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 26

Hearing held at
L'audience tenue à

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

January 19, 2016
Le 19 janvier 2016

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Ottawa, Ontario
(613) 748-6043

Canada

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Printed in Canada

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 19, 2016
Audience tenue à Burnaby (Colombie-Britannique), mardi, le 19 janvier 2016

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

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

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Applicant/Demandeur
Trans Mountain Pipeline ULC
- Ms. Terri-Lee Oleniuk
- Ms. Lesley Matthews

Intervenors/Intervenants
City of Surrey
- Mr. Anthony Capuccinello
- Mr. Scott Neuman
- Mr. Ted Uhrich

Musqueam Indian Band
- Mr. James Reynolds
- Councillor Morgan Guerin

Mr. David Farmer

City of New Westminster
- Mr. Mark Allison
- Mr. James Allen
- Mr. Tim Armstrong
- Mr. Elmer Rudolph

National Energy Board/Office national de l'énergie
- Ms. Nicole Godbout
- Mr. Paul Johnston

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No.	Description	Paragraph No./No. de paragraphe

--- Upon commencing at 9:02 a.m./L'audience débute à 9h02

12293. **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.

12294. We acknowledge today being on the traditional land of the Coast Salish people, and prior to the opening of today's session, the Tsleil-Waututh Nation performed a blessing ceremony in this hearing room and we thank them for providing this blessing.

12295. Over the next three weeks, we will hear oral summary argument from intervenors on Trans Mountain's application filed on December the 16th, 2013. The first two weeks of argument will occur in Burnaby and then argument will move to Calgary for a final week.

12296. The application is for permission to build and operate approximately 987 kilometres of new oil pipeline, to reactivate 193 kilometres of existing oil pipeline, and to build and modify related facilities such as pump stations, tank terminals and a marine terminal between Edmonton, Alberta and Burnaby, British Columbia.

12297. My name is David Hamilton and I am chairing the Panel. With me, to my left is Ms. Alison Scott and to my right is Mr. Phil Davies, and together we are the Panel assessing the Trans Mountain Project Application.

12298. To start, I will take a moment to review housekeeping items. 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 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 lanyards. And fortunately security guards will be at both -- uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.

12299. Once outside the building, proceed to the hotel muster point located at the northwest corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure all members of your party are accounted for and await further instructions from Delta Burnaby representatives.

12300. There are a number of NEB staff members who are in attendance today. You will be able to identify them because they are wearing a gold coloured name tag. These are the people who work with us, the Panel, to create and deliver a transparent and respectful process. If you have any questions concerning the process, please contact them.

12301. All hearing sessions will be transcribed, and you can get copies of the transcript later each day on our website. We are also broadcasting live on the broadcast Board's website, in audio as well as video, and later today recordings will be available for download. All those interested in the Project will be able to view the hearing in real time, regardless of where they are located.

12302. As indicated in Procedural Direction 20, the Board has set time limits to hear oral summary argument. The time limit for intervenors is 40 minutes each. This time limit will be strictly enforced and they reflect that intervenors have had the opportunity to file written argument-in-chief prior to providing oral summary argument.

12303. There's 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. If necessary, the microphone will be switched off, although I will warn you before this happens.

12304. 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 on any terms and conditions to which the Project should be subject if it is approved.

12305. More specifically, oral summary argument is an opportunity for Trans Mountain and intervenors to highlight and summarize key portions of their written argument or evidence already on the record, all of which the Panel has read and considered, that supports any views taken.

12306. New evidence cannot be introduced through written argument or during oral summary argument, nor can visual aids be used. It is also not necessary to repeat portions of others' arguments that you agree or disagree with. You can simply adopt it in agreement, or refer to it and explain your disagreement.

12307. Finally, argument is also not the place to ask questions of the Board, Trans Mountain, or other intervenors. 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.

12308. My fellow Panel Members and I are looking forward to hearing from intervenors that have signed up to provide oral summary argument. The Board wishes to limit potential distractions and to provide a fair, safe and efficient opportunity for everyone that will be providing oral summary argument.

12309. The Board does not allow signs and banners to be displayed in the hearing room. I will also not tolerate shouting, inappropriate language or interruptions of any kind. The Board expects all those in the hearing room, including Trans Mountain, intervenors and accredited media, to maintain an atmosphere of decorum and respect for those that are presenting their argument. Disruptions will not be tolerated, and those responsible may be asked to leave.

12310. Further, members of the media are asked not to set up, take down or move equipment while the Panel or a presenter is speaking and to do so only during breaks. Media interviews are not permitted within the hearing room.

12311. Going forward, each morning, the Board will open up the floor to preliminary matters that Trans Mountain or intervenors may wish to raise. The Board may hear motions or requests directly related to the oral summary argument process.

12312. However, as we said in Procedural Direction 20, the Board reserves the right to direct that any matter raised be submitted in writing, providing Trans Mountain and all intervenors, including those not present in the hearing room, the opportunity to respond. This may include any matters not directly related to oral summary argument, or matters that could have been raised earlier. The Panel wants to ensure that we have enough time to hear each of the intervenors that have registered to present oral final argument.

12313. With that, I think we are ready to get under way this morning in Burnaby, and we will hear from the City of Surrey. Following Surrey, we will adjourn until this afternoon when we will hear from the Musqueam Indian Band, Mr. David Farmer, and the City of New Westminster.

12314. Therefore, before we begin, are there any preliminary matters that anybody wishes to raise?

--- (No response/Aucune réponse)

12315. I see none. So now we'll hear from Mr. Capuccinello for the City of -- the City of Surrey.

12316. Mr. Capuccinello, we have read your written argument and you now have 40 minutes to present your oral summary argument, so please proceed.

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

12317. **MR. CAPUCCINELLO:** Mr. Chairman, Panel, my name is Anthony Capuccinello, Counsel for the City of Surrey. I have here with me Scott Neuman, Manager of Design and Construction, and Ted Uhrich, Manager of Parks Planning.

12318. The position of the City of Surrey is set out in section 7 of the City's written argument.

12319. In brief, number one, the City does not, in principle, support any expansion of Trans Mountain system that negatively impacts the City of Surrey. Two, if the NEB is inclined to recommend approval of the project, the City requests that a condition be imposed on any approval requiring Trans Mountain to abandon, decommission and remove that portion of the existing pipeline in Surrey.

12320. Three, if the NEB is inclined to recommend approval of the project, the City further requests that having regard to the negative impacts and feasible options and alternatives available that those conditions set out in section 7 of the City's written argument be imposed.

12321. Now, you have heard through the submissions and argument of Trans Mountain a story, a story applauding the expertise of the Board's advisors, a story full of self-serving statements expressing how fair this process has been and how the status quo that has been in place for over 60 years has worked so well. Sadly, that story is a fiction. The City of Surrey's submissions and argument are based on facts, facts supported in evidence and facts supported by law.

12322. Trans Mountain's existing pipeline was approved over 60 years ago in 1953, before the National Energy Board even existed. A lot has changed since then.

12323. Sadly, the advisors of the Board as regulator have fallen asleep at the wheel. Their lack of expertise is clear from the facts in evidence before you. It is clear from the draft conditions circulated for comment. While the regulators of other utilities have kept pace with the times and have adapted to new issues that have arisen or to old issues that were initially overlooked, the same cannot be said for the Board as regulator.

12324. It has been the City of Surrey and other municipalities that have been living with the problems that were created back in 1953, problems that have been left unaddressed. It is municipalities like Surrey, one of the fastest growing municipalities in Canada and one of the most populated municipalities impacted by this system, that is hemorrhaging money and has incurred unnecessary liabilities all to the blind eye of the advisors of the Board.

12325. Fortunately, Mr. Chairman and Panel, Trans Mountain's application for a Certificate of Public Convenience and Necessity triggers the Board's jurisdiction which, if exercised properly and in the manner that Parliament intended, will ensure that these negative impacts and problems that have arisen and been left unaddressed can finally be remedied.

12326. The legislation mandates and the public interest demands that the Board through section 52 and section 108 of the *National Energy Board Act* recommend that terms and conditions be imposed on any approval or recommendation of approval that it may grant that eliminate these negative impacts.

12327. First, I will address the negative impacts to utilities and to highways, which the proposed pipeline will occupy and cross.

12328. Municipalities and others whose utilities are impacted and who have jurisdiction over highways will incur present and future costs as a consequence of the pipeline occupying or crossing these highways, or as a consequence of the pipeline being constructed in proximity to these utilities.

12329. These costs are substantial and have been quantified by Larry Martin,

professional engineer of Associated Engineering, in his report that was filed as evidence by the City of Surrey and several other municipalities. On behalf of five lower mainland municipalities, Surrey, Burnaby, Township of Langley, Coquitlam and Abbotsford, these costs were quantified over a 50-year period and were estimated to exceed $93 million.

12330. Through the affidavit of Ken Zondervan, professional engineer and former design and construction manager of the City of Surrey, actual invoices were attached.

12331. For example, the costs incurred by Surrey to undertake a single highway infrastructure project within a City highway that was traversed by the existing Trans Mountain pipeline, the cost that the City had to incur, costs that were required by Trans Mountain to be paid before Trans Mountain would undertake any improvement to its pipeline to accommodate the crossing exceeded $1.7 million. That is one crossing.

12332. The affidavit of Ken Zondervan refers to other crossings. And again, the costs are substantial.

12333. Put into context, you think $93 million is a big number. It is. We've demonstrated through evidence, through actual invoices, that one crossing in Surrey triggered a $1.7 million cost.

12334. Contrary to Trans Mountain's submissions, those costs are properly borne by Trans Mountain. It is not for municipalities and it is not for the province to pay those costs and subsidize the shareholders of Trans Mountain and Kinder Morgan.

12335. The absence of terms and conditions related to cost allocation among other things in the original certificate issued approving the existing Trans Mountain pipeline in 1953, and the failure of the Board as regulator to make any order addressing this issue, and the failure of those advising the Board to take action and address this problem have left municipalities and the province hemorrhaging money as a consequence of this pipeline system.

12336. Other regulators at both the federal and provincial level have recognized that it is not for municipalities or the province to pay these costs and subsidize the shareholders of private entities.

12337. These other regulators have also understood the imperative of having terms and conditions related to the occupation and crossing of highways and other public property determined before construction. These terms and conditions include terms related to the allocation of costs, indemnities and terms related to relocation.

12338. For example, under the *Oil and Gas Activities Act* in British Columbia which regulates high pressure pipelines, there is a cost allocation formula which is set out in the pipeline crossing regulation. There is also the requirement that terms be set before construction occurs in highways. This is set out in section 34 of the *Oil and Gas Activities Act*.

12339. Under the *Utilities Commission Act* in British Columbia which regulates public utilities such as Fortis, section 32 requires that terms, including the allocation of costs, be determined before construction occurs in highways or other public places.

12340. Under section 43 of the *Federal Telecommunications Act*, the same holds true.

12341. Under the *Federal Railway Safety Act*, costs incurred by the province and municipalities are to be reimbursed.

12342. While acknowledging that municipalities and the province will incur present and future costs, Trans Mountain has refused to reimburse and indemnify municipalities and the province for these costs.

12343. In fact, as set out in the affidavit of Ken Zondervan, professional engineer and former design and construction manager of the City of Surrey, and as confirmed in the responses provided by Trans Mountain to information requests made by the City of Surrey and filed as evidence in these proceedings, Trans Mountain has maintained that its historic practice of requiring municipalities and the province to pay these costs will continue, as will its other demands including Trans Mountain's demands for the creation of lot access or utility lots.

12344. At this time, Mr. Chairman and Panel, I would like to direct your attention to Exhibit Number C76-9-24, Adobe page 21.

12345. Referring to this exhibit, Mr. Chairman, you will see the area shaded

in red. What you have is 102 Avenue and segmenting 102 Avenue is what is called a 'Lot "X"'. It is a fee simple lot over which is registered a Trans Mountain easement or statutory right-of-way.

12346. Mr. Chairman, as the Panel and yourself are aware, a statutory right-of-way is a form of easement without a dominant tenant. So while that shaded area of red looks like a highway, smells like a highway, it isn't a highway. It is a fee simple lot. Because of that, there are numerous problems that arise.

12347. And you wonder how is it that a fee simple lot can find its way in the middle of what should be dedicated highway. It's because that is one of the conditions imposed by Trans Mountain. If you want to cross its pipeline or if you want to perform any works in proximity to it that require, in this case the requirement of a highway to be constructed over it, they will not permit the dedication of highway.

12348. And so, in effect, it isn't a highway in law. It is a fee simple lot which creates a host of problems, because as, Mr. Chairman, you are aware, and Panel, you are aware, in B.C. we have a torn system which brings with it a guarantee of indefeasible title.

12349. Now, problems that arise as a result of this are expressed in detail in the City's written argument. In brief, the current crossing provisions in the Act and regulations are deficient, as are the draft conditions circulated for comment in that they do not provide the necessary authority to compel Trans Mountain to extinguish statutory rights-of-way it is required in order to allow for highways to be widened or established.

12350. Under legislation in British Columbia there's no indefeasible title to highway, park or public square. This is set out in section 107 of the *Land Title Act*. To create a highway, indefeasible title is extinguished through the registration of a section 107 plan or through the filing and registration of a subdivision plan which dedicates areas as highway, areas such as that shaded area in red.

12351. In order to accomplish this, any person having an interest in the land to be dedicated as highway must consent to the dedication. Absent consent a highway can only be created through expropriation, which in the federal undertaking context such as this with Trans Mountain, that power arguably does not exist.

12352. It is only through imposing terms and conditions in a certificate pursuant to section 108 of the *National Energy Board Act* and section 52 of the Act stipulating that statutory rights-of-way in favour of Trans Mountain must be extinguished for highway dedication purposes. This will ensure that Trans Mountain and third-party mortgagees have notice of and are bound by said terms and conditions.

12353. Under the provincial scheme in British Columbia, the legislation clearly contemplates municipalities and the Province expropriating from pipeline companies.

12354. Because this issue has been left unaddressed by the Board as regulator, Trans Mountain has through its opportunistic behaviour leveraged and taken advantage of a municipality's inability to compel consent and has required municipalities and the Province to create fee simple lots in areas that should be dedicated highway.

12355. This leveraging has been facilitated by the NEB crossing regulations which provide that leave of the Board under section 112 is not necessary under certain circumstances. Those circumstances require a person wishing to carry out construction over a pipeline to agree to terms and conditions imposed by Trans Mountain no matter how outrageous they may be. That's set out in the regulation.

12356. If I may read section 4 of the regulation of the NEB:

> *"Leave of the Board is not required for any construction or installation of a facility other than the installation of an overhead line referred to in Section 5 if..."*

12357. And these are the operative words:

> *"...the facility owner obtains written permission from the pipeline company prior to construction or installation of the facility and accepts conditions set out in the permission."*

12358. And accepts conditions set out in the permission. That's exactly what's occurred here. Municipalities and the Province have been leveraged. Basically, if you want to cross the pipeline with your highway infrastructure project or with your utility project, then you have to agree to our terms. And one

of those terms is the creation of a Lot "X".

12359. Facing the uncertainties and inevitable costs and delays associated with attempting to expropriate from a federal undertaking such as Trans Mountain, and in the absence of similar provisions to section 2(1.3) of the *Expropriation Act* in British Columbia, municipalities and the Province are left with no option but to accept Trans Mountain's Lot "X" demands and, as a result, municipalities and the Province are frustrated in their attempts to establish proper highway corridors.

12360. Trans Mountain has confirmed that it will continue this practice of refusing to consent to the dedication of highways. This is set out in the responses to the City of Surrey information requests filed as exhibits in these proceedings.

12361. Because a Lot "X" is not a highway dedication, there are numerous negative consequences that flow from that. There's added liability, added liability under the *Occupiers' Liability Act* which would not apply to municipalities in the case of highways, which makes sense. When you think about it, a highway which is owned by the City of Surrey under law in B.C. is occupied by many other entities, whether that be telecommunication companies, hydro or other facility operators.

12362. And so the City does not control everyone who operates in a highway and, as such, it makes sense that municipalities and the Province alike are not held to that standard required under the *Occupiers' Liability Act*.

12363. That is not the case in fee simple lots; breach of contract, as well as tort of negligence apply. Statutory dispute resolutions and crossing benefits are lost. There's a loss of flexibility and control.

12364. **THE CHAIRMAN:** Mr. Capuccinello, I'll stop the clock right now because I understand one of the Board Members wishes to ask a question if you're open to receiving questions ---

12365. **MR. CAPUCCINELLO:** Yes.

12366. **THE CHAIRMAN:** --- rather than waiting until the end?

12367. **MR. CAPUCCINELLO:** Yes, of course.

12368. **THE CHAIRMAN:** With that, we'll stop the clock at this time so we can ask the question.

12369. Sorry, Ms. Scott.

12370. **MEMBER SCOTT:** Technical difficulties.

12371. I hear your argument. Certainly I've read it. And if I could paraphrase it, I think you're saying that you're concerned about the ability of the municipalities to recover expenses and reimbursement for additional costs that they incur.

12372. And I wonder -- and you've outlined in detail the provincial regulatory schemes in the Province and under other legislation. I wonder if you could tell me how Board Order No. 1 affects your argument?

12373. Because Board Order No. 1, as I understand it, does indeed allow an application to the NEB for dispute resolution in the event that there is a circumstance where a municipality and the proponent company can't agree about costs.

12374. And I wonder how that affects your submission that you're at complete mercy of the company without -- and must, as I understand your argument, come to an agreement whether or not it's reasonable or not.

12375. **MR. CAPUCCINELLO:** Yes, Mr. Chairman. As for you, Mr. Chairman, I have read Board Order No. 1, and as I recall Board Order No. 1 was last amended in July of 1988. I'm not aware of any subsequent amendment. What is apparent when you review Board Order No. 1 is that there are -- there are no cost allocation provisions at all and -- nor are there issues that prevent lot access being demanded.

12376. So you've asked, "Well what happens if you just bring your application to the Board?" Well that's no different than section 1-12. Section 1-12, municipalities and the Province have that same ability. If you want to bring an application, you bring that application to the Board seeking leave to cross on terms and conditions.

12377. But the reality is that that takes time. There is no prescribed format or process in the rules and there's no timeline. So then what can happen is you end

up with judicial reviews, you end up with delays. And the reality is that highway infrastructure projects are very time sensitive. There are funding -- funding is provided by the federal government. Funding is provided by the provincial government with timelines.

12378. And then you ask, "Well what happens if you can't meet the timeline? Just delay it." Well, guess what? Then you get sued. You get sued by contractors who've been awarded tenders. And that's what happened in the Fraser Highway process. You saw through the decision of Justice Pearlman how a utility can leverage its position, deny approval, force a process, say that the documents received regarding design are not adequate. And as such, you have delay, delay, delay.

12379. The Province recognized this problem, the very problem that seems to be solved by making an application to the Board. But again, that doesn't solve the problem. The fight is always about money. It isn't about design. It isn't about whether the pipeline can be accommodated with modifications to allow the project to proceed. It's always about money.

12380. And that's why the telecom industry has set a model agreement that allocates this, because they have the same provision, just as in the Order, bring your application. But it does not work and that's the point. And then there's nothing that will prevent the Lot "X" demand.

12381. **THE CHAIRMAN:** Ms. Scott.

12382. **MEMBER SCOTT:** So there is a process for compensation, but your assessment of it is it's not timely. But what's preventing -- what would be -- what would prevent the municipality from coming back at a later time after the project is gone through and accessing Board Order No. 1?

12383. **MR. CAPUCCINELLO:** In the Order, Mr. Chairman, at 3, Mr. Chairman, as I recall, the Order provides an opportunity to come forward if you have issues of a technical nature. Under section 1-12, you can bring your application, but you require leave before you cross.

12384. You have to remember that you're not permitted to cross the pipeline or undertake any work in proximity to the pipeline unless you have leave, which means the process has to have been completed. There's no opportunity to come to the Board after the fact; that's not how the legislative scheme was set up.

12385. This is precisely the problem that the province faced, and they remedied that back in 1959. And that's why it may seem that the city is being direct. But the reality is every regulator has changed and recognized that public money is being used to fund these projects, and municipalities and the province should not be held to ransom.

12386. That was the point that Justice Pearlman made in his decision in *FortisBC v. the City of Surrey*. There's this leveraging and the only way it can remove the leveraging is to have an allocation cost formula set up, and ensure that certain things like the Lot "X" scenario, which isn't even contemplated in the Order or in the Regs, is prevented because there are other entities that have to cross through that little shaded red that have that entitlement in law, but the entitlement applies to highways; it does not apply to fee simple lots.

12387. And so then you have the problem of section 23 of the *Land Title Act*, which guarantees indefeasible title. So now you have a statutory right-of-way registered in favour of Trans Mountain. Trans Mountain will say, "We have that right. It is registered and under section 23, only prior encumbrances can interfere with that right. You, as a Board, do not have jurisdiction." That's the problem. I've heard the problem in other analogies and in other contexts.

12388. So we're very direct in what we're saying because this is something that has been overlooked that needs to be addressed. The province addressed it to their credit. And as recently as a few years ago, they amended the *Expropriation Act* to get rid of this Lot "X" headache.

12389. The Ministry of Transportation spends millions of dollars building highway's infrastructure projects. They are not going to be held up by Lot "X" demands. They were not in the provincial context; they amended the *Expropriation Act.* They re-enacted under the *Oil and Gas Activities Act* a cost allocation formula and they no longer have a problem, neither does the City of Surrey. We have the power now, our projects are proceeding on time, we are not being held to ransom. The same cannot be said in the federal context. This problem has to be addressed.

12390. **THE CHAIRMAN:** Thank you.

12391. Then we will continue with your oral argument.

12392. **MR. CAPUCCINELLO:** Yes, thank you, Mr. Chairman.

12393. Now, prior to the questions, I was identifying problems associated with Lot "X". I'm just going to gloss over those. Those are in detail in the City's written argument.

12394. Now there's the added liability, as I mentioned, under the *Occupiers' Liability Act*, breach of contract, statutory dispute resolution and crossing benefits loss, loss of flexibility and control. Other utilities and commercial entities will demand Lot "X".

12395. Lot "X"s negatively affect the establishment of proper highway corridors, increased environmental liability, and a point that I've yet to come to is control over what should be a highway is shifted to Trans Mountain's mortgagees and any lien claimants.

12396. You will recall, Mr. Chairman and Panel, that under the NEB Act, Trans Mountain has the authority to mortgage its statutory rights-of-way. It also has the authority to mortgage its pipeline. So what does all that mean? Well in the context of Lot "X", what it means is now you have another headache to deal with. Not only do you have to worry about Trans Mountain having this right registered on title, but now mortgagees are there.

12397. And so where does it say in the Act that the Board has jurisdiction over these mortgagees? It doesn't. And so that creates another problem. But these problems can all be resolved and can be avoided if there are conditions imposed, and any certificate that's issued that clearly prohibit or that require Trans Mountain to obtain the consent of mortgagees and other interest holders to sign road and highway dedication plans.

12398. That's the only way around it. We don't have the power of expropriation. We're going to end up in Court over whether we can exercise any ability to compel the extinguishment of a statutory right-of-way.

12399. Now I pointed out, Mr. Chairman and Panel, that Justice Pearlman relied on this Lot "X" demand in the case of *FortisBC v. Surrey*, and found that the Lot "X" demand was a basis for concluding that there was fundamental breach and repudiation of an agreement, and terminated a 1956 agreement. He found that the demand for a Lot "X" frustrated the municipality -- in that case Surrey's ability to establish proper highway corridors. And as I mentioned, the province --

to its credit -- has solved that problem.

12400. Now, if I may turn to Exhibit C76-9-24, Adobe page 2.

12401. This is another Lot "X" and there are many more and they're all set out in the affidavit of Ken Zondervan. In order to address these issues related to the impacted utilities, including highway occupation and crossing issues, municipalities of Surrey, Burnaby, Township of Langley, Coquitlam and Abbotsford have jointly prepared the joint municipal conditions, which the City respectfully submits be included among the conditions that may be imposed on any approval.

12402. Those are set out, Mr. Chairman and Panel, in section 7 of the City's written argument.

12403. Now, as for Trans Mountain's reply evidence that it pays its taxes and therefore should be entitled to occupy highways and other public places, regardless of the cost to municipalities and the province, there is no such connection. Payment of taxes does not confer a right nor does it confer the right to burden municipalities and the provinces with all such costs and liability.

12404. Again, payment of costs, taxes, does not incur -- confer the right to occupy a highway or other public property.

12405. Public utilities including Fortis and telecommunication companies in the federal context occupy highways and other public property on terms that include the allocation of costs but also that they pay municipal taxes. In fact, in the case of Fortis, not only does Fortis pay municipal taxes, it is also subject to the cost allocation formula and it also pays municipalities 3 percent of gross revenues in return for occupying highways and other public places.

12406. I should also point out that Trans Mountain got it wrong in their reply evidence. They quantified how much tax they paid, but they forgot entirely that the money received, the remittances received by municipalities, much of that is collected on behalf of other taxing authorities such as B.C. Assessment authority, the Municipal finance authority, the School District, the Regional District and TransLink.

12407. At this time, Mr. Chairman and Panel, I would like to go to Exhibit C76-9-15.

12408. While we're waiting, Mr. Chairman, you will see, Mr. Chairman, looking at this exhibit, what's in red is the existing corridor and what's in yellow is the proposed corridor. That will help put in context the following submissions.

12409. I will now turn to the Surrey's request that a condition be imposed on any approval or recommendation of approval requiring that a portion of the existing pipeline in Surrey be abandoned, decommissioned and removed and that the proposed pipeline be located within the immediately adjacent corridor made up of the South Fraser perimeter road, the CN Rail corridor and the Golden Ears Connector corridor.

12410. It is within the public interest to avoid urban areas and environmentally sensitive areas. This is also set out in the stated objectives of Trans Mountain in its application.

12411. As the Board is well aware, the existing pipeline goes through very populated residential areas of Surrey. Surrey has filed expert evidence in the form of a report from Larry Martin, Professional Engineer of Associated Engineering that demonstrates that it is feasible to abandon, decommission and remove that portion of the existing pipeline through Surrey in favour of twinning the proposed line within Surrey along either the proposed alignment or within the feasible alternative alignments immediately adjacent to the proposed alignment, all within the Trans Mountain study corridor.

12412. The costs of doing so were also estimated in the report and were minimal. Larry Martin's expert evidence estimated that the cost of twinning was approximately $36 million, between one to two percent of the project cost, and that this cost is in fact much lower because by undertaking a twinning of the proposed pipeline through Surrey, Trans Mountain will no longer have to incur the costs of replacing its existing line, which is at or near the end of its useful life. Accounting for this, the twinning may actually be cost-neutral.

12413. While Trans Mountain in its reply evidence would have you believe that the existing pipeline will last forever and drew ridiculous comparisons to the Brooklyn Bridge and to the Flatiron Building, we trust the Board will exercise its common sense and see through such ridiculous comparisons and appreciate that the existing pipeline has a design life, which Larry Martin, Professional Engineer, in his expert report identified as being between 50 and 75 years, and that the existing line through Surrey will soon pass that design life.

12414. With respect, Mr. Chairman and Panel, nothing lasts forever, and I am sure the advisors of the Board can appreciate that.

12415. And when you look at the comparisons made, the Brooklyn Bridge and the Flatiron Building, those are aboveground structures. It does not take a rocket scientist to figure out that if you bury steel in soil, it will have a degrading effect on the soil and accelerate the diminution of its life.

12416. Now, turning to Exhibit C76-9-20, Adobe No. 22. This is one of three drawings, Mr. Chairman and Panel, that identify the feasible alternative corridors that I'm going to refer to. They are all located -- those alternatives being Option A and Option B identified in the expert report of Larry Martin. They are all within the Trans Mountain study corridor.

12417. Now, with respect to Option A and Option B, it's the City's expert evidence filed in this proceeding that demonstrates that not only are those two available options feasible but they are also superior from a geotechnical perspective and have less environmental impact. Each of these conditions or corridors -- alternative corridors avoid the environmentally sensitive Surrey Bend Regional Park. The environmental significance of Surrey Bend Regional Park cannot be overstated and is described in the uncontested evidence filed by the City of Surrey.

12418. I would now like to address the draft conditions in relation to emergency response. The uncontested evidence of Chief Len Garis and the evidence of Dr. Charles Jennings has been ignored in the draft conditions. There is absolutely no reference to Trans Mountain implementing an emergency response plan that is consistent with the best practices identified in the report co-authored by Dr. Charles Jennings, one of the foremost authorities on pre-incident emergency planning.

12419. This report, which is the most authoritative source on pre-incident emergency planning, goes unreferenced, and there is no indication that the best practices identified by the report are to be implemented by Trans Mountain. This report was prepared after analyzing failures in pre-incident emergency planning in recent catastrophic incidents, such as the Refugio oil spill in 2015 in Santa Monica, California, and the San Bruno, California, natural gas pipeline incident in 2010. The analysis undertaken in preparing the report involved a careful study of recent pipeline catastrophes from 1994 to present in the United States.

12420. It is respectfully submitted that acting in the public interest demands that a condition be imposed requiring that Trans Mountain implement an emergency response plan that is consistent with and satisfies the recommended best practices contained within the report co-authored by Dr. Charles Jennings and entitled "HMCRP Report 14 Guide for Communicating Emergency Response Information for Natural Gas and Hazardous Liquids Pipelines."

12421. Finally, Mr. Chairman and Panel, I would like to turn to the conditions that are consolidated in section 7 of the City's written argument. I will summarize each of these.

12422. First, under the Joint Municipal Conditions which have been endorsed or will be endorsed by Burnaby, Coquitlam, Abbotsford, the Township of Langley and Surrey, Condition 1 establishes a cost allocation formula, which is modelled after the pipeline crossing regulation under the *Oil and Gas Activities Act.*

12423. Condition 2 and 3 ensure that municipalities and the Province are not prevented from establishing proper highway corridors.

12424. Condition 4 prevents Trans Mountain from holding municipalities and the Province to ransom when Trans Mountain refuses to perform pipeline work to accommodate infrastructure projects in a timely manner.

12425. Condition 5 prevents Trans Mountain from including provisions in its permissions which are inconsistent with conditions in the Certificate of Public Convenience and Necessity.

12426. As the Board will recall, under the regulations as they currently read, if one is to obtain permission from Trans Mountain to cross the pipeline, you have to agree to all their terms and conditions. And buried in those permissions would be terms and conditions that are inconsistent with what municipalities and the Province would otherwise be subject to.

12427. Number 6, release and indemnification. This is modelled after the provision in the *National Energy Board Act* in favour of landowners whose land is traversed by Trans Mountain pipeline. This very language is taken from the Act. So when Trans Mountain acquires an interest in an owner's land it has to release and indemnify the owner, except in cases of gross negligence.

12428. City of Surrey and the Province are owners of highways. In fact, they have less control over their highways and yet, they don't even enjoy this immunity. At a minimum, the City and Province should enjoy this release and indemnification that is granted to landowners.

12429. Number 7 deals with consequential losses and damages and claims for such. This provision is modelled after a similar term imposed by the CRTC in licence agreements related to telecommunication infrastructure occupying highways and other public places.

12430. **THE CHAIRMAN:** Just to remind you, you have your five minutes left, Mr. Capuccinello.

12431. **MR. CAPUCCINELLO:** Thank you.

12432. Condition 8 is a requirement that Trans Mountain enter into agreements with affected municipalities prior to construction. Again, this is consistent with other regulatory schemes. I refer to the *Telecommunications Act*, section 43. I refer to section 32 of the *Utilities Commission Act*. I refer to section 34 of the *Oil and Gas Activities Act*.

12433. Condition 9 provides that those conditions above apply to the entire system.

12434. And then there are additional conditions that the City of Surrey recommends be imposed on any approval.

12435. Condition 10 and 11 relate to relocation outside of Surrey Bend into a feasible alternative corridor. Two have been identified. Both are within the Trans Mountain study corridor.

12436. Condition 12 relates to the abandonment, decommissioning and removal of a portion of the existing pipeline in Surrey. I've gone through the cost benefit scenario with you and the costs and how those cost savings are essentially minimal in the context of the entire project and what costs that will have to be incurred in any event.

12437. Condition 13 relates to emergency response plan and the requirement that a condition be imposed that the best practices identified in the report co-authored by Dr. Charles Jennings be imposed.

12438. Condition 14 relates to reimbursement of emergency event and incident costs. This is modelled after a recent amendment to the *Railway Safety Act*.

12439. And finally, Condition 15 provides that Conditions 13 and 14 apply to the entire expanded pipeline system.

12440. Mr. Chair, I notice I have 2 minutes and 23 seconds left. That concludes my submissions. Thank you.

12441. **THE CHAIRMAN:** Thank you very much, Mr. Capuccinello.

12442. The Panel will take until -- take a break to consider whether they have any further questions for you on your submissions. And so we'll return at 10:15.

--- Upon recessing at 9:56 a.m./L'audience est suspendue à 9h56
--- Upon resuming at 10:16 a.m./L'audience est reprise à 10h16

12443. **THE CHAIRMAN:** Thank you for your indulgence. The Panel do have a few questions for you. And so I'll start with Ms. Scott.

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12444. **MEMBER SCOTT:** Just to follow up on the discussion we were having this morning about compensation and so forth, you did an excellent job on your brief and again this morning on reviewing legislation in other jurisdictions that authorizes the different approach than what we have in the NEB with Board Order Number 1. And you've pointed out some deficiencies that you believe exist with Board Order Number 1.

12445. And I was wondering, in light of the fact that the other jurisdictions that you've referenced have seen fit to require legislation to make the change that they did within their own jurisdictions, whether or not you think our Board would require a similar legislation?

12446. Or put another way, what authority would we have to make a condition like the one that you're suggesting to accomplish what you want in the absence of that legislative authority that other jurisdictions have seen fit to require?

12447. **MR. CAPUCCINELLO:** Yes, thank you. Through you, Mr.

Chairman.

12448. Firstly, legislative amendment is not required. The authority is set out in section 52 of the *National Energy Board Act* and in section 108; 108 deals with the crossing of utilities.

12449. The authority -- and I agree with counsel for Trans Mountain on this -- the authority of the Board is very broad. I think Parliament, when they enacted this legislation, gave the Board a tremendous amount of jurisdiction and that jurisdiction is set out in the public -- what's in the public interest. What terms and conditions can be imposed? The *Utilities Commission Act* under the provincial scheme does so through regulation it imposes things, as it does in orders and as does the Oil and Gas Commission in B.C.

12450. And so there certainly is no impediment. And I would hate to think that this Panel would go away and just blow off the issue and think, well, we don't have legislative authority. You clearly do. And I would submit that it is your obligation to exercise that because this problem has gone on for 60 plus years. And it's probably because -- and no disrespect to anyone, but how many of the advisors have actually built a highway project? Or how many have faced the complexities of construction projects and funding deadlines? I think that's where the lack of expertise exists.

12451. So it's not a question of jurisdiction. It's really a question of what actually works and why is it that the Province, back in 1959, figured this problem out and they passed a regulation? Because they realized the fight's always about money. That's all it's about. Money. Yeah, we'll do the pipeline modifications, but it's all about money. And if you don't agree to money, then things get delayed and that's how this whole issue of leveraging occurs.

12452. So with respect, I do submit that the legislative framework set out in the *National Energy Board Act* does give this Board ample jurisdiction under both section 52 and section 108. And if you want to throw in the *Interpretation Act*, the federal legislation, you have to seek to achieve the objectives of the legislation, and that's clearly set out.

12453. So I hope that addresses your question.

12454. **MEMBER SCOTT:** So I think you're saying we have authority to do it under section 52 and section 12 in determining what is in the public interest in

the creation of a condition on the basis of that?

12455. **MR. CAPUCCINELLO:** And section 108 as well.

12456. **MEMBER SCOTT:** And section 108.

12457. And I guess you're also saying, though, perhaps looking beyond this hearing, that there's authority to make regulations under our Act that would be consistent with your submission, and you're also suggesting that absent that we could make an order?

12458. **MR. CAPUCCINELLO:** Yes.

12459. **MEMBER SCOTT:** So we have three sources of authority.

12460. **MR. CAPUCCINELLO:** That's correct.

12461. But I think the one thing you have to recall, though, is that with the introduction of mortgagees and the complexities that that brings with it, that when you have a notice system like a registry system in a land title office, it's notice to the world that there's a registered interest and, therefore, anyone that seeks to register an interest against that asset or that piece of land has notice.

12462. The only way really to accomplish that in this case, I think the most effective means -- and I'm not saying that an order may not achieve that, but the most effective means is to have the condition in the certificate because any mortgage is going to be on the basis of the certificate. It's the certificate that gives Trans Mountain the right to acquire statutory rights-of-way. It gives Trans Mountain the right to construct the pipeline.

12463. Knowing that, any mortgagee has notice and so they are bound by those terms and conditions. It's simply a case of similar to who has priority of something registered on title. If there's a prior existing charge -- in this case a notation in the Certificate of Public Convenience and Necessity -- it binds subsequent people that deal with that certificate, whether it be in the form of a mortgage or whether it be in the form of a lien, et cetera.

12464. **THE CHAIRMAN:** Mr. Davies?

12465. **MEMBER DAVIES:** I wanted to follow up on the suggestion that

was both in your written argument and reinforced this morning to the effect that this Panel consider issuing an order that would apply to the existing pipeline in the context of relocation of that line to the alignment or one of the alignments that's being proposed within the City of Surrey.

12466. So we have an application before us which is dealing with the expansion application, and you're asking us to consider matters that go to the existing system. The position this panel has taken and a number of our rulings on things which are different subjects than this but go to the reach of the Panel, we've taken the position that we don't -- we're not dealing with the existing system; we're dealing with the expansion.

12467. So help us understand how we might consider dealing with the existing system within the context of an application that's been circumscribed to dealing only with the expansion of the Trans Mountain system.

12468. **MR. CAPUCCINELLO:** With respect, again through you, Mr. Chair, the expansion of the system which this hearing is about is the system. The system includes the existing pipeline as well as the proposed pipeline. It functions as a unit. All the evidence that you have before you as well, this is going to increase production to a certain amount. It's going to provide for this.

12469. The public interest section of section 52 is very broad. I would submit that it's an incorrect interpretation of the section to limit your ability or jurisdiction to only the new segment of pipeline. It cannot be looked at in isolation. Otherwise, why is it an expansion of a system, why not a separate application altogether that has absolutely no reference or tie-in to the existing system?

12470. The point is it functions as a unit. And I would expect, even if you think logically, is the Board really going to impose emergency response conditions related only to this segment of the pipeline and not the others? The fact that the pipeline was approved in 1953, may not have been expanded recently in any significant way, are you really expecting the public to believe that you can impose conditions but only with respect to the new pipeline? The fact that everything's outdated and obsolete or incapable of dealing with the new issues that have arisen, I think, and with respect, is an incorrect interpretation.

12471. Section 52 is very broad. It does authorize what we are seeking. And I would hope the Board would reconsider if it's inclined to rule otherwise at this

time.

12472. **MEMBER DAVIES:** Thank you very much.

12473. **THE CHAIRMAN:** Perhaps, if I may, Ms. Comte, could you bring up the last exhibit that was referred on the -- with the route?

12474. Just some clarification on -- to make sure I'm clear on your submission. It was the one with the alternative routes. I think that was your last…

12475. And if I understand your submission and I understand the application, that the alternative route that you're suggesting, and mostly because of the Surrey Bend Park, which is significant not only to you but to other intervenors as well, as I understand, it is within the corridor? Your proposed alternatives are within the general corridor of the application?

12476. **MR. CAPUCCINELLO:** Yes, correct. They are within the Trans Mountain study corridor.

12477. I should also add, Mr. Chairman, so there's no confusion, that one slide is one of three. That's only a segment of a portion. Just for the interest of time I couldn't proceed to all three. But that corridor -- the alternative corridor is identified on that drawing, in fact, on the subsequent exhibits that are listed, continue on through Surrey.

12478. **THE CHAIRMAN:** And, as I understand, there has been some -- and in reply that Trans Mountain has submitted to some of your IRs on this subject, you know, that they are -- were prepared, as they always seem to be, to consider, you know, Surrey's and other landowners for alternative routes. Am I correct? Is that right?

12479. Is your position still that they would still consider -- because we're only approving the general corridor, as you know, and that if it is approved, if we recommend approval and the Governor in Council approve it, then what follows is detailed route hearings which are the next part of lifecycle regulation. So I'm just wondering if that's -- you took that into consideration?

12480. **MR. CAPUCCINELLO:** We've considered that but, Mr. Chairman, again, we have a disagreement on the scope of the route hearings.

12481. I think to make it absolutely clear to Trans Mountain that they cannot proceed with an alignment that involves Surrey Bend Regional Park is within your power. To leave that to a route hearing -- route hearings typically involve landowners, but this is the dilemma that we face, that it's not only in the context of being a landowner when you're a highway owner and you have other interests and you may not be served, and the scope of what can and cannot be done in a route hearing is not as certain as it is with your jurisdiction here in hearing the application and imposing conditions.

12482. It's well within your jurisdiction to simply say that an alignment going through Surrey Bend is not an option, that there are feasible alternative alignments within the study corridor and that those should be given priority. Otherwise, we're going to end up in a route hearing which I submit does not give us the expansive rights to insist that these alternative feasible corridors are utilized.

12483. **THE CHAIRMAN:** I appreciate that clarification.

12484. **MEMBER SCOTT:** Following up on the notion of the difference between the detailed route hearing and abandonment of a pipeline, ordinarily, as I'm sure you're aware, the abandonment of a pipeline proceeds after an application from a pipeline owner, and that's the usual course of abandonment. And when the -- when the Board receives such an application there are a lot of factors that go into consideration about abandonment and all of the interested parties that are affected by the abandonment or are interested in the abandonment are given the opportunity to participate.

12485. And in light of that provision -- again, it's a question of our jurisdiction -- I wonder how -- how to finesse the discrepancy between the detailed route hearing and the whole question of the abandonment application process?

12486. **MR. CAPUCCINELLO:** Yes Mr. Chairman, through you, again, this all boils down to section 52, what's in the public interest. That is very broad jurisdiction. I think if you adopt the narrow approach that you're suggesting or that you've indicated has been in place or adopted or implemented over the years, just because something has always been done a certain way doesn't mean that that's the limit of your jurisdiction.

12487. I think now that when you think about the intent of section 52 and you understand that this is an expansion of a system, that reintroduces the jurisdiction of the NEB to look at the totality of the system from an emergency response perspective, from an alignment perspective, from a decommissioning perspective.

12488. There may be individual sections in the Act that look discreetly at abandonment. Yes, but that does not preclude the overarching jurisdiction under this type of hearing. That's not unusual in other legislation. You may have a dispute with respect to a rail crossing, but then there are hearings which related to approval of rail systems.

12489. Again, it's not unusual and I would think that having regard to the fact that there are obvious problems with certain things not being detailed in terms of allocation of cost, this Lot "X" scenario. I hope that's evidence enough to show that just because something's been done a certain way for many, many years that does not limit your jurisdiction.

12490. All you need do is read section 52, look at the *Interpretation Act*, look at the objects of the *National Energy Board Act* to appreciate that you have this broad power, because I think it would be absurd if you were to impose -- say that your jurisdiction is limited.

12491. For example, again to emergency response to say, "Well yes, we've heard Dr. Charles Jennings. We've read his report. We agree that best practices should be applied and implemented by Trans Mountain. But unfortunately, only to the new little segment of pipeline, not to everything else. That has to involve another hearing. That has other interested parties that are involved."

12492. Well, in reality anyone that had an interest in this system had an opportunity to be involved as an intervenor or a participant in another capacity. If they've chosen not to, relying on the decommissioning section of the Act, then they've done so at their own peril. It's a whole -- everything is free -- free game. Once you want to expand a system, your system comes under scrutiny and terms and conditions can be imposed with respect to the entire system, including reactivation, including decommissioning, including removal, et cetera.

12493. **THE CHAIRMAN:** Thank you, sir, on behalf of the City for attending today and all of your involvement in -- throughout this process. So we will be taking all this into consideration as we decide how we move forward with this recommendation.

12494. So with that we thank you for your attendance today and your colleagues.

12495. And we're adjourned until 1:30 and we'll hear from the Musqueam Indian Band, followed by Mr. Farmer and then the City of New Westminster this afternoon.

12496. We're adjourned to 1:30.

--- Upon recessing at 10:34 a.m./L'audience est suspendue à 10h34
--- Upon resuming at 1:30 p.m./L'audience est reprise à 13h30

12497. **THE CHAIRMAN:** Good afternoon and welcome to this afternoon's session in Burnaby which is part of the National Energy Board's hearing regarding Trans Mountain's expansion project. We will continue to hear intervenor summary oral arguments.

12498. My name is David Hamilton and I am chairing the Panel. And with me to my left is Ms. Alison Scott and on my right is Mr. Phil Davies. And together we are the Panel assessing Trans Mountain's Expansion Project application.

12499. To start, I'd like to take a moment to briefly review a couple of housekeeping items. In the event that you hear the hotel fire alarm, the procedure will be to exit the hearing room using the entrances that you came in. Once you are outside the hearing room, there are two evacuation routes. The first is directly to your left when you exit the hearing room doors, and the second is located beside the registration desk where some of you received your lanyard. Uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.

12500. Once outside the building, proceed to the hotel muster point located at the northwest corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point please ensure all members of your party are accounted for and await further instructions from Delta Burnaby representatives.

12501. 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. 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 some oral summary argument.

12502. There is a timer that will indicate in a green light for the first 35 minutes, switching to yellow for the last 5 minutes of your speaking time. And finally, when 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.

12503. Final argument as a whole is an opportunity to express your views and the opinions about the project based on the evidence filed by Trans Mountain and intervenors on the hearing record. It is also an opportunity to make recommendations to the Board about matters within the list of issues or on any terms and conditions to which the project should be subject if it is approved.

12504. 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.

12505. My final -- my fellow Panel Members and I are looking forward to hearing from intervenors that have signed up to provide oral summary argument. The Board wishes to limit potential distractions and to provide a fair, safe and efficient opportunity for everyone that will be providing oral summary argument.

12506. Members of the media are asked not to set up, take down or move equipment while the Panel or a presenter is speaking and to do so only during breaks. Media interviews are not permitted in the hearing room.

12507. With that, I think we're ready to start. And I failed this morning for the record to recognize counsel from Trans Mountain. So I think for the record I'd ask counsel for Trans Mountain to introduce themselves.

12508. **MS. OLENIUK:** Thank you, Chair and good afternoon. My name is Terri-Lee Oleniuk and I'm legal counsel to Trans Mountain. To my left is Lesley Matthews and she's the regulatory lead for the project.

12509. **THE CHAIRMAN:** Thank you.

12510. This afternoon we will hear from the Musqueam Indian Band, Mr. David Farmer and the City of New Westminster.

12511. So with that, I understand, Mr. Reynolds, on behalf of the Musqueam Indian Band, you have -- we have read your -- all of the argument that you have filed and the evidence that has been filed on your behalf. So you have 40 minutes to make your presentation.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MUSQUEAM INDIAN BAND:

12512. **MR. REYNOLDS:** Thank you, Mr. Chair.

12513. I am the general counsel for the Musqueam Band and I will be making some legal submissions. But first, Councillor Morgan Guerin, who's a councillor with the Band Council, he's also a senior fisheries officer and a respected leader, a CM, of the Musqueam, very knowledge (sic) about Musqueam culture and history.

12514. Morgan will be giving a background. He'll be dealing with issues such as the traditional territory, the importance of fisheries and the impact of the project on Musqueam's established right to fish.

12515. Morgan?

12516. **COUNCILLOR GUERIN:** Thank you, Jim.

12517. Good afternoon, Board. I guess by starting, Jim has done a wonderful job introducing me. So I would like to start with a bit of protocol work, which is to say on behalf of Musqueam Chief and Council, we welcome you, the Board and all those participating in this important work today, to our traditional territory.

12518. It is important part of our protocol whether we agree or disagree that this protocol must be maintained because it sets the floor to be open with open ears, open heart and open mind. And with that, I welcome you to our traditional territory.

12519. So to start, I believe our first slide.

12520. To speak a bit about our first slide which we've introduced into evidence before, what is now known as the Greater Vancouver Area of B.C. is the home of the Musqueam, Tsleil-Waututh and Squamish. It is -- has been our home

since time immemorial and Musqueam having archaeological sites that date back over 8,500 years old with technology that has run from that era through to present day. So to say that we've been here for a while is a bit of an understatement. And I'm very proud to come of a people who have always looked after this land.

12521. Musqueam in that span of time had and has a rich and vibrant culture. Much of that is due to the resource that was always made available to us, to the rivers that always provided for us. We did not have to look for food. Food came to us. We just had to protect what we were given by the Creator.

12522. So that said, traditionally we, the Musqueam, the protectors of the mouth of the Fraser, have always been stewards to this land to maintain that it stays that way, not just for the generation in but generations to come. As I've stated before, our technology has not changed in all those years. Small advancements because it worked for what the world had at the time.

12523. Musqueam no longer has these access to these wild meats that were provided to us, to many of the forest and areas. And because of that we're solely dependent on our aquatic resources for traditional foods. But the present fishing allocation is not sufficient for Musqueam's needs. But Musqueam is not -- doesn't just fish for just for food but it is also an economy. And this is very basic to our history and culture of the Musqueam people.

12524. That said, as we can see, we have 1300 members now to look after. We are not in treaty. We are developing our own future. And we, as hən̓q̓əmin̓əm̓ speaking people, belong to a group of families that all speak the same language. So even though the nations may have last names, we are one family and have always looked after this area accordingly.

12525. And for that we have some great concern about the proposed pipeline route. And not just the pipeline route but the tanker traffic that goes with it. As you can see, it cuts right through the middle of our traditional territory and our statement of intent.

12526. Having fishing being our sole need to our culture and practice before, we are a little more than hesitant about potential impacts that a proposal would outline and the increased tanker traffic may cause because of that.

12527. Part of our way of life and especially with fishing to the Musqueam People is it's where we transfer a lot of our culture. Our Elders spend time with

our younger ones, they get taught about their history through the moving of hands, mending of nets, these sort of things.

12528. So the act of just catching a fish is not the all-important part. This is a cornerstone of our culture, is our language and what we do when we do these things. These are where the history lessons come out.

12529. And so when that happens, we have the increase of tanker traffic going through this area and many of our vessels are quite small, very small. And the wake provided by extra tanker traffic is of concern, very much of concern.

12530. The approach of tankers means that fishing must stop and nets must be removed, altering the desired means of fishing in order for the tanker to allow to be -- proceed. So we have to stop a culture practice that we've been doing for many, many millennia in order to allow these tankers to go through. And with the increase it means we will be having to do that more so.

12531. The wake of these tankers can quite easily swamp a small fishing boat and will impact fishing habitat. And that is -- and we've seen it happen. We've seen it happen in the last few years where we have boats that aren't even loaded with fish have gone down and we've had to save those people. So this is a very real, very real problem right now.

12532. The loss of aquatic resources cannot be compensated by economic gain or opportunity. This is how -- it's always been a concern of ours. Once it's gone it's gone, and we're starting to live with this all too often.

12533. I'm actually quite a young man in this world, but what I know from being a young man raised by my grandparents to now, that world has changed very much. The habitat has changed very much. And because of that the stories that were told to me by my grandfather I now have to tell as they had happened, not standing in the same spot. This is of great impact; that is loss of culture.

12534. We the Musqueam, as I stated before, have always been the protectors of the mouth of the Fraser and other First Nations rely on us to also maintain that we are the protectors of this area. Being at the mouth, we are the first ones to see the fish come home.

12535. There is great concern about the impacts of a spill or collision on the ecology, spawning grounds and migratory routes of salmon and other species.

We've seen the decimation of eulachon stocks and other stocks in our area. And from speaking to -- as I was as a young man where you could go down and pick up two buckets of eulachon and they were just given to you. Two buckets, 50 pounds of eulachon are now our entire quota for the year. So any addition to a loss of habitat could be spelled catastrophe.

12536. The ability to continue to fish is important to the traditional protocol arrangement that Musqueam has with other First Nations to barter salmon and other species, or to gain access to other resource areas.

12537. As I've said, we do not have resources to go and hunt for elk or deer and carry on those teachings that I have spoken of, teachings that have carried on for many, many millennia. So what we have done is enacted another protocol, and that is with other First Nations to allow the resource that we have from them where they cannot obtain them anymore, and we can go into their areas.

12538. In the act of a spill or some other loss of habitat or loss of fishing times, we could very, very well lose that as well too, thus cutting off one last piece of our culture.

12539. Next slide. And just wrap up a bit of my time, going back to what I have spoken of before in our teachings. As Langara -- in 1792 a man had this portrait created of a "Chief of Musqueam". That Chief is my fifth great-grandfather; you see the resemblance. He's got a better beard than I do. He's better dressed too.

12540. But it is to them that we uphold what we have been given. We were meant to steward and to look after. Our hands are on history. Our history goes back much farther than that 8500 year old site. And science keeps catching up to what we've already said all these years proving, "Oh, they were right, there was a village there."

12541. And to the right of my grandfather's photo is our Declaration 1976 signed actually a few months before I was born and many of the names signed underneath are now no longer here. So it is now my turn to take their voice and carry it forward and I'm glad and honoured to be able to do that today to this Panel.

12542. But that Declaration still stands true from the hands of our ancestors to now. These are the things that we believe and we have stood here long enough; I

think we have the right to believe in those things.

12543. I'd like to thank you for your time today.

12544. **THE CHAIRMAN:** Thank you, Morgan. Mr. Reynolds.

12545. **MR. REYNOLDS:** I should just point out what Mr. Guerin has referred to is in evidence. It's primarily attached to the written argument being extracts from the transcript of the oral hearing back in October 2014.

12546. I would like to deal with the legal submissions and make a couple of initial comments. And the first is that Musqueam would like to repeat that its participation in this process is not to be taken as approval of the process, and it's without prejudice to Musqueam's rights and remedies. As set out in the written argument, Musqueam has serious concerns about the process.

12547. Second, with regard to submissions made by some First Nations, they include assertions of rights or title within Musqueam's traditional territory. Musqueam's presentation and silence should not be taken to be acquiescence to any of those assertions. We don't anticipate that the NEB will be making findings of aboriginal rights and title, but were you to decide to do that, then we would expect that we would get a fair hearing, the opportunity to present evidence and to make submissions at that time.

12548. So with those initial comments, I'd like to get to the legal submissions. And by the way, I'm going to be following fairly closely the written -- the handout that you received. I think you will have -- it may be easier for you to follow, especially when I refer to some of the cases.

12549. I'll summarize the legal submissions of Musqueam which are set out in the written argument dated January the 12th. Most of the argument is, I believe, fairly straightforward and it's based upon well-established law flowing primarily from the decision of the Supreme Court of Canada in *Sparrow*. *Sparrow* was of course the decision which established aboriginal fishing rights for Musqueam, and recognized that they were protected by section 35 of the Constitution.

12550. Musqueam has established aboriginal rights to fish in its traditional territory which includes Burrard Inlet and part of the marine area that will be used by tankers. We are not asking the Board to make any findings on the extent of the aboriginal right, but only to respect the decision of the Supreme Court of Canada

in *Sparrow* made now over 25 years ago.

12551. This proven right is protected by section 35 of the *Constitution Act* 1982, and this is the provision of course which recognizes and affirms existing aboriginal and treaty rights. As *Sparrow* decided, any infringement beyond trivial infringement must be justified by the Crown under what's referred to as the "Sparrow test". And that's set out in some detail in the written argument. I won't go over it this afternoon.

12552. We submit that the evidence that Musqueam gave, including the evidence at the oral traditional hearing in October 2014, has clearly satisfied the test of showing nontrivial infringement to the extent that the *Sparrow* test requires a First Nation to discharge the burden of showing an infringement -- a nontrivial infringement. Musqueam has clearly done that, in our submission.

12553. And the burden is now on the Crown to justify the infringement, and this has not been done. Indeed the Crown doesn't purport to have done it. In our submission, the NEB process has not discharged the Crown's duty of justification.

12554. The written argument also refers to the UN Declaration on the Rights of Indigenous Peoples. And under the UN Declaration, article 32, there's a duty on the part of the federal government to consult and cooperate with Musqueam to obtain free prior and informed consent to the project.

12555. The new federal government has given a commitment to implement the Declaration. Musqueam welcomes that commitment and other commitments of the new federal government which are set out in the written argument and Musqueam looks forward to that cooperation and consultation but we do note that it's not yet happened.

12556. Until the Crown has satisfied its duty to consult with Musqueam and its justified infringements of Musqueam's proven right to fish and it's also satisfied its commitment under the UN Declaration, we submit that it would not be in the public interest -- for the purposes of section 52 of the NEB Act, it would not be in the public interest for the Board to recommend approval of the project.

12557. Those submissions basically summarize pages 1 to 11 of the written argument.

12558. I'd like to take a few more minutes to cover in a bit more detail the

submission which is at page 12 of the written argument. This, I submit, is a central and immediate issue with which the Board must deal because it goes to the ability of the Board to make a recommendation under section 52 of the NEB Act.

12559. It requires some reference to recent court decisions and especially the decision of the Federal Court of Appeal in the *Chippewas of the Thames* case which was decided in October of last year so it's a fairly recent decision. And that decision has been filed by, among others, the Lyackson First Nation in their authorities. That's Exhibit C219-13-2.

12560. And I'd like to make the following detailed points. First of all, quoting from paragraph 61 of the *Chippewas of the Thames* case:

> *"It is clear that the Board is obligated to carry out its mandate in a manner that respects the provisions of subsection 35(1) of the Constitution Act."*

12561. That's from the *Chippewas of the Thames* case.

12562. But it's also based on the decision of the Supreme Court of Canada in *Quebec Attorney General v. Canada NEB* 1994 decision of the Supreme Court of Canada, and the court said there at page 185:

> *"It is obvious that the Board must exercise its decision-making function... in accordance with the dictates of the Constitution, including section 35(1) of the Constitution Act..."*

12563. And as already noted, section 35(1) recognizes and affirms existing aboriginal and treaty rights, and of course that includes Musqueam's proven right to fish under the *Sparrow* decision of the Supreme Court of Canada.

12564. We would note that the Board is a court of record under section 11 of the NEB Act, and under subsection 12(2) for the purposes of the Act the Board has full jurisdiction to hear and determine all matters whether of law or of fact.

12565. And I'd like to refer to another decision of the Supreme Court of Canada, the *Carrier Sekani* case decided in 2010. It's cited at footnote 37, page 12 of the written argument. And in that case the Supreme Court of Canada held that:

"The power to decide questions of law...

12566. Which of course you have.

> *"...implies a power to decide constitutional issues that are properly before [a regulatory board], absent a clear demonstration that the legislature intended to exclude such jurisdiction from the [Board's] power."*

12567. That's from paragraph 69 of the *Carrier Sekani* case.

12568. And in the case of this hearing, the NEB has specifically included the potential impact of the project on aboriginal interest as an issue that it will consider. So that's clearly an issue that is properly before the Board.

12569. In *Carrier Sekani*, the court noted that boards might be given delegated power to carry out the Crown's duty to consult, the duty set out in the *Haida* decision of the Supreme Court of Canada, or alternatively the Board might be given the power or that power might be confined to -- and I've quoted the bottom of page 3:

> *"...determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process."*

12570. And that's from paragraph 57.

12571. So a board may have to make a determination of whether adequate consultation has taken place as a condition of statutory decision making.

12572. And we submit that that applies equally to the duty of justification as much as the duty to consult. And as set out in more detail in the written argument, those are two distinct concepts, the duty to consult and the duty to justify. The duty to consult certainly forms part of the duty to justify. The justification requires much more. And that is set out in detail in the written submissions based upon the *Sparrow* decision and the more recent *Tsilhqot'in* decision.

12573. And I want to be clear that we are not submitting that you have to conduct consultation yourselves, but we do submit that in order to respect section 35 of the Constitution and as a condition of your exercise of statutory powers

under section 52 of the NEB Act you must make a determination of whether adequate consultation and justification has taken place.

12574. I would like to repeat that, if I may. We are submitting that in order to respect section 35 of the Constitution and as a condition of your exercise of statutory powers under section 52 of the NEB Act you must make a determination of whether adequate consultation and justification has taken place.

12575. This is because you must carry out your mandate in a manner that respects Musqueam's established rights under section 35. That forms part of the Constitution. And again that's based on the passage I've quoted from *Carrier Sekani* recognized more recently in the *Chippewas of the Thames* case.

12576. And of course the Constitution is the supreme paramount law of Canada section 52 of the *Constitution Act* 1982. It prevails over the NEB Act, prevails over statutory provisions. It is the supreme law of Canada.

12577. I'd like to go back a bit in legal history to 2009. *Carrier Sekani* was 2010. *Carrier Sekani* was Supreme Court of Canada. In 2009 the *Standing Buffalo* case was decided by the Federal Court of Appeal. And that's cited at footnote 35, page 12 of the written argument.

12578. And in that decision the Federal Court of Appeal decided that the NEB was not -- the NEB was not under a duty to determine if the Crown had adequately consulted before the NEB could make a decision under section 52 of the NEB Act. Section 52 is, of course, the provision most relevant to this hearing.

12579. In our submission, *Standing Buffalo* has now been overtaken by the *Chippewas of the Thames* case as of October of last year, and *Standing Buffalo* is no longer applicable if the Crown has participated in the hearing. And I'd like to explain that.

12580. As I mentioned, October of last year, October 20th, the Federal Court of Appeal gave its judgment in the *Chippewas of Thames* case and the issue in that case was whether the *Carrier Sekani* case of the Supreme Court of Canada decided in 2010 had overruled the 2009 *Standing Buffalo* decision of the Federal Court of Appeal. The Court was split, with a majority saying that on the facts of that case, that case being the *Chippewas of the Thames* case, *Standing Buffalo* still applied. The third judge dissented. In his view, *Carrier Sekani* had overruled the *Standing Buffalo* case.

12581. And it's very important to understand the reasoning, the basis, for the dissention of the majority. Their decision not to follow the Supreme Court of Canada in the *Carrier Sekani* case, to distinguish it in legal phraseology, and to quote from the relevant paragraph, which is paragraph 49 of the *Chippewas* case, the reason the majority decided not to follow *Carrier Sekani* was because, and I quote:

> *"...the Supreme Court did not address the issue of whether a tribunal is obligated to make the Haida Determinations in a proceeding before it in which the Crown does not participate as a party."*

12582. Again, I'd like to repeat that, if I may. The reason the Federal Court of Appeal decided not to follow *Carrier Sekani* in the *Chippewas of the Thames* case was because in *Carrier Sekani*:

> *"...the Supreme Court did not address the issue of whether a tribunal is obligated to follow the Haida Determinations in a proceeding before it in which the Crown does not participate as a party."*

12583. Again, that's paragraph 49.

12584. As I mentioned, the third judge dissented and said *Standing Buffalo* shouldn't be followed in any event. And I do want to stress this, that the majority of the Federal Court of Appeal distinguished *Carrier Sekani* because of the lack of Crown participation in both the *Standing Buffalo* and the *Chippewas of the Thames* cases.

12585. And the Court thought that the Crown's non-participation was significant for a couple of reasons, and those are set out at page 12 of the written argument. And I won't go into that, but page 12 of the written argument sets out the reasoning of the Court, why the Court thought it was material that the Crown did participate -- and I repeat, did not participate -- in either *Standing Buffalo* or the *Chippewas* case.

12586. And I'd like to quote, if I could ---

12587. **THE CHAIRMAN:** Mr. Reynolds, I will stop the clock now because

-- if you could entertain a question from the Panel at this time? We find this quite efficient to do it while you are on the topic. It helps both sides to understand things as well. So we stop the clock so it will give you time.

12588. So Ms. Scott.

12589. **MEMBER SCOTT:** If I'm following your logic, in cases where the Crown has not participated, it's not appropriate necessarily to make a determination of the adequacy of Crown consultation, but where the Crown has, there's an obligation on us to do that? I'm just trying to follow the logic and I wonder if that wouldn't create a circumstance where there would be a disincentive to the Crown in ever participating in our process?

12590. **MR. REYNOLDS:** That may well be the case.

12591. **THE CHAIRMAN:** Here, we'll switch the microphone to Mr. Reynolds. Thank you.

12592. **MR. REYNOLDS:** And that may well be the case, and I believe there's a passage in *Carrier Sekani* where the Supreme Court notes that the Crown can not participate and that may frustrate the process.

12593. And it may be that I should quickly summarize why the majority in the *Chippewas* case decided that the Crown participation or non-participation in *Standing Buffalo* in the *Chippewas* case was significant. And I recall two reasons. One is because the Court said that when it comes to consultation, then it's as much a factual issue as a legal issue, and if the Crown does not participate, then the facts may not be before the NEB, probably won't be. If the Crown is not there, then the evidence relating to Crown consultation will not be before the NEB.

12594. The other basis on which the Federal Court of Appeal thought it important that the Crown had not participated was because it raised the question -- was the question of consultation properly before the Board if there was no Crown participation? Those, I believe, are the two reasons given by the majority in the *Chippewas* case for attaching significance to the Crown's lack of participation in those two cases.

12595. Sorry, Ms. Scott, do you have a further question?

12596. **MEMBER SCOTT:** In the event that the Crown has not participated, how in any decision making process then would you see an assessment of adequacy ever taking place? Where would you see that review happening?

12597. **MR. REYNOLDS:** Sorry, if the Crown has not participated?

12598. **MEMBER SCOTT:** I'm just wondering where this argument takes us if we follow it through to its logical conclusion for every case, not just this case.

12599. **MR. REYNOLDS:** Well, I long ago gave up trying to understand some decisions of the Federal Court of Appeal, and maybe I should ask you to read the decision, with respect, of the majority in the *Chippewas* case.

12600. But I do want to stress that those facts are not the facts before you. The Crown has participated, and I would like to get to that. But certainly the Federal Court of Appeal did attach significant weight to the non-participation in that case.

12601. **MEMBER SCOTT:** So again, if I'm following your argument, you would suggest that since they have participated here and they've indicated that they're looking at our process, so to speak -- in their evidence they've said that -- and they've said that they have other processes that they're following that are not necessarily coincident with ours.

12602. Do you see that as having any effect on our ability to assess Crown consultation?

12603. **MR. REYNOLDS:** I think the fact that the Crown has decided to use this process in some form of supposed discharge of at least the duty to consult is relevant. Because the Crown is before you, their consultation justification or lack thereof is an issue that's properly before you, and we say that's a precondition, a determination of whether they've satisfied their constitutional duty to consult and justify as a precondition to your ability, your jurisdiction, your power to go on and make a recommendation under section 52. That is the thrust of the argument.

12604. Thank you.

12605. **MEMBER SCOTT:** Thank you.

12606. **THE CHAIRMAN:** Thank you. We'll start the clock again and you can continue. Thank you.

12607. **MR. REYNOLDS:** I would like to quote from the conclusion of the majority in the *Chippewas of the Thames* case, which is at paragraph 59:

> *"...I conclude that the Board, in the absence of the Crown as a participant in the section 58 application in respect of the Project, was not required, as a precondition to its consideration of that application, to determine whether the Crown was under a Haida duty, and if so, had discharged that duty, in respect of the Project."*

12608. And we say, of course, that the other side of that coin is that if the Crown has participated in the process, then there is a duty on the part of the Panel to make a precondition -- as a precondition to its consideration of the application, to determine whether the Crown was under a Haida duty. And if so, has the Crown discharged that duty.

12609. But we would also say in the case of Musqueam -- and I do stress that Musqueam has established rights. Musqueam doesn't assert an Aboriginal right to fish. Musqueam has proven to the satisfaction of the highest court in this country, the Supreme Court of Canada, *Sparrow*, 25 years ago that it has an established right to fish and it's not just a matter of consultation. And again, this is set out in detail in the written argument. I won't go into it.

12610. But consultation is only a part, and I would say a minor part, of the duty to justify. So looking at paragraph 59 of the *Chippewas of the Thames* case, we would add the duty to justify to the duty to consult on the facts of Musqueam where there is a proven right.

12611. I should note that an application has been made to the Supreme Court of Canada for leave to appeal in the *Chippewas* case. And that, of course, is likely to take a few months before the Court decides whether or not to give leave, and if it does give leave, to have the hearing and render the decision.

12612. However, we say that it's completely irrelevant for the purpose of this hearing whether the Supreme Court of Canada overturns the majority decision in the *Chippewas of the Thames* case or not is irrelevant. Because as noted, the majority of the Federal Court of Appeal distinguished *Carrier Sekani* because of

the lack of participation by the Crown in the hearing. And, of course, the third judge, the dissenting judge would have followed *Carrier Sekani* in any event.

12613. And we say -- and I don't think it can really be disputed -- that the Crown has been a very active participant in this hearing. It's filed evidence. It's made 58 information requests to Aboriginal groups. It's also stated, as I believe Ms. Scott noted, that it will rely upon the NEB process impartial discharge of its duty to consult. And again, I would ask you to note the absence of any reference to "justify". And that's set out in the written argument of Natural Resources Canada filed last week.

12614. And there is no mention in the final argument of the Crown of Natural Resources Canada of any duty to justify. It's as if the *Sparrow* decision of the Supreme Court of Canada, no less, had never been made, as if it didn't exist. And it's a silence that's shared by the Applicant in their final argument. There are many references to consultation. I don't believe there is one reference to justification. And in the book of authorities filed by the Applicant, *Sparrow* does not appear. And yet it's clearly a leading decision -- and I'm somewhat biased as a counsel for Musqueam; but it's clearly a leading decision on section 35.

12615. And we say, in view of the Crown's participation in the current hearing, the decision of the majority in *Chippewas of the Thames* does not apply. Instead, the decision in *Carrier Sekani* is clearly applicable. It follows, therefore, that a pre-condition of your jurisdiction to make a recommendation under section 52 is a determination that the Crown has satisfied its duties under section 35, including the duty to consult and accommodate Musqueam and the further duty to justify the infringement of Musqueam's proven Aboriginal right to fish that will result if the project proceeds.

12616. And we submit that the Board is simply unable to make the required determination that the Crown has discharged its duties to consult Musqueam and to justify the infringement because in our submission, the Crown has done neither. And indeed, it doesn't even purport to have done so.

12617. It says in the final argument and in correspondence to the First Nations that it intends to consult during the period whilst you are deliberating in your decision the phase three consultations. This means consultation with numerous Aboriginal groups over a pre-determined three- four-month period which is totally unrealistic, it's arbitrary, not based upon any consultation with First Nations. And certainly in the case of Musqueam, Musqueam protested right from the beginning

that that is not good faith, reasonable consultation to have a pre-determined period.

12618. And perhaps of greater significance to Musqueam, the Crown hasn't even acknowledged a duty to justify and it's done nothing to purport to justify the infringement. Again, I would invite you to go through the final argument of Natural Resources Canada and see if you see any reference whatsoever, either in that written argument or in the documents that it refers to, to the duty to justify.

12619. **THE CHAIRMAN:** Just a note, Mr. Reynolds, you have five minutes remaining.

12620. **MR. REYNOLDS:** Thank you.

12621. So I will turn to the conclusion. And we respectfully submit that you lack jurisdiction to make any recommendation to issue a certificate under section 52 of the *NEB Act*. You have a duty to respect section 35 of the Constitution. You have to carry out your mandate in accordance with section 35, the Quebec case that I referred to, *Carrier Sekani, Chippewas*.

12622. Under the *Carrier Sekani* decision you must first make an initial determination whether the Crown has satisfied its duty of consultation and of justification before you can make that section 52 recommendation. And we submit on the facts that simply cannot be done. The Crown has not adequately consulted and it hasn't even pretended to have justified, hasn't even acknowledged that there's a duty to justify the infringement.

12623. In our respectful submission, you must either decline to make any recommendation under section 52 or refuse to grant -- sorry, you must decline to make any recommendation under section 52 and refuse to grant related authorizations until the Crown has complied with its constitutional duties of consultation and justification, or you must recommend dismissal of the application. Those, we respectfully submit, are the options before you.

12624. It cannot be in the public interest to recommend approval. It cannot be in the public interest to allow the Crown as represented by the former government to avoid its constitutional duties. The new federal government has given commitments to the Indigenous peoples of Canada, including Musqueam, that it will honour those duties. Musqueam welcomes the commitments. But until they are honoured, no approval can or should be given to the project.

12625. I see that I still have two and a half minutes and I would like to address another issue, if I may. And again, I have handed up a summary but the final points I'd like to make is that consultations should not be prematurely concluded -- sorry, it's a one-page -- prematurely concluded because of external pressures. And meaningful consultation is not based on the size of the consultation record.

12626. NR Canada refers in its written argument to consultation through the 58 information requests to a series of email communications, phone calls and meetings. That's at page 3 of their written argument. They also tie in phase three consultations to the statutory deadline for the NEB process. And in their final argument the Applicants make much of the number of engagement activities that have taken place with Aboriginal groups.

12627. We submit that meaningful consultation must take whatever time is required and that external pressures such as the statutory deadline for the NEB process is irrelevant. And we also submit that the adequacy of consultation must not be judged on the thickness of the consultation record.

12628. And I've given two cases. The first is Squamish -- sorry, *Squamish Nation versus B.C.* And that's at 2014 B.C. Supreme Court 991. And there's a quote which says:

> *"The Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed."*

12629. And then there's a further quotation from Justice Macintosh in the *West Moberly* case. And he says:

> *"The adequacy of consultation cannot be addressed at large. The quote cannot simply measure the volume of correspondence and studies and parts that went over them, pronouncing the consultation adequate or inadequate in the result. Instead, particular issues within the consultation process need to be raised and examined individually."*

12630. And that concludes my time and my submissions. Thank you, Panel.

12631. **THE CHAIRMAN:** The Panel are going to take a short break to

consider your submission and we may come back with some questions. So we will come back at 2:30.

12632. Thank you.

--- Upon recessing at 2:20 p.m./L'audience est suspendue à 14h20
--- Upon resuming at 2:31 p.m./L'audience est reprise à 14h31

12633. **THE CHAIRMAN:** Thank you for your patience. Ms. Scott has some follow-up questions for you.

12634. **MEMBER SCOTT:** Thank you for your presentation today. It has clarified your written submissions and I just want to see if I'm following the logic again.

12635. You acknowledge in your presentation today that Crown consultation takes place partly through our process and through the submissions of Crown. In this proceeding we understand that there are other things that are happening and if I'm following your argument, Crown consultation can't in essence be assessed by the NEB in this process because we don't have a complete record.

12636. Is that an accurate assessment of what you're suggesting?

12637. **MR. REYNOLDS:** No. With respect, Ms. Scott, the key point that I would like to leave you with is that you must make a predetermination of whether the Crown has both consulted, accommodated, but also justified Musqueam. There has been nothing said in the final argument, any correspondence from the Crown about justification.

12638. So clearly, you cannot reach the predetermination that the Crown has discharged its duty to justify the infringement of Musqueam's established rights established by the *Sparrow* decision. So that's the key point I would like to make.

12639. Turning to consultation, consultation is part of the duty to justify.

12640. **MEMBER SCOTT:** M'hm.

12641. **MR. REYNOLDS:** It's one of the steps in the process, but it's by no means the entirety of the duty to justify; it's much greater than that.

12642. But if I could now move to what I think you asked me -- yes, I think the Crown can use a regulatory proceeding, including this proceeding, to help it discharge its duty to consult. I don't challenge that; I think there's law on that.

12643. **MEMBER SCOTT:** Yes.

12644. **MR. REYNOLDS:** I do say that on the facts of this case and the evidence before you, the Crown cannot -- you cannot reach a predetermination that the Crown has discharged its duty to consult, let alone its duty to justify. The Crown has not consulted in a meaningful way. The Crown's theory of consultation was to break it up into phases, four phases, one of which is after the decision, whatever that decision is, under section 52.

12645. But the third -- phase three is part of the consultation process, and we say it's the part that the Crown has attached most weight to, certainly in our dealings with the Crown, "Don't worry, once the hearing is over there'll be a three- or four-month period, the phase three." I refer to it as a sopping up, a mopping up consultation. "We the Crown, are going to use the NEB hearing as the main form of consultation and then we're going to have a three- or four-month period whilst the Board reaches its decision under section 52, and then we'll just clear everything up."

12646. And we say that's not adequate, because a three- or four-month period to deal with I don't know how many First Nations -- Musqueam is only one. And to say as the Crown said, I believe, 18 months ago -- it may even be longer now -- that that's what they were planning to do, to use phase three as the consultation, the substantive consultation, a predetermined period to deal with numerous First Nations, including Musqueam, First Nations that have different legal rights, that certainly have different interests which will be affected by the project.

12647. For the Crown to say ahead of time, "This is how long we will allot to consultation", we say is allowing the external pressure, the pressure of the statutory deadlines to dictate the outcome of consultation. And as I submitted at the end of my presentation, there's case authority to say that's not acceptable. Consultation of course has to be in good faith, has to be reasonable.

12648. The *Haida* decision -- it invokes the honour of the Crown; it is not compatible with the honour of the Crown for the Crown to say -- and this is the former government rather than the current government -- but for the former government to dictate that we will allot these months for consultation and no

more. You cannot make a predetermination.

12649. Good faith consultation should be a process where the First Nation is able to express its concerns, raise its questions, have them dealt with. And there has to be that process. And to predetermine how much time the period will take, we say is not compatible with the duty of good faith and reasonable consultation.

12650. But again, with respect, I don't want to lose sight of what for Musqueam is the main point, which is that consultation is certainly a duty that is owed by the Crown to Musqueam in respect of asserted but as yet unproven aboriginal rights. But when it comes to the established aboriginal right to fish, established to the satisfaction of the Supreme Court of Canada in the *Sparrow* case 25 years ago, which gave Musqueam -- recognized, I should say, Musqueam's right to fish in its traditional territory.

12651. And as Councillor Guerin pointed out, this project cuts through the heart of that territory. That is an infringement which requires justification under the "Sparrow test". And the Crown hasn't engaged, hasn't embarked upon the justification process. I really do not think that anyone will find in the final argument of the Crown or in the documents referred to by the Crown in the final argument any reference to justification.

12652. And as I mentioned earlier, I don't think that concept, that legal duty of the Crown appears in the final argument of the Applicant. And certainly the *Sparrow* case, the leading case on justification, is not in the authorities filed by the applicant.

12653. **MEMBER SCOTT:** Thank you, Mr. Reynolds.

12654. **THE CHAIRMAN:** With that, on behalf of the Board, I would like to thank you, Mr. Reynolds, for your position today and also Councillor Guerin for yours and bringing your voice to the hearing today.

12655. With that we'll take a short five-minute break and we'll be hearing next from Mr. Farmer.

12656. Thank you.

--- Upon recessing at 2:39 p.m./L'audience est suspendue à 14h39

--- Upon resuming at 2:46 p.m./L'audience est reprise à 14h46

12657. **THE CHAIRMAN:** Welcome, Mr. Farmer. And I wasn't sure if I should say welcome being a neighbour since I live in Sydney and we're -- but we haven't met before. I just want to make sure the record is straight on that.

12658. And I don't know if you were here on the lighting system, that you have 40 minutes and you've figured that one out, so -- it's a bit like the Supreme Court I'm afraid, but ---

--- (Laughter/Rires)

12659. **THE CHAIRMAN:** So with that, Mr. Farmer, we're looking forward to hearing your oral summary argument, and you have 40 minutes.

12660. Thank you.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. DAVID FARMER:

12661. **MR. FARMER:** Thank you very much. And I appreciate this opportunity to present my views.

12662. First of all, a little about myself. I'm an ocean scientist. I study physical processes in the ocean and underwater acoustics. I have worked for many years at the Institute of Ocean Sciences in Sidney. And I spent some years as professor of oceanography and dean of a graduate school of oceanography at the University of Rhode Island.

12663. My work has been recognized in various ways. I have been elected as a fellow of the Royal Society of London and the Royal Society of Canada.

12664. My interest, as I say, is in scientific understanding of the -- and the testing of ideas with experimental evidence.

12665. As a scientist I have some serious concerns about the information we've been given, information on the economics of a project and the environmental issues. The environmental issues are serious, involving threats to marine life, and our response in the event of a major oil spill.

12666. I'll focus on the scientific issues and also draw attention with one or two examples to problems of transparency and lack of evidence.

12667. When the National Energy Board limits the information that intervenors require to draw correct conclusions this negates of course the whole purpose of a hearing and undermines for conclusions that the Board reaches.

12668. Now, Slide 1 shows the list of issues, and I'm interested in several of these, but I want to draw attention to what's at the bottom of the page of comments on up and downstream events because they're really very important to what I have to say.

12669. *"The Board does not intend to consider"*, it reads, *"the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline"*. In effect, this means we cannot explain any issues related to climate change.

12670. Now, this in turn presents problems for us intervenors and serious consequences, I believe, for the National Energy Board process.

12671. The lifetimes of climate change are the effects -- the lifetimes effects of climate change are overwhelming. The National Energy Board really must consider them and as it applies to the project.

12672. If there are any doubts on climate change, and there really shouldn't be in this day and age, it should be remembered that 97 percent of scientists agree -- that's more agreement than I have ever seen in the world of science that I've been involved in. Ninety-seven (97) percent of scientists agree that there's unequivocal evidence of the earth's climate system warming, and that, with at least 95 percent or higher certainty that the warming is produced by greenhouse gases from human activity.

12673. So I'd like to keep that as background while I review a question that I asked the Proponent on the next slide please.

12674. No, sorry, that's not my slide. That's not my slide either. My second slide was C124-2-2.

12675. Yes, that's correct. That's what I wanted. Thank you.

12676. Okay. Now, in this slide I quote from an MIT -- Massachusetts Institute of Technology --paper written by Dr. Chan and colleagues back in 2010, which is quoted by other intervenors.

> *"The Canadian oil sands industry appears highly vulnerable to climate policy. This vulnerability stems from the fact that CO2 emissions from the production of bitumen and upgrading are substantial and demand for petroleum products would be reduced with climate policy. . . The niche for the oil sands industry seems fairly narrow and mostly involves hoping that climate policy will fail."*

12677. Now, that was five years ago, and we know where we stand right now. But it was with that in mind, and similar references that I put forward in my questioning, that I asked Kinder Morgan whether they accepted that climate policy -- next slide please. I asked -- okay, well, it's Number H, down at the bottom:

> *Does Kinder Morgan accept that climate policy, which is oriented towards reducing [greenhouse gas] emissions through the fiscal policies identified above or through other policies that either restrain consumption of oil or inhibit emissions [such as] carbon capture and storage or both, imposes additional costs that must ultimately be borne by the consumer, thus tending to reduce demand relative to what it would otherwise be, thereby tending to decrease financial benefits arising from the project? If not, please explain."*

12678. So that was my question. I was asking about the benefits that Canada would get. And the answer was the same for all of my 17 questions on this particular topic.

12679. Could I have the next slide please?

12680. And you'll see it's with minor variations for a couple of them.

12681. Basically what the response was is this information request is not relevant to one or more of the issues identified in the National Energy Board's List of Issues for the Trans Mountain Expansion Project.

12682. So you need some information from the Proponent; you want to find out what their thoughts are and what their planning has been with respect to policy change on the practical aspects, the economic aspects associated with climate change policy and you're told that it's not relevant.

12683. That is an example of the difficulty intervenors face, and this is what has prevented them actually from giving you, the Panel, what you need to make a final decision. And it has so undermined the situation you will be in when you come to make this decision that I submit that you won't be able to make it in any reliable or rational sense at least for those issues listed where climate change would have an impact. And I identify those as one, two, three, four, five and nine.

12684. Okay, well, I can, of course, as an intervenor, come to you, the Panel, and ask you to compel the Proponent to provide an answer. This really worked. I mean, they did technically provide an answer but the answer was about as informative as this.

12685. However, for that particular question I asked what would be the impact on the benefits that we would get from this project I was told -- and I don't have this written down so I will paraphrase it. I was told that no problem because we have these fixed service agreements, we're going to get our money anyway, which is true, and will be highly relevant to Kinder Morgan's benefits but not relevant I think to Canada's benefits.

12686. So this illustrates a problem that you need to be very aware of, that the climate change issue, which is real and big, it's the most overwhelming issue facing your family and mine over the next generation and beyond, were somehow excluded. And I think that that was most unfortunate and ultimately will compromise any decision you might come to.

12687. Okay. Now, the other point I would make is that -- okay -- that most people in British Columbia are pretty passionate about the environment. We're very fortunate to live in this beautiful part of the world. And avoiding climate change issues is not going to be seen with much favour and it's going to be extremely difficult and probably impossible to get a social licence for this pipeline under the circumstances.

12688. So let me now ask for Slide 5. And while you're putting that one up, I'll say a few words about economic issues. Now, Trans Mountain, astonishingly, has used gross rather than net calculation of benefits. That's to say you look at

the total money coming in and you don't worry about the costs.

12689. This is a curious way to calculate benefits, at least of a country, and it's been up to intervenors to pay for and get another report or reports which take a proper look at the benefits. And what they find is disturbing that the project that's being proposed, subject to some uncertainties of course, will lead to a net cost of $7.4 billion over the project, the lifetime of the project, to Canada. And that, I understand, is a relatively conservative figure.

12690. So a rational analysis of the benefits must surely account for the cost as well as the -- the cost as well as the income. There is no other way to judge the benefits of this project for Canada.

12691. Now, as a scientist, I'm concerned about a significant lack of transparency, which may be common in certain fields but certainly isn't in science and it doesn't really advance our understanding of what's going on.

12692. The proponent, for example, in describing the -- one of a largest historical acquisitions and mergers which occurred in November of 2014 referred to it as a minor corporate reorganization when intervenors pressed it to inform the Board, a minor corporate reorganization that was sold to investors as a huge reorganization, a huge acquisition and merger which would greatly increase profitability and investor returns.

12693. There's something wrong here when the corporation says one thing out of one side of its mouth and another thing out of the other, completely at variance. We're left wondering what the true story is.

12694. However, there are certainly implications to this enormous event and these need to be understood. But the National Energy Board, the Panel, has not insisted that they find out about what's going on there and gain a full understanding which is made available to intervenors and the public. So the right questions are not being asked.

12695. The corporation is also right now currently rated just above junk status, which is nothing to be proud of, and even more worrying, it's vulnerable to a downgrade, as investors have been warned.

12696. So my question to the Panel would be, have you properly informed yourselves of the risks that this presents to the project, including the risks to

provision of adequate funds to cope with a really major oil spill which will require a huge amount of money?

12697. So these are economic aspects that are illustrative of what happens when you don't have full information available.

12698. Let me just comment on one other one which is the effect of climate change and climate change policy on stranded assets. There's increasingly now, as we all know, a move to get money out of companies that are -- or not invest in companies that have large deposits of coal or tar sands. And issues like that are going to come to the fore when major investment decisions are made. And how will this affect the company's profitability and how does it justify or how will it play into the validity and usefulness of this pipeline?

12699. So I will leave the economic aspects now, but I wanted you to be aware of those.

12700. And I'd like to turn to the part of the navigation route that takes ships through Boundary Pass and Haro Strait. That's a scenario I'm very familiar with, that I've studied. And I'd like to talk to you a little bit about some of the effects that the proponent has -- no, could you not go forward? Keep the slide there, please, on the chart. Thank you very much.

12701. I'd like to talk to you a little about the risks that might be involved if there was a spill in this area.

12702. So if you look at this chart -- and I have a pointer here -- I want to draw your attention to one or two things. You see these lines. There are solid lines and dashed lines. Those are tidal fronts. And the dashed lines are when there's a flood tide, the water coming into the Georgia Strait and the solid lines are the ebb tide when it's going into the opposite direction. And these are easily seen from aircraft images and can be followed pretty reliably in the positions that they're shown right there. And we decided that we should go and study them in more detail, which we have done.

12703. And I'm going to discuss the two that we've looked at closely. And please keep in mind where they are. This is Boundary Pass here and that's the dashed line you can see right up at the top. There's a ridge, a submarine ridge across that area and that's what triggers the tidal front I'll be showing you. And the second one is just off the west point of Stuart Island. It's called Turn Point.

And this is when there's an ebb tide and it's this solid line going down here. So those are two fronts that we've examined.

12704. Just for reference, over here where the pointer is, just to the left of Stuart Island, to the west of Stuart Island is the location of Arachne Reef where the model calculations have been done for the grounding that was analyzed with respect to the implications of a major spill.

12705. Okay. Next slide, please.

12706. So this slide just shows a photograph taken from a ship of what this front looks like when you're down near the water. There's nothing very big there. There are little waves breaking, but it's what's going on underneath the surface that's really interesting. The reason the waves are breaking is that the surface water is coming together at that location and that causes the waves to deepen, so that even in calm conditions you can get breaking waves. The waves deepen and break and -- although they don't get large -- and that marks the location of the front and makes it easy to find. That particular one is the one on the west, the one just across the water from Arachne Reef.

12707. But I'd like now to talk a little bit more about what goes on beneath the surface and go to the next slide, please. And here I'm going to show you an acoustical image which -- and acoustics have now become a very valuable tool for ocean scientists. And I will just walk you through what you're looking at.

12708. This is a view -- and you can think of it of looking sideways from beneath the surface of the ocean. And here is the ridge at Boundary Pass. That was the one up at the top of the chart. So this dark, red line here is the seafloor. And this is during a flood tide. So the water is moving from left to right. All of these little tiny black arrows, which you can't see in detail, I know, they simply indicate the direction and the speed of a current. So we can measure the speed of a current and its direction and we can also look at other properties.

12709. Here's the interesting one. Up where there's a sea at the top, perhaps you can just see a line spreading downwards. That is the signature of bubbles that have been brought down from the surface in this convergence, beneath where the breaking waves are. And they're drawn down because the surface water is coming from the left in this case. So it's moving in this direction. But when it gets to sea, it stops on the surface -- is sitting on the surface because it's now going down. And in fact, there's no current at all right up here to the right of that

red line for a short distance. The water on the right is brackish water from the Fraser River estuary and it is being pushed back by this strong tidal current.

12710. So now you have two currents working against each other. You've got the large volume of brackish water here which would like to carry on down into Boundary Pass but can't because there's a strong tide and the dense water from Boundary Pass straying in the opposite direction. So it plunges down like a waterfall, down here on the eastern side of this ridge, and then there's this boundary that starts at sea.

12711. This is a boundary between the two water masses and it dives downwards, if you like, along the top of the deeper water. But because it's moving very fast and this water is not moving very fast, it's unstable and it mixes. And this can be seen in various ways, but I can tell you, if you can't actually see it now, if you were to follow the arrows you would see a huge rotor here. It's about 60 metres high, enormous great big circular rotor that's actually mixing the fluid from one side into the other side.

12712. So this is a place of intense mixing. It's a place where surface water and whatever is floating on it gets sucked downwards and that, of course, is a risk if you have any oil in the area. It could certainly do something pretty dramatic. The oil would likely be broken up and it breaks up into very, very small droplets, and it would be brought beneath the surface, and oil brought beneath the surface cannot be recovered, as all involved agree.

12713. Let us take a look at the other of the two fronts in the next slide, please. Thank you.

12714. Now you're looking at a different kind of picture, but let me explain. It's not complicated. You remember that front was running south from Stuart Island? Well, we've got this tidal flow roaring towards us on the left. That's the blue water. This is coming towards us. It raced past that front and then initially the boundary between that fast moving water and the rest on the right was vertical, but because this water is denser than this water, it slides underneath.

12715. So what I want to draw your attention to is what's going on here. If you were able to look at these little arrows, and perhaps some of you can just see them, you'll note that they point downwards. This is an area of whirlpools, of colliding eddies, of intense turbulence and of vertical movements, both down and up, carrying whatever is on the surface with it down to depths of well over 100

metres. Bubbles are easy to see acoustically and we tracked those down to about 100 metres, but then they just dissolved at that depth. But the currents keep going on, you can see here, until much greater depth.

12716. Again, we see this as a mechanism for drawing what's on the surface into what's referred to as convergence zone -- there's a convergence of the water on the surface -- and plunging it down to great depths.

12717. The greatest vertical depths are on the outside here, the vertical speeds downwards. And if you look carefully, you may just see a large-scale vertical motion here with a slight current along the surface towards that convergence zone and down deep, a flow in the opposite direction.

12718. So oil could certainly spread across, not just by the currents, but oil will spread across under the influence of wind, and it can move far under the influence of wind, or it could have drifted through on a tide in the opposite direction and then come back again. There are many ways in which the oil can reach a particular location.

12719. So what I've described here are two of these tidal fronts and the way in which they can draw oil to this convergence zone and then it gets broken up by the turbulence and drawn down.

12720. Now, I did ask the proponent about this because I was concerned about it. It seemed to me, especially in a place like Boundary Pass and Haro Strait, that this should be given very serious consideration. It would certainly contribute to subduction, to drawing the oil below the surface and it would certainly have implications for any attempts to recover the oil, which would need to be thought through very carefully.

12721. Now, my questions did not really elicit much in the way of helpful answers, but the answer I did get was, first of all, that the model that was used could not, indeed cannot, actually describe the processes that I've just described to you.

12722. Why? Because, first of all, it doesn't have the resolution. It's too coarse. It has about a one-kilometre resolution and those lines of breaking waves you saw, though they could be quite long, a kilometre or more long, they're only tens of metres across at most. So that model cannot do it. There are other difficulties of the model too. It can't handle vertical acceleration.

12723. But the proponent also said that these small things didn't cover much of the area of the surface for water when you added them all up and dismissed them as being insignificant in response to my information requests.

12724. But that's not actually a correct or helpful response. The aerial extent is not what matters; it's the aerial extent times the component of flow due to the wind and the current effects too that carry the oil along the surface.

12725. So what we have here is an extraordinarily energetic place. It's been known to be energetic since oceanographers first took an interest in it back at least in the '50s, if not well before then. It was not even mentioned in the oceanographic account in the proposal, and it certainly has not been addressed in any way in the application. And I was not able to elicit any interest in pursuing it further.

12726. And in fact in one response, the reply evidence that came out, I think, in August, the proponent came up with what really amounted to a misunderstanding of what the circulation and what was going on in this part of the Salish Sea.

12727. So that really does concern me and it's something that should have been addressed properly. But I think it's the manner in which questions were answered and not really pursued rigorously that caused a misunderstanding or difficulty of this sort.

12728. Now, let me finally turn to the environmental risks associated with spills and also with noise, which is the other area of concern to me, which I know a little about. Now, as a scientist, I'm really concerned about the implications of harm to marine life. I should mention with respect to noise that I have worked with a student on ship noise and its effect on the ability of marine mammals to communicate, and quite some progress was made in that area.

12729. The material of interest is diluted bitumen, a toxic substance, and the spill threat is spread across the spectrum from small juvenile and larval stage fish up to marine mammals.

12730. The risk of a spill was identified by Det Norske Veritas as what works out to be not quite as rare as some people seem to think. Now, I have a lot of respect for Norske Veritas. They're a reliable assessment company. I know that.

Their estimate was that the worst credible case spill was 15 percent of a cargo. That's 16,000 cubic metres approximately. And if you were to run through 50 years of operation, there would then be a 10 percent charge -- opportunity or risk, I should say, of a grounding on Arachne Reef right in that area where all the fronts are.

12731. Ten (10) percent in 50 years may not seem very huge to some, but it seems very huge to me. And I tried to explain this to a friend and a family member just recently and the way I put it was this way.

12732. If you knew based on a reliable risk assessor that over the course of a 50-year career, say, for a specific activity, say your child was a pilot on a plane and you knew that over 50 years the plane would have a 10 percent chance on this particular flight path that he had elected to fly on or she had elected to fly on, there was a 10 percent chance of a terrible accident, would you take -- would you feel comfortable with your child being a pilot on that plane or would you be uncomfortable?

12733. Well, I know the way I would feel, and I suspect you'd feel the same way -- so it helps to bring us down from saying, "Well it's not for hundreds of years or whatever", and to think of it in terms of what the actual percentage will be and how we would react to it if it were a matter of personal concern.

12734. I think it's quite a large opportunity under the -- a risk under the circumstances. But of course many, many more smaller spills will occur and those should be of real concern to us also, because a spill may be 10 percent, that's 16 -- 16,000 cubic metres is still an enormous spill and it would have terrible effects. And still smaller spills contribute to a chronic contamination of a water column and kill substantial numbers of fish.

12735. And the way it happens is this -- and this is what I'm concerned about -- that in this very energetic environment where there's very intense turbulence, strong downwelling, breaking waves at the surface but strong downwelling and the oil, the dilbit that will suck down will certainly be broken up.

12736. The Kinder Morgan report says that the droplets would only be 35 microns in diameter -- in radius actually, and 35 microns -- that's 35 thousandths of a millimetre -- that's a very, very small droplet -- it rises very slowly. It rises at about .4 millimetres a second. So once it's down there, it's down there for a long time.

12737. And while there, it's being moved by currents, can travel some considerable distance and it -- it's also going to be available to contaminate juvenile and larval fish, harm them perhaps, but more seriously, draw the dilbit into the food chain, which then climbs up to the larger fish, including salmon, which presents significant marketability problems even if it's not tainted. People don't like to buy it if they think it comes from this area and might be tainted, so that's a serious problem. And eventually ends up being eaten perhaps by marine mammals, including the endangered southern resident killer whale.

12738. And so this -- all that going on and we must also worry from the marine mammal's point of view about the noise. Ships do make a lot of noise and we're talking about a not insignificant increase. Now, let me just put this in perspective with a situation that these animals -- and I'm speaking of now specifically of the southern resident killer whale population, what they have to face, already the background noise due to shipping is -- has caused significant changes to their behaviour. It has reduced their -- I think I -- no, I think I don't have an image of -- or anything for you on that. It has reduced the area over which they can communicate with other members of their tribe by 62 percent.

12739. This actually was an issue that I worked on with my student, she did some tests here with beluga whales and then was able to apply it to other animals too. Sixty-two (62) percent is a massive reduction in the distance that -- or in the area, rather, over which a killer whale can communicate with other members of its -- of its group. And it has particular relevance to the distance that a mother must be in order to communicate with its calf.

12740. So these are issues that only compound the problem also of an 18 percent reduction -- this is just with existing situations -- an 18 percent reduction in time spent feeding because of the influence of sound in reducing the whale's ability to find fish.

12741. **THE CHAIRMAN:** Just a note, Mr. Farmer, you've got 5 minutes left. Thank you.

12742. **MR. FARMER:** Okay, I will be fast. Thank you.

12743. So for a population close to collapse or -- and vulnerable to collapse, not close to collapse, but vulnerable to collapse, there are real issues here for that particular killer whale population.

12744. And I think that while it's certainly worthy that Kinder Morgan has proposed research funds and so on, that's certainly not going to offset the additional noise by another 7 percent on a population that's already feeling the effects so much at the present time.

12745. Let me summarize now, I have reported what I see from a scientist's perspective looking for clear evidence to support an understanding of the facts relating to this proposal. I have to say that the restrictions imposed on the list of the issues seriously undermine the ability to examine the issues properly.

12746. Moreover, a failure to insist on full responses to intervenors' questions, full and clear responses of a Proponent, also has caused serious damage to the process, as has the decision to avoid an oral cross-examination, which is well-known to be the best way to determine the truth. So these decisions have caused problems.

12747. I had -- let me just conclude then with three points here. First of all, the environmental spills -- the consequences of spills rather are extremely serious and oceanographic processes contributing to these consequences have not been properly considered.

12748. Secondly, the lack of transparency on the part of a Proponent and the failure of Board to, in many instances, pursue this lack of transparency, does compromise especially issues related to viability of a company and economic benefits to Canada.

12749. And thirdly, the suppression of climate change issues has seriously compromised the Board's ability to properly decide on this project, especially with respect to certain of the List of Issues identified earlier.

12750. Thank you.

--- (A short pause/Courte pause)

12751. **THE CHAIRMAN:** If you'll indulge a few questions, Mr. Farmer.

12752. **MR. FARMER:** Yes.

12753. **THE CHAIRMAN:** Mr. Davies?

12754. **MEMBER DAVIES:** I wonder if you could tell me what evidence is on the record that would give us a sense of the surface currents -- are you hearing me okay?

12755. **MR. FARMER:** I'm sorry.

12756. **MEMBER DAVIES:** That's fine.

12757. **MR. FARMER:** I didn't quite get the first part of your question.

12758. **MEMBER DAVIES:** I'll try to project a little better.

12759. **MR. FARMER:** That's good.

12760. **MEMBER DAVIES:** Great.

12761. I wonder if you could summarize the evidence that's on the record that would give us a sense of the aerial reach of the surface currents that migrate towards the subduction currents from the tidal fronts.

12762. Is there an evidentiary record that you could guide us towards that would give us a sense of how broad an area it would be under the influence of these fronts?

12763. **MR. FARMER:** The quick answer is no. There is a real problem in just going to a numerical model of a kind that's been used which essentially measures -- it does model -- it does actually quite a good job of tidal height, so the transport of water is probably not bad.

12764. But there are real problems in looking at the effect of a mechanism that draws water from the surface, which is actually very small in scale and therefore can't be modeled adequately. It leaves a very narrow front so it can't be modeled adequate. It can't be modeled at all, in fact, with the available model.

12765. The real problem, I think, is that our knowledge has not been pursued adequately. The Proponent, understandably, has used a computer model to calculate these things, but that is actually not a means of getting reliable evidence. It's a means of extrapolating from what you know. But the actual evidence did not appear to us about what was really going on beneath these fronts until we

went out, built our own instrumentation in many cases, went out and actually got measurements. That's the evidence -- the kind of evidence you need.

12766. Now, I think a fair bit could be done with drifter floats reconciling the model. I did actually suggest to the Proponents that what they do is take measurements that we have got with drifter floats and see if their model adequately was able to reproduce them but they said they weren't prepared to do that.

12767. I think one has to push as hard as one can -- two areas; one, to use every available bit of actual information as opposed to speculation information on the movement of these waters, not just a prediction from a model, and then use that to compare it with your model and be very critical about what you're looking at.

12768. So it's a totally different approach to just saying well I can model it, that's the answer, and we can all go home. It's much harder to go out in small boats in bad weather and get observations. But at the end of the day that's what I was referring to at the very beginning of my talk. It's the basis of improving your understanding by getting real evidence from the ocean. And that's what is actually needed, supplemented with careful -- small scale models able to resolve these features.

12769. And you don't have to model the whole of a Salish Sea. That would be ridiculous with a small scale model. But you can use little models that properly represent what's happening, incorporate them in the larger models. There are ways to handle this.

12770. **MEMBER DAVIES:** Well thank you very much. That was helpful.

12771. **MR. FARMER:** Okay. Thank you.

12772. **THE CHAIRMAN:** Thank you, Mr. Farmer, for your submission today.

12773. And we'll now take a short five-minute break and we'll reconvene with the City of New Westminster.

--- Upon recessing at 3:30 p.m./L'audience est suspendue à 15h30

--- Upon resuming at 3:36 p.m./L'audience est reprise à 13h36

12774. **THE CHAIRMAN:** We're now going to hear from -- I have no idea which order you would like to go in, but that's perfectly up to you which way you make your presentation. And I think you've been here, so you understand the 40 minutes and the lights that go.

12775. So if you could introduce yourself and then you have your 40 minutes to present on behalf of the city.

12776. Thank you.

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

12777. **MR. ALLISON:** Thank you, Mr. Chair and Members of the Panel.

12778. My name is Mark Allison. I'm the Manager of Strategic Initiatives and Sustainability for the City of New Westminster.

12779. If we can bring up our first exhibit, which is the map of the preferred pipeline limit. A little about context. That's the one. There we go. Great. Thank you.

12780. **THE CHAIRMAN:** Do you have a reference number for the transcript handy, or do we ---

12781. **MR. ALLISON:** It's on the form. It's part of the record.

12782. **THE CHAIRMAN:** I just want to make sure the transcript -- everybody knows what we're looking at because those are ---

12783. **MR. ALLISON:** We're looking at Appendix 1 to our initial information request document, which is from Trans Mountain documentation, which is the original alignment, the alignment of the pipeline through Coquitlam and Burnaby, the initial selected route. And then the purple line, which was the alternate route, which a few months into the process became the selected route.

12784. And the City of New Westminster will be talking about a number of areas. So for reference, down here this is the Sapperton neighbourhood of New

Westminster. Brunette River runs next to it. It's the boundary between New Westminster, Burnaby and Coquitlam. The Braid Industrial area down in here and the rest of the City of New Westminster. And we're interested of course in the Brunette River watershed and the Fraser River watershed.

12785. So, as you can see, the City of New Westminster is located next to the terminus city, the City of Burnaby and Westridge Terminal, and it's in close proximity to the proposed expansion route.

12786. We have significant concerns over impacts to local environment, including impacts on soil, water and local flora and fauna. In particular, we have concerns regarding the state of the emergency response plan that was available to local governments in order to respond adequately to potential spills of the pipeline. And of great interest to us is the ecologically sensitive Brunette River.

12787. Now, Mr. Elmer Rudolph here is going to run you through the history of how the river which was ecologically dead before 1969 has been brought back to life and it is a still very, very fragile ecosystem that needs to have extraordinary care to maintain its fish-bearing habitat.

12788. We also want to point out that the watersheds that are potentially impacted here in the Brunette River watershed are related to two of the 11 items in the Metro Vancouver ecological action plan. So the Metro Vancouver study which looked at the entire region and identified the top priorities for ecological habitat, protection and restoration were the upper and lower Brunette River watersheds.

12789. So it is a great concern to the city and its businesses. We did have a town hall meeting. The Proponent wasn't able to make that. But we did have members from the Pipeline Association and the Petroleum Producers there, as well as a number of experts, including our consultants, the fire chief and other representatives of environmental groups, and over 130 of our residents attended that. And we took a lot of what the feedback was from that and part of that became our written evidence was incorporated into our written evidence, which you've had a chance to realize.

12790. Now, there are many city policies that are directly related to our concerns over the pipeline. The official community plan has identified a number of conservation areas of particular interest. As you might know, New Westminster is a highly urbanized location. We've got a history going back to the

1860s. So much of our city is actually highly dense in terms of population and businesses.

12791. So there are relatively few numbers of original environmental value within the city, and one of those is the lower Brunette River Valley which has been compromised over the year by industrial activity.

12792. We also have the Brunette Creek neighbourhood plan which calls for restoration of the river. And Mr. Rudolph will tell you a bit about those efforts. But we've been working very carefully with Metro Vancouver to restore areas such as the Hume Park area to restore the original habitat in the area. And also through the Braid Industrial area, which is the site of industrial activity, over a century. We've worked with Metro Vancouver to restore much of the bank and the riparian along there.

12793. Our sustainability framework is called Vision 2032, and there are two objectives from that plan which are directly relevant to our objectives here in this process. The first is that key sense of ecosystems in the city be protected and are being restored, while parks, natural areas and other green areas, including yards, are gradually increasing in a biodiversity and habitat value.

12794. And second is that the habitat and recreation value of local waters and wetlands, including the Brunette and Fraser River watersheds, are being restored over time and the streams are being daylighted, and industrial waterfront properties are continually reducing impacts on the flora shore.

12795. So, as you can see, we've made quite a bit of progress over the years taking a watershed that's been significantly impacted by industrial activity and to restore some of the original ecological values. And so our plans are very much focussed on not just maintaining but rather restoring those ecological values over time.

12796. So in response to the city's objectives and the issues raised by local stakeholders, today we're going to elaborate on the five connections to project issues that were laid out by the National Energy Board for this and outlined in our application to apply as intervenors, the first being the potential environmental and socio-economic impacts of the proposed project, including cumulative effects from the project, the appropriateness of the general route and land requirements for the proposed project, potential impacts of the project on landowners in the area and in the city, contingency plan for spills, accidents and malfunctions during

construction and operation of the project and safety and security during construction of the post-project and operation of the project, including emergency response planning and third-party damage prevention.

12797. So representing the City today we have myself, and I will be providing an overview of our presentation, as well as coming back at the end to summarize our key points for the Panel's consideration.

12798. We have Mr. James Allen, Ecosystem Planner with Diamondhead Consulting. And Mr. Allen will be presenting a summary of the City's issues related to environmental and socio-economic impacts of the project on the City.

12799. Chief Tim Armstrong, to my right, is the Chief of the New Westminster Fire and Rescue Services and he will present a summary of the City's concerns related to safety, security and contingency planning, particularly emergency response planning.

12800. And finally, we'll have Mr. Elmer Rudolph who is the President of the Sapperton Fish and Game Club, which is a volunteer organization. And Mr. Rudolph's presentation will underline the significance of the identified environmental issues that Mr. Allen will be bringing up to the Brunette River watershed through the history of the river's loss of ecological values to destructive environmental -- industrial accidents over the last century and the efforts of the local volunteers to restore those habitat values.

12801. The City would like to acknowledge the efforts of Diamond Head Consulting and Zoetica Environmental Research Services in providing a lot of the data that was presented to the Panel in our written evidence. It's provided us a much more thorough -- indirectly, we weren't planning on it, but indirectly the process actually caused us to go and dig in deeper. And we have an incredible amount of work from our consultants helping us to identify those ecological values and the potential impacts on the City.

12802. And we also want to acknowledge the efforts of the Sapperton Fish and Game Club which, as I mentioned, has brought this watershed back from the brink of extinction, literally, to being a river that actually has spawning fish in there.

12803. So we're now going to pass it over to Mr. Allen who is going to present the ecological and socio-economic impacts of the river and items that the

City has concerns about.

12804. Mr. Allen.

12805. **MR. ALLEN:** Thanks, Mark.

12806. I'm going to try and summarize a lot of information in 10 minutes here, so we'll see how I do.

12807. So the lower Brunette River for part of its length acts as a natural boundary between New Westminster and the City of Coquitlam. Because of the relatively small size of this watercourse and the associated riparian area, development on either side of the river can potentially affect the ecological integrity of this system as a whole. Therefore, it is prudent for the City of New Westminster to comment on any development activity that occurs instream or within the adjacent riparian area.

12808. Based on the proposed pipeline alignment along the north and east sides of the Brunette River, the pipeline has the potential to impact directly, either through construction or indirectly through a spill, potentially, the land, water within the City of New Westminster. These include values at risk, including fish-bearing watercourses, city parks, greenways and residential, commercial and industrial zoned land.

12809. So for this presentation I'm going to just kind of summarize science-based evidence we presented in response to the written evidence statements from Trans Mountain in the Round 2 information requests.

12810. So the City of New Westminster has concerns that the current pipeline route does not minimize the potential for environmental and socio-economic effects. For starters, the alignment is in fairly close proximity to important waterways, those being the Fraser River, the Brunette River and several tributaries.

12811. Both the Brunette River and the Fraser River support commercial and recreationally important fish species. The Brunette River supports coho, chum, pink and Chinook salmon, in addition to steelhead, brook trout, cutthroat trout, steelhead and Dolly Varden.

12812. The Brunette River also supports numerous species of conservation

concern, some of which are listed as species at risk. For example, the Brunette River has one of only four populations of Nooksack Dace in Canada and that their population is the second most populace of the four.

12813. I believe there's an exhibit map that we've submitted in addition to that one. Okay. So here's the map of the Brunette and the colours essentially represent the different species of conservation concern within the waterway. So it's a relatively small river, but we think it punches well above its weight.

12814. So in recognition of the tremendous value of the Brunette River ecosystem, significant restoration efforts have been undertaken over the past 40 years to improve fish habitat in the Brunette and there have been significant improvements, which Elmer is going to refer to.

12815. The proposed pipeline within and adjacent to the riparian corridor of the Brunette River and its tributaries puts a lot of this work at risk due to the potential impacts of construction and operation.

12816. So recognizing the tremendous value of the Brunette, the City of Northwest -- of New Westminster is concerned that so little inventory work was completed as part of the assessment to investigate the potential environmental effects of the proposed pipeline.

12817. Specifically, the City of New Westminster would like to point out that no spill models or ecological risk assessments were conducted for the Brunette or its tributaries as part of the environmental assessment. The Brunette and its tributaries are low dilution systems. That means they're very narrow and they have low flow for most of the year.

12818. This means that in the event of a spill, there's a higher chance of reaching lethal concentrations compared to what would happen with a similar size spill in open water environments or larger watercourses such as the Fraser River which, incidentally, were the basis for the models that were completed for the environmental assessment.

12819. So really, a separate model for the Brunette must be completed to get a more accurate picture of the potential spill effects and impacts to fish populations to better evaluate risk.

12820. In addition, the ecological risk assessments that were completed as

part of the environmental assessment do not adequately consider turbidity and diluted bitumen, dilbit, and their potential effects on fish, fish populations and other organisms such as benthic invertebrates.

12821. Particular risk factors include turbidity and toxicity of spilled dilbit and the effects of residual dilbit when it binds to particles and sinks to the bottom of watercourses. The 2010 oil spill in the Kalamazoo River in Michigan provides some evidence of the potential effects of spills involving dilbit and how the substance can remain in these environments for months and even years afterwards.

12822. Ecological risk assessments used in the EA also do not fully consider the potential cumulative effects of environmental stressors when evaluating the toxicity of spilled oil. Examples of such stressors include poor water conditions, physiological changes to fish as they enter freshwater from saltwater. And so therefore it's very likely that the models that the EA used to estimate or -- sorry, estimate the potential effects of a spill on fish and water, aquatic organisms was underestimated.

12823. A range of maps also indicate that within the City of New Westminster there are potentially 114 species of conservation concern in the City, many of which would probably inhabit the Brunette River corridor, either the aquatic or the riparian environments.

12824. There is little evidence to suggest that sufficient information has been collected as part of the environmental assessment to properly assess the potential effects of the pipeline on species of conservation concern as they might relate to construction-related noise, habitat alteration or spills.

12825. There is also a history of industrial activity along the Brunette River corridor since the 1800s. Testing at some locations along this -- along the corridor has shown evidence of concentrations of residual contaminants, including heavy metals. No specific soil testing was completed within the proposed pipeline corridor. Pipeline construction could potentially disturb contaminants which can enter the environment and waterways and increase exposure to toxins. Some contaminants may also be corrosive.

12826. Monitoring methods proposed by Kinder Morgan, essentially having someone on site during construction to detect hydrocarbons, may be insufficient to detect some contaminants that cannot be seen or smelled.

12827. So I'm going to briefly summarize some key points of our evidence addressing the appropriateness of the general route and land requirements for the proposed project, including potential impacts for the project to landowners and land use.

12828. So the Brunette and the Fraser River are the primary green infrastructure in the City and have extremely high value as a public amenity, in addition to the fisheries and wildlife values that are present.

12829. Pipeline construction may limit the ability of New Westminster to meet local and regional land use planning objectives for residential park and trail development, as well as restoration and enhancement plans outlined in Metro Vancouver's Ecological Health Action Plan, Metro Vancouver being a partner with New Westminster for a lot of these initiatives.

12830. A major recreational greenway is planned for the Brunette River Corridor and the proposed pipeline is within 100 metres of the plan's Sapperton Green Development in New Westminster.

12831. This development will support high-rise towers, townhouses, office uses, in addition to a pedestrian crossing over the Brunette River, which will form part of the greenway.

12832. Of note for this EA, there was no property value analysis completed for residential homes located within 500 metres of the oil pipeline and there is no subsequent analysis of economic impacts resulting from potential spills.

12833. The current alignment of the proposed pipeline does not minimize risk to water bodies and fish habitat by maximizing distance from water. There has been no firm commitment from the proponent to locate the pipelines or staging areas outside of the 30-metre riparian zone of the Brunette River or to use trenchless construction methods for crossing watercourses.

12834. This indicates potential for loss of valuable riparian habitat within the Brunette corridor and subsequent ecological impacts to water quality, hydrology, microclimate and ecological connectivity.

12835. That is my 10 minutes, so thank you.

12836. **THE CHAIRMAN:** Sorry to interrupt you, Chief. So maybe we can stop the clock.

12837. Could I -- and as we've done with others, it's good to get questions out while it's fresh in my mind because you are going very fast. I understand why you're going fast, because you want to use the 40 minutes well.

12838. So I'm just trying to get in my mind with the Brunette -- the river and all the things you've just mentioned about and the risk of -- and the mitigations that are proposed for - where Trans Mountain are proposing.

12839. Is the alternatives that you've been proposing or would like to see within the corridor that's in the study area and the corridor that Trans Mountain have put forward?

12840. **MR. ALLEN:** So just to clarify, are the mitigation recommendations that we are putting forth within the riparian corridor of the Brunette?

12841. **THE CHAIRMAN:** That's right.

12842. **MR. ALLEN:** Right. Yes, they refer to this current alignment as it is proposed. However, we did notice that in the -- within the EA, there's only a broad corridor proposed for where the pipeline might actually occur. So within that corridor, there's really no indication of exactly where the pipeline will be. So if it's, say, 100-metre wide corridor, well, it could be really close to the Brunette River or it could be very far away. We're not exactly sure because I'm sure the design build hasn't gotten quite to that point.

12843. So really it's a concern at this point that we don't know exactly where that commitment for the actual alignment will be. So we've had to make some -- you know, some fairly robust recommendations to make sure we cover off the entire area.

12844. **THE CHAIRMAN:** And if I may follow up on that, if it's to protect the watershed and sensitivity and all the plans that the City and Metro Vancouver would like to do for that area, would that mean going -- if you had an alternative, would that go outside the corridor?

12845. **MR. ALLEN:** Yes, definitely. I mean, there was -- look at the initial proposal for the right-of-way corridor, which was through Coquitlam and was

kind of like the initial alignment and, as Mark was mentioning, this secondary more preferred line that came along later in the process. So yes, we'd probably wish we could take a closer, longer look at the new alignment as it's been suggested.

12846. **THE CHAIRMAN:** But probably there would be less risk with having it moved outside rather than mitigating the ---

12847. **MR. ALLEN:** Yeah, definitely.

12848. **THE CHAIRMAN:** But there still would be risks, especially different species at risk, as you mentioned, the Nooksack Dace as well. So they'd all still be in the area, but there would be less, depending on the assessment?

12849. **MR. ALLEN:** Yeah, well, perhaps Mark will take care of that.

12850. **MR. ALLISON:** It's an excellent question. There are risks with any alignment. The original alignment was set back quite a bit from the Brunette River, which of course would allow much more reaction time before any contaminants reached the river.

12851. **THE CHAIRMAN:** Thank you. Thank you for those clarifications, Mr. Allen.

12852. Chief, thank you.

12853. And we'll start the clock again so we don't eat into too much of your time. Thank you.

12854. **MR. ARMSTRONG:** Good afternoon, and I just want to take an opportunity to thank the Board to have this opportunity to speak today.

12855. My name is Tim Armstrong. I am the Fire Chief and Director of Emergency Management for the City of New Westminster. I'm also the President of the Metro Vancouver Fire Chiefs Association. So I'm also here talking on behalf of some of my colleagues within the Fire Service in Metro Vancouver.

12856. Some of the background, I bring 35 years of experience in emergency response and have been instrumental in developing a number of emergency response teams across Canada, in Calgary, in Manitoba, Toronto and as well as Halifax.

12857. These teams are multi-disciplined, multi-agency teams working under one command structure and are highly trained and respond to a broad range of emergencies. The key to their success is rapid ability to deploy in the event of an emergency and they offer multiple skillsets, and it's really all about relationships, working in the private industry with all levels of government.

12858. Today, I want to discuss the critical need to develop a successful emergency response plan. It is much more than preparing a large-scale document that may sit on a shelf for many years and never be utilized. It becomes outdated and obsolete. All is new, staff, new members and no real sense of team. Usually, as a result of an emergency, these members come together for the first time during the event.

12859. Agencies that don't train together on a regular basis are likely to fail in the event of a catastrophic event.

12860. After multiple requests to review Kinder Morgan's Burnaby tank farm and pipeline response plan, I finally received a heavily redacted version, and when questioned as to why the redactions, I was told for security reasons, these sections are redacted and would not be released.

12861. Having overall responsibility for public safety in the community and the authority having jurisdiction in New Westminster, I find this an unacceptable answer as we are named partners in their response plan without any consultation.

12862. We will likely be the first on scene. The fire service will establish overall command and develop an incident action plan. We will be responsible for life safety. We will be responsible for requiring additional mutual aid resources, fire and spill response, establishing safe perimeters, establishing decon corridors and overall responsibility for the incident action plan, as well as media response and community messaging.

12863. The emergency response plan supplied is more like an emergency remediation plan. It really is after the fact. When questioned what resources are available and what timeframe we could expect these resources to respond, we were told roughly 48 hours, as these resources would be coming from Alberta, mostly off-duty personnel on a voluntary basis.

12864. To us, this is unacceptable as the damage will already be done. The

spill and emergency response will be our responsibility initially.

12865. Again, we have great concerns about the lack of consultation regionally, lack of engagement as it relates to partners in emergency response. It was suggested to Kinder Morgan to reach out to the Fire Chiefs Association to create a close working relationship similar to the work being accomplished with the rail carriers, as it relates to HAZMAT response.

12866. Their attempt to reach out is to hold exercises periodically with select groups. They transit many communities and should be required to establish letters of agreement and emergency response plans in each community with the proper time and consultation, not just random cities to give an appearance of taking emergency response seriously.

12867. Having worked on the planning for the 2010 Winter Olympics which had high security risks, all partner agencies shared information and planned as well as trained together. Many relationships and synergies were established under that model, and I encourage a similar model to take place if this pipeline is to go forward.

12868. In closing, I want to bring your attention to an incident that I personally responded to with a 45-member team from Vancouver. We responded to Louisiana 24 hours after Hurricane Katrina devastated New Orleans. Our area of responsibility was for search and rescue in St. Bernard Parish. We operated primarily in a community named Chalmette, where Murphy Oil was located.

12869. The result of a damaged holding tank and a release caused 25,000 barrels of crude oil to flow into Chalmette, damaging 27 homes. We rescued people for days, walking through crude oil and responded to chemical burns while we were doing decontamination and medical treatment. The total settlement to date is 330 million dollars, paid for by Murphy Oil.

12870. Over a decade later, I stay in touch with the fire chief, and that community still has not recovered. The local fire and police services was left to deal with all the responses within the community, and there were no assistance from any outside agencies. Our team worked with the fire service and the police service for seven days before any outside response came to that community.

12871. Again, I just want to reemphasize the fact that there needs to be a collaboration process to work with emergency responders within this province to

develop a strong response plan if this pipeline is to go forward.

12872. Thanks for giving me this opportunity to voice my concerns and I'll turn it over to my next colleague.

12873. Thank you.

12874. **MR. RUDOLPH:** Good afternoon, everyone. My name is Elmer Rudolph. I'm the President of the Sapperton Fish and Game Club, which is located in the City of New Westminster.

12875. We have been the stewards of the Brunette River since 1969. The Brunette River, a small river, empties Burnaby Lake in the City of Burnaby, flows 6 kilometres to the east and empties into the Fraser River in New Westminster. For a small river it has a large watershed, touching the cities of Vancouver, Burnaby, Coquitlam, Port Moody and finally New Westminster.

12876. The reason we are here today is because the proposed Kinder Morgan pipeline route runs parallel to the Brunette River for 4 kilometres, and in some areas only 50 metres away. The history of the Brunette River over the last 100 years is like the ride of a rollercoaster, a way up, a way down and all points in between.

12877. At the top of the rollercoaster in 1900 the Brunette River was one of the best small rivers in the lower mainland for salmon. As a matter of fact, we can find stories from the local newspapers of that time describing the abundance of fish in the river. And not only just one species of salmon, but many, as was described earlier here. That was in around 1900.

12878. By the 1930s the Brunette River still had good numbers of salmon, but by the late 1940s the river was in trouble. Industrial pollution had severely crippled the salmon runs. And by 1955 the returning numbers had reached zero, documented as zero. That was the bottom of the rollercoaster.

12879. Nothing changed for 14 years, but in 1969 the Sapperton Fish and Game Club took it upon themselves to attempt to restore salmon to this river that was right in their backyards. And a river that they had remembered -- many of the members had remembered when they were kids, they swam in it, fished in it and played in it, and they wanted to restore it to some semblance of what they had remembered.

12880. But when we approached government agencies for help we got none at all. None of them, federal government, provincial government, local governments were not interested in trying to restore a so-called dead river. As a matter of fact, their experts all told us in chapter and verse that our efforts were misdirected and would be futile.

12881. Of course in 2016 those responses would have been entirely different, but this was 1969. Industries along the river back then were likewise not interested in helping, because it meant expense that no one in decades had caused -- forced them to incur. So we went it alone, doing what we could to clean it up.

12882. In the mid-1970s however, a sea change occurred. The Federal Department of Fisheries and Oceans became alarmed at the sharp decline in Coho salmon numbers in the Fraser River fishery and created the Salmonid Enhancement Program, known as SEP, to reverse this trend.

12883. They enlisted the help of local community groups who were interested, and of course, we were on top of the list because their efforts had been -- had created many newspaper stories over the years.

12884. The Department of Fisheries and Oceans brought with them the clout of the *Federal Fisheries Act* that banned the depositing of material harmful to salmon in salmon-bearing streams. Polluting industries along the Brunette were soon brought into line by this Act, and by the mid-1980s the Coho salmon were back in the Brunette River and have continued to return every year since.

12885. And we have added many -- several other species of salmon since then. As a matter of fact, in the years 2012 and 2013, we saw record numbers of three species of salmon return to all parts of the Brunette River watershed, at the bottom and the top, and in some areas, small streams that you could step across that people had not seen fish in for 50 years.

12886. Since 1999 the Sapperton Fish and Game Club, working with Metro Vancouver, and the provincial government, has seen approximately $1 million spent to improve the habitat areas in the river. We now have a valuable community resource and we are understandably very protective of it.

12887. We don’t want to lose it again, ever, which brings us to Kinder Morgan’s proposal to route their new pipeline right beside the Brunette River for

4 kilometres and with only -- within only 50 metres in some areas. During that 4-kilometre length it would cross four or five streams that flow directly into the Brunette. Any spill near those streams could be catastrophic for the river. Even if a spill did not enter the streams directly, it could seep into the ground and move a short distance into the river's aquifer, in some cases only 50 metres away.

12888. When we expressed concern to Kinder Morgan representatives, the only thing they offered was thicker pipe, nothing else whatsoever. No special precautions for a highly sensitive environmental area. Now that's a response we may have expected in 1969, but not in 2016. That was very disconcerting to us.

12889. Given the recent pipeline spill near Fort McMurray in Alberta supposedly using state-of-the-art construction techniques and warning systems, and the failure of that system to report that five-million litre spill for several days, you can understand our very real concern about the Brunette River's integrity and its safety.

12890. That spill in Alberta really rang alarm bells for us. Our community knows what it is to lose a river. And the work, it took hundreds of people spending thousands of hours to bring it back, and we don't want that to happen again to the Brunette.

12891. In conclusion, our Brunette River has been transformed from a very sorry state into a very valuable community asset, and we are all very concerned for its future well-being.

12892. Thank you.

12893. **MR. ALLEN:** Thanks, Elmer.

12894. I'd like to complete our presentation by reviewing some of our comments on the draft conditions and summarize the key points that we would like the Panel to take away.

12895. So on the draft conditions that were presented, as Chief Armstrong has indicated, the local emergency response organizations have not had access to the full information available, to allow them to determine if the emergency response plan is adequate and meets the needs of protecting the city and its residents.

12896. And what is expected is the full plan would be developed and signed

off with local emergency responders, and not reviewed as the conditions currently state, primarily through an independent third party.

12897. Key plans, including the risk management plans, environmental protection plans and riparian management plans, and as we've heard from our environmental experts and our stream keepers, the riparian area runs along roughly 4 kilometres in a very, very sensitive watershed, these only need to be provided to the National Energy Board between two months and three months or 60 days and 90 days before the start of construction of operation. So it's not a very long time, but also there's no external review of those plans, which causes us considerable concern.

12898. Similarly, as we heard from James, there's vital wildlife species at risk in the watershed. And similarly, the wildlife species at risk mitigation and habitat restoration plan would only need to be presented to the National Energy Board for review just four months before construction.

12899. So the conditions do not state the manner in which local governments or agencies, including our fire and rescue service or agencies such as Metro Vancouver Parks, which has been involved in the restoration work, how they would be involved in the development or the review of these plans. It simply states that the plans must be submitted with a summary of consultation with appropriate government authorities. So that doesn't give us a lot of confidence that there will be this absolutely critical local involvement in the development and review of those plans.

12900. What we'd recommend as a result is that the plans demonstrate how they were developed jointly with meaningful input from local governments, how the plans for local governments have been reviewed and comments had been filed with the NEB for review, and finally that the requirement for development, review and approval should be completed no less than one year before the start of construction.

12901. So to quickly summarize our key points that we'd like you to take away, point one is we do not feel that the Proponent has provided adequate rationale for having moved the original selected route closer into this highly sensitive riparian zone, other than potentially ease of construction or cost savings. So we have not had a response to our question on that.

12902. The construction activities, as has been outlined, is in an area that has

unfortunately -- we're all involved in this -- has been subject to significant industrial contamination, and there's a serious risk of those contaminants, which are quite widespread within this established industrial area, spreading into other areas that have been remediated in recent years. So we have great concerns about how that construction will happen. Currently the staging area is shown right in the riparian area.

12903. The river contains a number of species at risk, including the Nooksack Dace, which is only found in several other ecosystems, and this is the second-most predominant in the world. So we must demonstrate, given that we have a species at risk, that this alignment is the only one that is feasible.

12904. Our local fire and rescue services have not been provided the information that they need to determine if they can protect the city in the case of a serious incident. In what we have seen so far, the incident response can take, as we saw in English Bay, 12 hours, in New Orleans they have taken a week, and Alberta has taken several days before the response happened. So it very much becomes a remediation plan as opposed to a prevention plan and response plan. We think that it should be more than that.

12905. So we believe that the conditions should require that detailed plans and resources be allocated to all these plans and that our local agencies all have an adequate input to those plans and a degree of sign-off so that they can assure themselves that there an ability to protect those ecological environmental values and also respond in an appropriate manner during a time of an emergency.

12906. Now, the process -- in conclusion, the process has been difficult for us. We are a smaller municipality and we do have relatively limited resources, and we've greatly ---

12907. **THE CHAIRMAN:** Just a check that you have five minutes, Mr. Allen.

12908. **MR. ALLEN:** We greatly appreciate the efforts above and beyond the call of duty of our consulting folks and our stream keepers, but it's been very difficult to go through the material, 15,000 pages originally. And I've had the good fortune to be one of 400-odd intervenors looking at thousands and thousands of emails, trying to look at them when I can and decipher when there's stuff that's of interest to us.

12909. For example, it wasn't until several months later a colleague in Burnaby said "You know that they've changed the route next to the Brunette River". No, I didn't really know that.

12910. There's also been relatively short times to respond. In that case we did ask for a process to be put on hold until full information on the actual recommended pipeline was put in place, and due to the time limits placed on this Panel by the federal government there wasn't time -- we were told there wasn't time to stop the clock. And that, we think, has led to difficulty in responding in a timely manner, particularly with smaller municipalities that do not have the resources of larger agencies.

12911. Nevertheless, in spite of these challenges, we have been able to identify some critical issues that we don't think have adequate response from the Proponent. And we request respectfully that the Panel consider these issues that we've presented before deciding if and under what circumstances this proposal should be approved.

12912. Thank you.

12913. **THE CHAIRMAN:** Thank you.

12914. Perhaps my question for clarification is from Chief Armstrong perhaps, or whoever feels they can answer. And we've had a lot of evidence on emergency response plans, involvement of municipalities and through all -- what's available and what's not available and what we should do going forward if we were to recommend approval of the pipeline.

12915. And I agree with you, Chief, that coordination, and involvement and relationships are the key to if it's going to work and the involvement of those.

12916. Have you -- the fact is that the pipeline is going through a number of municipalities in the lower mainland, and have you and your colleagues in other municipalities given a thought of how that would be coordinated so that you could have a coordinated approach to responding to what Kinder Morgan may propose that we -- if it was accepted we recommend and if government approve it, how we would condition that and how we would review that to ensure that it would meet what those coordinated services would want? Have you ever -- have you given some thought amongst the municipalities in the lower mainland on that approach?

12917. **MR. ARMSTRONG:** Yes, we have a number of initiatives going right now, a regional hazmat consultation group within the Fire Chiefs Association to look at mutual aid response to other municipalities for a hazmat incident.

12918. We've been working diligently, again by putting pressure on the rail companies for moving dangerous goods through our communities, and we've got a lot of cooperation and a lot of forward movement especially in the last year with the rail companies as a result of Lac-Mégantic.

12919. And so we don't want to have a Lac-Mégantic here in B.C. I think we've got enough expertise in the province as far as with our resources to sit down at the table and come up with a response model that works. And that doesn't mean, you know, off-duty firefighters coming in and kind of responding ad hoc as a remediation contractor.

12920. And that might sound heavy-handed but that's what we find end up at a lot of our rail hazmat emergencies and that because what they tell us is their contractors for hire turn out to be less than that.

12921. And one of the things, we've reached out to the rail companies to say is we want to sit down with your contractors and actually train with your contractors and find out what their capabilities are so that when we do have an event we already have those relationships established and that we have some prior training and we understand our -- who's in command and how that command structure is going to work.

12922. I don't know if that answers your question.

12923. **THE CHAIRMAN:** Yeah, that's helpful, because to understand the depth and breadth of an incident that none of us want that that is coordinated and those -- when that happens is important that it happen earlier rather than later. That's what the evidence that we're hearing from a number of municipalities on that. And that coordinated approach is the only way to go.

12924. Great, thank you very much, and thank you for your presentation on behalf of the City of New Westminster. And we will be considering it along with all the other evidence that we have on the file.

12925. So with that we're adjourned until 9:00 a.m. tomorrow morning. And

we will hear first from the Katzie First Nation at 9:00 a.m.

12926. Thank you.

--- Upon adjourning at 4:22 p.m./L'audience est ajournée à 16h22