

It is important to note that consultations and the consultation process are not rights recognition or rights-determining processes.

Where the Government of Canada assessed that there was no duty to consult, or where there was insufficient information provided to the Crown to determine if a duty was triggered, NRCan sought to engage affected Indigenous groups on a policy basis where they had expressed concerns or interests in the Project.

3.1 Development of the Crown List

To identify Indigenous groups that may have s.35 rights or Indigenous interests that could be impacted by the Project, the Crown consultation team used information obtained directly from Indigenous groups, CER, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), and the proponent. The Crown consultation team then considered the following criteria:

- **if and when an Indigenous group asked to be included** in Crown consultations on the Project;
- **boundaries of traditional territories** and intersections between traditional territories and the Project RoW;
- **information from other government departments** regarding recent interactions with the Indigenous groups or previous commitments to consult on behalf of the Crown;
- **affiliations between groups**, including historic linkages between groups, and the extent to which affiliations between groups with different proximities to the RoW could impact the s.35 rights and Indigenous interests of more distant groups;
- **involvement in the CER process** and concern raised regarding the impact of the Project;
- **engagement with the proponent** to better understand Indigenous group concerns, asserted rights, and Indigenous interests in the Project; and,
- **asserted or established authority of** an Indigenous group to speak on behalf of s.35 rights-holders.

The Crown consultation team also conducted a preliminary impact analysis to better understand the extent to which the Project could impact each group. The preliminary impact analysis considered the potential magnitude of Project-related impacts to s.35 rights and Indigenous interests.

Initially, the Crown consultation team determined it had a duty to consult with twenty Indigenous groups. In February and March 2021, the Crown consultation team received additional information from other Indigenous groups that warranted their inclusion on the Crown list. In addition, the Métis Nation of Alberta, Regions 3 and 4 requested to be consulted separately.

The Crown consultation team determined that it had a duty to consult with the following twenty-seven Indigenous groups:

- Alexander First Nation
- Alexis Nakota Sioux Nation
- Bearspaw First Nation (Stoney Nakoda Nations)
- Blood Tribe
- Chiniki First Nation (Stoney Nakoda Nations)
- Driftpile Cree Nation
- Enoch Cree Nation #440
- Ermineskin Cree Nation
- Gift Lake Metis Settlement
- Horse Lake First Nation
- Lac Ste. Anne Métis (Gunn Métis Local #55)
- Louis Bull Tribe
- Métis Nation of Alberta (Region 3)
- Métis Nation of Alberta (Region 4)
- Montana First Nation
- Mountain Métis Nation Association
- O'Chiese First Nation
- Paul First Nation
- Peavine Metis Settlement
- Piikani Nation
- Saddle Lake Cree Nation
- Samson Cree Nation
- Siksika Nation
- Sunchild First Nation
- Tsuut'ina Nation
- Wesley First Nation (Stoney Nakoda Nations)
- Whitefish (Goodfish) First Nation #128

Based on information provided by the groups, NRCan was of the view that it had no legal duty to consult with five other Indigenous groups with respect to the Project. However, NRCan remained open to engage with these Indigenous groups and hear about how the proposed Project might affect their Indigenous interests and what, if any, steps might be taken to address those Project-related concerns¹. NRCan's engagement with an Indigenous group on a proposed project is not a rights recognition or a rights determining process. The following five Indigenous groups were engaged on a policy basis:

- Kelly Lake Cree Nation
- Kelly Lake First Nation
- Michel First Nation
- Mountain Cree (Smallboy) Camp
- Nakcowinewak Nation of Canada

¹ Natural Resources Canada sought to engage with Papaschase First Nation on a policy-basis to understand whether this group had any Project-related concerns. Natural Resources Canada did not receive a response. As a result, Papaschase First Nation was not added to the Crown list for the proposed Project.

3.2 Participant Funding

NRCan’s Participant Funding Program is designed to help facilitate the meaningful participation of Indigenous groups in consultation and engagement activities with the federal Crown. NRCan’s participant funding is in addition to and separate from the CER’s participant funding. NRCan’s Participant Funding Program for this Project aimed to be responsive to the needs of Indigenous participants through measures such as:

- ninety percent was available up-front to reduce the administrative burden on Indigenous groups allowing them to maximize participation and input into the process;
- eligible expenses incurred by Indigenous groups from November 10, 2020 could be covered under the program, irrespective of the date of application for participant funding; and,
- the Crown remained open to increase funding offers, on request, to support consultation activities.

The preliminary impacts analysis and the Crown’s preliminary understanding of rights and potential impacts to rights informed the funding amount offered to each Indigenous group.

NRCan offered approximately \$918,000 in participant funding to Indigenous groups. The final NRCan participant funding offers were either \$27,000 or \$36,000 per Indigenous group. NRCan also provided participant funding to the five Indigenous groups engaged on a policy basis.

Indigenous group	Amount Offered
Alexander First Nation	\$36,000
Alexis Nakota Sioux Nation	\$36,000
Bearspaw First Nation (Stoney Nakoda Nations)	\$27,000
Blood Tribe	\$27,000
Chiniki First Nation (Stoney Nakoda Nations)	\$27,000
Driftpile Cree Nation	\$27,000
Enoch Cree Nation #440	\$27,000
Ermineskin Cree Nation	\$36,000
Gift Lake Metis Settlement	\$27,000
Horse Lake First Nation	\$27,000
Kelly Lake Cree Nation	\$27,000
Kelly Lake First Nation	\$27,000
Lac Ste. Anne Métis (Gunn Métis Local #55)	\$27,000
Louis Bull Tribe	\$27,000
Métis Nation of Alberta (Region 3)	\$27,000
Métis Nation of Alberta (Region 4)	\$27,000
Michel First Nation	\$27,000
Montana First Nation	\$27,000
Mountain Cree (Smallboy) Camp	\$27,000

Mountain Métis Nation Association	\$27,000
Nakcowinewak Nation of Canada	\$27,000
O'Chiese First Nation	\$36,000
Paul First Nation	\$27,000
Peavine Metis Settlement	\$27,000
Piikani Nation	\$27,000
Saddle Lake Cree Nation	\$27,000
Samson Cree Nation	\$36,000
Siksika Nation	\$27,000
Sunchild First Nation	\$36,000
Tsuut'ina Nation	\$27,000
Wesley First Nation (Stoney Nakoda Nations)	\$27,000
Whitefish (Goodfish) Lake First Nation #128	\$27,000
Total	\$918,000

3.3 Approach to Supplemental Crown Consultation

The Crown consultation team undertook its consultation efforts with Indigenous groups with a number of objectives, including:

- supporting the Government's commitment to reconciliation and renewed relationships with Indigenous peoples; and,
- fostering informed and sound decision-making for the Project.

While developing the consultation objectives and approach for the Project, the Crown consultation team considered the views of Indigenous groups, in addition to recent jurisprudence, such as guidance from the 2018 Federal Court of Appeal's *Tsleil Waututh Nation* (TWN) decision addressing ways in which to carry out meaningful and responsive two-way dialogue. The Crown consultation team remained flexible in its approach to consultations by tailoring the process, to the extent possible, to be responsive to each Indigenous group.

The Crown relied on the CER Hearing process for the Project to inform the Crown consultation process and fulfill the Crown's duty to consult, to the extent possible. The Crown confirmed its reliance on the CER Hearing process and its approach to supplemental Crown consultations in letters to potentially impacted Indigenous groups sent in June 2019 and November 2020. The approach to supplemental Crown consultation was also posted on CER Hearing record for the Project on July 23, 2020. The approach noted the Crown would:

1. consult in a way that is fully consistent with meeting Canada's obligations under s.35 of the *Constitution Act, 1982* and the Government's commitments to advance reconciliation with Indigenous peoples;

2. engage in substantive, meaningful two-way dialogue in order to fully understand concerns raised and the nature and seriousness of potential impacts on rights and to work collaboratively to identify and provide accommodations, where appropriate; and,
3. be flexible in tailoring consultation approaches, to the extent possible, in a way that is responsive to the potential impacts and capacities of each group, and to the known concerns with the Project. This includes following any signed consultation protocol agreements with Indigenous peoples, to the extent possible.

The supplemental Crown consultation process was designed to allow the Crown and potentially impacted Indigenous groups to participate in substantive, meaningful two-way dialogue in order to understand potential outstanding impacts to s.35 rights and Indigenous interests and to discuss broader Indigenous interests, as appropriate. NRCan's Crown consultation team facilitated a whole-of-government approach to consultation, working with other relevant federal authorities to leverage federal expertise and connect Indigenous groups with any relevant programs across the Government of Canada.

Throughout supplemental consultations, the Crown consultation team worked collaboratively with Indigenous groups to build on the findings of the CER Recommendation Report and better understand the outstanding potential impacts of the proposed Project on s.35 rights and Indigenous interests. The Crown consultation team worked collaboratively with Indigenous groups to discuss the sufficiency of existing mitigation measures and commitments and to identify and provide specific measures to address outstanding impacts to s.35 rights and Indigenous interests, where appropriate.

Specific discussion points with Indigenous groups varied, however, special attention was given to working with groups to increase understanding of the CER Report and the recommended conditions. The Crown consultation team strived to:

- engage in a meaningful, two-way dialogue to seek to develop a deep understanding of the priorities of an Indigenous group, the potential impacts to s.35 rights posed by the Project, and an Indigenous group's potential interest in the Project;
- understand the nature and exercise of rights and interests exercised by affected Indigenous groups in the Project area;
- discuss the CER Report and identify any potential outstanding impacts and concerns not addressed by existing proponent mitigations, commitments or recommended regulatory conditions;
- consult in a manner that was responsive to the Indigenous group's individual needs; and,
- discuss and consider measures to avoid or mitigate any outstanding potential adverse impacts, as appropriate.

The Crown consultation team and Indigenous groups worked collaboratively to discuss proposed or potential mitigation measures and the proposed new condition that could address outstanding impacts

to rights. Where impacts could not be mitigated, the Crown consultation team sought to provide an explanation as to why that was the case.

3.4 Revised Timelines and Approach to Supplemental Crown Consultation due to COVID-19

In a letter to Indigenous groups dated November 12, 2020, the Crown consultation team informed Indigenous groups that, in light of COVID-19, and to ensure the health and safety of Indigenous groups and the Crown consultation team, supplemental consultations could not be conducted in person and would be conducted virtually using teleconferences and videoconferences. The Crown consultation team also asked Indigenous groups to let them know if technological limitations could prohibit this approach. This modified approach allowed Indigenous groups and the Crown consultation team to proceed with the consultation process, while following key public health advice to limit the spread of COVID-19. The Crown consultation team remained flexible to tailor virtual consultations to the extent possible.

The Crown consultation team actively reached out to Indigenous groups regarding their availability to consult, however, many groups indicated the need to prioritize their response to COVID-19 and the health of their members. Due to the challenges associated with COVID-19, several Indigenous groups formally requested an extension to consultation timelines to ensure meaningful consultations.

In a letter to Indigenous groups dated February 10, 2021, the *Minister of Natural Resources Canada*, the Honourable Seamus O'Regan Jr., advised that the GiC's decision timeline on the Project had been extended from February 19, 2021 to no later than June 19, 2021, to ensure that the duty to consult with Indigenous groups could be meaningfully fulfilled in light of the impacts of the COVID-19 pandemic on Indigenous communities.

Issues Tracking Table

To facilitate consultation, the Crown consultation team developed an Issues Tracking Table for each Indigenous group that included specific issues raised during supplemental consultations. The Issues Tracking Tables helped the Crown consultation team and Indigenous groups ensure that impacts and proposed resolutions were captured appropriately, in a timely manner, and that a clear response was provided. This tool set out information about the concern raised by the Indigenous group, and highlighted the mitigation measures and commitments proposed by NGTL, and the findings of the Commission, including the recommended conditions that could potentially address the issue. The Tables also indicated whether or not the concern had been addressed to the satisfaction of the Indigenous group. The Issues Tracking Tables were an iterative tool that were shared with Indigenous groups on an ongoing basis throughout the consultation process in order to ensure that the information was accurate, dialogue was meaningful, and, to seek further views regarding whether any potential outstanding Project impacts were left unaddressed, and, if so, to help Indigenous groups and the Crown consultation team collaboratively grapple with and address outstanding potential impacts, as appropriate.

Information Session

In response to concerns raised about the volume, complexity, and technical nature of the CER Recommendation Reports for other projects, the Crown consultation team organized a virtual information session for Indigenous groups with the CER on December 9, 2020. Twenty Indigenous groups participated, and representatives of the CER, NRCan, ECCC, and NGTL also attended the session. It served as an opportunity to learn more about the CER Recommendation Report and the CER's role as a lifecycle regulator, and for Indigenous groups to ask questions about the Project to the CER and NGTL.

Provision of Draft Annexes and Documents

The Crown consultation team developed a draft annex for each Indigenous group to facilitate meaningful two-way dialogue on each Indigenous group's concerns raised during supplemental consultation. These draft annexes included a summary of the following:

- the outstanding impacts raised by the Indigenous group's during supplemental consultations;
- the Indigenous group's proposed mitigations to the potential impact;
- NGTL's mitigation measures and commitments that could address the concern;
- the CER Recommendation Report findings and recommended conditions that could further address the concern; and,
- the Crown consultation team's analysis and response to potential outstanding impacts and any measures proposed by Indigenous groups to address those concerns.

At the end of March 2021, NRCan wrote to Indigenous groups to provide them with draft annexes in order to foster a transparent and meaningful dialogue and to ensure groups had sufficient time to review and provide comments on the preliminary responses to outstanding impacts to s.35 rights and/or Indigenous interests, as appropriate. Indigenous groups were also provided with a potential draft new condition intended to address concerns heard from Indigenous groups about their abilities to be involved in the post-Certificate regulatory process for the Project. The Crown consultation team informed Indigenous groups that supplemental consultations for the Project would close on April 20, 2021. Following the sharing of preliminary annexes with Indigenous groups, the Crown consultation team worked directly with Indigenous groups to respond to any potential outstanding impacts and to ensure the information the draft annex contained accurately represented the views and perspectives of the Indigenous group.

Independent Submissions by Indigenous Groups

In addition to the opportunities to submit information through the CER Hearing process or directly to the Crown consultation team, Indigenous groups were informed in March, 2021 that they had an opportunity to provide an independent submission for Ministers. An independent submission could outline an Indigenous group's independent views on any outstanding impacts, concerns, or other views in respect of the Project, the proponent, or the Crown consultation approach. The Crown consultation team received independent submissions from eleven Indigenous groups.

3.5 Natural Resources Canada Engagement with the Proponent

As Crown consultation coordinator for the Project, NRCan is responsible for undertaking and facilitating the Crown consultation process to ensure that any duty to consult and accommodate owed to Indigenous groups on the Project is met.

In support of this role, the Crown consultation team established frequent and consistent communications with NGTL. The purpose of these communications was to facilitate the sharing of information and encourage the resolution of outstanding issues and concerns that the Crown consultation team heard from Indigenous groups that could be suitably addressed by the proponent. The Crown consultation team sought authorization from Indigenous groups to disclose information, as appropriate, when bringing forward a specific outstanding issue or concern to NGTL. Through these discussions, the Crown consultation team also facilitated the proponent's direct involvement in Crown consultation meetings when requested by certain Indigenous groups.

4.0 Project-Related s.35 Rights and Indigenous Interests

On November 19, 2020, the Commission of the CER released its Recommendation Report for the Project which found that the Project is in the public interest and recommended that the Project be approved and that a Certificate be issued under s.52 of the NEB Act. Since the Project was designated under CEAA 2012, the CER was also required to conduct an EA and prepare an Environmental Assessment report which assessed the environmental and socio-economic effects of Project. The EA also considered species at risk and their critical habitat as per the requirement outlined in section 79 of SARA.

As part of its assessment of the Project, the Commission evaluated the sufficiency of NGTL's engagement with Indigenous peoples and found it to have been adequate. The Commission encouraged NGTL to continue to improve its early engagement efforts with a view to building on the knowledge of Indigenous peoples regarding stewardship of the land. The Commission was also of the view that early engagement efforts aimed at project planning can better facilitate the identification of opportunities for involvement of Indigenous peoples.

The Commission considered the views and concerns of Indigenous peoples participating in the Hearing process, the potential impacts on the rights and interests of Indigenous peoples, and proposed measures to avoid or mitigate those impacts. The Indigenous engagement logs that were filed by NGTL as part of the application and updated in a filing on the CER Hearing record summarized the engagement that NGTL undertook with Indigenous groups including those who did not participate in the CER Hearing process and outlined what NGTL heard regarding their views and concerns.

In its Recommendation Report, the Commission provided an *Obiter Dictum*². The Commission noted the value of co-developed, collaborative processes and arrangements involving NGTL, Indigenous groups, relevant government departments, and the CER to allow for involvement of Indigenous groups throughout the lifecycle of projects.

The Commission was of the view that any potential Project impacts on s.35 Indigenous and Treaty rights, after mitigation, would not likely be significant and could be successfully addressed by Project conditions and proponent commitments.

The Commission recommended twenty-four legally-binding conditions that would attach to the s.52 Certificate for the Project, should the Project be approved, relating to Project construction, Indigenous engagement, and environmental, economic, and safety matters.

Summary of Project-Related Impacts to Indigenous Rights and Interests

This section summarizes the potential outstanding Project-related impacts to s.35 rights and Indigenous interests raised by Indigenous groups through supplemental Crown consultation. The Crown consultation team's understanding of the potential outstanding Project impacts was developed based on supplemental

² *Obiter Dictum* = a judicial opinion which is not necessary for the decision.

consultations with Indigenous groups on the Project. It does not reiterate information regarding key concerns and potential impacts raised by Indigenous groups through the CER Hearing process and as detailed in the CER Recommendation Report. The majority of the impacts identified are based on potential Project impacts to s.35 rights, while others relate to broader Indigenous interests.

The Commission of the CER recommended two over-arching, legally-binding conditions. Should the Project be approved by GiC, NGTL would be required to adhere to conditions associated with the Certificate throughout the lifecycle of the Project. Through **Condition 2**, NGTL would be required to design, locate, construct, and operate the Project in accordance with, among other things, any commitments made through the regulatory process. These commitments would be set out in a Commitments Tracking Table, to be filed with the Commission pursuant to **Condition 13 – Commitments Tracking Table**.

Note that Conditions 2 and 13 apply to each issue of outstanding concern raised by Indigenous groups referred to below.

The issues of outstanding concern raised by Indigenous groups are the following:

Potential Impacts to s.35 Rights

4.1 Access and Availability of Lands

During supplemental consultations, Indigenous groups raised concerns regarding the potential for the Project to impact their access to lands for traditional use. These rights and interests can pertain to cultural and traditional purposes, including hunting and trapping, fishing, gathering and harvesting, use of trails and travel ways, and ceremonial practices. Indigenous groups also expressed concern that, if the Project were to proceed, less land would be available for traditional land use.

The Crown consultation team notes the Commission found that the route selection criteria used by NGTL would minimize potential adverse effects to the environment, landowners, and land users. The Commission also found that the Project would result in minimal new permanent footprint on Crown land and that the remainder of the Crown land would be available for exercising Indigenous and Treaty rights, including Traditional Land and Resource Use, (TLRU) activities, apart from a short period of time during active construction, and that the Commission concluded that a Crown Lands Offset Measures Plan would not be appropriate to be included as a condition for the Project.

The Crown consultation team notes that NGTL stated that it had designed the Project to reasonably avoid or minimize impacts on traditional land use. NGTL stated that the Project is largely routed adjacent to an existing RoW to minimize incremental effects of the Project. NGTL stated that the Project had been designed, and would be constructed and operated, following applicable standards, industry best management practices and Project-specific mitigation identified in the Environmental and Socio-Economic Assessment (ESA) and the Environmental Protection Plan (EPP). The purpose of the EPP is to describe the environmental mitigation measures and commitments to be carried out by NGTL, its contractors and subcontractors during construction and post-construction phases of the Project to avoid or reduce potential Project-related effects.

The Crown consultation team notes that NGTL's EPP includes mitigation measures that aim to maintain equivalent land capability and ensure that lands can support various uses similar to those that existed before construction. NGTL stated that, of the 375 ha of the Project footprint, only approximately 1 ha would be new fenced valve sites and unavailable for traditional use during operations (post-construction).

The Crown consultation team also notes that NGTL committed to ensuring the RoW would remain available for traditional use during construction and operation of the Project, with the exception of localized areas during construction for reasons of safety for workers and land users. NGTL committed to provide Indigenous groups with the proposed construction schedule and maps prior to the start of construction.

The Crown consultation team also notes that NGTL stated that following construction it would implement its Access Management Plan, where applicable, to deter an increase in motorized public access along new pipeline RoW, on new temporary construction access, and into existing linear disturbances that intersect the Project RoW.

The Crown consultation team also notes that NGTL committed to implementing its Traffic Control Management Plan which includes measures to reduce unauthorized motorized access and to ensure Project personnel do not hunt or fish on the construction footprint. NGTL also committed to continuing to evaluate and assess additional traditional knowledge information as it is made available and to continue to document and address, where feasible, traditional knowledge information and related concerns identified by Indigenous groups through its Aboriginal Engagement Program (AEP).

The Crown consultation team also notes a number of recommended conditions that could address the concerns of Indigenous groups regarding potential impacts of the Project on the access to and availability of lands.

- **Conditions 6 and 22**, regarding Construction and Post-Construction Monitoring Plans for Indigenous Peoples, would require NGTL to file plans describing participation by Indigenous groups in monitoring activities both during and post-construction.
- **Condition 7** would require NGTL to report on any outstanding TLRU investigations for the Project, including a description of how NGTL has revised its EPP and its lifecycle oversight as a result of the investigations.
- **Condition 12** would require NGTL to file confirmation that all heritage resource clearances have been obtained from the relevant provincial ministry prior to commencing construction, including a description of how NGTL will address any conditions/recommendations in these clearances and make any relevant updates to its EPP.
- **Condition 14** would require NGTL to provide a copy of the construction schedule to all Indigenous groups who have expressed an interest in receiving a copy.

The Crown consultation team acknowledges the concerns raised by Indigenous groups regarding the potential effects on the access to and availability of lands in the Project area as outlined above.

Crown consultation team conclusion:

The Crown is of the view that, given the role of the CER as a regulator throughout the lifecycle of the Project and the powers of the CER through compliance verification activities and enforcement actions, the mitigations proposed and commitments made by NGTL, the existing CER conditions, and the new condition are capable of addressing the potential impacts to the s.35 rights and Indigenous interests related to access to and availability of lands resources. The Crown's response to group-specific concerns and proposals raised by Indigenous groups in relation to access to and availability of lands are included in Indigenous group-specific CCAR annexes.

4.2 Project-Related Effects on TLRU Sites

During supplemental consultations, Indigenous groups raised concerns regarding the potential impact of the Project on their TLRU sites. These sites can include: burial sites; trails and travel ways; camps, cabins and cabin remains; historic sites; oral history sites and teaching areas; ceremonial (including sweat lodge and sun dance sites); plant, and mineral gathering sites; buffalo and elk pounds; and, cultural landscapes. Indigenous groups noted the importance of these sites in the context of exercising their Aboriginal and Treaty rights and protecting their traditional culture and way of life.

The Crown consultation team notes that NGTL stated it had developed site-specific mitigation measures, outlined in its EPP, that would be implemented prior to construction that seek to avoid or reduce effects on identified TLRU sites. As well, in the event that previously unidentified TLRU sites are identified by Indigenous groups, NGTL would implement its Cultural Resource Discovery Contingency Plan to engage the affected Indigenous groups regarding the development of site-specific mitigation measures. NGTL also stated that as additional information is received from Indigenous groups through NGTL's ongoing AEP on TLRU sites, it would review it to determine if additional or site-specific mitigation measures may be required, including micro-routing (detailed examination of the route to determine the appropriate path).

The Crown consultation team also notes that NGTL stated that following construction it would implement its Access Management Plan, where applicable, to deter an increase in motorized public access along new pipeline RoW, on new temporary construction access, and into existing linear disturbances that intersect the Project RoW.

The Crown consultation team notes that all personnel working on the Project must complete NGTL's construction orientation program which includes a cultural awareness component and that knowledge and input provided by Indigenous groups had been incorporated into the Project materials.

The Crown consultation team notes that NGTL committed to continuing to review and consider new information as it is made available and to continuing to engage with Indigenous groups throughout all phases of the Project through regional liaisons and TC Energy's Public Awareness Program.

The Crown consultation team notes the Commission's understanding that there were no unresolved TLRU concerns from Indigenous groups that would require new mitigation measures, and that NGTL's established non-site specific mitigation measures in the EPP would avoid or address potential effects on TLRU sites. The Crown consultation also notes the Commission was of the view that NGTL has committed to sufficient and appropriate mitigation measures and best practices to mitigate the potential adverse

