

Trans Mountain Pipeline Expansion Project Re-initiation of Phase III Crown Consultations

Consultation Approach with Indigenous Groups

Overview

The Crown is committed to working together with Indigenous groups to develop and implement a responsive and flexible Phase III consultation and accommodation process that is fully consistent with meeting Canada's obligations under the s. 35 of the *Constitution Act, 1982*, and the Crown's commitments to advance reconciliation with Indigenous peoples, including its pledge to implement the United Nations Declaration on the Rights of Indigenous Peoples. The Crown recognizes that meaningful engagement and consultation with Indigenous peoples aims to secure their free, prior and informed consent in matters that affect them and their rights. This is what the overall consultation process for this Project seeks to achieve, including the renewed Phase III consultations.

The Crown is following the guidance from the Federal Court of Appeal (FCA) and will move forward by engaging in meaningful, specific and focused dialogue with potentially impacted Indigenous groups on the Trans Mountain Expansion Project (TMX or "the project").

This document is an overview of the objectives and approach of the Crown as it re-initiates Phase III Crown consultations with Indigenous groups in relation to the project.

The Crown Phase III consultation and accommodation process is working with Indigenous groups in a manner that aligns with the Government's commitment to strengthen and renew its relationships with Indigenous peoples, while respecting and upholding the rights of Indigenous peoples in Canada.

What are our objectives for the new Crown Consultation process?

In response to the FCA decision, and based on guidance from the Court, in the re-initiated Phase III consultation, the Crown is consulting with potentially impacted Indigenous groups, guided by three key objectives:

1. Consult in a way that is fully consistent with meeting Canada's obligations under the 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 consultations in a way that is responsive to the potential impacts and capacities of each group, and to the known concerns with the project from the previous Phase III consultations.

What will be different this time?

This consultation and accommodation process is not about starting over. The Crown is building on existing relationships, the information submitted by Indigenous communities, and the existing consultation record, while making improvements to ensure the consultation is done right this time. This includes re-building trust in communities where trust has been lost.

- **Process will be informed by experts to ensure the Crown is fulfilling its duty to consult**
 - ✓ The Honourable Frank Iacobucci, former Supreme Court of Canada Justice, has been appointed as a Federal Representative to provide oversight and direction to the Government on how to conduct meaningful Phase III consultations and accommodations and ensure that this process proceeds as the Court prescribed.
 - ✓ Canada also appointed Serge Dupont, a former deputy clerk of the Privy Council Office, as Senior Executive Advisor to the Prime Minister to support the Privy Council Office on policy coordination and oversight of the response to ensure coherence between officials across the Government of Canada.
- **Iterative process based on meaningful two-way dialogue**
 - ✓ Process is based on two-way dialogue between Indigenous groups and the Crown via the Consultation Leads and other government officials. Input is received by the Consultation Leads and government officials from Indigenous groups throughout consultations with updates and responsive feedback from Cabinet and the Minister of Natural Resources on proposed accommodations provided to Indigenous groups by the Consultation Leads.
 - ✓ The Crown will make accommodations where appropriate; otherwise, it will provide a reasonable rationale to Indigenous groups.
- **Timely and accessible support for participation**
 - ✓ Participant funding is being provided up-front to reduce administrative burden and to allow communities to maximize participation and input into the process.
- **Higher-bar for transparency**
 - ✓ There is a greater commitment to public reporting, timely communication, and transparency, all while respecting confidentiality of conversations and negotiations.
- **Clear accommodation mandate**
 - ✓ Those engaged directly in carrying out the consultation have a mandate to conduct meaningful consultations, through two-way dialogue, and to discuss and agree to appropriate accommodations, with Indigenous groups.
 - ✓ Federal government departments are working with Indigenous groups to find solutions.

- **Reviewing the effects of project related marine shipping**

- ✓ The Government has asked the National Energy Board to go back and reconsider its recommendation to take into account the environmental effects of increase marine shipping from the proposed Project.

- **Role of the Crown Corporation**

- ✓ As a new Crown Corporation, Trans Mountain Canada is integrated into the consultation process and participate in meetings with Indigenous groups where appropriate.

- **Cultural component to launch consultations**

- ✓ Each team member is going through training by an Indigenous trainer on understanding how to work effectively with Indigenous groups.
- ✓ Culturally appropriate Indigenous protocols are being followed before the launch of any consultations with Indigenous groups.

A recommendation on whether to approve the project will only be considered by the Governor-in-Council once it is satisfied that the Crown has adequately fulfilled its duty to consult and that:

- ✓ Consultations with potentially impacted groups are being offered and/or carried out in a meaningful and responsive manner; and
- ✓ Accommodations have been considered, where appropriate, and responses are being provided to Indigenous groups.

What are the key elements of the re-initiated Phase III consultations?

Please see **ANNEX A for Roles and Responsibilities** and **Annex B for the Initial Accommodation Mandate**.

Contact Information

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ANNEX A

Roles and Responsibilities

Marine Reassessment

National Energy Board (NEB)

The NEB, following the direction provided by Governor in Council, is reconsidering the marine shipping impacts of the Project and recommendations, terms and conditions set out in its May 19, 2016 Report. Specifically, the NEB is taking into consideration the environmental effects of project – related marine shipping under *CEAA 2012* and the effects of marine shipping on species-at-risk, including the Southern Resident Killer Whale. The NEB is facilitating Indigenous participation in the reconsideration process and offer participant funding to Indigenous groups to enable consultation on the marine reassessment.

Marine Advisor

To ensure the NEB Panel reconsidering marine shipping has access to technical expertise as it assesses the effects of marine shipping, the Governor in Council appointed John A. Clarkson to be a marine technical advisor to the National Energy Board, on the basis of his expertise with operations matters in respect of marine traffic, Transport Canada marine regulations, and marine pilotage on the West Coast of Canada. appointed. The Argument-in-Chief of Mr. Clarkson was submitted to the National Energy Board on January 15, 2018.

Government Departments

Federal departments are active participants providing evidence and expertise in the NEB reconsideration process. As experts on topics under their respective mandates, departments are contributing specialists or expert information or knowledge by participating in the NEB's reconsideration process.

Consultation for Phase III

Minister of Natural Resources - Crown Consultation Coordinator

Minister Sohi is responsible for planning and implementing in a timely manner, the Crown consultation and accommodation process, in light of his statutory responsibilities to advise the Government on whether to approve the project. He is also responsible for ensuring that the Crown consultation and accommodation process fulfills the Crown's constitutional duty.

Cabinet

The Minister of Natural Resources updates the Cabinet Committee on Environment and Clean Growth on progress on the consultation process to ensure the teams have the necessary mandates to engage in meaningful two-way dialogue, and consider and respond to proposed accommodation measures. Regular check-in points at the Cabinet Committee on Environment and Clean Growth seek direction on proposed accommodations that will be developed by the Crown Consultation team with Indigenous groups.

Governor in Council

The Governor in Council is the Governor General, acting on the advice of the Prime Minister and the Cabinet. The Governor in Council represents the Crown in Canada and exercises the powers of government that are reserved for the Crown by the Constitution.

Minister of Finance

Minister Morneau is responsible for ensuring the proper oversight of the Trans Mountain Corporation as a subsidiary of the Canada Development Investment Corporation, a Crown Corporation that reports to Parliament through the Minister of Finance.

Federal Representative

The Government has appointed former Supreme Court of Canada Justice the Honourable Frank Iacobucci as a Federal Representative to oversee and provide direction on the consultation and accommodation process. He is providing independent advice and guidance to the Government regarding the consultation

and accommodation process and ensure this process proceeds as the Court prescribed. He works directly with the Minister, officials and other external experts.

Whole of Government Secretariat

The Crown Consultation Secretariat, including Consultation Leads and Team Officials, made up of representatives from across federal government departments, has been given a clear mandate to carry out the consultation plan, including correspondence and face-to-face meetings with representatives of Indigenous groups, using a tailored approach. Discussions will be meaningful, substantive and focused on responding to the concerns of each of the impacted Indigenous groups.

Consultation leads and team officials have the mandate to engage in meaningful two-way dialogue and discuss the concerns of Indigenous groups and agree to accommodation measures (following Cabinet approval where required) to address those concerns. This is an ongoing back-and-forth conversation between representatives of the Indigenous group and the Crown, to ensure multiple attempts to find appropriate solutions have been undertaken. The Secretariat facilitates Indigenous participation in the consultation and accommodation process and offer participant funding to Indigenous groups.

Trans Mountain Corporation (TMC)

As the proponent of the project and an operator of an existing pipeline, TMC remains subject to all applicable federal laws and regulatory requirements. TMC representatives are part of the consultation and accommodation process and participate in meetings with representatives of Indigenous groups where appropriate, although the ultimate responsibility for ensuring that the duty is adequately fulfilled remains with the Crown.

TMC officials have potential accommodations to consider, and may enter into various commercial contractual benefit arrangements that would take the form of relationship agreements, mutual benefit agreements (where considered appropriate), and other similar contracts. These commercial arrangements ultimately fall under the supervision of the TMC Board in a manner consistent with the Minister of Finance's instructions on expectations to the Canada Development Investment Corporation

Government Departments

As organizations with statutory and policy mandates, departments actively contribute to consultation efforts through identifying and discussing specific initiatives related to their mandate that could be developed and considered as accommodation measures.

ANNEX B

Initial Mandate for Meaningful Consultation and Accommodations, where appropriate

The initial mandate for meaningful consultation and, where appropriate, accommodations provides flexibility for Consultation Leads and Team officials, and the Minister of Natural Resources, to explore, consider, and pursue discussions regarding specific advancements or modifications within the broader scope of the Project.

This could include introducing additional protections or accommodations to address project-related impacts to the rights and interests of Indigenous groups.

Consultation Teams will be empowered to:

- ✓ Discuss accommodations tied to potential impacts to Aboriginal and Treaty rights;
- ✓ Solicit comment from Indigenous groups on potential accommodations measures;
- ✓ Discuss improvements to existing accommodations measures;
- ✓ Discuss new and reasonable accommodation measures with Indigenous groups to address concerns; and
- ✓ Agree to accommodation measures (following Cabinet approval where required).

The Minister of Natural Resources will:

- ✓ Be authorized to recommend additional conditions as directed by the FCA and/or consider discussion on new accommodation measures when responding to concerns of Indigenous communities;
- ✓ Liaise with other Cabinet Ministers, and TMC where appropriate, on appropriate accommodations that fall within their mandate;
- ✓ Seek direction from Cabinet should there be any accommodations with impact or cost of a substantial manner; and
- ✓ Transparently demonstrate how s.35 rights and interests expressed during consultations are reflected in the potential accommodation measures and potentially in the ultimate Governor in Council decision, and provide Indigenous groups with a rationale for decisions made by the Minister and/or Governor in Council regarding accommodation measures.

We will use both new and existing information to identify appropriate accommodation measures, including:

- Analysis of information gathered during the previous Phase III consultation process;
- The Consultation and Accommodation Report that was used to support the 2016 decision;
- The engagement record that has been built since the November 2016 decision;
- Inventory of recent analysis undertaken by officials within NRCan; and
- Records from consultation and engagement conducted by Trans Mountain Corporation.