



Department of Finance
Canada

Ministère des Finances
Canada

What We Heard Report:

First Step of Engagement Process on Indigenous
Economic Participation in TMX

Canada 

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1. Introduction

From July 2019 to September 2019, the Government of Canada (the Government) conducted the first step of a multistep engagement process regarding the possibility of Indigenous economic participation in the Trans Mountain Expansion Project (TMX). This “What We Heard” report is intended to accurately and concisely summarize input that the Department of Finance Canada (Finance) received from Indigenous communities during that first step. Notably, the report is not intended to express the Government’s perspective.

2. Background

On July 9, 2019, the Minister of Finance launched the first step of a multistep engagement process regarding the possibility of Indigenous economic participation in TMX (see Annex A for additional background). In launching this first step, the Minister highlighted four principles that would inform the engagement process:

- Potentially impacted Indigenous communities could have an opportunity for meaningful economic participation in TMX;
- Participation of Indigenous communities could help the economic development of their communities in keeping with the spirit of reconciliation;
- The Government of Canada invested in Trans Mountain to benefit all Canadians; and
- That TMX will be built and operated on a commercial-basis.

Officials from Finance conducted the first step of the engagement process. The core objectives were to seek input on the design and implementation of potential subsequent steps of the engagement process and preliminary input on Indigenous economic participation in TMX itself. This step sought input on the following five matters:

1. Views on the design and implementation subsequent steps of the engagement process;
2. Views on the potential to collaborate with other communities during subsequent steps of the engagement process;
3. Views on desired support, information, and advice required to participate effectively in the engagement process;
4. Views on the type of “economic participation”; and
5. Views on the implementation of economic participation.

The first step proactively sought input from 129 Indigenous communities that Canada identified as “potentially impacted” by TMX, and welcomed input from other Canadian individuals and groups. Finance received this input through a combination of meetings, teleconferences, and written submissions.

During the first step of the engagement process, Finance met with 55 Indigenous communities through 46 meetings and teleconferences. Finance jointly prepared a written summary of these discussions with each Indigenous community. In addition, two Indigenous communities submitted their views in writing. Finance also received input from three other groups via meetings and written submission. This report does not attribute views to any particular participant in the first step of the engagement process, and instead uses the term “Participants” to represent all of the parties that provided input as part of the first step of the engagement process (e.g., Indigenous communities, as well as Indigenous and non-Indigenous groups).

This report aims to summarize all of the input received during the first step of the engagement process on the five matters listed above in an accurate and concise manner. It is not intended to express the Government's perspective. Furthermore, it does not reflect input on other matters. Notably, Finance officials did record input on other matters and, where applicable, conveyed that input to the responsible federal authority.

On August 9, 2019, the Minister of Finance announced the appointment of an Advisory Committee to provide guidance and support to Finance as it advances its engagement work (see Annex B for additional information). The Committee was charged with two tasks: 1) to provide advice on next steps of the engagement process and 2) where applicable, to provide advice on Indigenous economic participation itself. In light of its role, the Advisory Committee reviewed a draft of this report prior to its finalization.

3. What we heard

Overall, the first step of the engagement process was productive. Finance received rich and varied feedback in response to most or all of the five matters. In addition, Finance was able to initiate direct relationships with each Participant. A number of Participants also expressed appreciation that, through the first step of the engagement process, Canada was engaging on a nation-to-nation basis, Canada did not consider that step to represent a s. 35 consultation, and Canada was seeking input on subsequent engagement rather than on a specific contemplated course of action. Some Participants did express frustration that Canada did not initiate the engagement process with substantive options for Indigenous economic participation in TMX.

The remainder of this section outlines views from Participants on the five matters.

3.1. Views on the design and implementation of subsequent steps of the engagement process

Most Participants expressed a strong desire for securing a direct and consistent point of contact at Finance that could facilitate the flow of information between all parties in subsequent steps of the engagement process. These Participants stressed that securing such a contact would help to build relationships and lessen the potential for, and effects of, engagement fatigue.

There was no consensus among Participants about the duration of the engagement process as a whole, or of each subsequent step. Some Participants expressed trepidation at the prospect of participating in a protracted engagement process in light of 1) high opportunity costs of such participation, and 2) engagement fatigue related to participating in multiple engagement and consultation processes. Conversely, some Participants favoured participating in an engagement process that is not constrained by artificial deadlines.

Many Participants emphasized the importance of Canada recognizing that some Indigenous communities are more advanced than others and tailoring the engagement process to equalize those differences. Because of such differences, these Participants suggested that subsequent steps of the engagement process might need to proceed at a pace that would be suitable to all Indigenous communities. Some Indigenous communities had advanced preferences regarding their economic participation in TMX and accordingly advocated entering into negotiations as early as possible.

Most Participants expressed support for Canada and Indigenous communities co-developing next steps of the engagement process. To that end, several Participants requested that Finance initiate a working agreement to guide both parties through the remainder of the engagement process.

As a means of organizing and focusing next steps of the engagement process, most Participants recommended that Canada develop a set of options for Indigenous economic participation in TMX. However, nearly all Participants expressed concern that Canada might return with a "one-size-fits-all" approach.

3.2. Views on the potential to collaborate with other communities during subsequent steps of the engagement process

Most Participants indicated a preference to continue engaging with Canada bilaterally, on a nation-to-nation basis. Conversely, several Participants expressed skepticism that a purely nation-to-nation engagement process (and, therefore, a bilateral one) could be successful given that they expected dozens of Indigenous communities to participate, and that those Indigenous communities would have different, and potentially conflicting, interests. Most Participants recognized that the engagement process eventually would likely need to become multilateral if it was to be successful. Most Indigenous communities were open to collaboration provided that collaborating was suitable to all parties.

Several Participants recommended that Canada create, support, and participate in a joint working group comprising federal officials and Indigenous representation that would play a role in subsequent steps of the engagement process (e.g., host meetings, share information, convene working tables). As a model, some Participants cited the TMX Indigenous Advisory and Monitoring Committee (IAMC). A small number of Participants suggested using the IAMC itself as a convening entity for the Indigenous economic participation engagement process, and others expressed support for creating a new working group in light of the IAMC's exclusive focus on regulatory matters.

Some Participants recommended that Canada engage influential Indigenous leaders who might be positioned to represent the diversity of Indigenous perspectives on economic participation in TMX.

Most Participants did not express specific views about "aggregators" (e.g., Western Indigenous Pipeline Group, Iron Coalition, Project Reconciliation) that have emerged with the sole purpose of convening Indigenous communities to acquire equity in Trans Mountain Corporation (TMC). Some Participants expressed disinterest in working with any of these aggregators. A number of Participants indicated that these entities were taking approaches that are inconsistent with their interests. Several Participants did disclose that they were engaging with aggregators to explore all possible avenues for economic participation in TMX. Moreover, some Participants expressed strong opposition to the possibility that Canada might enter into direct negotiations with any of these aggregators.¹

3.3. Views on desired support, information, and advice required to participate effectively in subsequent steps of the engagement process

Every Participant recommended that Canada offer financial support to Indigenous communities throughout the engagement process to cover 1) costs associated with participating (e.g., travel) and 2) advisory costs (e.g., legal counsel, financial advice). In light of the limited availability of technical advisory services in Canada, many Participants indicated that, on certain topics, they might benefit from having access to a single, independent advisor that is available to all of the Indigenous communities that are participating in the engagement process (e.g., conducting due diligence on TMC's financial position). Equally, many Participants advocated that Canada should provide financial support for every Indigenous community to seek independent advice.

Some Participants suggested that Canada involve a credible, independent facilitator in the next steps of the engagement process to build trust, facilitate co-development, and level the playing field for all parties.

Several Participants recommended that Canada offer financial support for the periodic need of Indigenous communities to engage and educate their members about TMC and TMX, including the engagement process and options for economic participation.

¹ Canada is not currently engaged in such negotiations.

All Participants cited a need for more information (e.g., financial, economic, commercial) with respect to TMC and TMX before engaging substantively on any opportunities for participating economically in TMX.

3.4. Views on the type of economic participation in TMX

Rationale for Canada. Most Participants offered one or more suggestions for why Canada should involve Indigenous communities in opportunities to participate economically in TMX:

- As a means of satisfying Canada's duty to consult and accommodate for TMX's expected impacts (i.e., direct, indirect, cumulative) on s. 35 rights and title;
- As a means of increasing support for TMX;
- As a means of supplementing TMC's benefit agreements with Indigenous communities;
- As a means of accelerating Indigenous economic development in the spirit of advancing reconciliation between Canada and Indigenous peoples; and
- As a means of facilitating Canada's ultimate intention of divesting TMC (i.e., by providing greater certainty for potential buyers).

Scope of opportunities for economic participation. Many Participants argued that the scope of opportunities for participating economically in TMX (i.e., the size of such opportunities) should not be limited to TMX's revenues. These Participants identified other potential opportunities, including those related to employment and procurement, the existing Trans Mountain pipeline, and Canada's return on investment from divesting TMC. Several Participants also indicated that potential participation should include receiving benefits from historical operations of the existing Trans Mountain pipeline.

Indigenous motivation. Participants identified several reasons for their interest in sharing in the economics of TMX, including:

- As a means of Canada formally recognizing asserted title claims and thereby establishing a precedent for other major projects;
- As a means of compensating for the risk of a potential accident related to TMX or related marine activity;
- As a means of attaining a role whereby they could exert influence over TMC and TMX;
- As a means of generating income and creating wealth, and thereby supporting greater self-sustainability; and
- As a means of obtaining additional information about TMC and TMX.

Type of economic participation. Participants expressed interest in several forms of participating economically in TMX (e.g., acquiring equity in TMC, sharing revenues with TMC, securing employment and procurement contracts, sharing revenues with Canada following its divestiture of TMC, receiving revenues from a new Aboriginal resource tax applicable to TMC and TMX, and sharing TMX-related corporate income tax receipts with Canada. Some Participants expressed skepticism that the employment and procurement opportunities outlined in their benefit agreements with TMC would materialize (or materialize substantively).

Most Participants focused on some variant of revenue sharing or equity as the preferred option for Indigenous economic participation in TMX. Furthermore, nearly all Participants indicated that their ultimate preference with respect to participating economically would depend on the details of each option for doing so. With respect to the proceeds of economic participation, many Participants advocated for full autonomy in their use of funds (particularly in the case of revenue sharing).

Eligibility & Apportionment. Most Participants indicated that eligibility (i.e., which Indigenous communities are eligible to participate in the engagement process, and what such participation signifies) and apportioning (i.e., what share of the total opportunity for economic participation is assigned to each Indigenous community) would be the most challenging issue to resolve. No consensus emerged on how to address these issues. Regarding the apportionment of economic benefits, most Participants suggested that Canada develop a transparent formula with multiple criteria, potentially including provisions for “top-ups.”² This formula could include, among other things, the following considerations:

- The expected impact of TMX (including TMX-related marine activity) on s. 35 rights, and title (e.g., in terms of the relative length of TMX and its related shipping corridor);
- Whether TMX or related marine activity encroaches on an Indigenous community’s reserve territory;
- An Indigenous community’s relative proximity to TMX and related marine activity;
- An Indigenous community’s population (i.e., on a per-capita basis³); and
- The relative risk to each Indigenous community related to an accident (e.g., a spill).

3.5. Views on the implementation of economic participation in TMX

With respect to the potential for acquiring equity in TMC, a number of Participants indicated that Canada would likely need to offer some form of loan support (e.g., direct loans and loan guarantees) to Indigenous communities, as many communities may otherwise find it too difficult or costly to secure private financing to participate. A number of Participants highlighted that any interest in acquiring equity would only materialize when there was greater certainty about TMX (e.g., once it is in-service).

Some Participants raised the prospect of creating a trust to safeguard economic benefits for Indigenous communities that choose not to participate in the engagement process or that choose to participate in the engagement process at different junctures. Several Participants did cite the importance of preserving opportunities for participating economically for Indigenous communities that are not currently available to participate in the engagement process or to discuss economic participation in light of ongoing legal challenges to TMX. Similarly, several Participants advocated for the creation of “on-ramps” to the engagement process, which would allow Indigenous communities the option of participating at their discretion.

Several Participants also noted one special consideration for Canada in proceeding with options for economic participation in TMX, which is that Canada will need to consider their suitability as models for Indigenous economic participation in other major projects.

² For example, the revenue-sharing formula that underpins the BC Gaming Commission model provides a top-up to “remote” Indigenous communities. This type of consideration could also apply to equity options.

³ Some Indigenous communities explicitly stated that a per-capita allocation would be inappropriate.

Annex A: Background on Indigenous Participation in the Economic Development of the Trans Mountain Expansion Project

Foreword

The Government of Canada wishes to thank all of the interested parties for participating in the economic participation engagement process, for their time and consideration. No relationship is more important to the Government than its relationship with Indigenous peoples – one based on respect, cooperation, partnership, and the recognition of and commitment to Indigenous rights.

Background

During Phase III consultations regarding the Trans Mountain Expansion Project (the Project), and separately, many Indigenous groups expressed interest in opportunities for greater economic participation in the Project. In March 2019, the Government of Canada announced its intent to explore such opportunities, should the Project be approved.

On June 18, 2019, the Governor in Council approved the Project subject to 156 conditions and to adhering to recommendations of the National Energy Board (NEB), and directed the NEB to issue a Certificate of Public Convenience and Necessity and a positive environmental decision statement in respect of the Project. With these, the Project will proceed to the next stage in the regulatory review process, including Phase IV consultations regarding detailed route approvals, condition compliance, and the NEB's consideration of routing and non-routing variance requests, as well as the implementation of mitigation and accommodation measures from Phase III.

With the Project now approved to move forward, the Government is launching an engagement process that will be led by the Department of Finance Canada, starting with an exploratory, information-gathering step in Summer 2019.

Engagement Principles

The engagement process will be informed by the following principles:

- Potentially impacted Indigenous groups could have an opportunity for meaningful economic participation in the Project;
- Participation of Indigenous groups could help the economic development of their communities in keeping with the spirit of reconciliation;
- The Government of Canada invested in Trans Mountain to benefit all Canadians; and
- The Project will be built and operated on a commercial basis.

Scope of Exploratory Discussions

For the exploratory step of the engagement process, officials from the Department of Finance Canada will organize a series of meetings over the Summer in Ottawa, Victoria, Vancouver, Kamloops, and Edmonton. This first step of engagement will seek to understand views on how Canada should approach the broader engagement process, and to gauge preliminary views about how economic participation in the Project might be structured.

The Government will seek to meet with Indigenous groups and organizations that represent Indigenous groups. This step will also allow for input from other interested parties, including the general public, should these parties wish to express their views. Input can be sent via e-mail to fin.transmountain@canada.ca until August 30, 2019.

Guiding Questions

1. What are your views on how the Government should engage potentially impacted Indigenous groups regarding their potential economic participation in the Project?
2. Based on information that is currently available, does your group see a benefit in participating economically in the Project?
3. If yes to question 2, do you have any initial views on how such "economic participation" should be structured (e.g., form, timing)? What does "economic participation" mean to you and your group (e.g., equity, partnership)?
4. Are you interested in collaborating with other groups in subsequent steps of the engagement process?
5. In order to participate effectively in subsequent steps of the engagement process, what information, advice, or support would you need to have?

Next Steps

Following the close of exploratory discussions with Indigenous groups, the Government expects to continue the engagement process by refining potential models for economic participation. This could entail a second round of meetings, and roundtables with representatives from the banking and financial services sector and the oil and gas sector (e.g., shippers), as well as representatives from project aggregators.

The engagement process led by the Department of Finance Canada will be separate from any Phase IV consultations, which will be overseen by the Department of Natural Resources Canada and the Minister of Natural Resources.

Annex B: Terms of Reference

Advisory Committee on Indigenous Economic Participation in TMX

Objective

To provide advice to the Department of Finance on Indigenous economic participation in the Trans Mountain Expansion Project.

Work Summary

The Advisory Committee's work would include providing advice and recommendations on the design and implementation of the Government's engagement with Indigenous communities on the subject of economic participation in the Project, potentially including (but not limited to):

- any discussion material prepared by the Department that could be released publicly;
- the structure, timing, and logistics of in-person engagement with groups;
- the collection and reporting of input; and
- the approach for the negotiation phase of the discussion, based on the results of Step 1 and in consultation with the Department.

Department officials would lead the discussions with Indigenous communities over the course of summer 2019. Committee members would be welcome to attend any engagement meeting, to assist with providing advice to Department officials. During the discussion period, the committee would meet regularly (e.g., once a month) to receive updates on implementation and progress, and would provide advice on adjustments to the approach as required.

The Advisory Committee would meet in Ottawa at points during the process, but teleconferences could be arranged if necessary. The committee would not have a lead role in engaging with the public or Indigenous groups, but its existence and membership composition could be publicly announced.

The contracted parties would be supported by a small secretariat housed within the Economic Development and Corporate Finance Branch of Finance Canada. The secretariat would provide logistical and administrative support, as well as analytical capacity as required.

Key Deliverables and Timelines for the Committee

Key milestones and deliverables for the committee would include:

- Early August 2019 – commencement of contract and public announcement of committee
- Mid-to-late August 2019 – delivery of initial advice to Finance Canada on approach and structure of engagement process, including agenda and material for one-on-one meetings with Indigenous groups
- August-October 2019 – monthly meetings of committee to discuss Finance Canada's implementation and progress of discussions, and identify any issues/adjustments required
- November 2019 – final advice on the approach to next steps of the engagement process.

Other considerations

Members of the Advisory Committee must be free from real, potential or perceived conflicts of interest with respect to the Project.

Members of the Advisory Committee would agree to undertake the work on a confidential basis and would enter into a non-disclosure agreement.