

Transport Minister Marc Garneau's responses to a request for reforms to port authority governance from VTACC director Kathryn Harrison

Dear Minister Garneau:

As a political scientist who for decades has studied Canadian political institutions and policymaking, I was shocked when I became aware of the number and extent of flaws in the governance model for Port Metro Vancouver. The problems include the following:

- The Port is mandated with regulating industries that use the Port, yet a majority of members appointed to the Port's board are nominated by those same industries.
- The Port relies exclusively on users fees and rent from tenants on federal lands within the Port's control to fund its operations. This is in conflict with the Port's responsibility to approve or reject development of those same lands and/or projects that would increase Port throughput.
- Although they have important decision making powers, those who lobby Port Authorities are exempted from reporting under the federal lobbying registry.
- Changes to the Canada Marine Act adopted as part of a 2014 omnibus budget bill limit transparency and accountability, even as port authorities are deliberating considering highly controversial developments and as allegations have emerged of organized crime operating in Canada's ports.

The activities that take place in Canada's ports demand careful attention not only for their contribution to our economy, but also for the environmental, health, and safety risks they pose. I urge you and your colleagues to revisit and fundamentally rethink the exercise of federal authority in Canada's ports.

Kathryn Harrison
Vancouver
(submitted via RealPortHearings.org 4/20/2016)

From: Minister of Transport <TC.MinisterofTransport-MinistredesTransports.TC@tc.gc.ca>
Subject: regarding the structure and governance model of Canada Port Authorities
Date: July 21, 2016 at 9:58:50 AM PDT
To: Kathryn Harrison

Thank you for your correspondence regarding the structure and governance model of Canada Port Authorities. Please accept my apology for the delay in replying.

Canada is a trading nation that relies on its ports, in particular Canada Port Authorities, to efficiently move its products to world markets. To that end, the Government of Canada established a legislative framework and governance model to ensure the authorities' competitiveness.

Canada Port Authorities are federally incorporated, autonomous, non-share corporations that operate at arm's length from the federal government. They are governed by boards of directors

nominated by port user groups and various levels of government. They operate according to business principles and have the authority and flexibility to determine strategic direction and make commercial decisions. In this context, the federal government has no power to direct or influence the actions of Canada Port Authorities.

Further, Canada Port Authorities also have environmental stewardship responsibilities. As you will appreciate, the protection of the environment is a shared responsibility between the federal and provincial/territorial governments. That being said, whether a federal or provincial/territorial environmental law is applicable within a port operated by a Canada Port Authority may be determined by multiple factors, one of which may be the status of the property as federal real property, but also by other factors, including the nature of the activity that an Authority is carrying out on the property.

Nevertheless, under section 67 of the Canadian Environmental Assessment Act, 2012 (CEAA 2012), federal authorities, like Canada Port Authorities, have to determine whether designated projects on federal lands are likely to cause significant adverse environmental effects. The public is kept informed yearly as federal authorities are obligated to report to Parliament of their activities under the CEAA 2012.

I should also explain that, on February 25, 2016, the government announced a new approach to Governor in Council appointments. The new approach supports an open, transparent and merit-based selection process that will ensure that Ministers' recommendations take into consideration the desire for Governor in Council appointments to achieve gender parity and reflect Canada's diversity in terms of linguistic, regional and employment equity representation. To meet these commitments, recruitment strategies and outreach activities will be used to reach qualified and diverse pools of candidates. In addition, candidates will provide information on their second official language proficiency and voluntarily self-identify as a member of an employment equity group (e.g., women, Indigenous Canadians, visible minorities, persons with disabilities). Candidates can self-identify as a member of an ethnic or cultural group.

All future appointments will be handled under this new framework. Additional information about the new process can be found at www.appointments-nominations.gc.ca.

In regard to your concerns about transparency, the Canada Marine Act sets clear requirements for Canada Port Authorities to produce documents such as annual financial statements and land-use plans and to make these available to the public. I would also note that Canada Port Authorities are subject to the Access to Information Act and the Privacy Act.

I appreciate your sharing your views on this matter. Thank you again for writing.

Yours sincerely,

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport

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From: Kathryn Harrison

Subject: re: regarding the structure and governance model of Canada Port Authorities

Date: July 28, 2016 at 8:36:22 AM PDT

To: TC.MinisterofTransport-MinistredesTransports.TC@tc.gc.ca

Dear Minister Garneau,

Thank you for taking the time to respond (below) to my submission concerning port governance. I have set out my concerns with your response below, and hope that you and your colleagues in the Liberal Cabinet and caucus will give them due consideration.

Before turning to that, though, I'd like to provide a bit of background about myself and why I care so much about port reform. I am a political science professor at UBC, where I have conducted research and taught courses on environmental policy for over 20 years. I first became engaged with the question of port governance when a new coal port was proposed on the Fraser River by proponent Fraser Surrey Docks. As a political scientist who has studied regulatory decision making for decades, I was taken aback by the lack of meaningful consultation and other problems with the review process. In response, I published several op-eds on the topic in the Vancouver Sun in order to increase public awareness.

Beyond my professional role, as a citizen concerned about the implications of climate change for future generations, I also was deeply troubled by the prospect of undoing the gains made in reducing US reliance on thermal coal by providing an outlet to export that same coal to other countries via Canada. I am a volunteer director of a Vancouver-based environmental group called Voters Taking Action on Climate Change. We have joined another group, Communities and Coal, and two individuals living near the proposed coal port, with legal representation from Ecojustice, in challenging Port of Vancouver's approval of Fraser Surrey Docks' thermal coal export facility. That case is currently before the Federal Court.

I have 5 concerns with respect to statements in your letter.

1. Port authorities are not autonomous.

Your letter describes Canada's port authorities as "autonomous," and states that "the federal government has no power to direct or influence the actions of Port Authorities." I find these statements shocking.

It is true that Port boards are arm's length, but it certainly does not follow that the federal government has no control over them. As set out in Section 14(1) of the Canada Marine Act, the members of each Board are appointed by the Governor in Council on your recommendation as Minister of Transport.

Moreover, the Parliament of Canada passed and thus could amend the Canada Marine Act. With a majority in the House of Commons, your government has considerable authority to do just that. In addition, the Letters Patent of individual port authorities are set by Order in Council and thus could be amended by Cabinet alone.

In other words, if you are concerned by the degree of autonomy of Canada's port authorities, it is well within your government's powers to change that, rather than offer it as an excuse for inaction.

Finally, and most importantly, federal port authorities, including Port of Vancouver, are acting on the federal government's legislative and proprietary powers under Canada's constitution. As such, it is essential that they be accountable to the Cabinet of the day, and that the Cabinet in turn answer to the elected House of Commons. To suggest that you as the Minister responsible for Canada's ports have "no power or influence" is a violation of the principle of Ministerial accountability and abdication of democratic accountability.

2. Ports are not private corporations.

Yes, Canada is a trading nation that relies on its ports. It does not follow that port authorities should or do operate exclusively "according to business principles and have the authority and flexibility to determine strategic direction and make commercial decisions." Canada's ports do have mandates to operate as corporate entities in some respects. For instance, Port of Vancouver operates a shopping mall at Canada Place and leases public lands to port users.

However, those are not the only nor arguably the most important mandates of the Port. In *Air Canada v. Toronto Port Authority* (Federal Court of Appeal, 2011), the court distinguished between ports' operations as quasi-private enterprises and their exercise of public authority as "federal board[s], commission[s], or other tribunal[s]." Among the factors that distinguish the exercise of public from private authority are the relationship to statutory schemes of authority and the exercise of compulsory power over the public.

Port authorities are delegated compulsory powers under both the Canada Marine Act and the Canadian Environmental Assessment Act, 2012. Port of Vancouver was not merely engaged in a commercial relationship with Fraser Surrey Docks as a lessor of federal port lands. It was also a regulator, with authority to approve or reject the proposed project.

Regulatory powers, including the requirement to protect public health and the environment, should not be exercised according to business principles, foremost among them efficiency and profit, but rather in pursuit of public goals determined by and accountable to the democratic process. The Canada Marine Act expressly anticipates that it will be administered with regard to high levels of safety and environmental protection (s 4(d)) and responsiveness to local needs and priorities (s 4(e)). These purposes reflect public, not simply private or business concerns.

3. It is a conflict of interest for port authorities to be governed by port users.

I am delighted to hear that the government of Canada is committed to making Governor-in-Council appointments more transparent, open, and diverse. However, that does not address the systemic problem that, as set out in its letters patent, the majority of appointments to Port of Vancouver's board of directors (and I assume of other port authorities as well) are nominated by the business sectors that use the Port. The implication is that Port is directed by allies of the very industries that it is directed to regulate. This is a fundamental and systemic conflict of interest.

It is not the only conflict. The Port is also directed to fully fund its operations with revenues from the properties it controls, including via leases of public lands to port users. In that context, there is an inherent bias in favour of approval of projects likely to yield revenues for the port.

The impacts of this system, and the resulting apprehension of bias in favour of the proponent of the Fraser Surrey Docks project, are among the issues in the VTACC/Communities and Coal court case.

4. Port authorities lack transparency.

You note that the Canada Marine Act requires that port authorities release annual financial statements and land-use plans, and that they are governed by the Access to Information Act and Privacy Act.

In my experience, Port of Vancouver's operations as a regulator fall far short of the transparency I have found in studying other federal regulatory bodies. For example, when I resorted to using the Access to Information Act (ATIP) to obtain records of Port of Vancouver's deliberations concerning the Fraser Surrey Docks Coal Port, what that revealed was a public authority working in collaboration with the industry it was directed to regulate, including co-sponsoring a coal industry conference and also seeking to hide that sponsorship, sharing intelligence on the activities of environmental activists (including a children's environmental group) with coal industry lobbyists, and congratulating those same lobbyists on editorials expounding the benefits of coal. That I was able to obtain such documents, though with considerable delay, through ATIP is small consolation considering the cozy, private relationship between regulator and regulated that was revealed.

To make matters worse, omnibus budget bill C-43 (2014) included amendments to the Canada Marine Act that would allow the government to pass regulations authorizing port authorities to destroy documents, thus evading the Access to Information Act and further restricting transparency and accountability, even to the responsible Minister. The same bill also authorized reclassification of federal lands in a way that would exempt them from the Canadian Environmental Assessment Act, 2012 and Species at Risk Act. (Legal analysis by the West Coast Environmental Law Association can be found [here](#).) Your party voted against that bill in opposition.

Finally, port authorities are exempt from the Lobbying Act, a fact that also could be corrected via statutory amendment. Ironically, in the case of Fraser Surrey Docks, the company and the lobbyists representing them were required to report their meetings with federal Cabinet Ministers and public servants, yet not their ongoing lobbying of the Port itself, even though in the first instance the Port was the entity charged with issuing approvals and making determinations with regard to the Canadian Environmental Assessment Act, 2012.

5. We need reform of port governance, not a defence of the status quo.

It is ironic that your response highlighted the responsibility of port authorities under

S. 67 of the Canadian Environmental Assessment Act, 2012, when the extent of the port's powers under CEAA, 2012 were established by repeal and replacement of the previous act, which had been in place for 20 years, in omnibus budget bill C-38 (2012). Those amendments significantly diminished the role of the Canadian Environmental Assessment Agency, while increasing the responsibility of line agencies, such as port authorities, with often-conflicting mandates. In opposition your party strongly opposed these amendments as a weakening of Canadian environmental law. Surely you do not now highlight the same section as reassurance of port authorities' commitment to environmental protection?

Rather than a defense of the flawed status quo, we need reforms of both Canada's environmental assessment process and our port governance to ensure that the interests of Canadians, in all their diversity, are protecting when it comes to approval and regulation of activities that take place in Canada's ports. I hope that you and your colleagues will undertake such reforms with the urgency they deserve.

I would be happy to discuss these matters further, and respectfully request an opportunity to do so.

Sincerely,

Kathryn Harrison

From: Minister of Transport <TC.MinisterofTransport-MinistredesTransports.TC@tc.gc.ca>
Subject: regarding the structure and governance model of Canada Port Authorities.
Date: October 20, 2016 at 6:37:05 AM PDT
To: Kathryn Harrison

Dear Ms. Harrison:

Thank you for your correspondence of July 28 and September 9, 2016, regarding the structure and governance model of Canada Port Authorities. Please accept my apology for the delay in replying.

As Minister of Transport, I am mandated with the overarching goal of ensuring that Canada's transportation system supports our ambitious economic growth and job creation agenda.

As you know, Canada is a maritime nation with an extensive coastline and a complex maritime transportation system. This complex and extensive system is vital to a country that relies heavily on international maritime commerce, of which ports are a key component.

As you may be aware, Transport Canada has embarked on the development of a long-term agenda for the future of transportation in Canada, which includes a particular emphasis on Canada's marine transportation system. As part of this work, Transport Canada is analyzing various matters related to Canada Port Authorities.

I appreciate all perspectives in the Government of Canada's ongoing consideration of whether Canadian transportation assets have the right balance of commercial and public interests.

Thank you again for writing.

Yours sincerely,

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport