

**NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE**



**Hearing Order OH-001-2014
Ordonnance d'audience OH-001-2014**

**Trans Mountain Pipeline ULC
Trans Mountain Expansion Project**

**Trans Mountain Pipeline ULC
Projet d'agrandissement du réseau de Trans Mountain**

VOLUME 27

**Hearing held at
L'audience tenue à**

**Delta Burnaby Hotel and Conference Centre
2nd floor, 4331 Dominion Street
Burnaby, British Columbia**

**January 20, 2016
Le 20 janvier 2016**

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HEARING ORDER/ORDONNANCE D'AUDIENCE
OH-001-2014

IN THE MATTER OF Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Burnaby, British Columbia, Wednesday, January 20, 2016
Audience tenue à Burnaby (Colombie-Britannique), mercredi, le 20 janvier 2016

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

D. Hamilton	Chairman/Président
P. Davies	Member/Membre
A. Scott	Member/Membre

APPEARANCES/COMPARUTIONS

Applicant/Demandeur

Trans Mountain Pipeline ULC

- Ms. Terri-Lee Oleniuk
- Ms. Lesley Matthews

Intervenors/Intervenants

Katzie First Nation

- Ms. Jennifer Griffith
- Ms. Debbie Miller

Masanobu Shoji

- Mr. Masanobu Shoji
- Mr. Leo Shoji
- Ms. Julia Hincks

City of Burnaby

- Mr. Gregory McDade
- Ms. Michelle Bradley
- Mr. Dipak Dattani
- Mr. Lambert Chu

Coldwater Indian Band

- Ms. Emma Hume

Andrew Weaver

- Dr. Andrew Weaver

Stz'uminus First Nation

- Ms. Melinda Skeels

National Energy Board/Office national de l'énergie

- Ms. Nicole Godbout
- Mr. Paul Johnston

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Opening remarks
Chairman

--- Upon commencing at 8:59 a.m./L'audience débute à 8h59

12927. **THE CHAIRMAN:** Good morning and welcome to this morning's session in Burnaby, which is part of the National Energy Board's hearing regarding Trans Mountain's expansion project. We will continue to hear intervenor summary oral arguments.
12928. My name is David Hamilton. I am the Chair of the Panel. And with me to my left is Ms. Alison Scott, and to my right is Mr. Phil Davies. And together we are the Panel assessing Trans Mountain's project application.
12929. To start, I'd like to take a moment to briefly review some housekeeping items.
12930. In the event we hear a hotel fire alarm, the procedure will be to exit the hearing room using the entrance that you came in. Once you are outside the hearing room, there are two evacuation routes. The first is directly to your left when you exit the hearing room doors, and the second is located beside the registration desk where some of you received your lanyard. Uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.
12931. Once outside the building, proceed to the hotel muster point located on the northwest corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure all members of your party are accounted for and await further instructions from the Delta Burnaby representatives.
12932. As indicated in Procedural Direction 20, the Board have set time limits to hear oral summary argument. The time limit for intervenors is 40 minutes each. This time limit will be strictly enforced and they reflect that intervenors have had the opportunity to file written argument-in-chief prior to providing oral summary argument.
12933. There is a timer that will indicate a green light for the first 35 minutes, switching to yellow for the last 5 minutes of your speaking time. Finally, when your time is up, a red light will come on. If necessary, the microphones will be switched off. I will warn you before this happens.
12934. Final arguments as a whole is an opportunity to express your views

**Opening remarks
Chairman**

and opinions about the project based on the evidence filed by Trans Mountain and intervenors on the hearing record. It is also an opportunity to make recommendations to the Board about matters within the List of Issues or on any terms and conditions to which the project should be subject if it is approved.

12935. The Board will not give any weight to new evidence introduced during oral summary argument or any submissions made that do not address the List of Issues.

12936. My fellow Panel Members and I are looking forward to hearing from intervenors that have signed up to provide oral summary argument. The Board wishes to limit potential distractions to provide a fair, safe and efficient opportunity for everyone that will be providing oral summary argument.

12937. Members of the media are asked to -- not to set up and take down or move equipment while the Panel or a presenter is speaking and to do so only during breaks. Media interviews are not permitted in the hearing room.

12938. With that, I think we are ready to get underway this morning. And we will -- this morning we will be hearing from the Katzie First Nation, Masanobu Shoji and the City of Burnaby.

12939. And with that, I'd like to -- before we get going I'd like to ask the representatives of Trans Mountain for the record to introduce themselves.

12940. **MS. OLENIUK:** Good morning, sir. My name is Terri-Lee Oleniuk and I'm legal counsel to Trans Mountain. With me to my left is Leslie Matthews and she's the regulatory lead for the project.

12941. **THE CHAIRMAN:** Thank you, Ms. Oleniuk.

12942. We'll now hear from the Katzie First Nation and, as you're aware, we have read your written argument and now you have 40 minutes to present your oral summary argument. Thank you.

12943. Ms. Griffith? Am I correct?

12944. **MS. GRIFFITH:** Correct.

12945. **THE CHAIRMAN:** Thank you.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE KATZIE
FIRST NATION:**

12946. **MS. GRIFFITH:** Thank you, Mr. Chair and Panel Members. My name is Jennifer Griffith and I am legal counsel to the Katzie First Nation. With me is Ms. Debbie Miller, the Chief Treaty Negotiator for the Katzie First Nation.

12947. Today you will hear from Katzie what Katzie's position is on the project, how the project will impact Katzie and the environment Katzie relies on, and comments on some of the proposed conditions. You will also hear about Trans Mountain's engagement with Katzie and about Crown consultation and the public interest.

12948. I will first speak to Katzie's position on the project and provide an overview of Katzie's territory and the project in Katzie territory. Ms. Miller will then explain why Katzie will be uniquely impacted by the project. After that, I will continue with submissions on impacts, spills, engagement and the public interest.

12949. I have provided the process advisors with a list of two exhibits we will rely on. We will also refer you to other exhibits but do not require these to be displayed.

12950. The Katzie First Nation asks the Board to recommend against the issuance of a section 52 certificate and against a positive decision statement under the *Canadian Environmental Assessment Act*. Katzie also asks that the Board decline to grant a section 58 order for the project in Katzie territory.

12951. The reasons for these requests are set out in detail in Katzie's written argument and today I'll highlight some of those.

12952. I'd like to ask for Exhibit C2-1-1, page 24, to be pulled up. This map shows Katzie territory. The territory includes the Pitt and Alouette watersheds in the north, continues to the main residential area around Pitt Meadows, Langley and Barnston Island along the Fraser River and then continues south to Boundary Bay.

12953. The proposed new pipeline -- and that's what it is in Katzie territory.

Final argument
Katzie First Nation

- It's a new pipeline. It's not a twinning or an expansion of an existing right-of-way. The proposed new pipeline crosses across the southern portion of Katzie territory here. And it passes along and across the Fraser River in Katzie territory. It is within two kilometres of Katzie IR Numbers 1 and 2 and within 500 metres of Katzie IR Number 3, which is on Barnston Island.
12954. I refer you to Exhibits B255-20, page 7, and B255-21, pages 1 to 3 showing the proposed pipeline route in Katzie territory for more detail.
12955. Ms. Miller will now elaborate about project impacts on Katzie.
12956. **MS. MILLER:** Good morning.
12957. So I am here today to represent the voice of the Katzie First Nation people. We gave oral evidence on October 22nd, 2014, and this can be found in Volume 10, lines 3997 through 3996, and I rely on this evidence to support what I'm saying here today.
12958. So from time immemorial, Katzie people have lived and continue to live along the Fraser and in the Pitt Polder, and it's a place that's been handed down to us from our ancestors and through the generations. We have become and are understood as the Katzie people; it is our identity, and we are rooted here through our traditions and life ways and we do not have another place to go.
12959. And I'm extremely uncomfortable with reading my words from a page. I just have to say this, because when I met you last, I had a group of individuals with me and I told you then that I was breaking rules in our Coast Salish way by trying to stick to words on a page. So I'm perplexed about how to add argument to what we've said already.
12960. But as you can see, in our territory we have brackish and freshwater marshlands, and this is an integral place to our society. And it's to these marshlands that we go to gather resources when they are needed and that they are available to us throughout the year. We know these areas provide these different resources and they're gathered for purposes that I cannot all explain to you in 40 minutes.
12961. So we need the shoots in the springtime and during the time when the plants are flourishing. We also go and harvest during a time when things are dormant. Most people look at this from an anthropological perspective, as a seasonal

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Katzie First Nation

- round. What we know, as the resources harvesters, is that there's a need to go and harvest and a need to gather. It is for us, the ability to maintain this use in a way that our traditions have taught -- in such a way that are exactly the way our ancestors taught us.
12962. And it's this Trans Mountain Pipeline, in our -- in the minds of the Katzie people, it's not possible, because, one, we haven't had conversation and we haven't been considered for the use that we undertake. Our ability to access these resources provide us with personal and cultural safety.
12963. Many people talk about what it means to be safe, and I can only tell you that from us, as a people, our systems and our life ways are integral to ensuring that our identity is maintained and our connection is through the lands and the resources. And this, as I keep reiterating, it's been taught to us by the people who are long since gone. And it's my responsibility and the people -- the people's responsibility to continue to teach those systems and activities to the young people and those who have yet to come. So to us, there isn't another place to go.
12964. And we've already watched -- although the map shows no development in terms of what it looks like in our territory -- there is very limited places where we live. We are a highly populated greater Vancouver region, and with that, it means that places like Surrey Bend are of vital importance to us.
12965. As Burgess Pierre, one of the presenters who was with me last, he spoke in his oral evidence of the teachings that he's received about the aquatic environment from the Fraser River through its tributaries. These teachings, as described by him, demonstrate the ability of the aquatic and marshland resources in Katzie's territory to sustain his family, providing year round sustenance.
12966. **MS. GRIFFITH:** It is the reliance of Katzie on the lands and resources of its territory for sustenance that means the project effects will be felt deeply by Katzie. The Katzie First Nation asserts Aboriginal title to and Aboriginal rights throughout its territory and relies on its oral and written evidence filed in these proceedings to support these claims.
12967. The following three points are important to understand what this means in terms of project review and engagement:
12968. Aboriginal rights are constitutionally protected. Aboriginal title is a

right to the land itself. And aboriginal title encompasses the right to choose how the land will be used.

12969. In the *Tsilhqot'in Decision*, the Supreme Court of Canada, after confirming its findings in *Delgamuukw*, described aboriginal title in the following way:

"Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."

12970. And that's at paragraph 73.

12971. The protection of aboriginal rights under section 5 -- 35.1 of the *Constitution Act* means that the honour of the Crown is engaged, even when the right has not yet been established through litigation or treaty. As a result, the Crown must consult with aboriginal people prior to taking actions which may infringe asserted aboriginal rights.

12972. Natural Resources Canada has filed evidence in these proceedings that state that Canada owes a high depth of consultation to the Katzie First Nation. This is found in the Natural Resources Canada written evidence, Exhibit C249-9-2 at page 119. A high depth of consultation is owed when the asserted claim is strong and when the potential impacts are serious.

12973. If the proposed project proceeds it will result in a fundamental infringement of Katzie's aboriginal title to the land required for the pipeline right-of-way. The infringement would be an infringement of the deepest possible type. It would infringe the Katzie First Nation's right to choose how to use the land, and its right to the exclusive use and occupation of the land. That use and occupation would be usurped by Trans Mountain.

12974. The project would also have negative effects on Katzie's Aboriginal rights. This will occur simply as a result of construction, but would be even more serious in the event of a spill. Yet the Federal Crown has not even begun the required two-way dialogue that is a necessary component of the obligation to consult with the Katzie First Nation about the project.

12975. I'll get back to how this affects your ability to assess the public interest a little later after discussing the way in which the project will affect Katzie aboriginal rights.
12976. If the project proceeds as proposed, pipeline construction is likely to have substantial negative effects on fish habitat, wetlands and archaeological sites in Katzie territory. The proposed pipeline will cross at least 40 watercourses in Katzie territory. I refer you to Exhibit B372-8. Sixteen (16) or more of these are high sensitivity fish habitat.
12977. Trans Mountain has proposed to mitigate adverse effects to fish and fish habitat by using construction methods and timing to reduce impacts. Nevertheless, Trans Mountain acknowledges that riparian habitat will be altered or disturbed for the project. This alteration will in turn affect Katzie's ability to access resources.
12978. Turning next to wetlands. The project anticipates destroying wetlands in the course of its pipeline construction, but takes the position that the adverse environmental effects associated with the construction of wetlands will be mitigated by habitat replacement. Trans Mountain relies on restoration of wetlands as mitigation of effects to arrive at a conclusion that the effects will not be significant. There will be temporary effects, however, as the wetlands recover to functional -- to a functional state.
12979. In recognition of the impact to wetlands, the Board's proposed Condition No. 52 requires Trans Mountain to develop a wetland survey and mitigation plan that includes an offset for temporary loss in individual functional condition as well as for permanent loss. Trans Mountain seeks to vary this condition to exclude the reference to temporary loss and limit the requirement to generate an offset plan to permanent loss.
12980. I refer you to Trans Mountain's written argument at Exhibit B444-2, page 35 where it adopts Exhibit B417-5, its analysis of draft conditions.
12981. The Katzie First Nation supports the requirement to develop an offset plan for both permanent and temporary loss. Even temporary habitat loss will impact Katzie First Nation current use of land and resources for traditional purposes and the exercise of aboriginal rights and ought to be avoided wherever possible.

12982. The Katzie First Nation is not alone in taking this position. The need to mitigate temporary loss of wetland is also identified by Environment and Climate Change Canada in its written argument, at Exhibit C131-8-2, page 39.
12983. You've heard from Ms. Miller about the year-round use of resources by Katzie. There is simply no good time of the year to destroy riparian habitat, wetlands or wetland plants. And even temporary disturbance or destruction will affect Katzie deeply.
12984. With respect to archaeological sites, mapping provided by Trans Mountain and filed with the Board in confidence shows the presence of known and registered archaeological sites within the pipeline corridor in Katzie territory. The archaeological sites that are within the pipeline and near the pipeline corridor consist of pre-contact surface and subsurface lithic scatter as well as a pre-contact fish weir indicative of traditional use and occupation.
12985. These archeological sites are important, non-renewable cultural resources. Every effort should be made to avoid impacts. The Katzie First Nation's preference is that these sites not be disturbed and the conditions should reflect this.
12986. If I could please have Exhibit B315-50. This is a map prepared by Trans Mountain in response to an information request from Katzie. For the present, I rely on it to show the location of Surrey Bend Regional Park in Katzie territory. Surrey Bend Regional Park is down here. This is Katzie IR No. 3, IR No. 1, and IR No. 2. And the proposed pipeline route is shown along here.
12987. I know you are familiar with the issues relating to Surrey Bend Regional Park from the submissions of the City of Surrey. Surrey Bend Regional Park is an important habitat in Katzie territory. It is a unique ecosystem that supports a high diversity of flora and fauna. It is also one of the few undeveloped areas in Katzie territory in proximity to Katzie's residential reserves. It is an area that continues to be used by Katzie members in the exercise of their aboriginal rights, as Burgess Pierre informed you.
12988. The Katzie First Nation continues to have concerns about the routing of the pipeline through Surrey Bend Regional Park and takes the positions that the routing should be realigned to avoid the park. And as you know, Katzie is not alone in having concerns about the proposed routing through the park. A number

of other intervenors have also expressed concerns, including the City of Surrey and the B.C. Wildlife Federation.

12989. Turning next to a major area of concern for Katzie and that is spills. Trans Mountain seeks to downplay the risk or the potential adverse effects of a spill by referring to a spill being unlikely. Trans Mountain states that the probability of a crude oil spill reaching fresh water is very low and relies on its pipeline failure likelihood assessment to support that statement. I refer you to Exhibit B315-48, page 25.
12990. Spills from pipelines, however, are a reality. The Board will be familiar with the range of spills that can occur from both the NEB's own databases and from media reports of spills outside Canada. Assessing significance of adverse effects cannot rely simply on an assessment of the likelihood of the effect occurring. This assessment cannot be divorced from an assessment of the degree and extent of the adverse effect. Even if a project only has a low likelihood of causing adverse environmental effects, assessing significance still requires an assessment of the magnitude of the adverse effects.
12991. Now, Trans Mountain has stated in its reply evidence that it did not adopt hypothetical spill effects as one of its corridor selection criteria and suggests that this issue should not drive corridor routing. I refer you to Exhibit B418-16 at page 17 and Exhibit B435-6 at pages 4 to 5.
12992. That the pipeline routing has not been driven by hypothetical spill effects in Katzie territory is abundantly clear from this map. This map was prepared in response to a Katzie information request for a map that shows all the potential spills between kilometres 1155 and 1162 that will reach Parsons Channel, a channel of the Fraser River. It shows spill pathways of 30-metre intervals in a portion of Katzie territory in pink. And you can see them here. The entire -- almost the entire pipeline is marked in pink along this section. These are the spills that would flow into the important habitat of Surrey Bend.
12993. And looking here, right along the edge of Parsons Channel, the pipeline is virtually adjacent to the river and on the map, when you look at it more closely in the record, that's almost a solid pink line.
12994. So what's clear from this map is the high likelihood of a spill from the pipeline along Parsons Channel reaching the Fraser River. The routing of the pipeline this close to the river means that Trans Mountain will not be in a position

to prevent a spill from the pipeline along this stretch of the Fraser River from entering the river.

12995. Trans Mountain's own evidence confirms this. It states at Exhibit B315-48, page 17, that:

"Spills occurring near small streams that feed into the channel reach Parsons Channel very quickly. They are predicted to travel down these small streams and reach the main channel in less than 2 minutes.

Spills occurring on land that travel over the land and into Parsons Channel are predicted to reach the channel in 1 to 29 minutes."

12996. Now, as a Board that is probably familiar with response times on pipeline spills, that doesn't provide a lot of time to respond and prevent a spill from reaching the river. The opportunity to prevent a spill along this stretch of the pipeline from entering the river is virtually non-existent.

12997. The pipeline corridor selection absolutely should have considered the effects of a spill into the Fraser River, a river that is identified as one of the most valuable river systems in the world supporting more salmon than any other single river in the world. And it is clear that a spill into the river will have adverse effects.

12998. Trans Mountain's evidence at Exhibit B315-48, pages 14 to 15 states:

"It is clear that a crude oil spill into a freshwater environment, resulting from a full-bore pipeline rupture, could have substantial negative environmental effects that could be long-lasting if not effectively remediated. Therefore, Trans Mountain agrees that such a spill could cause significant adverse environmental effects in the environs of and downstream from the spill."

12999. It's not only a full-bore rupture that is a concern though. A pinhole leak that's beyond the CPM computer pipeline monitoring detection level could also result in a substantial deposit of oil in the river.

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13000. The Katzie First Nation relies on the Fraser River to support its aboriginal food, social and ceremonial and commercial fishing and to support the exercise of its aboriginal rights.
13001. Katzie First Nations gather vegetation and hunt in their territory, including along the Fraser River and in the vicinity of the proposed pipeline route. And we see from the map that IRs 1, 2 and 3 are all at risk of shoreline oiling from a spill in the river, either here along Parsons Channel or further upstream. The potential effects of a spill from the Katzie First Nation's perspective are set out in the Katzie First Nation cultural impact assessment at Exhibit C187-13-9.
13002. The importance of the Fraser River and the potential effects of a spill is also discussed in the final arguments submitted on behalf of Living Oceans and Raincoast and the City of Vancouver. The proposed routing of the pipeline along the banks of the Fraser River should simply be rejected.
13003. The Katzie First Nation also wishes to comment on Trans Mountain's engagement with Katzie. Trans Mountain's engagement with the Katzie First Nation has quite simply been completely inadequate to discharge any aspects of Crown consultation or provide any traditional land use information for consideration in the environmental assessment or mitigation proposals.
13004. The Katzie First Nation has been systematically excluded from having its concerns considered and addressed. Trans Mountain's argument that it made significant efforts to gain a better understand of aboriginal interests, values and concerns simply does not apply to the Katzie First Nation.
13005. Trans Mountain's approach to aboriginal engagement in relation to the proposed project has not been inclusive of or responsive to the Katzie First Nation. As a result, Trans Mountain does not have Katzie traditional land use information specific to the project. This is information Trans Mountain could have worked with Katzie to obtain but chose not to. It is also information we say Trans Mountain needs to have if it is to have any chance of mitigating project impacts on Katzie.
13006. This is why Katzie is seeking a specific condition, should the Board recommend approval of the project requiring Trans Mountain to fund the necessary traditional land use study. Please be mindful though that this submission on this condition or any of the other conditions addresses in Katzie's written argument should not be construed as Katzie's support from project

approval. Katzie does not support project approval.

13007. Finally, I turn to the public interest. In a country where aboriginal rights are constitutionally protected a public interest assessment simply must include a consideration of the potential impacts on those aboriginal rights, and whether they can be avoided, mitigated or otherwise accommodated.

13008. You heard from Mr. Reynolds yesterday on behalf of the Musqueam Indian Band about the Supreme Court of Canada decision in *Carrier Sekani*, sometimes also referred to as *Rio Tinto*. In that decision the Supreme Court stated at paragraph 70:

“The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of [...] consultation under the Utilities Commission Act. As Donald J.A. asked, ‘How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?’”

13009. The Supreme Court was referring to the B.C. Court of Appeal decision in the same case at paragraph 42, which reads more fully:

“How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. “

13010. And for your reference, the provision of the *Utilities Commission Act* at issue, like the *NEB Act*, referred to the consideration of any other factor considered relevant to the public interest. From this we take that a public interest inquiry requires a consideration of whether there is a duty to consult and whether it has been discharged.

13011. A number of other aboriginal groups, including the Tsleil-Waututh First Nation, the Upper Nicola Band and the Tsawwassen First Nation in their final written arguments have also addressed the importance of the consideration of impacts to constitutionally protected rights in a public interest analysis.

13012. And you heard from Mr. Reynolds yesterday on behalf of the Musqueam Band that in a nutshell, it is a pre-condition to the Board’s

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recommendation under section 52 that the Crown has satisfied its duty with respect to section 35 rights. Katzie agrees with that.

13013. Katzie also agrees with the submission of Mr. Reynolds that on the evidence before it, the Board cannot pre-determine that Crown consultation is adequate. This is because the Crown's approach to consultation has been to allow the regulatory review of this project by the Board, which acts in a quasi-judicial capacity to proceed and close prior to engaging in a meaningful two-way consultation with potentially affected aboriginal groups, including the Katzie First Nation. As a result, the Board does not have the information it needs to consider impacts to constitutionally protected aboriginal rights.

13014. And echoing again what Mr. Reynolds said yesterday, the phase and time constraint approach to consultation which the Crown set out at the beginning of this project raises serious concerns about whether that process can be adequate at all. As a result, Katzie submits that the Board simply cannot make a final determination of the public interest.

13015. In closing, the Katzie First Nation cannot support approval of the project as proposed for the reasons set out in Katzie's written argument and referred to today, and urges the Board to recommend against approval.

13016. And subject to any questions, those are our submissions.

13017. **THE CHAIRMAN:** Thank you, Ms. Griffith. Could you give us a few minutes?

13018. Actually we're going to take a -- we'll take a 10-minute break. We want to consider some things before we come back. So we'll be back at a quarter to 10:00.

13019. Thank you.

--- Upon recessing at 9:34 a.m./L'audience est suspendue à 09h34

--- Upon resuming at 9:46 a.m./L'audience est reprise à 09h46

13020. **THE CHAIRMAN:** Thank you, I appreciate your indulgence. We have a couple of questions for you.

13021. Ms. Scott.

13022. **MEMBER SCOTT:** Thank you, Ms. Griffith.
13023. And I do have a couple questions; the first one is on the last point you made on public interest. And I'm just wondering if you can help me understand the -- essentially breeds off of the submission that you made about public interest.
13024. As I understand it, you're suggesting that the Board must make a determination off adequacy of Crown consultation prior to making a recommendation in support of a project, and that in order to get to that place the Crown consultation has to have been relatively complete, I would assume?
13025. **MS. GRIFFITH:** What I'm saying is, Panel Member Scott, is that a final recommendation under section 52 of the *National Energy Board Act* cannot be made without a consideration of the adequacy of Crown consultation.
13026. Now, the National Energy Board makes a recommendation to the Governor in Council. There's a time span in there where the consultation could potentially be adequately discharged. The obligation to consult could potentially be adequately discharged such that a further assessment of adequacy of consultation could be made by a different decision maker than the Board.
13027. What I'm saying is the Board cannot make a final recommendation of public interest because it does not have before it the essential information about Crown consultation, and the adequacy of Crown consultation, and whether the honour of the Crown has been discharged.
13028. I don't know if this context helps, but in the context of the Northern Gateway Pipeline Project, the Joint Review Panel made a public interest determination, and the Governor in Council referred to that public interest determination as the public interest determination of the Crown or of the Governor in Council.
13029. And we're saying that the Governor in Council cannot rely on a public interest determination by the Board to support a section 52 *National Energy Board Act* positive decision if Crown consultation hasn't been squarely before the Board and adequacy of Crown consultation hasn't been squarely before the Board. And in this instance, because of the timing, it isn't.
13030. **MEMBER SCOTT:** So there is only one public interest determination and it's ours to make, you're suggesting, in the event that the

process has been robust and complete and we're satisfied that it's been adequate. But in the event that the circumstances that you're describing or you believe exist in this case we couldn't possibly do that, and in light of that, Governor in Council can't rely on that to accept a recommendation that we might make.

13031. **MS. GRIFFITH:** That's correct.
13032. **MEMBER SCOTT:** Okay. In projects -- complex projects with a significant number of Aboriginal communities, major projects at least, would there ever be a circumstance with the current legislation that you think we could recommend public interest or find a public interest -- make a public interest determination in favour of a project?
13033. **MS. GRIFFITH:** Well, I think if you had the information before you about Crown consultation, about an assessment of the strength of the claims and a fulsome assessment of the project impacts on Aboriginal rights, a full Crown consultation record that is -- that demonstrates whether or not the honour of the Crown has been met through that consultation process and whether the impacts to the Aboriginal rights have either been avoided, mitigated, or accommodated, then you could.
13034. That's not the situation we're in with respect to this project review.
13035. **MEMBER SCOTT:** Thank you.
13036. The other question I have is about the quote that you made from the Supreme Court of Canada regarding fee simple. Essentially you've described, if I'm paraphrasing, that Aboriginal title is like fee simple; that it has the right to consent to what takes place on properties.
13037. I'm trying to understand that concept with our legislation and section 35, because remove section 35 from the equation and our legislation, in terms of fee simples, does authorize the impingement of rights, right of entry, provided in the Act, does limit landowners who have fee simple and their ability to control or consent to activity that takes place on the property.
13038. So I was just wondering if you could help me understand the three pieces, if I can describe it as that, as they go together.
13039. **MS. GRIFFITH:** So I think that's -- that might be a bit difficult to

- unpack, and I'm glad the clock is off. First principles, the raising of a fee simple title does not extinguish Aboriginal title. It does represent an infringement of that Aboriginal title. And yes, the *National Energy Board Act* allows a Proponent to access onto fee simple lands subject to some procedural requirements.
13040. **MEMBER SCOTT:** If I could stop you just there. I'm operating on the assumption that we're not dealing with fee simple lands; we're dealing with, just for a hypothetical circumstance, Aboriginal land that has Aboriginal title without fee simple. I guess otherwise it would be Crown land, I suppose.
13041. **MS. GRIFFITH:** Well, if you have Aboriginal land with Aboriginal title, then an authorization under the *National Energy Board Act* for entry onto that land would require a justification analysis along the lines of the *Sparrow* analysis that was described to you by Mr. Reynolds on behalf of the Musqueam Indian Band yesterday.
13042. So that would require analyzing whether there's a valid legislative objective. It would require consultation, and it would require justification to show that steps have been taken to fully engage and create the least infringement possible. And so that would be a prerequisite to the issuance of a certificate that grants those rights of entry onto Aboriginal title land.
13043. **MEMBER SCOTT:** So if we step back one from that and it's an asserted claim, is there any difference?
13044. **MS. GRIFFITH:** The case law distinguishes between asserted claims and proven or established claims in terms of what has to take place. So the case law currently doesn't require the full justification analysis that's set out in *Sparrow* but it does require consultation.
13045. And in consultation it's important to understand the nature of the claimed right. And the nature of the claimed right in Aboriginal title is that right to the proactive use and management of the land, to the economic elements of the land, to the use and occupation and the choice of how the land is used.
13046. So that has to be a dialogue that happens between the Crown and the First Nations prior to decision-making.
13047. **MEMBER SCOTT:** And is there a difference in the circumstance there whether it's justification or whether it's adequate?

13048. **MS. GRIFFITH:** Sorry; adequate consultation or justification?
13049. **MEMBER SCOTT:** Yeah, is there a difference in the standard between justification and adequacy of consultation?
13050. **MS. GRIFFITH:** I think that will be a very factual question. I think that adequacy of consultation is something that is frequently brought to the courts to wrestle with. There's no sort of cookbook for adequate consultation but we all know it when we see it and we all know it when it's lacking.
13051. **MEMBER SCOTT:** I'd similarly suggest there's no cookbook on justification. But is there a difference between the two?
13052. **MS. GRIFFITH:** Justification requires additional steps above and beyond consultation. As Mr. Reynolds explained yesterday, consultation is required to justify an infringement on an existing right, but there are other things that are also required, and that was the *Sparrow* analysis he referred you to.
13053. The consultation that occurs in the pre-proof sphere is meaningful engagement at the earliest possible stage; a full understanding of the nature of the rights, the nature of the potential effects; and an attempt to avoid, mitigate, or accommodate impacts to those rights.
13054. So those are the necessary components of a meaningful consultation process.
13055. **MEMBER SCOTT:** Thank you.
13056. **THE CHAIRMAN:** I was going to make a comment on the there's no cookbook for consultation, we'll know it when we see it -- a comment. Thank you.
13057. Again, thank you. I'd like to thank Ms. Miller -- it was nice to see you again -- and Ms. Griffith for your submissions today. And I can assure you that the Panel will take them into serious consideration as we consider our decision in this matter. So with that we thank you.
13058. And we will take a short five-minute break while we switch to our next presenter.

--- Upon recessing at 9:57 a.m./L'audience est suspendue à 9h57

--- Upon resuming at 10:07 a.m./L'audience est reprise à 10h07

13059. **THE CHAIRMAN:** Thank you.

13060. We will come back now, and we're going to hear from Mr. Shoji and on his behalf Ms. Hincks. And you have 40 minutes to make your presentation and answer any questions the Panel may have.

13061. Thank you.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. MASANOBU SHOJI:

13062. **MS. HINCKS:** Thank you. So my name is Julia Hincks and I'm legal counsel for Masanobu Shoji. With me today is, on my far left, Mr. Masanobu Shoji and in the middle here is his son, Leo Shoji.

13063. Before I begin, I'd like to acknowledge that we're here today on Coast Salish territory. And I'd also like to acknowledge the immense effort that the Shojis have made in being here today. Leo has come all the way from Southeast Asia to share his views with the Panel, and Masanobu has come from Alberta. So we're really happy to have them here today.

13064. For the format of the argument, Leo Shoji and I will be presenting on behalf of Masanobu Shoji. And we have reviewed and are familiar with Procedural Directions 19 and 20 and will follow them.

13065. We will be referring to some exhibits throughout our presentation but we won't be asking for any exhibits to be put up on display today.

13066. Today we're going to be presenting a very focused position on the social and economic impact that we expect the project will have on landowners. And this is based on the Shojis' unique position as landowners impacted by Trans Mountain's Anchor Loop Expansion Project.

13067. We don't plan to address the many other impacts associated with this proposed project, such as environmental impacts, impacts on Aboriginal groups, and impacts on non-landowner stakeholders such as municipalities. While we do

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not speak to these issues, we acknowledge that these are legitimate concerns and must be considered by the Panel and weighed in the Panel's recommendation to the Governor in Council.

13068. The Shojis' position is that the public interest is not served by recommending project approval on the basis of the multiple anticipated impacts to landowners and to the businesses on those landowner's lands. In considering the public interest, the Board must weigh and assess the negative aspects and impacts of the project. The Board has described the public interest as follows.

13069. The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.

13070. For the reasons we'll set out today, the burdens that will likely result from the proposed project will substantially outweigh any purported benefits. As such, the Board should recommend against issuance of a certificate of public convenience and necessity.

13071. So for the format of the argument, Leo will begin by providing an overview of his family's ranch, Mount Robson Ranch, and how it was impacted by Trans Mountain during the Anchor Loop Expansion Project. And then he'll explain how Trans Mountain's lack of communication impacted his family as directly affected landowners with the Anchor Loop Expansion Project.

13072. Then I'll discuss issues with this proposed project that tip the scale against a public interest recommendation, and I'll briefly respond to Trans Mountain's oral argument. I will also discuss the likely social and economic impacts of the proposed project and briefly touch on the Panel's conditions. And we plan that we will be completing our summary argument in much less than 40 minutes.

13073. So Leo will begin.

13074. **MR. LEO SHOJI:** Thank you.

13075. I'll begin by providing an overview of our family property. My father is the corporate landowner of Mount Robson Ranch, referred to in this submission

- as, “the ranch.” The ranch is a guest ranch located west of Jasper National Park surrounded by Mount Robson Provincial Park. We have owned and operated the ranch since 1996 as part of our larger tour outfit in operation since 1985.
13076. Until the mid-2000s, the ranch’s clientele were Japanese tour groups, and now the ranch serves a global clientele. Since my family has owned the ranch, Trans Mountain has had a pipeline right-of-way running through the ranch operations. This is referred to in Trans Mountain’s application as the “Trans Mountain Pipeline”; we will also refer to the existing right-of-way as the “Trans Mountain Pipeline”.
13077. In 2008, Trans Mountain installed the Anchor Loop Pipeline, a preliminary looping expansion to the existing Trans Mountain Pipeline through ranch operations. As a result, my family is uniquely poised as an intervenor impacted by the recent installation of a pipeline to provide information about the impact of the proposed project on families and business owners.
13078. Trans Mountain has argued that its application is supported by its relationships with stakeholders along the existing Trans Mountain Pipeline. Our submission is that this position is not supported by the record, and the social and economic impacts of the project outweigh any alleged benefits.
13079. In 2005, a man arrived at our family home in Calgary unannounced. This man advised he was an impartial negotiator who wanted to discuss compensation for potential disruptions regarding a proposed new pipeline through the ranch property. He said there would be no business disruption as a result of the pipeline construction and, in fact, we would gain economically.
13080. This man wanted my father to sign a document permitting pipeline construction through our property then and there. He left a coffee mug. This was the beginning of our relationship with Trans Mountain. In the following years, my family experienced, and continues to experience, significant hardship as a result of Trans Mountain’s rushed preparation and installation of the Anchor Loop Expansion.
13081. For the purposes of the summary argument, I will not get into details of each incident during and post-construction that is set out in our evidence as its schedules and in our written argument; however, I do wish to spend some time on Trans Mountain’s failure to meet its commitment to open and respectful communication.

13082. For our family, we felt pressure to make decisions respecting our property without being fully informed of impacts. And where we pressed for information from Trans Mountain's agents, we were often not giving [sic] the information we sought. Or alternatively, we were told one thing and then something different happened.
13083. To just give three examples; one, we were pressured into making decisions quickly and without full information.
13084. As I already mentioned, the first land agent we spoke to sought to have us sign documents allowing Trans Mountain to build the pipeline through the ranch property the day he arrived, despite me and my father not understanding the documents.
13085. Later, another land agent came to visit me and asked me to sign a right-of-entry document, despite my being very young at the time, my parents being out of town, and my having limited engagement with Trans Mountain at the time. I was not advised and did not understand that in signing the notice, I was acknowledging a 30-day time limit to file a statement of opposition with the Board. As the notice was not explained to me, I did not know that I could object.
13086. Two, we did not participate in the Anchor Loop environmental assessment because we did not know about it. Trans Mountain argued in its application that Anchor Loop's unique stakeholder engagement regime resulted in no interventions at the public hearing by non-governmental organizations. Exhibit B27-16 at Adobe page 2.
13087. However, this is not the case. We did not participate at the public hearing because we were not aware that this opportunity was available to us. We stated our apprehensions and concerns surrounding the Anchor Loop project from the earliest opportunity. To state that the reason for non-participation in the Anchor Loop project review is a result of successful stakeholder engagement is disingenuous.
13088. Three, when we asked for critical information from Trans Mountain we did not get it or we were given incorrect information. This happened often.
13089. To give just a few examples, (a) we were told by Trans Mountain's agents that the bridge providing the only access to the ranch would be replaced in

- November 2007, which was less of a problem as it was outside the ranch operating season.
13090. However, we were informed by another Trans Mountain agent in the summer of 2007 that the bridge construction would occur in mid-September that year, during ranch operations. This miscommunication resulted in our having to shut down ranch operations early.
13091. B) Despite our request to Trans Mountain, we were never given sufficient information about who would be on our property, when they would be on our property and for what purpose they would be on our property. We did hear a lot of noise on the property as well as a result.
13092. We started regularly travelling over the ranch property and set up cameras to monitor the activity to find out what was going on. As a result of not being advised of whether people on the property were with Trans Mountain, we could not assess whether individuals on our property were there legitimately or if they were trespassing.
13093. Our experience is not unique. Other intervenors, including members of CGLAP, Exhibit C47-4-8 and C47-4-7, have complained about the harms they have suffered as a result of Trans Mountain's failure to engage transparently with landowners. It's this lived experience that we say will affect the landowners, and that has a real social, psychological and economic cost.
13094. Thank you.
13095. **MS. HINCKS:** So as Leo discussed, his family did not know of the opportunity to participate in the National Energy Board's review of the Anchor Loop expansion project, and that made the review void over the important voice of the landowner.
13096. Likewise, this project review has been inadequate to get a complete picture of landowners' concerns respecting the proposed expansion project. As you know, an assessment of impacts to landowners is one of the issues the Board has decided it will consider in fulfilling its mandate.
13097. The Shoji's submission is that the project review does not permit for sufficient landowner involvement to meet the Panel's obligation.

13098. The regulatory review of this project is so substantial and so technical that landowners require legal and expert assistance to help them navigate the process and to understand the potential project impacts on their lands and on their businesses.

13099. The Board's failure to provide sufficient funding to landowners has limited their participation and restricted many landowners from providing information about project impacts on them and on their land use. Without a sufficient understanding from the landowners themselves about the impacts of the project on them, the Board cannot adequately assess project impacts on landowners and land use as required by the List of Issues.

13100. As an example of lack of access, a group of landowners in the Township of Langley, B.C. were denied funding to participate in the project review despite being advised by a program staff member that they should be supported in their contribution to this hearing process.

13101. One member of the group filed limited evidence in this proceeding advising that without funding he could not conduct an informed review of the project's application or any intervenors' filings and could not prepare any written evidence. That's Exhibit 317-1-1.

13102. Trans Mountain has also inflated the amount of involvement of the intervenors in the project review. In their oral summary argument, Trans Mountain asserted that by the expected date of the Board's report, and I quote:

"...more than 400 intervenors will have actively participated in one of the most comprehensive regulatory processes in the history of the Board."

13103. It's Hearing Transcript Volume 25, paragraph 12076.

13104. Now, I commend you to take a look through the list of intervenors on the online registry and count how many of them actually participated beyond making an application for intervention. By my count, over 180 of the 413 registered intervenors' only participation in this process was making the application for intervention.

13105. These are people who took the time to apply for intervention and met the National Energy Board's test for standing, yet they did not participate. This

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- demonstrates that the process, a complicated and vast process, does not permit full opportunity for landowners to submit their concerns.
13106. The Shoji's submission is that the process and the engagement isn't about numbers; it's about quality. It would be one-sided, incomplete and unfair for the Board to solely rely on Trans Mountain to collect and provide information about impacts on landowners and land use when landowners are unable to put their view forward.
13107. Without opportunity to hear from those directly affected, the Board cannot fulfil its obligation to consider impacts to landowners required by the List of Issues.
13108. Now, before I get to the conditions, I do want to touch briefly on the social and economic impacts that this project represents which the Shoji submit are not in the public interest. The Shojis assert that their experience with the Anchor Loop expansion caused significant economic and social impacts that other landowners can expect should the proposed project go ahead.
13109. Now, Trans Mountain asserts in its application that its intention is to find a route for the pipeline that minimizes impacts to landowners and communities and states that where privately held land is needed for the route, it will discuss proposed locations of the pipeline with landowners, Exhibit B146 at Adobe page 34 -- sorry, that's B1-46 at Adobe page 34.
13110. However, this was not the Shoji's experience with the Anchor Loop expansion project. The Shoji's experience was that Trans Mountain and its agents showed no flexibility in dealing with them. Instead, they pursued their own agenda at a significant social and economic cost to the Shojis and to the ranch and their tour business, and in their experience these costs were immeasurable. Trans Mountain was unwilling to negotiate any alternative routes for the pipeline going through the ranch property.
13111. When Trans Mountain initially proposed routing the pipeline immediately adjacent to ranch operations, the Shojis requested that it be re-routed south of the ranch operations. Trans Mountain's agent replied that this could not be done as a result of topography and existing utilities. However, they did not provide any further explanation nor did they offer alternative routings that would cause less disruption to the ranch operations.

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13112. In electing to proceed with this routing, Trans Mountain clear cut the dense forest adjacent to the ranch operations which provided a tree forest screen for the cabins, and in doing so severed the water pipe which provided the ranch with glacier-fed water. This required the Shojis to have a well water -- well and water filtration system installed and left them without water for 11 months, including two operating seasons. As a result of this, they ultimately cancelled all reservations at the ranch in 2008.
13113. It should go without saying that these preconstruction issues caused significant economic strain as well as stress and hardship for the Shojis. The operation phases of the Anchor Loop project also continue to harm the Shojis and their business.
13114. To give just two examples, in June 2008, the Shojis experienced flooding at the ranch office, most likely as a result of the removal of the buffer of trees required for the installation of the pipeline.
13115. Later, in May 2012, a bank constructed by Trans Mountain to protect the rights-of-ways from flood breached, flooding into the ranch campground, and despite Masanobu Shoji requesting that Trans Mountain come immediately to repair the breach, Trans Mountain finally came three months later in August 2012. When they came, they removed some silt but left the campground in very poor repair, and since then the Shojis have been unable to qualify for a campground licence as the quality of the campground has significantly diminished.
13116. Today, the Shojis continue to suffer loss of business as the cancellations caused by the Anchor Loop pipeline preparation and installation resulted in a breakdown of their relationship with many tour outfitters.
13117. In addition, Trans Mountain workers continue to use the Shoji's private road to access the pipeline rights-of-way despite Trans Mountain promising that its contractors would stop using the road.
13118. In addition, the Shojis are experiencing significant increase in trespassing on their ranch property.
13119. These experiences demonstrate that this project will pose a significant risk of social and economic costs to landowners that the Shojis say are not outweighed by a project benefit. Ultimately, a project that serves the interests of a company at the expense of landowners and their businesses cannot meet the

Board's test of the public interest that I highlighted at the beginning of these submissions.

13120. Finally, I'd like to turn to the issue of the proposed conditions.
13121. As stated in the Shoji's written submissions, their position is that the project is not in public interest. And so their comments on the proposed conditions cannot be mean -- or cannot be taken to mean that the Shojis believe that with certain conditions a Certificate of Public Convenience and Necessity ought to be granted or recommended.
13122. Putting aside their position that the conditions do not tip the scale in the public interest, the conditions as drafted are inadequate to ensure Trans Mountain's transparent and respectful engagement with landowners, which we have highlighted is an issue for the Shojis in these submissions.
13123. For example, to be transparent the conditions requiring land -- regarding landowners must include an opportunity for landowners to comment and verify that the purported activities took place. As drafted, the conditions do not contain any consequence for Trans Mountain failing to meet its obligation under the condition.
13124. As drafted, the conditions regarding landowners only require recording and filing. And for example, see Exhibit A199-3, conditions 17 and 86.
13125. This is insufficient to ensure that Trans Mountain will meet its stated goals in its landowner relations program. Based on the grounds set out today and in the Shoji's written submissions, the Board should not recommend approval of the project as it not -- as it is not in the public interest.
13126. And subject to any questions, those are our submissions.
13127. **THE CHAIRMAN:** Thank you, Ms. Hincks. If you give us a few minutes, please.
- (A short pause/Courte pause)
13128. **THE CHAIRMAN:** Just a question, perhaps a clarification; throughout your experience, your lived experiences -- Mr. Leo Shoji said a common denom was the -- did you -- through your experience and your

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relationships with Trans Mountain, did -- were you aware of the Board's ability to have a landowner complaint from a -- from the -- to the Board on some of the issues if you felt -- as you have expressed quite well -- your concerns with relationships with Trans Mountain?

13129. **MR. LEO SHOJI:** If I could have a moment to explain it to my father?

13130. **THE CHAIRMAN:** Yeah.

13131. **MR. LEO SHOJI:** Yeah, thank you for the question. We weren't aware of the ability to make a complaint to the National Energy Board directly until several years after our engagement with land agents.

13132. Thank you.

13133. **THE CHAIRMAN:** Okay, thank you for that.

13134. And following up on your suggested proposed conditions requiring that they comment -- for landowners to comment and verify and purported activities took place, but the conditions do not contain any consequences for failing to meet its obligations under the condition.

13135. Do you have an example of what that -- you might see it would be a consequence and what the Board could consider and deal with in that regard?

13136. **MS. HINCKS:** You know, in the void of an actual circumstance it's a little bit difficult, but I think that, you know, Trans Mountain needs to follow through on their commitments. And so if they don't and landowners make a complaint, then Trans Mountain shouldn't be able to proceed with the activity that they intend to proceed with on that landowner's land until the matter is resolved.

13137. **THE CHAIRMAN:** Thank you.

13138. I would like to thank you, the Shojis, and especially the trouble you have gone through to be here today and we appreciate your involvement in this hearing. And with that we thank you.

13139. And we will take a 15-minute break and then we'll begin with the City of Burnaby; or we'll come back at quarter to 11:00, 10:45.

13140. Thank you.

--- Upon recessing at 10:33 a.m./L'audience est suspendue à 10h33

--- Upon resuming at 10:44 a.m./L'audience est reprise à 10h44

13141. **THE CHAIRMAN:** We will -- a very familiar face in front of us now, on behalf of the City of Burnaby, Mr. McDade.

13142. You have 40 minutes and I think you were here earlier, so you know our lighting system; green, it will go after 35 minutes and then we'll take it from there.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE CITY OF BURNABY:

13143. **MR. McDADE:** Thank you, Mr. Chair, and thank you, Members of the Panel.

13144. With me is Michelle Bradley on my left who is co-counsel, and on my right is Dipak Dattani who's the Deputy Director of Engineering for the City of Burnaby, and Lambert Chu who's the City Manager -- Deputy City Manager for the City of Burnaby.

13145. I speak on behalf of the City of Burnaby and its elected mayor and unanimous council. The mayor and city council are the elected representatives of a city of 230,000 individuals; 230,000 people are going to be impacted and are speaking to you here.

13146. Our mayor has been re-elected for five terms with substantial majorities. Burnaby council knows and understands its citizens. They know and represent the public interest of Burnaby.

13147. The Board and this Panel have not been elected of course by anyone. Members are appointed by a previous government, and therefore selected with the authority of less than 39 percent of the citizens of Canada.

13148. The Board is known for its energy expertise; you do not have the authority to speak on behalf of the public interest of Burnaby, nor the rest of metro Vancouver, nor British Columbia. Burnaby is clearly the most impacted

- community from this project. This Panel must respect the views of their democratic government in determining the public interest for Burnaby.
13149. The process followed by this Panel has shown remarkable disregard for the public and the public interest, if the public interest is broader than that of the oil industry and the oil market.
13150. Let us first address the elephant in the room. This process is broken. The concerns have been expressed by many intervenors: the lack of cross-examination; the failure to test evidence in public; the narrowness of scope; the denial of standing to so many citizens; the complete failure of the written information request process; the absence of any true public hearings; the composition of this Board -- of the Board and this Panel.
13151. Trans Mountain in their argument claims the NEB has been a respected institution in Canada. That may be true on energy regulation matters in regulating pipelines and oil companies. It is certainly no longer true in regulating the broader public interest or the environmental interest of the citizens of the West Coast.
13152. Until the amendments made by the Harper Government in 2012, major projects such as this were regulated by the environmental authorities. A major project like this would usually have required a joint panel. Recognizing that whilst the NEB had some authority or expertise over technical energy matters, it does not have broad environmental expertise or authority.
13153. By continuing here, the NEB risks losing public respect in this proceeding. You represent the oil industry and pipelines, not the environmental interests of Canadians. This will not get social licence. This NEB cannot grant social licence.
13154. The Prime Minister of our country has said, quite correctly, governments grant permits but only communities grant permission.
13155. Let me be clear, this pipeline does not have community permission, not from the community of Burnaby, nor from any of the Lower Mainland municipalities, nor from the public or the Government of British Columbia.
13156. The Prime Minister has also promised to fix this process. He recognized and spoke publicly about what he called the Harper Government

- politicization of the National Energy Board. Those aren't my words. Those are the words of the Prime Minister of Canada.
13157. His formal mandate letter to Minister Carr, your Minister, directs the Minister to modernize the NEB, to ensure that regional views are part of the decision-making process, are part of a panel like this, and to expand the Board's expertise in environmental, community, and indigenous matters. In other words, a different board, a different panel.
13158. So why are we here? Why are we here now if the Prime Minister is going to keep his promises and change the composition and modernize this process?
13159. If the new federal government recognizes the inadequacy of the process and the lack of legitimacy of the NEB and is going to make changes, how can approval now, by you, under the old process grant legitimacy to a pipeline that's going to be built in the future?
13160. More particularly, how can you force the citizens of Burnaby against their will to live with the everyday risks of this new pipeline, this mega tank farm, the increased risk of oil spills in their neighbourhoods and their waters, forever essentially, based on a process that everyone but the oil companies recognizes needs fixing?
13161. To approve this project now and then to look at a subsequent modernized and improved process is going -- is inexplicable. Burnaby should not be the last victim of a flawed process.
13162. This government needs to suspend the process while the changes are put in place. There's no alternative. If they won't do that, then you must recognize the professional integrity of the NEB is itself at stake.
13163. This is not about you as individuals, but as a matter of credibility you must find a way to suspend this process and not issue a report in May on a process that's going to be improved and modernized and changed. Such a report would inevitably and irreparably damage the credibility of what comes next, even if there are changes to the process.
13164. The City of Burnaby calls upon this Panel to suspend these hearings. We call upon this Panel to reset the process in a way that keeps faith with the

- public trust that the Prime Minister of Canada has claimed he has.
13165. Throughout this process this Panel has shown no interest and complete disregard for what we would say is the broader public interest beyond that of the Proponent. There was no cross-examination. There was no challenging of evidence in public. There were no difficult questions for Trans Mountain from the NEB. And there was no reasonable opportunity for the public to test evidence. Indeed, in the midst of this process the government of the day appointed a consultant to the Proponent to the Board causing further delays.
13166. Trans Mountain in their argument to you claims this was a rigorous process because there were 17,000 questions and 400 intervenors. They failed to note that most of those questions were never answered by them and that your Panel subsequently rejected 95 percent of the motions for better answers.
13167. They failed to note that you rejected two-thirds of the requested intervenors and have refused to hold hearings in public, including today.
13168. They failed to note that many intervenors who withdrew from the protest -- from the hearings out of protest because of its total unfairness.
13169. They failed to note that you set the scope of the hearings to exclude some of the key issues.
13170. And they failed to note that this Panel never considered routing options at all.
13171. You have consistently sided with Trans Mountain on almost every issue of substance. No matter -- no wonder that some intervenors have called this hearing a charade, a farce, and a sham.
13172. This is the first serious NEB hearing involving a major project ever to have denied cross-examination to test the evidence. This is the only NEB hearing I am aware of that has excluded the public from beginning to end and still claimed it was holding a public hearing.
13173. It is perhaps telling that this Board, in the tolling hearing for this project, where the interest of oil companies were actually at stake, did allow full cross-examination and the testing of evidence in public. Clearly those are interests that matter to the Board.

13174. It has become obvious that this Board is not capable of representing the public interest. Indeed, it hears -- it appears sometimes that you're here primarily to concern yourself with the interest of an American-owned pipeline company and the oil companies, mostly foreign owned, who desire to ship oil back to their own countries.
13175. As an aside, I pause to note Trans Mountain's oral argument where they began by calling this project fundamentally Canadian by arguably one of the most rapacious American companies around, an offspring to Enron for a number of foreign-owned shippers to send our critical strategic resource, oil, to other countries for their use. What irony and cheek it takes to have Kinder Morgan making such a claim.
13176. This project after two years has clearly failed to gain social licence. The number of actual municipal governments and other governments opposed; Burnaby, Vancouver, Victoria, North Vancouver, West Vancouver, Surrey and many more, and the regional government, Metro Vancouver, and the provincial government, British Columbia, these are the governments of the people who have rejected this project. This project has no social licence.
13177. Every level of government has made those decisions. How could you possibly justify putting your opinion about the public interest ahead of the elected governments of the millions of people most affected? The millions of people most affected.
13178. Your professional lives are from Northwest Territories, Saskatchewan, Nova Scotia.
13179. The Prime Minister is right to recognize that the composition of a panel designed to get social licence, the politicization of the NEB is not right and not sustainable. It must, as the Prime Minister has directed your minister, reflect regional views.
13180. Now, I want to move on to our second point.
13181. This process has failed to demonstrate that this pipeline is in the public interest. Even if a pipeline to the West Coast is in the -- was deemed necessary by you as in the national interest, it remains to be shown that the damage and risk of this pipeline is justified. Is this the right location in 2016 for a pipeline to the

West Coast? Any sensible planning process -- and I pause -- any sensible planning process, looking at significant risk, would ask that question. Is this the right location? Is this the best location? Is this the only location? Are there other locations to minimize risk?

13182. But it's also an obligation of law. Under CEAA -- which before the previous government's amendments of 2012 was handled by environmental experts -- under CEAA, the environmental assessment for the project must take into account, amongst other things, and I quote, section 19(g):

"...alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means."

13183. In other words, let us look at whether this is the best process, the best place whether they're ---

13184. The Board's own filing manual also requires consideration of alternate routes. In the Board's North Montney Decision, the Board stated, and again I quote:

"[Applicants are required to justify their projects to the Board] ...and [to] demonstrate that, taking into consideration all [technically and economically] viable alternatives available, the proposed project is the most appropriate option to meet the needs [that would be satisfied by the project] while serving the public interest."

13185. That's a sensible statement. "The most appropriate option".

13186. Trans Mountain has failed to produce any evidence to you of consideration of other possible options. This failure should be fatal to the application. It is not enough for them to come before you and say, well, we did look at two other options but they were more costly, but we're not going to produce any evidence about that and we're not going to produce any analysis of the feasibility about that.

13187. If the cost of Trans Mountain is your only consideration, even then you'd need evidence, but perhaps that statement would have some value. But this is not -- it should not be about the cost to the proponent; it should be about the

- best option.
13188. Trans Mountain has not chosen the right location at all or even attempted to justify it. They have simply argued, without evidence, that following the existing route is the least costly to them. When we asked IRs about that question, and other intervenors asked IRs about that question, they failed to produce any answers of substance and this Panel failed to require them to do that.
13189. They have said, in effect, that a decision made in 1950 for a small pipeline -- 150,000 barrels, I think, was the original size -- for the social purpose of serving refineries for the Lower Mainland, for serving local purposes, that that decision made 60-plus years ago, gives them a free pass today from any sensible planning approach.
13190. On that basis -- could I have the first exhibit on our list up, C69-44-2, if I might? This is an excerpt from the deputy fire chief's fire report. I hope you'll recognize it. This is an indication of the consequences of an accident.
13191. They have put forward, Trans Mountain to you, without any consideration of alternative locations whatsoever, a location on a completely unacceptable site, on a slope, too small for the expansion they need, too close to schools and neighbourhoods, at the intersection of the only evacuation route for Simon Fraser University.
13192. Who would pick that site today for that facility? No one, but because they had a pipe tank farm there, even though it's too small for the expanded matter, they put that before you. What evidence have they put of consideration of other alternatives, and more importantly, what have you -- what are you able to show the public, and the citizens of Burnaby, to show that you've given consideration to alternative sites that would not be so inappropriate? Perhaps that site was appropriate in 1950, under the circumstances then; it's not appropriate today.
13193. They put up -- forward a marine terminal that they're going to take down and rebuild three new docks, right next to neighbourhoods, on a watercourse used by many thousands of recreational users, at the back end of one of the most heavily used waterways on the West Coast, requiring transit by larger tankers under -- through both narrows, and under two bridges. Shipping of diluted bitumen through one of the most congested routes for shipping on the West Coast, and a land route through major metropolitan areas.

13194. What person today would say, I'm going to build a pipeline from Alberta to British Columbia and I think I'll take it right through the heart of the Lower Mainland and all these developed municipalities and through city centres and urban neighbourhoods? Through municipalities and under city streets, which -- and you heard from the City of Surrey yesterday -- which compromises future planning, which crowds existing utilities, which inhibits future development through city parks and conservation sites used and beloved by hundreds of thousands of people, and through and under people's backyards and laneways.
13195. In our written argument we've explained why this is possibly, or arguably, the worst possible location for a pipeline. What kind of a planning process would not look at other alternatives?
13196. In fact, we note that the Premier of Alberta has filed with you a carefully crafted argument that supports the evidence of economic need for a pipeline but says nothing about the location. Even the Premier of Alberta accepts that a better location would be a better idea. A pipeline, perhaps, but not this pipeline.
13197. The argument that this follows the existing route is something that Trans Mountain has actually said in writing and that the 1950s might have had social license at a time when the Lower Mainland and refineries and jobs wanted the oil, is not a reason at all for not examining alternatives; it's simply an excuse. Just because one smaller pipeline with a different product for a different purpose was justified 65 years ago does not mean that a new and very different project should or ought to be approved now.
13198. The absence of evidence on alternative options dooms this process, both as a matter of law -- in my submission -- but more as a matter of sensible planning. Even if a pipeline is in the national interest, it shouldn't be this one. It shouldn't be any surprise to anyone in this room that putting a pipeline through a major municipality, and in this case through six or seven of them, in 2016 is not -- is no go. It's a showstopper.
13199. To try and suggest that this pipeline is the best option, one would need some evidence of alternatives. There is no such evidence.
13200. In the absence of alternative analysis, any declaration of the public interest would have no credibility. This pipeline cannot be approved. And the

failure lies directly at the heart of the Proponent and their failure to put forward any reasonable alternative examination.

13201. Now a few words about the public interest, that term, which pretty much every argument that you -- has been filed refers to.
13202. The NEB case law says only that the public interest means, in effect, whatever the NEB says it does in any particular project. But in the NEB report released by your Chair on January 12th following a trip that actually involved dealing with members of the public, he's concluded that the public interest in respect of pipelines is evolving. That's the term directly out of that report, and that's correct.
13203. The public interest is no longer about the marketplace. It's no longer about what produces the most taxes. The public interest has evolved.
13204. And yet Trans Mountain proposes to justify this route and the terminal locations in Burnaby based on a public interest assessment that's 65 years old. By saying that they -- by calling this an expansion and by claiming they're following the existing route, even though that's not true in Burnaby, they are, in a sense, trying to ride on the assessment of 65 years ago.
13205. Trans Mountain's claims of benefits to the public interest, their evidence of the benefits available to Canada are largely money; taxes, profits. And they say to you that it's the marketplace that should determine the need for this pipeline.
13206. In fact, the Canadian Association Petroleum Producer's argument that's been filed before you actually says out loud in writing, opposition -- I'm quoting from their argument at page 13 -- sorry; page 19:

"...opposition to the Project based on socio economic cost benefit analysis should be rejected."

13207. Opposition to the project based on socio economic cost benefit analysis should be rejected. They call that a holdover of the command/control era rejected by the forces of market deregulation in 1985. They say that the approach taken by the NEB for the past several decades, which is to look at what the marketplace dictates in respective need, is to be determined.

13208. The Canadian Association of Petroleum Producers, the oil companies, say to you, “Don’t look at cost benefit analysis. Look only to the marketplace.”

13209. What kind of a world is that? And let me ask you whether the public interest has evolved beyond that.

13210. Now, CNRL and the other major shippers have also filed an argument before you. They go even further. They say to you, and I quote from paragraph 29 of their argument:

“It is not the role of the Board to act as the central planner of the Canadian oil transportation system. The Board can and should rely on competition and shipper choice to determine which new pipeline projects should proceed.”

13211. In the same paragraph they say the Board should not deny a project on the basis there might be other potential options.

13212. Sorry. Excuse me. They say that the NEB is not the planner of the system, that they have to rely on -- they have to defer to competition and shipper choice to determine which new pipeline projects proceed. Other options are irrelevant, they say. Let the market rule.

13213. Now I only have one word for that: Shame.

13214. They say this is consistent with many years of NEB decisions. These are the shippers, the lawyers for the shippers talking; consistent with many years of NEB decisions and CAPP and Trans Mountain agree. This isn’t me talking. It is the Proponents and the shippers who know the NEB well.

13215. The NEB has consistently ruled in favour of shippers and market need as being the primary test of the so-called public interest. No wonder the NEB is sorely out of step with the Canadian public. No wonder the Prime Minister recognizes a need to modernize the NEB and to get regional voices and environmental and community and Indigenous voices.

13216. The burdens are here from this pipeline. CAPP, in their argument, suggested we should ignore the lack of benefits to the Lower Mainland and the disparity that they’re taking the burdens. They trivialize -- and that’s the right word for this -- the concerns of Burnaby and its citizens by saying that:

“...pipelines...almost always lead...to someone or some locality bearing a burden without a perceived corresponding benefit.”

13217. That is a quote from their argument. They urge you to ignore that injustice.
13218. This is not a pipeline, I say, to bring oil to the Lower Mainland, to supply local industry, to bring us gasoline as the pipeline was in the 1950s. This is a pipeline solely for export. No benefits at all to B.C. but all the burdens and all the risks are borne here. And none to the rest of Canada.
13219. Where are the benefits? Well, they belong to a small group of shippers headquartered out of Calgary, most of them walking distance from your offices. If this is in the national public interest, where are the voices of the rest of Canada? Instead, the only ones in favour before you are the shippers, CAPP, and the Government of Alberta. Intervenors are overwhelmingly opposed.
13220. This is not a national issue at all. This is an oil company issue. This is about whether it is in the public interest to ride roughshod over all of British Columbia, to produce greater profits for a small handful of companies. And they say that it is enough that Canada will benefit from increased taxes, which themselves are a very small portion of their profits, and profits that they exist to take out of the country.
13221. I say again; where are the voices of the rest of Canada if this is so much in the national interest?
13222. A judge of the B.C. Supreme Court decided a case involving Enbridge last week. She said this about that project. It applies here.

“The proposed Project, while interprovincial, is not national and it disproportionately impacts the interests of British Columbians.”

13223. That’s the reality here.
13224. In these circumstances, the judge called it “unassailable”; that was the judge’s term, “unassailable” that provincial interests are substantially affected.

13225. Minister Carr's spokesman was reported in the media last week as saying, "This is a thorough science-based review."
13226. Let me make this suggestion to that observation: Nonsense. It is certainly not thorough. The thousands of questions that weren't answered. The unsatisfactory state of the evidence on risk and oil spills and emergency response outlined by many other intervenors. And it's not really a public review at all. Nothing has happened in public.
13227. If there is testing of the competing scientific evidence that various people have put before you, I don't know where it's happening. If it's happening with your advisors in backroom offices, it's not a review. It's certainly not a public review.
13228. But my major point is it's not science based. That claim is mere political pabulum for the masses. There is no science in the important questions before you here. This is not about how thick the pipe is or how many wells you should have. This is about enforcing (sic) risk -- or forcing risk involuntarily on an entire population.
13229. You're being asked to weigh the public interest and safety concerns of Burnaby and Lower Mainland residents against the economic interests of the oil companies in Alberta. You are claiming the right to decide how much risk is acceptable, whether oil spills in Burrard Inlet can be weighed against profits, whether the possibility of tank farm explosions and fires next to Burnaby schools and SFU, no matter how remote, is something they should bear for the public good, of the so-called national interest, but really it's about money.
13230. You're being asked to decide whether Lower Mainland municipalities or citizens should have to bear that burden. Now, that's not science. That is values. That's an important part of the process.
13231. You can't make a decision under section 52 without considering those questions. That's not science based, but somehow the interests of the Lower Mainland have been skipped.
13232. In the *Sumas 2* decision, one of the few decisions where the NEB actually turned down a project ---

13233. **THE CHAIRMAN:** Just note that you have five minutes remaining, Mr. McDade.

13234. **MR. McDADE:** I'm coming to the end. Thank you.

13235. The *Sumas 2* decision, which was a transmission -- an electricity transmission line, not an oil industry project and involved a joint panel which is what this project should have had, turned down a project on the basis -- and I quote from it in our written argument -- I won't quote here -- that where the benefits are not to the local populations and a local population is being asked to bear all of the burdens and local governments are opposed, the project could not proceed.

13236. But in *Sumas 2* the joint panel actually had meetings where the public could show up and express their concern over the project. They listened to the people who would be affected. People turned out in droves. The project was rejected.

13237. But how would you know what the public in British Columbia is thinking? With respect, the process followed by this Panel has made every effort to avoid any public contact whatsoever. You have designed a process where two years in you have never had a single meeting where the public could attend -- unprecedented, ridiculous.

13238. Imagine that a municipal council would pretend to hold a public hearing on rezoning but exclude the public from coming to it. What makes you think you can call your process a public hearing when you've avoided all contact? Yes, you are streaming these proceedings online, so maybe you can say the public knows what you're hearing, but you've avoided all contact with them. There's no chance of breathing the same air, no chance your deliberations might be soiled by actual people in the same room. And you call this a public hearing?

13239. The voices of Burnaby have been heard at public hearings. We have heard from endless numbers of citizens, real contact with real people. This is a public hearing. This is the voices of the people impacted. It's very unfortunate that you've not been able to hear those voices. Perhaps you're embarrassed by that. I don't know. But you know what they were going to say. Maybe that's why you've even closed these proceedings to the public, because of concern the public would come and actually express its opinions.

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13240. You must turn this project down. It is not in the public interest. You know it; I know it. The only question is whether you'll have the courage to do it. I wish you goodwill in your deliberations.

13241. And those are the submissions of the City of Burnaby. Thank you.

--- (Applause/Applaudissements)

13242. **THE CHAIRMAN:** The Panel will take a short break to consider if we have any questions of clarification from you, Mr. McDade. So we'll come back at 25 to 12:00. Thank you.

--- Upon recessing at 11:24 a.m./L'audience est suspendue à 11h24

--- Upon resuming at 11:35 a.m./L'audience est reprise à 11h35

13243. **THE CHAIRMAN:** Mr. McDade, we have heard your submissions on behalf of the City of Burnaby and the Panel has no questions.

13244. We will reconvene at 1:30 when we will hear from the Coldwater Indian Band, Mr. Andrew Weaver and the Stz'uminus First Nation. We're adjourned until 1:30.

--- Upon recessing at 11:36 a.m./L'audience est suspendue à 11h36

--- Upon resuming at 1:30 p.m./L'audience est reprise à 13h30

13245. **THE CHAIRMAN:** Good afternoon and welcome to this afternoon session in Burnaby, which is part of the National Energy Board's hearing regarding Trans Mountain's Expansion Project. We will continue to hear intervenor summary oral arguments.

13246. My name is David Hamilton; I am the Chair of the Panel. And with me, to my left, is Ms. Alison Scott and, to my right, Mr. Davies. And together we are the Panel assessing the Trans Mountain Expansion Project Application.

13247. I will just take a few minutes to remind you of security briefing. In case there's a -- you hear the hotel fire alarm, the procedure will be to exit the hearing room using the entrance that you came in.

13248. Once you are outside the hearing room, there are two evacuation

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- routes. The first is directly to your left when you exit the hearing room doors and the second is located beside the registration desk where some of you received your lanyard.
13249. Uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.
13250. Once outside the building, proceed to the hotel muster point located in the northwest corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure all your members of your party are accounted for and await further instructions from the Delta Burnaby representatives.
13251. As indicated in Procedural Direction 20, the Board has set time limits to hear oral summary argument. The time limit for intervenors is 40 minutes each. This time limit will be strictly enforced and they reflect that the intervenors have had the opportunity to file written argument in-chief prior to proceeding providing oral summary argument.
13252. There is a timer that will be indicating a green light for the first 35 minutes switching to yellow for the last five minutes of your speaking time. Finally, when your time is up, a red light will come on. If necessary, the microphones will be switched off, although I will warn you before this happens.
13253. Final argument, as a whole, is an opportunity to express your views and opinions about the project based on the evidence filed by Trans Mountain and intervenors on the hearing record.
13254. There is also the opportunity to make recommendations to the Board about matters within the list of issues or any terms and conditions to which the project should be subject if it is approved. The Board will not give any weight to new evidence introduced during oral summary argument or any submissions made that do not address the list of issues.
13255. With that, I think we are ready to start. And this afternoon we will be hearing from the Coldwater Indian Band, Mr. Andrew Weaver, and the Stz'uminus First Nation.
13256. And prior to hearing from Coldwater, I would just ask the

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representatives of Trans Mountain to introduce themselves for this afternoon's session.

13257. Thank you.

13258. **MS. OLENIUK:** Good afternoon, my name is Terri-Lee Oleniuk and I am legal counsel to Trans Mountain. With me, to my left, is Lesley Matthews, and she is the Regulatory Lead for the Trans Mountain Expansion Project.

13259. **THE CHAIRMAN:** Thank you.

13260. And we will hear from Ms. Hume, who is representing the Coldwater Indian Band, and you have 40 minutes to make your presentation. Thank you, Ms. Hume.

13261. **MS. HUME:** Thank you, Panel.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE
COLDWATER INDIAN BAND:**

13262. **MS. HUME:** As you said, my name is Emma Hume, counsel for the Coldwater Indian Band. I am going to follow closely portions of our written argument and will provide references to page numbers, if you happen to have that in front of you. If questions come up, please feel free to ask them as I go along.

13263. So today, Coldwater primary residential community is located on the Coldwater Indian Reserve No. 1 in the Coldwater Valley, which is located just north of the Kingsvale Pump Station on that map that's before you now.

13264. Nearly half of Coldwater's membership lives on reserve in the Coldwater Valley, just outside of Merritt. And this reserve, along with two others, was set aside for them in the late 1800s, after many of the best lands had already been alienated, and the reserve was set aside for agricultural purposes.

13265. Today, Coldwater members rely on traditional resources harvested throughout the Valley and greater Nlaka'pamux territory to sustain their culture and their way of life. They also rely on water sourced from an aquifer below their reserve for drinking water and other domestic needs, for agriculture, and for fire protection. This is the only known aquifer in the Coldwater Valley.

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13266. The reserve is home for our Coldwater members. After decades of development and alienation throughout the broader territory, many consider it to be the last thing they have. They will be there for generations to come. There is no plan to leave. And because of this, the ability to sustain themselves from the land and water is critical.
13267. I can't over-emphasize how important this place is to them and how important it is that they feel safe there and that they can drink the water source from below their reserve.
13268. In the 1950s, the existing pipeline was constructed directly through the community, so close to their homes that it would be an understatement to say that it runs through their backyards. They see it from their living rooms; they see it every day.
13269. The existing pipeline has leaked on the reserve on at least one occasion, and remediation continues more than a year after the leak was detected. There is a large hole in one member's backyard to this day.
13270. A hydrogeologist commissioned by the Band last year also found that polycyclic aromatic hydrocarbons, or PAHs, were in Coldwater's drinking water and has identified the existing pipeline as a potential source of these.
13271. Today, rather than build another pipeline directly through the community, Trans Mountain proposes to construct the project along the hill directly above the reserve. In effect, Trans Mountain has unilaterally declared that the pipeline right-of-way would be shifted from the reserve itself to a right-of-way along its boundary.
13272. As I will outline in further detail, this routing decision was made unilaterally without considering Coldwater's concerns or their interests. In particular, Trans Mountain has ignored and, indeed, in some cases disputed the legitimacy of Coldwater's concerns about the impacts and risks of the proposed routes.
13273. Coldwater's concerns include the risks and impacts posed by particular routes to their drinking water supply, stress and anxiety that would result from having a pipeline on the hill above their homes, impacts of the flow of water through the reserve, impacts on Coldwater's Aboriginal rights and interests, including burials and places of spiritual importance on the reserve. Some

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- members report that children and babies have been buried along the creeks and that the pipeline would disturb if it was built through the reserve.
13274. Importantly, Trans Mountain has unilaterally removed from consideration the one project route located across the Coldwater River and off of their reserve that does not pose any risk to Coldwater's drinking supply or threaten members' feelings of safety in their own homes. This route is called the "West Alternative Route," and the map that I understand has been passed out to you, that's the green route, the green line there, and I'll get into more detail on that in a moment.
13275. So this is the "West Alternative Route" and it was identified by Trans Mountain as a route early on but, as noted, was removed from consideration without notice or consultation with Coldwater.
13276. Because of the failure to consider or incorporate Coldwater's views and concerns into their routing analysis, neither during project scoping, application, nor through routing preferences last identified to the Board in July of 2015, the Board is not in a position to recommend approval of the proposed project.
13277. There are two primary reasons for this. First, there has been an inadequate assessment of project alternatives in the Coldwater Valley as required under CEAA 2012. Second, it would not be in the public interest to recommend approval of a project when Coldwater's interests, including their constitutionally protected rights, have been ignored.
13278. A complete re-examination of routing in the Coldwater Valley is required. This needs to be taken in direct engagement with Coldwater and is required before any recommendation can be made. The West Alternative is not necessarily the solution to Coldwater's concerns. But it may be a way to reduce impacts and risks of the project and it must be considered and fully assessed.
13279. In addition to Coldwater's concerns about project routing and impacts on their water supply, their drinking water supply, the proposed project threatens to have significant adverse effects on Coldwater's rights and interests, including Aboriginal title. Coldwater submits that the Board has a legal duty to assess the adequacy of the Crown's consultation to date and that that duty to consult must be fulfilled before making any recommendation with respect to the project.

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13280. The evidence is clear that the Crown's duty to consult Coldwater has not been discharged to date. In fact, consultation is scheduled to occur after the close of NEB hearings and once conditions have already been set by the Board.
13281. Because consultation remains outstanding, the Board cannot recommend approval of the project. Instead, it must recommend that no certificate of public convenience and necessity be issued for the proposed project.
13282. The remainder of my submissions today will touch on the following in turn. First, I'll provide a very brief background on Coldwater. Then I'll discuss project routing in the Coldwater Valley and potential impacts of the project, in particular risks posed to the project on Coldwater's water supply.
13283. I'm going to skim over a bunch of other impacts, particularly those related to other Aboriginal rights and interests, just in the interest of time, but those are all canvassed in our written submissions.
13284. And fourth, I'll outline why a complete re-examination of project routing is required and briefly touch on consultation to date with Coldwater, which again is covered in more detail in our written submissions.
13285. First to provide some background on Coldwater and I'll be starting at page 3 of our written argument.
13286. Coldwater is a member of the Nlaka'pamux Aboriginal nation, one of 15 bands that make up this nation. And the nation asserts and claims Aboriginal rights and title to an area that includes the Lower Thomson River, Fraser Canyon, Nicola Valley, Coldwater Valley and the Coquihalla area, along with a broader area that's discussed in our written argument.
13287. Coldwater has been in the region since before contact with the Europeans and once had a village at the confluence of the Coldwater Nicola Rivers. That's where they got their name. The village was called Coldwater.
13288. The best lands were alienated in this region, including the former side of their village. And so the Crown set aside a number of reserves for Coldwater, including Coldwater IR 1 for agricultural purpose in the late 1800s. And that's the reserve that you see in the map before you.
13289. Coldwater continues to have strong ties to the land. They practise the

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- seasonal round that sustains their way of life and their culture. And I urge you to read the preliminary ethnographic and historic overview and traditional land use study prepared on Coldwater by Richard Inglis. For your reference, that's Exhibit C78-10-4. And of course, review the transcripts of their oral evidence.
13290. In addition to the lands that sustain them, water is of course central to Coldwater's way of life. Everything depends on it. So too does Coldwater's continued ability to feel like they can live on their reserve.
13291. And this is when I'll turn to project routing in the Coldwater Valley, which starts at page 12 of our argument. And I'll ask that you please bring up Exhibit B5-27, which is a section of -- that's PDF page 17. And this is from Trans Mountain's application, section 4 of the ESA on routing.
13292. Here you will see a number of route alternatives and I'll discuss them each in turn. The first is the existing TMPL right-of-way, which is that orange line that runs through the reserve. It's pink on either side there. So it's that one right there, that orange line. That's the existing ---
13293. **THE CHAIRMAN:** Just, Ms. Hume, just for clarity, is that the same as what we have in front of us then?
13294. **MS. HUME:** Yes.
13295. **THE CHAIRMAN:** Thank you.
13296. **MS. HUME:** Then the next route is the modified alternative, which is this pink line. You'll see it runs right through the reserve. And then where the main residential community is, which is right here, it goes to the east just above the community and then cuts back to the existing right-of-way and exits the reserve.
13297. Then there is the east -- there's two east alternatives, one of which is Kinder Morgan -- or Trans Mountain's preferred route. And that is the blue and red line that comes up. The second it hits the boundary of the reserve it heads up the hill, goes along the hill, down and then connects back. You see there's two routing options there. There's that blue one or the red one that continues on further down and connects with the existing right-of-way.
13298. And I'll just note that this area here, kind of the darker shaded area,

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- that is the Coldwater Valley. So you can see that this blue and red line kind of cuts along the valley wall and is just above the community. And just for reference, that red line is the Coquihalla Highway. That -- the red and blue line would have to cross twice if it was constructed.
13299. And then finally, there's the green line. That's the west alternative line. So this is the routing option that Trans Mountain has identified and has subsequently taken off consideration. You'll see that it goes up the Coldwater Valley and then is up on that plateau kind of when it's across from the community and then cuts back down and connects to the existing right-of-way.
13300. You'll -- I'll also note that the -- I'm not sure you can see it very well but there's a black line here that this west alternative connects to and that's the Spectra right-of-way. So there's an existing right-of-way. This green route would result in .7 kilometers of Greenfield disturbance. This red and blue line would result in significantly more Greenfield disturbance. So that's just one consideration to note there.
13301. So this obviously is a page from Trans Mountain's application where they've identified all of these routing options. If I could ask that you turn to the next page just briefly; they have the four route alternatives set out and various stats on each route outlined. There's no reference in this document. As far as I can tell that the west alternative's not being considered. And Trans Mountain also wrote to Coldwater in 2013 identifying these routes as alternative options, including the west alternative.
13302. In March of 2015, after being informed by a consultant working on a traditional land use study for Coldwater that Trans Mountain had refused to provide digital shape files or information with respect to that green route, that west alternative, Coldwater contacted Trans Mountain. And they were told that the west alternative was determined early on not to be an option. This is how Coldwater learned that the west alternative had been unilaterally removed from consideration as a routing option.
13303. There'd been no previous correspondence that this route was no longer being considered. And Coldwater had gone out, hired a consultant to look at the routes. They were talking with the community about it and they also hired a hydrogeologist to assess each of the route options in terms of potential impacts on their groundwater, their water supply.

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13304. By a letter dated April 17th, 2015, Coldwater outlined their serious concerns that Trans Mountain's decision to remove the west alternative from consideration was done unilaterally without any input from Coldwater. Chief Lee Spahan wrote a letter to the -- to Kinder Morgan that their -- the Band's preliminary assessment of options suggested the west alternative may in fact be the preferred option on the basis of potential effects to our aquifer, our rights and our overall quality of life and sense of well-being. Coldwater requested an explanation from Trans Mountain as to why the west alternative is no longer an option.
13305. Our written submissions detail correspondence back and forth between Coldwater and Trans Mountain over the past year. But the bottom line is that the west alternative was unilaterally removed from consideration and hasn't been adequately considered -- explained to Coldwater why that has occurred, and despite the fact that Trans Mountain identified it as a routing option early on in their application.
13306. After being notified that the west alternative may be Coldwater's preferred option, Trans Mountain has not put it back into consideration. You'll note that in July of 2015 they identified to the Board that the east route -- and if I could ask that you turn back, flip back a page just so we have the map before us again.
13307. That blue and red line was their preferred option despite the fact that this may, in fact, be the worst route from Coldwater's perspective.
13308. The route Trans Mountain seeks Board approval of was selected without considering Coldwater's concerns and has not been revisited.
13309. I'll get into the inadequacies of Trans Mountain's routing analysis in a moment, but I just wanted to outline that history of that correspondence and the various routing options there before you now.
13310. I'll now turn to discuss potential impacts of the project and in particular the risks to Coldwater's water supply. As I mentioned, I'm going to skip over a bunch of the other concerns and impacts that the project would have just in the interest of time.
13311. I'd ask that you turn to Exhibit C78-10-5 and at PDF page 10.

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13312. This is a diagram from a report commissioned by the Band by B.C. Ground Water. The report's titled "Hydrologic Overview of the Area Surrounding the Proposed Kinder Morgan Pipeline Expansion" and I'll refer to it as the B.C. Ground Water report.
13313. This diagram here shows the aquifer in blue saturated -- that blue is the saturated area where the aquifer is. You'll see the red dot in the middle is the existing pipeline. And on either side of that pipeline are two wells. Those are the wells that the community gets 90 percent of their water from. There's a number of other private wells on the reserve but they don't touch the aquifer which supplies most of the water for the reserve and for the community.
13314. Further up you'll see the alternate pipeline. So that is the pink route on the routing map. And then further up the hill is the modified east alternative, which is the red and blue line on your -- on the map before you.
13315. This is the only known aquifer in the Coldwater Valley. And I'll note that it was not identified in Trans Mountain's routing analysis, their risk analysis, and the first evidence of this aquifer before the Board is this B.C. Ground Water report that was commissioned by Coldwater and filed with the Board in May.
13316. The aquifer is a result of a localized deposit of permeable sediments. It's unique in the Coldwater Valley. It's located in an embayment in the valley that was not scoured or appreciably altered during the last ice age due to its hanging position on the east valley flank. The aquifer is recharged primarily from surface water infiltration. So it's fed by water percolating down through the watershed.
13317. And you'll see there that white kind of speckled space just above the blue saturated material is that area where the water comes down and percolates down into the aquifer. So that's the active recharge zone. And you'll note that those two alternative pipeline routes are located directly in that permeable -- that recharge zone.
13318. I'll ask that you turn to the next page of that exhibit.
13319. So this shows the existing pipeline right-of-way in grey, the community's wells, and then it also shows that -- in red that's that -- the pink line, so the modified alternative, and then there the yellow one is the east alternative located up the hill.

13320. And you'll see here area of active surface water contribution to the aquifer. So that's where the water is actively flowing into the aquifer that then supplies these two wells that are right here next to the existing pipeline.
13321. If you could just turn back a page. Thank you.
13322. You'll note that the existing pipeline is located in sediment, a glacial fluvial deposit. And so based on the B.C. groundwater report the expert's opinion is that this provides some level of protection. If there were a leak or anything from the pipeline it would take longer for contaminants to reach the aquifer, whereas the other two alternative pipelines located -- pipeline routes located in the active recharge zone have a much more direct connection to the aquifer below the reserve. So if there was a leak it would reach the aquifer faster and could have a more severe impact on Coldwater's water supply.
13323. I also note that in B.C. Ground Water's report they discuss how there could be an accumulation of petrochemical traces because there isn't the flushing that's often found in some aquifers. This aquifer is contained so the water wouldn't be coming down and flushing through and diluting the contaminants. They could build up in this aquifer. So there's a particular risk there as well.
13324. So based on this report, B.C. Ground Water has provided their opinion -- their expert opinion that the only pipeline route that poses no risk to Coldwater's water supply is that green route that we showed you earlier. That's the west alternative route. It's located outside of the watershed that feeds this aquifer. And because of that there's no risk associated with it in terms of impacts on Coldwater's drinking water supply.
13325. The reply evidence that Trans Mountain has filed disputes the B.C. Ground Water report stating that there's no direct hydrologic connection between the aquifer and the creeks along the reaches where the two alternative pipeline routes are proposed on the east of the reserve. And so Trans Mountain expects that there's very limited opportunity for substantial aquifer risks.
13326. They haven't done any studies. They've just critiqued the expert report that Coldwater has provided. And I would note that our expert has extensive experience in the region. He's constructed wells. He knows the area very well. And Coldwater is very disappointed in Trans Mountain's rejection of his opinion.

13327. The mitigation measures that have been identified by Trans Mountain are inadequate to deal with these potential risks. First, avoidance has been taken off the table. The west alternative is not being considered despite Coldwater's concerns.
13328. And I'd ask that you turn back to that first exhibit, Exhibit B5-27, just so we have the map before us.
13329. Trans Mountain has also rejected the mitigation measures that Coldwater has proposed in the B.C. groundwater report. That report recommends developing a groundwater quality monitoring program. In response to one of Coldwater's information requests Trans Mountain has said it would not develop or implement a groundwater quality monitoring program until a leak had been detected. By then it may be too late.
13330. And I note that there has already been one leak on the reserve. There's no groundwater monitoring program in place. So I'm not sure what would happen with a second pipeline there.
13331. If a leak were to occur that would render Coldwater's water supply non-usable. Trans Mountain has said that it would re-establish or replace a potable water supply, but there's no alternative water supply that has been identified in the Coldwater Valley. And given Trans Mountain's disputed any responsibility for existing PAHs in their water supply this provides little comfort to Coldwater that Trans Mountain would take their concerns seriously if additional impacts were identified with their water supply.
13332. The Board's draft conditions, with all due respect, are also completely inadequate and do not even begin to address Coldwater's concerns. It's not even clear that they would apply to Coldwater's aquifer. Many conditions propose the development of plans but we do not know the content of these plans and therefore it cannot be concluded that they will be sufficient.
13333. With respect to Condition 63(d) -- that's the pipeline environmental protection plan -- this would include procedural -- it should include a procedure for protecting identified vulnerable aquifers. Vulnerable aquifers are determined based on aquifers mapped by the Minister of Environment, the B.C. Minister of Environment, and as I mentioned earlier, Coldwater -- or sorry -- Trans Mountain didn't identify the aquifer on Coldwater's reserve because it hadn't been mapped

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- by the Ministry of Environment. So based on my reading of Condition 63 it wouldn't apply to Coldwater's aquifer.
13334. Condition 81, consultation, protection for municipal water sources -- this requires that Trans Mountain file consultation reports with the Board on consultations with aboriginal groups related to the protection of municipal and community water sources.
13335. The reports required under the condition simply must outline the nature and the result of consultation. It doesn't stipulate whether mitigation measures must be put in place. It's not clear what constitutes a community water source and whether or not that would include Coldwater as aquifer in their drinking water.
13336. And furthermore, Trans Mountain has already rejected Coldwater's request to develop and implement a groundwater monitoring program for the reserve. This suggests that any further engagement will not result in any substantive protection for Coldwater's reserve, simply a requirement to talk. Coldwater and Trans Mountain have been talking and nothing has come of it.
13337. Finally, Condition 127, groundwater monitoring program, this requires that Trans Mountain put in place a monitoring program in relation to pump stations. There is a pump station located in the Coldwater Valley. I mentioned that earlier. It's the Kingsvale pump station.
13338. Coldwater does not know of any aquifer in that area, nor has Trans Mountain identified one. It's puzzling that a monitoring program is required for this pump station where it's not clear that anyone's relying on that water -- it may be but, we don't even know that there's an aquifer there -- but there's no monitoring program required for Coldwater IR-1.
13339. If this area had been monitored since the construction of the existing pipeline, we might have a clearer picture on whether or not the pipeline resulted in petro-chemical traces that are now in Coldwater's water supply.
13340. In the interests of time, I'm going to skip over the very serious concerns that Coldwater has about the proposed project and impacts it would have on their Aboriginal rights and title interests and the failure of Trans Mountain to even begin to assess those and the inadequacies of mitigation measures proposed, and I'm going to touch now on why a complete re-examination of project routing

is required.

13341. Under section 9 of CEAA 2012, the environmental assessment of the proposed project must consider alternative means of carrying out the project. The NEB filing manual states that Trans Mountain must, and I quote:

“Describe and justify the selection of the proposed route and site, including a comparison of options evaluated using appropriate selection criteria.”

13342. We also know that Aboriginal interests are of critical concern to the Board and should be incorporated into this routing analysis. For alternatives and routing to be properly considered, they must consider all environmental effects, including risk to groundwater, water, Aboriginal interests. Trans Mountain has not done this.
13343. If you could turn to page 18 of that -- the exhibit that was before us, the routing analysis. You'll see there that Trans Mountain has considered a number of factors. There's no mention of an aquifer. There's no mention of Coldwater's concerns. There's no mention of the burials that may be impacted by the various routes. Similarly, there's no discussion about the stress and anxiety that would be caused to community members if the pipeline was located on the hill above their community and there's also no mention of the fact that that pink route, the one that cuts through the reserve but avoids the backyards of folks -- and I'll get you to turn back a page.
13344. That route -- it may be located now on lands that aren't developed, but it -- Trans Mountain's routing analysis says nothing of Coldwater's plans for that area. It's directly adjacent to their community. They may want to build homes there and that would be precluded by this pipeline. This modified alternative route would essentially box Coldwater in and their development.
13345. On the other side, you see there the Coldwater River, that pink alternative would really hamstring Coldwater's development on their reserve, on their lands, on the one piece of land that many members consider to be their home after lands throughout the territory have been alienated.
13346. I recall one member speaking before you in October of 2014 saying, “What is this? Why do you want to ruin the last thing that we have left? This is our home.”

13347. I'd also note that the factors that Trans Mountain did consider in their routing analysis have not been adequately weighed. Notably, Trans Mountain emphasized the primary consideration in routing analysis is minimizing disturbance by following existing rights- of-ways.
13348. The west alternative, that green route, that would create the least amount of greenfield disturbance of all the routes identified by Trans Mountain in the Coldwater Valley, 0.7 kilometres of green field disturbance. Instead, Trans Mountain has identified the modified east alternative as its preferred route. This would result in 7.6 kilometres of greenfield disturbance.
13349. In Trans Mountains' argument they emphasize the importance of minimizing disturbance by using the existing right-of-way and their routing options don't even accord with that.
13350. Now, turning ever so briefly to the question of consultation, it's our submission that the Crown's duty to consult Coldwater must be discharged before any recommendation with respect to the project can be made. This recommendation that you are charged with making is a higher level strategic decision. The recommendation will include conditions that cannot be changed by the Crown and there's no chance for reconciliation between Coldwater's interests and Trans Mountain interests once the project route has been approved by the Board and conditions have been set.
13351. In this -- to date, the duty to consult has not been discharged. Consultation is planned to follow the close of the NEB hearings. The Crown and Coldwater have not engaged in direct discussions regarding routing and NRCan's evidence that they filed clearly demonstrates the lack of understanding about Coldwater's concerns. At most, the process to date has been limited to the exchange of information and even that has been deficient, as is outlined in our written argument and as I expect will be outlined by numerous other intervenors that will be appearing before you and have already appeared before you.
13352. Routing is also relevant to the question of consultation. Coldwater must be engaged early before irrevocable decisions have been made. Moving the right-of-way from the reserve to the boundary without consideration of Coldwater's interests is not consultation. Courts have clearly found that.
13353. Approval of any route, particularly the preferred route, that red and

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blue line, would give the project unacceptable momentum and would preclude the development of appropriate conditions on any of the routes that are recommended for approval if any of those are recommended.

13354. In conclusion, Coldwater submits that the Board decline to recommend to issue a Certificate of Public Convenience and Necessity and recommend that no Certificate of Public Convenience and Necessity be issued until the Crown has discharged its duty to consult and accommodate Coldwater, and this has not happened yet.

13355. Happy to answer any questions that you may have. Those are my submissions.

13356. **THE CHAIRMAN:** Thank you Ms. Hume. Give us a moment.

--- (A short pause/Courte pause)

13357. **THE CHAIRMAN:** Actually, one of our Panel Members is hard of hearing as well, so I think we will take a 10-minute recess so we can all discuss whether we have some questions or not. Thank you, Ms. Hume. We'll come back at 20 after 2:00. Thank you.

--- Upon recessing at 2:09 p.m./L'audience est suspendue à 14h09

--- Upon resuming at 2:20 p.m./L'audience est reprise à 14h20

13358. **THE CHAIRMAN:** Thank you for your indulgence, Ms. Hume. Perhaps the Board has maybe a couple of questions for you. I think Mr. Davies is going to go first.

13359. **MEMBER DAVIES:** I wanted to follow up on the question of the west alternative. And procedurally one of the alternatives that -- one of the procedural alternatives that could be available -- and I'd like your thought on it -- would be for the Coldwater Indian Band to take its concerns into a detailed route hearing process. Do you have thoughts on that that you could share with us?

13360. **MS. HUME:** Yes, thank you. Coldwater doesn't think that a detailed route hearing would be sufficient; there's a number a reasons for that. I think the first reason is that it wouldn't involve a full assessment of the various impacts including the environmental impacts, the impacts on health, on Coldwater's interests and rights that's contemplated under CEAA 2012. And I think it's

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required before recommendation is made with respect to the project.

13361. It also precludes the possibility that none of the routes are acceptable or in the public interest. If the Board did find that one of the routes was in the public interest and a certificate was recommended, if the route was chosen after a detailed route hearing, project conditions would have already been set and would not speak to the particular route that had been identified. And appropriate accommodation and mitigation measures can only be developed if the route is known, if the impacts have been fully assessed, which they have not been.

13362. And further, it's Coldwater's submission that any conditions or mitigation measures must be enforceable and that those would be put in place through conditions recommended by the Board.

13363. And finally, waiting for a route hearing after a recommendation had already been made, and after potentially a decision by a Governor in Council had been made, would give the project significant momentum contrary to a lot of consultation that such discussions occur after, you know, the project's effectively been approved.

13364. And I would also note that, you know, on a practical level Coldwater has incurred significant costs in participating in this proceeding. You know, further route hearings and these sorts of things would require them to expend further resources that they don't have. This needs to be dealt with now; it can't wait.

13365. Thanks.

13366. **MEMBER DAVIES:** Well, I had some possible follow-up questions, but I think you've taken them all off the table. So thank you for a very comprehensive response.

13367. Thank you.

13368. **THE CHAIRMAN:** Thank you, Ms. Hume. With that, we thank you for your presentation today and on behalf of the Coldwater Indian Band.

13369. And we will now take a short five-minute recess and then we'll hear from Mr. Andrew Weaver.

--- Upon recessing at 2:23 p.m./L'audience est suspendue à 14h23

--- Upon resuming at 2:29 p.m./L'audience est reprise à 14h29

13370. **THE CHAIRMAN:** Good afternoon, Mr. Weaver, and welcome. And I think as you heard earlier, the Board is interested in hearing your presentation and your oral summary argument, and you have 40 minutes to make your presentation. And if you would allow us, if we have questions, we may intervene if that's acceptable to you, or we may wait until the end depending on where we go.

13371. **DR. WEAVER:** I would like it for you to intervene on the condition that you don't take from my 40 minutes.

13372. **THE CHAIRMAN:** No, we stop the clock, Mr. Weaver, so ---

13373. **DR. WEAVER:** Okay.

13374. **THE CHAIRMAN:** --- just like in the House, we do have a timer as well.

13375. **DR. WEAVER:** Right.

13376. **THE CHAIRMAN:** With that, please proceed.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR DR. ANDREW WEAVER:

13377. **DR. WEAVER:** Thank you. I'd like to begin by thanking the Board for allotting me the time to present my oral summary argument. And I've laid out the full scope of my position, including supporting evidence in the final written argument. And my oral summary argument will highlight my main concerns and provide my overarching rationale for why I believe this project should not proceed.

13378. Please let me begin by offering some information about my background and focus as it pertains to this hearing process so I can give you some context. I sought intervention status, both as a member of the legislative assembly of British Columbia and as a scientist with a doctorate in applied mathematics and with a specialty in physical oceanography, atmospheric and

- climate science.
13379. As an MLA I was first elected in May 2013 to represent the constituency of Oak Bay-Gordon Head, which is located along the Trans Mountain tanker sailing route on the southeastern tip of Vancouver Island. Given my representative function I sought to focus on and give voice to the concerns of my constituents as they pertain to this project. And I believe this is particularly important given that I am the only B.C. MLA with intervenor status in this hearing process.
13380. Now, as a scientist I served as -- and continue to serve as in this capacity -- Lansdowne Professor and I was a Canada Research Chair in climate modeling and analysis in the School of Earth and Ocean Sciences at the University of Victoria where I worked for over 20 years.
13381. I've been involved as a lead author on the UN Intergovernmental Panel on Climate Change's 2nd, 3rd, 4th and 5th scientific assessments, and have authored and co-authored over 200 peer-reviewed, scientific papers in a variety of fields relevant to this submission.
13382. I'm a Fellow of the Royal Society of Canada, the Canadian Meteorological and Oceanographic Society, the American Meteorological Society, the American Geophysical Union and the American Association for the Advancement of Science. Throughout this process, I've applied my scientific expertise particularly in physical oceanography and modeling to evaluate the evidence provided in this application.
13383. So given my constituency and background, I've chosen to focus particularly on the risks associated with marine oil spills. And my argument will therefore focus primarily on the following three areas within the issues.
13384. The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed project, including the potential effects of accidents or malfunctions that may occur. Contingency planning for spills, accidents or malfunctions during construction and operation of the project. Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.
13385. I'll present my argument in five parts. First, I'll discuss the significant

shortfalls inherent in TERMPOL 3.15, General Risk Analysis and Intended Methods of Reducing Risk, and outline how the proponent have failed to adequately address or represent the degree of risk associated with the Project.

13386. Second, I'll present an analysis and evaluation of the scientific studies presented by the proponent with regard to the fate and behaviour of diluted bitumen in a marine environment, arguing that Trans Mountain has failed to adequately support its assumption used throughout its submission that diluted bitumen will remain positively buoyant in the event of a spill.

13387. Third, I will discuss the deficiencies inherent in the existing and proposed spill response measures.

13388. Fourth, I will offer an assessment of the human health risk assessment, of note that HHRA in subsequent discussion, provided by the proponent, arguing that it does not adequately portray the potential health effects that may occur in the event of an oil spill.

13389. And finally, I will apply these and other points to demonstrate that the proponent has neglected to represent the full scope of effects the project could have on local communities such as the riding I represent, Oak Bay-Gordon Head.

13390. So throughout these five parts I'll argue the following: first, Trans Mountain has failed to adequately and accurately represent the full scope of risks and negative effects an oil tanker spill would present to human health, the environment and coastal communities; second, Trans Mountain has failed to represent a clear and satisfactory ability to respond to an oil spill in a manner that would sufficiently mitigate the negative effects as well as adequately contain and recover the spilled oil.

13391. As a result, Trans Mountain has failed to demonstrate it and its partner organizations have adequately understood, and have the capacity to sufficiently mitigate, the serious risks posed by the Trans Mountain expansion project to justify a complete application or a positive recommendation to the Governor in Council.

13392. For these reasons, as I detailed in the rest of my submission, I submit to the Board that they should conclude that the application is incomplete, should -- and should therefore decline to forward a recommendation to the GIC. In the alternative, I submit that the Board must recommend to the GIC that the

application be dismissed.

13393. Due to the various substantive deficiencies with Trans Mountain's application set out in my formal written submission earlier, I submit that these are the only courses of action open to the Board. And for this reason, I have made no submissions as to potential conditions that the Board could impose, as no such conditions could sufficiently remedy the serious flaws inherent in Trans Mountain's application.
13394. Please let me start also with some procedural concerns before I move to the core of my final argument. I'd like to say a few words about the hearing process itself.
13395. As the only B.C. MLA participating as an intervenor in these hearings, I felt it was my duty and my responsibility to continue with the process to the end. Had I withdrawn from the hearing process, as so many others have, British Columbians would not have had a single provincially elected representative who could represent them as a full participant in this process.
13396. I consider this particularly important, given that numerous British Columbians have argued that they were actively excluded from participating in this review. That said, it's been made clear to me for quite some time from others, as well as my own participation, that this process is neither fair nor objective.
13397. The Board's decision to consider upstream and downstream economic issues while excluding upstream and downstream environmental issues is in my view both inconsistent and biased towards the Proponent. Environmental and economic effects are intimately linked and cannot arbitrarily be separated from each other.
13398. The Board's decision to remove oral cross-examination from the hearing process seriously undermines the intervenors' ability to test Trans Mountain's evidence. That intervenors had to challenge thousands of Trans Mountain's information request responses is shocking. That the Board only ruled in favour of the intervenors fewer than 5 percent of the time is truly disappointing.
13399. The Board plays a critical role in ensuring that intervenors are supported to scrutinize the Proponent. Yet the manner in which this hearing process has been conducted has seriously undermined my ability to get sufficient

- answers to my questions.
13400. I hope that at the very least the Board will agree that the burden of proof lies with Trans Mountain and that the company's failure to provide adequate answers to thousands of information requests in turn constitutes a failure to meet that burden of proof.
13401. I fear that this hearing process is more about ticking boxes than truly reviewing the merits of the Proponent's application. I worry that the Board has decided long ago that the Trans Mountain Expansion Project would be approved, regardless of what happened at these hearings.
13402. Should that be the case, then I'm confident that both the Board and the Proponent will be hearing further from British Columbians, for it is clear that even if Trans Mountain has succeeded in getting the Board's support, it has failed miserably in earning the support and the respect of the citizens of this province.
13403. I hope that I am wrong. I hope that the Board listens to the intervenors. I hope the outcome of this hearing process was not decided months ago, as it would seem.
13404. So I submit the following oral summary argument in the hope that the points I'm about to make truly will be considered, for they paint a picture of a project that simply cannot be approved.
13405. Let me start with the probability of a tanker-based oil spill.
13406. As part of the application, Trans Mountain was required to assess the relative additional risks the project would pose in a tanker sailing route. Trans Mountain made its case, as summarized in Section 5.2 and 5.3 of Volume 8A, based primarily on two reports; TERMPOL 3.8, "Casualty Data Survey," and TERMPOL 3.15, "General Risk Analysis and Intended Methods of Reducing Risk."
13407. Together, these reports form the basis of Trans Mountain's case regarding the degree of risk posed by the project. I address the "Casualty Data Survey" in detail in my final written argument but here I will focus on TERMPOL 3.15, as it will be outlined below.
13408. The Board has no credible way of assessing the validity of TERMPOL

- 3.15 and hence should give it no weight in its consideration.
13409. Through TERMPOL 3.15, Trans Mountain set out to build the case that the additional risk posed by and relating to the project oil tankers could be successfully mitigated by additional risk reduction measures, namely the extended escort tug and the moving exclusion zone.
13410. In building their case, they attempted to estimate the base risk posed by current marine traffic, the additional risk posed by the project tankers, and the extent to which the risk reduction measures could help mitigate that additional risk.
13411. According to the analysis, the return period for a spill of any size is 309 years at present conditions. With the implementation of the Trans Mountain Expansion Project, the return period dropped to 46 years. However, with the addition of the extended escort tug and the moving exclusion zone, DNV calculates that the return period will increase to 237 years.
13412. The accuracy of these estimates depends predominantly on the extent to which the model, known as MARCS, accurately represents real-world conditions in the marine study area. The first question one must ask is therefore this: Have the baseline parameters of MARCS and the risk reduction factors been validated for the marine study area? Has a sensitivity analysis been conducted on the overall model and on each risk reduction factor? How is the model being calibrated to avoid tuning to get the result that you want as opposed to actually letting the result emerge so as to ensure its particular abilities?
13413. These are absolutely critical, essential ways of -- there are two, rather, essential ways of answering these questions.
13414. The first is to have the model made available to participants in the hearing process so that they may conduct independent analyses of its representative and predictive abilities. But, unfortunately, MARCS is proprietary and hence access to the model has been denied.
13415. The other is to provide the information necessary to answer these questions in the absence of access to the model. At a minimum, one would never -- one would need any backup, peer reviewed, and independent evaluations of the model. DNV references several backup studies but none were provided on record.

13416. Moreover, one would also need the actual validation and sensitivity analyses that were conducted for the overall model and for the individual risk reduction factors. Unfortunately, Trans Mountain has not provided this information.
13417. At the end of the hearing process, here is where the information stands. One, the general discussions of the sensitivity and validation of MARCS provided in Section 11 of TERMPOL 3.15 remain entirely insufficient and do not provide the information necessary to adequately evaluate the accuracy of the model.
13418. Two, we know the basic parameters of MARCS are based on North Sea average shipping operations in the mid- to late-1990s. Yet, no information has been provided as to how the model has been calibrated for current and local conditions along the Trans Mountain sailing route; quite different from the North Sea in the 1990s.
13419. We therefore have no way of knowing if the basic fundamental parameters of MARCS are truly representative of local conditions for the purposes of this project. Not a single validation or sensitivity analysis was provided for any of the risk reduction factors applied to MARCS. We therefore have absolutely no confidence that those factors have been applied accurately and that they represent -- truly represent real world conditions along the tanker sailing route.
13420. The fact that MARCS may have successfully represented past cases is not sufficient evidence to conclude that the MARCS can accurately represent future cases, including the Trans Mountain Expansion Project. This is because one can tune over various errors and inconsistencies in the model to achieve the desired result when run in hindcast mode without actually ever addressing these errors. Trans Mountain has failed to provide sufficient information to discount tuning as a realistic and reasonable possibility.
13421. As such, one still cannot have any confidence in the predictive abilities of MARCS.
13422. In the absence of this information, one simply cannot properly evaluate the representative or predictive nature of MARCS as it pertains to the risk analysis conducted for the project. And without this ability one has no way of knowing if the results of the MARCS analysis are accurate or not.

13423. And given the serious impact that a spill could have on the region, it would be irresponsible, in my view, to accept the assertions provided in Trans Mountain's application in the absence of -- as evidence.
13424. It is for this reason that I argue that the risk analysis provided in TERMPOL 3.15 should not be given any weight in the Board's consideration and final decision. Lacking a credible and substantiated risk analysis, I submit that Trans Mountain's application is incomplete.
13425. To the fate and behaviour of diluted bitumen in marine environments. Now, Trans Mountain based their entire analysis of the fate and behaviour of diluted bitumen -- I'm going to call it "dilbit" -- in the marine environment on the faulty assumption that dilbit floats.
13426. Published evidence, together with the federal government's study and an Environment Canada presentation to the Royal Society of Canada's Expert Panel entitled, "The Behaviour and Environmental Impacts of Crude Oil Released into Aqueous Environments," all of which are submitted as evidence to the NEB, they clearly conclude otherwise.
13427. Unlike other crude oils, dilbit can sink in the presence of suspended particulate matter, for example, sediment particles in the ocean. Suspended particulate matter, of course, is very common in B.C.'s coastal waters meaning that any dilbit spill would likely lead to submerged oil. And of course you just have to fly over the Fraser River to see the presence of submerged -- rather, suspended particulate matter in our waters.
13428. Currently, there is no ability to effectively clean up oil that sinks below the surface, making dilbit a particularly risky substance to transport.
13429. The Proponent has based the assessment of the fate and behaviour of diluted bitumen in the marine environment on two submissions. The first contained a comparison of the properties of diluted bitumen with other oils. And the second commissioned report, referred to as the Gainford Study, undertook tank experiments using saline water typical of the Burrard Inlet that did not include suspended sediments.
13430. There's strong evidence that dilbit could sink in seawater containing sufficient suspended sediments, of which there are no shortage in our coastal

- waters. The Salish Sea receives year-round sediment laden freshwater from the Fraser River. And the tank experiments conducted in A4H9A1 where sediments were accounted for noted the following: High energy wave action mixed the sediments with diluted bitumen causing the mixture to sink or be dispersed as floating tar balls.
13431. Similarly, the Environment Canada presentation to the RSC expert panel noted that in the presence of fine- to medium-suspended sediments with fresh to moderate weathering, a large part of the oil sinks as fine oil particles, as is the case or as was the case of when what -- when the spill occurred in Kalamazoo in the United States.
13432. So it's clear that unless required to do so, Trans Mountain has no intention of conducting additional tank and/or fielding studies to explore the fate and behaviour of diluted bitumen in the coastal environment where sediments are present in the water column.
13433. Until such time as these studies are available, it's simply not possible to properly assess the risk and potential damages associated with a diluted bitumen spill in the Salish Sea. And I submit that in light of the glaring gap in scientific understanding, that it would be reckless to approve the Trans Mountain project at this time.
13434. Furthermore, two subsequent independent expert assessments validate my assertion by making it abundantly clear that we simply do not know enough to properly assess the risk and potential damages associated with a diluted bitumen spill in the Salish Sea. The two expert assessments of course are the Royal Society Expert Panel Report entitled, "The Behaviour and Environmental Impact of Crude Oil Released in Acquiesce Environments," and the U.S. National Academy of Sciences report entitled, "Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects and Response."
13435. In fact, given that diluted bitumen is already being loaded onto tankers at the Burnaby facility, it behooves, frankly, the National Energy Board to recommend an immediate moratorium on any diluted bitumen shipments until such time as a scientific understanding is improved as to the fate and behaviour of diluted bitumen in our marine environment.
13436. Now to the ocean modelling analysis. The Proponent has conducted a number of ocean model simulations using the proprietary H3D model. As also

noted by intervenor Dr. David Farmer, who will be here tomorrow, also a fellow of the Royal Society of Canada and a fellow of the Royal Society of London, who has extensive expertise in ocean physics and in small-scale ocean mixing processes such as tidal fronts, vortex sheet tilting, breaking internal waves and whirlpools, he'll show that these have a -- play a key role in mixing and subduction in the Strait of Juan de Fuca. And many of these mixing processes -- many of these complex mixing processes are non-hydrostatic. So as such, the use of a hydrostatic model is simply not appropriate in the present context.

13437. I also posed numerous questions and -- with respect to the validation of H3D in the process. The Proponent argued several times, and I quote:

“The primary validation of an [ocean model --] oceanographic model concerns...reproduction of observed tidal heights.”

13438. This statement is just, frankly, fundamentally incorrect. It's wrong; there's no two ways about it. Tidal heights are very simple to predict and you do not need a 3D model to actually do that.

13439. They're easy to reproduce with much simpler models than H3D. For ocean model validation, an assessment is required of the three-dimensional velocity field, temperature, and salinity fields. And in the case of oil spill modelling, it's critical to evaluate the three-dimensional current fields.

13440. The Proponent discussed only one form of current evaluation -- and I'm not making this up; I could not believe it -- in the original submission. Bob Lord fell in the water on June -- July the 25th, 1993. And as I read this, you'll see that I -- you couldn't make this up. And his drift was subsequently simulated. So a fellow fell off a B.C. ferry and he drifted in the ocean.

13441. In my more than three decades of ocean and climate modelling research, I've never before heard of a person falling out of a ship as being used as a data point for model validation, and one of the only components of model validation submitted in this process.

13442. While evidence exists to suggest the model does a reasonable job capturing the magnitude of the long channel flow, the model clearly did not capture the across channel flow. But it is precisely this across channel flow that is critical in assessing where oil ends up if a spill occurs.

13443. In addition, no evaluation of vertical flow was provided, and frankly, it could not be provided because the model is a hydrostatic model in highly turbulent coastal waters. This information is critical if one wants to assess the adequacy of the model in capturing the mixing and subduction process mentioned above.

13444. And given that the model is hydrostatic, there will be no vertical acceleration. As a result, the vertical velocity field, and subsequently any vertical evection of tracers or oil, will almost certainly be unrealistic, leading one to question the suitability of H3D for this application in light of the complex oceanography of the region and the unique properties of diluted bitumen.

13445. It is therefore my expert opinion that the proprietary ocean model that has been used to predict the fate and behaviour of a potential dilbit spill in the Salish Sea is not the appropriate tool to address the questions being asked.

13446. Now to the proposed and existing oil spill response and recovery capacity, where some rather more enlightening assumptions are revealed.

13447. Western Canada Marine Response Corporation's Future Oil Spill Response Approach Plan outlines WCMRC and the Trans Mountain's proposal for enhancing existing oil spill response capacity in the event that the project is approved.

13448. While the proposed enhancements would certainly constitute a significant improvement, I argue that even with those enhancements, insufficient capacity will exist to adequately respond to a dilbit spill.

13449. There are three primary reasons for this:

13450. One, as previously noted, dilbit can sink or submerge in the presence of suspended particulate matter, which is common in the marine study area. Based on the information provided, it's clear that WCMRC currently does not, and under the proposed enhancement still would not, have any capacity to recover submerged or sunken oils.

13451. Under proposed enhancements number two, WCMRC would have to rely on cascading equipment in from other jurisdictions to respond to a spill larger than 20,000 tons. Yet the Proponent has failed to adequately outline the scope, ability, and potential complications associated with cascading in the additional

- equipment. One therefore has no way of evaluating whether this is an effective approach or not, yet it is clear from Trans Mountain's descriptions that it is a highly uncertain process.
13452. And three, even a 20,000 ton response capacity does not imply the ability to recover all 20,000 tons of spilled oil. Recovery rates on average are only about 5 to 15 percent, which I would argue is too low to demonstrate sufficient ability to mitigate the risks of this project.
13453. Arachne Reef Oil Spill Response Simulation Study is an important study that was submitted as evidence. Let me please explain.
13454. The simulated spill scenario that was provided by EBA and WCMRC at Arachne Reef to demonstrate the effectiveness of the proposed spill response enhancements can only be seen as an utterly, completely unrealistic scenario. Please let me explain.
13455. I submit that collectively the assumptions applied to this simulation are not adequately representative of conditions that response crews will likely encounter in the event of a spill along the Trans Mountain tanker sailing route. The representativeness of a scenario's assumptions influences the accuracy and the results as evaluative or representative outputs. By not supplying sufficiently representative assumptions to the simulation, the authors were able to derive better than average results that would likely not be representative of real world conditions.
13456. These assumptions include the following:
13457. The enhanced spill response regime would be available despite the fact that the enhancements are still only a proposal, and without providing a comparable baseline simulation, applying only existing capacity.
13458. Two, no oil would sink or submerge, therefore allowing the response to be unimpeded by the fact that WCMRC has no current or proposed capacity to recover sunken or submerged oil.
13459. And three -- and this is another one that you simply can't make up -- 20 hours of daylight would be -- was assumed to be present to facilitate the spill response, despite the fact that to find any day at any time of the year in August, one would have to be around the same latitude as Tuktoyaktuk in the Arctic

- Ocean for such 20 hours. So to be perfectly blunt, we should be looking at the modelling of a spill in the Vancouver area, not Tuktoyaktuk. The assumptions of no wind, calm conditions with daylight available in Tuktoyaktuk hardly leaves one to have any confidence in the ability of this simulation to do anything more than tick a box and say we did something.
13460. No adverse weather conditions, as I mentioned, occurred to prevent or complicate response efforts. It was another assumption.
13461. I don't know whether you've been in a ship on the coast of British Columbia lately but we have a lot of windy and wavy days. The fact that 30 to 60 percent of the time wind and wave conditions along the tanker route would make recovery efforts difficult, difficult if not impossible, was not taken into account.
13462. No toxic or explosive hazards were present. We have an oil spill and we have no toxic or explosive hazards present; that's kind of idealized.
13463. There was no need to cascade equipment in to support recovery efforts, and hence no need to factor in resulting delays or complications.
13464. You can't make this stuff up. This was nothing more than a box ticking exercise. And frankly in and of itself should be reason to dismiss this entire application. It was not a serious submission. And when attempts to receive additional information were made answers were stymied.
13465. As noted by the WCMRC and EBA the speed of containment of a spill is a significant determinant of success of recovery efforts. Should wind and wave conditions be present the responder approach time or equipment availability prevent recovery -- excuse me -- I read that too fast. Should wind and wave conditions, responder approach time or equipment availability prevent recovery efforts for hours or even days it would significantly impede containment efforts and therefore recovery rates. None of these complications were simulated in the Trans Mountain application.
13466. So while individually each of these assumptions could be argued to represent a so-called realistic condition, collectively they paint an under-representatively ideal scenario from a spill response standpoint.
13467. In contrast, in the United States vessels must be certified as having sufficient spill response resources assuming complications by adverse weather.

13468. Recognizing that no single scenario will fully represent the range of conditions experienced along the tanker sailing route, Trans Mountain could have included an additional scenario representing conservative assumptions from a spill response standpoint.
13469. Since Trans Mountain has denied a request that it provide such a scenario one does not have sufficient information to judge the range of recovery rates that may occur throughout the year under different conditions. One is therefore unable to make a comprehensive judgment based on the information provided by Trans Mountain as to the effectiveness of current or proposed spill response capacity except to derive from the success rate -- that the success rate would likely be substantially lower than the result -- than that resulting in the Arachne Reef scenario.
13470. Finally, Trans Mountain's refusal to provide any analyses and simulations assuming a total loss spill scenario could be interpreted as an unwillingness to consider the full scope of risk associated with the project. It must also be seen as a failure to meet the basic requirements of demonstrating that Trans Mountain and its partner organizations have the capacity to mitigate the full scope of risk the project would create.
13471. Now to the human health risk assessment of facility and marine spill scenario technical report. My office and I, with no help from others, divvied up the task of analyzing this report, all 15,000 pages of it. In this section we also found other concerns. My office did a review of the human health risk assessment of facility and marine spill scenario technical report for the Trans Mountain expansion project and these filings outline the potential human health effects associated with the number of simulated marine and facility oil spill scenarios.
13472. These tests were conducted in order to provide a "more detailed analysis of the potential health effects that might occur in relation to each of the simulated oil spill scenarios than the earlier qualitative assessments in order to further enhance awareness and understanding of the nature and extent of such effects."
13473. Looking through the HHRA it became clear that the lack of understanding of how heavy oil will behave in water and the subsequent lack of modeling of a heavy oil spill affected the conclusions reached in this report.

- Specifically, it's my belief that Trans Mountain has failed to represent an accurate spill scenario, providing neither a worse case nor a sufficiently conservative case, nor even a realistic case that portrays the actual risks to human health.
13474. I go into significant detail in my written argument in-chief regarding the three interconnected issues with the modeling for the HHRA. The weather considered at Arachne Reef where the Trans Mountain's credible worst case spill is indeed credible and whether the ability to respond to a spill is reasonable.
13475. Collectively these issues discredit the HHRA report that has been conducted. Unless a realistic and conservative oil spill scenario is used, the conclusions of HHRA are restricted to the unique and unrealistic scenario found in the report. The old adage junk in equals junk out comes to mind here.
13476. This is of little use to the Board engaging the risks associated with the project and to authorities who must use this information to plan their responses. Furthermore, the report was structured in such a way that the exposure pathways considered are limited by conditions applied to the report without considering other realistic exposure pathways that may present themselves in a spill scenario, particularly one that involves heavy oil.
13477. The HHRA provided by the Trans Mountain look at a scenario that centers on the summer season with low wind speed and almost no vertical mixing in the water column. All of these factors may be fine for an airborne exposure pathway but my concern is they also bias which pathways they consider.
13478. While the HHRA technical report appears to maximize the potential for the airborne exposure pathway, the obvious question is whether scenarios that include high wind and wave conditions, and/or the presence of a particulate matter in the marine environment may result in more oil becoming submerged evading contaminant booms ending up on shorelines or becoming ingested by aquatic organisms.
13479. Should any of these instances occur they would represent two additional pathways, ingestion of or physical contact for human exposure that are not dealt with in this -- with a sufficiently rigorous manner in this report, while the question of submerged oil appears to be ignored entirely in the report.
13480. So given the uncertainties about how submerged oil behaves, I fail to see whether the decision to not conduct a scenario that included the possibility of

- submerged oil accurately represents the potential for other exposure pathways to exist, those again being ingestion or physical contact, and whether the inhalation pathway has been sufficiently represented. The failure to adequately model what a spill would look like and the failure to consider other exposure pathways are directly connected.
13481. The report also glosses over any possibility of oil becoming submerged, weather conditions, moving oil to a different location, or limiting response measures, the possibility of a far larger spill than a Trans Mountain definition of a CWC.
13482. So without addressing these concerns I fail to see how the conclusions reached in the HHRA can be extended to any scenario beyond the idealized scenario envisioned by Trans Mountain more appropriate for the latitude of Tuktoyaktuk.
13483. As such, Trans Mountain has thus far failed to meet its requirements to address Issues 5 and 12 on the approved issues list as they pertain to the HHRA.
13484. To community impacts from a marine oil spill -- in terms of local community impacts, one of my primary concerns is around the projected demands a diluted bitumen oil spill will place on local communities and emergency and first responders. My concern is not to the enhanced economic stimulus that a spill would make to hotel rooms and workers in and around the area cleaning it up.
13485. Whether it be additional need for police forces to quarantine areas, extra burden placed on fire departments, or increased demand on hospitals, each of these local resources comes with costs and limited means. Trans Mountain has neglected to fully consider the impacts and demands an oil spill could have on local emergency services in its hypothetical spill scenario.
13486. As such, at this time we have no idea if communities will have the capacity to respond to any size or type of oil spill along the coastlines, let alone a large size spill of diluted bitumen complicated by adverse weather or submerged oil. Instead, communities are left to rely on Trans Mountain's assertion that outside services will provide any and all support the communities will need and that these services themselves have the capacity to respond to all possible spill scenarios.
13487. In their own attempt to determine local government marine oil spill

preparedness and response capability the Georgia Strait Alliance conducted a report assessing these issues in the Georgia Strait region. This report represented a number of -- presented a number of concerning conclusions, including that according to government members themselves, quote:

“Local governments are unprepared and unable to effectively engage in marine oil spill preparation and response activities.”

13488. End quote.

13489. The area that I represent is home to a diverse marine habitat and an economy that relies heavily on ecotourism and fishing industries. An oil spill along our coastline would not only have devastating short-term and long-term impacts on the local marine life but could have a serious negative impact on local economies and business.

13490. When I asked the proponent to provide an estimate of the expected oil spill response costs associated with various sized oil spills at Arachne Reef, as well as their best estimate of where the financial costs would come from, the proponent was unable to provide a solid answer. I’m concerned that the costs of a tanker spill could well exceed the maximum oil spill compensation regime, as has happened in the past.

13491. **THE CHAIRMAN:** You have five minutes remaining, Dr. Weaver.

13492. **DR. WEAVER:** Summation. I submit that Trans Mountain has advanced an incomplete application that fails to adequately and accurately represent the full risks and negative effects of the project would present to the region, while also failing to substantiate its position that the Proponent and its partners could sufficiently mitigate any negative effects that may result from an oil tanker spill.

13493. In evaluating the risks of an oil spill, Trans Mountain failed to present a risk analysis that upheld even basic scrutiny. Insufficient evidence was provided by the Proponent to demonstrate the representative and predictive accuracy of MARCS for applicability to the marine study area.

13494. Back-up studies evaluating the model were never provided on record, insufficient evidence was provided to discount tuning, and neither the core

- parameters of MARCS nor the risk reduction inputs were supported with validation or sensitivity analyses.
13495. In light of this, I've argued that the risk analysis provided in TERMPOL 3.15 should not be given any weight in the Board's consideration. Lacking a credible and substantiated risk analysis, I argue that Trans Mountain's application is incomplete.
13496. Trans Mountain based their entire analysis of the fate and behaviour of diluted bitumen in a marine environment on the faulty assumption that dilbit floats. And as I've outlined earlier, there are numerous lines of evidence that suggest this is not the case.
13497. Currently there is no ability to effectively clean up oil that sinks below the surface, making dilbit a particularly risky substance to transport. And it's clear that unless required to do so, Trans Mountain has no intention of conducting additional tank and/or field studies to explore the fate and behaviour of diluted bitumen in a coastal environment where there are suspended sediments.
13498. And until such time as these studies are available, it's simply not possible to properly assess the risk and potential damages associated with a diluted bitumen spill in the Salish Sea. I submit that there is a glaring gap in scientific understanding, and it would be reckless to approve the Trans Mountain project at this time.
13499. In addition to the present inability to effectively respond to a spill of dilbit in the marine environment, I submit that the ocean model used to assess potential spill trajectories has not been effectively evaluated for use in highly turbulent channels and in the presence of oceanic frontal systems commonly found in the Salish Sea.
13500. It's my expert opinion that the proprietary ocean model is not the appropriate tool to address the questions being asked. And the ocean model cannot capture the complex mixing and subduction processes that are known to exist in the Salish Sea. The model is hydrostatic and the vertical velocity fields, and hence vertical distribution of tracers will almost certainly be poorly represented. Model evaluation clearly shows an inability of the model to capture across channel flow and there has been no drifter testing of model predictions.
13501. Furthermore, Trans Mountain has neglected to demonstrate that it and

its partner organizations have sufficient capacity to respond to a diluted bitumen tanker spill. First, there have been no demonstrated capacity to contain and recover sunken and submerged oils.

13502. Second, the Proponent showed a complete disregard for consideration of any spill larger than 15 percent of the oil tanker's cargo capacity. The unwillingness to consider a large spill, let alone a total loss scenario, and the refusal to apply adverse weather conditions and other complications to its simulations, is demonstrative of an approach that neglects to consider and prepare for the full scope of risks associated with the project.
13503. Given this, the Arachne Reef spill scenario can only be considered a best-case, if not totally unrealistic, scenario under ideal conditions, and not a realistic outcome under either average or worst-case scenarios.
13504. Meanwhile, although the proposed enhanced response capacity is a right step in the right direction, it remains insufficient to deal with a diluted bitumen spill that could result in submerged and sunken oil. And I therefore argue that the proposed enhancements must be viewed as incomplete for the purpose of this application.
13505. The HHRA by Trans Mountain failed to meet the requirements to address issues 5 and 12 on the approved issues list, and contributes to the application being incomplete.
13506. I submit that the conclusions reached in the HHRA cannot be considered to have any representative or predictive value outside of the narrow parameters of the specific scenario that was modelled in this report.
13507. For the reasons outlined above, I cannot support approval of this project. Furthermore, based on the substantive deficiency elaborated in my written submission, I respectfully submit that the Board must conclude that the application is incomplete, pursuant to the threshold requirement of section 52(1) of the *NEB Act*, and therefore decline to forward a recommendation to the GIC.
13508. In the alternative, I request that the Board recommend to the GIC that the application be dismissed. I submit that no conditions sufficiently remedy the flaws inherent in the application, and therefore make no submissions as to the potential conditions that may be imposed.

13509. Thank you for allocating the time to me.

13510. **THE CHAIRMAN:** Thank you, Dr. Weaver. Just one second.

--- (A short pause/Courte pause)

13511. **THE CHAIRMAN:** Dr. Weaver, the Board is wondering if you're aware of anywhere in Canada or in the world that there has been any restrictions placed on the movement of dilbit being transported in the oceans.

13512. **DR. WEAVER:** I will say that -- well, dilbit's a unique product, right. It's a mixture of bitumen and diluent and liquids, which one of the reasons why I argued that the Board should actually step forward and call for an immediate moratorium on existing dilbit transfer, is that this product never used to be shipped in traditional pipelines. What would be shipped would -- what was put in the pipeline historically in the Trans Mountain Pipeline would be synthetic crude being shipped to California refineries.

13513. Sometime over the last few decades synthetic crude and other crudes became diluted bitumen, and there was no environmental assessment process that occurred when that occurred. Right now, today, we have about one tanker a week going off filled with diluted bitumen to Asia or California. And at no such time could I find or recall there ever being an environmental assessment, despite the fact that the behaviour of synthetic crude versus diluted bitumen is quite different.

13514. The Royal Society of Canada report and most recently -- although it's not submitted in evidence because it just appeared -- the National Academy of Sciences report was very clear that diluted bitumen in coastal waters in a great unknown. We have no -- we have no understanding of its behaviour other than it has a potential to sink in the presence of suspended water -- particles.

13515. So the answer is no, but the reason why I framed it that way is I think the answer should be yes. It should happen now, today, coming out of Burnaby because of the change in what was put in the pipe from beginning to end with the existing Trans Mountain line.

13516. **THE CHAIRMAN:** Thank you, Dr. Weaver. The Board appreciates the professional manner in which you have presented, appreciate the sincerity of your intention to facilitate the Board's deliberations by providing your

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professional perspective on the use of this -- of the material before us. And we really appreciate your attendance today, and we thank you for that.

13517. So with that, Dr. Weaver, we can assure you that we will consider your -- yours along with everybody else's submissions as we consider this important question that's in front of us.

13518. **DR. WEAVER:** Thank you.

13519. **THE CHAIRMAN:** Thank you.

13520. We'll now take a short 10-minute break and we will then hear from the Stz'uminus First Nation.

--- Upon recessing at 3:14 p.m./L'audience est suspendue à 15h14

--- Upon resuming at 3:27 p.m./L'audience est reprise à 15h27

13521. **THE CHAIRMAN:** We will continue and we will hear the submissions from Stz'uminus First Nation. Ms. Skeels.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE
STZ'UMINUS FIRST NATION:**

13522. **MS. SKEELS:** I'm Melinda Skeels, here on behalf of the Stz'uminus First Nation.

13523. Since time immemorial, the Stz'uminus people have relied upon the lands and waters in their territory, particularly the Salish Sea and the Lower Fraser River, and the marine life and ecosystems that those waters support. Stz'uminus culture and identity are inextricably linked to their marine territory. The cultural and economic survival of the Stz'uminus people depends upon the environmental integrity of the Salish Sea and the Lower Fraser River.

13524. The evidence before the Board on Trans Mountain's application indicates that the proposed project would have very serious impacts on the environment and on Stz'uminus' Aboriginal rights, including serious adverse impacts on southern resident killer whales and potentially devastating impacts on marine life in the Salish Sea and the Fraser River due to spills or accidents.

13525. The serious potential impacts of the project on the Stz'uminus give

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- rise to constitutional duty on the part of the Crown to consult and accommodate Stz'uminus in relation to the project.
13526. Before recommending the issuance of a CPCN, the Board must determine that the Crown has discharged its duty to consult Stz'uminus. The evidence before the Board indicates that the Crown has not discharged that duty.
13527. In fact, the consultation provided has been woefully inadequate. As a result, it cannot be said that the project is in the public interest and, as a matter of law, the CPCN cannot be issued.
13528. I intend to follow the order of our written submissions fairly closely, although I'll not be going through all of them. I'll start by explaining a bit about the Stz'uminus First Nation and their connection to the waters and adjacent lands in their territory. I'll then talk about this Board's obligation to assess the Crown's duty consult First Nations.
13529. I will then go on to outline why we say the duty has not been discharged here. Finally, I will touch briefly on two impacts of the project that are of particular concern to my clients, the impacts on the southern resident killer whale population and the impacts and harms from a potential spill.
13530. The Stz'uminus First Nation is an Aboriginal people within the meaning of section 35 of the *Constitution Act* of 1982. Stz'uminus is also a band as defined in the *Indian Act*. Stz'uminus has more than 12,000 registered members. About half of them live on reserves in Kulleet Bay and Shell Beach which are near the town of Chemainus and on the western shore of the Ladysmith Harbour. The remainder are largely spread throughout Stz'uminus and Coast Salish territories.
13531. Stz'uminus people speak Hulq'umi'num and are connected to the larger Coast Salish community through culture and kinship ties. The Coast Salish people inhabit the areas surrounding the Salish Sea.
13532. Stz'uminus asserts Aboriginal rights in and around and title to its traditional territory which covers a portion of the Salish Sea and extends up the Fraser River to around Yale.
13533. Stz'uminus use and occupy its traditional territory and relied on marine and freshwater resources in its territory to sustain its people and culture

since time immemorial.

13534. Stz'uminus people have always been and continue to be a marine-oriented people. The marine and riparian portions of Stz'uminus traditional territory are critical to Stz'uminus culture and identity. Stz'uminus people continue to have an intimate relationship with the marine and riparian environments which serve as their front yard, their grocery store and their highway.
13535. The marine and freshwater resources in Stz'uminus territory continue to form an integral part of the Stz'uminus way of life and culture, providing the Stz'uminus with physical, cultural and spiritual sustenance. Stz'uminus people rely on numerous marine resources throughout their traditional territory for food, education, cultural and ceremonial purposes, medicine, economic development and self-sufficiently.
13536. You have all of this in written evidence before you and you also heard a good deal about it from Willie Seymour in Victoria some time ago now, I guess. So I'll just touch briefly on some of the high points of that evidence.
13537. As far as food, Stz'uminus members continue to depend on marine and freshwater resources for dietary sustenance for themselves and for their families. They rely on traditional food for daily consumption in many cases. Salmon in particular is harvested from the ocean and rivers, smoked and canned, providing regular dietary sustenance to Stz'uminus members throughout the year.
13538. You heard from Willie Seymour about the importance of salmon to the Stz'uminus people and I'll just read a brief quote to remind you of what he had to say. He said:

“Salmon is very important to our people. All species of salmon; chum salmon, coho, pinks, spring salmon, sockeye, all served a purpose for our people. Some had more iron than others. Some had oils in it that would benefit the consumer, the ones that used the salmon for their sustenance and that was really important, and so then it became commercialized and our people again, being the experts in the water and harvesting salmon, bartered and traded with the first settlers, the first ships that came around, and tons of it. Tons of salmon.”

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13539. They also -- and Willie told you about this too -- rely on aquatic resources to serve an important medicinal function. They further provide cultural and ceremonial function. Willie told us about it and you also have some written evidence about their use in cultural events, celebrations and ceremonies in the longhouse, traditional burning ceremonies, war canoe ceremonies.

13540. Willie in particular gave you some evidence about burns that they've been conducting recently out in an ancient village site called Tl'uqtius, which is on the southern arm of the Fraser River, near what's called Lulu Island now. There's traditional berries and plants in Tl'uqtius, as well as fish and other resources of the Fraser River and they depend on the health of the ecosystem of both the Fraser River and the Salish Sea.

13541. Marine resources also form the basis for the Stz'uminus creation story, along with many other Stz'uminus stories. Mr. Seymour gave the following evidence:

"So the stories, I believe, are true. I believe those stories. They are the truths of our ancestors. And harvesting is the truths of our ancestors, utilizing all of the resource, from the ocean resource, the land resource, the air resource.

The medicinal plants are sacred. And I can't emphasize that enough. If that was to be damaged, our drugstore would no longer be there because that's our drugstore. And the ocean; the old people say, "When the tide's out, the table's ready", you go harvest your food."

13542. I'll pause here to say that I feel quite inadequate to be relating Willie's words. I hope you remember them in a detail -- in the manner in which he shared them with you.

13543. Also, educational purposes are connected to the marine resources that the Stz'uminus people rely on. You have some evidence in the written evidence about how Stz'uminus has been reintroducing traditional foods to younger generations. Having continued access to these traditional resources is an important component in passing on that traditional culture to the next generation.

13544. Finally, economic interests. You've just heard about how Willie was talking about the way that salmon were used economically in pre-contact times.

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- They continue to play an important economic role for Stz'uminus. Traditionally, the Stz'uminus people harvested salmon for commercial purposes, using it to barter and trade with first settlers.
13545. Today, Stz'uminus holds Aboriginal and communal fishing licences for a wide variety of species: sockeye, coho, pink, chum, chinook, as well as herring spawn on kelp or boughs, pacific herring, groundfish, Dungeness and rock crab, prawns, manila clams, littleneck clams, butter clams and the pacific oyster.
13546. Stz'uminus plans to develop its aquaculture business in order to provide employment to members and income for Stz'uminus traditional resources.
13547. In 2014, they harvested 250,000 pounds of clams under a provincial tenure and they have plans to expand that business into geoduck, sea urchins, sea cucumber and oysters.
13548. The next section of my written argument talks about the project. I think that I don't need to belabour that point here. I think the Board and everyone listening is well aware of what is planned with the project. So I won't talk about that.
13549. I do want touch a little bit, though, on what we say the impacts of the project on Stz'uminus are. The importance of marine and freshwater resources to the Stz'uminus people is exemplified by members' continued reliance on marine and freshwater resources, for nutritional, ceremonial, educational, medicinal and economic purposes, as I've just outlined. Its significance to the Stz'uminus people cannot be overstated. The Stz'uminus and Coast Salish waters are sacred to the Stz'uminus people.
13550. Their significant interests in the marine and freshwater environments tend to be very significant -- seriously and significantly affected by increased oil tanker traffic and, in particular, by accidents or spills in the Salish Sea.
13551. The Stz'uminus people's history, culture and identity are all intimately entwined with the marine environment. Traditional marine resources is a way of life for the Stz'uminus. It's a defining characteristic central to Stz'uminus existence on the coast as a sea-faring nation. The loss of access to Stz'uminus marine resources would be devastating to Stz'uminus and would put the continued existence of the Stz'uminus culture at risk.

13552. Another quote from Mr. Seymour:

“There’s great concern of what would happen if something happened to our waters because they’re all sacred to us. We do not take without a prayer. We do not take more than we need.”

13553. The particular nature of the project impacts on Stz'uminus is largely unknown at this time. Stz'uminus hasn't had the opportunity to undertake any kind of rigorous assessment of the project's effects on their rights or interests in the course of this hearing process. Nor has Trans Mountain, nor the Board, nor the Crown done so.

13554. As a result at this time, the project impacts on Stz'uminus must necessarily be framed in broad terms, as I've just done. The limited evidence that was presented, however, indicates that Stz'uminus has a very strong claim to Aboriginal rights, including Aboriginal title to waters and adjacent lands that stand to be affected by the project, and that the project presents a severe potential adverse impact on Stz'uminus Aboriginal rights.

13555. There's no question that if approved and constructed, the project would have a serious long-term impact on Stz'uminus people and Stz'uminus Aboriginal rights and that an oil spill would be devastating to their rights and interests.

13556. I'm going to move on now to talk about why we say the Board has a duty to assess the Crown's duty to consult.

13557. Trans Mountain, of course, has applied for a CPCN under section 52 of the *National Energy Board Act*. The factors that the Board may consider in determining whether to recommend issuance of a CPCN include:

“Any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.”

13558. Now, the public interest that's talked about there, that includes Aboriginal interest. Aboriginal interest is a public interest. Furthermore, reconciliation between Aboriginal peoples and the Crown is in the public interest. We've heard about that in the media recently with the Truth and Reconciliation Commission. We've heard about our new Prime Minister talking about the

importance of it, our new Minister of Justice talking about the importance of it.

13559. In *Rio Tinto Alcan Inc. and Carrier Sekani Tribal Council*, the Supreme Court of Canada considered the implications of a requirement in the British Columbia *Utilities Commission Act* that required the Commission there to consider, “any factor that the Commission considers relevant to the public interest”.

13560. And I think what Madam Justice McLachlin had to say writing for the Court there applies equally to this Board’s duty.

“The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of consultation under the Utilities Commission Act.”

13561. Sorry; that’s not in the submissions. It’s at paragraph 70 of *Rio Tinto and Carrier Sekani Tribal Council*.

13562. **THE CHAIRMAN:** Sorry; what paragraph was that?

13563. **MS. SKEELS:** Seventy (70).

13564. The Board has determined a broad range of issues, including the following, irrelevant to its public interest determination for the project: The need for the project environmental and social impacts of the project to marine shipping activities; the appropriateness of the route; significantly from what I’m submitting here, impacts on Aboriginal interests; and contingency planning for spills and accidents.

13565. Objectives for consultation in relation to the project set out in the Board’s filing manual include, “that those potentially affected by the project have been adequately consulted” and “that any concerns raised have been considered, and addressed as appropriate.”

13566. The Board also has a responsibility -- I’m sorry; the Board is also the responsible authority for carrying out the environmental assessment for the project under the *Canadian Environmental Assessment Act*.

13567. At the conclusion of the process, the Board will make a

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- recommendation to the Governor in Council regarding whether the project is and will be required by present and future public convenience and necessity and must provide the Governor in Council with terms and conditions for project approval.
13568. The Governor in Council may then approve the project with the conditions specified, reject the project, or refer the project back to the Board for consideration. But -- and I say this is very significant for your duty in terms of assessing the duty to consult -- has no power to amend the conditions established by the Board.
13569. So that's the regulatory framework. There's also a constitutional framework to keep in mind in terms of the Board's duty here.
13570. The Board, of course, must exercise its authority consistent with the Constitution, which includes the constitutional obligations owed to Stz'uminus under Section 35 of the *Constitution Act*.
13571. The Supreme Court of Canada has required that the Crown act honourably when reconciling Aboriginal and treaty rights with other interests. Whenever the Crown has knowledge of the potential existence of an Aboriginal or treaty right and contemplates conduct that could adversely affect that right, the honour of the Crown gives rise to its -- to a constitutional duty to consult, and if appropriate, accommodate the holders of the Aboriginal right.
13572. Administrative tribunals like this one that consider projects with the potential to impact Aboriginal rights may be explicitly given a duty to consult, they may have the duty to determine whether consultation has been discharged, or they may have both. The mandate of a particular tribunal depends upon whether the tribunal's enabling legislation empowers it to consider questions of law, and what remedial powers the tribunal possess.
13573. The Board in this case does not have a duty to consult in relation to the project. But it does have a legal duty to consider whether the Crown's duty to consult has been discharged before issuing its recommendation under section 52.
13574. The Board's obligation to determine whether the duty to consult has been discharged closed from its power to decide questions of law, which, as was stated by the Supreme Court in *Rio Tinto*:

"...implies a power to decide constitutional issues that are

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properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power.”

13575. A tribunal such as this Board has the power to consider the adequacy of consultation but not enter into consultation should provide the relief that it considers appropriate in the circumstances in accordance with its express or implied remedial powers, quote:

“The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in Haida Nation.”

13576. This Board thus has a broad remedial power to ensure that the project is not recommended to be in the public interest before meaningful consultation has been undertaken.

13577. Whether the duty to consult Stz'uminus has been discharged in relation to the project is squarely before this Board. The Crown, through Natural Resources Canada, is participating extensively in the review process for the project. The Crown has filed its evidence on the Crown's consultation process to date and issued information requests dealing with adequacy of the accommodation measures proposed by Trans Mountain. The Board has further acknowledged in its list of issues that impacts on Aboriginal interests will be considered in its public interest determination.

13578. For these reasons, before determining whether to issue a recommendation that a CPCN be issued, the Board must consider whether the Crown has discharged its duty to consult and accommodate Aboriginal groups that stand to be affected by the project.

13579. Further, this is not a duty that can be postponed. In order to be meaningful, consultation must occur early at the planning stages of a project before the project is defined and decisions have been made.

13580. The Court in the *Squamish Nation and Minister of Sustainable Resource Management* held:

“The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions.

Once important preliminary decisions have been made and relied upon by the proponent and others, there is a clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation.”

13581. Consultation cannot be put off to a later stage in the process. In *Haida*, really the seminal consultation case, the Supreme Court of Canada emphasized the need to consult at the strategic planning stages. They were talking there about the issuance of tree farm licenses. And the Court held:

“The T.F.L. decision reflects the strategic planning for [the] utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right[s] and title.”

13582. A little bit later down -- on in the quote there:

“If consultation is to be meaningful, it must take place at the stage of granting or renewing [the] Tree Farm Licences.”

13583. In -- again, in *Rio Tinto*, the Supreme Court of Canada held that government action giving rise to a duty to consult, quote:

“...is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”

13584. This Board’s decision to recommend the CPCN or not is not simply one of many decisions in relation to the project. It’s the key regulatory decision to be made in relation to this project. It will determine whether, based on the evidence, the project is in the public interest. It is a strategic higher-level decision of exactly the type that the case law contemplates, which will, at a minimum, provide significant momentum to the project.

13585. Now, I acknowledge, it’s technically the Governor in Council that issues the CPCN. In practice, the Governor in Council defers to the Board’s recommendation. Moreover, it’s this Board that must review and consider the

- enormous evidentiary record in relation to the project, including the consultation evidence.
13586. The Board's recommendation to approve or not approve a project is the most important and substantive regulatory decision in relation to the project.
13587. Even if the recommendation of the Board with respect to issuing the CPCN is not characterized as a strategic higher-level decision, it is at very least a strategic higher-level recommendation upon which the Governor in Council will rely. There can be no question that the duty to consult is engaged and must be addressed by the Board at this stage.
13588. Moreover, it's the Board that must determine any conditions to be imposed. The Governor in Council has no power to amend these conditions. Accordingly, any consultation that occurs after the Board has issued its report cannot give rise to new conditions, nor can it have any impact on the conditions recommended by the Board.
13589. The decision that the Board will make under section 52 is a discrete exercise of authority. As an administrative tribunal, exercising as specific statutory authority, the Board has broad powers to consider and decide issues of law and the public interest.
13590. If the Board is to exercise its jurisdiction under section 52, it must first address and decide all necessary questions of fact and law, including whether the Crown has discharged the duty to consult and accommodate Stz'uminus in relation to the project.
13591. We also say the proposed future consultation is not relevant to the decision that the Board needs to make about whether the duty has been discharged at this point. The Crown proposes to consult after the Board has issued its decision. This cannot have any bearing on the Board's determination of whether the duty to consult and accommodate has been discharged.
13592. NRCan has proposed a stage consultation process in which consultation would occur in four phases. One, initial engagement from submission of project description to the start of the NEB process. Two, what we're engaged in now, the NEB hearings. Three, post-NEB hearings, from the close of the hearing record to a Governor in Council decision; a period, I note, that cannot be longer than three months under the legislation. And finally,

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- regulatory permitting which doesn't appear to contemplate consultation at all on that Phase 4.
13593. As a matter of logic and common sense, the Board cannot consider future consultation for the simple reason that since it's not occurred, it's impossible to know whether it's been meaningful or effective.
13594. In any event, the circumstances in this case demonstrate that the proposed future consultation cannot be meaningful. NRCan's proposal to undertake consultation after the Board has concluded its hearing and issued its decision is fundamentally flawed. In order to be meaningful, consultation must occur early at the planning stages, as I took you through the case law a few minutes ago, before the project is defined and decisions have been made.
13595. The establishment of appropriate conditions on the approval of the project is one of the most obvious opportunities to accommodate Stz'uminus Aboriginal rights. However, those conditions will be determined by the Board and set out in the report at the same time as the Board issues a recommendation with respect to approval of the project.
13596. Consultation that occurs after the Board has released its report is incapable of providing this important form of accommodation. Consultation that occurs after the Board has released its report in key substantive decisions in relation to the project have been made cannot be meaningful.
13597. The Phase 3 consultation contemplated by NRCan consists of the establishment of a dialogue, quote:
- "...to determine if there are any concerns related to the Project that have not been fully addressed by the NEB's draft conditions."*
13598. The contemplated Phase 3 consultation would be premature at this stage. As noted earlier in my submissions, to date there has been no assessment of Stz'uminus Aboriginal rights that stand to be affected by the project nor any assessment of the project impacts on those rights.
13599. These are precisely the issues that must be the subject of consultation that has yet to take place. Consultation contemplated by NRCan, however, seems to wrongly assume that these steps have already been completed.

13600. It would be premature for Stz'uminus and the Crown to discuss, quote, *"concerns related to the Project that have not been fully addressed by the NEB's draft conditions"* until such time as there has been an assessment of the project's impacts on Stz'uminus' rights and interests.

13601. Until that has occurred, Stz'uminus will not be in a position to articulate its concerns related to the project in any comprehensive way, let alone determine which of those concerns have been addressed by conditions that may be recommended by the Board.

13602. For these reasons, in our submission, even if we're open to the Board to consider future consultation in determining whether the duty to consult Stz'uminus has been discharged, the proposed future consultation is completely inadequate to deal with the discharge -- I'm sorry; to discharge the duty to consult.

13603. I will now go into why we say the duty has not been discharged. Briefly, the fundamental purpose of consultation in the modern law of Aboriginal and treaty rights is:

"The reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

13604. Reconciliation is not a mere interest but a constitutional imperative for the Crown.

13605. In *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* the B.C. Court of Appeal described consultation process this way, quote:

"Consultation requires an interactive process with efforts by both the Crown actor and potentially affected First Nation to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations."

13606. As the Court said in *Mikisew*:

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“Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.”

13607. Consultation must occur early, at the planning stages of the process, as I took you through earlier.

13608. Any reliance by the Crown on regulatory process to discharge the duty of consultation is:

“...subject to the Crown’s overriding duty to consider their adequacy in any particular situation.”

13609. Where an Aboriginal group’s concerns cannot be dealt in the course of the regulatory process, that process is not sufficient to fulfill the Crown’s duty to consult and the Crown has an independent obligation to address the deficiencies in order to discharge that duty.

13610. As a constitutional obligation, the duty is upstream of federal and provincial statutes. As a result, in order to discharge the duty, the Crown may be required to amend or step outside existing statutory regimes and regulatory processes to fulfill its constitutional obligation. That hasn’t happened here.

13611. Now, the content of the duty to consult Stz’uminus. As I said earlier, the duty arises whenever the Crown has knowledge of the potential existence of an Aboriginal right and contemplates conduct that could affect that right. The content varies, depending on the nature of the right and the nature of the potential impact.

13612. In this case, in its preliminary assessment, the Crown determined the depth of consultation owed to Stz’uminus is high. There is no reason to revisit that. There is no evidence that that has been revisited. They haven’t discharged a duty at the high end of the spectrum. I don’t think they’ve discharged a duty at any end of the spectrum but certainly not at the high end. It falls well short in this case. There has been no meaningful consultation or accommodation. The Crown’s conduct has failed to undertake any of the fundamental steps in the consultation process.

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13613. First, there has been no assessment of the Aboriginal rights. Ascertaining the scope and nature of the Aboriginal rights that stand to be affected by the contemplated Crown conduct is the critical first stage, and this hasn't happened.
13614. Stz'uminus has had very little opportunity to present information in relation to the scope and nature its rights that stand to be affected. There is no evidence before the Board of any meaningful engagement between the Stz'uminus and the Crown in relation to those rights.
13615. Secondly, there's been no assessment of project impacts on Stz'uminus Aboriginal rights. Normally, this happens after the scope and nature of the rights that stand to be affected and then ascertained.
13616. At a minimum, meaningful assessment of project impacts on Stz'uminus Aboriginal rights requires an assessment of project impacts specific to Stz'uminus based on an open exchange between Stz'uminus and the Crown. There is no evidence that that has happened.
13617. Stz'uminus as not provided with adequate funding to meaningfully engage or undertake an independent assessment of project impacts on their rights, nor did the Crown undertake any such assessment. Instead, the Crown provided a list of key issues of Stz'uminus, which were determined in the absence of any meaningful discussion or participation by Stz'uminus.
13618. NRCan's articulation of Stz'uminus' concerns was extremely vague, under-inclusive and did not accurately capture Stz'uminus' concerns.
13619. Given the potential for the project to result in significant adverse effects on Stz'uminus Aboriginal rights, it is critical that a rigorous assessment of impacts be undertaken and then appropriate mitigation or avoidance measures can be considered. There is no evidence that either has taken place here.
13620. Finally, accommodation. Appropriate accommodation to minimize impacts on Aboriginal rights can only follow proper consultation, including careful listening to concerns.
13621. It is not possible to accommodate project impacts on Stz'uminus without undertaking the first two steps outlined above. The draft conditions proposed by the Board and the mitigation measures identified by the Crown were

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- not developed in consultation with Stz'uminus, and do not provide any accommodation specific to Stz'uminus concerns. Nor has the Board's hearing process provided Stz'uminus with the opportunity to express its interests and concerns.
13622. Leaving aside these defects and dealing for a moment only with the substance of the accommodation proposed, there has been no adequate accommodation in relation to project impacts on Stz'uminus Aboriginal rights.
13623. First or all, with respect to the draft conditions, we say they're inadequate. They are not really conditions in the sense that they're not binding obligations that would prevent the project from proceeding. None of them specifically address impacts to Stz'uminus people, lands, waters, or rights, or require that impacts to Stz'uminus rights or interests be mitigated or accommodated at any time prior to project construction.
13624. Few of the conditions are addressed to Aboriginal peoples generally, and those that are have little significance due to their vague, non-binding nature and failure to meaningfully mitigate impacts or consider or provide for benefits in proportion to the impacts on specific Aboriginal groups or specific peoples.
13625. The condition relating to traditional land use, Condition 84, defers land use investigations and only requires a filing 60 days before construction commences. Any information so gathered regarding construction impacts on traditional land use or sites will be incapable of informing project planning, except at the most superficial level.
13626. Neither the provision of employment opportunities to Aboriginal peoples, Condition 94, nor the provision of Aboriginal groups with an opportunity to monitor construction of the project provides accommodation for project impacts on collectively held Aboriginal rights or title, nor do they serve to mitigate those impacts.
13627. Further, many of the conditions defer matters of importance to Stz'uminus until after regulatory approval has been provided. Of particular concern to Stz'uminus are Conditions 29, 111, and 112. These conditions address information deficits on matters of critical importance to dealing with the project impacts to Stz'uminus territory.
13628. These matters cannot be considered before the duty to consult -- I'm

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sorry; these matters need to be considered before the duty to consult Stz'uminus can be discharged and, therefore, before the Board can recommend approval.

13629. Also, the proposed mitigation measures are inadequate. The mitigation measures prepared by Canada -- proposed by Canada to address impacts on Stz'uminus interests are unenforceable, were developed in the absence of any discussion with Stz'uminus, and do not address project impacts on Stz'uminus Aboriginal rights.

13630. Even at the lowest end of the spectrum, there's an obligation to minimize potential adverse impacts to Aboriginal rights. There's been -- there is little indication that any effort has been dedicated to avoiding project impacts before they arise, which should be the first step in addressing Stz'uminus concerns.

13631. The Board's hearing process has been fundamentally flawed and cannot be relied on to fulfill the duty to consult. At the outset of the hearing, the Crown indicated that it intended to rely on the Board's hearing process to discharge the duty to consult Stz'uminus.

13632. I will now discuss why we say the Board's hearing process was fundamentally flawed such that it's incapable of facilitating the discharge of that duty. The Federal Crown has acknowledged as much in its submissions and in direct communications with First Nations.

13633. There are three ways in which we say the process is flawed; funding, incomplete information through the information request process, and no oral cross-examination. Those are areas that I think you've heard about and probably will hear about some more, and so I'm not going to go into them in great detail right now, noting the time.

13634. I'll just summarize by saying the B.C. Court of Appeal has found that meaningful consultations is, quote:

"...not just a process of gathering and exchanging information, but rather an interactive process that includes the opportunity for dialogue between the parties for give and take."

13635. Meaningful consultation has not occurred in relation to the project. Stz'uminus' primary opportunity for engagement regarding the project has been

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- through the Board's hearing process. That process has proven to be an inappropriate and ineffective as a forum for consultation. Its adjudicative nature is antithetical to the kind of constructive, open dialogue that characterizes meaningful consultation.
13636. Moreover, Stz'uminus' involvement in the hearing process was severely compromised by significant capacity constraints, inadequate procedural rights, and non-cooperation by Trans Mountain and the Crown.
13637. The most fundamental substantive steps in the consultation process, the assessment of Stz'uminus Aboriginal rights and project impacts on Stz'uminus rights, have been wholly inadequate. There's been no effort to avoid project impacts on Stz'uminus rights, and the mitigation that has been proposed was developed without input from Stz'uminus and is not responsive to Stz'uminus' concerns.
13638. As the Crown has acknowledged, the project has the potential to have very serious impacts on Stz'uminus Aboriginal rights. Given this potential, it's critical that a rigorous assessment of project impacts on Stz'uminus rights be undertaken, and that appropriate avoidance, mitigation, and accommodation measures be developed in direct consultation with Stz'uminus. To date, neither step has occurred.
13639. By any measure, the Crown has failed to discharge the duty to consult Stz'uminus in relation to the project.
13640. There's two project risks and impacts that I want to touch on briefly. The evidence adduced before the Board indicates that Trans Mountain has failed to accurately assess and justify the risks and impacts of the project.
13641. In particular, Stz'uminus is concerned about impacts on southern -- the southern resident killer whale population caused by increased marine traffic, and that risks of catastrophic harm from spills or accidents have been underestimated and that the harm caused by spills or accidents has been understated.
13642. It is the view of Stz'uminus that, based on the record before the Board, the project risks are totally unacceptable and project impacts are completely unjustified.
13643. Killer whales are sacred to the Stz'uminus people and feature

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prominently in Stz'uminus stories, songs, and culture. In the course of his oral traditional evidence Willie Seymour sang a song of the killer whale people and -- of the killer whale and related a story demonstrating the kinship felt between Stz'uminus people and the killer whale.

13644. I've set out a quote for you in my written submissions and I'll just read a brief portion of it here. So he went out:

"The young man went out and like his grandfather he followed the killer whale. They also knew that he was a grandchild of the original man that found them. So the killer whale is considered our relative as well. They are mammals and they were very helpful in harvesting."

13645. As Trans Mountain acknowledges, the project would have significant adverse impacts on the endangered southern killer whale population. These impacts are assured as they stand to be caused not only by a spill or accident, but due to sensory disturbances caused by project-related marine traffic. Trans Mountain's own consultants estimate these impacts as negative, long-term, high magnitude, high probability, and significant.

13646. The Raincoast Conservation Foundation has filed evidence that the project would intensify existing threats to, and accelerate the rate of decline of, the southern resident killer whale population, possibly leading to complete extinction.

13647. Due to the inextricable link between the killer whale and Stz'uminus people's identity and culture, the further endangerment and possible extinction of the southern resident killer whale population would constitute an infringement of Stz'uminus Aboriginal rights of the most severe degree.

13648. The evidence -- and I'm going to move on to spills now.

13649. The evidence filed by intervenors such as the City of Vancouver, Metro Vancouver, the Squamish Nation, Tsleil-Waututh First Nation, Ecojustice, Living Oceans Society and others overwhelmingly indicates that Trans Mountain has underestimated the risk of spills or accidents caused by the project and understand the harm -- understated the harm that would be caused by spills and accidents.

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13650. Stz'uminus adopts and relies on the submissions of the Squamish Nation regarding Trans Mountain's failure to properly assess risks and impacts of accidents and malfunctions, including the submissions dealing with the assessment of risk, the assessment of impacts, and inadequate emergency response capabilities.
13651. Stz'uminus also adopts and relies on the conclusion reached by the Province of British Columbia that the record before the Board falls well short of what would be required to show that world class spill response capability would be in place in advance of the project.
13652. **THE CHAIRMAN:** Just to remind you, you've less than five minutes.
13653. **MS. SKEELS:** The consequences of spills or accidents -- or other accidents or malfunctions in relation to the project has the potential to be catastrophic to Stz'uminus. Trans Mountain has not developed a comprehensive response plan, or shown that they are -- there are sufficient resources to respond to such spills effectively and protect Stz'uminus territory.
13654. Trans Mountain underestimates the risk of a spill and has failed to provide evidence that there is the necessary capability to respond to an oil spill from the project, particularly to one involving submerged or sunken diluted bitumen.
13655. The subject of this hearing is whether the Board ought to recommend the issuance of the key regulatory approval in relation to the project; a Certificate of Public Convenience and Necessity. The Board must consider a host of issues, including environmental, socio-economic impacts and impacts on Aboriginal people. Ultimately, the touchstone in the Board's inquiry is whether the project is in the public interest.
13656. In making its determination under section 52 of the Act, the Board must operate within the confines of the law, including the Constitution. The project prevents -- presents a very serious impact on Stz'uminus rights, including Aboriginal title. And as a result, before recommending issuance of a regulatory approval of the project, the Board must determine the Crown has discharged its duty to consult and accommodate Stz'uminus.
13657. It cannot reasonably be concluded the Crown has done so. As the

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Crown's conceded, the content of the duty to consult Stz'uminus is at the high end of the spectrum described in *Haida*. The Crown, however, has failed to undertake even the most basic steps in the consultation process. The Crown has instead relied entirely on the Board's hearing process, which is fundamentally flawed and poorly suited to the process of meaningful consultation and accommodation.

13658. On the evidence before the Board, the project is not in the public interest. The project will have significant known adverse impacts on Stz'uminus Aboriginal rights, and presents an unacceptable risk of causing very severe adverse impacts on the environment and on Stz'uminus' rights.

13659. Even if it were possible to leave aside the constitutional issue of whether the Crown discharged the duty to consult Stz'uminus, it's not in the public interest to recommend the approval of a project that prevents -- presents such serious, unmitigated risks to the environment and Aboriginal rights.

13660. In the circumstances, the Board must not recommend the issuance of the CPCN. As such, Stz'uminus requests that the Board either decline to recommend the issuance of a CPCN in respect of the project, or recommend that no Certificate of Public Convenience and Necessity in respect of the project be issued until the Federal Crown has discharged its duty to consult and accommodate Stz'uminus in relation to the project.

13661. Those are my submissions.

13662. **THE CHAIRMAN:** We'll take a 10-minute break. The Panel will consider any questions we have for you.

13663. So we'll come back at quarter after four.

--- Upon recessing at 4:06 p.m./L'audience est suspendue à 16:06

--- Upon resuming at 4:13 p.m./L'audience est reprise à 16h13

13664. **THE CHAIRMAN:** Thank you for your indulgence. The Board has a couple of questions and Member Scott will -- will start off.

13665. **MEMBER SCOTT:** I'll take you to, Ms. Skeels, to your written argument roughly about paragraph 75, page 21.

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13666. You have suggested to us that it's necessary for the Board to make a determination about the adequacy of Crown consultation. And in paragraph 75, following on paragraph 74, you allude to the fact that regulatory processes aren't always going to be adequate to discharge the duty on the part of the Crown.
13667. And I'm interested to know when the Crown is required to step out of our process and what steps it might be taking when it is stepping out. Is it before our decision or recommendation, or is it after our decision? And if it's outside our process who determines the adequacy; is that the Governor in Council or some other agency?
13668. **MS. SKEELS:** Well, certainly the Governor in Council will have an obligation to be satisfied that the duty has been met at the point that the Governor in Council makes a decision.
13669. But I would say that the duty on the Board is to make sure that up until the point of the decision that the Board is being asked to make that the Crown's consultation duty has been discharged to that point.
13670. The Crown's duty is ongoing and continuing from the beginning when it's making strategic higher level decisions all the way through to operational stage, for example, of a project.
13671. I don't know if that got ---
13672. **MEMBER SCOTT:** It gets towards it but perhaps not necessarily directly on point.
13673. Once the Crown steps outside our process what would be our ability to assess adequacy at that stage?
13674. **MS. SKEELS:** Well, if it's after you've made your recommendation none, which I think is one of the key reasons why you need to be satisfied that up to the point of your decision the duty has been discharged.
13675. The Crown still has a remaining duty after a decision of this Board given that the process hasn't been completed at the time that this Board makes a decision. But one of the main thrusts of my argument here is that this Board will not have the option to consider whether, you know, anything that's done after its recommendation is made was adequate or not.

13676. **MEMBER SCOTT:** And how would this Board determine adequacy

13677. **MS. SKEELS:** This Board needs to ---
13678. **MEMBER SCOTT:** --- to the point where we believe that the Crown
is required to step out?
13679. **MS. SKEELS:** Well, the -- this Board needs to make a determination
with respect to whether on the evidence before it the duty has been sufficiently
discharged to meet the obligation that exists at the time that the Board's decision
is made.
13680. **MEMBER SCOTT:** So in terms of the record, so to speak, that we're
looking at, I'm wondering about matters that are outside our regulatory process
that may be ongoing between other Crown agencies and a particular First Nation
community -- how that fits in our record, and how we would access it and how we
would assess it.
13681. **MS. SKEELS:** Well, there are ways that it could be assessed -- that
you could assess it if it's put before you. If it's not put before you of course you
can't consider it and therefore you can't make a decision on it. But that doesn't --
but the fact that it hasn't been put before you would not relieve those agencies of
the -- or the Crown of the duty to consult. Of course in this case it has been put
squarely before you; NRCan has put evidence before you.
13682. **MEMBER SCOTT:** I believe my colleague Mr. Davies has a follow-
up.
13683. **MEMBER DAVIES:** I think I heard you say, and please correct me
if I'm wrong, that the Crown said it would rely upon this process to discharge its
duty to consult.
13684. **MS. SKEELS:** Yes. Sorry, it might take me a minute to find where I
said that in our submissions, but I did say that absolutely.
13685. **MEMBER DAVIES:** I had a different understanding and I'll put it
forward as a question because I want to make sure my understanding was correct.
And my understanding was that what the Crown, in fact, said was that they would

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rely upon this process to discharge its duty to the extent that was feasible.

13686. **MS. SKEELS:** I won't disagree with that. That -- I'm sorry; I don't have the reference to where that came from in front of me, but certainly that accords with my understanding that the Crown has stated that it continues, you know, that four phase process that is going to be ongoing after this.

13687. **MEMBER DAVIES:** So it conceivably then is one of several initiatives the Crown may be taking to discharge its duty by participating in this process?

13688. **MS. SKEELS:** Absolutely. And I'm sorry; I'm not meaning to suggest that the Crown has not taken any steps outside of the process. I acknowledge that the Crown has been engaging with First Nations, including my clients, outside of this process.

13689. But I need to come back to the point that this Board has a duty to consider whether the Crown's duty of consultation has been discharged, and you can only do that on the evidence that's been put before you.

13690. **MEMBER DAVIES:** I also want to make sure I understand the duty of the Crown which is driven by reconciliation -- a goal towards reconciliation. My understanding has been that that's an ongoing duty; that it's not necessarily extinguished in respect of any one event or initiative by virtue of there being, in our case, a recommendation perhaps, if we do reach that recommendation, to Governor in Council to issue the certificate.

13691. So if the duty is ongoing, if that's correct, would the fact that we have taken issues into our orbit preclude other agencies outside of our process before, during, after from engaging on those issues with affected parties, including your client?

13692. **MS. SKEELS:** No, I don't think that, you know, the very fact that you had engaged with the issues as a Board would result in any other Crown agency being precluded per se.

13693. I think the issue here lies more with -- you know, as I was trying to make the point, the conditions are going to be unalterable at that point and the momentum that is gained by the project by a recommendation from this Board carries with it a duty up to that point in time. It doesn't -- unless I can come up

with an outlandish example. I mean, it's not going to stop something from happening after that, because of course you're correct that the duty is an ongoing one.

13694. **MEMBER DAVIES:** So to put a concrete example perhaps to illustrate the somewhat convoluted question I threw at you, if another agency of the Crown, for instance Department of Environment, or Fisheries and Oceans, or Transport Canada elected to take steps towards mitigating risks that's existing and arguably is -- could be -- would be accelerated by the Trans Mountain contribution to increased tanker traffic, if some -- one of those agencies, or one or more of them were to take a position that they wanted to do more for the southern resident killer whale nothing we're doing here would preclude that; correct?

13695. **MS. SKEELS:** Well, except if I understand the evidence on the impacts on the southern resident killer whale population the problem is with the increased tanker traffic.

13696. **MEMBER DAVIES:** Yes.

13697. **MS. SKEELS:** So if the project is approved and the tankers are thereby approved to be able to be in the area I don't know what another organization -- another Crown agency could do. Put bubbles around the killer whales. I don't know how that would work.

13698. **MEMBER DAVIES:** Well, I mean, there's evidence I believe on the record to the extent that the propeller noise from tankers may be a contributing factor towards the difficulty the southern resident killer whale is finding in surviving in the habitat it's now in.

13699. So, you know, another agency may be in a position to wrestle with that question, notwithstanding the fact that it's been before us. That's the question.

13700. **MS. SKEELS:** Indeed they may be, but your obligation is not to look at what might happen down the line and whether it would be possible to reverse the effects of something that's being approved; it's to look at whether the Crown has discharged its duty of consultation in respect of the decision that you're being asked to make.

13701. **MEMBER DAVIES:** Okay. Well you've made it much clearer for me, and thank you.

**Final argument
Stz'uminus First Nation**

13702. **THE CHAIRMAN:** I think that is all the questions from the Board.
13703. So on behalf of Stz'uminus First Nation, Ms. Skeels, we thank you for your submissions today.
13704. We are adjourned until 9:00 a.m. tomorrow morning and we will hear tomorrow morning from the Squamish Nation, followed by Ms. Elizabeth May and then the Stó:lō Collective.
13705. So we're adjourned until 9:00 a.m. tomorrow morning.
- Upon adjourning at 4:25 p.m./L'audience est ajournée à 16h25