

**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 32

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

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

**January 26, 2016
Le 26 janvier 2016**

**International Reporting Inc.
Ottawa, Ontario
(613) 748-6043**

Canada

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This publication is the recorded verbatim transcript
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spoken by the participant at the public hearing.

Printed in Canada

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représentée par l'Office national de l'énergie

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Imprimé au Canada

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, Tuesday, January 26, 2016
Audience tenue à Burnaby (Colombie-Britannique), mardi, le 26 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. Regan Schlecker
- Ms. Lesley Matthews

Intervenors/Intervenants

Tsleil-Waututh Nation

- Mr. John Konovsky
- Mr. Paul Seaman
- Mr. Scott Smith
- Ms. Carleen Thomas
- Councillor Charlene Aleck

District of North Vancouver

- Mr. David Stuart
- Mr. Richard Walton

Living Oceans Society and Raincoast Conservation Foundation

- Ms. Karen Wristen
- Ms. Karen Campbell
- Ms. Dyna Tuytel
- Ms. Margot Venton
- Ms. Misty MacDuffee

Collaborative Group of Landowners Affected by Pipelines

- Mr. Peter Reus
- Mr. Delwen Stander
- Mr. Brian Kingman

BC Wildlife Federation

- Mr. Alan Martin
- Mr. George Penner

T'Sou-ke Nation

- Councillor Allan Planes
- Ms. Maya Stano

National Energy Board/Office national de l'énergie

- Ms. Nicole Godbout
- Mr. Asad Chaudhary

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No.	Description	Paragraph No./No. de paragraphe
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--- Upon commencing at 9:02 a.m./L'audience débute à 9h02

16472. **THE CHAIRMAN:** Good morning and welcome to today's session in Burnaby, which is part of the National Energy Board's hearing regarding the Trans Mountain Expansion Project. And we will continue to hear oral summary argument today.

16473. We acknowledge today being on the traditional land of the Coast Salish people.

16474. My name is David Hamilton and I am chairing 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 Expansion Project Application.

16475. I'll just take a brief moment to go over one housekeeping item.

16476. In the event that 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 of 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.

16477. Once outside the building, proceed to the muster point located on the northwest corner of the Delta Burnaby Hotel and Conference 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.

16478. As indicated in Procedural Direction Number 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 intervenors have had the opportunity to file written argument-in-chief prior to providing oral summary argument.

16479. 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 microphone will be

switched off, although I will warn you before this happens.

16480. 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. It is also an opportunity to make recommendations to the Board about matters within the List of Issues or any other 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.

16481. With that, I think we're ready to get underway this morning. And we will be hearing this morning from the Tsleil-Waututh Nation, the District of North Vancouver, followed by Living Oceans Society and Raincoast Conservation Foundation.

16482. To begin I think I will ask Trans Mountain, for the intervenors today and presenters, to introduce themselves for the record.

16483. **MS. OLENIUK:** Good morning. My name is Terri-Lee Oleniuk and I am legal counsel to Trans Mountain. Will me today is Regen Schlecker, Manager of Aboriginal Relations.

16484. **THE CHAIRMAN:** Thank you. And before we begin, I was wondering if there's any preliminary matters from any intervenors this morning.

--- (No response/Aucune réponse)

16485. **THE CHAIRMAN:** I see none. Therefore, we will begin with the Tsleil-Waututh Nation to present their oral summary argument. Mr. Smith?

--- FINAL ARGUMENT BY/ARGUMENT FINALE PAR THE TSLEIL-WAUTUTH NATION:

16486. **MR. SMITH:** Good morning, Mr. Chair and Panel Member Davies and Scott.

16487. My name is Scott Smith. Seated to my right is my colleague Paul Seaman. We are Tsleil-Waututh lawyers in this matter.

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16488. We are joined here today with Mr. John Konovsky to my left, the natural resource planner at Tsleil-Waututh Nation; Ms. Charlene Aleck, the Tsleil-Waututh councillor holding the Sacred Trust portfolio; and Ms. Carleen Thomas, to my left, the intergovernmental relations manager for Sacred Trust Tsleil-Waututh Nation.
16489. Today I will provide the Board with a very brief summary overview of Tsleil-Waututh's written argument broken down into eight major points. In outlining each point I will highlight the findings Tsleil-Waututh will be asking the Board to make in this hearing.
16490. I will begin my submissions by providing you with an overview. Tsleil-Waututh are the "People of the Inlet". Their territory includes Burrard Inlet and the waters draining into it.
16491. If we could go to Exhibit C358-13-2. This map shows the location of Tsleil-Waututh's consultation area boundary relative to project infrastructure. So the consultation area is the boundary all along in Burrard Inlet, including Howe Sound.
16492. The Tsleil-Waututh study area is the smaller area in this figure here. We will refer to this as Eastern Burrard Inlet in our written submissions and we'll do so in oral argument.
16493. The location of Tsleil-Waututh's main reserve, IR-3 is also shown on this map just across the way from the terminal, the marine shipping route and the pipeline.
16494. The Tsleil-Waututh people have occupied, governed and acted as the stewards of their territory since time out of mind, which has provided them with sustenance, spirituality, economy and transportation.
16495. If we could bring up Exhibit C358-13-2, the second map, map 24. This map contains data compiled from two traditional land use studies that Tsleil-Waututh has carried out. The map shows the density of Tsleil-Waututh use and occupancy on the basis of sites per square kilometre. It is clear from this map that Tsleil-Waututh intensively uses all of Eastern Burrard Inlet.
16496. Tsleil-Waututh possesses Aboriginal title, rights and interests throughout its territory, including titles to the land, waters, air and marine

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foreshore in Burrard Inlet. It also has extensive governance, cultural and harvesting rights there.

16497. Tsleil-Waututh has a sacred legal obligation to protect, defend and steward the land, waters, air and resources of its territory. Tsleil-Waututh has conducted a world class assessment of the project pursuant to its stewardship policy. The serious, permanent and far-reaching impacts of the project set out in the Assessment Report Tsleil-Waututh prepared have cause it to make the following two conclusions about the project.

16498. First, it will deprive past, current and future generations of Tsleil-Waututh people of the control and benefit of the water, land, air and resources in their territory.

16499. And second, it does not represent the best use of their territory and their land, waters, air and resources to satisfy the needs of their ancestors or present and future generations of Tsleil-Waututh people.

16500. As a result, Tsleil-Waututh has decided that it will not grant Trans Mountain authorization under its laws for the project to proceed in its territory.

16501. As Ms. Leah George-Wilson, former Chief of Tsleil-Waututh Nation, explained at the Oral Aboriginal Traditional Evidence hearings in Chilliwack:

“We stand here together as Tsleil-Waututh people and we say no. We say no, the risk is too great. Our obligation is not to oil. Our obligation is to our land, our water, our people, our life, our snəwʔéyəl. According to our snəwʔéyəl, our law, this project represents a risk that we, that we, Tsleil-Waututh people are not willing to take.”

16502. Tsleil-Waututh has filed its assessment report, including six expert reports, as well as substantive evidence relating to its claim to Aboriginal title and rights in this proceeding.

16503. The evidence on the hearing record establishes, first, that the project is likely to cause significant adverse environment effects that cannot be justified in the circumstances; second, the project will infringe Tsleil-Waututh’s title and rights in Eastern Burrard Inlet; and third, the project is, simply put, not in the public interest.

16504. The original Trans Mountain facility is now sought be expanded were completed in around 1953. As was the unfortunate norm at that time, Tsleil-Waututh was neither asked nor consulted about them, let alone asked for its permission to build such an enormous and risky undertaking in the core of its territory.
16505. Since that time, Tsleil-Waututh has been, and continues to be, adversely impacted by its operation. A key example is Trans Mountain's 2007 oil spill into Burrard Inlet.
16506. Yet, despite Tsleil-Waututh's Aboriginal title and rights receiving constitutional protection through section 35, and the Supreme Court recognizing the Crown's duty to consult in *Haida*, and more recently directing, in *Tsilhqot'in*, that the purpose of consultation must be to seek consent, incredibly, there has been no consultation with Tsleil-Waututh to date about this project.
16507. Canada has repeatedly stated that it will instead rely, to the extent possible, on the Board's process to satisfy its duty to consult. However, no consultation with Tsleil-Waututh has occurred, either by the Board or by Canada.
16508. This, simply put, is incredible given that you, as the Panel responsible for the environmental assessment and regulatory review of the project, are now expected to issue reports containing recommendations that must be informed by the outcome of consultation and outline potential ways forward. Simply put, this process cannot continue as is.
16509. I pause here to observe that the Board is currently under a significant amount of criticism that your process is flawed, lacks democratic legitimacy, will be overhauled, lacks independence, and that you, as Panel members, are incapable of making findings about environmental and Aboriginal issues.
16510. The thrust of these criticisms, if I may put it bluntly, is that the Board is not clothed with the ability to decide what is in the public interest.
16511. Some of that criticism is perhaps well-founded. You do not, for example, have the expertise or experience to assess impacts on Aboriginal title and rights. However, as you will hear in my submissions to you today, Tsleil-Waututh has stepped into this void to perform its own assessment of the project. This raises the question: What should this Panel do in the circumstances?

16512. The existing case law instructs that Aboriginal communities must avail themselves of existing regulatory processes to make their concerns about projects known. Tsleil-Waututh has done so here by adducing evidence establishing that the project will infringe its Aboriginal title and rights.
16513. You must give that evidence due weight and it must substantially inform your deliberations and, ultimately, your recommendations. It must be front and centre in your reports. It cannot be explained away on technicalities, swept under the rug, or otherwise avoided, ignored, or diminished.
16514. We have structured Tsleil-Waututh's summary submissions to you today to identify the specific findings we ask you to make and the steps you need to take to restore public confidence in your process. The Board, in my submission, has the opportunity and, indeed, the duty to do so by taking the following steps.
16515. First, accepting the role that Tsleil-Waututh is asking you to play in this matter is within your jurisdiction.
16516. Second, accepting that Tsleil-Waututh is before you and presenting evidence not merely as that of an intervenor, but as a government and a jurisdiction that has conducted its own world-class assessment and reached its own conclusions about the impact to the project on its title and rights; we ask that you put substantial weight on Tsleil-Waututh evidence and expert conclusions and incorporate them directly into your reports and recommendations.
16517. And thirdly, charting a course with your recommendations that will foster, rather than inhibit, what has been lacking from the start of this process; a true reconciliatory process that recognizes, respects, and accommodates Tsleil-Waututh's role as the original inhabitants of the inlet and their Aboriginal title and rights in their full form.
16518. In the circumstances, Tsleil-Waututh submits that the Board must do the following in preparing its reports.
16519. First, expressly find that Tsleil-Waututh has proven, for the purposes of this proceeding, Aboriginal title and rights in Eastern Burrard Inlet, and that the project represents a *prima facie* infringement of that title and those rights. And I note in passing that we do not in any way preclude the possibility of joint title

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- existing within Burrard Inlet as among Musqueam, Squamish, and Tsleil-Waututh.
16520. Second, act to ensure that required consultation occurs before you issue your reports or recommend -- or, in the alternative, recommend against project approval because of inadequate consultation.
16521. Third, recommend that the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances.
16522. Fourth, recommend that a certificate not be issued for the project.
16523. Fifth, recommend that Canada immediately engage in direct government-to-government consultations with Tsleil-Waututh in the spirit of reconciliation if it wishes to do anything other than decide not to issue a certificate.
16524. I will now turn to the issue of the Board's regulatory and constitutional roles. The Board has two regulatory jurisdictions under two statutes with respect to reviewing the project. The first is its role under the *National Energy Board Act*, which I'll refer to as NEBA.
16525. The Board must conduct a hearing as well as prepare and submit a report to the minister containing its recommendation on whether a certificate should be issued for the project having regard to the public interest.
16526. The second is the CEAA requirement to conduct an environmental assessment of the project and prepare and submit a report to the minister containing your recommendations as to whether the project is likely to cause significant adverse environmental effects and, if so, whether those effects can be justified in the circumstances.
16527. **THE CHAIRMAN:** Mr. Smith, would you entertain questions throughout your presentation? It won't count to your time.
16528. **MR. SMITH:** Absolutely, I'm happy to answer any and all of the Board's questions at any time during my presentation as long we're stopping the clock.
16529. **THE CHAIRMAN:** It's agreed. The clock is stopped.

16530. In your -- you list your five points there, if -- I mean help me. One of the points was that the Board -- you recommend the Board should consult before we issue our report. And I'm trying to marry that to your last point on government to government; how would you see that accomplished? Would they be married together; independent? I'm just trying to -- your thoughts on that.

16531. **MR. SMITH:** Yeah, it's a great question, so thank you.

16532. We argue in our written submissions that the Board itself has a duty to carry out consultation and the Board should be consulting about the issues that are live in this proceeding.

16533. Now, that doesn't preclude the need for subsequent consultation with the Crown, either in parallel or after the hearing is closed on issues outside of the Board's jurisdiction. So a key example of that is, Tsleil-Waututh's title and governance rights; it's asserting that it has the right to say no in relation to the project. And then that triggers the need to engage in a direct government-to-government discussion with the actual decision-maker because that would be outside of the Board's jurisdiction, so that would go up to the GIC.

16534. But to be clear, and to come back to your question, we're clearly saying that the Board itself has a duty to carry out consultation and then that has to happen during the hearing process. And to date that hasn't occurred.

16535. **THE CHAIRMAN:** Thank you. Continue.

16536. **MR. SMITH:** The second is the CEEA requirement to conduct an environmental assessment of the project, and prepare and submit a report to the minister containing your recommendations as to whether the project is likely to cause significant adverse environmental effects and if so, whether those effects can be justified in the circumstances.

16537. I note in passing that Tsleil-Waututh has appealed the initial environment assessment scoping decisions the Board made to the Federal Court of Appeal, including that the designated project includes marine shipping activities.

16538. For clarity, Tsleil-Waututh's position is that the Federal Court of Appeal is a proper venue to determine this issue. Tsleil-Waututh's position is

being put forward to you today on the assumption that it will succeed on this issue and that the Court will order the Board to include marine shipping as part of the designated project it is assessing under CEAA.

16539. The Board also has a third constitutional jurisdiction associated with reviewing this project. The Board has included Aboriginal interests in its List of Issues. The case law holds that the Board is always required to exercise its decision-making functions in accordance with the dictates of section 35 of the *Constitution Act 1982*.
16540. Tribunals with the authority to decide questions of law, whose jurisdiction to consider the Constitution has not expressly been withdrawn like the Board, are presumed to have the corresponding authority and duty to consider and apply the Constitution when answering legal questions before them.
16541. Tsleil-Waututh submits that the Board therefore has two roles it must assume with respect to Aboriginal interests and its constitutional jurisdiction in making its recommendations in this matter, having proper regard to section 35.
16542. First, the Board must consider whether the evidence filed by Tsleil-Waututh has established, for the purposes of this proceeding, Aboriginal title and rights in eastern Burrard Inlet and whether the project would *prima facie* infringe that title and those rights.
16543. This requires the Board to consider and apply the Supreme Court's test for section 35 Title and Rights from the *Tsilhqot'in* and *Van der Peet* decisions, and incorporate those findings in making its recommendations.
16544. Second, the Board must also assume a proper role in relation to the duty to consult. And this is what I was referring to a moment ago. The Supreme Court held in *Carrier Sekani* that a tribunal can have one of four possible roles; the duty to consult, the duty to assess the adequacy of consultation, both duties, or neither duty.
16545. The focus on determining a tribunal's proper role is on its ability to consider questions of law and remedial powers it possesses. Or in other words, what it may be asked to do in relation to consultation at a particular stage.
16546. The Board is a court of record and empowered with full jurisdiction to hear and determine all matters, whether of law or effect.

16547. Tsleil-Waututh has sought and received leave to appeal to the Federal Court of Appeal on the issue of the Board's April 2nd, 2014 scoping decisions and argued that the Board was required to consult at that time and in relation to those decisions. Again, Tsleil-Waututh's position is that the Federal Court of Appeal is a proper venue to determine this discrete issue.
16548. The Board has the power to decide questions of law, and Parliament has not excluded the ability to decide constitutional issues from the Board's jurisdiction under either NEBA or the *Canadian Environmental Assessment Act 2012*, which I'll refer to as CEEA.
16549. Each of these statutes also provides the Boards with functions and remedial powers relevant to engaging in consultation at different times. Consequently, the Board must carry out and assess the adequacy of consultations at various times throughout its NEBA and CEEA processes.
16550. I will now move on to summarize Tsleil-Waututh's assessment of the project. Tsleil-Waututh assessed the project as it was described in the application and other filed materials. Its assessment focused on effects in eastern Burrard Inlet. The assessment report describes baseline conditions. By that I mean the conditions of Burrard Inlet pre-contact and at the time of the Crown's assertion of sovereignty, as well as current conditions today.
16551. The assessment report makes the following four conclusions. First, the loss of herring in 1885 and the closure of bivalve harvest in Burrard Inlet in 1972 bookended the collapse of Burrard Inlet's environmental integrity.
16552. Second, after thousands of years of supporting Tsleil-Waututh's way of life, in less than 200 years key marine resources in Burrard Inlet were exterminated, contaminated or made inaccessible.
16553. Third, Tsleil-Waututh's subsistence economy was shattered.
16554. And fourth, cumulative effects have continued to accrue, pushing Burrard Inlet further beyond its care and capacity, all in violation of Tsleil-Waututh law.
16555. If we could go to Exhibit C-358-13-12. This is map 25 from Tsleil-Waututh's assessment report.

16556. It shows the current conditions in Burrard Inlet, including that the vast majority of streams are lost, endangered or threatened. Those are shown in orange on the map. There's a large amount of industrial and port use; those are shown in black on the map. And bivalve harvesting in Burrard Inlet has been closed; that's shown in pink on the map.

16557. Tsleil-Waututh hired five leading international experts to assess the potential impacts of the project in Burrard Inlet. It asked the Board to now accept the following expert conclusions; Doctors Gunton and Broadbent's conclusion that oil spills in Burrard Inlet from the project are essentially inevitable, the following three conclusions by Dr. Jerry Galt:

“Oil spreads quickly in the physical setting of Burrard Inlet, and has the potential to foul all the basins of the Inlet, including Indian Arm, a place of special importance to Tsleil-Waututh.

A reasonable worst-case spill has the potential to cover many square kilometres of the water surface with oil.

Most oils strands quickly on shorelines after a spill in Burrard Inlet, but can refloat and move again with tidal currents.”

16558. So if we could bring up Exhibit C-358-13-13. This is another map from the Tsleil-Waututh assessment. Map 27 shows the location of oil in relation to the sensitive sites, which are shown in blue. If we could scroll over to the right side of the map, please. That would be helpful.

16559. Twenty-four (24) hours after a reasonable worst case spill. As you can see, many sensitive sites would be oiled. Tsleil-Waututh also accepts -- or requests that the Board accept the following three conclusions by Nuka research.

16560. During the winter, environment conditions preclude the response to an oil spill 57 percent of the time in Central Harbour, and 56 percent of the time in the outer harbour in Burrard Inlet.

16561. If the conditions preventing a response extend for several days, there may not be an opportunity for on water recovery of oil. And even under the best of circumstances, less than half the volume of spilled oil can be recovered in a

- cleanup response in Burrard Inlet, which would leave considerable in the air, on the shorelines and in the waters of Burrard Inlet.
16562. The following four conclusions by Dr. Jeffrey Short. First, spilled diluted bitumen submerged within 24 hours of a spill in Burrard Inlet or the Fraser River estuary in spring or summer; that would render cleanup efforts very difficult and indeed essentially ineffective.
16563. Second, spilled diluted bitumen will have serious environmental effects in Burrard Inlet and the Fraser River estuary. A reasonable worst-case oil spill could lead, in Doctor Short's view, to a major ecological catastrophe.
16564. Dr. Short concludes that such a catastrophe could include the mortality of up to 500,000 birds, high mortalities of marine mammals, and jeopardize the viability of the resident southern killer whale population which you have heard so much about.
16565. All of this would trigger major disruptions to the food dynamics in Burrard inlet resulting in a collapse of the ecosystem in the Inlet.
16566. Third, stranded and submerged oil will cause adverse effects on many marine organisms, interrupt traditional subsistence harvesting practices, cause larger and prolonged commercial fisheries closures and reduce tourism.
16567. Fourth -- and this is important -- even a small to medium oil spill can have substantial adverse effects on birds, marine mammals and intertidal communities in the inland.
16568. Trans Mountain, for its part, has conceded in its reply evidence that Dr. Short's information is generally factual.
16569. The intervenor Metro Vancouver retained Levelton Consultants to assess the effects of spilled dilbit on air quality. Levelton concludes that a reasonable worst-case oil spill at the Westridge Marine Terminal has the potential to expose over 1,000,000 residents, including those living on Tsleil-Waututh Reserve, to acute health effects from toxic air contaminant emissions.
16570. Based on Tsleil-Waututh's expert reports and its own analysis, the Assessment Report assesses project impacts on Tsleil-Waututh's Aboriginal title, rights and interests.

16571. The Assessment Report identifies two species of impacts: direct effects from marine shipping and oil spill effects. It summarizes oil spill, direct and cumulative effects of the project on Tsleil-Waututh's title, rights and interests in Table 7. I commend that to you. I won't unfortunately have the time to go through it in detail with you today.

16572. The Assessment Report concludes that the project will jeopardize, prejudice, or otherwise compromise Tsleil-Waututh's title, rights and interests in the following three ways. And I'm going to summarize these to the full extent to which they will do so as set out in the Assessment Report.

16573. First, it will interfere with Tsleil-Waututh's rights and responsibilities to manage its territory in a manner consistent with its laws and to determine how its territory will and should be used. Second, it will interfere with or hinder or cause additional impediments to the restoration to Tsleil-Waututh's subsistence economy. And third, it will interfere with, hinder or cause additional impediments to Tsleil-Waututh's important cultural work.

16574. Following community input the Assessment Report was finalized. It makes the following four conclusions about the project.

16575. Firstly, it violates Tsleil-Waututh law. Second, it has the potential to deprive past, current, and future generations of Tsleil-Waututh peoples of control and benefit of the waters, land, air, and resources in their territory. Thirdly, it does not represent the best use of Tsleil-Waututh's territory to satisfy the needs of Tsleil-Waututh's ancestors and the needs of present and future generations. And finally, it fails the first lens test of the Tsleil-Waututh Stewardship Policy.

16576. Tsleil-Waututh asks the Board accept these conclusions for the purposes of making recommendations. Surely it is in the best evidence available to the Board on the issues of impacts to Tsleil-Waututh's title and rights, and surely the Board must afford it with much weight and defer to it on these issues.

16577. Conversely, Tsleil-Waututh asks the Board give little weight to Trans Mountain's assessment of environmental effects in Burrard Inlet. Each of Tsleil-Waututh's independent expert reports concluded that Trans Mountain's evidence is inadequate and cannot be relied on.

16578. We also argue that the Board should place no weight on Trans

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Mountain's reply evidence because it is large in part in proper reply for the reasons already outlined in Tsleil-Waututh's written argument.

16579. I will now move on to the fourth issue, Tsleil-Waututh's Aboriginal title and rights in Eastern Burrard Inlet.
16580. Tsleil-Waututh submits it has provided the Board with evidence sufficient to prove certain Aboriginal title and rights recognized and affirmed by section 35 of the *Constitution Act* for the limited purposes of this proceeding.
16581. The Supreme Court's decisions in *Delgamuukw* and *Tsilhqot'in* teach that to successfully prove Aboriginal title the following elements must be established: sufficiency of occupation; continuity, where present occupation is relied on; and exclusivity.
16582. The Supreme Court's decision in *Van der Peet* instructs that to successfully prove Aboriginal rights, the following elements must be met on the facts: the pre-contact existence of a practice; that the claimed right was integral to the pre-contact society in the sense it made it distinctive; and that the claimed modern right has a reasonable degree of continuity with the integral pre-contact practice.
16583. Tsleil-Waututh has provided un-contradicted evidence directed to each of the elements to prove certain Aboriginal interests in Eastern Burrard Inlet, including title, harvesting rights, cultural rights, and a stewardship right to regulate the Inlet itself and act as its stewards.
16584. By un-contradicted evidence we mean that neither Trans Mountain nor the Crown have adduced contrary evidence nor challenged Tsleil-Waututh's evidence in any way.
16585. We ask that the Board make a finding in relation to Aboriginal title and rights only for the purposes of the proceeding before the Board, and for the purposes of establishing a requirement that the Crown must obtain Tsleil-Waututh's consent or justify the project's infringements of its Aboriginal title and rights in question.
16586. The Supreme Court's reasoning in *Delgamuukw* makes clear that doing so would not rule out, for example, the possibility of joint title existing within Burrard Inlet as among Musqueam, Squamish and Tsleil-Waututh.

16587. Tsleil-Waututh notes that all of these potential joint title holders do, however, stand united against the project.
16588. Tsleil-Waututh submits that it has demonstrated on the evidence it has put before the Board that it has proven certain Aboriginal title and rights, and that the project would represent a *prima facie* interference for non-trivial impacts to them. It therefore submits that the Board must apply the test from *Tsilhqot'in* and *Van der Peet* and make corresponding findings of non-trivial infringements in its reports.
16589. I will now turn to the Board's Draft Terms and Conditions. Very few of the proposed terms and conditions are tangibly related to Burrard Inlet, and those related to Burrard Inlet are already described as mitigation measures in the application. The Assessment Report concludes that the mitigation measures proposed in the application and other materials filed with the Board cannot be relied on because of the inaccuracies and/or inadequacies of Trans Mountain's assessment.
16590. Tsleil-Waututh has therefore concluded that the terms and conditions will not provide a tangible reduction in the likelihood of oil spills in Burrard Inlet above and beyond what was proposed in the application, will not contribute to a tangible increase in the ability or capacity to recover spilled oil in Burrard Inlet above and beyond what is proposed in the application, and do not materially affect or change any of the conclusions reached in its Assessment Report.
16591. Moreover -- and this is a very critical point -- it is impossible to mitigate the effects that would occur on Tsleil-Waututh's Aboriginal title and stewardship right if the project is approved and built in spite of Tsleil-Waututh's decision that it should not proceed in its territory.
16592. I will now turn to the issue of what the Board must do in relation to consultation.
16593. It is indisputable that the Crown's duty to consult Tsleil-Waututh has been triggered and is at the high end of the *Haida* spectrum. Natural Resources Canada acknowledges as much in its written evidence.
16594. Given that the Crown is relying on the Board's process to satisfy its duty to consult, Tsleil-Waututh had to be consulted about the discreet decisions

- that the Board has made to design and implement its environmental assessment and regulatory review process. In particular, the Board's recommendations about whether the project can be approved must be informed by the outcome of Crown consultation so that the Crown can rely on them. Yet, there has been no consultation with Tsleil-Waututh to date.
16595. There are at least two serious practical legal consequences that flow from this failure. First, the Board's reports and recommendations ought to be based at least in part on the outcome of consultation. However, such a result is not possible because Canada has set up the process to delay any consultation with the Crown itself until such time as the Board's hearing record is closed. And the Board has not itself carried out any consultation.
16596. Simply put, these circumstances serve to deprive the Board of the very information that it needs to ensure that the requirements of consultation have been met. Moreover, this situation cannot be remedied later as consultation during Phase III will necessarily be extremely narrow, limited to outstanding issues not addressed by the Board of its draft conditions, and will not be overseen by the Board.
16597. Second, there has been no consultation or accommodation in relation to Tsleil-Waututh's Aboriginal title and its free-standing stewardship right.
16598. All of this raises serious questions about what you, the Panel, must do in the circumstances. I'm going to suggest to you that there are four steps you must take so that your recommendations and reports accord with the dictates of the Constitution, respect section 35, and restore public confidence in the Board's process...
16599. First, you must request an extension of time from the minister under section 52(7) of NEBA so that consultation can occur before you submit your reports to the minister.
16600. Second, if an extension of time is granted, the Board must itself consult with and accommodate Tsleil-Waututh using its remedial powers under NEBA and CEAA to address, to the extent possible, Tsleil-Waututh's concerns.
16601. Alternatively, if the Board is not empowered to consult, the Crown must do so and that information must be brought before you as the Panel. In either scenario, the Board must identify in its reports how it addressed Tsleil-

- Waututh's concerns and any concerns that the Board was unable to address.
16602. The Board may need to require Trans Mountain to provide additional information and/or to undertake additional studies about project-related impacts under section 52(5) of NEBA.
16603. Thirdly, and in the alternative, if no extension is sought or granted, you must recommend against project approval, because the Crown's duty to consult has not been discharged in relation to your environmental assessment and your regulatory review of the project, and therefore you are unable as the Panel to make recommendations based on the outcome of consultation, which you are legally and constitutionally required to do so.
16604. Fourth, and in any event, you must recommend that Canada engage in government-to-government consultation with Tsleil-Waututh, aimed at reconciling any recommendation or decision that a certificate for the project be issued and Tsleil-Waututh's decision that the project cannot go ahead in its territory.
16605. This latter step is necessary because the Board and its process are unable to address the very thing that Tsleil-Waututh most wants to be consulted about as a title holder; its right to decide what uses its lands, waters and resources will be put. The GIC is, as the decision maker, uniquely situated to address what must happen in view of Tsleil-Waututh's decision to say no to the project.
16606. Your recommendations must take into account that in 1982, we collectively agreed as a nation that our values included the recognition and affirmation of Aboriginal title and rights and we enshrined those values in our constitution so that they would forever be protected.
16607. **THE CHAIRMAN:** I see you've noticed that you have five minutes remaining.
16608. **MR. SCOTT:** Okay, thank you.
16609. What would not be acceptable outcome for this process would be to allow this project to barrel ahead and to unconstitutionally run roughshod over Tsleil-Waututh's Aboriginal title and rights. Tsleil-Waututh has made an informed and deliberate decision to withhold its consent. It is not the 1950s any more.

16610. I will now turn to the recommendation that the Board must make under CEAA. The Board should conclude that oil spills and marine shipping activities, independently and together, will cause adverse environmental and cumulative effects on fish and fish habitat; migratory birds; the current use of lands and resources by Tsleil-Waututh members for traditional purposes; the health and socio-economic condition of Tsleil-Waututh members; Tsleil-Waututh's physical and cultural health, heritage and structures, sites and things of archaeological importance to Tsleil-Waututh.
16611. The Board should conclude that these effects are significant, as they will be of high magnitude, have far-reaching geographic consequences in Burrard Inlet and beyond, be permanent and irreversible, cause corresponding adverse impacts, and indeed, infringe Tsleil-Waututh's title, rights and interests. And any further adverse environmental effects caused by the project in Burrard Inlet would be highly significant, given that the environment there is of high ecological importance but is already seriously compromised.
16612. The Board should also conclude that project-related marine shipping activities will cause significant adverse environmental effects on the endangered southern resident killer whale population.
16613. And Tsleil-Waututh also asks the Board to conclude that those significant adverse environmental effects are likely for the reasons set out in our written submissions. Also, for the reasons outlined in our written submissions, the heavy burden of attempting to justify the permanent, irreversible, widespread and highly significant adverse environmental effects that the project is likely to cause simply cannot be met here.
16614. Indeed, there's a heavy burden associated with justifying such highly significant adverse effects by perceived economic benefits.
16615. The Board must therefore recommend that the GIC decide, taking into account the mitigation measures identified by Trans Mountain and in the Board's draft terms and condition that the project is likely to cause significant adverse environmental effects that simply cannot be justified in the circumstances.
16616. I will now set out the four reasons why the Board should recommend that a certificate not be issued. I think I can do that in about two minutes, but I would ask for a bit of leeway. At most it will take me four or five minutes to get

- through these arguments.
16617. **THE CHAIRMAN:** Keep talking.
16618. **MR. SMITH:** First, the project is likely to cause significant adverse environmental effects that cannot be justified. Section 7(b) of CEEA prohibits the Board from ultimately issuing a certificate if the GIC makes such a determination.
16619. Second, issuing a certificate would amount to a *prima facie* infringement of Tsleil-Waututh's Aboriginal title and its other Aboriginal rights in eastern Burrard Inlet. Issuing a certificate authorizing the project to be built would completely disregard Tsleil-Waututh's decision and cause significant impacts to its Aboriginal title and stewardship right. It would significantly interfere with Tsleil-Waututh's jurisdiction and control over its lands, waters and resources by authorizing the project to go ahead without its consent and against its informed and deliberate decision to say no.
16620. Indeed, it would run contrary to the decision Tsleil-Waututh has made pursuant to its right to govern and manage its lands, waters and resources and determine the uses to which they will be put and delay, reverse, and/or obstruct Tsleil-Waututh from achieving its environmental stewardship objectives in Burrard Inlet.
16621. These infringements would occur in the core of Tsleil-Waututh's territory for the life of the project and they would not be limited to isolated events. Rather, approving the project would result in a decades-long infringement of rights, given that the project is expected to operate for over 50 years. Infringements would occur on a daily basis each and every time an oil tanker transits Burrard Inlet. In that sense, Tsleil-Waututh would be forced to confront Canada's dishonourable decision to ignore and disregard its decision on the project each day for decades to come. Such infringements would be effectively permanent.
16622. Issuing a certificate would also seriously impair Tsleil-Waututh's ability to exercise its Aboriginal harvesting, cultural and spiritual rights in eastern Burrard Inlet. Those impacts would be also widespread and permanent.
16623. For the issuance of a certificate to be an acceptable outcome, the next step of the infringement analysis requires the GIC to prove that such

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infringements are constitutionally justified. In view of the serious infringements and the implications to the governance of Tsleil-Waututh's lands, waters and resources and likely deprivation of the benefit of them to future generations, Tsleil-Waututh submits that the Board must recommend that Canada immediately engage in direct government-to-government consultation with Tsleil-Waututh in the spirit of reconciliation if it wishes to do anything other than decide not to issue a certificate for the project.

16624. Third -- and this is an important one -- even if the Board disagrees that Tsleil-Waututh has proven Aboriginal title and rights in eastern Burrard Inlet for the purposes of the proceeding, there'd be a very large risk for Canada and Trans Mountain to proceed in the face of Tsleil-Waututh informed and carefully considered decision to say no.

16625. The Supreme Court made clear in the *Tsilhqot'in* decision that because Tsleil-Waututh opposes the project and has withheld its consent to it being carried out on its title lands and waters, the project may have to be cancelled once Tsleil-Waututh receives a court declaration of Aboriginal title. Those are the Supreme Court's words, not mine. Cancelled.

16626. Removing the project from Tsleil-Waututh's lands and waters would only increase the project's already unacceptable cost to Canada.

16627. Fourth, and finally, Trans Mountain, in Tsleil-Waututh's submission, has failed to adequately demonstrate that there's an economic need for the project.

16628. Those are our submissions and I'd be happy to answer any questions. And thank you very much for the extra couple of minutes to finish those oral arguments.

16629. **THE CHAIRMAN:** Thank you, Mr. Smith.

--- (Applause/Applaudissements)

16630. **THE CHAIRMAN:** The Panel will take actually a 15-minute recess to consider any questions.

16631. So we'll return at five after 10:00.

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--- Upon recessing at 9:50 a.m./L'audience est suspendue à 09h50

--- Upon resuming at 10:06 a.m./L'audience reprise à 10h06

16632. **THE CHAIRMAN:** Thank you for your indulgence, Mr. Smith. The Panel did have some unresolved questions prior to coming in to hear your oral argument; however, we admit that your thorough and detailed oral argument has resolved the questions that we had.

16633. So with that, I acknowledge your presence today from the Tsleil-Waututh Nation and those who attended with you, and we thank you on behalf of the Board.

16634. **MR. SMITH:** Thank you.

16635. **THE CHAIRMAN:** We'll now take a short recess and we will be hearing from the District of North Vancouver.

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

--- Upon resuming at 10:12 a.m./L'audience reprise à 10h12

16636. **THE CHAIRMAN:** Thank you. We will come back to order.

16637. We're hearing now from the District of North Vancouver. And the Board welcomes the Mayor of the District of North Vancouver, Mr. Walton.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE DISTRICT OF NORTH VANCOUVER:

16638. **MR. WALTON:** Thank you very much. Thank you for the opportunity to appear before you today to provide input on behalf of the residents and the Council of the District of North Vancouver.

16639. My presentation is not lengthy; it's 10 to 15 minutes, and we're focusing on some very specific points within our much larger presentation that was -- has already been filed with the NEB.

16640. You will have received our written submission. What I hope to do today, in speaking with you directly, is to draw your attention to our community's major concerns and to explain why it our position that the NEB should not approve Trans Mountain's application for expansion.

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16641. I'm focusing my marks -- remarks specifically on the threat to sensitive ecological areas on our waterfront and the potential impact an oil spill would have.
16642. The District of North Vancouver highly values and strongly identifies with its natural environment, as do many municipal jurisdictions in Canada. Residents of the district expect their municipal government to responsibly protect and manage the natural assets of Vancouver's North Shore with a view to the very long-term future.
16643. In addition to the more natural areas along our foreshore, the district also recognizes that it has an industrial waterfront that forms part of Canada's largest port by volume -- is North Vancouver City and District. We recognize it's a strategic national economic asset and provides significant business opportunities and employment for Metro Vancouver residents.
16644. In short, the shared waterfront along Burrard Inlet supports a range of uses and it shapes and defines the ecology, economy and the lifestyle of the north shore.
16645. The District is responsible for promoting and enhancing the environmental, social, cultural, and economic interests of the community, and is the steward of these interests for future generations.
16646. This clear understanding is reflected in our 2011 Official Community Plan which identifies the rivers, creeks and waterfront as highly-valued environmental, recreational, cultural heritage, and economic assets.
16647. Our municipality has over 40 kilometres of shoreline on Burrard Inlet, comprised of both district-owned and private land, and the district's shoreline is located within very close proximity to the Westridge Marine Terminal. Its jurisdictional boundary is within one kilometre, and the closest point of land at Cates Park/Whey-ah-Wichen is just one 1.2 kilometres from the terminal itself.
16648. Our shoreline is home to the internationally recognized conservation area at Maplewood Flats, the last undeveloped waterfront wetland ecosystem on the north shore of Burrard Inlet, which has regional and international importance. And I might add, until 125 years ago, these wetlands stretched from West Vancouver's Ambleside Park almost to Cates Park, virtually the entire north shore

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of the Burrard Inlet.

16649. The conservation area specifically has been internationally designated as an important bird area. It is preserved as a wildlife sanctuary and carefully managed by the Wild Bird Trust, a society dedicated to protecting wild birds with a particular focus on habitat protection and enhancement.
16650. This conservation area, the site of the largest remaining fresh and saltwater marshlands and mudflats in Burrard inlet, hosts innumerable species including an estimated 33,000 human visitors every year.
16651. The district's evidence includes an Affidavit by Patricia Banning-Lover, President of the B.C. Wild Bird Trust which highlights the particular vulnerability of this conservation area.
16652. Our shoreline is also home to municipal parks that provide significant recreational and environmental benefits and attract local, regional, and international visitors. The parks are highly used and highly valued by residents and visitors alike. This is illustrated in the Affidavit submitted by Susan Rogers, the District's Manager of Parks, 28,000 people attending special events in the parks and 5,000 picnic shelter bookings alone in 2014.
16653. The Cates Park/Whey-ah-Wichen boat launch is regionally significant as there are limited launching operations for recreational boaters in the Burrard Inlet, Indian Arm area. It's the only public boat launch in the district and in 2014 there were over 4,500 permits issued for its use.
16654. Casual visitors on an average summer day at Cates Park/Whey-ah-Wichen can exceed 3,000 people coming to enjoy the beaches, the trails, boating, and ocean views and, again, all within 1.2 kilometres of Westridge.
16655. Film and TV production industry; regularly usage of district parks for filming, particularly those in our oceanfront areas.
16656. So Cates Park/Whey-ah-Wichen is a very important recreational waterfront area within the region. A biophysical inventory was conducted at the park which indicates that the marine ecosystem of the foreshore will be greatly impacted in the event of any oil spill.
16657. Trans Mountain acknowledges, and I quote:

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“...a marine spill could result in adverse effects on recreational activities, including boating and beach use... [and] ...evidence from past spills indicates that if a large oil spill were to affect recreational areas, use of these areas would likely be disrupted, either voluntarily or by regulation, for at least one season.”

16658. Such an impairment of usage of our public recreation area would be a significant disruption and loss of amenity to the residents of the region.
16659. Trans Mountain has focused its application on what it deems to be the low likelihood of an oil spill but it fails to adequately balance this risk against the very high environmental consequences of any size spill.
16660. We are not satisfied, based on the material presented in Trans Mountain’s application and through the NEB process, that our concerns about ecological risks have been adequately addressed.
16661. As illustrated in the evidence submitted by the District, the application does not provide for adequate and effective protection or cleanup of the District’s complex shoreline, particularly the uniquely sensitive Maplewood Conservation Area.
16662. It doesn’t provide for environmental monitoring of the varied and long-term effects of a spill on biological communities. It doesn’t provide protection of the District’s community ecological investments, and it doesn’t address knowledge gaps regarding the behaviour and the treatment of diluted bitumen in the marine environment.
16663. Those are some pretty significant gaps by even the most generous of assessments.
16664. The Kalamazoo oil spill experience and studies thus far indicate that spilled oil would likely be very difficult to remove from the various substrates on the north shore. And if it’s not removed, the oil that remains in the sand and mud could form an asphalt-like layer and persist for years.
16665. Please see the affidavit from now retired District of North Vancouver environmental services manager Ken Bennett, which we submitted regarding this

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- point. Exhibit C106-8-24, Affidavit of Ken Bennett.
16666. Given the experiences with oil spills in other jurisdictions in which the oil persisted even after lengthy periods of time, the possible impact of even a relatively small oil spill on the environment is a serious concern to the District.
16667. It is our contention that the potential for these lasting environment effects on the sensitive ecosystem of Burrard Inlet and the Maplewood Conservation Area vastly outweigh any possible benefit of the project.
16668. Burrard Inlet is an important marine ecosystem vulnerable to significant adverse impacts from any oil spill. The oil slick trajectory scenarios modelled by Genwest for the City of Vancouver, Burnaby and Tsleil-Waututh First Nation show a high probability of the oil reaching the shorelines within the District.
16669. Even with a very quick response, which by the way we have no guarantee of, oil can be moved by currents to other locations causing significant environmental impacts and cleanup costs.
16670. I keep mentioning risks, and there's good reason for that. In 2005 in North Van District, we had a landslide in a residential area; the Blue Ridge escarpment collapsed. And in the blink of an eye thousands of tons of mud, rock and trees came down the hillside and many properties were damaged. But most tragically, a District resident Eliza Kuttner passed away in the slide. And as Mayor, I've spent many years helping the community heal from that natural disaster.
16671. Our council took a good hard look at how we deal with risk. And as a result, we adopted a new approach to managing those risks that are particularly associated with natural hazards. This approach establishes criteria for the degree of risk that is acceptable to the community that is faced with the actual risk.
16672. And in recognition, in Geneva in 2011, I accepted on behalf of the District of North Vancouver, the United Nations biannual Sasakawa Award for disaster risk reduction. And it was also recognized as a world role model city for the United Nations resilient cities project.
16673. Now here's the most important point that came out of that experience and that work. Decisions regarding risk management should take account of the

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- wider context of the risk, including a consideration of the tolerance of those risks borne by parties other than the organization that will benefit from the risk. And again, including the consideration of the tolerance of risk borne by parties other than the organization that would directly benefit from the risk.
16674. This principle is both a Canadian and international standard for risk management, and yet it is not being used in this process.
16675. Given the increase in tanker traffic from 5 to 34 tankers each month, and the growing size of these vessels, the Trans Mountain Project would significantly increase the risk of an oil spill in Burrard Inlet. And that increased risk is borne by all of the communities that border the Inlet, but none so much as us.
16676. And I would also point out that North Vancouver District took its time, unlike most of the harbour communities, to learn to listen to not only our residents but also the scientific information available. We held an early public meeting. I joke sometimes that 50 percent of our residents are retired engineers with lots of knowledge and a little too much time. We have a very knowledgeable community with people who have had careers in marine shipping and in science and the petrochemical industries.
16677. And as a result, we had a very robust debate including some of the people in the audience behind me who were there, pros and cons. It was very balanced. So we did not come out and prejudge anything. We didn't prejudge the process, we didn't prejudge its validity, or the integrity of Kinder Morgan.
16678. Our experience, however, is that in spite of this there has been no significant consultation with the communities located along the Inlet to determine whether there are acceptable of risks with respect to the Trans Mountain Pipeline Expansion Project and the increased risk of oil spills that it brings to the region. I heard that actually echoed in our Tsleil-Waututh neighbours and colleagues who just spoke.
16679. I guess the question I have is, in 2006 how is that acceptable? Shouldn't you start with North Vancouver District and the Tsleil-Waututh Nation, as our shores are the most immediate to the risks associated with bitumen transference to tankers.
16680. So what happens if we do have a spill in Burrard Inlet? Current spill

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- response methods are slow, laborious, very expensive, and ineffective in certain circumstances. Cleanup of the Conservation Area mud flats in the end may simply not be possible. And you must understand this would be devastating to life forms in this important ecological area, especially so if it were to happen during a seasonal period with high wildlife populations.
16681. Ultimately, any oil contamination in the mud flats will have long-lasting adverse ecological consequences and undermine the ecological, cultural and economic value of the last remaining natural mud flats in Burrard Inlet.
16682. Section 4.6 of Trans Mountain's emergency response plan from Westridge Marine Terminal states that it is not possible to clean up freshwater flats. It is expected that this would be the case for the tidal mud flats and the estuarine habitats as well.
16683. The probability of oiled shoreline at Maplewood Flats in the event of a spill at Westridge Marine Terminals is clearly illustrated by the table of the results of seasonal stochastic modelling provided by Trans Mountain, who acknowledges that as coastline, Maplewood mud flats would be tidally influenced and as such present unique challenges to cleanup.
16684. Because intertidal mud flats are difficult and possibly hazardous to walk upon, containment boom deployment would likely occur from a boat. And if you've ever seen the mud flats, you would quickly realize that for all practical purposes this is a physical impossibility. If the tide is out you cannot boom from a boat.
16685. And so the matter of fact is this. That even with the best possible emergency response system in place, if there is a spill in Burrard Inlet that oil is very likely going to reach the Tsleil-Waututh and District shoreline. And a spill that reaches this shoreline would result in serious and lasting negative impacts on the District's physical and ecological environment, as well as its economy, public health and safety.
16686. No matter how good the spill response program is, from the District's perspective, it will inevitably be a cleanup operation. No matter how fast the response, the damage will have been done. And in light of this, the District's assessment of the Trans Mountain Expansion Project is that the environmental, economic, public health, and safety risks posed by this project clearly and undeniably outweigh any public benefit. And imposing conditions on Trans

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Mountain's operations cannot effectively mitigate those risks, and consequently, we are opposed to the project.

16687. And finally, on a more personal note, I began my work career as a 22-year-old teaching Canadian Literature in North Vancouver. I routinely took 17-year-olds on field trips to Dollarton, where the writer Malcolm Lowry's squatter shack was located immediately across from the proposed terminal. Lowry, who wrote one of the finest novels in the English language "Under the Volcano", while looking across at the refinery's flaming towers took great delight in the fact that the "S" in the Shell sign was burned out. Therefore, he would look across and see red letters "HELL" ---

--- (Laughter/Rires)

16688. **MR. WALTON:** --- in between the flaming towers of gas flares. And this appears in many of his works, as a bit of a humorous aside.

16689. Lowry's novella "Forest Path to the Spring" was written as a symphony of love to both his wife and the natural rhythms that mankind found amongst the winds and the waters and wild creatures of Burrard Inlet from Dollarton. He asked God in it, "Why have you given such beauty to us?"

16690. And as the North Shore steward in 2016, I remind all of us of our sacred duty and always remember why have been given such natural beauty? And it's certainly our stewardship role to protect that going forward.

16691. So I thank you very much for your time, and we'd be pleased to answer any questions. David Stuart is the chief administrative officer of North Vancouver District, and our community has taken a long time to come up with these summary comments which I think define our position. So we thank you.

--- (Applause/Aplaudissements)

16692. **THE CHAIRMAN:** If you would indulge, the Panel does have a couple of questions. And I'll start with Ms. Scott.

16693. **MEMBER SCOTT:** Mayor Walton, I wonder if you can help me a bit with your description of the risk management process that you described. I understood you to say that in managing natural hazards in the framework that you have in place, you have -- I'm not sure if you said "accounted for" or "deferred

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to”” the community that is affected by the risk. And the framework in which I’d like to hear your answer is the advice you would offer us under the *National Energy Board Act* where we’re required to come to conclusions about that public interest and national interests versus local interest and how we could use your process under our Act.

16694. **MR. WALTON:** Thank you. I’ll make some preliminary comments and with your indulgence have Mr. Stuart, who’s overseen a lot of this technical work over the years, may wish to stand up and wrap some additional comments around it.

16695. But ultimately, when we were looking at our lands slippage risks, we recognized that the logical thing to do was to define that in terms of the probability of human injury or death. And we got our advice from engineering academics and from the experience and work that was done in both Australia and New Zealand, who had pioneered some of this risk-assessment work as a result of some of their natural hazards.

16696. Ironically and sadly, the woman in our community, Eliza, who lost her life, was in a similar event in Hong Kong as a nine year old. Hong Kong responded to those tragic mudslides in the 1980s and risk methodology was actually sort of developed, and we took a lot of learning from Hong Kong.

16697. But although land slippage risks are determine by a series of percentage analysis and engineering analysis and calculations that come down to mathematics as to whether the risk tolerability of a community is, for example, 1 in 10,000 or 1 in 100,000 for a human life being affected by a landslide. And really that determines whether or not there’s a residence at the top or a residence at the bottom or whether or not there’s particular traffic or human activity around.

16698. When we come to the mudflat, it’s a slightly different situation because you may find that the damage done by an oil spill would have, as I mentioned here, you know, irreparable damage done to the environment. Although it may not directly cause a human life, our feeling and then the challenge we had sort of looking forward is how do you look at the impact potentially on human life on top of marine life, given the fact that the bitumen along the foreshore certainly would have almost immediate impact on a lot of species. But the human risk of life would likely be latent. It would be -- probably would take a longer period of time to impact that.

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16699. David, do you want to make any comments?

16700. **MEMBER SCOTT:** If you could specifically address the whole idea of how this fits in the balancing of national versus local interest. I'm particularly interested in that. I think I understand what you've described as your risk management of natural hazards in your jurisdiction, but I wonder how that fits in a framework where we're required not just to have consideration of your local consequences, but how we could implement that in an assessment that requires us to have national considerations.

16701. **MR. STUART:** Well, one of the challenges that we found as we approached the whole issue of risk was framing it in such a way that the average person on the street, the community that we serve, could understand.

16702. And so you look to some of the standard indices that would indicate the kinds of risks that people experience in their normal lives, and then when you look at risk in its concept -- which is really the probability and the severity of the impact -- you try to engage in a scale that says, "What kind of risks do people normally experience in their day-to-day life?" And one of the risks that we identified was, "Well, what's going to happen if you step out of your house and what are the chances you're going to get into a car accident?" It's just a way of framing what often become fears. And in fact, there are many things and many risks that we all take in our everyday life.

16703. So we approached the assessment of risk using that kind of a framework and gave a taskforce and the community an opportunity to wrestle with what was the acceptable risk.

16704. But as community leaders we also took that discussion and broadened it from landslides to include debris flow, floods, extreme weather events, interface fires, and flooding and earthquakes. And in fact, very recently we have applied the same kind of risk approach and cooperated with the federal government and UBC to actually map out the entire district, and looked at the probability and the consequences, both for life safety and a number of other factors, of all of the buildings in the district if an earthquake occurred. And then we decided on a series of actions.

16705. And in some cases, it was recognized that we couldn't completely mitigate that. And in fact, what we've done has now started to in fact inform particularly business areas and high-risk areas as to what they could do to mitigate

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- their risks and have provided professional assistance to mitigate that risk.
16706. We've done that similarly with respect to slope. We actually assessed all of the slopes in North Vancouver from a geotechnical standpoint, identified the high-risk points, identified the mitigation that occur, and provided in fact those residents that were in high-risk areas with free independent technical advice as to what they could do to mitigate that risk.
16707. So if I could apply that from a local to a national scene and the application to this particular projet, it's a matter of defining what the community accepts is an acceptable risk; determining what in fact can be done to mitigate that risk; and then if you reapply the formulas, would the mitigation or actions that can be taken to reduce the risk and reduce the severity, are they sufficient for the community to accept.
16708. And I know that's difficult on a broad scale, but we are talking about a reasonably specific geographic area. And we think there is literature out there that talks about risk management that would enable you to say, "This is the risk if nothing happens, if we take no action; and this would be the risk if we did, this, this, and that." And is that more now acceptable to the community or not.
16709. **THE CHAIRMAN:** Mr. Davies has a question on this area too.
16710. **MEMBER DAVIES:** Other municipalities have brought up the spill response example that the Marathassa, I believe it's pronounced, incident demonstrated. And in the context of that we've heard, I think, something of a consistent view by many of your municipal colleagues around Burrard Inlet and in the City of Victoria as well, that that incident demonstrated a lack of coordination, a lack of cooperation amongst the affected municipalities.
16711. But I wanted to also bring it to you on the question of what you just said about the mapping that your jurisdiction has done in regard to particular risks, you know, geotechnical and all of that. I didn't hear among them -- the specific examples that you gave, I didn't hear among them the risk of bunker fuel leak that could be coming from a vessel that's currently transiting in and out of Burrard Inlet and the very real risk, as was demonstrated by the Marathassa incident.
16712. **MR. STUART:** A couple of comments with respect to that. Our focus has been on natural disasters and I couldn't quite call a spill from an oil

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- tanker a natural disaster. It's a man-made disaster. That not being said, we did participate in the -- an emergency response around that particular incident and we would concur with our fellow municipalities and those that participated that the model of response doesn't work, and in fact, participated in assisting the Coast Guard in developing their recommendations for changes.
16713. In particular, one of the issues that we identified is that there's not a common mapping which is available to the experts. We're monitoring the movement of oil if there's a spill and therefore a lot more mapping needs to be done so that those who are advising the response teams have an understanding of local conditions, and that's a real weakness right now with that -- with respect to that.
16714. **THE CHAIRMAN:** If you'll allow me to pull some threads through with my questions, where I'm going with. In your submission -- in your oral argument, you talk about the ecological value of the Burrard Inlet and it's an inlet that has many First Nations, many communities, that are all involved in --- that live around it, use it.
16715. So I'm interested -- there was -- you indicate on page 7 the Burrard Inlet Environmental Action Program, and that has now been since disbanded in 2013, and in that, the group developed an environmental management plan, environmental indicators, habitat atlas and including maps displaying the habitat and the various types as well.
16716. Where does that information reside now from that group? And has that been -- because I know you make some certain conditions about mapping and the importance is not lost on us on the Maplewood Conservation Area and the Wildlife Bird Trust information in your evidence. So I'm leaning to some more questions on that mapping, but that information, where does that lie now and how is that integrated into anything moving forward?
16717. **MR. STUART:** It's my understanding that it exists in some warehouses somewhere. We went looking for it as a part of the process of trying to gather information to inform our response to this proposal. But I don't believe it's widely available and nor do I understand it to be immediately available to those interested parties, including government agencies, who want -- might want to look at it.
16718. **THE CHAIRMAN:** Hence then -- so that leads me to my string of

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- question regarding the -- on page 25 you make some additions to conditions on an "environmental impact" where you talk about establishing and maintaining a system for maintaining environmental baseline data to inform spill response in long-term remediation, including birds, fish, fisheries data, in Burrard Inlet and shoreline mapping.
16719. And I'm wondering how you would -- who would be involved in that, considering we're mapping the -- suggesting we're mapping the whole of the Burrard Inlet shoreline? And how would that -- who would have responsibility to do that and how would that be integrated to the greater use of Burrard Inlet, considering there are First Nations communities, a number of people involved in that?
16720. **MR. STUART:** Most municipalities and some of the First Nations, in fact, have very active geographic information spatial systems but we tend to map to the shoreline, which is where the municipal boundaries cease, the high water line. So such an endeavour would really have to be a collaboration between federal, provincial, municipal and First Nation agencies.
16721. And I think -- at least I can speak on behalf of the municipalities -- I think that's something we would -- and the First Nations, perhaps -- that we would be very interested in, and we think it's absolutely essential if we are to continue to examine, not only just this project, but any project, in fact, that occurs in the industrialized area of the Burrard Inlet.
16722. And as the mayor recognized, we are an industrial port. We recognize that. We're not suggesting that that's necessarily going to change, but there's a certain amount of due diligence that we think is necessary in order to actively assess those projects and their potential impact.
16723. **THE CHAIRMAN:** And I sent -- I understand that and -- because in your -- in our -- your suggestion under "Emergency Response Resources and Planning" some conditions, you know, that you're suggesting that Trans Mountain -- the maps that they've produced don't accurately -- such maps do not illustrate the true extent of beaches, mud flats and estuaries as they exist at low tide, which the mayor had comment on.
16724. So if we're to -- as you know, our responsibility is -- we have only certain limits to our responsibilities under our Act. So how would you envision that we could influence that, integrate it to deal with the issue regarding Burrard

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Inlet, because there a number of players. Would you have any suggestions for how we could perhaps assist?

16725. **MR. STUART:** Well, I think it would be difficult to me -- for me to second guess exactly how the federal government would approach that, but ultimately these waters are federal waters and I think the recommendation would have to be that they would undertake, by an appropriate lead agency, and perhaps that's the Environment, perhaps that's the Coast Guard; I'm not sure, but that a lead agency be formed and -- to work with and collaborate with other agencies that have an interest in this to develop that specific information and continue the monitoring.
16726. During the spill that was mentioned earlier on, in fact, it was a dearth of information and in some cases, the advice that was being given to the -- those that were in charge of the cleanup and monitoring it were actually based back east and really did not have available the local information, the local mapping and the local conditions that might have really assisted us in preparing.
16727. I mean, to be very honest, in the District of North Vancouver, the only approach we had to finding out, in fact, if oil was landing on our beaches was to send our park rangers down two or three times a day to the beaches. And that's not a very scientific approach determining and trying to mitigate or prevent impact of oil spills.
16728. **THE CHAIRMAN:** With that -- by all means, Mayor Walton, please.
16729. **MR. WALTON:** Just as a slight add on to that, one of the things we discovered during our community work was that likely this -- there's a significant existing risk right now. There has been with the last 100 years. I think it was clear from the spill in Burnaby, the land spill, that that's the case.
16730. And I think the thing that struck me during the Marathassa spill and the response, is that fact that there was a -- there was some modelling done that I indicated was paid for by, I believe, it's Burnaby, Vancouver and the Tsleil-Waututh First Nations.
16731. But the idea, for example, of their being already a database of tidal flows and tide levels and vulnerable points within the harbour; that work, for example, has never, to my knowledge, been done or initiated in 100 years, despite the level of risk that exists currently regardless of whether or not we -- you know,

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this -- you grant Kinder Morgan its ability to expand Westridge. And I think that kind of work, for example, is the kind of work that might well have flowed from a detailed consultation within the harbour long before this application came forward.

16732. And I think that there's existing risk which is, I think, what -- you know, what we're saying right now, let alone we have an inability to respond to an adequate level -- you know, our community certainly indicated right now, let alone taking that next step forward. And that's the community consultation that we talked about and I know the Tsleil-Waututh before us talked about -- this is 2016 and we have to do it better than we have.

16733. And we're starting from a situation where the -- if you read back some of your annals of Vancouver and you read the descriptions of Vancouver's North Shore, we -- there was such irreparable damage done in the first 100 years. In fact, a lot of it was done by 1915 with the railroad berming all the way along the North Shore which interrupted the tidal flows and completely changed the natural -- that's happened. We can't undo that, but I think what we can do is ensure that what ecological resources we have left are certainly protected. And we have that within our ability to do. Thank you.

16734. **THE CHAIRMAN:** Thank you, Mayor Walton, and -- for your presentation today.

16735. And we will now take a 5-minute recess and then we will be hearing from the Living Oceans Society and Raincoast Conservation Foundation. Thank you.

--- Upon recessing at 10:49 a.m./L'audience est suspendue à 10h49

--- Upon resuming at 10:59 a.m./L'audience est reprise à 10h59

16736. **THE CHAIRMAN:** We're now prepared to hear the oral summary argument from Living Oceans Society and the Raincoast Conversation Foundation.

16737. So we're in your hands and we're ready to hear your -- we've read all your evidence and your written argument-in-chief and we're looking forward to hearing your oral summary argument.

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--- FINAL ARGUMENTS BY/ARGUMENTATION FINALE PAR LIVING OCEANS SOCIETY AND RAINCOAST CONVERSATION FOUNDATION:

16738. **MS. TUYTEL:** Thank you.

16739. Good morning. My name is Dyna Tuytel and I'm counsel for Living Oceans Society and Raincoast Conservation Foundation. I'm joined today by Karen Wristen, who is the executive director of Living Oceans Society; Misty MacDuffee, who is a biologist with Raincoast Conservation Foundation; and by my colleagues Margot Venton and Karen Campbell, who are also counsel to these intervenors.

16740. Living Oceans and Raincoast are intervenors in this process because they have vast experience and knowledge of coastal wildlife, ecosystems and communities, and because they have deep concerns about this project.

16741. They've participated in the Board's review to provide evidence and to make arguments about some of the project's impacts that are of greatest concern to them. These include impacts on southern resident killer whales, Fraser River fish species, especially salmon, marine forage fish species, the fate and behaviour and effects of spilled diluted bitumen, air quality impacts and related human health effects, and other public interest considerations.

16742. Living Oceans and Raincoast submit that the Board should recommend against approval of the project for four reasons. First, the requirements of the *Canadian Environmental Assessment Act*, which I'll refer to as CEAA, cannot be met.

16743. Second, the project will cause significant adverse environmental effects that cannot be justified in the circumstances pursuant to CEAA. Third, the Board cannot meet its *Species at Risk Act*, or SARA, obligations and the project would be unlawful according to SARA. And fourth, the project overall is not in the public interest.

16744. Given the time limit, the fact that my clients have filed very thorough written submissions, and the Board's interest in hearing only key points, I'm going to limit my comments today to three points drawn from our written argument, which are, first, the requirements of CEAA and why they are not met in the case of the effects of diluted bitumen spills; second, the requirements of CEAA and SARA and why they are not met and the project would be unlawful in

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the case of effects on the southern resident killer whales; and third, my clients' submissions on the public interest determination the Board will make under the *NEB Act*, including public interest economic considerations.

16745. Living Oceans and Raincoast will rely on their written submissions for everything that I don't address today.
16746. And I'll start with the effects of diluted bitumen spills as an example of Trans Mountain not meeting the CEAA requirements. I'll explain why the Board is unable to meet its CEAA obligations to consider the project's effects, their significance, and mitigation.
16747. Trans Mountain's approach to the effects of oil spills impedes the Board's ability to meet CEAA requirements. CEAA requires the Board to consider the environmental effects of the project, including effects of accidents or malfunctions that may occur and their significance and potential mitigation.
16748. It also requires the Board to do this in a way that's consistent with the precautionary principle. This means that scientific uncertainty is not a reason to underestimate problems or to allow them to occur and defer solutions to a later time.
16749. The environmental effects of the project include the effects of an oil spill. But because Trans Mountain focuses on the probability of an oil spill from the pipeline or a tanker, which it says is low, and because it takes the position that diluted bitumen is unlikely to sink or submerge, Trans Mountain doesn't adequately address the effects of a diluted bitumen spill.
16750. The fate and behaviour of diluted bitumen has been debated by the Proponent and by intervenors in their evidences and final arguments. It's subject to ongoing research outside of this hearing.
16751. Living Oceans has filed a peer-review of Trans Mountain's Marine Environmental Risk Assessment, which was prepared by Dr. Jeffrey Short who's an expert on the effects of oil spills. His report shows that under certain conditions which are present in areas where the pipeline or a tanker could spill, diluted bitumen will submerge.
16752. There is some agreement between the parties on this point and that Trans Mountain concedes that certain wind and wave conditions and sediment

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- concentrations may result in submergence. But Trans Mountain's position overall is that this is unlikely. Because of its approach to this evidence, Trans Mountain fails to assess the full range of effects on the environment from an oil spill, including the possibility of organisms being exposed to submerged oil or all of the ways that submerged oil can harm organisms, and resulting impacts.
16753. Dr. Short's evidence addresses these impacts as does Dr. Caroline Fox's evidence on the project's effects on pacific herring and other marine forage fish, which is part of Raincoast's evidence and is addressed in paragraph 84 to 87 of our written argument.
16754. Dr. Short addresses the effects of diluted bitumen submerging and his evidence shows that it would be ingested by species in the water column or on shorelines, including herring and salmon and their prey, which are all important species.
16755. Raincoast's evidence on the project's effects on Fraser River fish species show that submerged diluted bitumen in the lower Fraser could become trapped in riverbed sediments where fish spawn, and could expose fish to toxicity for a period of months to years resulting in multiple weak or missing year classes of a fish species.
16756. Even oil that doesn't submerge will have significant adverse effects by exposing species at the surface, such as birds or marine mammals, to an oil slick or to toxic fumes. And this is what Raincoast's evidence on killer whales shows probably caused the unprecedented mortalities in two orca pods following the Exxon Valdez oil spill.
16757. Dr. Short's evidence also shows that Trans Mountain underestimates shoreline impacts and recovery times. This is in part because it fails to identify how much of each type of shoreline will be affected and fails to recognize that some shoreline types can retain oil for years or even decades.
16758. For example, estuaries, marshes, and lagoon habitats account for 19 percent of Burrard Inlet and Fraser Estuary shorelines and these are the most productive and ecologically valuable shoreline types.
16759. Dr. Short shows that shoreline areas with tidal marshes could retain oil for prolonged periods of time. Impacts would include species being oiled, ingesting oil or eating oiled prey, or being exposed to toxic compounds in oil that

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dissolve in water.

16760. Trans Mountain also fails to identify effects of oil spills due to its methodology. And I'd like to focus on this for a minute within this discussion of oil spill impacts because this is a pattern in Trans Mountain's evidence that goes beyond its oil spill evidence. Flawed methodologies are a problem throughout Trans Mountain's evidence and they result in inaccurate and unreliable predictions about project effects and they cause Trans Mountain to understate those impacts or overstate project benefits.
16761. Flawed methodologies appear in Trans Mountain's studies of air quality and human health impacts, which my clients address in detail in their written argument at paragraphs 226 to 252 where they explain the conclusions of Dr. Isobel Simpson's peer-review of Trans Mountain's air quality evidence and Dr. Stuart Batterman's peer-review of human health impacts filed as a part of Living Oceans evidence.
16762. Flawed methodologies also appear in Trans Mountain's economic evidence, which I'll address later in my comments.
16763. In the specific case of oil spills, though, Dr. Short's evidence and Dr. Fox's evidence explains that Trans Mountain's methodology doesn't assess hazard independently of the risk of exposure to oil. It concludes that the hazard of species being exposed to oil is minimal based on the probability of oil exposure, and it fails to address hazard based on species sensitivity to oiling. This is not an appropriate risk-assessment methodology.
16764. The focus on risk of exposure at the expense of sensitivity to exposure is also another example of shortcomings resulting from Trans Mountain relying very heavily on the probability that something won't happen. Again, the result is that potential effects are ignored.
16765. With respect to the CEAA requirement to consider significance of effects, Trans Mountain says that the effects of a spill would not be significant. This is connected with several shortcomings of its approach, which include a failure to fully identify effects --because ones that are not identified can't be identified as significant; its overly optimistic description of how quickly aquatic habitat will recover from an oil spill in the face of Living Oceans's evidence to the contrary; and its overemphasis on likeliness in determining significance.

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16766. Assuming that effects are not significant and therefore don't need to be mitigated due to remaining scientific uncertainty, is not a precautionary approach. Where there is uncertainty, Trans Mountain assumes the effects are not significant, whereas, the proper precautionary approach would be to assume that they may in fact be significant.
16767. Finally, Trans Mountain fails to address mitigation for diluted bitumen spills. Because it takes the position that diluted bitumen probably won't submerge, Trans Mountain hasn't addressed the possibility of oil submerging in its cleanup plans or environmental protection plans. It fails to outline mitigation measures for spills resulting in spilled diluted bitumen and fails to address the lack of available technology to clean it up.
16768. Other evidence filed by Living Oceans shows that there is no technology currently available that can recover submerged or sinking diluted bitumen.
16769. As my second main point today, I'll use the case of the southern resident killer whales to illustrate that the project will cause significant adverse environmental effects that are not justified in the circumstances pursuant to CEAA, and to show that the Board's obligation under the *Species at Risk Act* can be met.
16770. I'll describe the CEAA and SARA requirements and then I'll explain in some detail why, based on evidence filed by Raincoast, the project will have significant adverse environmental effects that won't be mitigated and can't be justified in the circumstances, and why the requirements of SARA aren't met.
16771. So in the context of these whales, I've said that you're dealing with two sets of legal requirements; first in terms of CEAA, in addition to the requirements that I've just described in the context of oil spills for considering environmental effects, their significance and mitigation, CEAA requires the Board to make a recommendation to Cabinet about whether the project is likely to cause significant adverse environmental effects and, if so, whether they're justified in the circumstances, taking mitigation measures into account.
16772. And SARA raises the bar further for environmental assessment where species at risk are concerned. It requires the Board to ensure that environmental assessment identifies all adverse effects of the project on a list of wildlife species and its critical habitat.

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16773. It requires the Board to ensure that measures are taken to avoid or lessen all of those effects, regardless of their significance, and it requires that the measures be taken in a way that's consistent with the recovery strategy for the species.
16774. The Board's own filing manual interprets how the SARA requirements apply in the context of project applications filed with the Board, and it does so in a very robust way by stating the projects must preferably avoid or fully mitigate and compensate for projects' contributions to cumulative effects on SARA-listed species. These requirements are especially relevant to the SARA-listed endangered southern resident killer whales.
16775. And if we could pull up Exhibit B18-25 at Adobe page 16 and, if possible, scroll or zoom in on the area that's shaded in purple.
16776. As you can see from this map, the project tanker route runs right through the southern residents' critical habitat, which is defined in SARA as the habitat that's necessary for their survival and recovery.
16777. This map from Trans Mountain's application is a little bit difficult to read because there's a fair bit going on, but the area filled in with purple is critical habitat for the southern resident killer whales, and the area on the Canadian side of the international boundary line is the officially designated critical habitat under Canadian law.
16778. As you can see the tanker routes in blue and red travel through critical habitat from that point just west of the Vancouver label on the map all the way to Cape Flattery at the northwest corner of Washington.
16779. So these whales and their critical habitat face three main threats which are described in Raincoast's evidence and in the official recovery strategy; acoustic disturbance from vessel traffic; prey availability; and contamination, including from oil spills. I'll briefly explain how each of these threats would be exacerbated by the project, starting with acoustic impacts.
16780. As the Board is aware, acoustic impacts on the Southern Residents are the one effect of this project that Trans Mountain concedes will be a significant adverse environmental effect. Raincoast has filed evidence from Dr. Christopher Clark, a world-leading expert on the impacts of vessel noise on whales at Cornell

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University, and his evidence explains that noise has two kinds of impacts.

16781. One is that vessels create what can be described as an acoustic smog which prohibits whales from using sound to communicate with each other or to hunt using echo location. The whales are already losing up to 97 percent of their opportunities to communicate during busy traffic times in the Salish Sea and Dr. Clark's evidence says that the addition of project-related vessels could take away their few remaining opportunities to communicate.
16782. The other impact of vessel noise is behaviour. Vessel causes the whales to interrupt whatever useful thing they're doing, such as communicating or hunting, and to replace that with other behaviours such as travelling. This means that vessels are interfering with their ability to do things that are critical to their survival, such as finding food, and it means that by switching to travelling behaviours they're expending extra energy which is really problematic for a population that faces a shortage of prey.
16783. And this brings me to the second threat to the whales, which is prey availability. Despite recognizing that the declining availability of Chinook salmon is one the three main threats facing these whales, Trans Mountain fails to assess the effects of the project on prey availability.
16784. Raincoast does address this effect in its evidence and argument, and it makes the connection between the whales' reliance on Chinook and the risks that a spill in or near the Fraser River could pose to Chinook salmon. Their evidence shows that Chinook are especially vulnerable to a spill due to the areas that they frequent within the Fraser River and the number of months per year that they're present there.
16785. Finally, the project will exacerbate the threat of contamination and, in particular, oil spills. Raincoast's evidence and the official recovery strategy both show that the effects of the spill on the whales could be potentially catastrophic.
16786. Despite acknowledging that whales don't avoid spilled oil and that the whales are likely to be exposed to oil in critical habitat in the event of a spill there, Trans Mountain doesn't recognize the effects of a spill on critical habitat or on the whales as significant because it downplays the effects of spills on the whales, both in terms of impacts on an individual whale or on the population of whales, and because it says spills are unlikely.

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16787. This, and the failure to address prey impacts, are another example of Trans Mountain's overemphasis on likeliness and its failure to assess effects of accidents that may occur on the basis that they may not occur.
16788. There are two more important things to note about these three effects. One is that Trans Mountain fails to address the effects of the project on critical habitat itself, which SARA specifically requires the Board to address.
16789. Critical habitat isn't just a space; it's a space with particular attributes that are necessary for the survival and the recovery of a species. In this case, those attributes include a quiet enough acoustic environment, a clean enough marine environment, and the availability of prey. Each of the three main threats to the whales corresponds with a threat to an attribute of their critical habitat.
16790. The other important thing to note about these effects is that Trans Mountain also fails to address how all three effects interact on the whales and the population level effects of those threats; that is, how these threats could affect the number of whales in the population and whether it increased or, in this case, declines.
16791. Trans Mountain claimed that it didn't have the tools available to assess population level effects, but Raincoast has provided such evidence of the population level effects of the main threats and the combination of them in a population viability analysis provided by a number of experts, which I'll refer to as the PVA.
16792. And if we could pull up Exhibit C291-1-6 at Adobe page 36. So we're looking at Figure 14 on the bottom half of the page. And essentially what this graph from the PVA shows is how the three main threats to the whales would be exacerbated by the project and cause a decline in the population. And you can see this from the coloured lines on the graph which show the population level effects of individual threats, as well as the black line which shows the greater combined total effect of these threats on the whales' population.
16793. What the PVA shows is that the whales can't handle this project. It shows that there is still hope that this population can recover if existing threats are mitigated but it shows that with the addition of the project to the existing threats, they face a decline and a 50 percent chance of becoming effectively extinct within 100 years.

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16794. No one has filed competing evidence on this point and Trans Mountain did not file reply evidence on this point. So no one has challenged Raincoast's evidence of population level effects.
16795. Based on these facts, the Board should recommend that the project will have significant adverse environmental effects that will not be mitigated and cannot be justified pursuant to CEAA.
16796. I'll briefly address each of significance, mitigation, and justification, in that order.
16797. First, each of the effects that I've just described is significant. Significant acoustic impacts are a certainty. They'll result from normal project operations, and Trans Mountain concedes that they're a significant effect.
16798. Second and third, effects of an oil spill on the whales or on the availability of Chinook salmon. The fact that the effects of an oil spill on the whales themselves or on their prey would be the effects of an accident or malfunction -- in other words risks as opposed to absolute certainties -- does not mean that these effects are not significant.
16799. Effects of accidents and malfunctions are among the environmental effects that may be significant according to the language of CEAA, and likeliness is only one of many factors relevant to significance, which Living Oceans and Raincoast have described in detail in their written submissions.
16800. These effects would be significant. They are major recognized threats to the southern residents, and the evidence shows that they will cause the population to decline. Each of these effects on the whales themselves, as I have said, corresponds with a significant effect on critical habitat. The overall effect is degradation of their critical habitat.
16801. And the evidence shows that the combined effect of these threats with the addition of the project will be a decline in this highly endangered population, and this can only be considered a significant effect.
16802. Next, I'd like to explain our submissions on mitigation of these effects. These are set out in full in our written argument at paragraphs 281 to 287, and I'll summarize them.

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16803. Based on the evidence before you, there's no way that you can ensure that the significant adverse effects on the whales can be mitigated. Mitigation is defined in CEAA as the elimination, reduction, or control of adverse effects including restitution for those effects.
16804. Trans Mountain has not proposed mitigation to address any of the effects on the endangered southern resident killer whales even though CEAA requires the Board to consider mitigation measures for significant effects and SARA -- which I'll turn to after CEAA -- requires mitigation measures for all adverse effects regardless of significance.
16805. Trans Mountain's position is that there is no feasible mitigation available for the significant effects of tanker noise on the whales and their critical habitat. So instead of proposing actual mitigation, Trans Mountain relies on the Port Metro Vancouver coordinated ECHO Program, and says it will incorporate ECHO's findings into its Marine Mammal Protection Program.
16806. There are a number of problems with this approach. The Marine Mammal Protection Program will not be filed with the Board until after the Board makes its recommendation, and only 60 days before project operations begin. And it won't actually contain specific mitigation measures or other specific obligations.
16807. ECHO itself is a plan for future studies conducted by other parties for which Trans Mountain will provide some funding with no guarantees as to when the studies will conclude, whether they'll successfully identify mitigation measures and whether those measures, if any, will be implemented by Trans Mountain. Trans Mountain isn't accountable for the outcomes of the ECHO Program.
16808. Trans Mountain says that it intends to incorporate ECHO's findings into its Marine Mammal Protection Plan, but the intent to do something in the future can't be mitigation. What Trans Mountain has proposed is not mitigation, and it can't legally substitute for mitigation.
16809. Practically speaking, the reliance on a plan to work out mitigation at some point in the future to address significant adverse effects that we already know will occur is extremely problematic in the case of an endangered population already teetering on the brink of a dangerous decline. We can't wait until later to mitigate effects that we know are going to occur because there may not be a later

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for these whales.

16810. The whales need effective mitigation measures identified and implemented before the project begins operations. This is why the law requires you to ensure mitigation of all adverse effects on endangered species because there is no later for an endangered species.
16811. In the case of this project's adverse effects on the southern residents, based on the evidence you have before you, you don't have the tools to fulfill this obligation. The mitigation that's needed doesn't exist at this time.
16812. My final point about CEAA is that these significant and unmitigated effects are not justified in the circumstances. The circumstances relevant to whether an adverse effect is justified are the countervailing benefits of the project in question, but Trans Mountain on irrelevant considerations.
16813. Trans Mountain argues that the acoustic effects are justified because the project related vessels will only be a fraction of overall traffic, and the shipping lanes are already busy and will be used anyway. This is an excuse, not a justification.
16814. This also misses the point of addressing the project's cumulative effects. Environmental assessments must address cumulative effects because the project in question is always only part of the problem. Justification is needed not only for the project's contribution to harming killer whales and their habitat, but also for the significant cumulative effects and project related tanker traffic in combination with other sources of noise. The fact that this project would make a bad situation worse is not an argument for going ahead with it anyway.
16815. Trans Mountain also argues that the acoustic effects are justified because there is no solution. But the fact that there will be no mitigation weighs against justification. Significant and unmitigated effects on an endangered species, which will prevent its recovery and may lead to its extinction, and will not be mitigated cannot possibly be justified in the circumstances.
16816. The justification analysis here comes down to weighing the short-term benefits of transporting oil against effects that include an iconic and intelligent mammal species declining and a very high risk of it disappearing forever. Those are the CEAA requirements.

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16817. And I've said that SARA raises the bar higher than CEAA when it comes to effects on endangered species. I've mentioned that SARA explicitly requires the Board to identify all adverse effects on the southern residents, and to ensure measures are taken to avoid or lessen all adverse effects. SARA doesn't include a justification option. You can't justify effects on an endangered species; you have to mitigate them.
16818. I've pointed out that Trans Mountain's application doesn't include measures to address adverse effects on killer whales, and that based on the evidence on the record there isn't a way for the Board to ensure adequate mitigation using conditions. If the Board can't meet the requirement to ensure that measures are in place, it can't recommend in favour of this project.
16819. SARA's purpose is to prevent extinction and recover species. Unlike CEAA, SARA does not include a justification analysis, and it's not an option for the Board or for any responsible authority under environmental assessment legislation to approve or recommend in favour of a project that will jeopardize the survival or recovery of a listed species or destroy its critical habitat. The evidence shows that this project will jeopardize critical habitat and the whales' recovery, and even their very survival.
16820. The third and final issue today that I'm going to speak to you is the Board's task under section 52 of the NEB Act and its public interest recommendation, including the particular question of economic costs and benefits.
16821. I'll start with the question of economic costs and benefits, and then I'll address the public interest more broadly.
16822. In terms of environmental benefits, Trans Mountain has alluded to some maintenance work in parks and has claimed incredibly that the project will benefit the southern residents due to Trans Mountain's contribution of funding for research about effects on them. Really though, the benefits of the project that Trans Mountain relies on are limited to the economic benefits of market access and higher prices for oil, and even these benefits are overstated.
16823. The report that Living Oceans filed prepared by Dr. Gunton and his colleagues is a direct response to Trans Mountain's Muse Stancil Report. It demonstrates that Trans Mountain has overstated the project's economic benefits and failed to capture its economic costs. And I'll give two examples of this.

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16824. First, the Gunton report says that the project will actually result in a net cost to Canada of billions of dollars. This is largely because the authors have determined using industry projections that the project may create excess pipeline capacity and is not needed.
16825. The authors provided numerous estimates of that cost based on multiple analyses, then incorporated different assumptions and forecasts to account for uncertainties in estimating costs and benefits especially in the context of oil markets. Each one showed a net cost to Canada. In contrast, Trans Mountain's report relies on one set of assumptions.
16826. Second, the authors make it clear that neither they nor Trans Mountain have accounted for unquantifiable environmental costs of the project. If these were able to be quantified they would be an additional cost. Trans Mountain argues that it has internalized costs of this nature. But given the number of adverse effects that it has failed to address or dismisses as unlikely, my clients are not reassured that it has actually internalized the cost of those effects.
16827. When it comes to the test that is involved for the Board's recommendation as to whether the project is in the public interest under the NEB Act, you will weigh all of the project's benefits against all of its burdens.
16828. I've addressed many of these burdens in my comments today. Living Oceans and Raincoast addressed them in more detail in their written argument, including significant air quality and human health effects, including exceedances of air emission standards for substances that are known to be harmful to human health. And they also address in more detail effects of oil spills on many species of marine and Fraser River fish. Other intervenors have addressed a great deal more burdens of this project.
16829. The project's economic benefits, which are overstated, are outweighed by the many environmental, social, and economic burdens of this project, which Living Oceans and Raincoast and others have presented to you. Even the burdens captured by my clients alone, in our submission, outweigh the project's benefits. This is the case even if the Board adopts the amended and additional conditions that my clients have recommended, and other intervenors have recommended.
16830. The benefits and burdens of this project have an important difference. The project is not the last or the only opportunity to create jobs or tax revenues or

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- to move natural resources. It is not irreplaceable to anyone but the Proponent. Its benefits would be relatively short term.
16831. In contrast, the adverse effects of the project include lasting, and in some cases, permanent damage to economic, social, and cultural resources that cannot be replaced. There is no replacement for Fraser River salmon stocks. There is no alternative to the southern resident killer whales.
16832. As well as the overall balancing exercise the Board will undertake, there are certain specific aspects of the public interest that are relevant in this case, which are reflected in the laws that apply to this review and that I've discussed today.
16833. In keeping with the requirements and purposes of CEAA, the project cannot be in the public interest if it has significant adverse environmental effects that won't be mitigated and can't be justified in the circumstances. In our submissions there are many, mostly notably the significant adverse environmental effects on the southern resident killer whales, which I've discussed in some detail.
16834. There is also a public interest in the preservation of at-risk species. This public interest is evidenced by the enactment of SARA and is described in its preamble which takes note of the value that Canadians place on wildlife.
16835. I've explained how the project's effects on southern resident killer whales are contrary to SARA. The project cannot be in the public interest if it is contrary to SARA. And setting SARA aside, it seems self-evident that the extinction of an iconic endangered species can never be justified or in the public interest.
16836. To conclude, counsel for Trans Mountain opened his oral argument by telling you that the world has changed. It has changed a great deal since the original Trans Mountain Pipeline was constructed in the 1950s. The public interested has evolved and our laws reflect it.
16837. Environmental assessment legislation requires applications for major projects to meet certain minimum requirements and to be carefully considered by regulators. *Species at Risk* legislation now guards against the extinction of endangered and other at-risk species.
16838. The ecological context has changed. In particular, extensive human

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activity in the lower Fraser River and the Salish Sea have left these areas vulnerable to additional impacts, and the large population of the lower mainland now means that many people are at risk of emissions from, or accidents at, a project facility.

16839. Trans Mountain told you in oral argument that real and important benefits shouldn't be cast aside based on improbable risks. Living Oceans and Raincoast submit that real risks of serious harm to human health and to ecologically, culturally, and commercially valuable species and ecosystems, as well as certain unmitigated significant adverse effects on an iconic endangered species, including its possible extinction, should not all be disregarded in the face of overstated economic benefits for a few. There is so much at stake.

16840. Living Oceans and Raincoast submit that the Board should recommend against the project.

16841. Those are my submissions.

16842. **THE CHAIRMAN:** Thank you for your submissions.

16843. The Board will take a recess to consider some questions. So we'll come back at 11:45.

16844. Thank you.

--- Upon recessing at 11:33 a.m./L'audience est suspendue à 11h33

--- Upon resuming at 11:45 a.m./L'audience est reprise à 11h45

16845. **THE CHAIRMAN:** Thank you for your indulgence. The Panel do have some questions and we'll start with Ms. Scott, please.

16846. **MEMBER SCOTT:** I wanted to explore a bit your argument on section 79 of SARA and its relationship to CEAA and to the public interest determination that we have under the NEB Act.

16847. As I understand your argument, in circumstances where there is an endangered species there's a requirement that mitigation measures be proposed and that -- just to cut to the quick, as is the case here, there are no mitigation measure proposed that can -- as I think your argument reads or would go, that are consistent with a recovery strategy -- I think that's your argument -- that we have

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an obligation to turn the project down. And I follow the thread of your argument. I don't actually see those words in section 79(2).

16848. And I'm just trying to find by analogy, or explore by analogy, at least, how this would operate in other circumstances because I think this is a law of general application. And I wonder if you could help me understand maybe in circumstances where we're not dealing with diluted bitumen, take some of that issue away from the operation of the Act, but we're dealing with a timber licence, something that's within the jurisdiction of the Province of British Columbia to authorize and presumably require an environmental assessment for and it results in the increase of the number of ships coming and going from Port Metro Vancouver.

16849. How does SARA affect the decisions that the province makes or the obligations of any federally regulated authority in that chain of command, if I can call it that?

16850. **MS. TUYTEL:** Sure. So I'll try to break this down into a few pieces.

16851. For starters, in the analogy that you've proposed, a key difference here is that the Act that applies in this case is the *Canadian Environmental Assessment Act*, as we know, and I'm just going to turn to the relevant provision, if you'll give me a moment.

16852. So the purpose of CEAA as set out in section 4, which I'm still turning to -- my apologies -- is:

"...to protect [the] components of the environment that are within the legislative authority of Parliament..."

16853. So we're dealing under CEAA with things that are of federal concern. And you mentioned the example of the connection between this forestry project and hypothetical forestry project in increased ship traffic. And I think that an important difference here is that you've scoped this project and created a list of issues that capture these marine effects that are so closely connected to the pipeline itself -- the pipeline would not exist were it not for the tanker traffic. I'm not sure that that connection would be made in the example that you've proposed.

16854. For example, if we look at the "Environmental Effects" section of CEAA that sets out what environmental effects are for the purposes of this Act, it

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includes things such as aquatic species as defined under the *Species at Risk Act*. It identifies things that are directly linked or necessarily incidental to a federal undertaking, a federal authority's exercise of a power such as the Board's.

16855. So I think that there's an important difference in that the example you've given -- I'm not sure how that would work out, but in this case it's very clearly been assigned to you to consider these impacts.
16856. **MEMBER SCOTT:** I wouldn't suggest otherwise.
16857. **MS. TUYTEL:** M'hm.
16858. **MEMBER SCOTT:** That's not the point. It's the question of how SARA actually operates and whether or not there are any limits on that legislation in decisions that agencies take, whether they're provincial or federal.
16859. We're not suggesting that we don't understand your argument with regard to how you see it operating with respect to our legislation but there other players. There are other exports happening in the Port Metro Vancouver, and we wonder how your interpretation of SARA would impact those other shipments, which caused the said same problem that you see with the TMX Project, and that is the increased traffic and increased vessel noise.
16860. And do you see SARA as limited to only projects that are federally regulated or is it something of concern to other regulators? And just help me understand.
16861. **MS. TUYTEL:** Sure, and thank you for setting me back on the path to answer your question. This is absolutely a bigger issue than the specific project. It's something that's going to require some big-picture thinking and big-picture solutions.
16862. And what's before you today is a specific example of that, which you've been delegated to deal with, and with respect to this particular project, so we're looking at one specific instance of this within the bigger problem that you've identified.
16863. So for the purposes of your assessment of this project, just by that bigger picture issue which my clients would say absolutely needs to be addressed in a meaningful way, you are also required to look at this project's specific effects

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and its contribution to cumulative effects. And SARA does apply to this assessment in that section 79.2 says that you must ensure that measures are taken to avoid or lessen those effects, so with respect to this specific environmental assessment that's taking place within this broader context.

16864. **MEMBER SCOTT:** Sorry, moving between the Acts here.
16865. **THE CHAIRMAN:** If you just allow us, could we do one to make sure we cover everything that the Panel wants to see? And if you feel the need to take some time too, it works both ways.
16866. **MS. TUYTEL:** Sure.
16867. **THE CHAIRMAN:** It's on the same line, and I'll -- perhaps while Ms. Scott is reviewing her -- some questions, Mr. Davies will come in as well now.
16868. **MEMBER DAVIES:** What I'm wrestling with is the similar issue to what Ms. Scott has raised and that is the interpretation of SARA that you've asked us to adopt. So let me go back and organize what I've heard you say, in my mind, and make sure that I've understood it properly.
16869. It's common ground between the applicant and your client's evidence that the acoustic noise of commercial traffic in established shipping lanes is -- creates deleterious effects for the killer whale, per se, as well as potentially its critical habitat. The acoustic aspect of that is a problem that's contributed to by any vessel traffic that comes and goes.
16870. There are -- the second point is that to the extent that that acoustic pollution creates problems for SARA listed species, the southern resident killer whale, that any activity which cannot be mitigated and is common ground as well, that there's no current mitigation technology that is known that can reduce the acoustic effects.
16871. Your proposition that you're asking us to accept is that therefore, if it can't be mitigated and it's -- it does have a demonstrable adverse affect, it cannot be justified and that's the part that I'm stumbling over.
16872. And don't take this as anything other than a legal discussion. I don't mean in any way to suggest that an endangered species isn't worth this Board's

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and every other federal Board's full attention. But I'm just wondering what the legal test is, because that's what caught my interest as you were going through.

16873. So I think what Ms. Scott was trying to do was to take it out of the context of this particular application and take it out of the context of dilbit or fossil fuel and just talk generally about traffic that's federally regulated. Port Metro Vancouver and Department of Transport and Coast Guard, all of whom are federal authorities, are equally bound, as we are, in exercising their discretion, I submit, to pay attention to the deleterious effects of increased traffic and in this case, the consequences that increased traffic would have on the southern resident killer whale.

16874. So what we're wondering about is, if your legal test is correct, that if the significant adverse effect cannot be mitigated, there is no justification, full stop. So any additional tanker traffic that's regulated by a federal authority would be caught by the same legal test. So in effect, your interpretation creates a moratorium on any additional tanker traffic through these waters, and that's what we want you to help us understand.

16875. **MS. TUYTEL:** Okay. So again, I'll try to sort of deal with this in pieces in a way that I hope will make sense.

16876. So as I said -- and as is the case in any environmental assessment, you have the difficult task of assessing this project within a broader context. So every EA takes place in a broader context and this one involves this difficult issue of ship traffic.

16877. And you're correct about our position. I will make one adjustment to what you've said. You said that if effects can't be mitigated they can't be justified, and that's the test that we put to you in front of -- or under the *Canadian Environmental Assessment Act*.

16878. But SARA, as I've described, doesn't have a justification analysis, so it's that extra level. Under CEAA effects must be mitigated or justified; under SARA, they must be mitigated, and effects can't be justified.

16879. So the provisions of SARA and its purposes make it clear that measures need to be taken to avoid or lessen effects; that's what section 79 says. And the purpose of SARA, which I'll just paraphrase rather than reading it, is that we need to recover endangered species, not allow them to decline or become

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extinct. So that -- those are our sort of overarching legal frameworks that we're working within.

16880. So ultimately, what we're saying is that if it can't be done safely and lawfully, it can't be done, and you've asked whether this is a sort of moratorium on tanker traffic, and I think that that really needs to be looked at on a case-by-case basis. So in this case, what we're looking at is a sevenfold increase in tanker traffic and without referring to the documents themselves, I believe that's about a 13.5 percent increase in overall major vessel traffic. So this in particular is a significant increase.

16881. So within that context, and without speaking to every other project, which is outside the scope of your review today -- and in this particular case, under these particular legal requirements, if this project can't be done safely and lawfully, it can't be done.

16882. **MEMBER DAVIES:** So if an operator of some project that was exporting goods from Vancouver Harbour made further contribution to the cumulative negative effects that are influencing the survival probabilities of a SARA listed endangered species, if it's something less than 15 percent or whatever the number was, there would be a different test than if it were the same or more?

16883. So if I could demonstrate as a project by the Proponent that the increased vessel traffic would only be 7 or 8 percent or 9 or 10, that puts it in a qualitatively different situation than if it's something in excess of 14 or 15 or 16.

16884. I'm looking for the logical thread in your argument because I still submit that your interpretation of SARA, to the extent that any increase in vessel traffic contributes to a further derogation of the survival strategies for the southern resident killer whale, your interpretation of SARA says that a federal agency, if it cannot find a mitigation strategy, has no justification test that can be met and, therefore, it must say no.

16885. **MS. TUYTEL:** Right. So my choice of using numbers to express this may not have been the best choice.

16886. I think what's really important is that our evidence shows that the effect of this project is such that it will cause a decline in the population of the whales and such that they may lose their opportunities to communicate. So

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there's certainly not a different test depending on the magnitude of the impact; the test is the same, the facts may be different. So in this case we have evidence that shows that there will be this significant adverse effect and we've shown that it will cause a decline in the population.

16887. And I can't speculate about percentage increases in traffic or what the specific effect of a certain percentage might be or how that might apply in the case of another project. There would need to be evidence of the impacts of that particular project and we've provided evidence that's very specific to this project. But, I mean, overall this is the test that applies to every project and in this case we say that it's not met.

16888. **THE CHAIRMAN:** You indicated that, you know, the three, the acoustic impacts, the prey availability, and the contaminant from an oil spill. And you indicated that all three, of course, interact. And you also indicated that Trans Mountain had recognized the significant effects of the acoustic impacts with the increased traffic.

16889. Would you indicate to the Panel; would we need all three or would one -- if the test is on one, on the acoustic impacts, that we should, as I hear your argument, under SARA we should recommend that it not proceed?

16890. **MS. TUYTEL:** Thank you.

16891. So I've emphasized acoustic impacts in part because that's an impact that the Proponent and my clients agree would be significant.

16892. But each of these three effects is crucially important. Each one is identified in the recovery strategy as a major threat to the whales. Each one, as our evidence shows, would be exacerbated by the project and would have corresponding effects on the whales.

16893. So in our submission these are all three significant effects and all three need to be mitigated.

16894. **THE CHAIRMAN:** Okay, thank you.

16895. With that, the Panel have no further questions.

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16896. We thank Living Oceans Society and the Raincoast Conservation Foundation for your oral summary argument today, and as we continue, we will consider this, along with all the other evidence that your clients have submitted.
16897. With that, we'll adjourn until 1:30 when we will hear from the Collaborative Group of Landowners Affected by the Pipeline, followed by the BC Wildlife Federation, and concluding this afternoon with the T'Sou-ke Nation.
16898. We're adjourned until 1:30.
- Upon recessing at 12:06 p.m./L'audience est suspendue à 12h06
--- Upon resuming at 1:31 p.m./L'audience est reprise à 13h31
16899. **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 Expansion Project.
16900. We acknowledge today being on the traditional land of the Coast Salish people.
16901. 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. Phil Davies, and together we are the Panel that's assessing Trans Mountain Expansion Project Application.
16902. Just one small housekeeping matter; in the event that we hear a fire alarm, the procedure will be to exit the hearing room 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.
16903. Uniformed security guards will be on both locations to facilitate your exit. Please follow their instructions.
16904. 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 that all members of your party are accounted for and await further instruction from Delta Burnaby representatives.
16905. As indicated in Procedural Direction 20, the Board has set time limits

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- 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.
16906. There is a timer that will indicate 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, and if necessary the microphone will be switched off, although I will warn you before this happens.
16907. With that, I think we're ready to get going this afternoon. And we will hear first from the Collaborative Group of Landowners Affected by Pipelines, followed by the B. Wildlife Federation, and then concluding today with the T'Sou-ke Nation.
16908. Prior to beginning I'll ask the representatives of Trans Mountain to introduce themselves to today's presenters.
16909. **MS. OLENIUK:** Good morning. My name is Terri-Lee Oleniuk and I am legal counsel to Trans Mountain. With me is Lesley Matthews and she's the Regulatory Lead for the expansion project.
16910. **THE CHAIRMAN:** Thank you. And prior to our intervenor presenting I'd just like to make a ruling.
16911. The Panel has received the Tsawout First Nation's request filed this morning to be allowed one additional representative, Ms. Belinda Claxton, a Tsawout knowledge-holder, who provided oral traditional evidence earlier in this hearing, who will be accompanying Chief Harvey Underwood at their oral summary argument presentation taking place on Thursday, the 28th of January.
16912. The Panel grants the request and directs its staff to notify the Tsawout First Nation of its decision. And perhaps the Regulatory Officer could give us a ruling number.
16913. **THE REGULATORY OFFICER:** It would be Ruling 117.
16914. **THE CHAIRMAN:** Thank you, Ms. Comte.

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16915. With that, we're ready to begin and we will hear the oral summary argument. And please proceed.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE
COLLABORATIVE GROUP OF LANDOWNERS AFFECTED BY PIPELINES**

16916. **MR. STANDER:** Thank you and good afternoon Members of the Panel.

16917. My name is Delwen Stander; I am counsel for C.G.L.A.P. You've already spelled its name out in full, the Collaborative Group of Landowners Affected by Pipelines.

16918. It's a diverse group, Members of the Panel, that I represent. It's a society that was formed specifically for the purposes of this hearing so that representations could be made on behalf of this disparate group of farmers, homeowners, businesses, commercial interests, market gardeners, equestrian stables all united in the common interest to present to the NEB regarding this application; their common interests, which have been set out as early as the filing of their intervenor application. And I will get to those shortly.

16919. With me today is the President of C.G.L.A.P., Mr. Peter Reus, and next to him the secretary of C.G.L.A.P., Mr. Brian Kingman, who is also an intervenor on his own right.

16920. This is an important proceeding today. It's not only important in a free and democratic society that people are given the right to be heard in such an application, but it's also important that the public see and hear what they have to say.

16921. What I will be doing, Members of the Panel, is highlighting our very lengthy written argument. We are under that strict guideline of 40 minutes. And in the time allotted what I intend to do is make a brief introduction and then go through those five key topics that are identified in our materials.

16922. So I will be speaking to you about soils and crops; I will be speaking to you about harassment and inconvenience; about proper and fair compensation for the pipeline's proposed easement lands. I will be speaking to you about compensation for damage to the lands during the construction and post-construction period. I will be speaking about the necessity of good faith in all

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negotiations; and then making some conclusions regarding the conditions that we urge upon the Panel if this project is to be approved and recommended to the Governor in Council.

16923. Now, I start by way of introduction by saying this to you, Members of the Panel, my clients, the owners of C.G.L.A.P., are in a fairly unique position in this application in that they are not opposed to this expansion project, unlike the vast majority of intervenors, but they do seek two important things. They seek the protection of their lands and they seek fair and proper compensation in all its aspects if this project is to proceed.

16924. And what they're trying to do, Members of the Panel, is this: They're trying to create the atmosphere for a new type of relationship between the owners and the pipeline company. It's a paradigm shift that is proposed by C.G.L.A.P. moving towards a relationship where there is equality, and in addition to that, cooperation.

16925. We don't come here today to put up roadblocks. We rather come suggesting a vast majority of conditions that will improve the relationship and make it more one of a partnership rather than the relationship of a servant, the landowners, and an absentee master, the pipeline company. And as I go through these submissions I ask you to bear that in mind. This is a novel idea only to the extent that we're talking about it, but it's certainly not a revolutionary idea of creating an equal relationship between the owners of land and the pipeline company.

16926. On page 2 of the written submission -- and I don't know if Members of the Panel have it before them, but I will be moving through this written summary.

16927. But on page 2 and following, there are a number of submissions regarding soil damage. We don't have the time today to go through all of them, but what I'd like the Panel to take away from this is the following. We have summarized how we've gotten through the IR process -- which has been an excellent process, quite frankly -- and we've made a lot of ground with Trans Mountain on behalf of C.G.L.A.P. through the IR process in getting a number of assurance and promises.

16928. The take-away is this: If those promises are going to be something that we can rely on, we would like to see them be conditions that the NEB imposes if this matter is approved and recommended, that way they will have

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some teeth for these landowners. We need to move them from an assurance and a promise into an actual condition. And again, they've been set out in detail with references to the IRs from which they are taken.

16929. But I will highlight a couple just to give you an example of the type of professional advice you're getting, and that's what it really is. You've got a group of farmers, for example -- C.G.L.A.P. is mostly composed of farmers. You have this group of farmers and they've been at it a long time. They know their lands; they know how to treat their lands. Their lands are vital to them. They live and die by the quality of their soil and the crops that they can grow on them. And all of this is very important. And I say this is a dynamic and vital part of the public interest that you're here to oversee.

16930. The Fraser Valley -- and I asked for the -- I asked for the laser pointer, not that I'm sure that the Panel needs any geography lessons here today, or geographical advice, but my clients come from Hope all the way down to about there in Langley. Collectively, they have 60 to 65 kilometres of pipeline going through their properties. Most of them are farmers.

16931. So when we tell you what they would like to see as conditions in these submissions, it's because you've got the advice of people that deal with it every day. So when they make representations like on page 4 where they talk about what type of tires and the tire pressure there should be on heavy vehicles, that's because they have heavy vehicles moving around on their farms all the time and they know how the land will be impacted by heavy vehicles.

16932. And similarly, when submissions are made at the bottom of page 4 regarding the three-lift soil handling approach, they know that this is a good thing for all farmlands, not just 16 areas identified by the pipeline company, but any agricultural farms where there's crop raising or animal grazing going on. This is of vital importance and we ask that those things find their way into conditions if this project is to be recommended.

16933. Similarly, on the top of page 5, we deal with core sampling. There's only one way of showing the land owner that you've properly treated his soils and that's by giving him a post-construction core sample, not every now and then or not those people who ask for it, but that it be a condition for agricultural land that this be something that happens each time.

16934. And again, I pause to remind the Panel that there a lot of promises set

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- out in here. We need to make them conditions so that they become far more concrete for the land owners.
16935. Following this, we then go through horizontal directional drilling. Again, not enough time to deal with it but there have been assurances made; we'd like to see them become conditions. And if I become like a broken record regarding that, Panel, please bear with me, but that is the substance of repeating all of these things in the written argument, is to take them out of the IR process and move them into the conditions that you have already circulated as draft conditions.
16936. Then there's the section dealing with crop damage. Again, we've set out in detail all that we have to say about how crops should be handled, how damage should be prevented, the types of compensation that should be given when crops are damaged. These are very important things to the vast majority of the C.G.L.A.P. members.
16937. We mentioned things like loss of contracts. If you're a blueberry farmer and your crop gets destroyed during the year of construction and you lose a contract with ABC Grocery Store to provide them with the product, and you don't get that contract back because they go down the street to somebody else who doesn't have a pipeline going through their property and they can get the berries elsewhere, that's going to result in damage. And these are the types of things that we've mentioned in our written argument and I urge the Panel to carefully consider them.
16938. As with the soil conditions, there's fruitful ground here for adding to those draft conditions and making them more expansive in order to protect this breadbasket of the Fraser Valley.
16939. I also mention in the submissions -- written submissions -- the temperature effects issue. In the interest of time, the only thing that I want to tell the Panel about this is as follows. In addition to what I've written down there, I highlight the fact that we don't have the temperature effect study that's specifically germane to the Fraser Valley yet.
16940. At the instigation of C.G.L.A.P. and in following that, the agreement by Trans Mountain to underwrite it, the University of the Fraser Valley set about doing a temperature-effect study of the existing Trans Mountain pipeline going through the Fraser Valley. Those results are not yet ready. I would urge that it be

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a condition of any recommendation or approval of this project that Trans Mountain be required to get that study completed, have it available to not only the NEB but the public through dissemination; and that if any conditions have to be made based on that study, that they be incorporated.

16941. We make submissions at the top of page 10 regarding a future fund for decommissioning of the pipeline. Now, I know a lot of intervenors have talked about this decommissioning fund but we come at it a slightly different way.

16942. We're interested in what's going to happen 40, 50 years from now if this pipeline needs to be decommissioned. What's going to happen with the soils and the crops? It's very expensive to do that three-lift soil removal and replacement method. It's expensive to compensate people for crop loss. Has money been set aside for that? Will it be set aside for that?

16943. We recommend, therefore, that a condition be that a contingency reserve study be done regarding soil and crops, and that it find its way into a plan that's actually filed with the NEB and available to the public; and that from time to time, on a regular reporting basis, land owners who are affected by that get an update about how much money is going into that fund and what the plan is.

16944. That concludes the submissions that I have to make regarding soils and crops.

16945. I'm moving then to the section of the argument that deals with harassment and inconvenience.

16946. I ask you to remember throughout these submissions that 64 years ago is when this pipeline was through -- 1952. So when you hear about the stories you've heard -- and I watched some of them on the broadcast -- and you hear the stories that are set out in the affidavits of C.G.L.A.P., you've got to realize, members of the Panel, with respect, that these people have been putting up with a significant amount of inconvenience and an increasingly complicated overlay of regulations and orders that affect the pipeline lands on their property for 64 years.

16947. When they give you examples of the inconvenience of having a pipeline on their property, especially certain types of owners, like farmers, I ask you to bear in mind that those are coming from very real situations and very real examples have been given to you.

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16948. Exemplars have been taken from the ownership of C.G.L.A.P. and presented to you in the form of affidavits. I note that none of these affidavits are contradicted by Trans Mountain in its materials. It chose not to contradict any of this affidavit evidence and therefore it comes to you without contradiction. These exemplars set out examples from these working people's lives of what happens on their property in certain instances.
16949. You have, for example, the affidavit of Mr. Graham that deals with a soil compaction and levelling problem that happened over a decade ago and yet remains, to this day, without ever having been properly compensated for that damage.
16950. You have the Omichinski Affidavit which deals with property being accessed without notice and subsequent damage to property resulting -- and equipment -- and also with soil contamination.
16951. You have the Christina Kehler Affidavit which deals with the interruption of regular and safe farming practices and the inconvenience of having to deal with that.
16952. You have the Pearl Singleton Affidavit. This deals with the noise and upset that's caused to livestock and animals when there are these frequent flyovers of the easement area. You have levelling and safety issues mentioned by her. Importantly, and I'll circle back to this, you have the aggressive and bullying attitude of land agents to which she was subjected. And you have, also, the disregard for the value of landowners' time.
16953. Time is important to people who have busy lives. And when their time is taken carelessly and casually, that has an impact on them. I note in bold at the bottom of page 13 what Ms. Singleton says and is a sentiment that's echoed by all of the C.G.L.A.P. owners.
16954. In this paradigm where they become equal and cooperative partners rather than a servant to a master, in that paradigm what happens is that the company considers the inconvenience to the landowner and the company considers the impact of its actions on the landowner; and that through compensation and an annual relationship, there's more of a stake in what goes on and a better cooperative relationship exists.
16955. And I will circle back to that, members of the Panel.

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16956. You have the Ian Cooke Affidavit. I submit to you this is a shocking example of disregard for proprietary rights. This man's fields were flooded without him being asked.
16957. You have the Kingman Affidavit -- Mr. Kingman's here today -- talking about how shallow the existing pipeline is and how it interferes with existing farming operations, technically probably a violation of the easement and the very real problems that it causes for him in his working life.
16958. All of these examples are placed before you for no other reason than this; to form the ground and the foundation for proper conditions going forward that would prevent unnecessary inconvenience and harassment of the these owners if is expansion process is to be approved.
16959. I have a group of submissions regarding the safety zone. Not enough time to go through them all before you this afternoon, but I would leave you with these two thoughts; first of all, there was no safety zone in 1952. All of these things, this increasingly bureaucratic and regulatory regime that's built up over the easement lands, has an impact on these landowners, especially on farmers.
16960. And what we urge is a review of that as part of the process of considering this application before you; a review of it to simplify it for landowners. We talk about special conditions that the NEB might grant if it decides to recommend this project, things that affect the depth of farming activities, the width of the safety zone, proximity exemptions; all of these things have been set out in detail.
16961. We end this particular subsection, though, by saying this; when you have these administrative penalties that hang over, like a Sword of Damocles, the heads of the farmers when they're doing these regular farming operations, there's room for mischief, there's room for that to be used as a form of harassment and inconvenience, unnecessary inconvenience.
16962. So we suggest that one of the things that could be done is to set up a novel appeal process regarding these administrative penalties whereby a member of the NEB, a representative of CEPLA -- CEPA, rather, and a representative of the Canadian Federation of Agriculture would form a small panel that could hear appeals of these administrative penalties, especially as they regard these regular and normal farming operations.

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16963. We then have a section of this argument at the bottom of page 17 dealing with guidelines for how owners get dealt with in the context of intimidation and harassment. I'll have more to say about this later in a different context.
16964. But C.G.L.A.P. makes submissions, members of the Panel, regarding a code of conduct that should be established. The items in that code of conduct, which include such obvious things, I submit, as respect and courtesy and honesty and promptness, and that also that there be a system whereby Trans Mountain is required to give an audit to the NEB which is available to the public, and particularly the landowners affected, which sets out when there is a conflict, what happened during that conflict and whether it resolved or how it resolved. We do not find this to be an unreasonable or outrageous request.
16965. And I say it's important for the following reasons: If you are a landowner who has been inconvenienced or harassed, how do you know what it's all about unless you can see it within the context of your fellow landowners and their experiences? How do you know if there's a pattern of conduct or not? You don't unless there's this audit and you're -- the information is available to you.
16966. In a paradigm where you are an equal partner with the pipeline company, rather than a servant to a master, you're entitled to see that information and know how you're being treated in the context of treatment of other landowners.
16967. **THE CHAIRMAN:** Mr. Stander, would you be interested in answering questions as you're going through with that?
16968. **MR. STANDER:** Absolutely, Mr. Hamilton.
16969. **THE CHAIRMAN:** Just for ---
16970. **MR. STANDER:** Absolutely.
16971. **THE CHAIRMAN:** On this topic, on the -- you say a stringent set of guidelines regarding the procedure for interacting with landowners, and sometimes I've had experience whereby you put too much stringent guidelines in that you could box yourself into a situation that you didn't want to get into.

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16972. In developing those guidelines, would you see that as a two-way back and forth between the landowners and Trans Mountain, or would you lay out your expectations as you have done here? How would you see that developing so that you wouldn't get into a situation that you're boxed into so stringent that there's no way to move after that; the cooperation and understanding gets lost, that you're trying to achieve?

16973. **MR. STANDER:** Mr. Hamilton, what I would say is this: We see these as minimums, not a box that will be entirely inclusive. C.G.L.A.P. owners would be happy if this were the minimum thing that was done, so if the company wanted to go further and do an even better job, that's fine. But having a code of conduct, I think, is already something that there has been groundwork laid for by Trans Mountain itself in some of the representations that they've made during this process.

16974. They talk, for example, of their landowners having to take a -- to abide by a code of conduct set out by CEPA -- I believe it's a CEPA Code of Conduct. We want to make sure that that is the bare minimum. We do not fear that this will box the parties in.

16975. One of the things that I'm going to get to later on in the submissions -- and I'm happy to see that the clock is stopped on this -- one of the things that I'm going to get to later on in my submissions, Mr. Chairman, is this. When you have this negotiation going on, whether it's the negotiation to get the easement put in place or it's negotiation for post-construction arrangements, all of those things we're looking for to be done in good faith. That's all.

16976. And good faith will colour everything that is done. If there is good faith, then there will be contentment with the landowners. Even if sometimes they don't get exactly what they want, if they know they've been treated fairly, they'll be happy. That's how reasonable I believe that my clients have been throughout this process, and that's why they don't come to you today saying, "No"; they don't come to you saying, "Never." They come to you saying, "Yes, as long as."

16977. **THE CHAIRMAN:** Thank you. Now the clock will start again for you.

16978. **MR. STANDER:** Very well. That is my segue actually, Mr. Chairman, to my submissions regarding the easement and the form of easement.

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16979. This is something that the Panel itself asked about during the IR process, is what form of easement is going to be used. And I can tell you that through the IR process, again, Trans Mountain has been pleased to have a great deal of cooperation from Trans Mountain in getting various accommodations regarding things that they'd like to see in the easement document. And these have been set out in the bottom of page 18.
16980. But when I move on to page 19 of the argument and following, there are additional things that we think that are fair and reasonable that should be included in any such easement document, and that it would be in the public interest if these things are included.
16981. So we've talked about a variety of things and, again, time does not permit for me to take you through them all, but these are all in order to put teeth into that arrangement so that there is some certainty for these landowners, so that rather than relying on what we call "weasel words" of "reasonable" or "discretion," that we've got actual contractual provisions in the easement that say what the landowners want and what Trans Mountain is going to deliver.
16982. I quote from Walt Whitman in the submissions, "*Good fences make good neighbours*"; they really do. When people know what the boundaries are, when they know what they have to work within, they have a much better relationship.
16983. All of these submissions really have, at their foundation, establishing a better relationship, not one of antagonism, but one of cooperation.
16984. We also make a small submission near the end of these -- this section on dealing with easements regarding the multiplicity of easements on land titles. If Trans Mountain is indeed, in some instances or in most instances, going to be putting that one easement directly on top of the existing easement, then our submission is that the old easement must go away and the new easement be the one that's left.
16985. Now, I deal then at the end of the section of harassment and inconvenience talking about the canard, if you will, of saying, "Well, you get a lump sum or you get an annual payment and that is your compensation for putting up with inconvenience and harassment."

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16986. That entirely misses the mark, Members of the Panel. It doesn't. You get that compensation for giving up the rights to your land, to a certain extent, so that a pipeline can go through them, and it comes with a certain set of requirements; some of them governed by legislation and regulation, some of them governed by the contract.
16987. But what we're talking about is when it goes beyond that, when a landowner is unnecessarily inconvenienced or harassed. At that point there has to be proper compensation. That's not part of the deal that you buy into when you get your lump sum or your annual payment for the easement itself.
16988. And we say this regardless of whether it's innocent or arbitrary or careless or entirely unexpected. If this does happen, that there should be a consequence. So we talk at the top of page 22 regarding a tariff of compensation. We talk about the creation of an independent ombudsman, who will look after issues of harassment and intimidation and I quite cheekily have added that it would be funded by Trans Mountain.
16989. We also talk about in addition to any monetary penalties that the ombudsman would oversee that there also be something in there regarding actual costs. So the fellow in the affidavit wasn't told that the people were coming out. They left signs lying on the grass, he rode over them with his mower, his mowing deck was damaged; he would get the repair of his mowing deck in addition to any penalty for people coming onto the property without notice.
16990. That concludes my submissions regarding harassment and intimidation. Or inconvenience rather, not intimidation.
16991. Moving then to proper and fair compensation. I know it's been suggested that the Panel doesn't deal with compensation, and I say that that's wrong. What the Panel doesn't deal with, and what it says on the Panel -- on the NEB website is that the Panel does not get involved in determining compensation amounts. But that's one thing, Members of the Panel, with respect. It's an entirely different matter to speak about formulas of compensation, types of compensation and whether compensation is going to be given for any particular thing. That is well, I submit, within your statutory and regulatory authority.
16992. Indeed, the List of Issues that you put before the intervenors before we began this process included potential socioeconomic effects, terms and conditions to be included in the approval, and the potential impact of the project on

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- landowners. And I say that it is an enormous impact on landowners, what compensation they're going to receive.
16993. I'm at the top of page 23 in case you're following.
16994. I'd like to take you back to 1952. In 1952, if you were given \$75 for your easement, what you were really given in 2015-16 terms is \$675. You were given that as compensation for 64 years plus of use of your land.
16995. I submit to you, Members of the Panel, that Trans Mountain in making the types of compensation offers they have made so far accedes to the obvious point. It would be entirely unacceptable in this day and age for a pipeline company to come before you seeking approval of a project where it was giving out that type of money in exchange for the significant proprietary rights that they get through these easements, especially with all the overlays of the safety zone provisions and all the regulations and requirements that landowners are now put to. It would be unacceptable. Nobody would say that that's acceptable.
16996. So when you're looking at this particular matter, you are in a way righting an historical wrong because it was wrong. How will the NEB be judged in years to come? How will this entire process be judged in years to come if we look back 60 years from now and we see something is historically unfair as what occurred in 1952 happening again?
16997. We've set out a couple of things in this section. We've set out our ideas for what could be a formula for an annual payment, and we've set out our ideas regarding a lump sum payment and how it should be calculated.
16998. I want to deal first with the annual payment idea. And again, the context is an ongoing equal and cooperative relationship, a partnership rather than a servant and a master. We've noted an idea of basing it partly on a rental of land, something that the case law itself notes that former Minister Lalonde had in mind when he drafted that particular section of the Act. And also, a contribution toward the landowner based on the amount of commodity that goes through his property.
16999. None of these things are novel; none of these things are unusual. They exist in Canada to this day in many places. We say that when you think about these ideas we've put before you think about them in the context of the type of money we're speaking about.

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17000. We've given an example of a landowner, an individual landowner, what he might get in one year if he had three acres and there was X number of barrels of commodity going through his property. He might get \$9,600 in a year.
17001. We've also given you an example of all of the C.G.L.A.P. members, and not all of them are on the same page on this, Members of the Panel. I can tell you that right now. Some people want a lump sum. But if all of the members of C.G.L.A.P., those 60-odd kilometres of pipeline, were to go for this type of a formula at their option -- if it was a condition placed on the approval of the project -- then we'd be talking about \$258,000 a year for all of these owners combined, 90-odd owners.
17002. Compare that to the following. Trans Mountain Kinder Morgan is anticipating \$400-417 million a year in profits. Western Canadian Oil Producers are anticipating about \$3.7 billion dollars a year in income as a result of this pipeline. In comparison, the figures that we're talking about as compensation to the landowner pale miserably. In one instance we're talking about less than 6/1,000th of a percent and in the other instance we're talking about 1/10,000th of a percent. Miniscule.
17003. But I can see that the most important question that needs to be answered is this: why would some landowners want to have annual payments of the small amounts that we're talking about rather than taking a lump sum? And there are three answers to that, Members of the Panel.
17004. First of all is stewardship. Some of members of C.G.L.A.P. want to be good stewards for their children, and their grandchildren and their great-grandchildren. They don't want to take a lump sum up front not knowing how it's going to be dissipated over the years, so that their great-grandchildren are then faced with all of the requirements for looking after that pipeline on their property without ever having seen one cent. So it's a stewardship issue for some.
17005. For others it's an issue of protection of interest on potential resale. Take a lump sum now and you sell your property 10 years later, the new owners are going to be looking at the property with a pipeline on it and saying, "That's nice for you. You took the money 10 years ago; now I have to deal with all these conditions. What did I get for that? What do I get for that?"
17006. You avoid both of these problems by having an annual payment, an

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- ongoing annual payment, a dynamic annual payment that can be changed and modified as the years require. You also avoid the unpleasantness of a historical review looking back and saying, “Those were the lump sums that were given out at that time? That’s terrible.”
17007. You’ve also heard testimony very recently from a Mr. Klakowich of Burnaby talking about the fact that his resale value of his property went down because he had a pipeline on it, or it was less because of this pending approval. I can’t remember exactly what his evidence was, but there was clearly evidence given to you about a reduction in sale value because of a pipeline.
17008. If you had an annual payment coming in from the pipeline company, that would certainly counter and mitigate that negative factor.
17009. In terms of the lump sum idea, Members of the Panel, we’ve talked about two important things in this area. I can sum them up for you as follows. First of all, we’ve given you expert evidence of a Mr. Lathrop. He’s been accepted by the courts in numerous instances. He’s a very knowledgeable fellow. He finds that the current method of approach of Trans Mountain is incorrect, and what should be dealt with when coming up with these values if they’re to be based on a market, is a market comparison approach. So we urge that that be the method of valuation, the market comparison approach.
17010. And then we have submissions to make also on the percentages of that that should be paid for the use of the land through which the pipeline goes. So again, we present you with our recommendations for a formula rather than an amount.
17011. I move then to page 28 of the submissions, Members of the Panel, “Compensation for the Temporary Workspace.”
17012. As I’ve been saying, there’s no time to fully elaborate on this for you, but I want to leave you with a couple of takeaways.
17013. First of all, to ask landowners, particularly farmers, to give up a space for three years is incredibly onerous. What we suggest instead is that there be a three-year window and that the company pick one year within that three-year window. And if there’s proper planning in advance we don’t see that this is unreasonable or unfair. It has a profound effect when you say to a farmer that he has to give up space for three years. It interrupts crops; it interrupts soil. It has a

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great deal of impact.

17014. Our particular recommendations are set out on the top of page 29.
17015. Now, we also summarize our proposed conditions at the bottom of page 29. And I highlight for you the following: Trans Mountain said that they were willing to spend \$370 million to get this easement in place on their path towards -- from point A to point B. And in terms of this \$370 million budget, the amounts that C.G.L.A.P. thinks that are fair are eminently reasonable.
17016. Why would the Panel, though, get involved in things like this? Why would it get involved in how long workspace should be granted for, the terms of the easement, the compensation? I submit to you, Members of the Panel, that if you leave it up to the existing regime, which is not the paradigm that we suggest, what you have is an owner who is in an unequal bargaining position with the pipeline company. And that inequality of bargaining power is not in the public interest. It takes away the opportunity that you have now of establishing conditions that will allow for certainty and prevent a multiplicity of problems arising in the future.
17017. Before concluding my submissions regarding compensation about the easement itself, I want to tell you about this.
17018. **THE CHAIRMAN:** I see you've noted you have five minutes remaining.
17019. **MR. STANDER:** Yes, I have.
17020. I want to tell you about this. We've attached as one of our exhibits an argument that was made before the Senate. And the Senate Hansard is from the 41st Parliament (2011-2013), Proceedings of the Standing Commission on Energy and the Environment and Natural Resources from Thursday, February 28th, 2013.
17021. C.G.L.A.P. does not endorse or adopt all of what was said by CEPA before the Senate that day, but it certainly thinks that they're spot-on with this observation that, "*You cannot assist the pipeline company in enforcing an unacceptable right of entry onto private landowners' lands without thinking about the impact that it has on them*".
17022. They're 100 percent spot-on on that and I urge a reading of that article

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by the Panel, because make no mistake, Members of the Panel, if you have the statutory authority to recommend for approval a pipeline going through private owners' lands -- incumbent with that, of course, is all the inconvenience and the extra responsibility that it places on members and owners -- then you ought also, with respect, be in the business of establishing firm conditions regarding the compensation that these people are entitled to because anything less, my submission is, abandons the task of looking after the public interest and leave the process open to scorn and disapproval of the Canadian public.

17023. And I say this very carefully, Members of the Panel, that when the government and its boards does not look after the public interest, it leads to cynicism and an erosion of the public trust and the rule of law. And these are things that underpin many of our submissions.
17024. The bottom of page 30 and onwards we've talked about compensation during and after the pipeline. Again, time does not permit us to go through all of these, but I ask you to carefully review them. We talk about different forms of compensation that should be allowed, including such things as site visits, which are important to farmers.
17025. I conclude, then, by talking to you about good faith, in the two minutes that I have remaining.
17026. You've heard testimony and you've read affidavit arguments and -- evidence, rather, about aggressive and bullying land agents. You've heard about inconvenience. If we're not to repeat the mistakes of 1952 when landowners were not given a meaningful opportunity of discourse before a body like yours before these easements were foisted upon them, then we have to look after the landowners by making specific conditions which protect them; protect them from bullying; protect them from signing bonuses being used to create an artificial rush of their decision; protect them from negotiations which are based on secrets that they can't be privy too. "Oh, we have a formulaic approach to this and you're part of that." Or, "Our deal with everybody other than you is the same." We know that that's not true.
17027. We know that the First Nations, for example, have agreements with Trans Mountain to which the rest of us are not privy. And my submission to you on this point, Members of the Panel, is secrecy is a bad thing when you're talking about the underlying relationship which governs the energy infrastructure of our country. Secrecy is not certainty for owners, and secrecy simply breeds suspicion

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and mistrust.

17028. We submit that there be proper conditions placed on the pipeline company if this is to proceed, which arrives at certainty and minimizes potential dispute by making this process a far more open one.

17029. We conclude in our submissions, then, by setting out in detail where you can find each of our recommendations in the argument. You asked a former applicant or intervenor what should happen if there are breaches. We say significant fines and penalties that are payable to the landowner if there are significant breaches.

17030. So in conclusion, I thank you for the opportunity of being able to present to you on behalf of C.G.L.A.P. It's an important process and we're glad to have been involved in it.

17031. I leave you with this: Again, we do not oppose the application. We are looking for the protection of our clients' lands. We're looking for a fair and appropriate compensation regime to be put in place. And, most importantly, we're looking for your help in fostering a new paradigm of equality and cooperation as partners.

17032. Thank you, Members of the Panel.

17033. **THE CHAIRMAN:** The Panel will take a 10-minute break to consider any questions, so we'll return at 2:30.

--- Upon recessing at 2:18 p.m./L'audience est suspendue à 14h18

--- Upon resuming at 2:32 p.m./L'audience est reprise à 14h32

17034. **THE CHAIRMAN:** Thank you, Mr. Stander. Perhaps I'll ask if Mr. Davies has a question for you to start with.

17035. **MEMBER DAVIES:** Actually, I have two questions.

17036. First is, is that a New England accent I'm hearing?

17037. **MR. STANDER:** I'm afraid I can't admit to -- I don't know if this thing is on. I can't admit to being from New England, Mr. Davis. What I have is a bit of a mongrel accent. My parents are originally South African and I was

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raised in both Canada and Southern Africa while growing up, and I've ended up with this.

17038. **MEMBER DAVIES:** Good. Well, it suits you.

17039. **MR. STANDER:** Thank you.

17040. **MEMBER DAVIES:** The substantive question is, the Board has in place the -- well, has concluded recently a process on abandonment funding and I noticed you picked some of those thoughts in your remarks today. So I guess the question is; is your client aware of the abandonment funding process that's currently in place? And if not, well, then that something will lead there but if yes, I'm wondering if there's any comments that might be helpful to us in the context we're now in as to how that process has worked and whether you think there's room for improvement.

17041. **MR. STANDER:** Very well, Mr. Davies.

17042. The way I would respond is this; we are aware that there is a process in place for that. We've seen that through the IR process. And we do not come before you today with expert actuarial evidence.

17043. Rather, we come before you with the submissions of a group of amateurs in this field, landowners who have at least this basic understanding, that is we get 50 years down the road, is there going to be money to do the two important things that they have focused on in their submissions, lifting that soil off in three steps, taking the pipe out, putting it back in three steps and making sure there's no damage?

17044. And in addition to that, while all that is going on, what's going to happen with the crops? Not just commercial crops, but what is going to happen with the hay if you are an equestrian stable that you're growing or the grazing land that you have if you've got beef cattle? All of those things are very important.

17045. And I said in my submissions that it is costly. It is costly. And we have no idea what inflation's going to do in the next 50 years. This is where we defer to the expert actuaries and that's why we say that the only way of properly handling this is by having a fund established based on an actual contingency reserve plan. And that plan has to not only address the costs of ripping it out of

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the land but ripping it out of the land properly with compensation for any damage to crops and the soil itself.

17046. **MEMBER DAVIES:** Thank you very much.

17047. **THE CHAIRMAN:** I have one question to help me to clarify your statements or your comments in regards -- on page 34, where you talk about the NEB involvement before negotiations -- and I'll allow you to turn to it so you'll see.

17048. **MR. STANDER:** I have it, Mr. Hamilton.

17049. **THE CHAIRMAN:** Where you submit that "*... any involvement of the NEB before pipeline construction commences on this proposed project, as it relates to negotiations between individual landowners and Trans Mountain, will pay dividends in the future,*" I'm just wondering if that's a solution that would fit every situation for every landowner.

17050. Would they be required to be -- have the NEB involved? Would it be -- are you saying that there would be -- where you'd do that, that there would be an ability for the NEB to come in rather than doing it later as you indicated under sections 88 and 90 of the Act.

17051. I'm just wondering how you -- what your thought on that would be. Would it be one approach -- one situation fits everybody?

17052. **MR. STANDER:** Yes, it would be a one approach fits everybody because, to clarify, I'm not talking about the NEB being involved after setting the conditions. This involvement is entirely designed as a submission on conditions.

17053. So when we talk about the types of conditions we'd like to see you put in place -- in this document, the draft conditions -- if this is recommended to the Governor in Council for approval, it's at that stage that you would have the involvement because it's at this stage now, the recommendation and approval stage, if that's what's going to happen, that your assistance and involvement is most sought by the people that I represent, not afterwards.

17054. If the condition is there -- if those conditions that we've suggested are there, they will enable this process to happen in an orderly fashion. They will enable the certainty that I talked about and the effective minimizing the number of

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- disputes that get forward to the negotiation or arbitration stage underneath the Act. I'm not talking about negotiations between the owner and the company; I'm talking about negotiations and arbitrations as they're defined in the Act.
17055. It will reduce all of those problems dramatically, we submit, by just having conditions in place. That's the involvement.
17056. We don't foresee -- if this is what you took from that, Mr. Hamilton -- we don't foresee this as an ongoing involvement of the NEB. We're talking about the condition stage before the project is actually recommended.
17057. **THE CHAIRMAN:** And I'm still not clear. Now, you've -- sorry, maybe you've confused me more. I mean ---
- (Laughter/Rires)
17058. **THE CHAIRMAN:** --- could you give me an -- could you give me an example of what -- what you would -- this would be?
17059. **MR. STANDER:** All right. So ---
17060. **THE CHAIRMAN:** If Peter was negotiating with Trans Mountain, when would that happen and what would you feel the involvement of the NEB would be?
17061. **MR. STANDER:** All right. If Peter was negotiating with Trans Mountain after the recommendation and approval has gone up to the Governor in Council -- and let's say the Governor in Council accepts your conditions and says yes, they're going to build, okay? The conditions would be in place so when Peter sat down with Trans Mountain he would know that, for example, there is a code in place, a code regarding how they can negotiate with him, that the code has certain provisions in it.
17062. He would know that there is a formula for the types of compensation he can pick from -- a smorgasbord of compensation, if you will. He knows what he can pick from. He will know that there are special conditions in place regarding the safety zone for this application process. All of those conditions that we say are reasonable and fair, and that the Panel should add to its draft conditions, those are the conditions that will lead to certainty and improve that negotiation position on behalf of the landowners.

17063. That puts them on the equal footing I've been talking about. It's this atmosphere of cooperation and equality that will underpin the new paradigm that we suggest.

17064. **THE CHAIRMAN:** So you're wanting a framework for the rules of the game?

17065. **MR. STANDER:** Exactly.

17066. **THE CHAIRMAN:** Okay. Great, that's helpful. Thank you for that. I got it now -- the rules of the game. That's much better.

17067. With that, we thank you for -- and for the various landowners that have come here today for your -- the evidence you have submitted throughout the process and for your oral summary argument today. We thank you for that.

17068. And we will, then take a short five-minute recess and then we'll hear from the BC Wildlife Federation. Thank you.

--- Upon recessing at 2:40 p.m./L'audience est suspendue à 14h40

--- Upon resuming at 2:47 p.m./L'audience est reprise à 14h47

17069. **THE CHAIRMAN:** We'll now continue and Mr. Martin, we'll hear the oral summary argument on behalf of the BC Wildlife Federation.

17070. We're all yours, Mr. Martin.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE BC WILDLIFE FEDERATION:

17071. **MR. MARTIN:** Thank you very much.

17072. What I'd like to do over the next few minutes is give a brief introduction to myself and George Penner, who the BC Wildlife Federation is and what we represent, and a fairly high level summary of the written arguments that we submitted on December 12th, I believe it was.

17073. My name is Alan Martin. I am on contract with the BC Wildlife Federation to assist them with their strategic initiatives and government relations.

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- I'm a fisheries biologist by training, and I've spent most of my career working for the provincial government. I've been involved in a number of different processes relative to development, starting with the Revelstoke 1880 dam, where I gave evidence on behalf B.C. Hydro.
17074. I was the Chair of the Biological Resources Committee for the IJC's review of the Sage Creek Coal Mine, and participated in a couple of panels with the BCUC hearings on the Nechako completion project.
17075. So I'll keep the presentation as it relates to the BC Wildlife Federation facts-based, solution-based and focused on the questions that have arisen through these hearings.
17076. I'm very ably assisted by Mr. George Penner. He is a retired engineer. He actually worked on the Trans Mountain pipeline when it was put in in 1952. He is an expert at river crossings, and was the inspector of pipelines for the Province of Saskatchewan, so he has experience in this area. And he's been of great assistance in a number of the technical issues that have been brought forward not only by Mr. Penner but by the members of our organizations.
17077. We've had a number of meetings, particularly in the Lower Mainland, and there have been a number of issues raised. And we believe we have taken those ones that are material and brought them forward, and focused on the issues that are relevant to this organization and not try to spread ourselves too thin and outside our areas of expertise.
17078. So the BC Wildlife Federation is one of the province's oldest and largest not-for-profit conservation organizations. We're a non-profit organization with over 49,000 members from all walks of life.
17079. There are two issues that are fundamental to the members of the BC Wildlife Federation. It is the sustainability of fish wildlife and habitats, and the access of our members to those public resources.
17080. The approach that we take for development, pipeline or others, is that we believe that the avoid, mitigate and offset hierarchy should be adhered to to maintain the sustainability of those resources. And if that cannot be effectively applied, then we certainly bring our voices to bear to any proposal where those conditions are not met.

17081. The NEB listed 12 issues in its Hearing Order and the BC Wildlife Federation responded to three of the 12, specifically.
17082. The potential environmental and socio-economic effects of the proposed project, including any cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB's Filing Manual.
17083. Number 5. 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.
17084. And the terms and conditions to be included in any approval the Board may issue.
17085. What we have done is responded to a review of the draft conditions. We've responded to 19 of them. They are written in the submission. And I don't think we'll go down and deal with those. Those are now on record. But the BC Wildlife Federation is of the opinion that due process should be respected and that Trans Mountain should not be given proceed with any facet of the project until a federal cabinet makes a decision on the Trans Mountain Expansion Pipeline Project. This includes the request of work to commence immediately and granting approval via the section 58 Order for early works.
17086. So the way we've structured our submission is a list of issues, review of draft conditions, cumulative effects and assessment, wetlands, Surrey Bend Regional Park and compensation. And followed up with a conclusion.
17087. What I'd like to do is start off with the conclusion, and then briefly go through the other components in the sake of keeping this high level focused and on time.
17088. In the National Energy Board's review of the Trans Mountain Expansion Project, the BC Wildlife Federation encourages the National Energy Board to reconsider potential cumulative effects of the project on the environment during the project's construction phase, as identified in issue for the hearing order.
17089. As I've stated, we've provided comments on the 19 draft conditions. And we would like to emphasize the importance of respecting due process, and feel strongly that the NEB order -- NEB should not grant approval of the section

58 Order, as I've previously stated.

17090. The BC Wildlife Federation respectfully requests the NEB require comprehensive monitoring of all watercourses, wetland and wildlife habitat impacted by this development with a goal of improved functioning, not just “no-net loss.”
17091. Despite the Trans Mountain’s claim that wetlands will not be impacted during the construction and operations, resources should be allocated to ensure adequate and transparent follow-up monitoring occurs to verify that wetland functions and extent are restored, and if there is any measurable impact, certain resources must be allocated to ensure measures are taken to offset those residual impacts. The offsets or restoration activities need to ensure there is no net loss of function from a full range and is adequately attained at or above baseline conditions.
17092. The BC Wildlife Federation is pleased to participate in the process and to have the opportunity to put our concerns on record with the National Energy Board in a solutions-based manner.
17093. We have focused on key fish and wildlife habitats along the proposed pipeline corridor, particularly in the lower mainland, and have deliberately not attempted to deal with the full range of environmental, and social and economic issues. We’ve focused on areas that we are familiar with and can contribute.
17094. The BC Wildlife Federation acknowledges other intervenors in the process that have provided input in a range of these areas, and congratulates them on their efforts.
17095. One of the major areas that we the Federation are concerned about is cumulative effects. And cumulative effects are a very difficult problem to deal with because you’re addressing a changing baseline over time and the question is, “What are you comparing against, and what actions should you take and who should be responsible?”
17096. And cumulative effects, as I am sure the Panel is well aware, are impacts from the development activity that add up over time causing changes to the environment.

“These changes result from the combined impact of past,

existing and reasonably foreseeable future developments in the area that have or will be constructed."

17097. And that's a quote from the Canadian Environmental Assessment Agency.
17098. It's to everybody's benefit that cumulative effects be assessed when making decisions about the Trans Mountain Expansion Project because managing these effects is essential for ensuring that these developments and the -- are sustainable, in terms of their environmental footprint.
17099. It's BC Wildlife's understanding that the Province of British Columbia is currently developing a Cumulative Effects Framework that aims to address the cumulative impacts of historic and current natural resource development. A new current Cumulative Effects Framework is required because considering only the impact of project- or sector-specific effects allows unintended impacts to accumulate over time.
17100. And indeed on May 12th -- May 26th, the Office of the Auditor General released a report entitled, "Managing Cumulative Effects of Natural Resource Development in B.C."
17101. It is in the interest of British Columbians to address cumulative effects management without delay.
17102. So the BC Wildlife Federation supports the statement of the -- statements from the Office of the Auditor General and certainly, the quote:
- "Decisions about natural resource development will continue to be made without fully understanding the implications for the environment and the well-being of British Columbians. Governments need to provide direction so all the natural resource ministries and agencies can jointly address cumulative effects."*
17103. The BC Wildlife Federation encourages the NEB to take that step and provide some direction and leadership to back up cumulative effects as stated in the List of Issues. As mentioned earlier in our submission, cumulative effects are not addressed in the 150 draft conditions, which the Federation considers an oversight.

17104. To ensure cumulative effects from the proposed Trans Mountain Project are taken into account, the BC Wildlife Federation proposes that all wetland streams and other important communities impacted by the new pipeline construction should be monitored in both the pre- and post-construction phases of development.
17105. Our position is that data and information management is key to establishing the benchmark or baseline conditions of these ecosystems. Establishing a baseline provides vital information in assessing the historical use of the habitat and this is necessary in future to avoid what we call “shifting baselines.”
17106. Establishing baselines assists in verifying that the resource development has been carried out as per the direction of the accountable authority, such as Environment Canada and the Federal Department of Fisheries and Oceans.
17107. Clearly, 11 percent of the 994-kilometre oil pipeline will be new right-of-way, and the majority of it in the lower mainland. The new right-of-way travels through and will run adjacent to parks and conservation areas before travelling through Burnaby Mountain to reach its end at Burrard Inlet.
17108. The proposed new pipeline corridor is directly adjacent to the Fraser for approximately 10 kilometres from Golden Ears Way through Surrey Bend until it crosses Highway No. 1. The pipeline -- construction activity along the pipeline corridor will have further impacts on residential areas, parks, rivers and conservation areas in the lower mainland.
17109. Our organization supports a formal cumulative risk assessment for each watercourse, watershed, and wildlife habitat impacted by the development.
17110. Trans Mountain identified fish-bearing streams, endangered species, and bird populations as part of its construction planning. Because there is no cumulative impact assessment in place provincially, the BC Wildlife Federation has concerns the Proponent’s approach in regards to monitoring construction in these areas is not thorough enough to ensure it is functioning -- that these habitats are functioning well into the future.
17111. The BC Wildlife Federation supports the -- thinks these areas are

- important and should be left in a better functioning stage than when development started because of the absence of this baseline. It's basically taking a conservative approach in terms of -- in the absence of a good baseline, it would be better to over-mitigate and -- the potential impacts of these pipeline corridors.
17112. So what we're looking for is basically not no net loss but net gain, particularly in these valuable habitats.
17113. Of these habitats, we think wetlands represent one of the most important areas in the natural environment and certainly in the lower mainland they are one of these scarcer environments because of development that has taken place in this area.
17114. The BC Wildlife Federation agrees wholeheartedly with Environment Canada's statement on the vital role of wetlands, which is consistent with our organization's aim to conserve and protect the province's fish, wildlife and habitat for present and future generations.
17115. In its revised final argument, Trans Mountain will implement management systems and industry best practice to protect and mitigate environmental impacts from spills and foreign material contamination through construction, as described in its environmental protection plans, and general and site specific protection measures will be implemented by Trans Mountain during construction. These measures include the provision of emergency spill kits, appropriate for site conditions and activities, be available at all time.
17116. We recognize that provincially the emergency spill response strategy is to conduct remedial measures until public health and safety concerns are addressed and that these remedial measures are continued until there's no further environmental benefits.
17117. Certainly, the issue is not -- the residual issue there is that the immediate activities, in terms of the spill response, may not be -- may not have any further environmental benefits, but there will be long-term implications of these spills, and we see this as an important area that needs to be addressed beyond the immediate spill response and would like to see that explicitly identified in the approach to spills, both in the terrestrial and marine environment.
17118. Surrey Bend Regional Park: The BC Wildlife Federation has concerns regarding the Trans Mountain's preferred route for the expansion of the pipeline.

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We do not feel the NEB has taken into consideration the consequences to Surrey Bend Regional Park during construction, and once the pipeline is operational.

17119. It is -- we think that the Surrey Bend Regional Park is a unique wetland and in order to maintain the values of that wetland this is one area that should be avoided, from our view.
17120. Compensation: I think -- listening to the previous intervenor, I think compensation, from the BC Wildlife Federation's point of view, is basically the larger issue with respect to compensation in terms of the whole avoid, mitigate, and offset policy question, and what we're calling for is the creation of a funding mechanism to create a long-term inventory and monitoring plan for the affected watercourses, wetlands, and wildlife habitat, and in addition, if there are areas can't be mitigated, what -- an approach to offsetting those areas and a mechanism to do that.
17121. One of the issues around compensation is the lack of core funding. And we think the National Energy Board should provide direction in how financial support for these compensation programs should be implemented.
17122. We have, in collaboration with the Fraser Basin Council, prepared a discussion paper on funding and delivery models to advance watershed sustainability. And that reference is in your package.
17123. I think the issue of independent and transparent monitoring both during construction and after construction is key, and that the research and monitoring information is critical in the event of requirements for restoration both because of construction impacts or potential accidental spills. Without the proper baseline information it is very difficult to assess, remediate, and, if possible, address any damage caused by spills.
17124. I think that the establishment of a marine and terrestrial environmental research and monitoring endowment fund to provide stable long-term funding over the life of the project is an excellent suggestion. It would assist in learning how to make incremental improvements to practices, plans, and restoration. Certainly, an endowment of the level proposed by the Ecological Reserves Board of 450 million, you know, is -- I think that is a target.
17125. The actual mechanics of doing that I won't comment on but the ability to have that capacity over a long-term is essential. And I think that forming a

- multi-stakeholder board of trustees in doing that would certainly be unifying, in terms of all the interests along the pipeline, and that it would improve the dialogue between all sectors including the energy sector in terms of improving the performance and the acceptance of these types of projects in the future.
17126. Certainly a monitoring research framework needs government, First Nations, industry, and NGO guidance. I think that when setting up such an oversight body, specifically for areas, that it would improve the governance of these types of projects in the longer term. And certainly we would support and be willing to participate in such a process.
17127. So we certainly recommend a legacy fund or endowment fund be set up with the objective to not only monitor and improve performance, but provide the research and capacity to restore and enhance any negative impacts on fish wildlife and their habitats.
17128. That's my summary. There are more details in the paper, but I would throw it open to the Panel if they have any questions or comments.
17129. **MR. CHAIRMAN:** Mr. Martin, I acknowledge -- and we had heard on the Surrey Bend Regional Park, we'd heard from the First Nations; we've heard from the City of Surrey, as well, as you indicate, three or four intervenors on the significance of that. And that's not lost on us and we're aware of the concerns that are expressed and how important that park is and what's contained in that park.
17130. But I was interested in your comment on page -- and I think you did allude to it in your oral comments on page 18 where you talk about:
- “The BCWF recommends a commitment from the NEB for independent audits of wetlands, streams and wildlife habitat to assess if permanent loss has occurred due to pipeline construction.”*
17131. And we have a number of conditions that kind of flow from that. And you've identified some of them and there's Condition 52 on the, “Wetland Survey and Mitigation Plan”; there's the “Riparian Habitat Management Plan,” and you have mentioned these. And then there's the, “Wetlands Reclamation Evaluation and Offset Plan.”

17132. And I'm just wondering -- and a third-party verification is not in those. I'm wondering when would that occur, the timing for all -- I know it would have to be after. But is there something you have seen in the draft conditions that would build to that to ensure that that open and transparent and everyone involved that needs to be involved -- because there may be -- the reference to the BCWF is -- you know, you represent a large group of people, and how you would be involved in that type of thing and verification.

17133. **MR. MARTIN:** I think the first point is that it's important that in many of the conditions that the NEB had put on that it was bring back a plan to address the concerns raised with these important elements along the pipeline, and within a certain time period.

17134. I think that setting up a mechanism that those plans are independently reviewed and monitored to ensure that they have been implemented as directed by the NEB, and not only implemented as directed by the NEB but -- not only that they're compliant, but they're also effective in addressing the values. And I think that's an issue where it would provide public trust not only for the Proponent but the regulator to say, "We have a system in place that provides some checks and balances and oversight that looks after the public interest in these important values, and that it's built into the process."

17135. If it is independent then I think you will get a lot more buy-in from all parties, in terms of the performance of these projects. And, ultimately, it's the performance of the projects and the maintaining the sustainability of the resource that are the two primary objectives that we're looking -- that need to be satisfied.

17136. **THE CHAIRMAN:** Thank you for that clarification.

17137. Ms. Scott, you have a follow-up question.

17138. **MEMBER SCOTT:** My question is about the Cumulative Effects Framework that you reference that British Columbia is developing. Do you have any idea about the timeframe of the work that's being undertaken by B.C. and whether or not that might be available in time for us to actually look at?

17139. **MR. MARTIN:** The Cumulative Effects Policy is expected to be in place by March of this year, and then the supporting technical documents would flow after that.

17140. It's my view that the Cumulative Effects Framework is in very early days and that it's something that, you know, all process need to keep at front of mind. But I don't think this document will provide you with a silver bullet to deal with cumulative effects. Cumulative effects will remain a -- what I'd like to call a wicked problem for these types of proposals and other resource developments.

17141. **MEMBER SCOTT:** Thank you.

17142. **THE CHAIRMAN:** The Board has no further questions. And we'd like to thank you, Mr. Martin, and recognize Mr. Penner for being here today.

17143. And we will now take a five minute recess and then we'll hear from the T'Sou-ke Nation. Thank you.

--- Upon recessing at 3:19 p.m./L'audience est suspendue à 15h19

--- Upon resuming at 3:25p.m./L'audience est reprise à 15h25

17144. **THE CHAIRMAN:** Welcome representatives of the T'Sou-ke Nation and we'd be pleased to hear your oral summary argument.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE T'SOU-KE NATION:

17145. **MS. STANO:** Thank you.

17146. Good afternoon, Mr. Chair, Ms. Scott, and Mr. Davies. My name is Maya Stano and I am legal counsel for the T'Sou-ke Nation. With me today is T'Sou-ke Councillor Allan Planes representing the T'Sou-ke Nation and the T'Sou-ke Chief and Council.

17147. Councillor Planes traveled here to be with us today to stress the importance with which the T'Sou-ke Nation views the proposed project and corresponding impacts to T'Sou-ke's Aboriginal title, rights and interests.

17148. I will ask Councillor Planes to introduce the submissions today and provide some context to T'Sou-ke and its interests in being here today.

17149. Councillor?

17150. **COUNCILLOR PLANES:** Before we being today we would like to acknowledge the Coast Salish people on whose traditional territories we are meeting today and thank the Tsleil-Waututh Nation, the Musqueam Band, and the Squamish Nation for having us here today.
17151. I would also note that T'Sou-ke's participation here is not to be taken as approval of the process and is without prejudice to T'Sou-ke's rights and remedies.
17152. T'Sou-ke's position on the project is set out in Part 1 of its final written argument. In brief, the project, in particular the large oil carrier vessels that will cross directly through the heart of T'Sou-ke's traditional territory, posts significant risks to T'Sou-ke as a nation, to its highly valued Aboriginal rights, and to its identity as Coast Salish people.
17153. To date, T'Sou-ke does not believe that there has been a sufficiently thorough assessment of the project and its impact to our nation. This has resulted in a legally deficient regulatory review process that, if it leads to approvals being granted, will threaten the ultimate viability of the project.
17154. In these circumstances the appropriate remedy is to address gaps in the environmental assessment and to ensure that the Crown carries out its constitutional duties in a meaningful manner before any recommendations or decisions are made on the grant of any approvals for the project.
17155. As repeatedly highlighted by Canadian courts and clearly recognized by the federal government, the ultimate goal in making decisions that impact Aboriginal rights and title is to achieve reconciliation, which lies at the heart of the Crown and Aboriginal relations and is ultimately the grand purpose of section 35 of the *Constitution Act*.
17156. In this instance, addressing the gaps in the environmental assessment process and fulfilling the Crown's requisite constitutional duties must be made a priority. Nothing less is required to achieve a true reconciliation of T'Sou-ke's Aboriginal interest and the pre-existence of the T'Sou-ke Nation with the assertion of the Crown's sovereignty and the interest in the broader society.
17157. The Board must carry out its mandate in a manner that respects section 35 of the *Constitution Act* which provisions recognize and affirms Aboriginal title and rights, including those of T'Sou-ke Nation.

17158. In the current circumstances, with an incomplete assessment of the project impacts on T'Sou-ke's title and rights and consultation and accommodation with T'Sou-ke outstanding, it is not in the public interest for the Board to recommend approval of the project.
17159. It all begins and ends with water. T'Sou-ke Aboriginal title, rights and interests are all intimately tied to water. As explained by our Chief, Gordon Planes, water is a part of who we are and it's salt water or freshwater -- to us it's both the same.
17160. The boundaries of T'Sou-ke territory are itself defined by the flow of water. T'Sou-ke's traditional territory begins up in the mountains, which are our gardens and from which the water flows into sacred lakes such as T'Sou-ke Lake and the Smokehouse lakes, down through important fish-rearing creeks and rivers into the ocean and across our Northern Straits, also known as the Juan de Fuca Strait, to the territories of our relatives on what is now defined as American soil.
17161. The spread of T'Sou-ke territory to the American side of the Northern Straits is evidenced by our ancestors being signatories to the Point No Point Treaty signed in 1855, which sought to protect our usual and accustomed harvesting grounds. The fact that the American colonists entered into a treaty with T'Sou-ke clearly illustrates how extensively we use the entire span of the Northern Straits both within Canada and south into the United States.
17162. T'Sou-ke's territory is of central significance to our distinctive culture. The source of our Aboriginal title lies in both our occupation of our territory prior to Crown sovereignty, which occupation has continued through to the present, and in our pre-existing system of traditional laws.
17163. The words of our Chief, Gordon Planes, aptly describes the special bond that we have with our territory and the central significance of our territory to our distinctive culture.
- “Our relationship to our Territory [...] makes us who we are. [...]We depend on our Territory for more than a place to live and a source of food: it is the place from which we became the First Nation that we are. Our Territory is our identity.”*
17164. Although our territory covers the land, air, water, and resources

therein, the focus of our submissions today is on our use of marine environment and foreshore within our territory. These areas of our territory, which lie at the cornerstone of our identity and culture, are at significant risk from the project-related oil tankers.

17165. As described in detail in Part 2 of our final written argument, the marine environment within our territory supports a host of different Aboriginal rights, including Aboriginal title; Aboriginal rights to harvest various plants and animal species for sustenance; cultural and economic purposes; Aboriginal rights to marine navigation and travel; Aboriginal rights to traditional knowledge, cultural and way of life; and the Aboriginal right to self-governance.
17166. I will now ask our legal counsel, Ms. Stano, to continue with our submissions.
17167. **MS. STANO:** Thank you, Councillor.
17168. Some historical background provides context to T'Sou-ke's Aboriginal rights. In 1850 T'Sou-ke, under the name of "Family of Soke" signed a treaty with Governor James Douglas. Canadian courts have, however, highlighted several problems with the treaties that Governor Douglas signed at that time with First Nations on Vancouver Island such as T'Sou-ke.
17169. These problems include that the signatories of the chiefs were placed on a blank sheet of paper with the written words of the treaty added later; that the different parties barely understood each other's languages, if at all, and that there were significant differences between the Aboriginal and the European conceptions of real property.
17170. Collectively, this renders any alleged sale of lands under the Douglas Treaty highly questionable. It is more likely that, as advised by T'Sou-ke Elders, the T'Sou-ke ancestors signed the document on the understanding that it sought to guarantee some of its Aboriginal rights and to establish a working relationship between the parties to jointly manage the resources, thereby reflecting the stewardship ethic that lies at the core of T'Sou-ke's cultural identity and traditional laws.
17171. Now more recently T'Sou-ke has engaged, along with some of its neighbours, in treaty negotiations with the Government of Canada and Province of B.C. This treaty negotiation process is now moving into the fifth stage of a six-

- stage process, with a signed agreement in principle that includes significant land settlements in favour of T'Sou-ke.
17172. The fact that T'Sou-ke is at an advanced stage of treaty negotiations indicates an acknowledgement by the Crown of T'Sou-ke's strong claim to title and rights in its territory. But pending resolution of these claims, the honour of the Crown requires that T'Sou-ke's title and rights be determined, recognized, and respected through Crown consultation and accommodation to prevent any damage thereof.
17173. Unfortunately, T'Sou-ke's ability to meaningfully exercise its vital Aboriginal rights has already been impaired by various causes. These include; colonization, the *Indian Act*, forestry, commercial fishing, and the spread of urbanization.
17174. In addition, existing shipping lines which include or traverse T'Sou-ke's traditional marine routes are becoming increasingly hazardous and unsafe to T'Sou-ke members in small fishing boats or canoes. Any further increase in shipping traffic across these traditional marine routes would create a significant and potentially irreversible adverse impact on T'Sou-ke's members' abilities to exercise their core fishing, marine navigation, and marine travel rights.
17175. Now, T'Sou-ke has not been sitting idling by in the face of these impacts. Instead, T'Sou-ke takes its stewardship responsibilities to heart, which responsibilities the Nation views as an integral part of the traditional laws and its relationship with its territory.
17176. Some examples of T'Sou-ke's extensive stewardship efforts include; renewable power projects that rely on tidal and solar energy; extensive ecosystem restoration efforts; and sustainable marine harvest operations.
17177. In light of the existing impact on its territory and its active efforts to overcome them, T'Sou-ke is particularly concerned that no further impacts occur within its territory or to its Aboriginal title and rights. As such, this project is of particular concern to T'Sou-ke, especially the roughly sevenfold increase in large oil vessels travelling directly through T'Sou-ke's territory which could delay, reverse, or entirely frustrate T'Sou-ke's active stewardship efforts and its members' abilities to meaningfully exercise their Aboriginal rights.
17178. These concerns are exacerbated by T'Sou-ke's extensive traditional

- knowledge of the environment in the Northern Straits and in the Salish Sea, including the frequently severe local weather conditions therein which underscore the unpredictability of the sea and the frequently unsafe conditions for navigation of shipping traffic.
17179. I now turn to Part 5 of T'Sou-ke's final written argument, in which some important legal deficiencies with the Board's review of the project to date are outlined.
17180. In light of these deficiencies, the Board does not have sufficient information before it to determine whether the project's benefit outweighs its potential risks sufficiently to justify making a recommendation that a certificate be issued for the project at this time.
17181. In today's oral submissions I will focus on three of the specific deficiencies in the environmental assessment. In particular, the exclusion of marine shipping activities from the definition of the designated project; the insufficient assessment of the risks of oil spills, accidents and malfunctions; and finally the failure to adequately assess the project's effects on T'Sou-ke's Aboriginal title rights and interests.
17182. First, the deficiencies in the review process began with the issue of the Board's Hearing Order on April 2nd, 2014 which order excluded marine shipping from the definition of the designated project under the CEAA 2012.
17183. The CEAA 2012 clearly provides that designated projects are to include "*any physical activity that is incidental to these physical activities*".
17184. Now, as the large majority of the oil to be transported via the project's pipeline will be shipped from the Westridge Terminal directly through T'Sou-ke's territory, marine shipping activities are indisputably incidental to the project. The exclusions of these incidental marine shipping activities from the project definition has hindered a full evaluation of the project effects and a full assessment of appropriate mitigation measures.
17185. The project-related marine shipping activities are not a minor consequence of the project. Instead, the sevenfold increase in marine shipping activities would be an inevitable result of approval of the project and is not a separate issue that can be hived off from the environmental assessment. The fact that existing shipping lanes will be used does not negate the impact associated

with a significant increase of oil vessel traffic within those shipping lanes.

17186. Now, the failure to include the incidental marine shipping activities within the scope of the designated project creates the real risk that the environmental effects of these marine shipping activities will not be considered as environmental effects of the project for the purposes of the decision on whether the project is likely to cause significant adverse effects, as well as the real risk that marine shipping activities will not be subject to the mandatory conditions attached to a decision statement issued under the CEEA 2012.

17187. Secondly, the project application is deficient in its assessment of the effects of marine oil spills and the significance of those effects. As such, based on the application before it, the Board is unable to adequately assess the risks of oil spills, accidents, and malfunctions to the marine environment which includes T'Sou-ke's territory and their title thereto and the rights therein.

17188. The deficiencies of this assessment are outlined in detail at paragraphs 169 to 193 of T'Sou-ke's final written argument.

17189. But rather than repeating these extensive submissions today, I will direct the Board to some key passages of the expert evidence available on the record that pertain to two of the deficiencies outlined in T'Sou-ke's final written argument.

17190. First, I stress the importance of a thorough risk assessment of the effects of a marine oil spill, which includes an assessment of the significance of those effects. As explained in an expert report completed by Pottinger Gaherty on behalf of the intervenor the Pacheedaht First Nation, the project application does not include a determination of the significance of the effects of accidents and malfunctions that may result from the release of diluted bitumen to the marine environment.

17191. As such, it does not satisfy the requirements of 19(b) of the CEEA 2012, which specifically requires the significance of effects to be taken into account.

17192. Now Pottinger Gaherty also concluded that the project's applications' lack of complete risk assessment limited a thorough understanding of the relative risks along the shipping route. Concurrently, the type of shoreline is an important factor in evaluating how long oil remains on the shore, and thereby evaluating the

- potential significance of an effect of a spill.
17193. To provide a valid assessment of the risk of significant effects to T'Sou-ke's title and corresponding rights, the application must first accurately describe the specific shoreline characteristics within T'Sou-ke's territory. No such detailed description was provided in the project application.
17194. This all ties closely into mitigation. As to discharge its regulatory duties, it is critical for the Board to understand whether there are risks to the environment, social and cultural values that cannot be mitigated.
17195. However, the Traditional Marine Knowledge and Use Study commissioned by T'Sou-ke for this project identified several gaps in the project application's proposed mitigation measures.
17196. These include; a lack of clarity and measurability in the proposed mitigation measures; a lack of publicly available information on how actual oil spill response plans will be implemented; a failure to address the loss of marine-related economic opportunities, such as aquaculture and ecotourism, as valid project interactions; and a failure to address the wider changes that will occur on T'Sou-ke's territory due to project-related increases in traffic during both regular operations as well as in an oil spill scenario.
17197. Secondly, as marine shipping activities were excluded from the definition of designated project, there was a significant lack in specific environmental setting discussion and climate data for the marine environment provided in the project application. This is a key omission as the behaviour-spilled oil depends heavily on specific environmental processes and conditions.
17198. As explained in a 2013 report by Environment Canada, also placed on the record by the Pacheedaht First Nation, oil spilled in marine environments may take a variety of forms, and the question of whether dilbit products spilled in the marine environment will float or sink depends on their exposure to a number of natural processes. This includes the temperature of the water with the recovery of bitumen at temperatures below eight degrees Celsius being particularly challenging.
17199. Without adequate climatic information on the marine environment included in the project application, appropriate spill recovery technologies cannot be identified. This is particularly troublesome as it will most likely take much

longer to recover oil in T'Sou-ke's territory due to both its location and the frequent extreme weather conditions that limit navigation and the ability to promptly implement spill recovery technologies.

17200. In summary, by excluding marine shipping activities from the definition of the designated project, there was insufficient information on the environmental setting, processes, and conditions of the marine environment through which the projects large oil vessels would travel.
17201. This information is key to understand -- to conducting spill-risk assessments and spill modelling and identifying viable and affective spill response and recovery technologies.
17202. Without this information, there is no certainty that a spill of any size, be it small or large, can be cleaned up in such a manner that -- as to not impact the environment or T'Sou-ke's Aboriginal title rights and interests.
17203. Now, turning to the assessment of the effects of the project on T'Sou-ke's Aboriginal title rights and interests, we reiterate that these effects are not limited to large-scale oil spills. Large-scale oil spills would, however, have significant impacts on T'Sou-ke's use and occupancy.
17204. The corresponding implications for T'Sou-ke's culture and Aboriginal title and rights would be catastrophic and, at minimum, long term in duration, but possibly multi-generational to permanent in adverse effects outcomes.
17205. But the effects of the project on T'Sou-ke's Aboriginal title rights and interests are not limited to large-scale oil spills. Even the normal operations of the project would likely result in significant impacts on the current use of marine and foreshore resources by T'Sou-ke members, as well as on unique T'Sou-ke cultural and spiritual values, particularly in areas where T'Sou-ke's ability to meaningfully exercise their rights are already impaired because of unaddressed cumulative impacts.
17206. These impacts include a reduces ability or willingness of T'Sou-ke members to travel by boat within and adjacent to the project footprint for subsistence harvesting, commercial fishing, and cultural activities, and a corresponding rejection in the daily practice of T'Sou-ke's knowledge and culture thereby impacting the transfer of traditional knowledge and culture to future generations.

17207. The scope and magnitude of these impacts are not adequately captured in the project application. As such, the Board is unable to complete a thorough assessment of the project-related effects on T'Sou-ke's Aboriginal title rights and interests.
17208. Finally, as outlined in paragraphs 205 of 209 of T'Sou-ke's final written argument, and as alluded to previously, there remain serious gaps in the proposed mitigation measures outlined in the project application with several residual project effects remaining after its proposed mitigation measures are adopted, coupled with insufficient accommodation, if any, provided for such residual effects. I reiterate, that was paragraphs 205 to 209.
17209. Now, in addition to the legal deficiencies in the Board's review of the project to date, there has also been insufficient Crown consultation with T'Sou-ke as outlined in Part 6 of T'Sou-ke's final written argument.
17210. Consultation, which is grounded in the honour of the Crown, must be done in a timely and comprehensive manner, and in good faith in the spirit of reconciliation. To be meaningful, consultation must take place when the project is defined and continue until the project is completed. If it occurs too late in the decision-making process, the duty to consult and accommodate will be rendered futile. Shortcomings in the consultation process at a stage that serves as the basis for future decisions cannot be addressed on the basis that there will be further consultation.
17211. It is well-recognized that the depth of consultation varies along a spectrum. Now, as outlined in T'Sou-ke's final written argument, T'Sou-ke holds strong claims to Aboriginal title rights and interests across its territory including the marine shipping lanes directly related to the project.
17212. The Crown itself has agreed that the depth of consultation required with T'Sou-ke in this case lies at the high end of the spectrum.
17213. Now, although the honour of the Crown demands a high level of consultation and accommodation, T'Sou-ke has never been meaningfully consulted in regards to the project. This is particularly troublesome as T'Sou-ke's Aboriginal title rights and interests clearly stand to be significantly adversely impacted by the project. Although the Crown has indicated that it intends to rely on the Board's process to fulfill constitutional duties to T'Sou-ke, their fulfillment

remains outstanding.

17214. The honour of the Crown has been absent from the start. This is clear from the Crown's failure to consult with T'Sou-ke at key initial stages of the process such as when the project was being scoped and defined, and when a completeness determination was being made on the project application. This failure has impacted the entire regulatory process creating significant deficiencies, some of which have been discussed today.
17215. In later correspondence on its intended process for consultation, the Crown sought to outline four separate stages of consultation. This communication came whilst the first phase was already complete and the second phase well underway. Clearly, this approach does not uphold the honour of the Crown or discharge the requisite constitutional duty in any meaningful manner.
17216. As previously mentioned, shortcomings in the consultation process at a stage that serves as the basis for future decisions cannot be addressed on the basis that there will be further consultation.
17217. In summary, it would be a legal error for the Board to make recommendations on the project application at this time as the Crown had not yet discharged its duty to consult T'Sou-ke. Similarly, the Board is unable to make recommendations based on the outcome of consultation because the requisite consultation remains outstanding,
17218. I will now turn to the Board's draft terms and conditions. Specific recommendations for their revision are outlined in Part 8 of T'Sou-ke's final written argument.
17219. These recommendations generally revolve around T'Sou-ke's involvement in the project planning and operations, including notification on any changes in shipping routes; progress updates on the implementation of specific commitments; environmental planning, as well as planning for monitoring and addressing adverse socioeconomic effects; and the installation of air-monitoring stations in T'Sou-ke's territory.
17220. T'Sou-ke also recommends that, if granted, the certificate terms and conditions must require Trans Mountain to provide T'Sou-ke with a meaningful opportunity to review and comment on the commitments related to oil-tanker traffic and enhanced oil spill response, which comments Trans Mountain must

- carefully consider and seek to incorporate.
17221. A comprehensive spill-risk assessment also remains outstanding and required thorough field studies to fully understand the marine environment through which project-related oil vessels will travel.
17222. Concurrently, there must be joint spill management planning with First Nations such as T'Sou-ke whose traditional territories the shipping lanes pass through or may impact.
17223. This includes ongoing monitoring, training, education, and the provision of sufficient equipment to ensure that T'Sou-ke members are adequately equipped to act as first responders in the event of a spill in any condition that they may face, which includes in different weather conditions, at different times during the day or night, and to respond to different magnitudes of spills.
17224. In summary, a thorough assessment of the proposed project and its impacts to the T'Sou-ke Nation remains outstanding. Concurrently, the Crown has not fulfilled its constitutional duty to consult and accommodate T'Sou-ke thereby failing to uphold the honour of the Crown.
17225. Addressing these impacts in the environmental assessment process and fulfilling the Crown's requisite constitutional duties must be made a priority. Until these matters are duly addressed and resolved, the Board cannot issue any recommendation to grant approval of the project.
17226. On behalf of the T'Sou-ke Nation, these are our submissions.
17227. **THE CHAIRMAN:** Thank you, Councillor, and Ms. Stano.
17228. The Board will take 10 minutes to consider any questions and we'll return at five after 4:00.
- Upon recessing at 3:53 p.m./L'audience est suspendue à 15h53
--- Upon resuming at 4:00 p.m./L'audience est reprise à 14h00
17229. **THE CHAIRMAN:** Thank you for your indulgence. And if you'll entertain some questions, Ms. Scott will go first.
17230. **MEMBER SCOTT:** I have a question about Crown consultation.

- Some intervenors who have presented prior to your attendance have urged upon the Board that we assess Crown consultation. Others have taken a different view and suggested that the responsibility to assess Crown consultation is Governor in Council's or the Federal Crown, at least, and since we're not the Federal Crown, and the ultimate decision is Governor in Council's, that's where the decision should take place.
17231. And I didn't see anything in your submissions one way or the other, so I wonder if you could help us understand what your position on our obligation to assess Crown consultation might be?
17232. **MS. STANO:** Thank you, Member Scott. So the reason you didn't hear anything is, as you know, the issue of who has the responsibility to discharge the duty to consult is somewhat in a grey area right now with that, the litigation before the Federal Court of Appeal and a decision expected this summer.
17233. So we are a little hesitant to delve extensively into that specific matter, but the Board, as you know, has the responsibility to consider matters of law and this includes section 35 and the consultation requirements.
17234. I believe it is T'Sou-ke's position that the NEB does have certain duties to conduct procedural aspects of the consultation, and clearly then the assessment of those can't be done by the party doing the actual consultation.
17235. Any consultation that sits outside of the Board's jurisdiction and Tsleil-Waututh, the Nation's counsel discussed that in somewhat detail with regards to government-to-government and matters within the Board's jurisdiction. And those are issues with regards to what consultation has happened up to date because some of the government-to-government discussions will happen outside and after the NEB process.
17236. Those are matters that we would like to see some type of assessment and decision coming from the NEB on the level of consultation.
17237. **MEMBER SCOTT:** So if I'm understanding you, that would require a different kind of record, because right now we're not necessarily privy to those discussions.
17238. **MS. STANO:** Sorry, the -- you would not be maybe privy to the government-to-government discussions, so that's outside your jurisdiction anyway

- and those might cover issues outside your jurisdiction. But any discussions that the Crown states that they have had with regards to First Nations in terms of consultation for the process -- for the purposes of the NEB process since Phase II -- Phase I and Phase II fall within that NEB process, that's something that we would like to see some language from the NEB, some decision or recommendations.
17239. **MEMBER SCOTT:** You also, in your presentation, argued that the NEB -- or rather that consultation required -- to discharge that duty required that there be engagement at various different stages of the NEB process. And you identified specifically the application for determining whether or not the application was complete.
17240. Can you just perhaps elaborate how you see that actually working in each application?
17241. **MS. STANO:** Absolutely. In my written missions at paragraph -- well, sorry. Let me just pull it up.
17242. So at paragraphs -- starting at paragraphs 233 through to 241, there is this discussion on completeness evaluation, and actually, specifically 240. And the matter of the completeness determination is really again setting the stage for the whole review process.
17243. Now, because of this grey area that we're at with regards to -- in the law in terms of who has the responsibility to carry out the consultation, that's where you'll see in our written submissions, we've alluded to both the Crown and the Board. So whether or not it was the Board -- and if the duty ultimately falls on the Crown when the Federal Court of Appeal comes out with its decision, then we're saying that the Crown should have spoken with T'Sou-ke and other First Nations on that completeness -- a draft version, essentially, of that completeness determination -- and then spoken with the NEB separately or in conjunction with the T'Sou-ke so that it was discharging its consultation duties throughout the whole process rather than simply saying, "We're going to let the NEB deal with this and we're not going to have any involvement in it."
17244. That is on the standpoint where I'm saying the NEB is not responsible for consultation. If the Federal Court of Appeal says the NEB does have that jurisdiction to consult, essentially, then we would have expected the NEB to consult with First Nations such as T'Sou-ke on the draft -- a draft version of a

- completeness evaluation or in determining whether or not the application was complete.
17245. So whatever party was -- will be found to be responsible, some party must -- should have consulted with T'Sou-ke in terms of whether or not the application was complete or not, be it the NEB or the Crown. In this instance, neither did.
17246. **MEMBER SCOTT:** And that would necessarily apply to every First Nation that was participating in our process and would also have to account for the nature of the alleged violation as well?
17247. **MS. STANO:** It would tie -- well, consultation always ties into the spectrum, right? And so -- and here again, it's not only T'Sou-ke saying that the level of consultation is needed to be quite high; it -- the Crown itself has recognized that the depth of consultation is required at the high end.
17248. So any First Nation that -- at minimum, any First Nation that has that high level of possible impacts to their rights and title should have had involvement at key decision points. And the completeness determination is one of the key decision points.
17249. You know, I can point to the environmental assessment process in terms of EIF statement. So just -- if it's just under the CEAA 2012 or even under the B.C. process -- well, maybe I'll just take the B.C. process because it's quite simple.
17250. When there's an application screening stage that happens before the application review and there there's quite a lot of First Nations' involvement and discussions and meetings with First Nations to discuss whether or not the application is ready to move into that review stage. So that's the completeness determination again, and that was lacking in this case.
17251. **MEMBER SCOTT:** Thank you. You've been very helpful.
17252. **THE CHAIRMAN:** Perhaps can -- I just wanted to make sure I'm clear, which is -- because we need to -- on your submission in 253 leading to 254, in the alternative as proposed in 258, am I reading in 253 that:

"T'Sou-ke respectfully submits that the appropriate remedy in

these circumstances is to require the Crown to carry out consultation prior to proceeding further with the proposed government conduct, specifically, granting the Certificate of the project."

17253. And then:

"Therefore, they respectfully submit that the Certificate should not be issued for the project until these matters are remedied."

17254. And then in the alternative:

"T'Sou-ke respectfully submits that the Board should refrain from granting project approvals until the Crown has discharged its consultation duties."

17255. Am I assuming that on 253 that if the Board would have concluded this process and submitted its recommendation, and that would then go -- you're recommending that the Crown wouldn't, of course, issue it because they have to have a consultation phrase -- phrase that kicks in after we submit it.

17256. But I'm -- if that's correct, then how -- what is the alternative, granting any project approvals until the Crown -- I'm just trying to get what the alternative is and the Board's role in the alternative.

17257. **MS. STANO:** I see what you're saying and I think I should clarify this, Chairman.

17258. We've referenced a Court of -- Yukon Court of Appeal decision that talks about when did the breach happen? And really, that's what you have to go back to. So to clarify this, the main relief is -- requested is that the whole process be brought back to when the breach occurred, which was right at the start when marine shipping activities were excluded from the designated project.

17259. As we discussed in part today in our -- outlined in our written submissions, this lead to a number of problems and omissions in the application, which has gotten us to this stage but which is an incomplete assessment of the whole project.

17260. Now, so that's the first remedy and in the alternative it is that

consultation be carried out before any certificate is granted.

17261. Does that clarify?

17262. **THE CHAIRMAN:** Yes, it does. Thank you for that.

17263. The Board have no further questions. We thank councillor and Ms. Stano for attending today and we will consider your oral submissions along with all the other submissions that you have submitted.

17264. We will adjourn now and tomorrow morning we will hear from Mr. Michael Hale, followed by the Yarrow Ecovillage, then the Lower Nicola Indian Band.

17265. We're adjourned until 9:00 a.m. tomorrow morning.

--- Upon adjourning at 4:10 p.m./L'audience est ajournée à 16h10