

March 28, 2019

Sent By E-mail

Jocelyne Beaudet
Panel Chair, Roberts Bank Terminal 2 Project
c/o Cindy Parker, Project Manager, Roberts Bank Terminal 2 Project
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Dear Ms. Beaudet:

Re: Roberts Bank Terminal 2 Project: proposed inclusion of Project-related marine shipping in the designated project that must be assessed pursuant to the *Canadian Environmental Assessment Act, 2012*

A. Overview

We are T'Sou-ke Nation's ("**T'Sou-ke**") lawyers in this matter. We write in connection with Minister McKenna's [March 8, 2019 letter to the Review Panel](#) on the proposed inclusion of Project-related marine shipping in the designated project to be assessed pursuant to the *Canadian Environmental Assessment Act, 2012* ("**CEAA 2012**"), related amendments to the Terms of Reference for the Roberts Bank Terminal 2 Project ("**Project**"), and your [March 15, 2019 response](#) to the Minister.

If the Minister does amend the Panel's Terms of Reference to include Project-related marine shipping in the designated project that must be assessed pursuant to CEAA 2012, T'Sou-ke submits that the Panel does not have sufficient information before it on that issue. The Project cannot proceed to a public hearing until the Panel rectifies this deficiency.

B. The Review Panel has insufficient information to proceed to a public hearing

In her March 8 letter, Minister McKenna advised you that she intends to amend the Project's Terms of Reference to specify that Project-related marine shipping within Canada's territorial sea is an activity "incidental to" the "designated project" under s. 2(1) of CEAA 2012.¹ The Minister further noted that she did "not anticipate this change to substantively affect [the Panel's] ongoing work to determine if there is sufficient information to proceed to the public hearing".

¹ T'Sou-ke brought this matter to the attention of the Minister and the Review Panel on [October 26, 2018](#).

In your March 15 response to the Minister, you confirmed that the proposed inclusion “will not affect [the Panel’s] ongoing work”, and that the public hearing would be proceeding on May 14, 2019. You concluded by thanking the Minister for “formally includ[ing]” Project-related marine shipping into the Panel’s Terms of Reference.

In T’Sou-ke’s respectful view, the proposed inclusion of Project-related marine shipping is more than a mere formality. Rather, its inclusion makes clear a critical informational deficiency that T’Sou-ke has been bringing to the Panel’s attention since 2016: that the Panel has no information before it on T’Sou-ke’s marine traditional uses that may be impacted by the Project.

In October 2018, T’Sou-ke again reminded the Panel (as it had on [October 27, 2016](#)) that the proponent Vancouver Fraser Port Authority (“**Port**”) had not arranged for the preparation of a Project-specific Marine Traditional Use Study (“**MTUS**”) from T’Sou-ke.

Instead, VFPA has, without T’Sou-ke’s consent and against its strenuous objections, purported to rely on a MTUS T’Sou-ke prepared for an entirely different project. **This course of action is entirely inconsistent with the Canadian Environmental Assessment Agency’s reference guide entitled “[Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act, 2012](#)”**, which establishes, among other things, that “only the community can decide if they are willing to provide access to their [traditional knowledge]”, and that a proponent must “work closely with the community” to seek prior, informed consent for its use.

Notwithstanding that T’Sou-ke brought this serious matter to the Panel’s attention, the Panel decided it had sufficient information before it to proceed to a public hearing on [March 1, 2019](#). This information gap has become all the more critical in light of the Minister’s proposed inclusion of Project-related marine shipping into the Panel’s Terms of Reference, which postdates the Panel’s sufficiency determination.

Without a Project-specific MTUS from T’Sou-ke, the Board has insufficient information before it to proceed to a public hearing. Until (i) a Project-specific MTUS is incorporated into the Port’s application, and (ii) the Port removes from its application all traditional knowledge it has appropriated without T’Sou-ke’s consent, the Panel will not have sufficient information to proceed to a public hearing.

If the Panel holds a public hearing without having that critical information before it, it will:

- (1) be unable “to promote communication and cooperation with aboriginal peoples with respect to environmental assessments”, frustrating a central purpose of CEAA 2012 as set out in s. 4(1)(d);
- (2) have no information to assess any change that may be caused to the environment on T’Sou-ke’s current use of lands and resources for traditional purposes, as required pursuant to s. 5(1)(c)(iii) of CEAA 2012; and

- (3) be inconsistent with s. 19(3), which provides that “[t]he environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge”.

As T’Sou-ke has previously requested, the Review Panel must exercise its power under s. 44(2) of CEAA 2012 to require the Port to:

- (1) commission and pay for a MTUS to be carried out by T’Sou-ke to assess how the Project may impact T’Sou-ke’s Aboriginal title, rights, and interests as well as its current use of lands and resources for traditional purposes; and
- (2) submit a revised Environmental Impact Statement containing this information.

C. Conclusion

For the reasons set out above, T’Sou-ke urges the Panel to revisit its March 1, 2019 determination, conclude that it does not have sufficient information before it to proceed to a public hearing, and require the Port to take the steps outlined above.

Yours sincerely,

Gowling WLG (Canada) LLP

<Original signed by>

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