

June 14, 2019

The Honourable Amarjeet Sohi, P.C., M.P.
Minister of Natural Resources
Natural Resources Canada
588 Booth Street
Ottawa, ON KiA 0E4

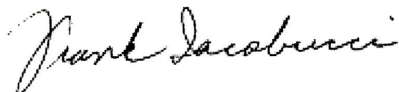
Dear Minister Sohi:

Re: Trans Mountain Expansion Project: Summary of My Role and Work as Federal Representative in the Re-initiated Phase III Consultation

As Federal Representative in the re-initiated Phase III consultation process, I write to provide you with a summary of the role I played and the work I undertook to fulfill the mandate I was given.

In transmitting this summary, I wish to express my thanks to you and the Government of Canada for allowing me the opportunity to participate in the Trans Mountain Expansion Project and also to thank you and your colleagues for the support and courtesy extended to me and the leadership you provided.

Yours truly,



Frank Iacobucci

Trans Mountain Expansion Project: Summary of My Role and Work as Federal Representative in the Re-initiated Phase III Consultations

The Honourable Frank Iacobucci, C.C., Q.C.

June 14, 2019

My Role

On August 30, 2018, the Federal Court of Appeal, in *Tsleil-Waututh Nation v. Canada (Attorney General)*, granted an application for judicial review to quash the 2016 Order in Council accepting the National Energy Board's recommendation that the Trans Mountain Expansion Project be approved, and remitted the matter to the Governor in Council for redetermination. The Court found that the consultation framework selected by Canada was sufficient to enable Canada to make reasonable efforts to consult with Indigenous groups affected by the Project, but that Canada failed to properly execute that consultation framework. It stated that the corrected consultation process could be "specific and focused". The Court also found that the National Energy Board erred in excluding the impacts of Project-related marine shipping from the scope of the Project and its evaluation of the public interest.

On October 3, 2018, Canada announced that it would not appeal the Court's decision. Instead, Canada would re-initiate Phase III consultations with all 117 Indigenous groups that Canada had determined in 2016 may be impacted by the Project. The number of Indigenous Groups consulted in 2018/2019 increased to 129 after new information became available about Project-related impacts and Canada determined that additional Indigenous groups should be consulted.

In addition, on September 20, 2018, the Governor in Council issued an Order in Council directing the National Energy Board to reconsider aspects of its 2016 report and to submit its report and recommendation by February 22, 2019. On that date, following a 22-week reconsideration process, the National Energy Board released its Reconsideration Report, which concluded, in weighing the competing considerations, that the Project was in the national interest. The National Energy Board recommended that the Governor in Council approve the issuance of a certificate of public convenience and necessity to Trans Mountain, subject to 156 conditions, seven of which were revised from 2016.

I was appointed as Federal Representative on October 3, 2018. My role is described in the Crown's Consultation Approach, which was shared with Indigenous groups. It was to "oversee and provide direction on the consultation and accommodation process", and to provide "independent advice and guidance to the Government regarding the consultation and accommodation process" in the aim of ensuring that the process "proceeds as the Court prescribed".

My Work

Following my appointment, I worked closely with Crown officials (including members of the Crown consultation teams) throughout the National Energy Board reconsideration and the re-initiated Phase III consultation process. My assignment has included:

- working with government officials to shape the Crown's approach to the re-initiated Phase III consultation process, including assisting with the development of the Crown's Consultation Approach and other foundational documents;

- hosting a set of four roundtable meetings with potentially-affected Indigenous groups in November and December 2018 in Edmonton, Kamloops, Vancouver and Victoria;
- reviewing and, where appropriate, responding to correspondence from Indigenous groups;
- regularly providing advice to Crown officials at all levels of government;
- participating in regular updates with members of the Crown consultation teams throughout the consultations;
- reviewing and providing advice on the drafting of the 2019 Crown Consultation and Accommodation Report (the “2019 CCAR”), including certain annexes specific to Indigenous groups; and
- reviewing the independent submissions that the Crown received from Indigenous groups.

Throughout the re-initiated Phase III consultation process, I had weekly, and during certain periods almost daily, meetings and conference calls with the Crown consultation leads to offer advice and guidance on how to respond to the concerns raised by Indigenous groups. I also met regularly with senior officials from various federal departments to discuss both broader and group-specific issues. I had regular meetings or calls with the Minister of Natural Resources and a smaller group of Ministers to discuss some of these same issues.

Consultation

In response to the Federal Court of Appeal’s finding that Canada had failed to engage in a considered, meaningful two-way dialogue with Indigenous groups, the Crown consultation teams were given a broad mandate to engage in meaningful, two-way consultations with potentially-affected Indigenous groups. The Crown organized significantly expanded consultation teams to meet with every one of the 129 potentially-affected Indigenous groups. There were nine consultation teams with three consultation leads. The consultation teams were comprised of more than 60 officials from 13 different federal departments, reflecting Canada’s whole-of-government approach to the re-initiated Phase III consultations. I understand that the Crown allocated \$5.3 million in funding to enable Indigenous groups to participate in the re-initiated Phase III consultation process.

The consultation process was designed to: (a) provide an opportunity for Indigenous groups to dialogue directly with the Crown about matters of process and substance, including matters not addressed in the National Energy Board reconsideration; and (b) be an iterative process, with the consultation teams having a mandate to discuss and agree to appropriate accommodations with Indigenous groups and being able to seek expanded accommodation mandates from Cabinet as required throughout the consultations to address and respond to concerns raised by Indigenous groups. The consultation process also provided an opportunity for the Crown and Indigenous groups to further identify potential Project-related impacts specific to each group and to propose appropriate individualized accommodation measures.

The re-initiated Phase III consultations were conducted in accordance with the Consultation Approach. As was urged in the discussion in the roundtables mentioned above, the Consultation Approach provides that consultations would be conducted with the aim of securing the “free, prior and informed consent” of Indigenous groups with respect to Project-related impacts on their Aboriginal and treaty rights. However, it must be remembered that there is no right of a veto by an Indigenous group in respect of Project approval.

I have been advised that the consultation teams met at least once with the 122 Indigenous groups willing to meet and often met multiple times with various Indigenous groups, having had 402 meetings in total with Indigenous groups over the re-initiated Phase III consultation process. Trans Mountain was usually in attendance as well. In addition, I understand that the Minister of Natural Resources attended 46 meetings with over 65 Indigenous groups since the Federal Court of Appeal's decision on August 30, 2018.

At those meetings and in the correspondence, Indigenous groups, the Crown and Trans Mountain consulted in respect of the potential impacts of the Project and other issues raised by Indigenous groups. In contrast to 2016, the Crown did not just take notes for consideration by the Governor in Council, but actively engaged with Indigenous groups about the potential impacts of the Project and how those impacts can be minimized, often working with Trans Mountain and various Government departments to provide additional information and to respond to questions asked.

In response to requests from some Indigenous groups for more time for the re-initiated Phase III consultations, on April 17, 2019, the Governor in Council issued an Order in Council to extend the statutory time limit for making a decision on the Project from May 22, 2019 to June 18, 2019.

The draft 2019 CCAR, along with each Indigenous group's Annex, was shared with each Indigenous group on either April 24 or April 25, 2019. Indigenous groups were given until May 29, 2019 to provide comments on their respective draft Annexes and to provide their own submissions to be included as part of the consultation record and attached to the 2019 CCAR. On May 28, 2019, the date to provide comments on the draft Annexes was extended to May 31, 2019, and the date to provide independent submissions to the Crown was extended to June 6, 2019. Fifty-eight Indigenous groups provided comments on the draft Annexes and 43 sent their own independent submissions for inclusion with the 2019 CCAR. This process of sharing the draft Annexes and receiving comments and submissions from Indigenous groups was an additional avenue by which the Crown and Indigenous groups meaningfully consulted with one another and exchanged views on the consultation process and appropriate accommodations.

Accommodation

Through the consultation process, the Crown identified five general areas in which the Project could have impact on Aboriginal and treaty rights – hunting, trapping and gathering rights; freshwater fishing rights; marine fishing and harvesting rights; other traditional and cultural practices; and Aboriginal title, resources and governance rights. During the consultation process, there were extensive discussions with Indigenous groups as to how those impacts might be mitigated through accommodation measures. The accommodations discussed included, among others:

- accommodations first discussed in 2016, such as the Indigenous Advisory and Monitoring Committee, which is now established and operating, to oversee and provide Indigenous input into Project construction and operation;
- the 156 conditions, to be imposed if the Project is approved, set forth by the National Energy Board in its Reconsideration Report, seven of which were revised from 2016, including many directed specifically at mitigating potential impacts of the Project on Indigenous groups;
- new broad accommodation measures, which can also be tailored to respond to concerns raised by specific Indigenous groups, including:

- **Co-developing Community Response.** This measure is intended to co-develop a role for Indigenous groups in the Project area in emergency preparedness and response to marine incidents. This could include: knowledge sharing, training and exercises, response planning, personnel, equipment, and communications technologies and tools.
 - **Aquatic Habitat Restoration Fund.** This measure would provide funding and capacity support for projects related to habitat restoration to address direct and indirect impacts of the Project on aquatic species and habitats. Specific initiatives are to be developed in collaboration with Indigenous groups.
 - **Enhanced Maritime Situational Awareness Initiative.** Pilots of this project will be developed to enhance Indigenous vessel safety in the water. This web-based system will integrate information such as vessel traffic, hydrography, weather and local knowledge, and will support local decision-making and enhance marine safety and environmental protection.
 - **Marine Safety Equipment and Training.** The Crown will provide funding to Indigenous groups for safety equipment such as Automatic Identification Systems, marine radios, and emergency position-indicating radio beacons, as well as funding for training to improve marine safety on the water.
 - **Quiet Vessel Initiative.** The Crown will fund research into testing safe and effective quiet vessel technologies and operational practices to mitigate the impact of underwater noise sources on the Southern Resident Killer Whale.
 - **Salish Sea Initiative.** This measure will provide a collaborative governance structure and funding for Indigenous organizations to develop capacity and fully engage on addressing cumulative effects in the Salish Sea, in collaboration with other stakeholders, through monitoring, management activities and research. Among other things, the Salish Sea Initiative is planned to devote significant resources to supporting the health of fish populations (both in the Salish Sea and which migrate upriver) and the Southern Resident Killer Whale.
 - **Terrestrial Cumulative Effects Initiative.** This measure will involve collaborating with Indigenous groups to co-develop specific cumulative effects initiatives that focus on (i) understanding the current state of environmental health considering existing industrialization, and (ii) monitoring and sharing information on changes over time in response to ongoing development.
 - **Terrestrial Studies.** This measure will involve supporting Indigenous-led traditional use studies to better understand the potential and cumulative impacts of the Project, which would inform ongoing cumulative effects monitoring and the construction, operations and maintenance phases of the Project, if approved.
- new specific accommodation measures offered in response to the specific concerns of individual Indigenous groups;
 - numerous commitments made by Trans Mountain that will be binding as a result of National Energy Board conditions or that are contained, together with other accommodations, in Mutual Benefit Agreements signed by Indigenous groups with Trans Mountain; and
 - other Crown measures that, while independent from the Project, serve to accommodate potential Project-related impacts on Indigenous groups, including Transport Canada's administration of federal marine safety legislation, the Oceans Protection Plan and various initiatives developed under it to support the health and recovery of the Southern Resident Killer Whale population, the

Whales Initiative, the *Pipeline Safety Act*, the National Ship-Source Oil Spill Regime, and at least eight different currently established and funded fish and fish habitat protection initiatives that are intended to improve the health of fish populations and the quality of fish habitat, and which are applicable to the Project area.

Where accommodations were not offered, the Crown provided a reasonable rationale to Indigenous groups and did not simply take notes of the concerns or commit to describe the issues to Ministers.

Concluding Observations

I would like to conclude by expressing some observations on the re-initiated Phase III consultation process that result from the oversight, direction and advice that I offered in the carrying out of my mandate. To begin with, I was involved in virtually all stages of the re-initiated Phase III consultation process. The process benefited from comments received from Indigenous groups and officials in many departments. In that respect, I wish to acknowledge the overall impressive efforts of Indigenous groups in their participation and commitment in the process. Although some groups disagreed or dissented, their positions need to be respected.

Also of great significance was the comprehensive effort made by the nine consultation teams consisting of more than 60 officials under the Consultation Leads. All of this was done to reflect the whole-of-government approach that was under the guidance and direction of Ministers who worked collectively as a team. At the same time, the proponent, Trans Mountain Corporation, although an independent entity, was able to work effectively in a cooperative role with both Indigenous groups and government officials. The Crown consultation teams, with the authority given from Ministers of the Crown, were able to table positions that sought to address Indigenous concerns. In this connection, I observed that the Crown consultation teams endeavoured to seek the consent of the Indigenous groups even though that was not always achieved.

Consequently, when I stand back from all that has taken place in the re-initiated Phase III consultations, I am satisfied, based on the consultation record and the applicable jurisprudence, that the Crown has remedied the defects in consultation identified by the Federal Court of Appeal and has meaningfully consulted with potentially-affected Indigenous groups.

Furthermore, all the above accommodation measures taken together are responsive to the impacts and concerns expressed by potentially-affected Indigenous groups. They demonstrate that the Crown has listened to the concerns expressed by Indigenous groups and has proposed reasonable measures to accommodate those concerns. This is indicative of a meaningful, two-way dialogue between the Crown and potentially-affected Indigenous groups in accordance with the Crown's constitutional obligations.

To conclude, I have been involved with Indigenous issues for most of my professional life in the various positions I have had, and, for the last 15 years, as a lawyer participating in numerous Indigenous files. From those perspectives, working on this file, regardless of the outcome, has reinforced my hope for a better relationship between Indigenous people and Canada on the pathway to fair and honourable reconciliation.