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 28

Hearing held at
L'audience tenue à

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

January 21, 2016
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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, Thursday, January 21, 2016
Audience tenue à Burnaby (Colombie-Britannique), jeudi, le 21 janvier 2016

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

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

APPEARANCES/COMPARUTIONS

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

Intervenors/Intervenants
Squamish Nation
- Mr. Aaron Bruce
- Ms. Michelle Bradley
- Chief Ian Campbell
- Chief Bill Williams

Elizabeth May
- Ms. Elizabeth May

Stó:lō Collective
- Chief David Jimmie
- Ms. Jean Teillet
- Ms. Keri Ardell
- Councillor Sandy McDonald
- Ms. Carrie Oloriz
- Ms. Shana Roberts
- Mr. Murray Sam
- Chief Tina Sam
- Mr. Ernie Victor

City of Port Moody
- Mr. James Yardley
- Mr. Kevin Ramsay
- Ms. Margot Davis

BC Nature and Nature Canada
- Mr. Chris Tollefson
- Mr. Anthony Ho

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

13706. **THE CHAIRMAN:** Good morning and welcome to this morning's session in Burnaby, which is part of the National Energy Board's hearing regarding Trans Mountain Expansion Project.

13707. We will continue to hear intervenor oral summary argument. We acknowledge today being on the traditional land of the Coast Salish people.

13708. My name is David Hamilton. I am the Chair of the Panel and with me to my left is Ms. Alison Scott and, to my right, Mr. Phil Davies. And together, we are the Panel assessing the Trans Mountain Expansion Project application.

13709. To start with, I would just like to take a brief moment to review some housekeeping items. In the event that we hear the hotel fire alarm, the procedure will be to exit the hearing room using the entrance that you came in. Once you are outside the hearing room, there are two evacuation routes. The first is directly to your left when you exit the hearing room doors, and the second is located beside the registration desk where some of you received your lanyard.

13710. Uniformed security guards will be in both locations to facilitate your exit. Please follow their instructions. Once outside the building, proceed to the hotel muster point located on the northwest corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure all members of your party are accounted for and await further instructions from the Delta Burnaby representatives.

13711. As indicated in Procedural Direction No. 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.

13712. There is a timer that will indicate a green light for the first 35 minutes, switching to a yellow for the last five minutes of your speaking time. Finally, when your time is up, a red light will come on and if necessary the microphones will be switched off, although I will warn you before this happens.

13713. Final argument as a whole is an opportunity to express your views and opinions about the project based on the evidence filed by Trans Mountain and

intervenors on the hearing record. It is also an opportunity to make recommendations to the Board about matters within the list of issues or any other terms and conditions to which the project should be subject if it is approved.

13714. 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.

13715. With that, I think we are ready to get underway this morning, and we will hear from, first, the Squamish Nation, then Ms. Elizabeth May and, before lunch, the Stó:lō Collective.

13716. And before we begin, I would ask for the record if Trans Mountain would introduce themselves to our presenters this morning.

13717. **MS. OLENIUK:** Good morning. My name is Terri-Lee Oleniuk and I am legal counsel to Trans Mountain.

13718. To my left is Lesley Matthews and she is the regulatory lead for the project.

13719. **THE CHAIRMAN:** Thank you, Ms. Oleniuk.

13720. And I will ask before we begin if there are any preliminary matters from anybody this morning?

--- (No response/Aucune réponse)

13721. **THE CHAIRMAN:** I see none.

13722. So welcome to the Squamish Nation this morning and we have read all the evidence and your written argument-in-chief. So we now afford you the 40 minutes to present your oral summary argument.

13723. Mr. Bruce.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE SQUAMISH NATION:

13724. **MR. BRUCE:** (Speaking in native language). My Squamish name is Kelts'-tkinem. My English name is Aaron Bruce and I'm legal counsel for the Squamish Nation.

13725. To my left is legal counsel, Michelle Bradley. To my immediate right is Xálek'/Sekyú Siyám, Chief Ian Campbell. And to the other side of him is Telàsemkin-siyam, Chief Bill Williams.

13726. Per Squamish protocol, I would like to call up Xálek'/Sekyú Siyám to say a few words.

13727. **CHIEF CAMPBELL:** (Speaking in native language).

13728. I just want to say good morning. Thank you very much to my legal counsel for their presentations today. Just welcoming you to the shared territories of our Squamish Musqueam Tsleil-Waututh, asking the Creator to bring light upon our lands and our waters, the spirit that sustains us all, all life on earth. Really thinking of the teachings of our old timers, the good advice that's been handed down to us from our ancestors of our responsibilities toward the stewardship of our lands and resources; that this is unceded territories of the Squamish Musqueam Tsleil-Waututh. And I ask you to have that open mind, that good feeling in your heart as we begin our day.

13729. See the cedar boughs next to you are an important medicine to our people to have that purity of thought and heart. So thanking all the witnesses that are here for their good work as well and finding solutions to this very complex matter.

13730. (Speaking in native language).

13731. **MR. BRUCE:** We do have one matter we'd like to bring up before we get started today, and I mean this will all due respect.

13732. The Squamish Nation is very disappointed to not have had the opportunity to have its Chiefs and Council and community members attend this session today. This is a historic event for the Squamish Nation. This is supposed to be a public process. Squamish people need to witness this work today. It is part of our culture. It is part of who we are.

13733. So we are very disappointed to not have this protocol respected, but

we do welcome the opportunity to make our presentations today.

13734. So our roadmap today is that I am going to talk a little bit about the Squamish Nation and its interests, the role of the National Energy Board in the consultation process. The National Energy Board process needs to be restructured in order to address Aboriginal interests. And finally, we will talk about the duty to consult has not been discharged.

13735. The first thing you need to understand is that the Squamish people have lived in what you call the project area for thousands of years. As our dear Elder Paitsmauk so eloquently put it in the oral evidence portion of the hearing, we look at the maps, we show the territories of the Squamish. I don't like to use the word "territory". I say, that is our home. That is our home.

13736. The land will never go away. Our Squamish people will never go away. So we've got to be careful what we do today.

13737. Just one thing that I always think about, I think about the love at our homelands. So the love for that, it's like the wind, it's still with us, it will never go away. It's our home.

13738. The Squamish Nation has used and occupied the Burrard Inlet area and Lower Howe Sound since time immemorial. All components of this project are proposed within Squamish territory -- the pipeline, the facility and the shipping routes.

13739. Today, there are three reserves situated in Burrard Inlet. These are former village sites and are located at the mouth of the Capilano River, mouth of the Seymour River, and the mouth of Mosquito Creek. The majority of Squamish Nation members live on these three reserves.

13740. Much information has already been presented to the Board about Squamish use and occupation of the project area. I will not rehash all of that rich history and continued use, but will discuss some important points for the Board to hear today.

13741. I could go on at length about place names, village sites, fishing areas, hunting areas, access to resources, which are all Squamish values that will be impacted on by this project proceeding. You can read about these in our evidence and written argument.

13742. On a straight western science level, you may understand what those values are, but I want to draw your attention to some things you probably do not know, and that you will not fully understand because you are not Squamish.

13743. The interconnection of Squamish culture and the lands and waters within our territory -- from a Squamish worldview, you cannot separate cultural and spiritual values from the lands and waters. From the Squamish perspective, you can't just count the number of fish in an area and call that value -- and call that a value to be assessed and determine whether the impact is adverse or not by the number of fish that may be killed by the project.

13744. The value for Squamish is the historical link to the past, the transmission of culture and language, the spiritual aspect of being part of that land and resource. These are just some of the Squamish values that will be impacted on if the project kills some fish. You can get a flavour of this by reading the Traditional Use and Occupancy Report and oral evidence transcripts but you cannot get a real understanding of it. Only Squamish can truly understand it, but we want to have that conversation with the Crown and industry to try and come to an understanding so that we can protect these values in the best way possible. It's our sacred duty as Squamish to protect these values for future generations.

13745. The rivers and creeks within Squamish territory have been and continue to be important sites for spiritual training and bathing. The bathing practice is also related to the longhouse, which is a focal point of Squamish culture. The bathing practices are more than a ritualistic cleansing; they also serve as a means to reawaken the person to the past in the same way that practices in the longhouse itself wake up a person to their past.

13746. At the oral evidence hearing, Paitsmauk again related taking a spiritual bath in the cold creek to the spirit dancing he does in the longhouse:

> *"To get that cold, cold water, what is the first thing you do? You holler. You scream 'cold'.*
>
> *You see, I am a mask dancer. I have a mask; I dance. I go back. I holler. I wake it up. I wake up what was given to me a long time ago. It's here. And I only understand it as being S wx wú7mesh."*

13747. The longhouse is the hub of Squamish culture, religion, beliefs, and practices. There are currently two longhouses located in Squamish territory. One at xwmelch'stn, which is the Capilano Reserve, and the other one at ch'ich'elxwi7kw, the Seymour Reserve, but there was historically a number throughout Squamish territory. I personally remember one being right at the mouth of Mosquito Creek in my lifetime. It's not there right now, but there has been more in our territory.

13748. Paitsmauk shared the oral evidence here -- at the oral evidence hearing:

> *"I sit there some nights watching the work go on and sit there until 2:00, 3:00, 4:00 in the morning and I think our people have done this for thousands of years. What's happening outside those doors doesn't matter; we're still here."*

13749. This is a profound statement. How many people in the Lower Mainland of Vancouver know that these longhouses are right in the middle of this big metropolis; that Squamish cultural and spiritual practices are happening right outside their door? As mentioned earlier, Squamish people do not separate cultural and spiritual values from the lands, waters, resources around them. Squamish people are not assimilated.

13750. The resources needed to support the longhouse tradition are drawn from the waters and lands in and around Burrard Inlet. The masks are made from local cedar; feathers harvested from local waterfowl are used to welcome the new spirit dancers in the longhouse, and the food used for ceremonial and sustenance purposes is harvested from the territory, such as salmon from the Capilano and Seymour Rivers. Continued access to these resources is integral to the longhouse tradition enduring.

13751. As with the institution of the longhouse, the importance of Squamish territory must be viewed within the larger context of Squamish culture and society. Specific acts that take place on the lands and waters within Squamish territory represent more than just individual, discrete events. Activities such as fishing or seafood gathering are active expressions of Squamish culture.

13752. The connection between territory and culture is an essential component of Squamish identity. Harvesting in the same places as Squamish ancestors and relatives allows for the transmission of site-specific Squamish

teachings and history. Being on and learning from Squamish territory expresses and reinvigorates Squamish identity. Squamish remain critically concerned that the project will interrupt their cultural practices and impact sites of cultural significance.

13753. Squamish is actively engaged in rehabilitating the marine and terrestrial environments in both Howe Sound and Burrard Inlet -- two places that are within the project area -- in an attempt to counteract the effects of industrialization. Squamish actively strive to ensure that the resources within its territory will be available for future generations.

13754. Squamish remains critically concerned that the imposition of the project in Burrard Inlet and Howe Sound will permanently undermine the revitalization efforts, and will result in Squamish no longer being able to meaningfully practice their Aboriginal rights in areas in which they have traditionally done so.

13755. These efforts are more than just maintaining a level of fish and mammals in an area. It is maintaining the connection between cultural and spiritual values with these lands, waters, and resources. It is preserving Squamish identity.

13756. Squamish Nation continues to govern its people under its customs. Our council is made up of 16 councillors. This is reflective of the 16 hereditary chiefs that amalgamated the respective lands and resources in 1923 to become one strong nation. This was in response to the colonial government's siege on Squamish lands and waters.

13757. The Squamish Nation operates on a government-to-government level with the provincial and federal Crown. It has entered into many government-to-government agreements concerning lands and resources. Additionally, it is in the B.C. treaty process to discuss a government-to-government-to-government relationship with Canada and British Columbia. It also manages its reserve lands under bylaws that only it can enforce.

13758. The Squamish Nation has also entered into protocol agreements on government-to-government level with other Coast Salish Nations on both sides of the Canada/U.S. Border. By all accounts, the Squamish Nation is a government that has unique interests in the lands and waters in its territory. Based on its governmental status and unique interests, it cannot be viewed as just another

stakeholder in a review process. From Squamish's perspective, Squamish consent is required before a decision is made by the Crown on a project.

13759. So you now have a better understanding that the Squamish Nation has unique interests that cannot be understood by just reading a report or exchanging information. So how do we get to an understanding of what those interests are, the importance of those interests, and the potential impacts of the project on those interests? It's not by trading written reports and letters; it's by rolling up your sleeves and having discussions to resolve these difficult issues.

13760. The courts have determined that the Crown has a constitutional duty to have those difficult discussions and work toward solutions, to reconcile the competing interests of the Crown and First Nations. Meaningful discussions to get to meaningful solutions. Unfortunately, that has not happened on this project.

13761. I am now going to walk you through the National Energy Board's role in the duty to consult and how the Crown has not discharged its duty to consult with the Squamish Nation.

13762. Under section 52 of the *National Energy Board Act*, the Board issues a Certificate of Public Convenience and considers a number of factors to consider in making that decision, including whether the project is in the public interest. The Board, for this project, has a set -- has set a list of issues that are relevant to the public interest, including whether the project will potentially impact on Aboriginal interests.

13763. The Board then makes a recommendation to the Governor in Council with conditions. The Governor in Council then makes a decision but has no power to amend the conditions. That's a really important point that you need to remember, and I'm going to get to that a little bit later.

13764. The Board must ensure that the review is in accordance with the Constitution, including constitutional obligations to the Squamish under section 35. The Crown must consult with Squamish to protect and respect their asserted Aboriginal rights and title and other interests, which are recognized and affirmed under section 35, prior to any decision being made on this project.

13765. The fundamental purpose of the duty to consult is the reconciliation of Aboriginal peoples and Non-Aboriginal peoples and their respective claims, interests and ambitions. In consultation, the Crown must act honourably, meaning

it cannot run roughshod over Aboriginal interests. It must act in good faith with the intention of substantially addressing Aboriginal concerns through meaningful consultation. Go beyond mere information exchange, which may require the Crown to make changes to its proposed action based on information obtained through a consultation. Must occur early at the planning stages, not after a decision has been made.

13766. The Crown has recognized that the duty to consult Squamish on this project is at the high end of the consultation spectrum. This is an acknowledgment that Squamish has a strong claim to the area of the project and that the project has the potential for serious adverse impacts on Squamish's rights and title interest. This means that the Crown is required to engage in extensive discussions with the intention of substantially addressing Squamish concerns.

13767. To the extent possible, the Crown wants to discharge its duty through the National Energy Board process. The duty to consult is a constitutional obligation invoking the honour of the Crown. It cannot be relegated to an afterthought in the review process and must be met before the project gains momentum.

13768. The constitutional nature of the duty to consult gives rise to a special public interest that must be satisfied and cannot be overridden by Trans Mountain's economic interest. The National Energy Board has the jurisdiction to decide constitutional issues and must determine whether consultation has been discharged before recommending whether the project is in the public interest.

13769. The recommendation of the Board is a strategic higher level decision for the project. The Board will be recommending conditions. As Squamish is being consulted at the high end of the spectrum, the Crown must accommodate Squamish by substantially addressing Squamish's concerns.

13770. One way to do this under the National Energy Board process is through the establishment of conditions. The Crown has determined that it will not complete consultation prior to the National Energy Board making its recommendation to the Governor in Council. The Governor in Council does not have the power to amend the recommended conditions. Therefore, consultation that occurs after the Board makes its recommendations cannot meaningfully address Squamish Nation's concerns with the project through conditions. Essentially, this is consultation without the prospect of accommodation.

13771. To the extent possible, the Crown is relying on the National Energy Board process and Squamish has big concerns with that. So why are we here today? Why am I standing here making this argument? None of us should be here.

13772. The public has lost confidence in the National Energy Board process. Amendments to the *National Energy Board Act* and the *Canadian Environmental Assessment Act* in 2012 included the removal of the joint review panel and the imposition of legislative timelines for the review and it stripped the NEB of all credibility.

13773. Recently, the federal government has publicly stated that the NEB process needs to be reformed to address First Nations concerns. It needs to partner with Indigenous peoples to reassure Canadians that science and environmental impacts and risks are properly monitored to be in the best interests of all Canadians.

13774. It is also stated that the National Energy Board process needs to be modernized to include expertise in the fields such as Indigenous traditional knowledge. For this process, I do not see anyone on this Board that has this expertise in traditional knowledge. The composition of the Board has to change to address this. That's how we can get to a better standing -- better understanding of the values I spoke of earlier.

13775. Also, in its argument filed with the National Energy Board for this project, the Crown as represented by Natural Resources Canada confirmed that the federal government's commitment to renew its relationship with Indigenous peoples. It also explained that there are still outstanding consultation issues that need to be addressed in this consultation process.

13776. Natural Resources Canada states in its evidence that in December -- in the December 4th, 2015 speech from the throne and recent ministerial mandate letters the government has indicated a commitment to immediately review environmental assessment processes to restore public confidence and to renew the government's relationship with Indigenous peoples. The Minister of Natural Resources has also indicated that an interim strategy for projects currently under review will be announced shortly.

13777. Clearly, the Crown recognizes that the current process is deficient to address First Nation concerns. We shouldn't be here today. The federal

government does not have confidence in its own process and has not yet addressed these deficiencies. How can decisions be made to recommend that a project is in the public interest when all we know -- when all -- we all know that the process does not address these structural issues? The deficiencies in this process are evident and the promissory forms have not happened.

13778. Why should Squamish continue to expend valuable resources to participate in a process that is recognized as not capable of addressing its interests and had no input in developing?

13779. The federal government must live up to its promise of reforming the process to be consistent with a government to government relationship based on recognition of rights before the Board makes its recommendations.

13780. In order for the federal government to meet its commitments to partner with First Nations, the Squamish Nation needs to be engaged on a government to government basis at the outset of the review process to ensure that the process is designed in a manner that is able to address Squamish's unique interests and constitutionally protected rights.

13781. There are clear differences in how Squamish manages its lands and waters and how the Crown and Proponents manage resources. These differences need to be recognized in the structure of the review process. The current National Energy Board process is flawed in terms of addressing Squamish's unique interests and rights. This flawed approach is evident in the review of this project.

13782. I'm not sure if you have a copy of our argument but I'd like you to turn to page 35. I want to go through some of the issues that Squamish Nation has had with the current process.

13783. The process has been Proponent driven. Trans Mountain unilaterally determined the location of the project without consultation with Squamish or consideration of Squamish land management objectives or areas of unique cultural value that the project may put at risk. Consultation on project siting must occur at the outset in order to meaningfully accommodate Squamish concerns.

13784. The process is adversarial. The review process is inherently adversarial and counterintuitive to the intended ethos of consultation and the relationship between the Crown and First Nations.

13785. The process failed to consider cultural value. The focus of the review process has been overly narrow and failed to provide an assessment of cultural value. Squamish does not separate culture from nature. These two concepts are intrinsically linked for Squamish people.

13786. Trans Mountain failed to provide an assessment of the impacts of the project on Squamish rights, practices and culture, and instead provided a generic assessment for all First Nations to be impacted on by the project, and broadly concluded without any evidentiary basis that the impacts to traditional use could be mitigated using generic measures, focussed solely on biophysical components ignoring cultural values. We get back to what I talked about earlier about the fish. Squamish sees it differently. This is not sufficient and has resulted in an assessment that has not accounted for the impacts of the project to Squamish.

13787. The process failed to consider other -- consider impacts to Aboriginal rights and title. The review process did not engage in any way with the specific impacts to Aboriginal rights and title of Squamish.

13788. Trans Mountain did not provide an assessment of how the project would impact on Squamish use of their territory. It is not sufficient to assume that Squamish can just use other locations within its territory to harvest resources. Squamish practices are location specific and dependent on access to certain parts of the territory.

13789. Information sharing for the project was restricted by Trans Mountain's failure to provide complete information and by the National Energy Board's failure to demand that Trans Mountain provided complete information or allow cross-examination.

13790. Trans Mountain unilaterally developed its application without engagement with Squamish and refused to provide Squamish with complete responses to information requests made throughout the review process. The National Energy Board in turn refused to demand that Trans Mountain clarify its responses to Squamish.

13791. The legislated timelines restricted participation by Squamish. Throughout the review process for the project, Squamish participation was restricted by the timelines for reviewing large volumes of material filed by Trans Mountain. Squamish was not able to engage in any substantive dialogue about the project to be able to assess the impacts of the project and begin to develop

Squamish specific mitigation measures. As a result, the mitigation measures that were proposed by Trans Mountain were generic and in no way address Squamish's specific concerns.

13792. Capacity funding is also related to that. Squamish had put in a budget of 293,000 or so and received $40,000 to do all of this work.

13793. There is no shared decision making for the project. Not only did the review process for the project exclude Squamish from fully participating in the process, but the current process does not provide Squamish with the opportunity to make any decisions about the project regarding potential impacts to their rights and title interest.

13794. The review process for the project must not continue until the National Energy Board process is restructured in order to be able to meaningfully consider and address the interests of the Squamish Nation.

13795. The recognition by the federal government that the process is deficient in this respect is a recognition that the current process cannot assist in any way in discharging the constitutional duty to consult the Squamish Nation, or provide an accurate assessment of Squamish interests to be impacted by the project. These are factors that are integral to the National Energy Board's public interest determination. Without meaningfully considering these factors, the National Energy Board must not make a recommendation whether the project is in the public interest. The duty to consult and accommodate has not been discharged.

13796. I'd like you to turn to page 39 in the argument, if you could. So the Crown admits that a consultation to date has not been adequate. If you look on page 39, it lays out the phase approach. So you can see the first two phases, the initial engagement and the National Energy Board hearings are where we're at today. We're moving on to the post-NEB hearings after we submit our arguments today and then there's the regulatory permitting.

13797. The first two phases include the initial filing of the project description and the National Energy Board process. Natural Resources Canada proposes two phases of consultation after the National Energy process from the close of the hearing record to a Governor in Council decision on the project from the -- and from the Governor in Council decision on the project to issuance of departmental regulatory approvals.

13798. The Crown has stated that Phase III consultation will include meeting with First Nations to address outstanding concerns, and to consider proposals for accommodation. The Crown has acknowledged that consultation after the NEB process has closed is needed to understand and address impacts of the project to First Nations.

13799. Natural Resources Canada in its written argument before the Board lists the outstanding issues related to the project that have not been addressed in the National Energy Board process. This is an acknowledgement that consultation to date has not been adequate.

13800. The Crown has not met with Squamish during the National Energy Board process to substantively discuss the scope of aboriginal rights and potential impacts of the project on Squamish aboriginal rights, and only proposes to do so after the NEB hearing record is closed. This is wholly inadequate to discharge the duty owed to the Squamish Nation.

13801. Any consultation that occurs after the hearing record closes severely limits the potential accommodation available to Squamish and cannot be meaningful.

13802. The scope and nature of rights and title have not been determined yet. Ascertaining the scope and nature of the Aboriginal rights that stand to be affected by the contemplated Crown conduct is an essential first step in discharging the duty to consult. To understand the full scope of the Aboriginal rights, the Crown must consider the perspective of the First Nation.

13803. This step was never taken in the course of the Board's hearing. No meaningful steps were ever taken to understand Squamish's rights, and no adequate opportunity was given to Squamish to do so.

13804. This is really the end of the story; there's nothing to be assessed yet. There is no way that the Crown can make determinations on what the impacts are as they don't know what the interests are yet.

13805. The NEB process is deficient and didn't allow for consultation with Squamish, and the Crown did not determine what the scope and nature of Squamish's Aboriginal rights are that will be impacted on by the project.

13806. So we see that the consultation process is only just the beginning -- is

only just beginning. The Crown is not close to discharging its duty to consult. However, the issue with post-hearing consultation is that it is meaningless. There is no opportunity for the Governor in Council to unilaterally change the recommended conditions of project approval at this stage. It is consultation without the prospect of accommodation. It is just another phase to allow a First Nation to blow off steam.

13807. I'd like to move on now to a question I think you want to know the answer to. Why should the National Energy Board decide on consultation? The decision or recommendation you are making will set the conditions for the project on which the Governor in Council will base its decision. The conditions are a key way to accommodate impacts on Squamish.

13808. Before setting the conditions, the Board must ensure that the Squamish has been consulted and the constitutional obligations owed to Squamish are discharged. Any consultation by the Crown after the Board's recommendation cannot be meaningful as it will be too late to have an input on those conditions.

13809. The Board must decide whether consultation has been sufficient on the record before -- before then. Any proposed process afterwards that may or may not happen is not relevant to the Board's decision here.

13810. On the record before the Board it is clear that consultation has not been adequate, and there has been -- and there has been no accommodation of Squamish. The Crown's mitigation measures are generic measures developed by Trans Mountain.

13811. We haven't discussed any specific impacts because we can't, but there are some obvious issues with this project. Trans Mountain has minimized the significance of the potential risks and impacts of the project. Trans Mountain in its risk assessment focuses on the likelihood of accidents and malfunctions saying that the chance of occurrence is very low, instead of the consequences of those accidents and malfunctions to Squamish people, lands and waters.

13812. A spill of diluted bitumen in Squamish territory has the potential to have very severe long-term impacts on Squamish's way of life, and these impacts must be considered in the project review.

13813. Trans Mountain also has not shown that there is a spill response capability to adequately respond to spills of diluted bitumen. This is particularly

so given the ability of diluted bitumen to sink or become submerged in an aquatic environment.

13814. Before I make Squamish's recommendations on the project, I would like to finish with one last thought from our dear Elder Paitsmauk. Paitsmauk spoke of how conservation is the foundation of Squamish culture that is ensued -- that is ensured access to resources in Squamish territory for generations to come.

13815. So I'm reading a quote from the oral evidence hearings.

> *"Our traditions and values that we've been taught are with us, they're still with us today. Our families and others, we always talk about, you know, well, they say, 'Well, gee, that's nice of you to bring one or two sacks of clams to help them for [...] work, some salmon, some ducks [and] deer meat'. But they always talk about, is there still a lot of deer left, is there a lot of fish left, the clams. Make sure you leave enough for the next peoples to come along. Don't take it all. So we just said, 'Ah' -- to the people, we shake our head, 'Ah, we're listening; we're listening.' But then when they destroyed the clam beds in front of our village, no one was listening."*

13816. Those clam beds are gone forever. A part of Squamish culture and identity was lost.

13817. What Squamish has said in its submissions today is that you have not been listening. You actually have not provided an opportunity for us to talk about our home and our sacred connection to the lands, waters and other resources in our home.

13818. The current Trans Mountain project was built in a time when there was no legal duty for the Crown to talk to -- to talk to us and address our concerns. Nobody was listening back then. Today, there's a constitutional obligation; this obligation is not being met. You have an opportunity to right the wrongs of the past by listening to us.

13819. The Squamish Nation cannot condone a project that poses such a significant threat to Squamish's way of life. The Squamish Nation does not consent to the project going through Squamish territory and request that the National Energy Board recommend that the Certificate for the project not be

issued, as the project is not in the public interest. It's definitely not in the Squamish Nation's interest.

13820. And those are our submissions today. Thank you.

13821. **THE CHAIRMAN:** Thank you, Mr. Bruce. And also before -- we're going to take a short break so the Panel consider your submissions and in relation if we have any questions that we may wish to ask. But I'd like to acknowledge Chief Campbell for your blessing at the beginning as well.

13822. So we'll take a -- till 5 to 10:00 to -- and we'll come back with any questions.

13823. Thank you.

--- Upon recessing at 9:39 a.m./L'audience est suspendue à 09h39
--- Upon resuming at 10:01 a.m./L'audience est reprise à 10h01

13824. **THE CHAIRMAN:** Thank you for your indulgence for the extra time. The Panel do have a few questions for the Squamish Nation, Mr. Bruce. So perhaps I'll start with Ms. Scott.

13825. **MEMBER SCOTT:** Thank you.

13826. In your presentation when you were describing Crown's consultation, you indicated that no attempt has been made to understand Squamish rights. And you asked the question of how can the Crown determine or assess the scope of -- or the scope and nature of those rights in order to assess the degree of consultation that's necessary as a result. And I wondered if you could relate that back to our process for me?

13827. Because as I understand it, early on in the process Crown does contact First Nations and encourage participation. And is there inadequacy in our process to allow a complete record for the assessment of Aboriginal rights?

13828. **MR. BRUCE:** Yes. A big part of our argument is that the Crown has not engaged with the Squamish Nation. They've tried to discharge its duty to consult, to the extent possible, through the NEB process, and to address those deficiencies in the process they would need to consult with Squamish on a government-to-government level.

13829. Neither of those have happened. And our argument is that we are government. The federal Government of Canada has come out and said that his process needs to recognize First Nations as governments and at the very earliest stages of the process the First Nations should be involved in the design in order to find a way to address the assessment of Aboriginal rights and title.

13830. The NEB process is broken, as we had said. We cannot do it through that process. The Crown has not remedied those deficiencies. The Crown has a constitutional obligation to consult with the Squamish Nation. It has not been met because it has not even started assessing what those rights are.

13831. **MEMBER SCOTT:** So in the process, as it's set out, we have created a record, and your position would be that there's not enough on our record for anybody to determine the scope of consultation necessary and that we're not really in a position then to make a recommendation to Governor in Council about adequacy of consultation because there isn't enough on the record to establish what the degree of consultation would have been, as I understand your argument.

13832. **MR. BRUCE:** Well, I mean, I guess there's two pieces. We're saying that there hasn't been enough information from the Squamish Nation. You go back to the principles of consultation and it's not just information gathering and sharing. There's got to be more.

13833. The NEB process is about just exchanging information and people making assumptions on that information. Squamish Nation never had the opportunity to explain what those interests are. And so in that sense, there may be some information on record.

13834. We don't think it's adequate information about the Squamish Nation, but I think the Board can make a decision if they had -- you know, we say you have the ability and the power to make that decision, whether the duty to consult has been discharged. We would say that whether there is some information or no information, that duty to consult cannot be discharged because the process has been inadequate.

13835. **MEMBER SCOTT:** In another part of your argument you indicated that mitigation and accommodation measures are generic measures developed by Trans Mountain. And I wondered if you could perhaps expand on that for me a bit as to whether or not the measures identified by Trans Mountain, whether

they're specific or generic, can ever satisfy elements at least of the Crown's duty to consult or accommodate?

13836. **MR. BRUCE:** Well, I mean, quite honestly it's offensive. The Crown has a duty to consult the Squamish Nation. The Squamish Nation has specific interests in the project area and the impacts of the project on those interests need to be addressed. You know, with all due respect to other First Nations, we're in this process fort the Squamish Nation.

13837. Trans Mountain's information, they don't have enough information on the Squamish Nation to make that assessment. So again, we're coming back to the adequacy of the consultation.

13838. **MEMBER SCOTT:** In terms of the inadequacies, I take it some of those inadequacies might be described as the government-to-government element. Some of them might be more resource based. And I wonder if you see a distinction between -- I hope I -- I heard you this morning, and the Squamish Nation doesn't separate nature from culture, but if you would indulge me a little bit, whether or not some of the resource-based accommodation that Trans Mountain has proposed, whether that does ever or could ever satisfy Crown consultation?

13839. **MR. BRUCE:** Well, again, the Squamish Nation has not had the opportunity to fully participate in the process, hasn't had an opportunity to really comment on anything in the process, as you say, for capacity reasons, financial and human resource capacities. The timelines are very restrictive. So Squamish Nation hasn't had an opportunity to really assess any of the information and hasn't been able to put information forward at this point in time. So again, the process just is inadequate, has not met Squamish Nation's needs.

13840. **MEMBER SCOTT:** I believe my colleague Mr. Davies has some specific questions on the legislation.

13841. **THE CHAIRMAN:** Thanks, Ms. Scott.

13842. Mr. Davies?

13843. **MEMBER DAVIES:** I wanted to thank Chief Campbell for his blessing at the start and, in particular, to draw note to one remark that he included in that, and that was words to the effect of what a difficult decision and what

complex matters are before us.

13844. Some of what we've heard from you, Mr. Bruce, this morning, it's illustrative of that and I feel I want to explore a little bit some of what you've said, which may help me at least in putting my mind to these complex matters. So indulge me for a moment if you would.

13845. The provisions of the Act that pertain to Governor in Council's approval, dismissal, or returning for reconsideration are conditions that have been referenced in your argument. I didn't hear you make reference to the fact that amongst the things the GIC could do is to reject the report in its entirety. Is that something that you accept is within their legislated mandate, the mandate that the legislation outlines?

13846. **MR. BRUCE:** My focus is on the decision that the National Energy Board needs to make now. You have the authority to make that decision under the legislation.

13847. **MEMBER DAVIES:** I don't mean to correct you, but I think our authority is to make a recommendation. The decision is made by Cabinet.

13848. **MR. BRUCE:** That's fair. But you're making a recommendation based on satisfying the public interest and setting conditions. The Squamish Nation has not been involved in developing those conditions. So you're making a decision that's going to impact Squamish. You're setting the conditions, and you must ensure that consultation to date has been adequate. So we've established that.

13849. You cannot use consultation as an afterthought in the review process. It must start early in the process to be meaningful. The honour of the Crown is at stake. So we go back to the foundation principles of consultation again.

13850. But you have the ability to decide constitutional issues and you cannot ignore this obligation to Squamish based on the fact that the Governor in Council may determine you made a mistake and refer it back. This may or may not happen. It's very speculative. The Squamish Nation needs to know right now whether they have the opportunity to have some input on those conditions because there's impacts to their Aboriginal rights and title.

13851. **MEMBER DAVIES:** I'm looking at section 53(1), which says:

> *"After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation or any of the terms and conditions set out in the report back to the Board for reconsideration."*

13852. Specific mention is made there of the terms and conditions.

13853. Do you feel that that in any way allows the Crown's duty to consult to continue after our report is issued?

13854. **MR. BRUCE:** Well, I mean, the Squamish Nation doesn't want to be an afterthought in this process. We've been asked to participate in a consultation process. The National Energy Board process is supposed to be used as a vehicle, to the extent possible, to carry out that consultation. We don't understand why a decision would not be made right now when the consultation -- a majority of the consultation is supposed to be happening now.

13855. Are you saying that the meaningful consultation, substantive consultation should happen after the NEB process? No, it shouldn't be. We need to be talking about the issues now. A decision needs to be made now.

13856. The conditions are everything. If we can't have an opportunity to have our interests represented in those conditions regarding impacts to our Aboriginal rights and title, how can you say this process is fair? I don't understand that. You have the ability to make a decision now. Make it.

13857. **MEMBER DAVIES:** Good. Thank you for that. It's helpful to get your point of view and I appreciate the passion in your voice as well. Thank you.

13858. **MR. CHAIRMAN:** Thank you, Mr. Davies.

13859. Ms. Scott has a follow-up question.

13860. **MEMBER SCOTT:** I am just trying to help the discussion and as I understand what you've told us, you've told us we don't have enough information to determine that the Crown has discharged its obligations. And on that basis alone, you want us to reject the project.

13861. I wonder if there is a possibility in the section that Mr. Davies was

taking you through for the Board to make conclusions about Crown consultation and Governor in Council to make other conclusions, further conclusions that further Crown consultation is required.

13862. And I am just trying to explore what impact that would have in terms of the order that we might make.

13863. **MR. BRUCE:** Again, we come back to the conditions. If you can't change the conditions at the point where Squamish is consulting with the Crown, those conditions are meaningless, the consultation is meaningless.

13864. You've already set the conditions. You set the conditions now. You make the recommendation with those conditions. Those conditions cannot be changed. You're saying they can be referred back or they can be -- you know, for further reconsideration. But we're saying the whole -- the honour of the Crown is at stake here. At this point in time, the honour of the Crown is at stake, and we need to resolve the consultation issues now.

13865. **MEMBER SCOTT:** And if the recommendation went forward to the -- I don't know whether it's going to be positive or negative or whatever it's going to be, but if it -- as a part of that recommendation, if there was a conclusion one way or the other about Crown consultation, couldn't Governor in Council, as I see section 53, require us to develop other conditions? Isn't that part of what Governor in Council can do in 53.2?

13866. **MR. BRUCE:** I am going to maintain our position that we need to make that decision now. You may be pointing to Crown consultation in terms of the Crown has never explored that with us. Why would that not have happened earlier in the process? We have not had any discussions with the Crown regarding our interests. It's all been process-related and from our understanding, they are trying to discharge their duty to consult to the extent possible through the NEB process, which is ending now.

13867. **MEMBER SCOTT:** Thank you, Mr. Bruce.

13868. **THE CHAIRMAN:** Mr. Bruce, Chief Campbell, on behalf of the Panel and the Board, we thank you for your submissions today, and they will be considered along with all of the other evidence that we have and still yet to hear until we conclude our hearing on this.

13869. With that, we thank you and we will take a short five-minute break and hear from Ms. Elizabeth May who will be next.

13870. Thank you.

--- Upon recessing at 10:17 a.m./L'audience est suspendue à 10h17
--- Upon resuming at 10:26 a.m./L'audience est reprise à 10h26

13871. **THE CHAIRMAN:** Sorry for being so tardy coming back. We would now like to hear from Elizabeth May, a Member of Parliament from my riding of Saanich-Gulf Islands.

13872. So with that, Ms. May, I think you understand the clock system and we are looking forward to hearing your oral summary argument. Thank you.

13873. **MS. MAY:** Thank you, and I was also aware that you're a resident of Sidney. So I represent you in Parliament among the other residents of Saanich-Gulf Islands. I also have in common with Ms. Scott. We went to the same law school. And I have yet to figure out what Mr. Davies and I have in common, but we'll find something.

13874. **THE CHAIRMAN:** I might challenge you in that later.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MS. ELIZABETH MAY:

13875. **MS. MAY:** Well, I want to start by acknowledging that we're on the traditional territory of the Coast Salish peoples of the Tsleil-Waututh, Musqueam, and Squamish First Nations.

13876. I am also honoured to take the podium right after the Squamish First Nation and Aaron Bruce and a very compelling final argument.

13877. My constituents form a number of the Intervenors before you in this Panel. As it happens, Dr. Andrew Weaver is a constituent and as is Adam Olsen, who spoke as a member of the Tsartlip First Nation. Dr. David Farmer, a very distinguished scientist, is also one of my constituents. And there are four First Nations within Saanich-Gulf Islands, three of which presented a significant final argument as well as evidence before you.

13878. So I have to explain that I'm here in my capacity as a Member of Parliament. I applied for Intervenor status nearly two years ago to represent the interests of my constituents. I'm here in that sense in a non-partisan way.

13879. By way of some background, I first appeared before the National Energy Board as counsel in 1981. I am very familiar with the National Energy Board and in its previous state, which we used to refer to as a quasi-judicial body. I know the nature of administrative law has moved apace and there is now the notion of a spectrum of different bodies between courts of law through administrative bodies.

13880. But it's very clear that much has changed in National Energy Board process, which has made this particular application enormously challenging; challenging for the intervenors, challenging for the public. And as you've heard in many of the final arguments already, the target of promised political changes from our new Prime Minister.

13881. The challenge to this process is also doubly difficult because of the changes that were made in the spring of 2012 in Omnibus Budget Bill C-38, which I vigorously opposed. And for the first time, the National Energy Board was put in charge, as were a number of other regulatory energy bodies, of environmental assessment.

13882. And with all due respect, I think the National Energy Board is completely unsuited and inexperienced and should never again be put in charge of environmental assessment. But that's obviously not your decision. It was a decision made by a Parliament that pushed it through under the previous Prime Minister.

13883. But as a result of those changes, there were timelines associated with this hearing and those timelines were used as the excuse to drive quite a few changes in terms of procedural rights for Intervenors. This has raised many issues throughout this hearing of procedural fairness, and I think those arguments are serious. Procedural fairness was not observed in denying oral cross-examination, for example.

13884. But in this final argument, what I want to try to do is, in a cross-cutting way, look at the issue of the lack of oral cross-examination not just as a matter of an offence to the rights of people like me as Intervenors but to the quality of the

evidence you have before you as decision-makers.

13885. Because the essence of cross-examination is not just an aspect of fairness to participants. It is for the adjudicators of facts an essential way that evidence is tested and facts can be determined. And I submit to you that there is a significant frailty to the evidence that would not be in place had cross-examination occurred.

13886. So I want to go through some of those issues with you and I will use it, as I said, in a cross-cutting way.

13887. Now, let me explain what I did as an intervenor, in approaching Trans Mountain's application. I can't really -- it must be an age thing, or a generational thing -- I can't cope with things that are just on Internet, or that I can access electronically, so I printed it out. I took it to the local print shop. It came to 23,000 pages.

13888. And then I sorted it. I actually dealt with it physically. I went through and removed all the duplicative bits, all of the repetitive descriptions of the project, all of the PowerPoint presentations that were identical, but for the name of the town where it was presented and the date. I took out all the repetitive, non-important, irrelevant material. That set aside several thousand pages.

13889. I went back and then sorted through the very useful description of the area as it now is, our healthy environment as it exists -- and of course recognizing, as the Squamish Nation just pointed out, clam beds have been lost, it's not entirely a pristine environment, but there's a good description and there's a description of the economic benefits of the various sectors that are risk here. I set that aside and I read everything else.

13890. Now, my conclusion is that Trans Mountain set out to make their application unnecessarily long with the intention of intimidating people from actually approaching it and doing what I did. Very few people will have read every section in the various parts of the application. And when Trans Mountain claims that they've been rigorous or that their eight volumes somehow connote some level of diligence, I submit to you that it was entirely aimed at discouraging public engagement.

13891. It's in reading the document in its entirety that it becomes clear that Trans Mountain applied, for instance, very different approaches to some risks

than to others. In the absence of cross-examination, I wasn't able to put this to them, but I would submit to you in final argument, that repeatedly Trans Mountain rejects certain scenarios as low probability, low likelihood, and particularly, plausible worst case scenarios, such as those put forward in the excellent analyses from the City of Vancouver, from Burnaby, from groups like Living Oceans, from the Tsleil-Waututh First Nation. They set those aside, and you can find a reference to their dismissal of those in page 331 of their final argument, a similar comment in response to my information requests at page 15 of my second IR. And Trans Mountain responded, an oil spill from a project related tanker is a low likelihood occurrence. You -- these are repetitive through -- they say a tank farm fire. Again, low likelihood occurrence.

13892. On the other hand, some very low probability events, and I'd say on the order of vanishingly small to nil, get a lot of attention. A highly fanciful low probability of answer described in detail in the Agriculture Assessment Technical Report, Volume A3S2K9, pages 7 and to 12, is the discussion of the risk of pipeline construction increasing avian flu.

13893. They put forward the hypothetical risk that a construction worker will blunder into a poultry barn and through viral material on their boots contaminate poultry. This is -- I can't find any record of this ever happening in real life, unlike a lot of low probability events, such as pipeline breaks and tanker leaks that do happen in real life. But they -- they'll put attention to this and they're going to make sure their construction workers wear booties and have foot baths available to avoid contaminating the poultry barns that I -- do you think, anyone here think there's any chance of a construction worker deciding to blunder into a poultry barn?

13894. Okay, another one is the threat to milk production in that same volume, A3S2K9 at page 2 to 7, where they, and I quote, Kinder Morgan has determined, quote:

"Milk cows are very curious." (As read)

13895. And they then conclude that there's a risk to milk production because the curious milk cows will become fascinated by the pipeline construction and it might diminish production.

13896. I mean -- well, if there had been cross-examination, I would have liked to put to them why are these fanciful low probability events treated as credible by

you, but a worst case scenario of an accident in Vancouver is not credible?

13897. The role of cross-examination is more than procedural fairness; it is about testing the quality of the evidence, and any book on evidence will tell you that it's particularly essential, when issues of credibility are at stake, but it's also generally of assistance in weighing competing expert reports. In a normal NEB hearing, I would have been here with experts able to cross-examine experts and ask questions that went to the heart of whether they knew what they were doing when they did certain studies.

13898. Now, the novel approach taken in this hearing -- and this is unprecedented to have no access to cross-examination. But it's not just a question of whether intervenors got oral cross-examination or written; that isn't the issue. And it hit me the other day when I was preparing this argument: we never got to question the witnesses at all.

13899. We were able to ask questions in writing of Kinder Morgan, and I suspect their legal counsel prepared the answers. We never got to ask any questions at all of the witnesses who prepared the evidence on which this application is based, and similarly, none of our expert witnesses who prepared reports -- and I speak of "our" in a collectivity of intervenors -- were subjected to cross-examination.

13900. So it's a really huge level of disconnect here between those who presented the evidence as experts and those who intervened to try to get to the truth of the matter, and what it does is it fundamentally undermines the reliability of the evidence that you must rely on in coming to your decision.

13901. It's an enormous flaw in a process, and it's not just about procedural fairness, although it is that; it is more fundamentally about a disconnect between those who prepared the evidence and their proxies, who prepared, as you've heard from many intervenors, completely unsatisfactory replies. In essence, the intervenors were never allowed to put any questions at all to those people in a position to answer the questions, and this leaves the National Energy Board with a pile of untested evidence.

13902. Now, I'm going to go in my next section of what I want to put to you, some specific examples of where cross-examination would have helped. A key focus that I looked at as an intervenor is the behaviour of bitumen and diluent in water, both marine and fresh water.

13903. Now, at page 333 of their final argument, Trans Mountain makes it clear that it again confirms that it primarily relied on its Gainford Study. Now, one thing about scientific evidence is that in a sense the scientific peer review process does something that in a legal context cross-examination also does. It verifies. So the Gainford Study, it must be noted, was not peer reviewed.

13904. Now, the Gainford Study was asked three questions, but it was not, for instance, within the scope of that study to ask can you recover bitumen once it sinks below the water. That was not included, and nor was it included to study what happens. How much of the diluent will volatilize? How much benzoin is going to get in the atmosphere? That was not part of the Gainford Study.

13905. Now, I asked questions about the Gainford Study repeatedly, and I never got satisfactory answers. Now, part of the reason was this disconnect of it being in writing, and the other part was I was asking essentially Trans Mountain lawyers and not the people who did the study.

13906. But Trans Mountain has focused all of their confidence that bitumen and diluent will behave the way crude will behave in a marine environment, on a one-time only 10-day study. So when I asked repeatedly if they didn't agree that it would be -- if this was not inadequate for large-scale conclusions, the response in the information reply was to point out that 10 days was enough because the cleanup crews will have arrived. The 10 days is enough to know that you're going to get your booms and you're going to start the cleanup effort within 10 days.

13907. But that wasn't the main point of my question. I tried again. I mean, this was a very inadequate test with inadequate tools. They had a small pail test, where it's reported in the evidence that they didn't have a ruler wide enough, the spill went a little bit wider than the ruler they had. The people who did the study report in their notes that it would have been a good idea to repeat the experiment with better equipment.

13908. So when I asked Kinder Morgan, wouldn't it be a good idea, since it's in a comment in the Gainford Study it would be a good idea to do it more than once, since the equipment wasn't all that good. And they -- basically, they took fresh water, they added salt, they're in Gainford, Alberta. They failed to meet the temperature or the pH parameters that were set in the study going in because it was an exceptionally hot time in Alberta. The temperature -- they said, well, maybe that’s like summer in the Burrard Inlet.

13909. I mean, they have obviously not been in the Burrard Inlet in summer. It was a completely non-responsive reply that I got from Kinder Morgan. But they did say, "Don't worry, other studies have corroborated what we found in the Gainford Study." But that's increasingly not the case.

13910. Increasingly -- and I submitted in my evidence one study done with much more sophisticated equipment at the Bedford Institute of Technology. Bedford Institute Study was led by King, lead author, et al, titled "Flume Tank Studies to Elucidate the Fate and Behaviour of Diluted Bitumen Spilled at Sea." Now, this study was peer reviewed. So that's one hint in terms of what evidence can be more reliable. And it is in the -- on the evidentiary record because I submitted it in the evidentiary period.

13911. Now, the King Study -- and this is also significant -- found that:

> *"...all [...] the product would likely sink in freshwater environments."*

13912. That's important. The question of how diluent and bitumen will behave at sea is of grave concern to the people of Saanich-Gulf Islands, but so too is the risk of pipeline spills all along the route. And in freshwater "all the product would likely sink."

13913. Now, what the King Study found about seawater -- and they had the advantage of using actual ocean water. They had the advantage of tanks that actually did a better job of simulating what an ocean natural weathering would be. They found:

> *"...after 7 days of natural weathering, some of the [what they refer to as] AWB,..."*

13914. Access western blend, but basically the bitumen material.

> *"...became dense [...] enough in the form of oil balls to sink in brackish water."*

13915. From the King Study, which is in my evidence.

13916. Now, a similar finding I've included in the evidence -- this is a joint

three federal department study of Environment Canada, as it was then called, the Department of Fisheries and Oceans and Natural Resources Canada. In my evidence it's submitted as what they had as a PowerPoint presentation of February 4, 2015. And they also confirmed oil balls form and sink.

13917. Now, in reply to my interrogatories and information requests, Trans Mountain said -- and this is in my second IR under letter (h) as a response. Trans Mountain says:

> *"Recently announced studies include those led by the Royal Society of Canada and the U.S. National Academy of Sciences."*

13918. It's at page 7 of 23.

13919. Now, this was in Kinder Morgan's effort to say, "Well, lots more studies are coming." But you'll note they didn't want to hear those studies when they were published. Having referenced the U.S. National Academy of Sciences report in their response to me, I think Trans Mountain should have been estopped from objecting to the introduction of that study in evidence here. It was rejected as unfair to Trans Mountain to accept a new study which doesn't corroborate their Gainford 10-day test.

13920. As Dr. Andrew Weaver has pointed out in his written evidence -- written -- rather written final argument, the Royal Society of Canada expert panel and the U.S. National Academy of Sciences report:

> *"...make it clear that we simply do not know enough to properly assess the risk and potential damages associated with a diluted bitumen spill in the Salish Sea."*

13921. Now, further, and this was just recently that you heard from Dr. David Farmer in person, as you've also heard from Dr. Weaver in person, but Dr. Farmer's evidence is quite compelling that the Trans Mountain model, which is private to them and was never submitted for peer review as a model, but the model was inadequate and utterly fails to consider the oil subduction caused by tidal fronts in the San Juan and Gulf Islands marine route.

13922. Now, Dr. Farmer, I have to say, is both a constituent, but I -- when I looked at his CV, he's a modest man. I hope you looked at his CV. To be a

fellow of the Royal Society of London and the Royal Society of Canada, I don't think any of the people who submitted any expert evidence for Trans Mountain have that distinguished a scientific career as Dr. Farmer.

13923. But what he proved -- and proved -- I would say he has proven that Trans Mountain misunderstood the physical processes involved and even of the literature they referenced in their own application. Dr. Farmer's written final argument notes that:

> *"Trans Mountain appears not to have reviewed the literature it references in its application."*

13924. This was the sort of thing that needed real cross-examination.

13925. Now, another place where we needed real cross-examination is the risk of pipeline accidents. While Trans Mountain repeatedly points out throughout its evidence, throughout its argument, that tankers leaving the Westridge Terminal are not their responsibility nor under their control, clearly pipelines are directly their business and directly in their control.

13926. With over 116 at least salmon-bearing crossings in B.C. alone, and that's admitted by Trans Mountain at page 305 of their final argument, and particularly the Fraser River and its critical importance for so many different salmon runs, any pipeline accident such as the one which actually occurred in Kalamazoo, Michigan under Enbridge's control could have devastating impacts.

13927. In this cross-examination of Trans Mountain's confidence in its own record, despite the numerous accidents that have been reported in which the City of Vancouver final argument makes very clear are relevant, but its reliance on its detection systems, early warnings, bells, whistles, alarms, technology will make sure the pipelines don't fail. Now that, by the way, is referred to at page 147 of Trans Mountain's final argument, how much they rely on the great technology to warn them that make it almost impossible to imagine a serious pipeline accident.

13928. So the reason why I submitted in my evidence the report of the U.S. -- and it's really the U.S. National -- the Transportation Safety Board accident report on the Kalamazoo, Michigan spill. I recommend it to you as individual Panel Commissioners to read this, to read -- it's not just one example of human error. It's a catalogue. When this was released, the press release and the comments from the U.S. agencies that reviewed this was -- were that Enbridge had a culture

of negligence.

13929. And part of a culture of negligence comes from extreme confidence in your technology and a kind of complacency that comes from that.

13930. So sure enough, I mean, when the pipeline broke in Michigan, the bells and whistles all worked. There were 20-minute alarms ringing in headquarters, in the control booth. And the technology people there, the engineers, the people running Enbridge's pipeline looked at the bells and the whistles and heard the alarms, and just like as if we were at home and we had a piece of toast stuck in the toaster and it set off the alarm in the house, they went around switching off the alarms because they concluded, well, there's a pressure drop because they were testing the pipeline, so there's nothing wrong here. Our equipment is malfunctioning.

13931. One shift went home. The next shift showed up. The first shift never told the second shift they'd had alarms. They start -- 81 percent of the bitumen and diluent that contaminates the Kalamazoo River to this day, 81 percent of that spill occurred after the alarms because they chose to ignore them. It's instructive to know what happens in real life. I would have liked to have asked them questions about that on cross-examination.

13932. Human error must not be discounted in probability of risks, particularly as Vancouver's evidence and final argument has confirmed, there are numerous other examples of human error. We don't have to go any farther, actually, than imagining how unlikely it was that Vancouver would be dealing with a spill from the Marathassa, a relatively small spill that lapped up on the shores of English Bay. We've had recent experiences with implausible spills.

13933. So Vancouver's argument makes it clear. But we know that across all of those salmon-bearing streams, freshwater, if bitumen and diluent leak it will sink. And it's almost impossible to clean up, as the Kalamazoo, Michigan spill has made it very clear.

13934. This should have been cross-examined in evidence. It's not clear that the industry in general nor Trans Mountain in particular have learned anything from the Kalamazoo accident. In fact, I was astonished to find this quote at page 286 of Trans Mountain's final argument in which they say:

"Evidence from actual case studies showed that freshwater

ecosystems recover from oil spills, often within relatively short periods of time."

13935. Well, they certainly can't be referring to bitumen and diluent because our experience with that is entirely to the contrary. I mean, I'm -- you know, the fuel truck that spilled into Goldstream, we remember that. That was horrific. But the damage was limited pretty much to one year. The salmon were back the following year. So I don't know what evidence from actual case studies Trans Mountain wants to cite. But we know when bitumen and diluent spill in freshwater there is not a quick recovery.

13936. So our last example for cross-examine was real -- cross-examination was essential and not allowed is the one issue I know on the record that really deals with credibility; the credibility of an expert report that used information that should never have been cited.

13937. Now, this issue was first identified by former intervenor Robyn Allan, and I think in the public interest and for all Canadians, a public thank you to Robyn Allan for diligent work. I understand her reasons for withdrawing from this process. You can see I want to give it the old college try and keep fighting to ask you to turn this project down in your recommendation.

13938. But Robyn Allan identified the use of an environmental protection agency document from the U.S. government in Dr. H.J. Ruitenbeek's study on estimating oil spill costs. Contrary to Trans Mountain's protestations, Ruitenbeek did cite a study by Dagmar Etkin. That study was cited in his expert report to this body as "Etkin, D.S. 2004. Modeling oil spill response and damage costs. US EPA".

13939. Now, if you seek that out on the US EPA Web site it appears as -- in capital letters, DRAFT, and it says: "Do not cite or quote." But, on the copy that was included in the evidence to this Panel, that disclaimer was not on the copy provided to the National Energy Board.

13940. Now, this is not a small matter. So the fact that a disputed and unethically sourced document is actually the only source cited by Ruitenbeek that dealt with terrestrial data. So any conclusions by Ruitenbeek on cost of a spill on land had to have included that information.

13941. Now, it's on the record, it's in the evidence, it's in many of the

motions and applications from Robyn Allan that when she contacted the US EPA they said, "No, that was a draft that was eliminated at the first stage of peer review because it's not a reliable approach."

13942. Now, Trans Mountain claims it's all inconsequential whether it was a draft or a final, but I think it contaminates the basis of the evidence. This is the strongest example because it goes to the issue of credibility where an expert should have been asked on the stand. Maybe there's a sound answer, but we were never able to ask either Ruitenbeek or Etkin how they decided to whiteout the words "DRAFT, do not cite."

13943. This is exactly where cross-examination is necessary or it undermines the integrity of the evidence. And if there is a valid explanation for this, neither Etkin nor Ruitenbeek were ever put forward to explain themselves.

13944. Additional points: As the Member of Parliament for Saanich-Gulf Islands I have an interesting role in relation to the First Nations communities in my riding. We have a nation-to-nation relationship, and yet I'm also their MP and work for them, they're my constituents, they're my boss, they're also First Nations. And as the Tsawout and Tsartlip briefs so strongly put it, they explain the Douglas Treaties.

13945. The Douglas Treaties are among the strongest, clearest treaties to protect, in perpetuity, rights of First Nations peoples and the Coast Salish peoples to use of and fishing rights and so on, it's very clear.

13946. So I do not stand here to speak for First Nations, that'd be completely inappropriate. My -- I raise my hands, I'm so grateful to Tsleil-Waututh, to Squamish, to all the First Nations that have come here to protect our home. As we heard from Aaron Bruce, we -- they speak of Squamish Nation as home, it's our home too.

13947. I have to say I find it disturbing that Trans Mountain refuses to use the words First Nations in its argumentation or evidence. They refer to First Nations as "Aboriginal groups", as if they're mere stakeholders. I think there's a profound -- potentially profound misunderstanding of the constitutionally protected rights and treaty rights to First Nations.

13948. Now, primarily it's the fiduciary responsibility of the Crown; I completely agree with the lawyer for Squamish Nation, it's the honour of the

Crown that's at stake here. But it needs to be noted that this project cannot be approved without offending our Constitution inherent rights of First Nations and treaty rights.

13949. Secondly, I wish to provide full support to all the intervenors who argued that it was inappropriate for the National Energy Board to exclude climate change as a key; in fact, the most vital, consideration.

13950. I'm updating slightly Vancouver's excellent final argument in which they spoke of the importance of avoiding 2 degree Celsius global average temperature increase. But under the recently concluded Paris Agreement of December 2015, it's 1.5 degree Celsius that we must strive to avoid. That translates into a very different energy future; that translates into moving away from fossil fuels as quickly as possible.

13951. As you've heard from numerous witnesses, this goes to many different levels of question. What kind of security and so-called need for the project? What's in the public interest for Canada? To exclude climate change is, I think, an egregious mistake that goes to the heart of this issue.

13952. In a similar context, in the United States when the State Department did an environmental impact statement on Keystone Pipeline, they made greenhouse gas implications the key question and they studied it. And it was on that basis that they turned down Keystone. So it's -- it remains -- as a Member of Parliament for me and I think most of constituents find it incomprehensible that climate considerations were excluded in this process.

13953. The next issue that needs to be mentioned is the threat to the Southern Resident Killer Whale populations. I know this troubles the Board. It troubled me that when the Department of Fisheries and Oceans made recommendations to Trans Mountain about steps they could take.

13954. Trans Mountain's approach is just to say, "Well, we're one of many out there who threaten the survival of the species." There's nothing specifically in the responsibility of Trans Mountain to take steps to protect the Southern Resident Killer Whale population from both the noise of the increased tanker traffic going from one a week to one a day; it's going to have a very significant impact. We're talking about a threat of accident that could really damage the entire marine ecosystem.

13955. So there's no specific responsibility felt at this point by Trans Mountain, and I think that's fatal to their application.

13956. I also want to support the evidence and the final argument of one of Canada's largest labour organizations, Unifor. Unifor's evidence is that the Trans Mountain expansion threatens existing jobs in Canada's refineries, particularly specifically here in Burnaby, the Chevron Refinery. It also threatens other value-added jobs because shipping out raw bitumen is all about not refining it in Canada. And it's a threat to many thousands of people who work in the commercial fisheries.

13957. Now, Unifor's final argument notes:

> *"This Panel determined that consideration of potential adverse impacts of the... [Trans Mountain expansion] on job creation, Canadian energy security, and diversification of the oil and gas sector was beyond its mandate."*

13958. Page 8, Unifor's final argument.

13959. I think that's also lamentable. Even on the economics this project fails. It can only get a green light under public interest if key risks are excluded, like climate change, and key benefits are overstated, like the economics of the project. This project is, as you've heard from many other intervenors, only in Kinder Morgan's interest.

13960. So I put it to you, in conclusion, that -- as other members of the public have tried to come here as intervenors, have tried to say; this process is broken, through no fault of your own. Bill C-38 took a hatchet to environmental assessment and mucked up the role of the NEB.

13961. On top of that, after two years -- is it really two years since I applied to be an intervenor? -- I find it astonishing that this is my first time to be allowed in the room with a little tag that says, "If I leave the room, I have to surrender the tag and have to apply to come back in the room." This level of security doesn't exist at the Supreme Court of Canada, nor in the Parliament of Canada.

13962. We're at a public hearing and as people can see as this is live-streamed, the room is mostly empty because unless you've applied ahead of time -- and I can bring one friend with me, I should have introduced her by now, Dr.

Lynne Quarmby is the Chair of the Biochemistry Department, Simon Fraser University. And when Kinder Morgan boasts of its stakeholder engagement, I suppose that includes filing a lawsuit against Dr. Lynne Quarmby for $5 million for what they call, "tortuous conspiracy," because she had the gall to protest their project and to write an op ed it. The lawsuit has since been removed.

13963. This is a broken process. On the science, Kinder Morgan has to get a failing grade. Real scientists have come before you, like Dr. Andrew Weaver. I recall for you his, "You can't make this stuff up" moment. Real scientists have come before you, like Dr. David Farmer, like Dr. Andrew Weaver. On the science Kinder Morgan gets a failing grade.

13964. So we must take -- and I submit that you must take careful stock of where governments stand on this project. The Government of British Columbia says its conditions have not been met. The municipalities of Vancouver, Burnaby, Victoria, North and West Vancouver, as well as First Nations have called on you to use your discretion as finders of fact and as makers of a recommendation to say we recommend this is not in the public interest.

13965. We must look at particularly the leading efforts of First Nations and recognize the constitutional implications, as I've already referenced.

13966. This project fails to meet the public interest test even when you exclude things that are off the list. It represents an unacceptable risk to ecosystems, endangered species, existing industries, economic activities, and livelihoods. It poses a threat to thousands and thousands of British Columbians, a risk for which there is no benefit to those same British Columbians. It fails a national test in the public interest.

13967. So I urge you as Commissioners and Members of the National Energy Board to review the evidence fairly. Look at the weight of the Intervenor evidence. Consider the frailty of evidence that has not been tested under cross-examination. And bear in mind that peer reviewed studies have at least had some real review whereas Kinder Morgan's evidence, for the most part, has had none.

13968. I acknowledge the foundation of any decision is evidence but you must have a foundation on which you can build something, and the evidence put before you by the Applicant isn't solid. It's shifting sands.

13969. I urge you; in fact I beg you, I implore you to recommend against this project, its application, any licence for it. It must die here.

13970. Thank you.

--- (Applause/Applaudissements)

13971. **THE CHAIRMAN:** Dr. May, the Panel have no questions for you. It is -- your statements -- we understand your position. We're very clear on it, and we will consider it with all the other evidence that we're still yet to hear on the oral summary argument while we consider this difficult decision for the Board on this matter.

13972. So with that -- and I do recognize Dr. Quamby as well, and so it's nice to see you here today.

13973. So with that. we will take a short break and we will then hear from the Stó:lō Collective.

13974. Thank you.

--- Upon recessing at 11:04 a.m./L'audience est suspendue à 11h04
--- Upon resuming at 11:17 a.m./L'audience est reprise à 11h17

13975. **THE CHAIRMAN:** Good morning again.

13976. And we would like to welcome the representatives of the Stó:lō Collective to present their oral summary argument on this case. And I understand we'll start with Chief Jimmie if I'm correct.

13977. Proceed. Thank you.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE STÓ:LŌ COLLECTIVE:

13978. **CHIEF JIMMIE:** (Speaking in native language).

13979. My traditional name is Lenéx wi :ót. I'm the elected Chief of the Squiala First Nation, also the President of Stó:lō Nation and the President of the Ts'elxwéyeqw Tribe.

13980. I just want to acknowledge the traditional territory of the Musqueam, Squamish and Tsleil-Waututh here today.

13981. And I'll be presenting here on behalf of the Stó:lō Collective.

13982. I'd just like to introduce everyone that's here on our behalf today. We have our legal counsel Jean Teillet, who has been awarded the Indigenous Peoples' Counsel award.

13983. We have Shana Roberts to my right, Carrie Oloriz, Ernie Victor, Chief Tina Sam, Murray Sam, Keri Ardell and Councillor Sandy McDonald.

13984. So I'd also like to just briefly acknowledge Chief Ian Campbell this morning for his introductory to the day. It's always an honour to be amongst that type of introduction and the knowledge that he holds in relation to the territory that we're in.

13985. So you'll see today that I'm wearing this blanket, and just a brief explanation on the blanket and what it means. It's a very high honour to receive a blanket and the positions of leadership that we enter into. And there's a number of different meanings behind the blanket.

13986. It is nice today because it's a little cold in here and it's keeping me warm. But part of that is protection, and in these difficult positions of leadership, similar to your roles through this process, we're often faced with difficult decisions and difficult tasks, and part of the blanket represents a level of protection for when we enter into these difficult positions and dealing with these tasks.

13987. So it's very symbolic and fitting for today as I'm here talking about protection; I'm here talking on behalf of our people, not only the past generation but our current and future generation as well.

13988. So I'm going to run through different aspects of this submission today, those being, first of all, who the Stó:lō are, who the Stó:lō Collective is, the status quo with respect to the project, the comments on the procedural aspects of the NEB public process, comments on the terms and conditions, impacts of the project on the Stó:lō Collective, the response to Trans Mountain's reply to our motion to adduce new evidence regarding Lightening Rock.

13989. So I'll start off with a brief explanation of who the Stó:lō are and who the Stó:lō Collective are. So under the meaning of section 35 of the *Constitution Act* of 1982 the Stó:lō are an Aboriginal peoples of Canada. Stó:lō means river. Stó:lō means river of rivers. Stó:lō means people of the river, in reference to the Fraser River.

13990. The relationship of the Stó:lō to the Fraser River is extremely important. The river is the central artery of the Stó:lō. We have a long and deep spiritual, cultural and economic relationship with the Fraser River, and our relationship to the salmon in the Fraser is part of our history, livelihood and culture.

13991. We live on the banks of or very near to the Fraser River, and this project as it passes through the lower Fraser Valley goes directly over our traditional territory, over our reserves, over our homes and over our spiritual and cultural sites and it affects our livelihood.

13992. The Stó:lō Collective is a representative of 13 *Indian Act* bands. I will list them because it's important to note that not all Stó:lō are included in this submission today.

13993. So we are here representing Aitchelitz, Skowkale, Shxwà:y, Soowahlie, Squiala, Tzeachten, Yakweakwioose, Skwah, Kwaw-Kwaw-Apilt, Leq'á:mél, Sumas, Scowlitz and Skawahlook.

13994. So amongst those 13, we're representing three tribes, the Skowkale Tribe, the Sumas and the Leq'á:mél.

13995. I'm just going to briefly talk about the organization of the Stó:lō. Traditional practice amongst the Stó:lō is to come together for specific issues. So when we have impacts to our territories or to our communities we come together specifically and organize ourselves in a way that is conducive to dealing with those specific impacts.

13996. We do have our permanent organizations, our political bodies, being the Stó:lō Tribal Council and the Stó:lō Nation, Chiefs Council, but specific for this process we've had these 13 communities come together in order to have representation here today.

13997. We understand that this is a bit confusing to outsiders but it is not confusing to us and it is very important for us and is a sensible way to organizing to deal with specific issues.

13998. Some Stó:lō bands chose not to participate in the Collective or in the hearing and some chose to represent themselves, and we honour and respect those decisions that they make.

13999. Some participated in the Collective at the beginning of the hearing process but separated along the way, but the common thread that we have is that all are concerned about the project and all have the same concern that we do not want to see our rights, title and interest damaged.

14000. I'll move on now to the status quo with respect to this project.

14001. It's important for the Board to hear what the status quo is with respect to the Stó:lō in this project. Some bands in the Stó:lō Collective have the existing pipeline crossing their reserve lands.

14002. The current proposal is to twin the pipeline over some reserve lands, which requires the consent of every certificate of possession holder on the reserve. The proposal also is to run the new pipeline adjacent to other reserve lands.

14003. Some bands in the Stó:lō Collective are currently in the Treaty negotiations in the process of choosing land parcels. The existing pipeline and the proposed one are a negative influence on this because the pipeline severely impacts what can be done on those parcels.

14004. Some of these parcels are adjacent to Highway 1, and these are very valuable lands and their economic value for the Treaty group has been negated entirely because of the pipeline.

14005. There are very few parcels available for Treaty lands in the valley, and the project will remove more of these. So this has an impact to the Treaty group as well.

14006. Status quo also includes the vulnerable state that the Stó:lō are already in, which could be referred to as "the thin skin victim". The Stó:lō are vulnerable to this project because of existing infrastructure of highways, railroads, hydro,

pipelines, et cetera, all of which traverse through the Lower Fraser Valley following the river.

14007. Because we have suffered a continuing diminishment of the use and enjoyment of our lands and resources, we have very little land that is left available, and Trans Mountain is proposing to take yet more of that land.

14008. The status quo also includes a lack of confidence in Trans Mountain based on our past experience with Trans Mountain pipeline and tank failures, spills and health hazards. The simple fact is that our people are afraid.

14009. The Stó:lō are part of the public that must have confidence in the process and the project, but the Stó:lō are afraid and lack confidence in both the process and the project. The bottom line is that Stó:lō should not be worse off from the project, but based on our experience, we fear this is what will happen to us.

14010. I will move on now to the comments on the procedural aspects of the NEB public process. The Stó:lō Collective position with respect to this hearing, and it's important to note we didn't come into this process with a predetermined judgment. We came in and wanted to fully participate in this process and gain an understanding of how our concerns would be addressed through the process.

14011. We wanted to weigh the evidence that resulted from the process and to see from the process what Trans Mountain proposed with respect to how the project would affect Stó:lō rights, title and interests.

14012. We find ourselves at this stage in the position where we cannot make a necessary determination on how the project would affect our rights and title, because the process didn't generate the necessary information.

14013. We have set out in our written argument the flaws in the process that undermined the information gathering, which included a lack of cross-examination, which we heard earlier today, a decision to exclude evidence with respect to the existing pipeline and the seven-month evidence gap.

14014. We would add one more flaw and that's the whole idea of reliance on Trans Mountain to conduct its consultation properly without sufficient checks from Canada or the Board during the process to ensure that what Trans Mountain says is actually happening.

14015. The evidence shows that Trans Mountain's idea of what is appropriate consultation is not consistent with the expectation of either the Crown's obligations or the Board's duties.

14016. Trans Mountain's attitude throughout has been that the NEB does not object to -- as long as the NEB does not object to what it submits, it must be doing it right. This placed an obligation on the NEB to police Trans Mountain's actions, an obligation that cannot be fulfilled simply through information requests.

14017. Trans Mountain says that it is not concerned to meet Stó:lō interests. It is only concerned to meet the needs of the NEB. This is included -- a lot of this material is included and referenced in our written submission, so I won't go into detail. I do have it outlined in the oral submission on which pages and reference that would be.

14018. Trans Mountain's statement is wrong. It must be concerned to not damage Stó:lō rights, title and interests. It is manifestly wrong for Trans Mountain to proceed in the belief that its objective is not to meet the needs of the Stó:lō.

14019. I do not propose to go into detail on the process flaws with respect to the lack of cross-examination, exclusion of evidence with respect to the existing pipeline, the seven-month evidence gap or the untested reliance on Trans Mountain because these are set out in detail in our written submission.

14020. I will only make one comment on cross-examination -- or comment on one of these, which is the cross-examination. We believe it was very wrong of the Board to determine that the only cross-examination in this entire process was against Aboriginal people who were providing oral traditional knowledge as evidence. The message is that the Board felt the need to test the accuracy of Aboriginal oral testimony by means of cross-examination but did not feel the need to test the accuracy of any of Trans Mountain's evidence in the same way.

14021. This was culturally inappropriate with respect to our Elders. It also provides an extraordinary example of the lack of fairness and the perception of lack of fairness in the process.

14022. If our oral testimony was subject to cross-examination, it is only fair that we'd have been permitted to cross-examine Trans Mountain as well. It is

unfair to allow the proponent to cross-examine witnesses and deny the same ability to other parties. Many of our leaders objected strongly to this and we decided not to participate in the oral testimony of traditional knowledge. This also contributed to some bands separating from the Stó:lō Collective as a result.

14023. All in all, the Board's decision to only allow cross-examination on oral traditional knowledge created dissention in First Nation communities, added to the perception that this process is unfair, and disrespected our Elders and our traditions.

14024. Information requests did not obtain the necessary information for the following reasons. Trans Mountain never responded to information requests adequately. The standard answer that we received was that at some time in the future, Trans Mountain would talk to us about talking. This is vague, unresponsive and not a commitment that has any substance. Talking in and of itself does not resolve our concerns about the effects of the project. We need action that resolves our concerns, not just talk.

14025. Trans Mountain was allowed by the Board to get away with responding to many of our information request questions with this vague, unresponsive answer. It adds to the appearance that this process is unfair when the proponent can give evasive non-answers to the information request questions and be seen to be adequately fulfilling the needs of the hearing process.

14026. Commitments Trans Mountain did make to the Stó:lō Collective have been either lost or unfulfilled, adjusted to suit Trans Mountain's needs or broken already.

14027. The unfulfilled or lost commitments, suggested commitments or broken commitments can be found in our written submission.

14028. This adds to the perception that the process is flawed. The conflicting information before the Board about the effects of the project on Stó:lō rights, title and interests speaks to the misrepresentations in Trans Mountain's final argument. Trans Mountain says, and I will quote a few of these comments that we've received:

> *"It has made every effort; made significant modifications; identified resource-specific mitigation measures; made significant efforts; been inclusive and responsive; undertook*

> *extensive efforts; provided an opportunity to engage in meaningful dialogue; provided with opportunity to participate; committed to maximizing opportunities."* (As read)

14029. All with respect to engaging Aboriginal peoples affected by the project and with respect to protecting our interests and getting Aboriginal people to participate in the benefit from the project.

14030. Stó:lō say that the evidence before the Board does not support these statements. We do, however, agree with Trans Mountain when it says:

> *"Evidence from past spills demonstrates that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects."* (As read)

14031. The Aboriginal people that they are talking about are us, the Stó:lō. We have past experience about how they've dealt with spills that were a health threat to our communities. We've had to evacuate. Our kids were pulled from their schools. The smell in communities was intolerable, and Trans Mountain responded days late. They gave no information to the community and their cleanups did not return the land to the previous state.

14032. Trans Mountain has proven itself unreliable on this front, but still they say now that accidents and malfunctions have a low probability of occurrence.

14033. Trans Mountain also says their routine operations will not result in significant adverse effects on the ability of Aboriginal communities to continue to use land, water, or resources for traditional purposes.

14034. This has not been our experience to date. We note that their plans include significant damage to, if not total destruction of at least one important cultural site for the Stó:lō, that being Lightening Rock, which they plan to use as a staging area. It is exactly the routine operation of the construction process that will cause the damage. This will be a significant adverse effect on our use of land, waters, and resources; it will be irreversible, and it cannot be mitigated or compensated.

14035. Trans Mountain has met with us and taken our materials, but nothing we have said has been heard by them. They collected our data but have taken no steps to incorporate it fully into their plans. We have objected several times, but

the plans have not changed in response.

14036. Now, moving on to the comments on the terms and conditions. I do not propose to speak to all the comments on the terms and conditions -- they are in our written submissions in paragraphs 122 to 130 -- but I will speak to two issues, being mitigation and the protection of Stó:lō sacred and cultural sites.

14037. Under mitigation, there are not enough mitigation measures in the terms and conditions. Not all of our sacred sites, rights, title and interests have been included in Trans Mountain mitigation plans. Mitigation plans have no standards applied to them, and it's important to note that monitoring is not mitigation. I'll say it again, that monitoring is not mitigation.

14038. Mitigation should not be tied to a mutual benefits agreement, and Trans Mountain has repeatedly done this where we have strongly objected. Mitigation of the effects of the project on our sacred sites and rights and title and interests should not be in any way connected to a mutual benefits agreement. Mitigation is being included in MBAs, the mutual benefit agreements, because they are not in this process. We are including, in conversations of -- with mutual benefit agreements, to look at protecting, because there's the lack of confidence that it's being fulfilled through this process.

14039. The protection of Stó:lō sacred sites and cultural sites. There is nothing in the terms and conditions that Trans Mountain must protect Stó:lō sacred sites and their constitutionally recognized fishing rights. Vitally important that protection of our sacred and cultural sites be one of the terms and conditions. Some of our sacred sites, many fishing sites, et cetera, are within the pipeline right-of-way but are not included in the alignment sheets.

14040. At least one important cultural site, which I've mentioned previously, is Lightening Rock that will be damaged, if not destroyed, because Trans Mountain ignored our information and plans to use this as a staging area. I will speak later to the Lightening Rock later in my submission when we reply on the motion to adduce new evidence.

14041. How will the NEB guarantee the protection of our sacred and cultural sites when Trans Mountain ignores or excludes our information from its plans? Its experts are not provided with the necessary information, which we provided to Trans Mountain. Every Trans Mountain plan before the NEB omits our cultural and spiritual sites, all of this over our continued objections, yet the terms and

conditions are silent on the necessary protection. How will the NEB ever know if Stó:lō interests are damaged if there is nothing in the terms and conditions? And the answer is very clear -- you won't know.

14042. Involvement of the Stó:lō in an -- in the ongoing project. How will Stó:lō know about the effects of the project on Stó:lō interests if we have no opportunity to participate in, review, and approve plans? Stó:lō will only know if we constantly go out onsite to monitor Trans Mountain's work over several years, which is highly onerous on the Stó:lō and unfunded.

14043. The Stó:lō cannot be expected to police Trans Mountain as this is the job of the NEB. The process to date has shown that our interests are not going to be protected by Trans Mountain. The process has not given us any indication that this will change in the future.

14044. Now, moving on to the impacts of the project on the Stó:lō Collective. The record before the NEB contains outdated, insufficient, contradictory, and inaccurate evidence with respect to how the proposed project will impact the members of the Stó:lō Collective, and with respect to the cumulative effects on our culture.

14045. The Stó:lō Collective submits that because of the flawed process, the NEB cannot issue a positive recommendation for the proposed project because it does not have before it accurate, up-to-date, non-contradictory and sufficient information to conclude that the proposed project will not cause significant adverse environmental effects, or to make the determination that the proposed project is in the public interests. The Stó:lō Collective submits that for procedural reasons, the NEB should not recommend that the project be approved.

14046. Now, moving to a reply regarding Lightening Rock. The Stó:lō Collective filed a motion to adduce new evidence. This motion was granted in part with respect to Lightening Rock, which is an important Stó:lō cultural site. Trans Mountain filed a reply to the motion on January 18th, 2016, which is as follows:

> *"In response to these [Stó:lō] concerns, Trans Mountain redesigned the Project footprint to avoid any interaction with the currently mapped Site boundary. As indicated in the attached figure, construction activities to install the pipeline in this area will take place on the existing 18 m wide easement*

> *with an additional 7 m of temporary work space required for construction, for a combined [total of] 25 m… width required to install the pipeline in this area. The construction area has been significantly narrowed from the original 42 m width to avoid the known Site boundary."*

14047. The Board stated that the Stó:lō Collective could reply to Trans Mountain in our oral submission, and our following is our response:

14048. The currently mapped site boundary in the archaeological site boundary -- sorry, the currently mapped site boundary is the archaeological site boundary; it is not the cultural heritage site boundary that the Stó:lō provided to Trans Mountain. The archaeological site and the cultural heritage site boundaries for the Lightening Rock area are very different.

14049. The cultural heritage site boundaries are larger than the archaeological site. The cultural heritage site boundaries are part of an intangible portion of the cemetery area that's documented there. The archaeological site boundary used by Trans Mountain in their adjustment is inadequate and insufficient to avoid impacting the cultural heritage site recognized by the Stó:lō.

14050. This cultural heritage site is not an ancient unused site. It is used today, most recently at a gathering of Stó:lō and B.C. First Nation leaders on December 4th, known as the Gathering at Lightening Rock. At this gathering, it was reaffirmed by the leadership of the Sumas First Nations, Stó:lō Nation Chiefs Council, Stó:lō Tribal Council, the B.C. Assembly of First Nations, the First Nations Summit, the Union of B.C. Indian Chiefs, and the First Nations Leadership Council, that the entirety of this site needs to be recognized and protected from any disturbance.

14051. I personally attended this gathering, and it's important to note that we had representation from all of those organizations that stressed the importance of recognizing the cultural site and how important it was to Stó:lō. It's difficult to put into words or to describe a feeling that you have when you walk on to a cultural significant site. When you have a burial ground and you know that your ancestors have been there, and there's a connection that you feel immediately when you get there. So it's just important to stress how that felt when you got to that site.

14052. Neither Trans Mountain nor their consultants have ever discussed

details of this site, its boundaries, its protective needs, Trans Mountain's development plans, the environmental protection plan, and the site's inclusion in the development planning process with anyone from the Stó:lō Collective.

14053. Trans Mountain and their consultants have yet again proceeded to make unilateral decisions about the management of Stó:lō cultural heritage sites without any input from the Stó:lō and have once again gotten it wrong. It is necessary to reiterate that any heritage work carried out by Trans Mountain must include and fund the direct involvement of our Stó:lō team as a matter of technical development planning, not as a factor of mutual benefit negotiations or agreements.

14054. Trans Mountain says they will work collaboratively with Stó:lō and that they are committed to that and to following the Stó:lō heritage policy and the Stó:lō heritage investigation permits. However, that is not what they have done to date.

14055. In fact, there has been no consultation or engagement regarding these sites. This shows the need for a strong commitment by the NEB regarding the protection of Stó:lō cultural sites within the terms and conditions, something which we note NRCan has also requested. Such commitments and terms and conditions must be made directly with the First Nations who will be affected.

14056. Just before providing a conclusion, I will have Jean Teillet come up to add some components, as legal representation with the Stó:lō Collective.

14057. **MS. TEILLET**: Thank you, Chief Jimmie.

14058. I just wanted to introduce myself. I am xwelítem and I'm not Stó:lō, but in my language, the Michif language, I would say tansi. It means "I see you". I am a classic Red River Métis.

14059. I'm actually the great-grandniece of Louis Riel and I am fulfilling a very classic Métis role, which is working as the bridge between the western society and First Nations society, and my family has been doing it for a long, long, long time and my great grand-uncle was hanged for doing that. I hope a similar fate doesn't await me, but I do note that he is the only member -- standing member of Parliament that this country has ever hanged, notwithstanding that Elizabeth May was just here.

14060. I wanted to make one submission to you because I have seen over the last day or so that it has greatly been a matter of great discussion for the Board, which is the issue of consultation versus the Board and then the obligations of the Governor in Council.

14061. Now, I should also introduce myself as I was co-counsel on the two cases that went to the Supreme Court of Canada on consultation, so the *Taku River* case which is the companion case to the *Haida* case. We actually were the first ones who went to trial on the consultation and we actually carved out the concept of consultation and then we went to the Court of Appeal. *Haida* came up behind us.

14062. We were joined together at the Supreme Court of Canada and the Supreme Court decided to put most of the judgment around *Haida*. I was co-counsel with Arthur Pape on -- for *Taku River* and we were intervenors on *Haida*. I think I know what I speak of when I talk about the consultation obligation and how it reflects on the Crown and on a body such as this. Now, those cases, neither of them were about the National Energy Board. They were about environmental assessments, both of them.

14063. So what I would say is that the consultation obligation is an extra statutory -- over and above the statutory obligations of this Board. It rests with the Crown, it's true, but it is a constitutional obligation as opposed to your statutory obligation, and there is no question in the law about the priority of those two things. Constitutional obligations rise over and above statutory obligations. They obviously influence this Board, but they rest with the Crown.

14064. My analysis of the way it will go the Governor in Council -- and I agree with you this morning when you were saying they get to reject the project; they do, clearly. They have that possibility. But it is a mistake to believe that only your recommendations are before the Governor in Council.

14065. The Crown is going to do its consultation, and when the Governor in Council makes its decision, it's going to be sitting looking at two things: your recommendations and report and the report from Natural Resources Canada who has the lead on consultation, and they're going to have to take both into consideration when they make their decision.

14066. And in my analysis, they cannot decide that your recommendations can be looked at in the absence of what the Crown puts forward as its consultation

report and they must consider them, and they must give full consideration to the consultation report form the Crown in addition to yours. And if that means rejecting your report or amending your statutory or your recommendations in any way because of what the Crown says, that constitutional consultation obligation, I believe, permits them to do that.

14067. It cannot be that there is a constitutional obligation to consult with Aboriginal people which is meaningful because it means you might have to change your plans. I know you understand that. But it cannot mean that the Minister or the Governor in Council is precluded from changing the plans because of the consultation obligation it receives from the Crown.

14068. **THE CHAIRMAN**: Sorry, I don't mean to interrupt you. I wondered if you would entertain some questions of clarification as you're going through and we won't count that as your time. So if you're comfortable with that, we would have a question. It would help us because this is very helpful to the Panel.

14069. **MS. TEILLET**: Yes, basically that's my submission. So if you have questions, I'm happy to take them.

14070. **THE CHAIRMAN**: Ms. Scott.

14071. **MEMBER SCOTT**: A number of intervenors have invited us to make a finding on the duty to consult and suggested what the outcome should be in that finding. You mentioned the obligation of Governor in Council under section 35 and then you talk about our statutory obligations.

14072. I wonder if you have any comment to offer us or suggestions or observations about the obligation of this Board to make a determination of Crown consultation -- adequacy of Crown consultation?

14073. **MS. TEILLET**: Sorry. My analysis would be that it isn't about you commenting on the Crown's consultation because the Crown consultation is not complete.

14074. The Crown has made it very clear that they intend to rely on what Trans Mountain has done and their obligation is going to continue after this, but because they're relying on what Trans Mountain has done, your obligation is to make a decision about whether Trans Mountain has fulfilled and done in any way an adequate job of the consultation, such that the Crown could even rely on it,

because that is part of what is before you, is that they say they've done it and they say it throughout their report.

14075. So we say you have an obligation to make a statement -- a full statement about whether what Trans Mountain has done can be relied on by the Crown in any way at all.

14076. Now, the Crown is making submissions to you too, and so you obviously can comment on those. But my sense is that the Crown consultation right now has barely begun and their obligation is going to largely be picked up at the close of this hearing in reliance on what Trans Mountain has already done and in reliance on what your report will be.

14077. **MEMBER SCOTT**: That's helpful.

14078. In terms of -- if I can just come back at it so I make sure I understand. In terms of the recommendation that we make, while you're suggesting the final determination about adequacy of Crown consultation, it rests with Governor in Council. I think that's what you said?

14079. **MS. TEILLET**: Yes.

14080. **MEMBER SCOTT**: The final determination. And I think you've also said that we have some obligation to assess what Trans Mountain has done in relation to the Crown's duty and make observations about that; is that correct?

14081. **MS. TEILLET**: I believe you have an obligation to make a determination as to what Trans Mountain has done because it purports to have done consultation. You have an obligation to determine whether that is adequate, and what they have done is -- have they made -- you know what consultation means, right? I mean, it's not a mystery to any of us.

14082. The Supreme Court of Canada has been pretty clear about it and the biggest part of it isn't whether -- the first part is always the easiest. They put out their information, right? Okay, fine, we've got their big report. We put out our information. The tricky part for you is whether they heard it, or did they make any changes? Did they adequately include it in their plans? Have they been doing it? And I think the submission from Stó:lō to you has been no.

14083. Because certainly with respect to Lightening Rock, the fact that -- it

was a classic example, they -- we told them about our sacred sites. In the first instance I believe they excluded them. They said they were confidential. We said, "No, no, no, put them in." We said -- then they made selections, some they said weren't important, they just -- arbitrary.

14084. It's another inadequate, inappropriate way of dealing with information that's coming from us. It's not up to them decide whether our sites are important or not. It's up to us to tell them, and them to make their plans so that they don't damage them. And in the case of Lightening Rock we say the potential is there to be utterly destroyed by their plans.

14085. And then even in their response to you which came in -- what's today, the 21st? -- two days, three days ago, they said, "Well, we've just changed it, now it's all better." They didn't even talk to us. That's inadequate consultation. And actually, you know, it's a total absence of consultation in the sense of hearing what we say and changing your plans so that you do not damage important cultural sites.

14086. And I would remind you that they made a commitment and you say they're held to their commitments, right? Whether they're in that Commitment Tracking Table or not, if they made a commitment they're held to it. We understand that's a ruling from the Board. But they're -- this is a commitment that they haven't done about protect -- they said one of their commitments was that they would protect our cultural sites, but they're not.

14087. Now it's up to you, I say, it's your obligation to make a full determination as to whether the consultation that was required in order to -- for them to fulfill that obligation; has that been carried out? Have they done their job on consultation and accommodation?

14088. Because I would say for Stó:lō this is not just about consultation, we're the people who are right on the river here, this is going -- and in fact it's going right under some -- one reserve where the proposal is -- actually, more than one because I think it's going under the Grass Reserve too -- proposed to go right around the border of another reserve, all along fishing sites.

14089. And I would also emphasize that Stó:lō are not just asserting constitutionally protected fishing rights, we have Supreme Court of Canada decisions that prove that we have fishing rights that are constitutionally protected in the Fraser River. These are not just asserted vague, vague rights.

14090. **MEMBER SCOTT:** Thank you. Very helpful, thank you.

14091. **MS. TEILLET:** If there are no more questions for me -- or yes perhaps.

14092. **THE CHAIRMAN:** I'm trying to formulate a question based on -- and perhaps it's to understand -- I hate the word process because I get confused myself on process, consultation, but on the issue of the Lightening Rock and the cultural site boundary versus the archeological boundary -- and I think, Chief Jimmie, you said that NRCan, as the Crown acting in this case, had recognized that in their submission in their consultation with you in aspects.

14093. And I'm just trying to -- the process is that Trans Mountain had proposed this, you came back with this, and now you've -- we got a reply on that, on that particular issue. And I think you mentioned that NRCan had made a similar recommendation of the importance of that site.

14094. And so I'm just following Ms. Teillet's example on what we need to do, the Board's responsibility on recognizing that. We would then assess that along with all of the other information of what Trans Mountain has consulted. And if they hadn't provided proper mitigation, we could make a condition if we we're going to approve them. We have to make conditions anyway, whether we recommend approval or not.

14095. So then when does that get tested? It gets tested afterwards once we make a recommendation. And so the Crown consultation -- I'm going with your levels, and pardon the confusion because I have to get this correct in my mind because that's very important to the Panel in doing this, so ---

14096. **MEMBER SCOTT:** Is that tested by GIC or us?

14097. **THE CHAIRMAN:** Pardon me?

14098. **MEMBER SCOTT:** Tested by GIC or us?

14099. **THE CHAIRMAN:** Yeah, that's -- thank you from my Panel. Is that tested by us or is that tested by GIC?

14100. **MS. TEILLET:** Okay, I'm trying to -- let me just clarify what we

were thinking about NRCan on that. It's not so much that NRCan made a specific request about Lightening Rock specifically. It was that the need for a strong commitment from you to make a term and condition of the protection of cultural sites, that that become a term and condition of the project.

14101. I believe -- and I don't want to misunderstand what NRCan is setting, but that's what I understand them to have requested from you, was that it'd be a specific term and condition that cultural sites be protected. So we raise that only by way of saying that we're not the only ones, we've got this one particular one which is Lightening Rock and we're just putting that in there. So I hope I've clarified that.

14102. Now, I'm trying to be clear about your question about where -- just let me -- I'm sorry; what? Make them specific.

14103. My colleague, Shana, is saying that what NRCan said was that it was also very important to name the First Nation in the term and condition, and not just make it a generic "protect cultural sites" so that they're -- they're held -- their feet are held to the fire on very specific things.

14104. So I'm trying to understand your question, so you're asking about where this particular issue would be tested, would -- is it from you or from the GIC?

14105. **THE CHAIRMAN:** I understand where we -- what our -- I think our responsibility is, on this, we have to test whatever evidence and make a condition based on what Trans Mountain said they're going to do and not going to do, and other intervenors.

14106. If we put a condition forward and that it's not acceptable to -- how do you test -- how is that tested? How do you get consulted on that if you're not on our conditions, that's my question, post our recommendation?

14107. **MS. TEILLET:** Thank you for that, because even though it's not in our oral submissions -- and probably should have been, so that's my fault on the terms and condition -- but it is in our written submissions. And what we've said is that Stó:lō -- one of the terms and conditions we're proposing is that it's not good enough for Trans Mountain to go away, make their plans and then just there before you, because you will have no way of knowing whether it's meeting Stó:lō's needs.

14108. And so what we're saying to you is that the need is for Stó:lō to be able to review them. Now. I'm -- I hesitate a little bit because, you know, I'm -- this veto power kind of thing kind of raises its head, but still there must be some way for us for a term and condition to be created so that if they decide to do something, they have to run it by Stó:lō.

14109. And Stó:lō have to be able to say, "Yeah, that's going to work" or, you know, I mean for example, "Okay, we're not going to use Lightening Rock, we're going to go around it, we're going to put our staging area somewhere else." And then Stó:lō can say, "Thank you, we really appreciate the fact that you've done that." Or they say, "Okay, well now we've said it's only going to be this wide, now we're going to just shrink it more and..."

14110. But basically Stó:lō think that whole area is a no-go zone and we've told them that, right? So the -- but we -- how do you -- how will you know that after? So what we're saying is there has to be a term and condition whereby when they make their plans, there has to be some means of running it through Stó:lō to see whether it is acceptable or whether it does what it's supposed to do.

14111. Because if it's just a term and condition on them, and then it comes to you, we're just cut out and we -- that's what we were trying to suggest when we talked about the fact that we can't police this ourselves. It -- I mean you're the policing Board, right? I mean you're the body that is going to be -- if someone complains, they write a letter to you. You will supposedly investigate if there's a problem or something going on down the road; you're the regulator.

14112. So what we need is some way to have Stó:lō inserted in here somewhere on a continuing basis. So I'm suggesting in your term and condition you have to include some ability to have the protection of sites or ongoing work that's going on; Stó:lō have to be included in this in an ongoing way.

14113. And I would add one more thing. One of the things that Trans Mountain is doing is saying, "Well we'll have Aboriginal experts." It's very clear that a generic Aboriginal expert -- so for example, me, I'm from Red River in Manitoba, I mean, now I've been working with Stó:lō for eight years, I have some better idea of where their cultural and spiritual sites are. But if they hire an Aboriginal person who's a Mi'kmaq from New Brunswick, that person isn't going to have a clue any more so than -- Stó:lō's word for White folks is xwelítem -- any more than a xwelítem would know. So having a generic Aboriginal advisor isn't

good enough. You have to have somebody from Stó:lō, who is knowledgeable and can help them, and we've offered this and they won't do it.

14114. So it's a problem, a really big problem. But I think that -- I know you have to make terms and conditions, so those are some of the things that would help by way of making this project doable in a way that caused no damage if Stó:lō were involved all the way down the line in assessing the adequacy of what's going on here.

14115. I'm hoping I'm answering your question.

14116. **THE CHAIRMAN:** It's very helpful to it.

14117. That's all our questions at the moment. Do you have concluding comments from -- Chief Jimmie? Perfect.

14118. Thank you, Ms. Teillet.

14119. **CHIEF JIMMIE:** Thank you, Jean.

14120. So in conclusion, my presentation here today emphasized the position of the Stó:lō Collective. We have rights and title in the project area. Some of those rights are recognized and affirmed by the Supreme Court of Canada. We have fully participated in this process but we are left with concerns.

14121. The process has not alleviated the fears of the Stó:lō based on our past experiences with Trans Mountain. The process has not provided sufficient, reliable data on which to recommend this project. The Proponent continues to work in a manner that repeatedly proposes to significantly impact our cultural and sacred sites. The terms and conditions are insufficient to protect our interests.

14122. And the result, we submit, that the Board cannot recommend the project at this time. The process was too flawed and cannot, at this stage, be repaired.

14123. I just want to take a moment, too, to acknowledge your roles in this process. In a -- as I mentioned earlier, in a position of leadership that can be very trying at times and you're faced with a lot of difficult statements and a lot of, in some instances, attacks that are -- where they shouldn't be. And I just wanted to recognize that I can't imagine the amount of information that you've had to

review. I can't imagine the pressure that sits upon your shoulders when reviewing all of this, and providing a recommendation based on hearing so many different aspects of this project.

14124. So I just wanted to just take a brief moment to acknowledge that I recognize the importance of the work that you're doing, and I recognize the importance of how difficult it must be, and just remind you why everyone has come before you through this process; why everyone has had such a deep passion with respect to their territories or their cultural sites.

14125. We heard today, twice already this morning, the passion from Squamish, the passion from our MP from Saanich. It just goes to speak to volumes of how much people care about this project and how the impacts can be quite devastating.

14126. So just a really quick note to acknowledge your work that you're doing and the importance of what you're doing and how difficult it will be, and also the importance of us being here today.

14127. We -- there was a lot of our leadership that had asked us not to participate, to not be here as a demonstration that the process is flawed, but we felt it was important to come and be a part of this and provide our final submission to this process.

14128. So with that, those are my submissions, subject to any questions from the Board.

14129. Thank you very much.

14130. **THE CHAIRMAN:** I just want to thank -- I don't think I've any words for you but to recognize that what you have just said, that goes where it's meant to go, and we each of us feel that, but we will do our best, as much as we can do to fulfill our responsibility. But I thank you for that recognition on behalf of Alison and Phil and myself; I appreciate that.

14131. With that, I thank you again for coming today, and we'll adjourn until 1:30 when we'll hear from the City of Port Moody, followed by the BC Nature, and Nature Canada.

14132. We're adjourned till 1:30.

--- Upon recessing at 12:09 p.m./L'audience est suspendue à 12h09
--- Upon resuming at 1:34 p.m./L'audience est reprise à 13h34

14133. **THE CHAIRMAN:** Good afternoon, and welcome to this afternoon's session in Burnaby, which is part of the National Energy Board's hearing regarding the Trans Mountain Expansion Project. We will continue to hear intervenor summary oral argument this afternoon.

14134. And just in case you weren't here this morning, I have to go through some housekeeping items just to ensure that we're all aware of the process for this afternoon.

14135. My name is David Hamilton. I am the Chair of the Panel, and with me, to my left, is Ms. Alison Scott, and to my right is Mr. Davies.

14136. Some housekeeping matters, that in the event that we get a fire alarm, the procedure will be to exit the hearing room using the entrance you came in. Once you're outside the hearing room, there are two excavation -- 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.

14137. Uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.

14138. Once outside the building, proceed to the hotel muster point located on the northwest corner of Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure that you have all your members of your party accounted for and wait further instructions from the Delta Burnaby representatives.

14139. As indicated in Procedural Direction No. 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 the opportunity to file written argument in-chief prior to providing oral summary argument.

14140. There is a timer that will indicate a green light for the first 35 minutes,

switching to a yellow for the last 5 minutes of your speaking time. Finally, when your time is up, a red light will come on. If necessary, the microphones will be switched off, although I will warn you before this happens.

14141. Final argument, as a whole, is an opportunity to express your views and opinions about the project, based on the evidence filed by Trans Mountain and intervenors on the hearing record. It is also an opportunity to make recommendations to the Board about matters within the List of Issues or any terms and conditions in which the project should be subject, if it is approved. The Board will not give any weight to new evidence introduced during oral summary argument or any submissions made that do not address the List of Issues.

14142. I think we're getting -- ready to get underway, and this afternoon we will be hearing from, first, the City of Port Moody, followed by the BC Nature, and Nature Canada.

14143. Prior to hearing from the City of Burnaby, we have a preliminary matter that the Board would like to deal with.

14144. The Board wishes to deal with this afternoon regarding the schedule of speakers. The Board received a motion today from Mr. Ken Klakowich, who is a registered intervenor. Mr. Klakowich was out of the country for several months and missed the deadline to be included in the schedule for oral summary argument. He would like to be scheduled to provide oral summary argument while the Panel is in Burnaby.

14145. In considering this motion, Ms. Oleniuk, does Trans Mountain have any objections to Mr. Klakowich's request?

14146. **MS OLENIUK:** Not at all sir; fine by us.

14147. **THE CHAIRMAN:** Therefore, in the interest of time, and understanding that Trans Mountain has no objections, the Board is prepared to rule on Mr. Klakowich's motion now.

14148. The motion is granted. An NEB process advisor will contact Mr. Klakowich to schedule him for an available time while we are sitting here in Burnaby.

14149. So with that, we're ready to begin, and here we have read all your argument and all your filings on this matter and therefore we're prepared to hear your oral summary argument.

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

14150. **MR. RAMSAY:** Mr. Chair and Members of the Panel, good afternoon and thank you very much for this opportunity to speak today. We're here today representing our council, our community and our local environment.

14151. My name is Kevin Ramsay. I'm the city manager for Port Moody. On my right is James Yardley, legal counsel for the City of Port Moody. And on my left is Margot Davis, one of the province's top environmental experts and our city's manager of sustainability.

14152. Port Moody is a waterfront community located just east of the Westridge Terminal, as I'm sure you know, at the head of Burrard Inlet.

14153. I have on the screen, if it could come up, a map of Port Moody, and you will see that when that comes up that Port Moody is a beautiful community. It is very much beloved by its residents and our visitors. When we do satisfaction surveys, Ipsos Reid surveys, we get amazing results on how much people love the environment and living in the community of Port Moody.

14154. While connected to the broader Metro Vancouver area Port Moody is a small community. We have around 35,000 people. And it's 26 square kilometres.

14155. The City of Port Moody wraps entirely around the shoreline of Burrard Inlet. Port Moody is more than a city with a shoreline; it's a shoreline city with over 90 percent of the community located within two kilometres of the shoreline. In fact, the very first line in our council's vision statement and our community's vision statement is that Port Moody is a unique and safe and vibrant waterfront city. The shoreline is so extensive that whatever happens there affects the entire community.

14156. Burrard Inlet and its shoreline is at the heart of our community. Burrard Inlet and its shoreline provides significant value and are intrinsic to the quality of life and well-being of our residents. It provides the foundation of a

mutually supportive network of relationships upon which the community depends on, providing the community with a deep sense of identity and security.

14157. Significant assets exist and many activities take place on Port Moody shoreline. Businesses, including a major port operation, numerous private residences and an extensive network of parks and recreational facilities are all on the water's edge.

14158. However, connections to Burrard Inlet extend well beyond physical investments and infrastructure. Burrard Inlet is intrinsic to the experience of living in Port Moody. As it has been for centuries, it is our history, our past, our present and our future. There's a deep appreciation on value of the natural environment and it is recognized that the natural environment is fundamental to the economic and social well-being of our community.

14159. I quote one of our key strategic priorities:

> *"To be leaders, stewards and advocates for the protection, conservation and enhancement of our natural environment."*

14160. And that is why we are here today, Panel.

14161. Although the proposed pipeline does not extend through Port Moody the project poses significant risks to Port Moody with respect to the potential for oil spills both from accidents at the Westridge Terminal and from project related vessels.

14162. Recognizing these risks, the City of Port Moody has invested significant resources, including spending hundreds of thousands of dollars to participate in this review process. This is significant for us. We're a small community. We have a low tax base. But we have respectfully participated in the process and have worked extensively to understand the project. This is including hosting a town hall meeting where representatives from Kinder Morgan participated. We have reached out to Kinder Morgan to make sure we understand this project as best we can.

14163. The conclusion of our investment in reviewing this project is that the project puts our community at significant risk and there is simply not sufficient evidence presented by Trans Mountain to demonstrate that these risks have been adequately considered and addressed.

14164. I do not want, our community does not want, and I believe the country does not want the environment and the social and economic activities that depend -- that we depend on destroyed for generations.

14165. I will pass it over to James Yardley.

14166. **MR. YARDLEY:** Mr. Chair, Members of the Panel, by way of overview, it's the City's position that at first Trans Mountain has failed to establish that the project is in the public interest under the *National Energy Board Act* or that it meets the requirements of the CEAA 2012 and that accordingly this panel should recommend that a Certificate of Public Convenience and Necessity not be issued for the project. This is for the following reasons.

14167. First, that Trans Mountain has not undertaken a sufficient assessment of potential impacts of the project. This is both general and with respect to Port Moody.

14168. Secondly, and in the alternate, the evidence that has been presented in this proceeding shows that the project has significant and unacceptable adverse environmental, social and economic risks that, in the City's view, are not acceptable.

14169. And third, that Trans Mountain has failed to develop or articulate in this proceeding a significant response -- sorry -- a sufficient response to emergencies.

14170. In the alternative, if the Board recommends issuance of a CPCN the City proposes the addition of a number of conditions and has comments on some of the conditions that are proposed by the Board.

14171. The key considerations for Port Moody arise out of the following. In terms of understanding what Port Moody is, as noted by Mr. Ramsay, and as noted in the City's filed evidence, Burrard Inlet and the shoreline along Burrard Inlet are very important to Port Moody.

14172. Many significant assets are located along the shore and many activities take place on and around Burrard Inlet. There are numerous residences along the water. There are many businesses that are directly dependent on marine traffic and there is parks and recreational space and natural space, and this is expanded

upon in our written submission.

14173. Turning to the parks and recreational activities, they are extremely important in the city. A series of city parks connected -- they are connected in a continuous string and they are the heart of Port Moody and a destination for people from across the region.

14174. The parks and recreation spaces, they support a variety of safe, accessible and affordable outdoor recreation opportunities. They also support healthy and active lifestyles and a natural environment that is respected, protected and enhanced for the enjoyment and benefits it provides. It also provides pride in the community and a strong sense of belonging.

14175. However, there are also numerous significant sensitive environmental areas located along Port Moody's shoreline. These include mud flats, intertidal areas, riparian areas and multiple streams. Many of the streams are fish bearing, and these are directly connected to Burrard Inlet. All of these areas are interdependent with Burrard Inlet and are designated as environmentally sensitive areas or ESAs for protection under the City's official community plan.

14176. Approximately 14 kilometres of shoreline and 50 kilometres of streams have been designated as ESAs under the City's official community plan, along with about 1.3 square kilometres of intertidal area.

14177. There is also a strong environmental ethic in Port Moody. According to a recent survey 82 percent of Port Moody citizens said that it is important for the City of Port Moody to be a leader in protecting the environment. Port Moody's environmental values are seen by the significant investments that have been made in the environment by the community, the City and others, including the federal government, in protecting, restoring and enhancing the natural environment in the Burrard Inlet watershed.

14178. Two key community driven examples of this are the hatcheries and education centres at Noons Creek and Mossom Creek. These community based programs contribute a wide variety of services that include fisheries and watershed restoration activities, environmental education and stewardship activities in the Burrard Inlet watershed. These initiatives are run by a dedicated group of volunteers and are supported by various organizations, including Fisheries and Oceans Canada, the City of Port Moody, local businesses and many individuals from the broader community.

14179. Further, activities that are connected to the shoreline and Burrard Inlet provide an important annual revenue source of over $400,000 to the City, and that's not including property taxes.

14180. I will now further expand on our three key reasons why the City believes that the Board cannot and should not recommend an approval for the project.

14181. The first is that Trans Mountain has not provided evidence to adequately assess the project. The City submits that Trans Mountain has failed to meet its burden -- and the burden is on Trans Mountain -- of providing sufficient evidence to show that the project is in the public interest. That is, the City believes that there are significant gaps and omissions in the evidence in relation to the impacts of the project generally.

14182. Of particular importance to the City are gaps and omissions with reference -- with respect rather to impacts on Port Moody. A key concern for the City and Community of Port Moody is the potential environmental and socio-economic impacts from a marine oil spill.

14183. Significant deficiencies in the overall approach taken by Trans Mountain to assessing spill risk have been identified by others. The evidence of Drs. Gunton and Broadbent, as noted in the written submission for the reference to the Exhibit number, it notes numerous concerns with respect to the oil risk assessments undertaken by Trans Mountain. The Gunton report notes that the spill risk analysis undertaken by Trans Mountain fails to meet any of seven best practices criteria that are identified and it also identifies 27 major weaknesses in Trans Mountain's spill analysis.

14184. As a result of the approach it has taken, Trans Mountain has significantly understated the frequency of potential oil spills and has failed to adequately assess their overall impact over the lifespan of the project.

14185. Likewise, the city believes that there are omissions with respect to identifying and properly considering critical risk reduction measures. One example arising out of the TERMPOL material is that Trans Mountain has not identified decision making protocols for allowing tankers to safely traverse Burrard Inlet during extreme weather events and instead proposes to rely on decisions by pilots.

14186. In the City's view, this shows heavy reliance on decision making that is susceptible to human error. Det Norske Veritas has noted that the human factor is the main cause in approximately 80 percent of accidents and the U.S. Coast Guard has also identified human error as contributing to high percentages of tanker accidents, towing vessel grounds, collisions, fires and explosions.

14187. Trans Mountain's evidence about the 2007 spill in Burnaby along its line confirms the potential for Port Moody to be affected by an oil spill having a marine or land-based source. As Trans Mountain notes in its evidence -- and this is in exhibit B18-2, Volume 7 -- oil from a spill of only 100 cubic metres affected 15 kilometres of shoreline and reached the Barnette Marine park at the entrance to the Port Moody arm of Burrard Inlet.

14188. Trans Mountain, in its evidence, also noted that that spill caused habitat loss, death or removal of marine plants, the likely loss of intertidal fauna such as starfish, effects on subtitle organisms such as crabs and effects on marine mammals and birds. This spill is of particular interest to the City. That is because while the city has provided evidence of the environmental, economic and social value of the Port Moody arm of Burrard Inlet, Trans Mountain has not in its application undertaken a sufficient assessment of how Port Moody might be affected by project-related activities such as an oil spill.

14189. Instead, what appears to the City to be a notable feature of Trans Mountain's approach to the assessment of project-related impacts is the general lack of consideration by it about impacts on Port Moody.

14190. Examples of this are seen in the exclusion by Trans Mountain of Port Moody and the Port Moody arm of Burrard Inlet, from the local study area assessments for several things, including marine fish and fish habitat, and that's in Exhibit B18-22, Volume 8a, paragraph 4.3.6.2 and Figure 4.2.2, also with respect to impacts on marine birds, and that's also in Exhibit B18-29, Volume 8a, paragraph 4.3.8.2 and impacts of the increased marine traffic that's associated -- or would be associated with the project on commercial, recreational and tourism uses. That is also in Exhibit B18 -- that's actually rather in Exhibit B18-26, Volume 8a, Figure 4.2-28.

14191. These omissions are inexplicable when one considers that, first, Port Moody is only 2.3 kilometres from the Westridge Terminal. Secondly, the tide flows from Westridge to Port Moody certainly on a daily basis. And third, that

the 2007 oil spill on the Trans Mountain line in Burnaby showed that even a relatively small spill and a one of a size that certainly falls within the magnitude of what Trans Mountain characterizes as a credible spill at Westridge can have a negative impact on the Port Moody arm of Burrard Inlet.

14192. The City does not know why Trans Mountain has omitted to undertake appropriate assessments for the Port Moody arm and Port Moody generally. However, the fact remains that Trans Mountain has omitted to provide an assessment of potential and foreseeable effects of the project on an area that is immediately adjacent to the Westridge Terminal and that both history and common sense show face impacts from the project that are both severe and likely to happen.

14193. The City's concerns about the lack of evidence from Trans Mountain go further. As is shown in the City's evidence, there is a lack of evidence concerning existing baseline conditions in Burrard Inlet. Without an adequate baseline, it is not possible to properly assess the full impacts, whether real or potential, on the environment form the project.

14194. In the event that the project is approved and proceeds, it will also not be possible to detect or assess actual impacts should they occur. This includes not being able to properly evaluate potential impacts from a project-related oil spill. Determining and measuring effectiveness of spill mitigation and restoration efforts will also not be adequately informed.

14195. The City submits that Trans Mountain's approach to protecting wildlife and wildlife habitat in and around Burrard Inlet is also deficient. For example, there is an inadequate evaluation of species at risk. Trans Mountain has stated that it recognizes the sensitivity of species at risk and is committed to implementing mitigation to avoid or reduce the project's potential effects, and it refers to species-specific mitigation plans that it says are being developed.

14196. However, while Trans Mountain has, in its reply evidence, acknowledged the evidence of Dr. Golds on behalf of the City of Port Moody which identifies four species at risk in the Burrard Inlet area and it has not challenged, refuted or otherwise disputed Dr. Golds' evidence, Trans Mountain appears to only be preparing a mitigation plan for one of the species and that's the pacific water shrew. Trans Mountain has not provided an explanation as to why it is not developing mitigation plans for other species at risk that are identified by the City.

14197. The City further submits that Trans Mountain's approach to protecting wildlife and wildlife habitats during a potential oil spill is deficient. The unchallenged evidence of the City is that a spill of oil associated with a project, which is a possibility that is not denied by Trans Mountain, could have significant effects on the environment including: first, on salmon travelling to and from the Noons Creek, Mossom Creek and other streams that are connected with Burrard inlet; secondly, on local populations of shorebirds and waterfowl and; third, on local species at risk that include the band-tailed pigeon, the great blue heron, the pacific water shrew and the western purple martin.

14198. However, Trans Mountain has not addressed how these effects will be mitigated. Instead, the assessment undertaken by Trans Mountain has been of what are, in the City's submission, specious concerns about the possibility of salmon being injured by the wake form vessels, or birds hitting ships at night. The omission of an assessment of oil spill related impacts to and mitigation for wildlife, which is a matter of great concern and reasonable foreseeability, speaks volumes.

14199. Trans Mountain has stated that measures to protect wildlife and wildlife habitat will be included in the emergency response plan. However, the City submits that the emergency response plan fails to identify measures and the potential effectiveness for protecting wildlife and wildlife habitat from project-related impacts in and around Port Moody.

14200. Furthermore, the City submits that the assessment with regard to evaluating the fate, effects and impacts of various products being proposed to be transported by the project is insufficient. While the project is intended to transport multiple different products, the assessment has focused on only one type of crude oil product, and that's Cold Lake Winter Blend or CLWB. Even if CLWB represents a large percentage of transported product, that, in the City's view, is not sufficient to establish that other products should not be similarly evaluated.

14201. The City submits that Trans Mountain's application, materials and evidence are deficient because of the failure to adequately investigate risks posed by the variety of products -- a full variety of products that may be shipped on the pipeline. This insufficiency is highlighted by Trans Mountain's statement that different diluents and source bitumens and dilbit and synthetic crude blends may behave differently when spilled as well as have very different chemical

characteristics and potential effects. This evidence presents real concerns about the sufficiency of the application's assessment.

14202. I just pause to note at this point that in the written submission the quote states that this is at page 66 of Volume 86-12. It should be actually page 59; there's on error on the page number.

14203. Trans Mountain has not assessed the impacts of an oil spill on the Port Moody community and environment, including but not limited to, impacts on foreshore and intertidal areas and the fate and effects of diluted bitumen on Port Moody mudflats.

14204. Trans Mountain has not assessed the cost of the project or of accidents associated with the project to the City and the Port Moody community. The City emphasizes that it will face direct costs and impacts in connection with the project on matters that include emergency preparedness, planning and response, emergency communication, asset depreciation and lost revenues from civic parks and other facilities that Trans Mountain has failed to consider.

14205. Attempts by the City, as with other intervenors, to obtain responsive answers from Trans Mountain to information requests haven't met with what appears to be -- appears to the City to be a systematic attempt by Trans Mountain to withhold meaningful and relevant information, or otherwise not address matters in the evidence.

14206. Ultimately, decades of effort by the city and others to protect the local environment in Port Moody are exposed to significant risk related to the project. The city is not content to accept Trans Mountain's assurances that the risks of the project to it are not material, without there being evidence that Trans Mountain has actually assessed the matter.

14207. Without a -- I'll try that again; without an appropriate local assessment having been undertaken by Trans Mountain, the city submits that this Board cannot make a determination that there are no significant impacts to Port Moody.

14208. These matters are important to Port Moody, its residents and its business community. They are part of the values and preferences of society that help define the public interest. Without an appropriate assessment having been undertaken, the city submits that the Board cannot reach an evidence-based conclusion that a CPCN can be issued.

14209. The second reason why the city believes that the Board cannot recommend an approval for the project is that to the extent it is available, the evidence shows that the project has unacceptable risks. There is every reason to believe that there will be oil spills associated with the project.

14210. Oil spills on the Trans Mountain pipeline have occurred in a random and sporadic basis, and have had a variety of causes. These spills have occurred at an average annual rate of over 1.5 spills per year, and three have occurred in the past 10 years, and they've involved almost 5.8 million litres of liquid hydrocarbons.

14211. Evidence from the City of Vancouver and the Washington State Department of Ecology show that there is a likely -- sorry, a substantial likelihood of a spill occurring during the lifetime of the project. Trans Mountain has not, in the city's view, refuted that conclusion. Likewise, there's the experience of the 2007 Trans Mountain oil spill in Burnaby to consider.

14212. The potential impacts of an oil spill in Burrard Inlet have been shown in the Oil Spill Trajectory Modeling by Genwest, Exhibit C-77-28-10. That modeling shows that spills in Burrard Inlet associated with the project will have significant and wide ranging impacts.

14213. This includes an 8,000 cubic metre oil spill model at the Westridge Terminal under the scenarios modelled, travelling up estuary to Port Moody, and within a matter of hours covering a major portion of the Port Moody Arm of Burrard Inlet.

14214. To the extent that Trans Mountain says that crews will respond to a spill and resources will respond, concerns about such response capabilities are identified in the report of Nuka Research and Planning Group. The Nuka report notes hindrances to effective response and oil recovery of a spill associated with the project that may arise from a variety of factors, including environmental conditions, resources -- sorry, response system capacity and logistical constraints.

14215. For example, Nuka found that for a summer spill in the Vancouver Central Harbour, on-water oil spill operations would be impeded or shut down because of weather or environmental conditions 34 percent of the time, and that the potential for shoreline stranding of oil in Burrard Inlet is significant.

14216. Nuka also noted that changes to the density and viscosity of diluted bitumen within the first few days of release may render oil spill response systems ineffective. A spill of bitumen associated with the project would have devastating impacts on Port Moody's shoreline, mudflats and intertidal areas.

14217. As previously noted, in the case of the Port Moody area, a marine oil spill associated with the project could have significant effects on a wide range of wildlife, including fish, shorebirds, waterfowl and species at risk, as well as significant impacts to longstanding environmental stewardship efforts and investments made over several decades by the community.

14218. Considering all of the above factors, Port Moody submits that the risks and negative impacts of the project require a denial of the CPCN.

14219. Third, this is dealing with the Trans Mountain's response plan for emergencies. The City submits that Trans Mountain has not articulated and appears to have not developed sufficient responses to emergencies.

14220. The City characterizes Trans Mountain's overall commitment and approach to emergency response in the following terms and believe it to be deficient. The approach to addressing oil spills associated with the project seems to be, first, to emphasize prevention instead of what would happen if a spill occurred,

14221. Secondly, assert Trans Mountain's limited responsibility for responding to marine spills except during loading at the Westridge Terminal.

14222. Third, noting that the tankers that will service the project will be owned and operated by third parties.

14223. And also fourth, suggesting that this an issue that is beyond the jurisdiction of this Board.

14224. Trans Mountain's emphasis on prevention rather than addressing response is, in addressing this issue, misplaced. While prevention is laudable, this is a laudable goal, the whole purpose of a response plan is to address what happens when prevention does not work.

14225. Trans Mountain's own recent track record shows that accidents have occurred in the past, and Trans Mountain has not provided a credible basis for this

Board to conclude that significant accidents will not continue to occur in the future. If anything, the opportunities for such accidents and emergencies will multiply with the project.

14226. The need for well thought out responses, even if they will rarely be used, is in the City's submission obvious. However, the evaluation of such plans is crucial and Trans Mountain has inexplicably gone to significant lengths to resist full disclosure of such plans.

14227. Trans Mountain has unreasonably, in the City's view, and unjustifiably resisted disclosure of comprehensive emergency planning information. The reason for this is neither obvious for a party seeking a CPCN for which -- sorry, it's not obvious for a party seeking a CPCN for which it has to satisfy the Board that it is meeting and satisfying the public interest.

14228. The reluctance of Trans Mountain to disclose evidence of its emergency planning in un-redacted form means that the Board, stakeholders whose interests either will or may be affected by such plans, and the Canadian public in general, do not have full information about Trans Mountain's emergency response plans and are unable to assess the readiness of the Proponent to respond to project-related accidents, malfunctions, and spills.

14229. The City submits that Trans Mountain's references to the emergency response responsibility of third parties does not assist this proceeding. While tankers may operate under the authority of other regulators, there's a direct connection between their operation and the project. But for the project, the additional tanker traffic and the risks such tankers pose would not exist.

14230. This Board has previously recognized the desirability of assessing the entirety of an undertaking even if part of the undertaking does not fall squarely into the Board's jurisdiction. Ultimately, Trans Mountain's apparent preference to downplay the assessment of tankers does not permit a transparent assessment of emergency response in this proceeding, nor move Trans Mountain's obligations to demonstrate that it has prepared a sufficient response to foreseeable emergencies.

14231. Trans Mountain has stated in its final submissions that aspects of marine shipping are also outside the Board's jurisdiction. This ignores the broad scope of matters that can be considered in determining whether to recommend a CPCN. It does not mean that Trans Mountain does not have to adequately address emergency responses related to project related shipping or that the public

interest that is to be considered by the Board does not require Trans Mountain to provide sufficient evidence in relation to marine shipping issues, including the impacts of shipping and accidents associated with the project in the local area.

14232. The City submits that the evidence that Trans Mountain has filed to date has not demonstrated adequate emergency response capacity by Trans Mountain. For example, the spill response capability of WCMRC -- which Trans Mountain depends upon in relation to oil spill response -- has not shown to be adequate.

14233. Evidence from the City of Vancouver concerning WCMRC's recent response to the Marathassa spill show a lack of suitable resources utilized by WCMRC, gaps in policy plans and resources, delays in instant notification and in reporting, delays in the responsible party acceptance of responsibility, gaps in incident management and command, and gaps in spill science and environmental protection.

14234. The State of Washington Department of Ecology has found that Trans Mountain,

> *"...provides too few details about response capability and access to the best achievable technologies strategically pre-staged to respond immediately to vessel spills in Canadian waters."*

14235. And the City adopts and supports that evidence.

14236. It also appears that provision of firefighting services for the Westridge Marine Terminal has not been sufficiently addressed. The evidence puts into question whether the City of Burnaby would respond to a fire at the Westridge Marine Terminal.

14237. Other than tugboats with firefighting capabilities, which have a minimum response time of 20 to 30 minutes, and shipboard personnel, the next level of fire response would either be industrial firefighting contractors, which have a reported response time of 6 to 12 hours, or other municipalities.

14238. This is of direct interest to the City of Port Moody. Port Moody is a neighbouring municipality to Burnaby and the Westridge facility. However, Trans Mountain has not contacted the City to request and secure firefighting

response support. The City is not clear on what role it would have in any response or what resources and training would be needed to prepare for such an eventuality.

14239. Trans Mountain's evidence is that finalized emergency plans will be prepared in advance of the commissioning and operation of the project and that it will consult with the City of Port Moody and other emergency response providers at that time.

14240. The City submits that in saying that it will establish an emergency management program without setting out its proposed terms, Trans Mountain has failed to address safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.

14241. There is a significant knowledge gap concerning other potential local government resources that would be needed to respond to an emergency related to the project. Trans Mountain has so far been unable to provide the specific communication mechanisms in an emergency in significant function areas that affect spill response and communication from the City standpoint.

14242. That includes details relating to communication between emergency command and Port Moody's Emergency Operations Centre to request municipal resource support for an emergency; to require municipal resources for advisory roles; to share information on response activities; to coordinate emergency evacuation; to coordinate volunteer management; and to respond to public concerns, enquiries, complaints and provide information to the community.

14243. Trans Mountain has not provided evidence describing how the local community and environment would be protected in the event of an oil spill related to the project. The City is not listed in the Westridge Marine Terminal ERP. There is no information on how sensitive areas within the City would be determined or how local knowledge and expertise would be integrated into Trans Mountain's ERP.

14244. Trans Mountain has not demonstrated effective response with respect to shoreline protection, cleanup, and recovery.

14245. Trans Mountain notes that *"oil would likely spread to the mudflat surface and may possibly penetrate burrows"*, yet it provides no details on

adequate measures to clean and recover oil in such situations.

14246. Further, Trans Mountain has not submitted other emergency response and recovery documents, including security plans, volunteer management protocols, public notification and communication procedures.

14247. As was noted in the instance of the Marathassa spill, approximately 4,000 people sought to volunteer in response with many showing up on the scene unrequested. There is nothing indicating how that would be addressed here.

14248. Trans Mountain, however, notes that, *"situations could arise where emergent volunteers present a potential pool from which to hire and train response workers"*, but it has not addressed this or indicated how that would be addressed in practice.

14249. It remains unclear to the City what resources and service levels of local emergency response by local governments and the City would be required by Trans Mountain.

14250. While Trans Mountain has confirmed that marine spills are likely to result in demands on local, municipal, regional and independent emergency responders and others, it has not adequately assessed or stated the potential service demands and costs on local governments as well as potential impacts of potentially conflicting demands for local, municipal emergency response resources in the event of a spill.

14251. Trans Mountain has stated that it

> *"...made significant efforts to liaise with agencies that may be involved in an emergency situation, share information about existing EMP and to seek input from emergency professionals".*

14252. However, the evidence of the City's fire chief is that he has not been clearly informed by Trans Mountain of what service is needed, how safety responders would be assured, how local responders would be trained to prepare for project-related emergencies, and how all associated emergency preparedness response and recovery services would be financed.

14253. In addition, response gaps identified are likely to mean that local governments who have the mandate to protect public safety in the community and

the environment would by default need to deploy unprepared and unfinanced resources.

14254. The City of Vancouver's evidence of the response to the Marathassa spill shows that Vancouver City staff were needed to be deployed to warn the public and volunteers of risk and to establish communication.

14255. The evidence estimates local government costs for a catastrophic spill at close to $1 billion; that's in the case of the City of Vancouver. Trans Mountain has taken issue with that in its argument.

14256. Whatever the correct answer is and Port Moody says the Board should prefer Vancouver's evidence to that of Trans Mountain, it is clear from Trans Mountain that,

> *"…funds do not provide compensation for losses that are not measurable, or which are purely punitive"* and *"compensation is not paid in respect of claims for environmental damage based on an abstract quantification"* based on *"theoretical models."*

14257. Thus, the sources of compensation are available in limited circumstances and will fail to address the full social and environmental costs of a spill.

14258. The City submits that all project-related costs should be borne by the project and that local governments and taxpayers should not have to bear them.

14259. **THE CHAIRMAN:** I just note that you have five minutes left, Mr. Yardley.

14260. **MR. YARDLEY:** Thank you.

14261. In summary, for the reasons highlighted above, the City of Port Moody submits that Trans Mountain has failed to establish that the project is in the public interest under the NEB Act and that it meets the requirements of the CEAA, and that the Panel should recommend that the CPCN not be issued.

14262. In the alternative, should the Board recommend the issuance of a CPCN for the project, the City submits that conditions of approval be based on

the following principles.

14263. The project should achieve the highest level of protection possible for Canadian communities and the environment throughout the life of the project. It should achieve a net positive benefit to Canadian communities and the environment throughout the life of the project.

14264. The project should achieve world-leading safety and spill response standards throughout its life; the highest level of oversight on conditions should be provided; and the ongoing compliance to the conditions should be transparent, documented and publicly available.

14265. There should be full cost assurance and recovery should be established for impacts related to all project activities and incidents, including but not limited to oil spill accidents. And there should be adequate and comprehensive consultation to affected local governments and communities.

14266. Specific comments are provided in the City's written argument on proposed draft conditions and additional condition recommendations, including establishment of an industry funded stakeholder-based entity to oversee project-related spill response preparedness, a financing plan to ensure full cost recovery for spill preparedness response and recovery, and an industry-funded environmental protection and investment program aimed at building ecological resiliency on an ongoing nature throughout the lifetime of the project.

14267. Thank you.

14268. Mr. Ramsay will have closing comments.

14269. **MR. RAMSAY:** Thank you, Mr. Yardley.

14270. In closing, the City of Port Moody has made every effort to work collaboratively throughout this process. We have been polite, respectful, and inclusive. We have worked with Kinder Morgan to gather the facts. We have invited them to participate in our community discussions, and we have spent considerable efforts to ensure we understand the technical issues.

14271. But here are the facts. Our small shoreline community is very vulnerable to an oil spill related to the project. The uncertainties of this project impose disproportionate burdens, risks and costs on small resource-constrained

local communities such as ours.

14272. From our own direct experience and experiences of our neighbouring municipalities, it is clear that there are enormous gaps in the current system for responding to marine emergencies.

14273. Compounding this is that there are simply too many unknowns about the project to demonstrate adequate emergency response preparedness and response to address project-related accidents and spills.

14274. Without a robust emergency preparedness and response program in place, local government and communities are exposed to unmanaged short- and long-term risks and impacts.

14275. I would like to be abundantly clear; further risk cannot be introduced to the region until there is a clear demonstration of how spills in Burrard Inlet will be managed or how the risk to the public of a spill in this densely populated area and important natural environment will be addressed.

14276. Panel, we understand that this may be a difficult decision for you. However, the points we have raised today, you simply cannot allow the project to proceed without addressing everything we have mentioned.

14277. Again, I thank you for allowing us to present today and would appreciate any questions you may have.

14278. **THE CHAIRMAN:** Thank you, Mr. Ramsay and Mr. Yardley too.

14279. One second please.

--- (A short pause/Courte pause)

14280. **THE CHAIRMAN:** I guess the Panel would just like to take a brief time to consider some possible questions that we may have for you. So we will come back at 2:30.

--- Upon recessing at 2:18 p.m./L'audience est suspendue à 14h18
--- Upon resuming at 2:31 p.m./L'audience est reprise à 14h31

14281. **THE CHAIRMAN:** Just I'm seeking some clarification on your

additional -- you've proposed in Appendix A to your argument in-chief, 11 conditions from the City of Port Moody, and I'm interested in the -- I don't know if integration is the right word, coordination, mitigation; I'm not quite sure what the words I want to use. But I was interested in Condition III on the, "Burrard Inlet Spill Preparedness and Response Oversight Entity."

14282. And your thoughts on was that -- with that sort of draft condition, was that to sort of address a number of your risks that you had talked about in your written argument? And how would that be -- would your view, would that be integrated into Trans Mountain's plans, other agency plans? Would it be a separate entity? And the approach that you're suggesting, and I know you've got to read it with some of the other ones, in particular, V, when you deal with the, "Detailed Foreshore and Intertidal Area Survey and Spill-Response Mitigation and Restoration Plan."

14283. I'm just -- and perhaps, you know, your -- the person experienced to the left may be -- to your left may be able to help me just to understand its relationship, its integration, coordination with other municipalities, because it deals with all of the events that may happen within the Burrard Inlet.

14284. **MS. DAVIS:** Yes, thank you, Board, Panel Members.

14285. My name is Margot Davis, and I'm Sustainability Manager with the City.

14286. In response to your question with regards to our proposed condition, that wouldn't satisfy all the City's concerns regarding what it has to do with the project. So it is our City's understanding that whatever the decision in regards to recommending approval or not that the Board makes, it must provide conditions as well to the federal government, who makes the determination. So in light of that, we have prepared our suggestions for conditions in the event that that should occur.

14287. Speaking directly with respect to proposed Condition No. III, this oversight entity; this is an approach being suggested by the City to actually address, as you've heard, one of the critical concerns around integration. We feel that integration and coordination is essential for effective spill response, and more importantly, for effective emergency planning preparedness throughout the lifetime of the project.

14288. We recognize that coordination currently is deficient and needs to be strengthened, and throughout the lifetime of the project, there's going to be changes in best practices and those need to continually evolve. So our suggestion here is that some work be done to set up an appropriate oversight entity that would look to do those functions, as well as other functions, particularly integrating really critical local environmental knowledge and expertise.

14289. In terms of the mechanics, we would be looking at the Applicant to be sorting out those details. Our position is that there should be a full cost regime built that all the risks and costs being posed by the project should be borne by the project and not be put onto other parties.

14290. **THE CHAIRMAN:** And -- thank you for that clarification. I have a better understanding of the City's intention.

14291. And so if I'm hearing you, this is fairly important for the City, this particular -- these conditions, and that one in particular is fairly important for the City; am I correct in understanding what your comment was? Was that ---

14292. **MS. DAVIS:** Yes, that is correct.

14293. **THE CHAIRMAN:** That's right.

14294. And included in that integration, I had a question -- we had a question to the Fire Chief from the City of Surrey about coordination of emergency response entities in each of the municipalities. And he indicated that that goes on anyway but we don't -- you know, we don't -- how is that -- how would that be integrated into a entity or into the proposals for emergency response that Trans Mountain have put in front of us?

14295. **MS. DAVIS:** Yeah, so I can provide comments that this is like a general approach and some suggestions, but we would be looking for -- this is some types of the work that we find is deficient and should be done as part of this project application.

14296. But what we would be seeing here is that because of the sheer volume of the project, and the multiple products and the different risks and the different points where different accidents could occur, and there could be different responsible parties and agencies that would respond, fire being one of those; that the entity would be -- the oversight entity would be the hub and the coordination

for this specific project risks. So the fire emergency responders would be connected into that, but it would include other important stakeholders and emergency service providers as well, including things like wildlife rescue and recovery expertise.

14297. **THE CHAIRMAN:** I may have a follow-up, but I know my colleague, Mr. Davies, has a follow-up question.

14298. Mr. Davies.

14299. **MEMBER DAVIES:** Thank you.

14300. In looking at this proposal in Roman III, the spill preparedness and response oversight entity, the mandate of such an entity, would it, in your mind, be limited solely to project-related spills or would it have a larger mandate in regard to other hazardous cargos that are in transit through Burrard Inlet?

14301. **MS. DAVIS:** Yes, the Board -- this is commenting on this specific project, but we do feel such an entity would be useful for addressing multiple projects, current and future, and really addressing potential cumulative risks in a much more meaningful way.

14302. **MEMBER DAVIES:** Thank you.

14303. **THE CHAIRMAN:** Well, on behalf of the Board, I'd like to thank the City of Port Muddy -- Port Moody for your oral argument today and for responding to the Board's questions. And we can assure you that as we go -- continue to the end of this process, it will be all taken into consideration.

14304. We'll take a short recess, and we will return to hear from the BC Nature and Nature Canada. Again, thank you.

--- Upon recessing at 2:38 p.m./L'audience est suspendue à 14h38
--- Upon resuming at 2:48 p.m./L'audience est reprise à 14h48

14305. **THE CHAIRMAN:** Good afternoon.

14306. I understand now we will hear oral summary argument from BC Nature and Nature Canada.

14307. So, sir, we're in your hands.

14308. **MR. TOLLEFSON:** Thank you, Mr. Chair, Members of the Panel.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR BC NATURE AND NATURE CANADA:

14309. **MR. TOLLEFSON:** My name is Chris Tollefson. I'm here with my colleague, Mr. Anthony Ho. We are counsel for BC Nature and Nature Canada, and this afternoon, we will be elaborating on some of the points in our written argument. We won't be referring to any exhibits, but if you did have the written argument in front of you, that would be helpful, I think.

14310. BC Nature and Nature Canada, we're very active joint intervenors in the process here. BC Nature is a province-wide federation of naturalists and naturalist groups with a membership of almost 5,000 members. Its interest is in the maintenance of the integrity of British Columbia's wide range of ecosystems and biodiversity and in related public education.

14311. Our other client here is Nature Canada. It is the national voice of naturalists and naturalist groups in Canada. Its mission is to protect and conserve wildlife and habitats in Canada by engaging people and advocating for nature.

14312. For the reasons that follow, we submit, respectfully, that there is sufficient -- there is insufficient before this Panel to discharge its statutory and common-law duties in respect of its review of this application. Fundamentally, we say that there is a lack of evidence for you to do your job.

14313. If, however, the Board is not inclined to dismiss the application on that footing, we say that its other alternative is to order that this hearing be extended to allow for further cross-examination in respect of the areas where we, and other intervenors as well, have identified that the evidence before you is insufficient. And we will say further about that topic later.

14314. To maximize the benefit of the time that we've been given, we propose to focus in on five points, five key points that are elaborated further in our written brief. We'll leave the rest of the brief with you as I know that you have read it and will be considering it.

14315. The five points that we want to address today are, firstly, your legal duties, your legal obligations, particularly in respect of CEAA 2012 in terms of the analysis, the assessment here of this application in terms of environmental effects. And I'll be addressing that shortly.

14316. I will then invite Mr. Ho to address in some detail one specific area -- one of many, we say -- where this application falls short, and that is in its analysis of malfunctions and accidents. And I'll give Mr. Ho approximately half the time to do that. We think it's important to get into a granular level with you, although obviously we could do a granular analysis of many other topics if there was more time.

14317. Then I will address you on three final points. This Panel is the first panel to have a statutory duty to make a recommendation on what justified in the circumstances means under the CEAA. Other panels have offered views on that, but you are the first Panel to be under a statutory obligation to offer an analysis of that and we have spent some time in our written argument to provide some submissions on that point, and I will be elaborating on those.

14318. I also, as I indicated, want to address the question of cross-examination, which we've raised at other points in the process but we -- in our submission, it's important at this point to look back at the process and consider what the impact of not having cross-examination has been in terms of the body of evidence before you.

14319. Finally, flowing from that, I want to address you on the question of remedy.

14320. So with that, I propose to move into the submissions proper. And here I'm at paragraph 18 in our written brief.

14321. In that paragraph and the paragraphs that follow we try to reprise what the task was and is for you under the CEAA -- CEAA 2012, that is -- in terms of analyzing environmental effects. And we say that that task is defined both by the CEAA, and in particular by section 19 of the CEAA, which sets out a series of mandatory factors for you to consider, but it's also defined by the case law. And in our written brief we do talk about some of the cases.

14322. Again, in the interest of time I'm not going to go into the case law in detail but I do want to flag for your attention what I consider to be, and many

consider to be, the defining case in terms of explaining the task for a Panel in your situation, and that is the *Cardinal River* case.

14323. *Cardinal River*, like many other cases, analyzes how there is really a two-step process in federal environmental assessment. The step that you are in charge of, which is doing the environmental assessment and at the end of that process offering a recommendation, and then the second stage, the decision-making stage. And in this case, that decision will be rendered by Cabinet.

14324. So in respect of that first stage, *Cardinal River* really does, I think, provide quite a comprehensive and useful set of guidance for you as to how to proceed. And it talks about how the task really has three elements.

14325. Information gathering: You have the duty to gather all of the relevant information necessary for the environmental assessment of this application.

14326. Secondly, you have the duty to actually do the assessment. And that assessment must be guided by the case law and by the factors that are set out in section 19. And I'll have more to say about that later.

14327. Finally, once you've done the assessment and based upon a fulsome and adequate evidentiary record, which we say you do not have, based upon that, it's your obligation to write a report. That report must contain the rationale for your decision, your conclusions, and your recommendations. All of this is set out in the *Cardinal River* case.

14328. Now, I have three points to make that flow from what I've just said. First is that until -- unless and until you have gathered information adequate to assess the project, we don't get to stages two and three. You cannot embark on assessment of this project until you are satisfied that you have collected an evidentiary record that is adequate for you to do an assessment, and moreover and more importantly, is adequate to provide the Governor in Council and other federal agencies with the information and analysis that will allow for them to make the important decisions that lie down the road.

14329. So we say in this process that we have not yet completed stage one. And if we haven't completed stage one, we don't even get to stages two and three under *Cardinal*.

14330. That is why, and I'll be coming to it, that is why I say that we need to

finish this stage. And to finish this stage we don't need to reopen cross-examination at large but we do need, in certain areas, and Mr. Ho will be talking about this, we do need to explore and allow for you to come to conclusions based upon the evidence. And we say that you've been deprived of that opportunity.

14331. I want to also make a second point about the analysis. When you do get to that stage, and we say you're not there yet, when you get to the assessment stage, it's important to bear in mind that there are a series of questions that you need to ask.

14332. The first question is; what are the likely environmental effects associated with this application? And those -- the evidence that has been gathered to date suggests that those are many and diverse. You have an obligation to look at and identify what those effects are.

14333. Then you have an obligation to ask this question; which of those likely effects are significant? Which ones rise to the level of significance as defined in the CEAA. And various intervenors have, and we have as well, indicated which of those effects rise to that level.

14334. Then the third question that you have to ask is; for those significant adverse environmental effects, can they be mitigated below the level of significance? And this is a tough concept, I've struggled with it myself. What the CEAA is saying is that are there mitigation measures -- and this is a defined term in the CEAA and you must, I submit this vigorously, you must go to the definition of "mitigation measures" to be able to answer this question because mitigation measures is a defined term that talks about technically and economically feasible measures.

14335. So with that in mind, the question then becomes, has the Applicant shown -- in relation to the significant adverse environmental effects that are likely to occur, has the Applicant shown that mitigation measures within the meaning of that term are capable of moving the needle from significant to insignificant in relation to those effects? Have they shown that?

14336. And the case law is very clear that there is an element of quantification. You have to quantify the significance in some way of those effects before you can ask the question and answer the question of whether mitigation measures can move the needle to the level of insignificance.

14337. And we say that this application is wholly deficient in that regard. There is no quantification of the significance of the effects. There's no quantification of the quantity or efficacy of the mitigation measures. And, therefore, you are not in a position to offer a conclusion as to whether mitigation measures are capable of changing those significant effects into insignificant ones. And that is covered in paragraphs 27 through to 29.

14338. Finally, I want to offer this observation to you.

14339. As much as it's important for you to focus in on significant adverse environmental effects, it's also important to appreciate that you have a broader mandate here, and that's partly because you're also applying the public convenience and necessity test under the *National Energy Board Act*, but it's also because CEAA isn't just about identifying significant adverse environmental effects. It has a role in identifying the true benefits in terms of sustainable development of a project going forward.

14340. And I commend to you in that regard the views that are offered by Professor Meinhard Doelle, who is one of the leading legal scholars on environmental assessment. At paragraph 32 in our brief, he talks about how there really is two roles here for you to play: the identification of the significant adverse environmental effects, mitigation and so on like I've talked about, but also a broader role for you to grapple with the sustainability, the overall sustainability of the project that is being proposed.

14341. And with that I would like to invite Mr. Ho to address you on malfunctions and accidents. Thank you.

14342. **MR. HO**: Good afternoon, Mr. Chair and Members of the Panel. My name is Anthony Ho and today I will be speaking to you with regard to BC Nature and Nature Canada's submissions on malfunctions and accidents which can be found at paragraphs 35 to 62 of the written argument.

14343. To start with, paragraph 191(a) of the CEAA 2012 places this Panel under a duty to assess environmental effects of malfunctions and accidents that may occur in connection with this project. And we submit that this duty must be understood within the context of that two-step decision making process that Mr. Tollefson spoke of just earlier that is found within the legislative scheme, wherein the first step the responsible authority, in this case this Panel, gathers the information and provides the analysis and recommendation.

14344. The decision making is deferred to the second step where the Governor in Council makes the final decision. It is important to remember, in our submission, that even if this Panel were to recommend, and the Governor in Council were to agree with you, that this project is not likely to cause significant adverse environmental effects, that the Governor in Council still retains the discretion to decide whether the project is in the public interest. And we say that the ability of the Governor in Council to meaningfully exercise this discretion depends on the accuracy and completeness of the information and analysis that this panel provides to the Governor in Council in your report.

14345. And so as we submit in paragraph 38 of out written argument that this Panel is under a duty to gather, analyze and present evidence in relation to environmental effects of malfunctions or accidents in such a way that the Governor in Council can meaningfully exercise its discretion to decide whether to allow this project to proceed.

14346. Now, at paragraph 39 of our written argument we just touch upon the duty to assess mitigation measures within the context of malfunctions and accidents. As indicated in our written argument, this Panel is under a duty to gather and provide information about the actual expected effects from the malfunctions or accidents such as from oil spills and the degree to which they may be mitigated, and this is as articulated by Justice Russell of the Federal Court in the decision *Greenpeace*.

14347. So in the context of malfunctions or accidents such as an oil spill, we submit that if this Panel were to rely upon mitigation measures to reduce adverse environmental effects of oil spills below its significant level, we say then this Panel is also under a duty to gather and provide information to the Governor in Council on what the actual predicted effects of the oil spill is and the degree to which they will be mitigated by those proposed mitigation measures.

14348. And BC Nature and Nature Canada submit that the deficiencies in the body of evidence before you and in Trans Mountain's application deprive this Panel of the ability to fully assess the potential environmental effects of malfunctions or accidents that may occur in connection with this project.

14349. And now I propose to highlight some of the deficiencies, a full discussion of which is found in our written argument from paragraph 41 to 62. We have organized the deficiencies into five broad categories. They are: Number

1, deficiencies arising from what -- the use of a -- of what Trans Mountain calls a habitat-focused approach; Number 2, deficiencies that we say arise from Trans Mountain's Preliminary Quantitative Ecological Risk Assessment or the PQERA; Number 3, deficiencies that we say arise from the Detailed Quantitative Ecological Risk Assessment, or the DQERA; Number 4, the failure to provide adequate baseline information about marine birds and finally; Number 5, marine spill recovery time that we say is unsubstantiated by the science.

14350. Now, I don't propose to go through all of those deficiencies, but I would just highlight a few for the purposes of these oral arguments.

14351. I will begin with our submissions with respect to the habitat-focus approach which can be found beginning at paragraph 41 of our written argument. Trans Mountain uses what it calls a habitat-focused approach to assess potential environmental impacts to marine birds from hypothetical spills, and it's basically a combination of two approaches.

14352. As Trans Mountain explains, the first assumes that marine birds could generally be present anywhere within the marine RSA, or the Regional Study Area, and thus shore birds and other marine birds are assessed using the stochastic probability contours representing shoreline or surface water habits respectively. And the second approach considers the potential for spilled crude oil to come into contact with known bird colonies, as well as designated important bird areas.

14353. Now, we summarize the deficiencies that we say exist in this habitat-focused approach at paragraph 43 of our argument. I would just highlight bullet a) and d) from there because they are related.

14354. This habitat-focused approach, in our submission, simply assumes that birds can be found anywhere within the RSA and then it directly correlates two things: Number 1, the probability that any given location may be exposed to oil from an oil spill with; Number 2, the magnitude of the ecological consequence to marine birds. That's to say the magnitude of the effect is mainly dependent on probability of exposure to oil spill.

14355. We say that the habitat-focused approach doesn't take into account other factors such as the population abundance and diversity of marine birds, breeding cycles, migration patterns, et cetera, all of which, we say, contribute to the magnitude of the effect. And without this information we say this Panel is deprived of the ability to gather and provide information to the Governor in

Council on what the actual expected effects of an oil spill would be to marine bird populations and the degree to which mitigation measures may reduce those adverse effects below a significant level.

14356. Now, I'm content to leave you with our written submissions on deficiencies regarding the PQERA and skip ahead to DQERA which begins at paragraph 49 of our written argument.

14357. In the DQERA Trans Mountain assesses potential acute environmental effects on marine birds from oil exposure and it based its analysis on a lethal exposure threshold of 10 micrometres of oil thickness. Now, both in our written evidence and in our written argument we say that Trans Mountain has not provided sufficient scientific justification for the use of this 10 micrometre threshold.

14358. For example, as we discuss in paragraph 50, the sources that Trans Mountain cites in support of its use of this threshold actually show that marine birds can suffer significant and potentially lethal effects from exposure to lesser amounts of oil, and in some cases from exposure to even orders of magnitude less amounts of oil.

14359. So we submit that the lack of the proper scientific basis for the threshold that Trans Mountain is using impedes this panel's ability to assess the actual predicted effects of an oil spill on marine birds, the significance of such oil spill and impacts, and the degree to which they may be mitigated.

14360. Lastly, and very quickly, I would like to address the issue of inadequate baseline information, and this is found in our argument at paragraphs 52 to 55.

14361. In short, we submit that Trans Mountain has failed to provide adequate baseline information on abundance, distribution and diversity of marine bird populations within the marine RSA and that without this baseline information, this Panel cannot adequately assess the actual predicted effects of an oil spill on marine bird populations and it impedes this Panel's ability to assess the significance of oil spill impacts and the degree to which they may be mitigated.

14362. Again, I will leave you with our submissions on recovery of marine bird populations after an oil spill and I will skip ahead to our conclusion, which can be found at paragraphs 59 to 62 of our written argument.

14363. BC Nature and Nature Canada submit that Trans Mountain's evidence regarding the potential environmental effects of an oil spill is incomplete, uncertain and unsubstantiated to such a degree that this Panel cannot properly evaluate the consequences of a marine oil spill.

14364. Now, Trans Mountain in its reply evidence states:

> *"Given that the effect magnitudes for essentially all crude oil spill scenarios result in the conclusion that birds could die as a result and that such an outcome would merit an effect magnitude of High, the alternative assessment methodology endorsed by BC Nature and Nature Canada […] is not required as it would not result in any different conclusion."*

14365. We submit, however, that this Panel is not only under a legal duty to make conclusions and findings with respect to environmental impacts, but this Panel is also under an equally important duty to gather the information and consider the factors listed under section 19.

14366. And as we've submitted in both our written argument and in these oral arguments, one of the key functions of this Panel in this environmental assessment is to provide the ultimate decision maker with the evidentiary basis upon which to decide whether this project should proceed. And without adequate information, this Panel cannot provide the Governor in Council with information about the actual expected effects and the degree to which they may be mitigated.

14367. So based on the foregoing, BC Nature and Nature Canada submit that these deficiencies found in the body of evidence before you regarding marine oil spill impacts deprives this Panel of the ability to conduct an adequate assessment of the environmental effects of malfunctions or accidents that may occur in connection with this project pursuant to section 19 of the CEAA 2012.

14368. I will now hand the podium back to Mr. Tollefson.

14369. **MR. TOLLEFSON:** Thank you.

14370. We've left with you some intervening arguments and now we move ahead to paragraph 83 in the written brief. That's no reflection on the efficacy of the efforts that are reflected in the intervening pages. It's a reflection of our

conclusion that in terms of these last two points, two of the last three points, that these are things that need elaboration.

14371. Justified in the circumstances I've already indicated is a terminology that for the first time the statute now has imposed upon you a duty to make a recommendation on. And so in that regard, this Panel has an important job, both in terms of the merits of this case, but also in terms of ensuring that it gets the law and the legal principles right.

14372. In that regard, we've offered a fairly detailed set of submissions in writing and I propose simply to canvass the key points. There are five key points that I submit emerge from our submissions on justified in the circumstances.

14373. The first is that it's very important not to conflate or confuse the question of whether significant adverse environmental effects that can't be mitigated -- it's important not to confuse your recommendation on that question with your recommendation on public convenience and necessity. We say that those are two quite different questions. There is some overlap, but we say those are different questions that require a different analysis.

14374. Secondly, the justified in the circumstances question is a question that we say arises squarely under the CEAA and -- CEAA 2012 and requires you to be very mindful of what the CEAA says in that regard. We'll be making submissions on that.

14375. Thirdly, you are not entirely on your own in terms of addressing this issue. There are precedents to look at in terms of how other panels, other boards have analyzed justified in the circumstances. And we say that the emerging approach is one that looks at, in a very holistic way, the net benefits of the project in terms of sustainability. And I want to address you on what some of the precursors are.

14376. And then finally, what I want to do is to talk about our preferred approach, which is an approach that was adopted by a panel in an assessment of the Lower Churchill Project.

14377. So with that, let me move to my first point. The fact that public convenience and necessity is quite a different test than justified in the circumstances. And I think, in my submission, that should be fairly obvious. The *National Energy Board Act* is a very different Act than the *Canadian*

Environmental Assessment Act. There is overlap and the public interest is a common feature to both.

14378. But in our submission, there's a big difference between the question of whether the project, in a sense, under the NEBA is in the national interest and whether, on the contrary, under CEAA, whether significant adverse environmental effects that can't be mitigated, whether those can be justified in the circumstances. We say that you have to calibrate the answer to your recommendation on that, a question, to what CEAA says. And we address our submissions on that point in paragraphs 86 up until 93.

14379. So the second point then is that you have to look at the CEAA and be mindful of the CEAA and respect what the CEAA says. And the CEAA is very clear. It says that in its purposes provision that you must apply the precautionary principle and that you must strive to come up with a report that is consistent with the principle of sustainable development. Both of those are very important concepts. You have a broad discretion as to how to interpret them, but you must be -- you must be clear that those principles align with the approach that you ultimately adopt.

14380. And we say that to ensure that your interpretation of those principles align with your report and the approach that you adopt, that there is guidance from the literature as well as from the work of other panels akin to yours.

14381. And point three then at paragraph 95 we direct you to, again, to Professor Doelle's text on the subject where he says this, that the exercise of the discretion to justify significant adverse environmental effects, he says that should be made in light of whether the project is expected to make a net positive benefit to sustainable development.

14382. So when you get to this stage -- and we say you're not there because you don't have a record that is adequate to allow you to move beyond the information-gathering stage at this point. But if and when you get to the stage of writing your report and you get to the stage of seeking to justify, in the circumstances, significant adverse environmental effects, we say that the approach that is recommended by Professor Doelle, which a net-benefit approach, is the right approach. It is the emerging approach. In fact, it is the only approach justified in the circumstances that -- that the cases to date have recommended.

14383. To point number 4: In support of what I've just said, point number 4

you have -- and this is paragraphs 96 and all the way through to 99 -- we have reprised two of the leading cases on the question of justified in the circumstances. The first is the *Whites Quarry* case which is discussed at paragraph 96. It adopts a net benefit sustainability approach of a type that I've just mentioned.

14384. Subsequently, there was also a Panel in the Kemess North Gold Mine Joint Project Review which has adopted the same net-benefit approach. And at 99 it's summarized how they tackled that task.

14385. So we say that the literature and the two precedents I've mentioned give you guidance, give you helpful guidance in this important job that lies ahead once you have adequate evidentiary record. And there certainly will be a finding in my submission that there are significant adverse environmental effects, and the question of justified will come up. This is where you need to go to muse over how you will make a contribution to this case law that's emerging.

14386. Finally, point 5, in terms of justified in the circumstances, the cutting edge, the sort of gold standard in terms of the analysis, in my submission, that it's built on this literature and is built on these cases is found in the Lower Churchill report of the Panel, of which Professor Doelle again was one of the Panel Members. And we discuss at paragraphs 101 through all the way to 106 in some detail the Lower Churchill approach, which is -- we've included the appendix that describes that approach at Tab 15. We've reprised it in full at Tab 15 of our Book of Authorities.

14387. In the interest of time, I think what I will do is to simply say this; that we're not there, we don't get yet to justified in the circumstances for the reasons that I've indicated. But if and when this Panel gets to that point, we strongly urge you to take into account the literature and the cases that we've -- that we've put before you.

14388. With that I'd like to finally -- I have two -- two final points of submission here, and they're connected. And I deal with this -- we deal with this at paragraph 111.

14389. **THE CHAIRMAN:** And I'm sure you -- you got your five minutes warning.

14390. Thank you very much.

14391. **MR. TOLLEFSON:** This issue of cross-examination has been one that has vexed the process from the outset. And we fully understand why the Panel felt it necessary to -- in the interest of the timelines, to make the decision that it made. We understand why the decision was made. As you know, we had concerns; our clients have had concerns about that decision from the beginning.

14392. And there is a due process concern, but in our submission, the overarching concern really is that in the end we were concerned that you would be deprived of information that was necessary for you to make a -- make an assessment, write a report with recommendations to the ultimate decision-maker. We were concerned about that from the very beginning.

14393. And we continued -- as it's set out in paragraph 112, we continued to communicate that concern through the IR process and we wrote -- we made a motion at the end of IR No. 2 where we said that the process had basically allowed the Proponent to introduce into the record unsubstantiated, unidentified expert testimony that could mislead the Panel.

14394. That was the problem in our view was that there was no accountability that is provided through the greatest engine for truth ever invented, which is cross-examination. We remain gravely, gravely concerned about the lack of cross-examination here. There is so much that, in our view, could be enlightened, could be of assistance to you, had there been cross-examination.

14395. We're not advocating reopening cross-examination at large, but we say in respect of the areas that we've identified and others have identified where the record is plainly in conflict, where you've been left with a completely untenable task of making a recommendation on a record that is wholly inadequate.

14396. You really are left with no choice but to open it up to cross-examination or to reject the application. And it's not too late. You made a decision, it was a decision you made in light of timelines that you were given, but you do have a choice here. You can reopen this; you're entitled to press pause.

14397. And in my submission, it's your duty in terms of information gathering, it's your duty to press pause at this point to allow for us to get to the truth of these matters in order that the public interest be served. And we set out in paragraphs 113 to 117 how that could happen. It doesn't even require the intervention of Governor in Council. You can simply decide that the record is not complete, there's more information that's needed and you can press pause right

now.

14398. So that takes me to the remedies section of our submission. We believe -- in our submission, it is important to get to the truth of the matter, for the science issues to be fought out on a level playing field where there is no closure, where the Proponent can't rag the puck till the clock is run down.

14399. So we say that our preference would be to reopen this process to cross-examination. And we say that you have full authority to do that; it's not too late. In the alternative -- in the alternative, we say that the record is so inadequate here; the uncertainties are so great that you are left with no other option but to dismiss this application on the footing set out in paragraph 120, that it is a project that is not required in terms of present and future public convenience and necessity. And it's a project that is likely to cause significant adverse environmental effects that cannot be justified.

14400. Those are my submissions. Thank you.

14401. **THE CHAIRMAN:** Thank you, Mr. Tollefson and Mr. Ho.

14402. I think we'll take -- I think we will take a short 10-minute recess to consider possible questions.

14403. Thank you.

--- Upon recessing at 3:29 p.m./L'audience est suspendue à 15h29
--- Upon resuming at 3:36 p.m./L'audience est reprise à 15h36

14404. **THE CHAIRMAN:** Thank you for your indulgence. The Panel has a couple of questions for you, if you -- if you may.

14405. First, Ms. Scott.

14406. **MEMBER SCOTT:** I believe these questions are for you, Mr. Tollefson.

14407. We heard you talk about the difference between CEAA legislation and the different findings under CEAA that are necessary and the public interest determination under the *National Energy Board Act* and the Certificate of Public Necessity and Convenience.

14408. Do you see a conflict in the legislation or are you suggesting a way that we need to read the two Acts together?

14409. **MR. TOLLEFSON:** In our -- in our submission we do talk about the history of the *National Energy Board Act*, which has quite a different history, a longer history than the CEAA and it was instituted for different purposes. And that legacy I think, still looms, but I think public convenience and necessity is a term that's broad enough today to embrace environmental considerations and the whole range of considerations, including submissions that were made by my friend for Port Moody today.

14410. I think that that is a broad – it is a broad concept, and certainly can be interpreted in a broad way. It doesn't direct you to interpret it in that broad way, but that is certainly within your discretion.

14411. The CEAA is different. The CEAA, we say, directs you to discharge your task to write a report to make findings and recommendations that are consistent with the precautionary principle, that are consistent with the principle of sustainable development. You have less discretion under the CEAA in that regard.

14412. So there's no necessary conflict between the two, but legally speaking, you are more constrained under the CEAA. That would be my submission.

14413. **MEMBER SCOTT:** And given that constraint under CEAA, does that in any way limit or shape our responsibility under the NEB Act in determining public interest?

14414. **MR. TOLLEFSON:** I would hope that you would strive for a report that recognizes that these are two different statutes, that you're wearing different hats. That's important. But I would submit that you should strive for a report that can be defended in terms of the precautionary principle, in terms of sustainable development under both statutes. In other words, that you bring into your deliberations, under the *National Energy Board Act*, those principles as well, and make it clear to the Canadian public that when you're interpreting public convenience and necessity that you have considered those concepts as part of that determination.

14415. **MEMBER SCOTT:** A couple of other points, if we can move on

then. I think I have your positon on interpretation.

14416. And pardon me if I'm jumping around a bit, but ---

14417. **MR. TOLLEFSON:** Please.

14418. **MEMBER SCOTT:** I'm looking at your brief, and in paragraph 119, in the relief sought section, you're requesting an order, or amending our hearing order. And -- so I wonder, are you making a motion at this stage in the process? Is this a motion that you're making, or is this -- how do we get the jurisdiction to do that?

14419. **MR. TOLLEFSON:** My submission would be that at the stage of final argument that it's not necessary to bring a motion forward when you're seeking a remedy, that it would be, in the normal course, expected that parties would seek various remedies, and that this is a remedy that is within the range of remedies that you are entitled to make at any point prior to being functus, prior to having rendered your report.

14420. **MEMBER SCOTT:** And where do the principles of natural justice come into that analysis? Ordinarily, if there is a motion, there's a motion, you have the burden, and the proponent in this case would have an opportunity to respond. And then there's, you know, there would be affidavits filed; there would be evidence specific to that. Are we at a stage where we can do that?

14421. **MR. TOLLEFSON:** Absolutely. I mean, you are the masters of your own procedure. You have to be concerned about procedural fairness, as I think you have. But what we are raising is this, that at the end of the day you do not have an evidentiary record; you have not been able to gather the evidence; the evidence is not there.

14422. It doesn't require a motion by me to do this. You can simply say the evidence is not there. We've heard all the submissions. Everybody gave their best shot in terms of persuading you that you're ready to make a decision. But on our own motion -- in other words, your motion -- we conclude that more information is needed, and we therefore press pause and we seek submissions from the parties who are interested in, not bringing in new evidence at this point, but simply having the right to cross-examine. We are seeking submissions from the parties as to which issues rise to the level where that would be appropriate. And we can tell you that we would be ready to rise to that invitation.

14423. **MEMBER SCOTT:** I'm intrigued by your invitation, but a couple of practical -- just trying to get my head around it. The request for a declaration from -- well, a request -- your suggestion that we require at this stage, that we stop, as you say, press pause, and say we want more cross-examination. A couple of things come to mind about that.

14424. You know, I appreciate that you have identified the issues that are important to you, and I know they're significant to you. Other intervenors have identified other portions of the evidence where they are similarly troubled. Do you see any difference that CEAA brings to our considerations that would allow us to hive off our responsibilities under the environmental determinations from, say, our engineering responsibilities to determine that construction is appropriate? I mean, how would that work from a practical matter in a process like this?

14425. **MR. TOLLEFSON:** My submission -- I guess this harkens back to what I submitted earlier -- is that the public convenience and necessity determination draws upon some or all of the same evidence as relevant to CEAA, incorporates some or all of the same principles. So it's not really possible to make one determination without the other. If anything, the CEAA issues, the ones that we focused on primarily, are a prerequisite.

14426. They -- you need to have a record that's adequate under the CEAA to be able to make a determination as to whether there are significant adverse environmental effects that are likely to happen, whether they can be mitigated. And that is a -- that's a landmine question, because that is a defined term which you have to apply very, very clearly and carefully. And then finally, you have to make a determination if there are residual effects that can't be mitigated; you have to make a determination or a recommendation unjustified.

14427. And in my view, it would not be a complicated matter to invite parties who have raised CEAA issues to put forward a case as to why their issues deserve cross-examination, what the parameters of that would be, and to facilitate that to happen. In my view, it's not only desirable, but really, you can't move forward without it because the record is so grossly deficient.

14428. So in short, that has to happen before you do the NEBA determination, public convenience and necessity, and in my submission, again, you're masters of your own procedure. You have to decide how far you need to go at this stage to get a record that is legally adequate.

14429. **MEMBER SOCTT:** So at least in terms of our CEAA responsibilities, I'm hearing you say you're convinced that we need to do this. I'm less clear about what you're saying about the other areas of our responsibility.

14430. **MR. TOLLEFSON:** Our submissions -- and it's a very good point -- our submissions on behalf of B.C. Nature and Nature Canada have been primarily in relation to the CEAA. So we do not want to speak on behalf of other intervenors, and we do not want to speculate more broadly. We have said that the NEBA tests for public convenience and necessity embraces the CEAA issues that we have raised, but I do take your point.

14431. **MEMBER SCOTT:** Well, I'm not asking you to speak on their behalf, but I wondered if you saw, or if you're able to say that the CEAA Act, in fact, requires us to treat you differently? If that's what you're telling us, that other intervenors ---

14432. **MR. TOLLEFSON:** I don't -- my clients don't ask to be treated differently than any other intervenors here. What we say is in respect of our issues and we know this to be an issue for other intervenors as well that the IR process did not work. We knew it wouldn't work and it didn't work and it actually turned out to be less effective than we hoped it would be.

14433. So at the end of the process, we're basically at the point where cross-examination is essential. You do not have an evidentiary basis and information record that you can do anything with at this point. And that's unfortunate but it can be fixed.

14434. **MEMBER SCOTT:** To summarize what I think I'm hearing you saying is that regardless of what is -- sorry. Side conversation is going on. I was wondering if my colleague felt the need to jump in or -- in any event.

14435. So what I'm hearing you say is that irrespective of other considerations, whatever they are, those are arguments that other people can make, probably have made, whatever, but from your point of view, at least in relation to the things that you've identified, the CEAA determination that we are required to make requires us to do this in order to make a valid determination.

14436. Just one other point before we leave this is, some of the draft conditions that we've put forward seem to suggest findings of significance. And

if those draft conditions were the ones that were ultimately put in place, would we have to reopen the evidence with respect to everything? Or how would we handle the potential confusion between areas where you believe we should have made findings of significance and areas where we may be inclined to already do that? I'm not sure.

14437. **MR. TOLLEFSON:** To my mind, it's desirable to adjourn consideration of conditions until the evidence is in. I know it's the practice of the Board to put out draft conditions ahead of time and it's -- and in many cases that could easily make sense.

14438. Here though, the gaps and deficiencies in the information are so extreme that, in my submission, there has to be a pause on the conditions process as well. We can't predict what conditions, draft or otherwise, will be necessary to meet the requirements of the CEAA or the NEBA until we have a body of evidence that is adequate from your point of view.

14439. **MEMBER SCOTT:** So we have draft conditions out there. And what I've been hearing you say, I think, is that regardless of those conditions you want to have a go at the whole thing again.

14440. **MR. TOLLEFSON:** As you know, we didn't comment on the draft conditions and that was for a reason, that in our view you don't gain anything by commenting on conditions that are premised on a body of evidence that's not complete.

14441. **MEMBER SCOTT:** Okay. Thank you.

14442. **MR. TOLLEFSON:** You're very welcome.

14443. **THE CHAIRMAN:** It's all right. I was just -- I'd indicated Mr. Ho was wanting to but I think you're happy. You have -- anything to add to any of the comments? I sense that you were -- just want to make sure that you have your opportunity to respond to questions from the Panel.

14444. **MR. HO:** Thank you for the opportunity. No, I'm good with all the submissions that Mr. Tollefson has made. Thank you very much.

14445. **THE CHAIRMAN:** With that, we thank you for your submissions and we will consider these as we have will and will continue until we decide our

course of action on this. Thank you for on behalf of BC Nature and Nature Canada for your presentation.

14446. We will adjourn and tomorrow we will start with the Swinomish, Tulalip, Suquamish and Lummi Indian Nation followed by the District of West Vancouver and then the Simon Fraser Student Society.

14447. So we are adjourned until 9:00 a.m. tomorrow morning.

--- Upon adjourning at 3:52 p.m./L'audience est ajournée à 15h52