



September 13, 2023

To: The Secretary Canada Energy Regulator
Suite 210, 517 – 10th Avenue S.W.
Calgary, AB T2R 0A8

Delivered by Fax: 1-877-288-8803

Re: Deviation application filed by Trans Mountain Pipeline L.P. (“Trans Mountain”) on August 10, 2023, pursuant to section 211 of the CER Act (“Application”)

Re: Application pursuant to section 211 of the Canadian Energy Regulator Act – Segment 5.3 (Pipsell area) CER File: OF-Fac-Oil-T260-2013-03 61

Re: Request to participate and comments of the Indigenous Caucus of the Indigenous Advisory and Monitoring Committee on the Trans Mountain Expansion and Existing Pipeline

I write on behalf of the Indigenous Caucus (the “**Caucus**”) of the Indigenous Advisory and Monitoring Committee on Trans Mountain (“**IAMC-TMX**”) to request to participate in the hearing of the Application through the provision of comments contained within.

The IAMC-TMX is an innovative body that brings together federal ministries, regulators and representatives from Indigenous communities to seek to advance the protection of the environment and Indigenous use and the lands and waters in relation to the existing Trans Mountain Pipeline and its expansion. The IAMC-TMX’s overarching purpose is to ensure that Indigenous knowledge, perspectives and interests are better integrated into the regulation of the construction and operation of the Project. The IAMC-TMX is made up of both government and Indigenous members, with the latter (who together comprise the Caucus) being selected by the affected Indigenous Nations. The Terms of Reference for the IAMC-TMX provide that the IAMC-TMX shall provide input and advice to regulators with respect to issues of concern to the Committee, as well as regulatory standards applicable to the construction of the Trans Mountain expansion project.

Through the work of the IAMC-TMX, the Indigenous Caucus has participated in extensive activities relating to the construction of the expansion project, including through monitoring, participation in emergency response activities, community engagement in relation to Indigenous concerns regarding the project and has met regularly with our government and regulator counterparts to provide advice in regard to matter of concern to our constituent Indigenous communities. Based on this experience, we request that the comments contained within be considered by the CER in its hearing of the Application. For clarity, we only seek to provide this written submission, we do not seek further participation in the hearing.

It is essential to the nature of the Indigenous Caucus that its members, either separately or collectively, do not represent the affected Indigenous nations, including in respect of their s. 35 rights. Rather, the Caucus seeks to support Indigenous nations in their common efforts to

protect their lands and waters and their rights and interests in them. The Caucus provides this submission on its own behalf; we do not purport to speak for affected Indigenous Nations.

The Caucus has been made aware of the Application and the written submissions filed by both Trans Mountain and Stk'emlúpsenc te Secwépemc Nation ("SSN"), as well as responses to information requests filed on September 11, 2023. The Caucus provides this written submission to address argument and evidence provided by Trans Mountain in its written submissions and in its [response to IR No. 2](#) regarding its determination that the commitment made to SSN regarding trenchless construction methods in the Pipsell (Jacko Lake) area are no longer economically feasible.

The Caucus has not been privy to discussions between SSN and Trans Mountain, nor has the Caucus undertaken its own technical analysis of the alternative construction methodologies put forward by the parties. Instead, the Caucus provides this submission to articulate its concern that accommodation measures developed through consultation with Indigenous communities not be abandoned due to the significant cost overruns and delays in completing this project. Those cost overruns and delays must not be used as an overriding justification for Trans Mountain to adjust critical elements of this project in a way that undermines Indigenous rights and interests.

Trans Mountain's justification for the proposed deviation is that (a) the costs of micro tunneling will significantly exceed the construction costs normally associated with trenchless construction and (b) that "continuing with micro-tunneling would likely delay the in-service date for the TMEP" resulting in "roughly \$200 million in lost revenues and roughly \$190 million in carrying charges for Trans Mountain" per month.¹ In its response to IR No. 2, Trans Mountain has again raised the spectre of significant monthly losses in relation to revenues and carrying charges, indicating that there may be impacts "beyond \$390 M per month" should the in-service date extend beyond March 31, 2024.²

The Caucus' view is that the Commission must not allow cost considerations relating to changes to the in-service date to override commitments made to Indigenous communities by Trans Mountain in relation to measures intended to address the impacts of the expansion project. It is critical to appreciate the significant imbalance in resources that exists between Trans Mountain and Indigenous communities when discussions of potential accommodation measures are undertaken. Indigenous communities do not typically have the capacity to evaluate whether proposed accommodation measures are technically or economically feasible. This leads to reliance upon proponents to ensure that agreed upon mitigations are measures that can actually be carried out as Indigenous consent is often premised on such accommodations.

Given Trans Mountain's reply to IR No. 2, it now appears that undertaking the originally permitted micro-tunneling technique promised to SSN may lead to delays in completing construction of this section beyond the March 31, 2024 in-service goal, even in a best case

¹ At paras, 10 and 15 of Trans Mountain Pipeline ULC - Reply Evidence of Trans Mountain Pipeline ULC ([C26029](#))

² Page 12, Jacko Lake IR No. 2 Response September 11, 2023 - A8S5S1 ([C26152-2 02](#))



scenario. However, it is patent that there have been numerous delays to the in-service deadline to date, and the CER should be careful to ensure, in evaluating the Application, that Trans Mountain is not permitted to abandon accommodation measures merely because initial estimates of construction costs and timelines were significantly underestimated. Put another way, Indigenous communities should not bear the consequences of inadequate planning or intervening circumstances, as they do not ultimately stand to benefit from the risks taken by the proponent during the planning phases.

Moreover, these justifications do not account for the irreparable harm to SSN's spiritual and cultural connections to the Pipsell (Jacko Lake) area. Trans Mountain's submissions assume that impacts that may be caused by trenching techniques, or expanded surface disturbance through abandoning micro-tunneling can be mitigated:

24. In light of Trans Mountain's suite of proven mitigation measures to avoid or minimize potential environmental, traditional land use ("TLU") and cultural impacts, including in other important cultural areas for Indigenous groups, Trans Mountain is confident that its proposed combination of HDD and conventional open trench construction will allow Trans Mountain to reasonably avoid or minimize impacts on the Lands.³

However, the IAMC has developed an Indigenous monitoring program that has provided trained Indigenous monitors to accompany CER inspectors during the construction of the expansion project, and has enabled monitors to review reports of incidents that have occurred during construction. Based on this experience, and reports of the IAMC Indigenous monitors, the Caucus does not share the confidence expressed by Trans Mountain in its ability to mitigate damage to sites of cultural significance when using trench methods of construction. Of particular concern in this Application, it is apparent that Trans Mountain has vastly underestimated the number of sites of significance to Indigenous communities as there have been a very large number of chance finds made in many of the construction spans. Based on the experience of our monitors, the potential for disturbance of sites of significance and for chance finds should more trench construction methods be authorized in the Pipsell (Jacko Lake) area is likely greater than is presently understood.

Thank you for considering our submission. We do not seek any time for the oral hearing of the Application.

Respectfully,

Raymond Cardinal
Chair, Indigenous Caucus
Indigenous Advisory and Monitoring Committee on Trans Mountain

³ At para 24 of Section 211 Deviation Application (PPBoR M002-PM03011-014) - A8S0Q0 ([C25832-1](#))