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 34

Hearing held at
L'audience tenue à

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

January 28, 2016
Le 28 janvier 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 28, 2016
Audience tenue à Burnaby (Colombie-Britannique), jeudi, le 28 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
Upper Nicola Band
- Chief Harvey McLeod
- Ms. Brenda Gaertner

Burnaby Residents Opposing Kinder Morgan Expansion Project
- Mr. Neil Chantler
- Ms. Mary Hatch
- Ms. Kathy Mezei
- Ms. Ruth Walmsley

Shackan Indian Band
- Grand Chief Percy Joe
- Mr. John Gailus
- Ms. Caroline Moore

Pro Information Pro Environment United People Network
- Ms. Lynn Perrin
- Mr. Jason Gratl

Tsawout First Nation
- Chief Harvey Underwood
- Ms. Brenda Gaertner
- Elder Belinda Bail Claxton

Board of the Friends of Ecological Reserves
- Mr. Garry Fletcher
- Mr. Mike Fenger

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

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No.	Description	Paragraph No./No. de paragraphe

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

17899. **THE CHAIRMAN:** Good morning and welcome to this morning'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.

17900. We acknowledge today being on the traditional land of the Coast Salish people.

17901. My name is David Hamilton; I am the Chair of the Panel. And with me to my left is Ms. Alison Scott and to my right is Mr. Phil Davies. And together we are the Panel assessing the Trans Mountain Expansion Project.

17902. I would just like to take a brief moment for a housekeeping item.

17903. In the event that we hear a hotel fire alarm, the procedure will be to exit the hearing room using the entrance that you came in. Once you are outside the hearing room, there are two evacuation routes. The first is directly to your left when you exit the hearing room doors, and the second is located beside the registration desk where some of you received your lanyard. Uniformed security guards will be in both locations to facilitate your exit. Please follow their instructions.

17904. Once outside the building, proceed to the hotel muster point which is located on the northwest corner of the Delta Burnaby Hotel and Conference Centre where Sumner Avenue and Manor Street intersect. At the hotel muster point, please ensure all members of your party are accounted for and wait further instructions.

17905. I think that you've been briefed on our timing system for your presentation this morning, so I won't take up time repeating that.

17906. Today we will be hearing first from the Upper Nicola, followed by the Burnaby Residents Opposing Kinder Morgan Expansion Project, and finishing this morning with the Shackan Indian Band.

17907. Before we begin, I would ask the representatives of Trans Mountain to introduce themselves to the presenters this morning.

17908. **MS. OLENIUK:** Good morning. My name is Terri-Lee Oleniuk and I am counsel to Trans Mountain. With me is Lesley Matthews and she's the regulatory lead for the expansion project.

17909. **THE CHAIRMAN:** Thank you.

17910. Before we begin, I'm inquiring if there's any preliminary matters from any intervenors or Trans Mountain this morning.

--- (No response/Aucune réponse)

17911. **THE CHAIRMAN:** Appears to be none.

17912. With that, the Board are welcoming Chief McLeod and Ms. Gaertner to make their oral summary argument from the Upper Nicola. Welcome. We have read all the evidence that you have submitted and we're now prepared to hear from you this morning.

17913. Chief McLeod.

--- FINAL ARGUMENT/ARGUMENTATION FINALE PAR THE UPPER NICOLA BAND:

17914. **CHIEF McLEOD:** (Speaking in native language). I too acknowledge doing my work in the traditional territories of our relatives, the Coast Salish people. Good morning.

17915. I was born and raised in Upper Nicola/Syilx Territory and have lived there all my life. My parents are Sarah McLeod and the late Vincent McLeod. My parents were both born and raised in Quilchena. My grandparents on my mom's side were the late George Pete Saddleman and Susan Saddleman. My grandparents on my father's side were the late David Saul and Cecilia Saul. My maternal grandfather was from Lillooet.

17916. Upper Nicola is a Syilx community which was formed from two of our village sites at Spaxomin and Quilchena. Upper Nicola has approximately 963 members.

17917. Prior to becoming Chief in 2014, I served on the Upper Nicola Band

Council for about 22 years. As Chief and councillors, we have a lot of responsibility. As Chief, one of my responsibilities is representing and speaking on behalf of the Upper Nicola membership at meetings with various governments, including at tribal, municipal, provincial, and federal level. It is with those responsibilities in my heart and mind that I am here today.

17918. As the Chief for Upper Nicola, I also serve as a member of the Chiefs Executive Council of the Okanagan Nation Alliance. The Chiefs Executive Council of the ONA has appointed me by resolution to take the lead in representing Okanagan interests in the engagement with the National Energy Board, Trans Mountain, and the Crown.

17919. We are here today to highlight for the Panel the ongoing concerns that Upper Nicola has with the proposed Trans Mountain Expansion Project. This oral presentation is intended to highlight but not change anything we have put in writing. We will try to answer any questions that you may have.

17920. Bring up Exhibit C363-21-17, on page 17.

17921. This will be the map showing Upper Nicola's area of interest, area of responsibility within Syilx Territory, and the location of the project.

17922. Approximately 11 percent, 130 kilometres, of the project pipeline will be located within Upper Nicola/Syilx Territory. This is a significant part of the proposed pipeline. While most of the proposed twinned pipeline will be new, one of the two structures will use older, currently deactivated pipeline that ends at the Black Pines Pump Station just upstream from Upper Nicola/Syilx Territory. In addition, the Kingsvale Pump Station and power line are located within the Upper Nicola/Syilx Territory.

17923. Paragraph 77 of our written submission describes the route that is depicted in this map and how this proposed pipeline proposes to cross our territory, including a critical important water bodies to our communities and ecosystems we rely upon, like Stump Lake, Nicola Lake, Douglas Lake, and the Upper Nicola and Salmon River Watersheds. We have open range land, Douglas fir forests and smaller lakes like Shumway Lake, Trapp Lake, and Napier Lake. The Nicola Watershed, including rolling hills, open pine, and fir woodland, grasslands and various streams and lakes.

17924. Quilchena Reserve, where I live, is next door to the proposed pipeline,

and some of our old village sites and campsites are located in a local study area and regional study area.

17925. The pipeline is intended to cross numerous creeks and streams within our territory, including Moore Creek, Mill Creek and other lakes and creeks on the north side of the Nicola Lake.

17926. Members of Upper Nicola and other Syilx have and continue to use and rely upon our territory for many cultural, spiritual, social, economic, and sustenance purposes. We continue to use our land for hunting, trapping, forest harvesting and gathering food and medicinal plants.

17927. We must continue to ensure that our future generations have the opportunity to live and rely upon our territory to maintain our way of life.

17928. In the same exhibit on pages 63 and 64, you see how the proposed pipeline would interfere with our continued way of life.

17929. We have title, rights and responsibilities to all components of our territory. Upper Nicola has laws, governance and responsibilities to the territory. We have protocols that tell us how to be Syilx in relation to our tmix^{w}lax^{w}. These laws are instilled in us and we have to respect everything and everyone around us.

17930. We also have laws and protocols that govern how we take care of our territory, to take care of the land and the water, and that is my responsibility for the rest of my life.

17931. The Syilx law of our tmix^{w}lax^{w} represents the relationship of the Syilx people to the land, all forms of life and the spirit of the land. It is from this place of deeply woven engagement with the land and unfolding conception of being in a world that we, as Upper Nicola/Syilx people, situate ourselves in relation to the land.

17932. In essence, tmix^{w}lax^{w} is evidence our strong presence on, and responsivity, to Upper Nicola/Syilx territory and is evidence of our exclusive stewardship of that land by Upper Nicola/Syilx people.

17933. Upper Nicola/Syilx exclusive stewardship of our territory is also evidenced in the protection of our siwłk^{w} -- and I ask my ancestors in my language speakers to forgive me -- water within the territory. Water is sacred and

is part of Upper Nicola/Syilx spirituality and religion. Water is also a part of our creation stories, teachings and laws of Upper Nicola.

17934. There are many streams and lakes in our territory that are at risk by this project. In our evidence, we provide you the Syilx law, the Syilx Nation, siwłkʷ declaration. As part of Syilx laws, Upper Nicola shares with all Syilx sacred responsibility to care for all forms of water within our area of responsibility. That responsibility is held by current generations on behalf of past and future generations.

17935. As the lifeblood of the people, the land and all that is, water must be treated with the utmost respect and dignity. As clearly stated in the declaration which is attached to my affidavit in this matter, water is sacred, precious and at risk.

17936. Elders have passed on teachings that the water in the territory is interconnected to underground caverns, aquifers and groundwater. That water, the water in Syilx territory, travels between Okanagan Lake to the higher lakes and to Nicola and Douglas Lakes.

17937. We have seen many changes to our land since Trans Mountain's first pipeline alone; the land and water and the climate of the area has changed a lot. And it continues to change. Mountain Pine Beetle erosion, drought, floods, longer and hotter, dryer summers are a reality, and it is likely only to get worse.

17938. While our people continue to rely upon and take care of our lands and resources, the tmixʷlaxʷ, as best as we can, our land, our waters and relationship to the land have been challenged very much since colonization.

17939. These cumulative impacts and effects have not been adequately assessed in relation to this proposed project. There are many immediate and serious project defects during construction. There are significant on-going operational concerns. Cumulative impacts and the risks of an oil spill are significant and forever. We are very concerned with impacts to the land, the water and our people's use of the territory.

17940. Our people hold and exercise Syilx title and rights to our area of responsibility within Syilx territory. Syilx title and rights must be taken into account when you are assessing the project. Based on the information we have been able to review and put before this Board, Trans Mountain has done an

inadequate and unreliable assessment of the impacts and effects and has not offered significant avoidance or mitigation of the impacts and risks.

17941. As outlined in our evidence, one of the things that the people need to understand is that when we have unanswered concerns, or when our ancestors are talking to us, the answer is going to be no if we cannot get the answers to the questions we have, or provided with the assurances we need that the project will not harm our land and water for this and future generations.

17942. Protecting the land and waters of our territory is of the most -- one of the most important things. Having dependable information upon -- about the impacts, risks and benefits of the project is critical for our review and assessment of the project.

17943. We will be here, and my family will be here, for generations to come, and it will always be my people's home. We need to take care of the territory, take care of the land, and that is our responsibility for the rest of our lives.

17944. After completing our traditional use study related to this project, Upper Nicola has been doing our best to complete due diligence -- a due diligence review of this proposed project.

17945. At Exhibit 363-21-13, we list the impact -- project impacts we have identified, all of which remain serious outstanding concerns with the project including:

17946. One, construction and operation of the first Trans Mountain pipeline without our consent;

17947. Two, construction and operation of the new pipeline including twinning and reactivation of segments, seismic and other geo-hazard, erosion and hydrologic flow issues, acid rock drainage and metal leaching;

17948. Three, impacts on water, watersheds and water crossing including wetlands, drainages, ground water, drinking water and everything that relies upon the watershed such as fish, wildlife, birds, deer, moose;

17949. Four, disturbance/losses to Upper Nicola/Syilx way of life, ongoing cultural and spiritual losses, loss of access to land and resources, impacts to fishing, hunting, food gathering, impacts on Upper Nicola/Syilx management of

lands and resources for present and future generations;

17950. Destruction of land and medicinal plants;

17951. Increased use of Upper Nicola/Syilx territory to recreational use;

17952. Construction and operation of the proposed Kingsvale hydroelectric line;

17953. Increased risk of oil spills and industrial accidents including concerns regarding inadequate knowledge and experience with the fate and behaviour of diluted bitumen;

17954. Long-term effects of building and operating pipelines, including the production and shipment of crude oil and carbon emissions;

17955. Cumulative impacts of ongoing development in Upper Nicola/Syilx territory;

17956. Infringements to section 35 rights including Syilx title -- Syilx title and rights.

17957. It is important to stress that for Upper Nicola/Syilx, impacts and effects to one of the -- to one of the environment, or to the territory as a whole, are impacts to all. Within our interrelated, interdependent worldview and according to Syilx laws, what you do to one part of the ecosystem, you do to all parts.

17958. So for example, damage to water, fish habitat or slope stability is damage to the territory and to Upper Nicola/Syilx people.

17959. Before turning this over to counsel, I would like to raise with you our continued concerns regarding the lack of adequate Crown consultation and the inadequacy of the NEB process.

17960. The Crown unilaterally decided that it would rely upon NEB's hearings to the extent possible to identify, consider and address impacts to our rights. This is a serious flaw.

17961. The NEB process cannot be relied upon to meet the Crown's duty to consult with us, and it is with deep and meaningful consultation on a nation-to-

nation basis. The Crown cannot on its own determine the process and the scope of issues in the consultation about impacts and infringements to our title and rights.

17962. A lot of our concerns have not been addressed throughout the process. This process has not resulted in reliable information. Our laws and governance must be considered when establishing a respectful nation-to-nation review process for consultation.

17963. There has been inadequate capacity funding to participate. There have been inadequate timelines. We had very little time to engage with our community. Frankly speaking, after more than three years of good faith, attempts by Upper Nicola to participate in a process that the Canadian Courts tell us we must show up for, the required Crown consultation remains outstanding.

17964. (Speaking in native language).

17965. **MS. GAERTNER:** In these oral and written submissions, Upper Nicola provides the Board with our reasons and rationale for why they cannot consent to the project at this time and why the Board should not recommend the issuance of a Certificate of Public Convenience and Necessity for the project at this time.

17966. In Procedural Direction No. 20 you invited us to adopt other intervenors' written oral submissions. We adopt the following arguments:

17967. The Province of British Columbia's Exhibit C-289-13-2, paragraphs 12 to 36, 38 to 41, 43 to 66, 68 to 83 and 89.

17968. We also adopt the Salmon River Enhancement Society Exhibit C-301-21-2, pdf pages 9 to 13.

17969. And we acknowledge the many hard work of many intervenors who have clearly expressed significant concerns that are outstanding with respect to this project.

17970. Pursuant to section 35 of Canada's Constitution, Upper Nicola and Syilx's title and rights, interests and impacts, and the impacts this project will have on those rights must be properly considered by you as the Panel in determining whether to recommend this project to the Governor in Council.

17971. Upper Nicola has presented strong evidence at a *prima facie* level of Aboriginal title and rights. You'll see that in the information throughout the written submissions and the affidavits. We have the Fish Lake Accord, the Syilx Water Declaration. We have Upper Nicola's use and occupancy of the territory. We have strong evidence of hunting, fishing, gathering all through the water systems that the Chief has referred to. They have the sacred responsibilities which flow from their land, which are a foundation of Aboriginal title and rights and Indigenous laws.

17972. Upper Nicola has presented strong evidence that this project will impact their title and rights, and so unquestionably they have provided sufficient evidence to trigger the obligation to consult at a deep and meaningful level. As you've heard from the Chief, that consultation is fully outstanding at this point in time.

17973. As set out in our written submissions, the Board must find that Trans Mountain's assessment of the impacts and effects were deficient in various ways, and therefore you cannot recommend the project with those deficiencies outstanding.

17974. That includes: construction and operational impacts, geo-hazard and seismic risks, insufficient information related to multiple water crossings being opened up at the same time during -- throughout the territory, a territory that is essentially a dry belt at most parts of the year, blasting and ripping associated with acid rock drainage, the cumulative effects and the risks associated with accidents and malfunctions.

17975. Trans Mountain has acknowledged that measures to protect sensitive environmental areas are important to Upper Nicola, such as the water bodies and riparian areas. And yet if you look at the material, we don't have an adequate analysis of these critical regional issues with respect to the water crossings, or the cumulative effects, or the climate change as the project is going through construction and operation.

17976. A hundred and thirty (130) kilometres of varied land with all kinds of water crossings, and yet we don't have a regional assessment of that level in which we, Upper Nicola, can look at and determine whether or not this project can be built, never mind maintained and operated.

17977. We don't have an integrated analysis of the construction and operational effects, and we don't have an adequate analysis for understanding what happens when you open that many watersheds in a dry belt at the same time.

17978. As an example of the places where due diligence was not maintained in the Trans Mountain material is that Upper Nicola after reviewing the material identified, and Trans Mountain agreed, that there would be at least 47 additional potential water crossings than their material had reflected.

17979. Trans Mountain then says, "That's okay, we'll handle it in a post-regulatory approval environment." Way too often in this process that's Trans Mountain's response. How can Upper Nicola review this project when too often they're going to learn about the impacts of the project in a post-approval process?

17980. How does that work? It doesn't work. You ask us to identify the impacts and the concerns and whether they're mitigated, and Trans Mountain tells us we'll address them after the regulatory process is finished. That doesn't make sense. It's not reliable.

17981. After completing their TUS and beginning to do the due diligence, and meeting with their communities and creating the list of concerns that the Chief has reviewed, the community began to say, "Well, what can we do to better understand this project?"

17982. And there were a number of places where they took on the effort of moving forward and getting experts, independent experts to try to help them understand that. You can tell from that that those are where their continuing concerns are occurring. What's the risk of an oil spill? Are we ready to respond to them, and is this project in the public interest?

17983. Unquestionably, Upper Nicola will be required to live with the long-term adverse effects of a spill in this territory. And those adverse impacts include significant impacts to water, ecosystems including drinking water, fish, plants and the health of their members and the exercise of their rights.

17984. The reasonably foreseeable impacts of a spill of diluted bitumen in this territory must be adequately understood and addressed before this Board can recommend the project. Without adequately researching and assessing the potential impacts of diluted bitumen in the territory, it is in our submission premature for Trans Mountain to assert that they can adequately mitigate against

such impacts.

17985. Trans Mountain acknowledges that a spill of diluted bitumen in freshwater environments could have substantial effects. They also state that the recovery of oil from fast moving river poses specific challenges.

17986. Oh, I should note that many of those rivers and streams that Upper Nicola -- that the Chief referred to and I've talked about -- they can become very dry and they can become very fast moving rivers all within any given year, given fresh and all those concerns. So the complexities of that water system at different times of the year has to be considered when addressing things like oil spill and oil spill response.

17987. You can't assume that it's going to be dry and you can't assume that it's going to be -- you must assume both. You must assume that it's going to be potentially dry, and you must assume it's potentially a fast-moving river, much like Kalamazoo.

17988. In their reply evidence, Trans Mountain boldly states:

> *"Trans Mountain and other experts believe enough is known about dilbit properties to allow for effective response in the unlikely event of a spill."*

17989. They also state that:

> *"In the unlikely event a spill, the response from the Project would entail the same procedures and approaches used for conventional crude oil spills."*

17990. You can see my references to those at our paragraph 196 in the written submissions.

17991. Upper Nicola's assessment of the research presented through this process and real life experience, including Kalamazoo, does not support Trans Mountain's bold assertions. There has not been adequate testing of diluted bitumen outside the laboratory, and there are too many variables upon which a real life spill could occur within the territory to allow science or Trans Mountain to accurately predict the diluted bitumen will weather and impact the hosting environment in the same way as conventional crude. That's an inaccurate

assumption or prediction on which we cannot rely upon in order to assess this project and to assess whether we're ready to deal with an accident.

17992. Given it is reasonable to expect that spilled diluted bitumen may submerge or sink in the rivers, streams and lakes of the territory depending on the circumstances at the time of a spill, they could -- it could coat gravel and sediment and it could coat riverbanks. Once it's done that, once the oil enters into the river, it could travel downstream anywhere as far as 56 kilometres, as we learned in Kalamazoo, and polluting the habitat as it goes along, including the important salmon habitat and other habitats that Upper Nicola and the territory rely upon.

17993. Given that Trans Mountain's spill response continues to be premised on the incorrect assumption that spilled diluted bitumen will float in freshwater and otherwise act in a manner like conventional crude, their assessment of the adverse impacts of the spill and the fiscal and environmental, costs, risks, impacts and effects of the project are inadequate and unreliable.

17994. Similarly, as discussed, if Trans Mountain's spill response effectiveness is based on the assumption that most oil will float, they will presume that conventional containment and recovery techniques and technologies will be effective. That assumption is contrary to real life experience and contrary to current research. It is not an assumption that Upper Nicola, this Board, or Canada can rely upon when considering whether adequate mitigation has been put in place to address the risks of the project.

17995. Trans Mountain's risk assessment of the toxic effects ignores the likelihood that the weathered oil will most likely become trapped in gravel and sediments of spawning shoals. It's Upper Nicola's submission that oil could easily remain trapped in sediments for years within the water systems of the territory depending on the rate of flushing of the bed sediments for water flows and on the amount of oil trapped during the spill.

17996. Those underwater aquifers that the Chief talked about -- if dilbit got into those underwater aquifers, we have no idea where it would show up in the territory throughout the water courses. The elders probably know; the ancestors probably know, but I can tell you that I don't think science knows. And so for Trans Mountain to stand up and say without doing a regional analysis, without doing the work that needs to be done with respect to proper assessment of the project and assessment of the water systems, is in my submission arrogant and unreliable.

17997. One of the common things that's often said -- and it's a common sense kind of thing -- that the best approach to a spill response is to get as leak detection and quick response. Trans Mountain has still not completed its risk-based design approach, which would provide a full list of detailed specific risk mitigation measures to be incorporated into the design.

17998. Trans Mountain has also not even confirmed which leak detection technologies will be used, leaving all these issues to a post-approval detailed design phase. Leak detection is critical to controlling the spill volume and consequently the adverse impacts.

17999. Trans Mountain should be already advising all of us that they would be adopting the most advanced technologies for spill detection possible despite any regulatory requirements, if they were truly serious about identifying and addressing the risks of oil spills. At a minimum, they should have already told us that the use of a dual leak detection system would be used and would be required.

18000. Another thing that you must consider is, what's the likelihood of an adverse impact occurring?

18001. One of the things that the members of Upper Nicola and Syilx raised with the Chief and Council regularly was what's the risk of an oil spill? And so again Upper Nicola took efforts to bring an independent assessment of that.

18002. At page 230 of our written submissions, we emphasize the conclusions of Doctors Gunton and Broadbent's "Spill Risk Report". For pipeline spills, Trans Mountain provides spill frequencies per kilometre per year for separate spill causes, but doesn't estimate the likelihood of a pipeline spill on either line 1 or line 2. So Trans Mountain didn't provide that to you.

18003. Rather, using criteria like transparency and other best practices, Doctors Gunton and Broadbent showed 27 major weaknesses in the risk analysis provided by Trans Mountain. The authors use several widely accepted spill risk methodologies to provide estimates for potential pipeline spill risks from the project. For pipelines, spill likelihood is high.

18004. Trans Mountain's own analysis shows that spill likelihood for the project from the pipeline is 99 percent. That sounds high to me. I'm sure it sounds high to you.

18005. Trans Mountain says, however, that the potential effects of a credible worst case and smaller spills don't need to be evaluated for significance because they represent low probability hypothetical events. I'm sorry; the probability is high and they should have been assessed.

18006. Now, while Trans Mountain did file a reply report making numerous assumptions and raising numerous criticisms in rebuttal of Upper Nicola's Spill Risk Report, Trans Mountain chose not to put any of those to Upper Nicola's experts by way of information requests. It is our strong submission that that choice was at their peril and that you must put no weight on the critique and rebuttals that Trans Mountain raises in its reply evidence.

18007. I have set out in the written arguments the law that informs the implications when a party chooses not to cross-examine. Now, of course we didn't have the right to cross-examine in these hearings and so the only tool was the information requests to test the evidence.

18008. And so in keeping with the rule in *Browne v. Dunn*, Trans Mountain should have used the written IR Process to test that evidence. Instead, they chose to be silent; they didn't challenge it; and they put it in through the reply evidence. This was especially prejudicial given your decision to deny us leave to file sur-reply evidence.

18009. So from Upper Nicola's submissions, the issue is not whether a pipeline leak will occur; it's whether we're ready. The Proponent, the Crown, the Board, First Nations stakeholders must grapple in this project review. Given the high probability, do we know what we need to know? Can we respond to an accident and malfunction?

18010. The Proponent creates significant distrust and concern by asserting that the likelihood is low and that diluted bitumen will float and will not permanently cause harm to the ecosystem. So it's difficult to trust the Proponent in this case. It is clear that much more must be done before this project can be recommended.

18011. The second report that we completed was done by Nuka, a well-renowned expert on oil spill preparedness and response. And they determined that the information presented in the application was vague, general with respect to spill response, and also concluded that the capability did not appear to be

clearly linked to spill risks or spill response, logistical considerations. No control points, no planning, no clear indications that we actually could respond to a spill in the Nicola and Stump Lake watersheds.

18012. You'll see in the report we only chose those two main watersheds. We couldn't afford to do the entire region and don't feel like it's Upper Nicola's responsibility to do that. But we did want to choose two watersheds that were clearly important and would need to be properly looked at. And there were no control plans for that area.

18013. The quantity and type of equipment available was limited, including lack of river booms. The equipment inventories for Kamloops and Hope don't seem to quantify or type out the kind of ancillary equipment that would be necessary. We don't know whether there's equipment there to construct the berms or dams or dykes or other barriers that would be necessary if it hit the land. And we don't know whether they have the kind of booms that would be necessary to deal with the water and the water depths that are reasonably anticipated.

18014. It's quite a sorry state in our view, especially because Trans Mountain is already transporting diluted bitumen through the territory. So this is the state it is already. The work hasn't been done; there hasn't been sufficient engagements with Upper Nicola about this issue; and a lot more work needs to be done.

18015. It is our submission that the Board cannot recommend the project when something as significant as emergency response planning for accidents, malfunctions along the pipeline has not been completed or in some cases hasn't even been started.

18016. I want ---

18017. **THE CHAIRMAN:** Just a note that you have five minutes remaining, Ms. Gaertner.

18018. **MS. GAERTNER:** --- to turn briefly to public interest. Upper Nicola retained an independent expert to provide an assessment of the risks and the benefits of this project in order to assist them with their own understanding and to assist the Board when looking at section 52 certificates, and importantly, to continue to inform the Crown consultation that's going to follow.

18019. Trans Mountain constantly argues that their secured long-term

contracts with oil and gas producers clearly indicates that this project is needed. Frankly, if that's the only indicator you wouldn't need to be here. The fact that industry wants this project does not make this project *ipso facto* in the public interest.

18020. Trans Mountain overstates project benefits by using gross economic impacts as the primary measure for the contribution of the project rather than net impacts or net economic benefits. Trans Mountain's conclusion that the project will generate significant benefits in the form of increased prices for Canadian oil exports, is based on questionable methodology, unrealistic assumptions, and is inconsistent with the oil market dynamics.

18021. Your Panel has already determined that you can't rely on this idea that one project in Canada is going to result for the life of the project in increased netbacks to industry. The oil markets, the world oil markets, make that completely an erroneous assumption and most of the economic benefits that this project relies upon, according to Trans Mountain, relies on that assumption.

18022. Finally, it is in the interests of all Canadians to ensure that the Constitution is respected through the reconciliation of section 35, "Aboriginal Rights", with the assertion of Crown sovereignty; the protection of Aboriginal rights; and ensuring that the process of reconciliation is promoted so that the honour of the Crown is upheld.

18023. It is simply incorrect to say that the impact of the project on an Indigenous group is local in nature. Rather, as the rights of Aboriginal peoples are enshrined in the Constitution, any impact that would unjustifiably infringe on these rights is of national public interest. It is in the interest of all Canadians to ensure that the Constitution is honoured and respected and that the process of reconciliation is upheld and promoted. This is discussed in recent Canadian jurisprudence and it's set out in our written submissions from 377 to 389.

18024. The reason why Aboriginal rights must be included in the public interest consideration is two-fold. First, it is the public interest that reconciliation occurs. Second, you must uphold the court decisions and the declarations, including the *United Nations Declaration of Indigenous People*.

18025. Reconciliation cannot be a burden borne solely by Aboriginal people and by the local people that are affected by a project. Reconciliation is between all Indigenous people, the Government of Canada including you, and all

Canadians. It's our work together.

18026. The Board must find that the impacts, effects, and risks associated with the project outweigh the potential benefits, including any economic benefits such that the project is not in the public interest.

18027. The Board cannot recommend the project in these circumstances. Deep consultation cannot occur when the Crown unilaterally determines the approach to consultation and relies on an adversarial regulatory hearing process to gather information. There are serious gaps in the assessment of the project on the title and rights of Upper Nicola/Syilx people. From Upper Nicola's perspective, these gaps in the assessment, along with the other issues we've detailed, require the Board to not recommend the project at this time.

18028. Your work must be consistent with section 35 of the Constitution and you cannot act contrary to the Constitution. What must you do in these circumstances? You must acknowledge that the outstanding Crown consultation duties to Upper Nicola have not been met, and they must be met before any Crown decision is made by either the federal or provincial governments to approve this project. You must advise the Crown, as we've already done, that there's outstanding information that Upper Nicola needs to understand the impacts of these projects and enter into good faith, meaningful, honourable consultation with the Crown.

18029. Because you're required by your statutory timelines to provide a recommendation report that includes the determination of whether the project is in the public interest, the Board cannot recommend the project in contravention of the Constitution and must at this time recommend against it.

18030. Those are my submissions. We are happy of course to take any questions.

18031. **THE CHAIRMAN:** Thank you, Ms. Gaertner.

18032. The Board will take a 10 minute -- we'll return at 5 to 10:00 and we'll consider any questions for you.

--- Upon recessing at 9:46 a.m./L'audience est suspendue à 9h46
--- Upon resuming at 9:57 a.m./L'audience est reprise à 9h57

18033. **THE CHAIRMAN:** Thank you, Chief and Ms. Gaertner, today for your presentations, for your submissions.

18034. The Panel -- and your submissions are clear. We had some questions prior to hearing your oral summary argument, but with your submissions from both of you the Panel have no further questions of you at this time.

18035. And to you, Chief, I acknowledge you being here today and your deep woven engagement with the land.

18036. So with that, we will take another short recess and we will return to hear from the Burnaby Residents Opposing Kinder Morgan Expansion Project.

--- Upon recessing at 9:58 a.m./L'audience est suspendue à 9h58
--- Upon resuming at 10:10 a.m./L'audience est reprise à 10h10

18037. **THE CHAIRMAN:** We'll resume now to hear the oral summary argument on behalf of Burnaby Residents Opposing Kinder Morgan Expansion Project. And as indicated, we have read all the evidence that you have submitted on behalf of your clients, and we have prepared to now hear your oral summary argument. And I think you've been briefed on the timing system so you're familiar with that.

18038. And if we have questions would you prefer to be entertained during or would you like us to wait until the end? Whichever way helps you, Mr. Chantler.

18039. **MR. CHANTLER:** Whatever suits you, Mr. Chair.

18040. **THE CHAIRMAN:** What that then, we're ready to hear your oral summary argument.

--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE BURNABY RESIDENTS OPPOSING KINDER MORGAN EXPANSION PROJECT:

18041. **MR. CHANTLER:** Thank you and good morning, Mr. Chair, Members of the Panel. My name is Neil Chantler and I'm counsel here on behalf of the intervenor BROKE.

18042. With me are three members of BROKE. I'd like to introduce them to

you.

18043. On my right, the far right, Ruth Walmsley has lived in Burnaby for 29 years. She works for a digital audio company and owns three homes in Burnaby that are near the existing and the proposed pipelines.

18044. To my left, Kathy Mezei has lived in Burnaby for 38 years. She's a professor Emerita at Simon Fraser University where she taught for most of her life. She lives on Capitol Hill between the Westridge Terminal and the Burnaby tank farm.

18045. And just to my right, Mary Hatch has lived in Burnaby for 45 years. She's a retired elementary school teacher and she lives on Inlet Drive in the Westridge neighbourhood. Ruth, Kathy, and Mary are all founding members of BROKE.

18046. My plan for today is to say a few words about BROKE and then I intend to make a few a comments about this process, including a motion with respect to Practice Direction 15. Then I will turn to the substance of our group's opposition to this project.

18047. But at the outset, I'll summarize our position.

18048. In BROKE's submission, this project poses an unacceptable risk to the health, safety and livelihood of Burnaby residents. Kinder Morgan wants to build this pipeline and expand its tank farm in a densely-populated urban centre with the highest seismic risk in Canada.

18049. And despite its enthusiasm to impose these risks on the local population, Kinder Morgan wants to build this project to minimum enforceable design standards.

18050. The risks posed by this project, I submit, are far too great. A major earthquake could cause ground motion, liquefaction and landslides that have the potential the pipeline and storage tanks. And a major earthquake in this region is not a remote possibility. While seismologists might debate the precise probability of a major earthquake striking this region, they all agree it is not a question of if, but when.

18051. This is the wrong location for a major oil pipeline. It is not in the

public risk -- interest, and the risks are not justified in the circumstances.

18052. I will elaborate on our position a little further in my submissions, but first BROKE.

18053. BROKE is a local residents group. It has grown to more than 800 members. It was formed in 2012 by a small group of local residents who were deeply concerned about this very project. Several of them had been affected by the 2007 rupture of the existing pipeline in the Westridge neighbourhood.

18054. BROKE's mandate includes raising public awareness about the risks posed by this project and opposing this project in the public arena and here before you, the National Energy Board.

18055. Its members are opposed to this project for many reasons including broad issues such as climate change, tar sands development, the risks of shipping, public health and safety and air quality. They're also concerned about local issues: noise and light pollution, disturbances to transportation and recreation areas, community wellbeing, property values, and potential impacts to local beaches, parklands and conservation areas.

18056. The group is intergenerational, non-partisan, non-hierarchical, and comprised of homeowners, retirees, teachers, students, union members and many others.

18057. The majority of BROKE members live right here in Burnaby. Some live in the Westridge neighbourhood and experience fugitive gases, noise and light pollution from the existing terminal already. Some live in Forest Hill or the Forest Grove neighbourhoods and experience fugitive gases from the storage tanks and the constant threat of further spills. You'll recall spills occurred in 2009 and 2012.

18058. None of them want to see these daily disturbances and hazards dramatically increased by the approval of this project.

18059. These are the people -- are among the people who would be most affected by approval of this project. These are the people who would live directly above the pipeline and directly downhill from the tank farm. Some would be sandwiched between two pipelines, both operated by the same company.

18060. Now I want to tell Mary Hatch's story. She lived through the 2007 rupture of the existing pipeline in the Westridge neighbourhood. Her affidavit has been filed as evidence in this proceeding. Her story is important because it personalizes what can happen in the event of a major oil spill in a residential neighbourhood. It also gives us some indication of what a pipeline rupture and disaster relief might look like on larger scale. It is the largest spill that has occurred along the existing Trans Mountain pipeline since Kinder Morgan took ownership.

18061. You will be familiar with the general facts. It occurred on July 24th, 2007 at 12:30 p.m. when a section of the pipeline connecting the Burnaby tank farm to Westridge Marine Terminal was punctured by a construction crew. The immediate result was a 30-metre fountain of oil that showered the surrounding area for 25 minutes before it was shut off.

18062. One hundred and thirty-three (133) homes were evacuated. Eighty-nine (89) of those required remediation work. Two hundred and thirty-four thousand (234,000) litres of oil seeped into the surrounding soil, storm drains and sewer lines. The storm drains carried huge quantities of oil to the Burrard Inlet where it was carried by wind and tide affecting 1,200 metres of shoreline.

18063. Ms. Hatch lives 100 metres from the site of the rupture. She was having lunch at home when it happened. A firefighter arrived at her door and told her to evacuate immediately. She went outside to find her house, her lawn and her car covered in oil. She drove off the property without any understanding of what was happening. She called her children and told them not to return home from school.

18064. Later that day, she attended an emergency meeting at a local seniors' centre. She was told to stay off her property. She was given a small credit for groceries and provided with information about local accommodation options. She was not permitted to return home for four days. And when she did return, fumes from the oil had contaminated her house.

18065. Over the following days, weeks and months, the cleanup efforts outside her home were constant. The house had to be washed, gutters had to be removed, and all soil, bark mulch and grass was removed. At times, there were as many as 27 people working on her property. The neighbourhood was full of restoration trucks, tree pruning equipment and work crews.

18066. The cleanup of her property continued for two years. The official cleanup in the neighbourhood lasted four. And after all that, Ms. Hatch remained completely dissatisfied with the manner in which the remediation work was completed on her property. Her house and gutters were cleaned hastily and without regard for the environment and significant amounts of contaminant remained.

18067. Ms. Hatch was not compensated adequately for this damage and she felt Kinder Morgan treated people differently based on how forcefully they complained. Her neighbour's roof was replaced; hers was not.

18068. Ms. Hatch spent countless hours of her own time on the cleanup providing instructions to the cleanup crew, dealing with insurance adjusters, and engineering firm, restoration staff, Kinder Morgan crew and the Burnaby Health Department. She did her own painting and rebuilt her own sundeck at her own expense.

18069. Now, Ms. Hatch acknowledges that her experience was better than some. Some of her neighbours were out of their homes for months while the cleanup continued.

18070. This experience was traumatic for Ms. Hatch and her entire family. And following this disaster, you can probably understand why Burnaby residents are opposed to the approval of another major oil pipeline through their neighbourhoods.

18071. The same company that handled this disaster in 2007 wants the public to trust that it will respond appropriately in the event of a major spill.

18072. In BROKE's submissions, Kinder Morgan has done nothing to earn that level of trust. Evidence filed by Simon Fraser University, the Etkin report, at page 21, cites examples of Kinder Morgan's accidents and safety violations across North America. These include 24 citations from the U.S. government, five of which led to federal enforcement actions.

18073. There were 36 significant incidents in Texas alone from 2003 to 2014. And there have been at least 180 spills, evacuations, explosions, fires and fatalities in 24 states since 2003.

18074. Kinder Morgan's track record and the decisions that it has made in the

course of this application under review have eroded any confidence the public has that Kinder Morgan is a responsible corporate citizen.

--- (Applause/Applaudissements)

18075. **MR. CHANTLER:** I will now digress and make a few comments about this process, and my next few comments can be taken as a motion in respect to Practice Direction 15.

18076. Many more than three BROKE members would have liked to have been here in attendance today. It is somewhat ironic given the capacity of this room and how many people are here -- I'd estimate 10 to 15 people aside from the staff and media that BROKE would ---

18077. **THE CHAIRMAN:** Mr. Chantler, just for process I want to make sure if you're indicating that you're now making that motion now; is that your intention?

18078. **MR. CHANTLER:** That's correct, Mr. Chair.

18079. **THE CHAIRMAN:** And we can hear -- if you could keep your comments to briefly what the motion is about, not argue the merits of it. Just if you could indicate what the motion is about, and then the Panel will take a break to consider that because I think it's important that we consider it in proper timing and that everyone is aware of it.

18080. So I'll allow you to raise the motion now. If you could just briefly indicate what the intention of your motion is, then we will take a break to decide whether we'll hear it now or afterwards.

18081. Thank you.

18082. **MR. CHANTLER:** Thank you.

18083. In response to your question, the substance of the motion is the restrictions imposed on this hearing process by Practice Direction 15 to limit attendance in this room to two people per intervenor.

18084. My intention is to make submissions calling on you to consider opening the doors of this hearing room to the general public. I make this motion

in accordance with rule -- section 35.6 of the National Energy Board's Rules of Practice and Procedure which allow a party to make a notice of motion orally during the course of a hearing.

18085. **THE CHAIRMAN:** Thank you.

18086. We will stop the clock and then we will -- the Panel will take a recess to consider how we will hear the motion now or what our options are to hear it now. Thank you.

--- Upon recessing at 10:24 a.m./L'audience est suspendue à 10h24
--- Upon resuming at 10:32 a.m./L'audience est reprise à 10h32

18087. **THE CHAIRMAN:** The Panel has decided to hear your motion orally. And so then we would ask you now to hear -- we'll hear your submissions on the motion.

18088. **MR. CHANTLER:** Thank you, Mr. Chair, Members of the Panel.

18089. My submissions will not be long.

18090. This hearing room should be full. This is supposed to be a public hearing. Its emptiness does not reflect the level of public interest in what's going on here. To the contrary, there have been on some days hundreds of people standing outside of this hotel in protest and out of deep concern about this pipeline project.

18091. The rationale for limitation on attendance was stated by the Panel to be the past history of disruptions and the publicly available information regarding occurrences of civil disobedience associated with this project.

18092. With respect, I submit this is insufficient justification for undermining the open court principle. The Supreme Court of Canada has called the open court principle a hallmark of democratic society inextricably tied to freedom of expression. The open court principle implies that justice must be done in public. Hearing rooms must be open to the public. The public must be free to enter without requesting permission.

18093. Section 11 of the *National Energy Board Act* establishes this Board as a court of record with all the powers, rights and privileges of a superior court.

And as a court of law, this Board is bound by the open court principle in the same way as any other court.

18094. The Supreme Court of Canada has formulated a test for when restrictions on the open court principle are properly justified. It's referred to as the Dagenais/Mentuck test, from two leading cases of the Supreme Court of Canada.

18095. That test is binding on this Panel. Restrictions to the open court principle are only justified when there are serious risks to the proper administration of justice and where reasonable alternate measures will not prevent those risks.

18096. The Supreme Court requires real substantial and well-grounded evidence of these risks to support any restriction on the open court principle. There is no such evidence here. In the history of this review project there have been no hearings open to the public. The concerns about distractions are mere speculation.

18097. I was counsel for BROKE on the injunction application brought by Kinder Morgan in B.C. Supreme Court. I can assure the Panel there were no disruptions during the hearings that required the judge to adjourn, or delay, or stop the proceedings. The open court principle was respected by Associate Chief Justice Austin Cullen, and the integrity of the process was preserved.

18098. As another anecdote, I was counsel for an intervenor at the Missing Women Commission of Inquiry in 2012. And one could hardly imagine a public hearing more controversial. For weeks hundreds of people stood outside the hearing room blockading a major downtown Vancouver intersection, banging on drums, and chanting in protest for what they perceived to be a completely unjust process inside the courtroom doors. And not once in nine months of that hearing were the doors ever closed to the public.

18099. Commissioner Wally Oppal handled the occasional disruption without security by asking members of the gallery to leave the room, and they did leave the room.

18100. And I submit that is exactly the process that should have been followed here. These are the reasonable alternate measures the Supreme Court of Canada is referring to.

18101. Broadcasting these hearings online is no substitute for opening the doors to this hearing room. The Panel does not have jurisdiction to redefine the open court principle. There is no evidence of actual serious risks to this hearing or evidence of how alternate measures would not have prevented those risks.

18102. Closing the doors to this hearing has harmed the public's perception of this process as one that is fair and impartial.

18103. In an open letter last week, the B.C. Civil Liberties Association called this Panel's decision to close these hearings unreasonable and unlawful. The Panel responded on Tuesday this week and questioned the B.C. Civil Liberty Association's standing to raise this issue.

18104. Well, on behalf of the intervenor BROKE, I echo the BCCLA's concerns and I request the Panel to open the doors to this hearing room for the few closing submissions that remain.

18105. This motion is in the hands of the Panel to dispose of at the Panel's discretion.

18106. **THE CHAIRMAN**: Thank you, Mr. Chantler. I'll offer the Applicant, if they have any comments, submissions they wish to make on the motion.

18107. **MS. OLENIUK**: Thank you, sir.

18108. Trans Mountain has no submissions and takes no position on the motion.

18109. **THE CHAIRMAN**: Thank you.

18110. With that, the Panel will return at 11:00 to give our ruling on this motion.

--- Upon recessing at 10:39 a.m./L'audience est suspendue à 10h39
--- Upon resuming at 11:03 a.m./L'audience est reprise à 11h03

18111. **THE CHAIRMAN:** Mr. Chantler, the Panel have considered your motion, and your motion is denied. Written reasons will -- to follow.

18112. My understanding is you have 27 minutes left on your presentation.

18113. **MR. CHANTLER:** Thank you Mr. Chair, Members of the Panel.

18114. I have a few more general comments to make about this hearing process.

18115. BROKE wishes to echo the grave concerns that have been articulated by other intervenors about the fairness, openness, thoroughness and lawfulness of this review.

18116. The failure of this process to consider the environmental impacts of tar sands development and client change -- climate change invalidates its claim to be a proper environmental assessment. And the new federal Cabinet apparently agrees and announced yesterday a new environmental assessment process.

18117. The Panel's unprecedented decision to limit cross-examination has significantly undermined procedural fairness and irreparably harmed the quality of the evidence under consideration.

18118. The information request process was no substitute for cross-examination and resulted in carefully constructed and evasive replies written by nameless employees of Kinder Morgan whose qualifications remain unknown.

18119. This process was overly onerous and inflexible. No one could have anticipated without sacrificing a tremendous amount of time. I spent hundreds of hours on behalf of BROKE in furtherance of our role in this proceeding. And there are many intervenors who do not have counsel; I cannot imagine how they found the time to participate. I suspect in many cases, people who stand to have their interests affected by this project could not.

18120. Of course a major factor limiting participation was funding. The NEB did not provide BROKE with sufficient funding to ensure its participation in this process was meaningful. BROKE has been unable to fully test the evidence and put forward its strongest position because it did not have the resources.

18121. BROKE could not have participated at all in this process without the generous support of the Environmental Dispute Resolution Fund administered by West Coast Environmental Law. And it could not have participated without the

generous support of its many members who donated their own money and fundraised to see the group's voice heard through this process.

18122. The Nation Energy Board is required by CEAA section 24 to ensure the public is provided with an opportunity to participate in the environmental assessment of a designated project.

18123. The NEB participant funding program awarded modest grants -- a modest grant to BROKE at the outset of this process when it was intended to last 15 months. And despite our request, no further grants were made when the process was extended first to 22 months and then to 25 months, despite the tremendous increase in time and costs.

18124. Those are my comments on the process.

18125. Now, I will turn to my substantive submissions on our opposition to this project, and why BROKE has chosen to focus on seismic risk.

18126. In short, BROKE couldn't tackle all of the issues of concern to its members.

18127. But BROKE also felt that Trans Mountain was understating the risk of a major earthquake in this area. It had committed to an inadequate design standard and it had offered no assurance that sufficient mitigation measures were in place with respect to public health and safety.

18128. I'll come back to those points in a moment.

18129. In order to tackle the issue of seismic risk, BROKE retained one of the leading seismic experts in Canada, Dr. Sheri Molnar. She has a PhD in Geophysics from the University of Victoria; she's presently employed as an assistant professor at the University of Western Ontario. Her many publications include two recent papers that specifically address earthquakes scenarios in southwestern B.C.

18130. Her report was filed as evidence on May 26th, 2015.

18131. Dr. Molnar asserts there is a significant chance of a major earthquake affecting the lower mainland in the next 50 years. She concluded in her report that Kinder Morgan's chosen design standards for the pipeline and the tank farms

may not be suitable given the seismic hazard present in this region and the evolving nature of seismic knowledge.

18132. She explained that a higher design standard is usually applied to infrastructure that poses a great hazard to the public and while the precise consequences of ground motion can never be fully projected, pipelines have ruptured in real-world scenarios in other jurisdictions.

18133. Dr. Molnar critiques Kinder Morgan's approach to seismic risk. Kinder Morgan refuses to acknowledge the presence of potential active faults in the region, limiting its definition of "active faults" to those that have been active in the Holocene Period. Dr. Molnar says the definition of "active faults" has evolved to include other evidence of potential activity.

18134. Kinder Morgan refuses to consider the cumulative earthquake hazard caused by aftershocks. Dr. Molnar says the science has evolved and a more modern approach would include the additional hazard posed by aftershocks.

18135. Kinder Morgan has not completed all the site-specific liquefaction tests recommended by its own engineers, BCG Engineering. BCG Engineering notes that itself in the "Seismic Hazard Update Report". And Kinder Morgan repeatedly only considers medium probability lesser events in its analysis of risk rather than lower probability but more significant events.

18136. Consistent with its approach in other areas of this application, Kinder Morgan does not want to talk about realistic worst case scenarios.

18137. So in the time remaining, I'll elaborate on some of these points.

18138. Now, what are we talking about when we refer to seismic risk or a significant chance of a major earthquake? As Dr. Molnar explains, southwestern British Columbia lies at the northern limit of the Cascadia subduction zone where the Juan de Fuca Plate and the North American Plate collide. These two tectonic plates are pressed together and move toward each other at the rate of two to five centimetres per year.

18139. The denser Juan de Fuca Plate is subducting beneath the lighter North American Plate and eventually when the strain becomes too great, the Juan de Fuca Plate will spring back to the west and the North American Plate may drop several metres.

18140. Dr. Molnar describes this as a mega-thrust or subduction earthquake. The last great subduction earthquake occurred in 1700 and was estimated to be magnitude 9. The shaking from that earthquake lasted several minutes. It collapsed houses of the Cowichan people on Vancouver Island, drowned coastal forests, and caused numerous landslides. The resulting tsunami eradicated the entire community of Pachena Bay on Vancouver Island and arrived in Japan 10 hours later.

18141. Thirteen (13) such earthquakes have occurred in the past 6,000 years, an average of every 500 to 600 years but in intervals ranging from 2 to 800 years. Based on the most current science, the probability of us experiencing the next major subduction earthquake in this region over the next 50 years is 17 percent or greater than 1 in 6.

18142. In addition to the risk of a major subduction earthquake, there are 15 potentially active faults of significant concern to the Burnaby area. The greatest earthquake hazard is from one of these, a nearby shallow crustal earthquake which would generate ground motion for 20 to 40 seconds. Dr. Molnar cites a 35 percent chance of this region experiencing strong or very strong ground shaking from a shallow crustal earthquake in the next 50 years.

18143. These are hardly remote probabilities. And of course with the passage of time these probabilities increase. A major earthquake is not as unlikely as Kinder Morgan would have you believe.

18144. Now, I'm going to say a few words about Kinder Morgan's chosen design standard.

18145. Despite the known seismic risk in this region, Kinder Morgan has elected to build its pipeline and tank farm to the minimum enforced design standards in Canada. Kinder Morgan assures us that it will adhere to the national and provincial building codes. But Dr. Molnar points out, these building codes were not developed to be applied to major oil pipelines.

18146. The building codes are developed to establish minimum life-safety standards for the design of new buildings. They are only meant to ensure that within a likely range of scenarios a building does not collapse and that people are able to escape. Compliance with these standards does not mean a building will not be damaged in an earthquake or require major repairs.

18147. Kinder Morgan concedes there are no guidelines in Canada that force or prescribe performance standards for seismic design with respect to pipelines. But it does nothing to explain why it is not following best practices used in other infrastructure projects.

18148. Dr. Molnar notes that buildings of public importance such as hospitals and schools, are routinely build to a much higher seismic design standard. And other projects that pose a serious risk to the public, such as power plants and dams, are routinely built to much higher seismic design standards.

18149. Higher design standards involve longer return periods, such as 10,000 years instead of 2,475 years, meaning the probability of exceedance is reduced. And where there is a regulatory vacuum, as there is here, companies often take the initiate to elevate the design standards on their own. Best practices advance.

18150. As an example of good corporate practice, B.C. Hydro has voluntarily elected to retrofit or rebuild all of its 41 hydroelectric dams in this province to a much higher design standard given the advance of seismic knowledge. This is a responsible approach to design standard that reflects our present reality.

18151. The science is evolving at a faster pace than our legislation. The choice of an appropriate design standard should require a precautionary approach. The Canadian government's failure to enact appropriate design standards for major oil pipelines does not mean that Kinder Morgan should be permitted to endanger the public by failing to apply current best practices in seismic design.

18152. Now, in its reply evidence, Kinder Morgan suggests that it will elevate the design standard in some select areas. Its engineers suggest that mitigation measures might include thicker-walled pipes; rerouting the pipe around or beneath liquefiable deposits; or employing higher fabrication, welding and inspection standards. But Kinder Morgan has not determined where those risks are; it has not properly studied those areas; and it is not committed to any particular mitigation measures at all. But Kinder Morgan will say that these are properly the matter or the subject of project conditions imposed by the Panel.

18153. But I submit you cannot and should not approve this project until the actual level of seismic risk is determined. Only when the level of seismic risk is determined and properly understood should you make a determination of whether or not this project is in the public interest, and only then can you fulfil your duty

under CEAA to determine whether mitigation measures are sufficient to justify the effects of this project on the public.

18154. The doubling of the Burnaby tank farm would pose a great threat to Burnaby residents. The tank farm overlooks several neighbourhoods, the Forest Grove Elementary School, and sensitive ecosystems and waterways. Immediately uphill is a densely treed forested area and a highly populated university and residential community.

18155. Like pipelines, oil storage tanks are susceptible to damage during earthquakes, and just as with the pipeline, Kinder Morgan is prepared to hear only to the minimum enforced design standards.

18156. Dr. Molnar describes past events where earthquakes have caused elephant foot buckling of the tank shell, failed roofs, fires, boil overs, the disconnection of connector pipes, sloshing of oil within the tanks and liquefaction of ground beneath the tanks.

18157. Meanwhile, the Burnaby Fire Department has condemned this proposal. It says unequivocally it would not have the capacity to deal with a major event at the tank farm. Again, Kinder Morgan has underrepresented the risk posed to the public by its proposed expansion plans.

18158. So why does any of this matter to you, the Panel, in the exercise of your duties? It matters because, among other considerations, you are required to determine whether this project is in the public interest. And in exercising that duty, you must weigh the salutary and deleterious effects of this project on that public interest.

18159. Kinder Morgan would have you afford very little weight to the deleterious effects of seismic risk on the public interest, but BROKE's contribution to this hearing hopes to change that. BROKE has filed evidence in this proceeding supporting its claim that the probability of a major earthquake in this region is significant. Coupled with the density of the local populations -- 230,000 people in Burnaby, two and a half million people in Greater Vancouver, there -- this is no place to build a major oil pipeline. And in BROKE's submission, the seismic risks ought to be given significant weight in your assessment of the public interest.

18160. It has long been recognized that the public interest evolves. I submit

to you that it must evolve to recognize emerging knowledge about seismic risk.

18161. Now, the assessment of public interest must consider, of course, the national, but also the local public interests at stake. And where health and safety considerations are at play, not all interests should be afforded equal weight. Burnaby residents could suffer extreme consequences as a result of this project in the event of a major earthquake. And even absent such an event, they will live with the constant threat and uncertainty of a spill or a fire caused by a major earthquake.

18162. The proposed pipeline and its associated infrastructure would sit like time bombs in the Burnaby neighbourhood.

18163. In your exercise of balancing the local and national interests, I submit you ought to take into consideration the nature and the intensity of the threat posed by this project to the local interests; the nature and intensity of that threat.

18164. The nature and intensity of that threat demand that the local interest in this case be given considerable weight. The public interest of the citizens of Burnaby who would live with this project every day should be afforded more weight than the public interest of those who would live outside of the area of risk.

18165. And insofar as the national interest is concerned, we say two things. First, that Kinder Morgan has failed make its case that this project is in the national interest and second, that some diffuse and undefined greater good cannot require a group of local residents to accept serious risks to their health and safety.

18166. This is the wrong location for a major oil pipeline, and I respectfully submit, you should not recommend approval to the Governor in Council.

18167. Thank you. Those are my submissions, subject to any questions that you have.

18168. **THE CHAIRMAN**: Thank you, and give us a second.

--- (A short pause/Courte pause)

18169. **THE CHAIRMAN**: Thank you, Mr. Chantler. A lot of your submissions had answered some of the Panel's questions regarding seismic and the air pollution. You've answered those in your submissions and as in your

written argument.

18170. And you concluded with an area that I was going to seek clarification on, which is the area on public interest that you had mentioned on page 29, paragraph 120 and then I led it up into your last submission in 143.

18171. And I think I'm clear in your position on the public interest and the individual residents -- groups of residents, local, and as you've heard, we, throughout the process in the last nearly 10 days that we've been here, is that balancing that we have to do.

18172. And your argument, as I understand it is that we need to weigh all of that, and that is our job, is to weigh all of that up, all of the evidence up, and that we had to put particular weight on the concerns of your client and of BROKE on those individuals. So in your submission, it's to weigh it.

18173. But I was interested in Ms. Hatch's -- your story on her and the effect of that spill. And you used the words "public trust" and I'm trying to understand the issue of -- if you believe that public trust and public interest are all intermingled, they're integrated, to get that trust back through any group or any individuals or any community along the pipeline route.

18174. I hope -- maybe -- I hope I haven't confused you more with my question than my ---

18175. **MR. CHANTLER**: Thank you for your comments and for your question. I think I understand you to be asking to what extent the public's trust should affect your consideration of the public interest of this project.

18176. And I'm not sure the two things are related, but I do think that you should be considering in your balancing of many factors in this review, Kinder Morgan's pockmarked safety record, as I called it in my submissions.

18177. And it's the reasons behind the public's lack of trust. The public's lack of trust isn't necessarily of your concern, other than to indicate areas that maybe you ought to be concerned about.

18178. **THE CHAIRMAN**: You're good?

18179. With that, the Board thanks you and your clients for their participation

through this process and we will now take a very short five minute recess to hear from the Shackan Indian Band. Thank you.

--- Upon recessing at 11:27 a.m./L'audience est suspendue à 11h27
--- Upon resuming at 11:36 a.m./L'audience est reprise à 11h36

18180. **THE CHAIRMAN:** Thank you and I apologize for the delay this morning.

18181. Nice to see you, Chief. Welcome. And so therefore we have read all your submissions and we'd be pleased -- the Panel would be pleased to receive the Shackan Indian oral summary argument.

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

18182. **MR. GAILUS:** Thank you, Mr. Chair.

18183. John Gailus, I'm legal counsel for Shackan Indian Band.

18184. With me today is Grand Chief Percy Joe. Chief Joe has been the Chief of Shackan Indian Band for 45 years with the exception of a brief two-year holiday, he's been the Chief since 1971.

18185. And also, just to my left is Caroline Moore. Caroline's been involved quite a bit assisting Shackan throughout this process. She's a consultant.

18186. If you do have any questions of me, I'm happy to take them as they come up. If there are specific questions regarding Shackan rights and title, I may defer to Chief Joe on that.

18187. So first of all, I want to recognize that we're here today on Coast Salish territory and make that acknowledgment.

18188. I also want to state before I get into my submissions that Shackan -- Shackan is not against development, per se. Shackan has sought out a number of developments that are consistent with their philosophy of sustainable development and also respectful of their Aboriginal rights and title.

18189. And so in this particular process, you know, Shackan's submissions

are -- at this point in time it is premature, given the deficiencies in the evidence as well as some recent developments that have taken place over the last couple of weeks, to express support for the project.

18190. So with that, I want to say that the Board is faced with a very difficult in front of you. You've got two determinations that you need to make. The first is whether the project is in the public interest under the *Nation Energy Board Act*. And then the second one is the CEAA determination, the significance determination under CEAA 2012, as you are a responsible authority under that Act.

18191. We submit that, given the information that's in front of you, Trans Mountain has not established the project is in the public interest. And in addition, their environmental assessment of the project is deficient and incomplete in a number of areas. And I'm going to take you to the submissions of Shackan in that regard; there's three deficiencies, we say. And we also say Trans Mountain has greatly overstated the potential benefits of this project while minimizing the impacts.

18192. The Crown in this case, both federal and provincial, we say, haven't upheld the honour of the Crown and they've failed to engage in meaningful consultation and accommodation, and effectively abdicating their constitutional responsibilities.

18193. So there's four significant issues that I want to address in these oral submissions. There's actually five but there's one procedural as well as four other issues: the impact of the project on Shackan's Aboriginal rights and title; the proper approach to environmental assessment and justification under CEAA 2012; the Crown's failure to consult with Aboriginal groups and the implications that this has for the project but also for the Board's decision-making process; and finally, whether or not the project is in the public interest.

18194. And I'd like to pull up an exhibit. It's Exhibit C-310-3-2. And so what this is is a map of the -- and Chief Joe will correct me if -- if I get this wrong. The ---

18195. **CHIEF JOE:** Niaka'pamux

18196. **MR. GAILUS:** I just can't say it for some reason -- the ---

18197. **CHIEF JOE:** Niaka'pamux

18198. **MR. GAILUS:** --- tradition ---

18199. **THE CHAIRMAN:** Maybe just get Chief Joe to say it into the microphone and it'll be on the record so you won't have any defence for it.

18200. **CHIEF JOE:** It is Niaka'pamux.

18201. **THE CHAIRMAN:** Thank you, Chief.

18202. **MR. GAILUS:** And for the rest of these submissions I'll just be referring to it as "the Nation" because my tongue can't seem to wrap its way around it.

18203. So this is map produced by Trans Mountain but it shows the Nation's territory and it also shows that the pipeline running through -- through the heart of the territory. You see -- you've seen -- you've seen this -- you've seen this map before.

18204. Shackan has three reserves off to the west of Merritt, approximately -- Shackan's community is approximately 40 kilometres by road from Merritt.

18205. Now, Shackan, of course is a Band; they hold Aboriginal rights and title as well under section 35. And the Nation's rights and title, they've never been surrendered or extinguished by treaty or otherwise. So Aboriginal title continues to exist over this area.

18206. Although the reserves, as I say, are 40 -- 40 kilometres from Merritt, I think it's important to note that the members don't exercise, generally, their Aboriginal rights there. They go throughout the territory; they hunt; they fish; they gather country foods; medicines. There are spiritual and cultural sites throughout the territory that are shared with the other -- the other Bands that make up the Nation.

18207. And it's important to note that a Band, you may have heard, is a bit of an artificial construct. So there are kinship relations amongst all of the various Bands, so it's a little bit artificial to speak of the Band as having a certain set of interests. It really is the Nation that holds the rights and title.

18208. So they also rely heavily on water and the related resources within the territory. And they've identified some key sites: Coquihalla Lakes and Nicola Lake which are connected to other high-use areas including Douglas Lake, Stump Lake, the Nicola River and Coldwater River.

18209. And this watershed, the Lower Nicola Watershed, is an interconnected ecosystem. It relies heavily on the health of its lakes and rivers for fish, for wildlife, for plants and animals, and also the continuity of the Shackan culture.

18210. You know, we speak about Aboriginal right as being simply the right to engage in an activity, and they're much more than that. I mean, this is the core of the culture. And for this First Nation and many other First Nations, they continue to practise these rights. They go out to get their food. They engage in ceremonies related to it. They're -- it's -- it is the core of who these -- who these people are.

18211. And I mean -- and that's something that isn't addressed in any detail in Trans Mountain's submissions. And oftentimes what's left out when one's dealing with environmental assessments is this acknowledgment. It's not just simply a right to engage in an activity simpliciter. All of the -- all of us can fish and hunt and trap and gather plants. We might need a licence but when we're talking about Aboriginal rights we need to recognize the cultural components that come with this as well.

18212. So Shackan is concerned about water. Obviously you've heard a lot about water and the impact of spills on water. I know the Board is aware of the situations that occurred of spill that happened in Coldwater. And this is from the existing pipeline. And it continues to be an area of significant concern.

18213. And so when we're talking about water, there's also groundwater that we need to be worried about, well sites and the like.

18214. Although the community is approximately 40 kilometres from the pipeline -- the existing pipeline, I mean it's important to acknowledge that the Nicola River is connected right to the community and that if there is a spill it's going to -- it's going to be felt by Shackan.

18215. The other issue is access to information. So we've got a pipeline -- we've got a couple of pipelines, actually, there now. We've got the Interior Lower Mainland Transmission Project, the B.C. Hydro Project. We've got

highways, the Coquihalla Highway, and there's also a relatively new highway, a connector that runs to Kelowna from Merritt.

18216. The territory is bisected by a number of linear disturbances. And Shackan's concerns are twofold on this. One, the ability of non-First Nations fishers and hunters to access sites that are important to Shackan, but also the ability of predators, wolves, for instance. Wolves love rights-of-way and that's how they get from one place to another.

18217. In addition, Shackan has experienced problems getting access to certain sites from the existing pipeline. So this is an outstanding issue that Shackan continues to try to address with Kinder Morgan as well.

18218. And we say that given these activities -- and also there is a mine up in the northwest as well, a fairly substantial mine -- that all of these projects, all of these disturbances in the territory are relevant and important when you're determining cumulative effects of the project.

18219. And I'm going to get to that a little bit later.

18220. Now, there are some procedural concerns. I don't intend to spend a lot of time on this; I know that you've heard this from a number of the intervenors in terms of the process. We do address this in our written argument, paragraphs 34 to 45. And Shackan is of the view that this process doesn't comply with the procedural fairness test that's set out in the *Baker* case. There hasn't been cross-examination. And I think the lack of cross-examination is reflected in the quality of the evidence that's before you.

18221. But more importantly, Shackan's been -- well, not more importantly, but certainly just as important for Shackan is the fact that while they've been found to have a direct interest in this project, they've been denied the means to bring forth the evidence in the process. Under the Participant Funding Program, Shackan was granted $1,250, I believe, for travel expenses to attend the oral traditional hearings that we had in Kamloops. I think it was last May.

18222. And we say that although I recognize that the funding program is separate from the Board, that this is breach of procedural fairness, a breach of what we call legitimate expectations. And although the Participant Funding Program said, "Well, essentially we've denied you funding because, you know, other First Nations have raised the same concerns," I think what happened in this

circumstances is the program ran out of money. Those who got in early did get some funding, inadequate as it may have been, and I know you've heard that from other intervenors.

18223. In this case the program was faced with a number of other applications from First Nations and other groups and had to make a tough call. But we had written to the Minister of Natural Resources asking him to top up the program and we're still waiting for a response to that.

18224. So Shackan has had to use its own limited resources to participate in this hearing to the extent that they can. They have received some funding from Kinder Morgan for Traditional Land Use studies, but this process, the NEB Process, they've had to self-finance.

18225. I want to turn to the Environmental Assessment under CEAA 2012 because I think this is a very important point.

18226. We say there's three fundamental errors in Trans Mountain's assessment. The first one is the determination of significance and justification under CEAA 2012; the second is the Cumulative Effects Assessment; and finally, the approach to current use of lands and resources for traditional purposes.

18227. So in this circumstance, the role of the Board under CEAA is to make a significance determination. You look at the various valued environmental components and you consider mitigation, and then you make a determination; you say, "After considering mitigation, are these environmental effects significant?" It's not on this Board to make a determination under CEAA whether those environmental effects -- if you find that there are significant effects still outstanding -- to make a justification decision. That's for the elected officials, the Governor in Council to make.

18228. And this is where things do get complicated because under the *NEB Act* you're required to do this public interest determination. You're required to actually do this cost-benefit analysis whereas under CEAA the benefits are put over here, essentially. Your role is to essentially come up with a balance sheet to say, "Here are all the effects that are outstanding in terms of significance, and here are the benefits on the other side. And Governor in Council, it's going to be up to you to determine whether or not one, those effects are justified in the circumstances, and two, whether or not the project is in the public interest."

18229. And so Trans Mountain's confused that in terms of the way in which they've approached it. So when we're talking about the environmental effects, you don't take those benefits into account or the purported benefits; it's up to the final decision-maker.

18230. And I think the reason this is important is this error likely led Trans Mountain to come to the conclusion that the only significant environmental effect that you need to be concerned about is on the southern resident killer whales.

18231. And we turn to cumulative effects. And the Board decided it wouldn't consider the environmental consequences of the upstream and the downstream. And we said in our written argument that while the end use of the oil likely is too remote for the purposes of environmental assessment, that it makes sense to consider oil sands production. If you're going to authorize a pipeline that's going to triple the capacity, it seems logical that that may lead to an increase in oil sands production.

18232. And I note that the Government of Canada yesterday have now said that they will look at these GHT issues. But we say that under the statute itself, this was a requirement in terms of cumulative effects.

18233. In addition, CEAA 2012 requires an assessment of the adverse effects on current use of lands and resources by Aboriginal people for traditional purposes. So this is where we get the environmental statute intersecting with Aboriginal and treaty rights.

18234. And this is squarely before the Board. So not only do you have to grapple with the procedural issues -- you know, did the Crown consult or what is the state of consultation; because now we know that the Government of Canada has said that they're going to continue consulting and apparently do a much more robust consultation.

18235. But CEAA 2012 really deals with the substantive issues. How is this project going to impact the Aboriginal rights, the treaty rights of the First Nations along the route? And if there are going to be impacts, can we mitigate those impacts? And that's the question for the Board.

18236. And it's laughable, I say, that Trans Mountain in their Environmental Assessment says, "Well, there aren't going to be any significant effects with the exception of the southern killer whale." You've heard from a number of First

Nations -- and Shackan as well agrees with this -- that there are significant effects, significant effects that can't be mitigated and one of the problems is the cumulative effects assessment starts with the baseline being today.

18237. So we need to be cognizant of what's going on in the territory. The places on which the nations can exercise their rights are becoming less and less. They can't access them, there's a pipeline there. They can't access wildlife because the predators are running wild. There's competition amongst non-First Nations harvesters.

18238. And in terms of the cumulative effects, as I said, it's both retrospective -- what's on the ground now -- and prospective. If this project is approved, you know, what are the likely implications on the ground? But also, you need to be cognizant of what else is going on. Are there other projects in the pipe that we think are likely to be approved, and what are those impacts going to be?

18239. Now, in addition to these impacts, the routing of the pipeline, particularly the routing through the Nation's territory remains undefined. There isn't a final route that Trans Mountain has put before this Board. And so when Trans Mountain is saying, well, the existing pipeline is going to be -- I can't remember what their number was -- 88 percent or it's going to be -- the expansion is going to be on the existing right of way 85 percent of the way. Well, I think the Board needs to be cognizant that there remain significant areas, and particularly through the Nicola Valley, where the pipeline route remains to be defined.

18240. And I suggest in our written submissions that, you know, this is another failing of Trans Mountain under CEAA, is you have to assess alternatives, alternative means of carrying out the project. Alternative means of carrying out the project means alternative routes. Alternative means of carrying out the project would be, you know, instead of going through some of the neighbourhoods in Burnaby going through Burnaby Mountain. You know, that's a good example of an alternative means of carrying out the project.

18241. And so we submit that Trans Mountain needs to go back and assess, as part of this environmental assessment, those alternatives because they're going to increase the impacts not only on the environment but the impacts on Shackan and the other First Nations' abilities to meaningfully carry out their rights.

18242. And so the other failing is this regional approach to environmental assessment; you know, we're just going to look at the region when we're

determining significance. And that overlooks the importance of location. You know, the first rule of real estate; location, location, location. And it applies equally when we're talking about rights and exercising rights. Location matters.

18243. And we referenced in our written argument the *Mikisew* case. And this was a case involving a road through Wood Buffalo National Park that the then Minister of Canadian Heritage had authorized. And the Court says,

> *"It makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf."*

18244. We call this the "go elsewhere" argument. Look at all the territory up here, you can go elsewhere.

18245. Now in that case, the Court was dealing with a road; in this case it's a pipeline. And we say the same principle applies, particularly when you consider the injurious affection. The pipeline itself, the right of way, you know, the impacts are not simply within that narrow construct.

18246. And Shackan has provided detailed land use information to Trans Mountain to inform the assessment of the impacts. So they've identified these sites. They've said, "These are the areas that we hunt and fish; these are the areas that we gather."

18247. Now there's an outstanding issue around spiritual and ceremonial sites because the concern with that is, is that getting in the public domain? And so Shackan continues to work with Kinder Morgan to try and find a way to address those issues.

18248. So in terms of First Nations, Trans Mountain spends a scant page and a half in their final argument dealing with the adverse effects on First Nations. And they characterize these concerns as socio-economic.

18249. Now they've done an adequate job of documenting their engagement with First Nations, and I know the Board has requested them to provide these consultation summaries. But they haven't done a good job of mitigating the adverse effects.

18250. And so the conclusion that the proposed pipeline and their facilities will not likely result in significant adverse environmental effects is coloured, we say, by an inadequate environmental assessment methodology.

18251. So the two things, the cumulative effects assessment and the current use of lands and resources, in particular are the two methodological flaws. And now also the failure to consider GHG emissions. We're not sure how the Government of Canada intends to address that but it seems to me that they need to go back and consider these issues anew.

18252. So you're going to say, "Well, what do we do with this?" You know, given if you accept my argument. Well, there's two options. You proceed with your own finding of significance; so you say southern killer whale, there's going to be a significant effect. You know, First Nations, there's going to be significant effects on their current use of land and resources, on fishing, on hunting, on gathering, on cultural and spiritual sites. Heritage resources is in CEAA in addition to traditional use of lands and resources.

18253. Or you request further study by the Proponent pursuant to section 23(2) of CEAA, 2012.

18254. And since we did our written submission, as I said, there have been two significant changes that have occurred. We have the decision in *Coastal First Nations v. B.C.* It's 2016 BCSC 34.

18255. And this was involving the Northern Gateway pipeline. And in that case, B.C. -- and you've probably heard this before, but B.C. did an equivalency agreement with the National Energy Board and said, well, we're going to rely on your process. And the Court said, "Well, that's fine but you can't give up your decision-making responsibility or your duty of consultation."

18256. And so we expect that given the position that B.C. has taken in this proceeding, they are likely going to require further work by Kinder Morgan to make a decision on issuing an environmental assessment certificate under their Act.

18257. In this case B.C. has sat on the sidelines. They haven't consulted at all with the First Nations. They were under the view that by entering this equivalency agreement they could basically put all the responsibility on the

federal Crown, notwithstanding the fact that if the project is approved there's going to be a myriad of provincial permits that are required.

18258. Now I wanted to turn to consultation. And I know that some of my colleagues -- unfortunately I missed Ms. Gaertner's presentation this morning, so I may be covering some of the same ground that she did. But we have a summary of the relevant principles at paragraphs 82 to 97 of the written argument.

18259. And we say in this case both the federal and provincial Crown have abdicated their consultation responsibilities, and I reference the equivalency agreement. And I also reference the fact that Canada has been content to allow the hearings to proceed without any substantive engagement with First Nations.

18260. And there's a problem with that, and we reference the *Coquitlam* case. And that involved the interior lower mainland transmission line. It was a case that came out the B.C. Utilities Commission. But the B.C. Court of Appeals said -- and this has been repeated over and over again:

> *"If consultation is to be meaningful, it must take place when the project is being defined."*

18261. Canada says, "Well, we'll consult with you and we're actually going to extend the timeline and we're going to give you more funding." Well, you know, the project has been defined with the exception of the outstanding routing. So we're not really sure what Canada intends these consultations to entail.

18262. We say that deep consultation -- in terms of that spectrum of consultation, deep consultation was required in this case. And obviously we say it hasn't been met with Shackan and the Nation. And I do want to quote from *Haida* this concept of deep consultation. It says:

> *"At the other end of the spectrum..."*

18263. It's paragraph 44.

> *"...lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of [a] high significance to [...] Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be*

> *required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory [in] every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases."*

18264. And I think it's that last point where Natural Resources Canada has seized on in terms of trying to fulfill their duty of consultation, "administrative regimes with impartial decision-makers". So we're going to give the National Energy Board that responsibility.

18265. The problem is that's not the intent of that clause. It's the situation where the Crown and the First Nation are at loggerheads and they say, "Okay, well, let's go to mediation or we're going to establish a Board or a Tribunal to deal with these sorts of issues, these consultation issues." In this case, the Crown has just sat back.

18266. I'm just acknowledging the time.

18267. In terms of the impact on the project, it will impact a significant part of the territory and also impinge on their maintenance of culture and way of life, and at page 10 of the oral summary. Some of the harm is potentially irreversible and likely cannot be mitigated. And we say in this context the scope of the Crown, the duty on the Crown to the Nation generally and Shackan in particular, is on the deeper end of the consultation.

18268. The duty is a cornerstone of Crown-Aboriginal relations. We say that none of the indicia set out in *Haida* have been met, and in order to fulfill this duty they need an adequate and appropriate process where the First Nations can assess the potential impacts of the project and provide feedback that's well-reasoned and capable of contributing meaningfully to the government's decision.

18269. The Board's hearing process, with its tight timelines, limited oral hearings, lack of funding, absence of cross-examination and I think more importantly lack of direct engagement by the Crown, has proven itself inadequate

to fulfill that objective, that reconciliation objective that's at the heart of consultation.

18270. The Board finds itself in a really difficult position because although you're obligated to carry out your duties in a manner that's consistent with the Constitution, including section 35, and although, in terms of the listed issues you're required to address Aboriginal interests, you don't have the duty to consult -- you're not an agent of the Crown; you're not bound by the Crown's fiduciary duties -- nor evaluate whether the duty has been discharged.

18271. Now, I know that some of the other intervenors have taken the position that the *Chippewas* case -- have tried to -- have argued that the *Chippewas* case is somehow consistent with *Carrier Sekani*. I think that's going to be a matter that the Supreme Court of Canada is going to have to figure out in terms of what the Board's duties are in determining the adequacy of consultation.

18272. But I suggest that it may well be that the determination that the Board makes in terms of consultation is not necessarily significant. And I'll explain why. Because at this point you're in a recommending function and the Crown has said, "We're going to consult." But I think that it is necessary for the Board, when you're writing your report and you're writing your recommendations, to be cognizant of the fact that Canada and B.C. have not consulted meaningfully to this point. You can say that. It's not a legal determination where we would go and seek a judicial review in the Federal Court of Appeal and say, "Well, the Board got it wrong." Although, I suppose we could; I haven't really thought about it, but ---

18273. **THE CHAIRMAN:** I just note that you have your five minutes remaining, Mr. Gailus.

18274. **MR. GAILUS**: Okay. Well, I think I'm going to finish just on time.

18275. So when fashioning your report and your recommendations, you need to be cognizant of section 35. You need to address the consultation; you need to address the impact on the substantive rights.

18276. Public interest. Well, we agree with Trans Mountain that the public interest is dynamic and context is of critical importance. And I've tried to give you some context in terms of the context in which Shackan finds itself.

18277. But neither Trans Mountain nor the Crown has a monopoly on the public interest. It's always in the public interest that the Crown action complies with the *Constitution Act*, in particular its consultation obligations. And we've got a reference there in the written argument to a case out of Ontario for that, the *Wahgoshig First Nation*.

18278. And in assessing this public interest, the courts and tribunals -- they're not limited to consideration of the economic value of the project that would result. The Aboriginal perspective and the impact that a project may have on aboriginal or treaty rights, must also be taken into account in assessing what is in the public interest.

18279. You know, there's two cases -- and that's from *Tsilhqot'in*, the Supreme Court of Canada decision. So the courts are saying you need to cognizant not only of the procedural obligations but the substance as well.

18280. Another important contextual fact is the entirety of the Trans Mountain pipeline in British Columbia -- I hope I got this right -- traverses unceded Aboriginal title lands. The construction of the initial pipeline constituted a massive infringement of the Aboriginal title and Aboriginal rights of the nations along the corridor for which reconciliation remains outstanding. There was no consultation; there was no compensation with the exception of some very small sums of money for the parts that traverse through reserves.

18281. Now, in terms of justification, the Supreme Court of Canada recently had a chance to restate the *Sparrow* test in *Tsilhqot'in*. And we say there's an infringement. It's a fairly low threshold. There has been a meaningful diminution of the right.

18282. But once you find that, the onus shifts to government to justify that infringement. They must demonstrate:

> *"[They] complied with [their] procedural duty to consult..."*

18283. Well, they haven't done that.

> *"The infringement is backed by compelling and substantial legislative objective in the public interest."*

18284. I'll get to that. And:

> *"[T]he benefit to the public is proportionate to any adverse effect on the Aboriginal interest. [And] this framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians."*

18285. And we also reference the lack of consultation initially and now, the routing hasn't been determined. These are all important contextual factors.

18286. On the economic side, Trans Mountain has not established a need for the project, the economic benefits or the economic feasibility of the project. And we reference the Gunton Report, which was filed by Tsawout and Upper Nicola for that.

18287. And then we've got spills. There remain important unanswered questions regarding the economic cost of clean-up. I know that there's a dispute over this. But we do have two examples, one on land, the Kalamazoo oil spill, which -- well, it actually got into the water there as well down in -- I think it's Michigan, on Enbridge Line 6B. And we've got Exxon Valdez when we're looking at a marine spill. And both of these we suggest are clear analogues and Trans Mountain has vastly underestimated the cost of spill remediation.

18288. It will just take me maybe 30 to complete this.

18289. There are certain -- and when I say certain I mean certainty, not "there are some" -- certain immitigable impacts, we say, by this project on First Nations' Aboriginal rights and title and uncertain evidence regarding both the need for the project, it's economic viability and whether it's in the public interest. And this balancing exercise is at the heart of CEAA 2012 as well as the NEB Act.

18290. Trans Mountain has not shown the purported economic benefits and need for the project would trump the adverse environmental effects and the impact on First Nations' Aboriginal rights and title.

18291. Given all these outstanding issues, Shackan requests the Board not recommend approval of the project at this time to the Governor in Council.

18292. **THE CHAIRMAN:** Actually, the Panel's going to take a very -- a five-minute break to consider possible questions for you.

--- Upon recessing at 12:18 p.m./L'audience est suspendue à 12h18
--- Upon resuming at 12:21 p.m./L'audience est reprise à 12h21

18293. **THE CHAIRMAN:** Mr. Gailus, I wonder if you could help me. I noticed when you were talking about current use of lands and resource for traditional purposes and I had a number of questions on that. You've answered some of them but there's some clarity -- when you make your statement -- excuse me -- your statement on page 14, subsection -- citation 72:

> *"The 'regional approach' to environmental assessment taken by Trans Mountain is not defensible in law or policy as it overlooks the importance of location. And the First Nations cannot simply 'go elsewhere' to exercise their rights."* (As read)

18294. And then you quote in 73 the *Mikisew* case and then, you know, drawing it through to CEAA and the significant adverse effects make the -- that we should make a determination in that regard.

18295. Is what -- I just want to be clear on the law that you're talking about. Is that CEAA in its -- and it's in -- by itself? Or is there other law that -- or policies that may be determinative -- determinative on that policy? And then get me to your two options, is where I'm trying to get to. Thank you.

18296. **MR. GAILUS:** Okay. So we have -- we have the *Mikisew* case that I think most clearly articulates that issue around location. But obviously CEAA and the various policy documents speak to this somewhat.

18297. There's a memorandum -- and I don't think it's actually even addressed in our written argument, but in terms of the determination of significance, I think it's from the '90s. It goes back quite a ways -- that CEAA put out a document, you know, in terms of how one goes about dealing with significance.

18298. And so it's not just simply saying -- and I think the point that I'm trying to make here is that, you know, if you do a regional approach and you say, "Well, on the whole, when we look at the territory, there still are places where they can go and exercise those rights." That assumes that those -- those places are comparable to the ones that you're going to lose as a result of the project.

18299. Recently, I think there's a good recent example in terms of the application of this principle in terms of "location matters", you know, is the Site C joint-review panel report. And we reference that in terms of the cumulative effects methodology. But in that case, you know, B.C. Hydro said, "Well, the First Nations can go elsewhere." You know, "Treaty 8 is 840,000 square kilometres; there's lots of places where they can go and exercise their rights."

18300. And the panel said, "No," you know, "there isn't a comparable place to the Peace River Valley that's going to be inundated nearby."

18301. And so -- I mean that's -- I think that that's a good -- that would be a good starting point, would be the analysis that the Panel did there around the importance of location.

18302. **THE CHAIRMAN:** Ms. Scott's got a follow up.

18303. **MEMBER SCOTT:** I think we have your point. And what you're saying is that the fact that there is -- there's a vast amount of territory inside the First Nations' territory, isn't determinative of any particular significance finding, and that indeed we have an obligation -- or TMX has an obligation to establish that in relation to very detailed information, whether or not there ought to be a significance determination.

18304. And I think you're going to bring it all back to the quality of information that is before us. Is that fair?

18305. **MR. GAILUS:** Yes. You know, when you look at the traditional land use studies that have been submitted by many of the First Nations, the information -- the information is actually there.

18306. The problem is that it hasn't been integrated into the environmental assessment and coming -- actually coming up and saying, "Okay, well, we think we can mitigate this," or, you know, more importantly, "We can accommodate it." And that's not an obligation of Trans Mountain; that's an obligation of the Crown to accommodate the rights.

18307. And so -- you know, I'm not pointing a finger at Trans Mountain on that. That's -- that's Canada and B.C.'s problem in terms of accommodation. If you can't mitigate it, you can't avoid it, "Can we find a way to accommodate you?"

18308. "Are there particular" -- for instance, say, "Are there particular areas that we can protect?"

18309. You know, this is the struggle, the negotiation that's supposed to go on between the First Nation and the Crown. I mean Trans Mountain has -- and Kinder Morgan only have so many tools in their toolbox, you know, when it comes down to it. I mean they can offer benefits agreements; they can look at mitigation; but they really, when it comes right down to it, in some cases they just can't offer that kind of substantive accommodations that the First Nations are looking for.

18310. **THE CHAIRMAN:** With that, Mr. Gailus, we thank you.

18311. We thank you, Chief Joe and for Ms. Moore for attending today. And we will consider your submissions as we have with all other submissions that are in front of us.

18312. With that, we're adjourned until 1:30. And we will hear this afternoon from the Pro Information Pro Environment United People Network, followed by the Tsawout First Nation, and finishing with the Board of Friends of Ecological Reserves.

18313. So we are adjourned until 1:30.

--- Upon recessing at 12:27 p.m./L'audience est suspendue à 12h27
--- Upon resuming at 1:33 p.m./L'audience est reprise à 13h33

18314. **THE CHAIRMAN:** Good afternoon and welcome to this afternoon's session again in Burnaby, which is part of the National Energy Board's hearing regarding Trans Mountain's Expansion Project.

18315. We will continue to hear intervenor summary oral arguments.

18316. Again we acknowledge today we are the traditional land of the Coast Salish people.

18317. 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 we are the Panel, together, who are assessing the Trans Mountain Expansion Project.

18318. I'd just like to brief you -- housekeeping item regarding evacuation.

18319. In the event that we hear a hotel fire alarm, the procedure will be to exit the hearing room using the entrance that you came in. Once you are outside of the hearing room, there are two evacuation routes. The first is directly to your left when you exit the hearing room doors, and the second is located beside the registration desk where some of you received your lanyards. Uniformed security guards will be at both locations to facilitate your exit. Please follow their instructions.

18320. Once outside the building, proceed to the hotel muster point located on the northeast --west corner of the Delta Burnaby Hotel and Conference Centre property where Sumner Avenue and Manor Street intersect. At that hotel muster point, please ensure all members of your party are accounted for and await further instructions from the Delta Burnaby representatives.

18321. I understand that you've been briefed on our timing system so I won't repeat that this afternoon.

18322. This afternoon we will be hearing first from Pro Information Pro Environment United People Network, followed by the Tsawout First Nation, and concluding this afternoon with the Boards of Friends of Ecological Reserves.

18323. With that, perhaps I would ask Trans Mountain's counsel to introduce themselves to our intervenors.

18324. **MS. OLENIUK:** Good morning. My name is Terri-Lee Oleniuk and I'm counsel to Trans Mountain. To my left is Lesley Matthews and she's the regulatory lead for the expansion project.

18325. **THE CHAIRMAN:** Thank you, Ms. Oleniuk.

18326. One outstanding matter that I'd like -- if the Regulatory Officer could give us a ruling number of the ruling the Board made this morning.

18327. **THE REGULATORY OFFICER:** It will be Ruling 118.

18328. **THE CHAIRMAN:** Thank you.

18329. With that, I think we're ready to proceed. The Panel have read all the evidence you've submitted, all the submissions that you've made. So we're looking forward to receiving your oral summary argument.

--- FINAL ARGUMENT BY/ARGUMENT FINALE PAR PRO INFORMATION PRO ENVIRONMENT UNITED PEOPLE NETWORK:

18330. **MS. PERRIN:** Thank you.

18331. I would like to acknowledge that this oral summary argument is taking place on unceded Coast Salish territory.

18332. My name is Lynn Perrin. I'm a director of Pro Information Pro Environment United People Network. And with me is Jason Gratl, our legal counsel. I will present for about 15 minutes and Mr. Gratl will use our remaining time.

18333. Just to give a bit about myself, I'm a public policy analyst and in the past I've been a tribunal member to deal with land issue issues bylaws for the Southern Gulf Islands.

18334. PIPEUP represents concerned citizens spanning the area from Hope to Surrey, British Columbia. PIPEUP members have local expertise and academic credentials in air quality, agriculture, water quality, fish and fish habitat, endangered species, and health and safety requirements for teachers and first responders.

18335. PIPEUP has engaged collaboratively with Fraser Valley residents through town hall meetings in Hope, Chilliwack, Abbotsford, Langley, and Surrey to share information and document residents' concerns.

18336. Some of PIPEUP's seven board members have worked in government and have knowledge and experience with regard to using both Canadian and B.C. legislation and regulations to keep people in our communities and workplaces safe from harm. Personally, I was on a team that established national PTSD prevention protocol. Also, I'm very familiar with the *Canadian Labour Code Health and Safety Regulations*.

18337. We've interacted with thousands of our neighbours in the past four

years, and have seen most people go from being unaware of a toxic diluted bitumen pipeline close by, to being extremely concerned within minutes. Since January 2012, over 4,000 hours of research has been done by PIPEUP volunteers. PIPEUP gained some of our information through attendance at every Trans Mountain public consultation meeting in our communities, four stakeholder meetings, and Trans Mountain delegations to local government and island trust meetings.

18338. One thing that we noticed at those meetings was how the Trans Mountain information kept on changing. For instance, the declining number of short-term construction jobs that will be created by this proposal.

18339. At one of the stakeholder meetings, one observation expressed by an attendee was the absence of on-the-ground knowledge of Trans Mountain's staff and experts after operating a pipeline in the Fraser Valley for 60 years.

18340. At one of the last public consultation meetings, PIPEUP pointed out the error on one of the information boards that had boasted about the 60 years safety record, as the National Energy Board had just released its report on the January 2012 spill at the Sumas Tank Farm.

18341. PIPEUP is concerned about coastal interests, especially the endangered resident orca. However, we want to bring forward our concerns about the Fraser River, its numerous tributaries, our vulnerable airshed, health and safety risks to school children, and threats to agriculture, our major economic driver.

18342. We know Fraser Valley residents care deeply about our fragile airshed because 10 years ago they wrote 20,000 letters to the National Energy Board opposing the Sumas Energy 2 Proposal.

18343. While many Fraser Valley residents were not aware of the pipeline, they are now very concerned about the expansion.

18344. Regrettably, some of our neighbours have been painfully aware of it. They are the ones who have had to deal with the intrusion and harassment of Trans Mountain staff and contractors on their land. They're the ones who smell the Sumas Tank Farm emissions as they drive their children to school. They're the ones who cannot use all of their very valuable farmland due to the presence of the legacy pipeline.

18345. Some of them, like John Vissers, who can smell the Sumas Tank Farm emissions from his home, were denied the opportunity to share their knowledge and experience as intervenors. PIPEUP Network is concerned that those directly affected who wrote letters of comment, have been barred from this public hearing or take the risk of being arrested and face potential criminal records.

18346. I'm now going to take you on a virtual site tour of our schools, our streams, and our farmlands. And could you please pull up C288-01, PIPEUP's IR, page 10? Yeah, that would be great.

18347. So in our first Information Request, one of the things that we wanted to ask Trans Mountain about was how they were going to ensure that our school children were going to be safe from the risks of a diluted bitumen spill and exposure to poly-aromatic hydrocarbons.

18348. So we listed the 35 schools in This Information Request and we actually asked Trans Mountain if they would commit to the California standards for schools near pipelines, which is 1,500 feet. Now, the pipeline goes under some of these schoolyards and very close to others, in fact, as close as the school that had to have their air intake shut down during the January 2012 spill.

18349. Could I have the next one, please?

18350. Oh, by the way, Trans Mountain said, "No," they would not do the highest standards as far as keeping our children safe.

18351. So these are their children I'm talking about here. These are children at an urban school at the top of the picture. And could you please blow that up a bit, and bring it down perhaps? Yeah.

18352. So this is an urban school, Dr. Thomas Swift. And the second lower one is Bradner Elementary and a rural school. So as you can see the children are out in the playground enjoying their school activities. And the pipeline is very close to these schools. And these are two of the 35. Thank you.

18353. Trans Mountain's meaning for safety is far different than their spill responses ---

18354. **THE CHAIRMAN:** Just a second, sorry. If you don't mind, can we

ask questions in or would you prefer ---

18355. **MS. PERRIN:** Absolutely.

18356. **THE CHAIRMAN:** Just to orientate me. Is this where the existing pipeline is and the proposed expansion will also be in the same corridor?

18357. **MS. PERRIN:** Yes.

18358. **THE CHAIRMAN:** Okay. I just wanted to orientate myself to that. Thank you.

18359. **MS. PERRIN:** Thank you.

18360. Trans Mountain's meaning for safety is far different than their spill responses and maintenance records demonstrate. Before Spill 80, January 2012 at the Sumas Tank Farm was contained, it took Trans Mountain 6 hours, 3 alarms at the Alberta Control Centre, and calls to 9-1-1 from residents who were nauseated and had headaches. Some actually had to go to the hospital emergency room. The elementary school air intake had to be shut off.

18361. At a public meeting, Trans Mountain and the NEB refused to tell those directly affected what was in the spill that made them sick. PIPEUP was told by NEB staff that the information was "c*ommercial proprietary information that trumped public health"*.

18362. PIPEUP Network is extremely concerned about this lack of transparency and spill preparedness and response due to the fact that proposed pipeline will go under or near 35 schools between Hope and Burnaby. This is Trans Mountain on its best behaviour in the full glare of the public and the NEB. What will they do if this proposal gets approved when their best behaviour is already abysmal?

18363. Could I have B323-9, please?

18364. This is part of Trans Mountain's submission in regard to serious harm to fish or fish habitat. And Dr. Rosenau talked about this particular creek, Nathan Creek, at the west side of Abbotsford. So this is a very, very important fish-bearing habitat. And if you just go down a bit to the bottom corner, please.

18365. So it shows a red dot there. What that means is that it's at extreme risk if Trans Mountain does the trench method rather than going underneath the creek. That's what the red dot means.

18366. Could I have the next one, please? It's B323-9.

18367. **THE CHAIRMAN:** Sorry, I didn't mean to -- and it won't go to your time.

18368. The designation of the orange, is that Trans Mountain's designation?

18369. **MS. PERRIN:** Yes, it is.

18370. **THE CHAIRMAN:** Yeah.

18371. **MS. PERRIN:** Or it's their consultant's designation.

18372. **THE CHAIRMAN:** Okay.

18373. **MS. PERRIN:** Yeah.

18374. **THE CHAIRMAN:** Thank you.

18375. **MS. PERRIN:** B323, page 5. Okay.

18376. This is West Creek, which is to the west of Nathan Creek. And again, it is a very important salmon habitat. And one of the reasons is its close proximity to the Strait of Georgia. The fish don't have to struggle to get to their spawning grounds, and so that's why this is a very, very important fish habitat. And again, it's also classed as at extreme risk if a trench method is used.

18377. Could I please have the next one, C288-16-2, our written evidence?

18378. This is written evidence from our fish biologist Mike Pearson, and it's also a red designation. I went and looked at -- this is Lorenzetta Creek -- and I went and looked at Trans Mountain's assessment of this, and this is also an extreme risk designation for this watercourse.

18379. Could I please have the next one?

18380. Yes. So this is the brook that Barbara Gard talked about on Saturday, McCallum Brook. Trans Mountain has done an integrity dig of this brook. So on the left-hand side is the brook on her property; on the right-hand side is the brook on City of Abbotsford property where the integrity dig was done. So that is what that watercourse looks like.

18381. And could you please scroll down to page 3, I think it is, yeah. So this is also -- now Trans Mountain calls this "remediation", Trans Mountain calls this "best practices". I call it habitat destruction.

18382. What has occurred at McCallum Brook is an example of Trans Mountain's misrepresentation of the facts. If you approve this proposal without a credible environmental assessment and rigorous conditions, what has occurred at McCallum Brook will be repeated during the construction and any future integrity digs in over 900 watercourses that the proposed expansion will cross.

18383. This puts downstream salmon habitat at risk. And according to evidence submitted by Raincoast Conservation, C291-1-3, further threatens the endangered J-pod orcas. This is where they get some of their food.

18384. Could you please put up A4S2Y5, pages 2 and 3? Yes, okay. Thank you.

18385. This is Sumas Prairie in the Fraser Valley, and it is a very, very fertile productive part of British Columbia. It is the most important agricultural community that could be in Canada, actually. And so we've got dairy farms, we've got poultry farms, we've got eggs, we've got berries, we've got a number of vegetable crops.

18386. Could you just scroll down a little bit further?

18387. This is Matsqui Prairie and it -- by the way, the pipeline goes through this farmland, okay? It goes through Sumas Prairie, up Sumas Mountain to the tank farm, and then down Sumas Mountain across Matsqui Prairie and on towards the west.

18388. As mentioned earlier, Fraser Valley farmers have not been able to fully use their land due to the presence of the Legacy pipeline, and the proposed right-of-way will present more hurdles to their agricultural operations. The proposed right-of-way crosses over three aquifers and groundwater that are essential to

farm wells and also to the public water system.

18389. This proposal will put at risk over $2.5 billion per year in local economic activity, which not only creates well over 11,000 local permanent jobs but also ensures food security for B.C., Canada and beyond. Each hectare of farmland here produces three times more income than anywhere else in Canada. And the growing conditions, agrologists tell us, are the best in North America and some of the best in the world.

18390. In today's market, today's market, one certified organic chicken originating from Fraser Valley farms or half a dozen cauliflower are worth significantly more than a barrel of toxic diluted bitumen.

--- (Applause/Applaudissements)

18391. **MS. PERRIN:** Farmland protection and food security are in the national public interest. We need food, clean air, and clean water but we do not need and we cannot use the toxic diluted bitumen placing our communities at risk, which is entirely for export and therefore will not provide long-term jobs or economic benefits to the Fraser Valley communities.

18392. Before Mr. Gratl begins his submission, I wish to acknowledge the excellent professional services of the NEB process advisory staff who have assisted PIPEUP network prior to and throughout this hearing.

18393. **MR. GRATL:** Good after, Mr. Hamilton, Ms. Scott and Mr. Davies. My name is Jason Gratl.

18394. My submissions are framed around the questions you asked of my friends, Chris Tollefson acting for BC Nature and Neil Chantler acting for BROKE, the Burnaby Residents Association.

18395. The questions raised to my friends Mr. Chantler and Tollefson, as I understood them, related to whether there are any steps the Panel can take to improve this process and address the perception that this process is marked by procedural shortcomings.

18396. As a preface to my answer, I want to identify a few of those procedural shortcomings that in my respectful submission pose a very serious challenge at this time to the institutional legitimacy of the National Energy Board.

18397. Now social licence -- and I'll just begin by observing -- is not something that the Proponent of the project needs exclusively. Social licence is something that's demanded by all adjudicative bodies. Any kind of court, any kind of unelected person who exercises significant decision-making power requires social licence, without which their decisions cease to become a reflection of the democracy within which they are made.

18398. Obviously the National Energy Board and its Members fall into that category of unelected public officials who make decisions of great moment for many Canadians.

18399. Now, there have been many demonstrations of public discomfort with the NEB process. The protesters on Burnaby Hill were not just protesting Trans Mountain. They were not protesting exclusively drilling, exploratory drilling for geotechnical information. They were protesting this court, this Board, this Panel and this process.

18400. They were saying, "We have to take to the Hill. We have to get ourselves arrested because there's nothing that this Panel can do for us." They were saying that you, the National Energy Board, has broken faith with them and that you cannot be trusted to appraise the public interest.

18401. That's a very serious marker of a challenge to the institutional legitimacy of the National Energy Board. And that challenge can't be waived off as some isolated incident or some small number of disaffected youth or the usual suspects.

18402. You've had some very high profile withdrawals from this process; well-placed, thoughtful, careful people. Marc Eliesen and Robyn Allen, highly educated, holding positions of significant responsibility in the private and public sector with specialization in the areas in which they were engaging with the National Energy Board, pulled out of the process, refused to participate and left you with harsh words regarding this process.

18403. When a court process endangers and engenders deep cynicism on the part of reasonable people, you ought to be concerned, because reasonable people like Mr. Eliesen and Ms. Allen are a critical social barometer of when we can be sure that justice is not being seen to be done.

18404. When you've lost Mr. Eliesen and Ms. Allen, in effect, you can be pretty sure you've lost the public's confidence as well.

18405. Now, you also have well-respected organizations like the B.C. Civil Liberties Association saying that this should be a more open process. And yes, I appreciate that this process is broadcast by webcam, but what the Board may not appreciate is that each and every one of these empty chairs in the gallery is also being broadcast by webcam. All of those empty chairs represent lost opportunities to regain institutional legitimacy.

18406. Then there is, frankly, a regional problem. The NEB Act requires that the NEB be based in Calgary. Now, the benefits of this pipeline proposal, if there are any, tend to flow to Alberta, principally Calgary. The jobs tend to be in large urban centres in Alberta, while the risks that attend this proposal flow largely to the west coast, in various urban centres, in various Aboriginal communities.

18407. That mal-distribution of the costs and benefits, along with the mal-distribution of decision-making power, the -- effectively, the regionalization of decision-making power, also affects the institutional legitimacy of the NEB as a whole.

18408. There's a further overarching problem that the NEB has systematically narrowed the issues at many key junctures. For example, when the financial wherewithal of Trans Mountain to pay for a spill, and the corporate structure of Trans Mountain, designed to avoid ---

18409. **THE CHAIRMAN**: Mr. Perrin [sic], maybe you could help me understand your comment on regional decision-making power. Could you clarify what -- who or what is your definition of regional decision-making power?

18410. **MR. GRATL**: I'll give you an example.

18411. Under the *National Energy Board Act*, Board members are to reside in Calgary unless express approval is given from the Governor in Council that they not do so. That means that decision-making power is concentrated in the same place that oil well and corporate oil structures are -- reside at the same time, that there's regionality to the interest in the same way that we obviously have a tension between central government and a national public interest, and Alberta's interest, economically. There has been a decision to concentrate decision-making power in Calgary, and effectively require decisions to be made by Calgary residents.

That does not assist.

18412. **MEMBER SCOTT**: And is your opinion affected in any way by the temporary Board members who do not reside in Calgary? I'm from Nova Scotia; Mr. Hamilton is from British Columbia. We have representation from Quebec, from Prince Edward Island, and some of our recent appointments to the permanent Board are from the North.

18413. **MR. GRATL**: Yes, but they're -- they may be from the North, but they're forced to move to Calgary.

18414. **MEMBER SCOTT**: And what about us, the temporary members?

18415. **MR. GRATL**: I think the fact that you're temporary members speaks volumes about the nature of your appointment.

18416. I would also say that even the placement of this courtroom -- in a ballroom in a casino in Burnaby -- speaks volumes about the temporary nature of your affiliation with the west coast, that you're here -- in the way that a previous government would have described it, "You're just visiting." You're not here in any kind of permanent way.

18417. The NEB hasn't even taken the step of securing the premises of the federal courthouse in downtown Vancouver to lend the hearings the aura that one might expect, so that Mr. Chair, if you peel back the curtain right behind you, you end up looking at a casino. There's a deep irony in that, in my respectful submission.

--- (Applause/Applaudissements)

18418. **THE CHAIRMAN**: And as I look out my window across the ocean in Sidney, I have a different view, but I will -- please proceed with your oral summary argument.

18419. **MR. GRATL**: Thank you.

18420. My next point, actually, Ms. Scott, was the problem of short-term appointments. Now, Mr. Hamilton, from 2012 to 2015, you sat on this Board as a temporary member who sat at pleasure of the government.

18421. **THE CHAIRMAN**: I'll just correct you one more time, if I may. I've been a temporary Board member. I was appointed in 2004.

18422. **MR. GRATL**: Yes, sir, you were. You were appointed temporarily and then your appointment was renewed for another three-year period, and then your appointment was renewed for another three-year period; as long as, a cynic would say, as long as the decisions that you made served the pleasure of the government.

18423. And with respect, that type of structure for appointment of Board members, at pleasure and on a temporary basis -- it doesn't lend itself to the type of institutional independence or appearance of institutional independence that the National Energy Board requires in order to carry -- for its decisions to carry the water that the structure of the Act hopes that it can carry.

18424. Now, in terms of submissions for improving the process.

18425. You've heard other intervenors say this, but I would repeat that cross-examination on expert evidence is critical to the legitimacy of this process. Now, there are conflicts in the expert evidence; in numerous areas are written submissions set out in detail to such areas.

18426. Firstly, contradictions dealing with the estimates of future pipelines and transportation capacity, numerous participants' evidence -- expert evidence -- conflict. And then in respect of the likelihood of tank fire and boil over, and the magnitude of that risk, there are conflicts between no less than eight sources of information.

18427. Now, both of those issues are absolutely critical to the mandate -- the statutory mandate of the -- of this Panel, but also to the 12 specifically enumerated issues that the Panel has decided to narrow its focus to concentrate on.

18428. Now, I would say as well that cross-examination may seem like a daunting task at this point, but there are a number of things that the -- a number of precautionary protective or limiting decisions that the Board could make to turn cross-examination into a manageable process.

18429. The first is limit cross-examination only to where there are conflicts in the expert evidence. Don't just call an expert and then call it a field day on the

expert's report in their entirety. You can narrow it down to the areas of specific conflict. That should shorten the time that any given expert is on the stand.

18430. Secondly, you can have cross-examination only by the parties who have filed expert reports. You know, that will whittle down the number of cross-examiners and presumably whittle away duplication as well.

18431. Then cross-examinations should be held in the geographic location to which the evidence relates, the implication there being, of course, in terms of the legitimacy of the process, local people affected, if the process if open, could attend evidence that pertains to their lives, to their health, to their safety, to their economic well-being, perhaps.

18432. Then cross-examination should be held, wherever feasible, in a courtroom. In terms of the availability of the Federal Court in Vancouver, they do allow those courtrooms to be used by administrative bodies other than the Federal Court itself.

18433. The Cohen Commission, for example, into the Fraser River sockeye and the Oppal Inquiry into missing and murdered women, were both held in the large federal courtroom on the fourth floor with ample room in the gallery and significant space allowed for multiple counsel teams. It's not the question of there not being a courtroom available. That is a choice that this Panel can make.

18434. Now, time required for cross-examination. The mechanism to provide time for cross-examination is set out under section 57(10) of the NEB Act, which allows the minister to provide a three month extension on the time required to give a report, provide a report, or an Order in Council can issue extending the timeline by longer than that.

18435. The likelihood of a political extension to the timeline just went up yesterday. I'm reading from the "Interim Measures for Pipeline Review".

> *"[The] minister [of Natural Resources] intends to extend [...] the [legislative] time limit for [our] government's decision by four months (to seven months in total), extending the date [for delivery of a decision]..."*

18436. Following your recommendation.

"...[...] to December 2016."

18437. The purpose of that is to allow them to consider carbon issues upstream.

18438. Now, while the minister is considering carbon issues upstream, there's absolutely no reason why that same time couldn't be taken by this Panel engaging in cross-examination in targeted areas of key affiants on important points. That would dramatically enhance the legitimacy of the Board's recommendation.

18439. Now, in addition to cross-examination, PIPEUP submits that the Board should take a precautionary adaptive management approach. Precautionary adaptive management is just our tagline for a balance between adaptive management -- which is necessary for large projects from time to time because it's just financially not feasible for a Proponent to sink costs into detailed engineering for every step of the way -- and the precautionary principle, which advises against taking precipitous steps when significant valuable public interests are threatened, public health in particular, species at-risk.

18440. Now, PIPEUP is extremely concerned that the precautionary principle is not being implemented in any way, that rather, a very extreme form of adaptive management has taken hold in the imagination of the National Energy Board.

18441. One example of this is the approach taken to orca habitat in the Georgia Strait. There -- just going granular into one issue for a moment -- there, tanker traffic is expected to increase by seven percent. The associated tanker noise is expected to increase correspondingly. Everyone agrees, including Trans Mountain, that this is a serious threat to orca habitat. But Trans Mountain won't commit to doing anything about it except funding some research into orca habitat and developing a program to support orca recovery. That is again, funding research and developing a program.

18442. Now, Trans Mountain describes the increased traffic as an industry-wide problem where everybody should share the burden. There's no basis for that. Trans Mountain says they refuse to alter the path of the tanker traffic to avoid species-at-risk habitat, and they refuse even to commit to speed limits to reduce noise. That is to say -- and I'll paraphrase; hopefully I'm not being unkind -- they won't even slow down for the orcas.

18443. Now, that's the project Proponent. And of course you're not bound by

what the project Proponent has to say. But PIPEUP is very discouraged by what you've released as a response to this submission, which is proposed Condition 78. The Panel released that for comment. And proposed Condition 78 doesn't require any mitigation by the Proponent. All it requires is that Trans Mountain file a summary of proposed mitigation and consultation. That summary is not even subject to an approval process.

18444. It fails to ensure that there's any evidentiary foundation sufficient to ensure that mitigation strategies will work to reduce that risk; it does nothing to prevent or even acknowledge irreversible or long-term harm to the orca; and it does nothing to secure baseline noise data, impose ascertainable indications of harm, or trigger mitigation if those thresholds are exceeded.

18445. Instead, what it says is, "Go ahead with your project. Just report what mitigation techniques you've put into place and report who you talked to and what you said and what you did about it." There's not even an after-the-fact approval process for the mitigation strategies, no specific requirements. Forget about a public consultation process about sufficiency of those mitigation techniques. This is adaptive management at its absolute unrestricted. It is truly wild west banana republic level adaptive management.

18446. And I say this with the greatest of respect: simply putting out Condition 78 as though it might even be fit for comment, is not something that assists the Board's legitimacy in terms of demonstrating an internalization of the obligation to protect species at risk and to protect human health.

18447. I urge upon you to return to Condition 78 and ask yourselves, "What can I do to show the public that Condition 78 does not represent the National Energy Board's attitude towards endangered species? What can I do to show that the Board takes the precautionary principle seriously and is prepared to adapt or appropriately balance the needs of project proponents for adaptive management with the preservation of human health and sensitive habitat from harm?"

18448. Further, I would respectfully submit that in order to restore the lost institution legitimacy of the NEB, the Board take open steps to take a more -- if I may say this -- more balanced, more skeptical attitude towards the Proponent itself. The Proponent -- I say this with respect to my friend -- the Proponent has given this Panel ample reason to be skeptical about their ability to meet condition and about their desire to meet conditions.

18449. In terms of their safety record, they have 83 spills since the inception of the pipeline, one and a half spills a year, many of them due to human error, many of them due to equipment failure.

18450. We have a report from the Accufacts -- Accufacts setting out deficiencies in their approach to risk and spill detection. We have a report from the City of Vancouver outlining the history of oil spills.

18451. Now ---

18452. **THE CHAIRMAN:** Just note you have five minutes left.

18453. **MR. GRATL:** Thank you, Mr. Chair.

18454. That in itself is a -- those are facts to be reckoned with by the Panel. But in terms of appraising your attitude towards the Proponent, you'll see in Trans Mountain's final argument that Trans Mountain seems incapable of grappling with the fact that it's engaged in a risky enterprise. It speaks in a very cavalier way of its magnificent environmental record, which is not borne out by the facts. There's simply no evidence to support claims and assertions of that nature.

18455. Instead the safety record is indicative of significant problems with Trans Mountain's management of its own equipment. Now, I say that remarking that -- that the NEB's capacity itself to monitor breaches of pipeline conditions has been called into question at that same time. That has nothing to do with the decision-making powers of this Panel, but it does speak to the institutional capacity of the NEB entirely.

18456. Now, instead of having a proper reckoning from Trans Mountain about its history and its intentions to mitigate spill risk, instead, we have the -- we have the project Proponent mentioning three times in its written submissions that it won the Emerald Award from the Albert Emerald Foundation.

18457. And it turns out that Trans Mountain's lawyer, Alan Ross from Borden Ladner Gervais is the current chair of the Board of the Alberta Emerald Foundation that gave Trans Mountain the award. Mr. Ross was on the Board of the Emerald Foundation in 2009 and 2010, and 2010, specifically, when Trans Mountain received the award.

18458. Then we had Marilyn Carpenter, who's listed as a TransCanada

employee on the Board of Directors of the Alberta Emerald Foundation. And then Trans Mountain is -- TransCanada is listed as a patron sponsor of the Alberta Energy Foundation.

18459. The list of Emerald judges included David Kmet. He's listed as Trans Mountain employee.

18460. Now, this is -- it starts to verge on Trans Mountain giving itself an award for environmental accomplishment. In the face of that type of representation from the project Proponent, the Panel, with respect, cannot accept such assertions with a straight face, must demonstrate skepticism. Those types of assertions, they defy plausibility. And for the Panel to give them any credence is a cause for significant concern.

18461. When the Anchor Loop Project for which Trans Mountain received the Emerald Award is examined, you can see from the Rosenau Report dated July 14th, 2015 that Trans Mountain caused extensive damage to riparian areas in the Anchor Loop.

18462. At the crossing at Snaring River, efforts to replant lost vegetation failed, in part. There were negative repercussions for ephemeral channels and the project Proponent left coco mat debris behind. This is far from

18463. This is far from something to celebrate.

18464. Now, many of the National Energy Board's proposed conditions appear to assume that Trans Mountain can be trusted to implement those conditions. And given the vagueness of those conditions, there's a heightened vulnerability that they may be misinterpreted.

18465. In my respectful submission, the Board's attitude towards the Proponent ought to be properly reflected in specific mitigation techniques with specific conditions where the ability of the mitigation technique to reduce the risk to human health or the environment is properly known and understood on the evidence.

18466. So those are my -- are the four areas in which, I would respectfully submit, that the Board can do something about its institutional credibility.

18467. So firstly -- firstly, allow for cross-examination.

18468. Secondly ---

18469. **THE CHAIRMAN:** I'll give you a chance to quickly summarize, then, because your time is up. But I'll give you ---

18470. **MR. GRATL:** I had thought, Mr. Chair, that you had earlier commented to Ms. Perrin that a question that you had asked wouldn't be used against me.

18471. **THE CHAIRMAN:** And if I recall, the clock was stopped and I can confirm that from a regulatory officer. So I'll give you two minutes to wrap up.

18472. **MR. GRATL:** Brilliant. Thank you.

18473. Secondly, the principle of precautionary adaptive management.

18474. Thirdly, a skeptical attitude towards the Proponent reflected in specificity of the conditions imposed for the pipeline approval.

18475. And then fourthly, opening up the process and to the extent possible within your statutory framework, de-regionalizing it.

18476. Thank you.

18477. **THE CHAIRMAN:** Thank you both Mr. Gratl and Ms. Perrin for your presentation today and your oral summary argument.

18478. We'll take a very short recess and we will here from the Tsawout First Nation.

18479. Thank you.

--- Upon recessing at 2:22 p.m./L'audience est suspendue à 14h22
--- Upon resuming at 2:35 p.m./L'audience est reprise à 14h35

18480. **THE CHAIRMAN:** Thank you. We'll now come back and we're going to hear from the Tsawout First Nation. And pleasure to welcome Chief Underwood, and we're prepared to hear your oral summary argument.

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

18481. **CHIEF UNDERWOOD**: Good afternoon. I just first of all want to thank the Coast Salish people, the land that we're having this meeting on.

18482. And as you said, my name is Chief Harvey Underwood, my English name. My first Nation Indian name is ŦOLE,W̱ETSTEN. This name was given to me by my grandfather on my dad's side. This is a story to my name including responsibilities, and it translates to mean "helper".

18483. I was born and raised in W̱SÁNEĆ territory and lived there all my life. My parents are Harry Bird Underwood, the late Molly Mary-Rose Underwood. My parents were born and raised in W̱SÁNEĆ territory and are from Tsawout.

18484. My grandparents on my mom's side were the late Johnny Claxton, also from Tsawout. and the late Elsie Claxton, nee Pelkey, also from Tsawout.

18485. My grandparents on my father's side were the late Burt Underwood and the late Ellen Underwood, both from Tsawout.

18486. My parents and grandparents and their ancestors before them, lived off the land and waters. They taught us that our sacred responsibility is to protect and care for the places where we get our food. This is why the protection of our land and waterways is so important to the W̱SÁNEĆ people. It's one of the most important laws that our ancestors gave us.

18487. I'm a member and an elected Chief of the Tsawout First Nation. My first term as Chief started in 2011. I was re-elected as Chief in 2013. Prior to becoming Chief, I served as a councillor for 16 years.

18488. As Chief, one of my responsibilities to Tsawout members is to bring forward their concerns regarding our territory, including the unique and important relationship we have to our marine waters. Another responsibility is to represent and speak on behalf of the Tsawout membership at meetings with various governments, including at the tribal, municipal, provincial and federal levels.

18489. These responsibilities I bring here, that I bring here today.

18490. Tsawout is part of W̱SÁNEĆ Nation, which also includes Tsartlip,

Tseycum, Malahat and Pauquchin. Although the Crown has divided us into separate bands, W̱SÁNEĆ people think of ourselves as family and know one another by our SENĆOŦEN names. We are also related to Semiahmoo, who are SENĆOŦEN speaking people.

18491. As set out in our evidence in this hearing and confirmed by Canadian courts, the W̱SÁNEĆ entered into a peace and friendship treaty with Sir James Douglas in 1852. Our ancestors understood the treaty as promising that the W̱SÁNEĆ would be able to continue on with our way of life unimpaired at our village sites, and our hunting and fishing would continue as formerly.

18492. As a result, as the courts have recognized on several occasions, W̱SÁNEĆ people have established hunting and fishing treaty rights throughout our territory. The treaty protects Tsawout rights to carry on our fisheries as formerly, which includes protecting the habitat of fish and aquatic resources of territory including salmon, cod, rockfish, halibut, crab, sea urchin and many others.

18493. The treaty also protects Tsawout's ability to exercise our preferred means of fishing in our preferred locations, to travel to and from our preferred and longstanding fishing locations, including our very important unique reef-net sites. These foods and the places we travel to gather them are important to the health and well-being of our people. The places are sacred, the food is medicine. And the unique W̱SÁNEĆ methods of harvesting, for example the reef-net fisheries, have been and must always be part of our way of life for this and future generations.

18494. You will recall the evidence that Syilx knowledge-holders provided to you regarding our unique relationship to the marine waters of our territory.

18495. Currently there is approximately 877 Tsawout members. Tsawout has six Indian reserves within the W̱SÁNEĆ Nation territory. Our primary residential community is at East Saanich Indian Reserve 2 located at Saanichton Bay. Our other reserves are located at Goldstream and various gulf islands.

18496. We are here today to highlight for the Panel the ongoing concerns that Tsawout has with the proposed Trans Mountain Expansion Project. Our team prepared extensive written submissions, and this oral presentation is intended to highlight our concerns. We will also try to answer any questions that you may have.

18497. So could you bring up Exhibit C355-15-18, page 20? Thank you.

18498. As set out in our evidence, the area shown in the map before you was extensively used and occupied by our people prior to and after the arrival of the Europeans in W̱SÁNEĆ Nation territory. Our place names and our reef-net sites are shown on this map.

18499. My ancestors lived in permanent settlements in sheltered bays in and around the Saanich Peninsula, as well as at settlements and campsites throughout the southern Gulf Islands, the San Juan Islands and in and around what is known as Roberts Bank and Boundary Bay, especially when the salmon runs were going on. W̱SÁNEĆ people are known as the salt water people due to the fact that we lived -- live and travel through and rely upon the marine waters in our territory.

18500. As shown on this map, W̱SÁNEĆ territory is bisected by the proposed tanker route to the project. The proposed expansion would increase the number of tankers and barges that would travel through the W̱SÁNEĆ territory from approximately 60 tankers per year to 408 tankers per year. That's over 800 tanker visits through our territory per year.

18501. From Tsawout's perspective, this is a very significant increase of tankers interfering with our way of life. And because these tankers are carrying diluted bitumen that's an unacceptable risk. These impacts mean that Tsawout is directly affected by the project.

18502. Tsawout's ability to exercise our treaty and Aboriginal rights, including title, within W̱SÁNEĆ territory will be significantly infringed and impact on the project both from day-to-day operations of tankers and related vessels and from accidents and malfunctions in the marine environment.

18503. There are too many cumulative impacts already in the territory. The increased impacts, the risk of this project are unacceptable to us. We're very concerned with the safety of our members, who continue to go on to fish, hunt, gather and simply enjoy our territory.

18504. One of our main routes from our village to the islands and to many of our fishing places is through the Haro Strait and by the Saturna Island. The project would directly impact and infringe upon our ability to safely use our territory. The project would displace us and prevent us from accessing our

territory, including our reef-net sites.

18505. Tsawout has concerns with the increased vessel weight and the impacts it will have on our culture and burial sites, including those located at or near the water's edge. Tsawout is concerned with the noise, what it would mean to our people, and the whales that live in and travel through our waters. We are very concerned that the southern resident orca population, whose home is in our territorial waters, is an endangered species and the transient population of orcas who come and go through our territory. These whales are our relatives.

18506. Tsawout is extremely concerned about the likelihood of an oil spill along the tanker route, and our inability to adequately respond to such a spill. A marine oil spill would have devastating impacts on our territory, our way of life and our future generations. We are concerned about how diluted bitumen would wash up on our beaches, would impact the kelp and all the fish and sea urchin and other creatures. Some of our reserves or important cultural sites are next to the shipping lanes.

18507. The islands have so much sand, rock, inlets, crevasses. If oil gets into these places -- and it would if it spilled along the marine route -- impacts to our territory and to Tsawout would be devastating.

18508. Could you please bring up Exhibit C355-15-6, page 1?

18509. As a result of conducting our marine use study, engaging with the community and doing the due diligence that was possible in the project, Tsawout identified a list of effects, impacts, and infringements of the project of all which remain outstanding:

18510. Disruption to Tsawout's way of life, including increased alienation from and interruption with Tsawout's sacred relationships and reliance on the waters and lands of our Territory, increased health effects and effects on our physical, mental, emotional and spiritual wellbeing.

18511. Disturbance to food gathering locations, multiple use sites and disruption to harvesting and marine resources, fishing, gathering of food and medicinal plants, hunting and cultural and spiritual practices;

18512. Disturbance to fish and aquatic resources.

18513. Disruption to marine ecosystems from increased wake noise, air emissions and lights.

18514. Disturbance to burial sites and other spiritual and cultural sites from increased vessel wake.

18515. Disruption to use of historic, modern and future marine travel ways and marine access throughout the Territory.

18516. Increased risk of accidents and malfunctions, of oil spills, which associated effects including water contamination, shoreline contamination and physical contact between a tanker's hull and marine sub-tidal habitat from vessel grounding.

18517. Concerns regarding the adequacy, readiness and capacity of spill response along the project tanker route.

18518. Appropriate mechanisms for avoidance and mitigation, and compensation for impacts to Tsawout, and liability and responsibility for damages and ecosystem recovery in the case of accidents or malfunctions.

18519. Increased risk because of insufficient knowledge regarding the fate and behaviour of diluted bitumen and impacts to the preparedness and capacity respond to a spill of diluted bitumen in the marine environment; continued increasing cumulative effects throughout the territory; unjustified infringements of our section 35 treaty rights, including Tsawout's treaty right to carry on our fisheries, as formerly.

18520. It's important to stress the impact to one part of the environment is an impact to the territory as a whole and an impact to us. According to our laws and ethics under traditional knowledge, what you do to one part of the ecosystems you do to all parts.

18521. Before turning this over to our counsel, I would like to raise with you continued concerns regarding the Crown consultation.

18522. The Crown decided on its own that it would rely on the NEB's hearing to the extent possible to identity, consider, and address impacts on our rights. This was and remains a significant flaw. The NEB Process cannot be relied upon to meet the Crown's duty to consult with us. It is not deep and meaningful

consultation on a nation-to-nation basis.

18523. The Crown cannot on its own determine the process and the scope of issues in the consultation about impacts and infringements to our treaty and Aboriginal rights. A lot of our concerns have not been addressed throughout this process, and Trans Mountain has not provided reliable information to assess this project.

18524. The Crown failed to include us in the TERMPOL review of the marine components of this project. This failure is a breach of the honour of the Crown as a result in the TERMPOL Review Committee having inadequate information to make its findings and recommendations.

18525. W̱SÁNEĆ laws and governance must be considered when establishing a respectful nation-to-nation review process for consultation on this project. There has been inadequate capacity funding to participate. There have been inadequate timelines. Meaningful consultation between Tsawout and the Crown has not occurred and the Crown has taken no steps whatsoever to justify infringements to our Douglas treaty rights.

18526. (Speaking in native language).

18527. **MS. GAERTNER:** Good afternoon. It's Brenda Gaertner with Chief Underwood for Tsawout.

18528. In Procedural Direction 20, the Board invited intervenors to adopt other intervenors' written or oral summary arguments which they agree with. We adopt the following: the Province of British Columbia, Exhibit C89-13-2, paragraphs 91 and 92; Living Oceans Society, Exhibit C14-41, paragraphs 81 to 225; the U.S. tribes, who are relatives of Tsawout's -- Exhibit 336-11-2 from PDF pages 27 to the top of page 30 before they begin in Part 4. Tsawout also wants to acknowledge the many outstanding concerns, in particular those that Tsleil-Waututh has raised regarding the terminal.

18529. In these submissions Tsawout will emphasize the reasons and the rationale for why the Board should not recommend the Certificate of Public Convenience and Necessity for this project.

18530. At paragraphs 38 to 64 in our written arguments review the case law. And that case law confirms, as Chief Underwood has already spoken to, to the

established treaty right to fish as formerly and hunt within the territory. This established right includes the right to access those fisheries at the usual and preferred locations and with preferred methods.

18531. Could you bring the previous exhibit up for us, please? Same page.

18532. Tsawout's treaty right to travel to and from the fishery was also affirmed by the B.C. Court of Appeal in *Claxton*; leave to appeal at the Supreme Court of Canada denied.

18533. Based on these court decisions, Tsawout's established treaty right to fish as formerly must be viewed extensively and expansively. They travel all through those territories. The route totally bisects it. They have the right to go to their fisheries; they have the right to travel to those fisheries. That impact is obvious.

18534. The *Claxton* decision also made it clear -- and it was one of the earliest decisions of the B.C. Court of Appeal and as I mentioned leave to the Supreme Court of Canada denied -- that shows the Tsawout's Douglas Treaty rights have the power to protect damage to habitat and to protect against infringements that prevent them from getting to their fisheries.

18535. The application of your Regulatory Framework guiding the issuance of these Certificates and Approvals under both the *National Energy Board Act* and under CEAA, must be consistent with section 35 obligations, including meeting the honour of the Crown. The necessity for the Crown to justify potential infringements to established treaty rights is outstanding. The need to meet and consult and accommodate their Aboriginal title and rights is also outstanding.

18536. The Board, in conducting your assessment and making your recommendations to the Governor in Council, must consider Tsawout's treaty rights to carry on their fisheries as formerly and their Aboriginal title and rights. In order to carry out your mandate both of these Acts, this requires recognizing that the concerns that Tsawout has brought forward with respect to the project have not been addressed.

18537. The Crown has not met its constitutional obligations to Tsawout. And before the Crown can authorize the issuance of a section 852 certificate, it must justify the infringements and meaningfully consult.

18538. Tsawout's Marine Use Study -- which this is a map that's contained in it -- sets out strong evidence of the contemporary use of their rights, which have been adapted and evolved to address the many impacts on their territory. Despite all these changes, Tsawout relies heavily on the food and the marine resources that their harvesters collect.

18539. Tsawout's treaty rights and unextinguished Aboriginal title and rights are also recognized under the *United Nations Declaration on the Rights of Indigenous People*, including the requirements for free and prior informed consent. As set out in paragraphs 91 to 95 of our written submission, in applying both Canadian law and under the *United Nations Declaration of Indigenous People*, Tsawout's free, prior, and informed consent would be required for this project to proceed. And it has not been obtained.

18540. Chief Harvey mentioned briefly the concerns we have around the TERMPOL Review Committee. I want to stress that Tsawout requested to be part of the TERMPOL Review Committee before it began its work on the basis that Tsawout is a government body that has absolutely important relevant information and knowledge to bring to the TERMPOL Review. However, Tsawout's request was denied by the Crown, as represented by Transport Canada, after significant delay and without any reason.

18541. When Tsawout requested information about the scoping of the TERMPOL review through your information request process, the Crown refused to provide that information despite being ordered by you to do so. Upon a further motion to compel a response, the Board allowed the Crown to change the answers such that they no longer needed to respond to Tsawout's questions. Such conduct does not meet the standard of the honour of the Crown.

18542. For these reasons, neither Tsawout, the Board, Trans Mountain, nor the Crown can rely on the completeness of the navigation and safety measures in the TERMPOL Report to mitigate the impacts of the marine shipping components.

18543. It's really quite hard to understand when a government says they're interested in combining science with traditional knowledge, that they left Tsawout out of the room on that discussion. It's really very difficult to understand it's not to be encouraged. And so for you to ignore it would be a mistake.

18544. **THE CHAIRMAN:** Can I ask you a question on that, on your point

there?

18545. **MS. GAERTNER:** Absolutely.

18546. **THE CHAIRMAN:** I understand your argument and I've read that quite carefully and in your relation to the TERMPOL Report. And you know our position of what we can do to rectify that. As you know, we have to put in conditions; we have to make comment on all of this that we don't have authority over the other federal Crown agencies.

18547. Can you help the Panel and help me and the Panel understand how we could rectify that, recommend, something we could do to recognize the shortcomings, as you've outlined them, to correct the situation?

18548. **MS. GAERTNER:** At this point in your hearing, Mr. Chairman, I believe that what you can do is not rely on the TERMPOL.

18549. Tsawout also sought opportunities to be engaged and consulted and the development of the Tug Escort Matrix, which was recommended by the TERMPOL Review Committee. When Tsawout asked Transport Canada, Transport Canada told Tsawout to talk to Trans Mountain. When they talked to Trans Mountain, they said that they weren't going to open up their committee.

18550. It's not in keeping with the honour of the Crown and it's not in keeping with you getting the best information you need to assess this project. And so when the doors are closed for proper participation, you can't rely on the outcomes. Despite these challenges, Tsawout has presented substantial evidence that the marine shipping components of this project, including vessel traffic and vessel weight, will have significant adverse environmental effects on the territory and the resources within it and the exercise of their rights.

18551. Now, in their reply evidence, Trans Mountain -- in their original evidence, they didn't have Tsawout's Marine Use Study. In their reply evidence, they summarize Tsawout's evidence and you'll see in the Marine Use Study, all kinds of evidence about the crisscrossing across this and all kinds of difficulties and absolute concerns about safety that their members have with all these tankers coming into their territory.

18552. Well, Trans Mountain summarizes it, but they make no change in their conclusion that that shipping route would -- won't affect Tsawout. How could

that shipping route not affect Tsawout?

18553. The loss of access in this case is not just the loss of sustenance and way of life -- and that's a pretty significant loss -- it's also the loss of health and well-being. You have the evidence of Elder Belinda Claxton, who's with us today to support us in this evidence before you from the traditional knowledge. You have it in the material before you. This directly goes to the health of the people and their abilities to sustain themselves, the Tsawout, into future generations.

18554. The cumulative effects of this area, you'll hear it -- you'll see it in all of the evidence we've summarized. With regard to this project, it is Tsawout's absolute concern that we are already at a tipping point on the impacts on their territory.

18555. The -- without a serious and comprehensive cumulative effects assessment of the increased vessel traffic along this route, this project cannot be approved.

18556. There are many assessments that Trans Mountain did with respect to the shipping components of the project that are deficient in various ways. We've outlined them all in our evidence. I'd like to take you through them in point form today, but I recognize the time and I'm a little bit sure -- I'm not sure I'm going to be able to finish. So I'll come back to it if I have time, but I do want to make sure I finish in good time.

18557. But I do want you to please take time with the written submissions to show -- because we did have many concerns about the deficiencies.

18558. On the next topic of deficiency, which is the issue with respect to oil spills, we did, together with Upper Nicola Indian Band, hire Dr. Gunton and Dr. Broadbent to do a critique of Trans Mountain's assessment.

18559. It's important, from Tsawout's perspective, that you keep in mind that these experts use various public sources of data from the National Energy Board, the Enbridge liquids pipeline system, the Pipeline and Hazardous Materials Safety Administration and the Project Application. They put forward sensitivity analysis and applied well established methodology, including the U.S. Oil Spill Risk Analysis. They were very transparent about what they used and what their data sources were, and they concluded that a tanker spill is highly likely to occur; 58 to 98 percent chance of a tanker spill.

18560. The U.S. Oil Spill Risk Analysis and the VTRA methodology estimate that it's between 58 to 98. Trans Mountain has 16 to 67. In that analysis, you'll see clearly that it's the experts' conclusions -- and Tsawout in their review has agreed with this -- that that 16 percent is clearly an outlier and that it is based on inaccurate and unreliable assumptions.

18561. It's our submission that the Board must conclude that the probability of an oil spill within the marine waters is high.

18562. Because you have duelling experts and you haven't had the opportunity for cross-examination, again, we rely on the laws established in *Brown v Dunn*, which is well-established common law, that a party must put their issues and their questions to an expert before impeaching them. Trans Mountain has not done that through the information requests and they've done so at their peril.

18563. Given the significant concerns for the oil spills and the high likelihood that it would occur, the next expert that Tsawout commissioned was a world-renowned expert, Nuka Research and Planning Group, to examine the challenges, capability and limited -- limitations in mechanical oil spill response tactics and technologies to control oil spills from the projects.

18564. It's important to note that in Nuka's analysis they assume all of the increased spill response set out in the project application would actually be put in place. So when you look at their conclusions, they're assuming that if that doesn't happen, the current ability for recovery is reduced, in their opinion, by 58 percent.

18565. Tsawout stresses the following key findings of this independent expert report.

18566. On water, spill recovery during winter months is reduced by as much as 50 percent compared to the summer. If a spill response is delayed for any reason, be it a lag in detection, poor weather, equipment malfunction, the total volume recovered would decrease significantly. For example, a 48-hour delay in the outer harbour would result in over 11,000 of 16,000 cubic metres of oil left in the environment. A 48-hour delay; that's all you need in the middle of winter and most of that dilbit is going to be all through their territory.

18567. It must also be noted that the Nuka model shows stranding on the

beaches will be significant. Spill response forces currently available in the southern B.C. have a capacity to recover only 10 to 20 percent of the worst-case scenario under favourable conditions. Current response capacity is clustered in the Vancouver port, reducing capacity anywhere else on that marine shipping route.

18568. Changes to diluted bitumen, both in terms of density and viscosity within the first few days may render oil spill response systems completely ineffective.

18569. Then you add the Fraser River and the outflow from the Fraser River and what that occurs with respect to -- what that means with respect to the W̱SÁNEĆ territory. Response equipment inventories related to the -- to responding there are limited. Existing equipment is meant only for floating oil and would not be effective if diluted bitumen submerged or sank.

18570. Now, I'm hoping that all of you have good knowledge, and it's common-sense knowledge, about what happens in the -- at the mouth of the Fraser. There's lots of debris on a regular basis that floats down that river, natural and unnatural. But it's absolutely clear that if that river was in its high flow and there was lots of debris coming down and that diluted bitumen attached to it, it's not going to just sit on top of the water. It's going to move and it's going to move all over the place.

18571. There's all kinds of traditional knowledge in the information we put forward and Genwest, on behalf of other intervenors, put excellent information forward on what will happen, given the currents and tides that are occurring at the mouth of the river and into this territory. The elders from Tsawout give lots of examples of how they expect that water to move around and the oil with it.

18572. In our submissions, the Board cannot recommend the project when something as significant as emergency response planning for accidents and malfunctions along the tanker route has not been completed and in some cases has not even started, particularly given the impacts and infringements that will have on the exercise of Tsawout's constitutionally-protected rights.

18573. Applying the precautionary principle, the Board must conclude that the likelihood of a tanker spill is high and that Trans Mountain's application and subsequent filings cannot be relied upon to adequately assess the impacts, effects and risks of the project.

18574. Trans Mountain's failure to adequately state or acknowledge the risks associated -- the risks -- causes additional concerns. The Proponent's understanding of the risks results in an atmosphere of distrust. The Proponent's commitment to do necessary planning in the future, once the project is approved, is also very concerning, given Trans Mountain is already currently shipping conventional crude oils and diluted bitumen through this territory.

18575. We won't have time to cover the significant concerns Tsawout has raised at paragraphs 346 to 366 regarding Trans Mountain's lack of reliable assessment on the costs of oil spills. We'll leave those paragraphs for you to read.

18576. In my last 10 minutes, I'm going to now turn to the Public Interest Assessments with respect to this project.

18577. Again, Tsawout retained independent experts to provide an assessment of the risks and benefits of the project as well as the economic feasibility of the project given the problematic analysis of the economic feasibility by Trans Mountain.

18578. Dr. Gunton et al. prepared a report entitled "Public Interest Evaluation" in order for Tsawout to better under this project and do their due diligence, and to assist you in your determinations of whether to recommend a section 52 Certificate.

18579. Long-term contracts from industry are not sufficient in and of themselves to determine whether a project is needed.

18580. I pause now to mention that these long-term contracts for the project were entered into during a time and a period of strong markets. Even though the producers have recently confirmed that they still support these contracts, they can only fulfill their contractual obligations by diverting oil from existing transportation facilities and imposing a cost incurred by other transportation systems. Trans Mountain ignores those costs in its analysis to support this project.

18581. The primary way, in our submission, for you to assess whether this project is needed, is to look at overall supply and demand for transportation systems within Canada. Trans Mountain analysis fails to do that. Dr. Gunton et al. show that there's a very strong likelihood for significant excess capacity even

without Keystone XL and the Northern Gateway Pipeline.

18582. Trans Mountain overstates project benefits by using gross economic impacts. Trans Mountain's conclusion that the project will generate significant benefits in the form of increased prices is based on questionable methodology, unrealistic assumptions, and is inconsistent with oil market dynamics.

18583. Trans Mountain's assessment of the need for the project is also deficient because it underestimates Western Canada's sedimentary basin transportation capacity, likely overestimates oil production and oil prices; and doesn't include alternative production and transportation capacity scenarios.

18584. A significant concern which goes directly to your assessment of this project, is that Trans Mountain and its experts provide no estimates of the economic losses resulting from the project including the potential excess transportation capacity that the project may cause, and no estimates of social and environmental costs of air pollution, greenhouse gas emissions, oil spills, and the direct environmental and social impacts resulting from the project. Without providing realistic benefits and likely costs, the information you need for determining whether the project is needed, and in the public interest, is not there.

18585. When assessing the public interest, you must also assess the changes that have occurred since the application was made and that these long-term transportation contracts were put into place. The economic downturn in the oil and gas industry globally, and for Alberta oil sands producers, must be considered.

18586. The Supreme Court of Canada's confirmation of Tsilhqot'in Aboriginal title and the role of consent going forward, occurred after this application was made.

18587. The Canadian Government has made significant international commitments to reduce greenhouse gas emissions significantly, which will include a significant curtailing of Alberta oil sands production.

18588. The Canadian government has also committed to acknowledge and work to reduce impacts and effects of climate change, and they've committed to respect treaty and Aboriginal rights, including the implementation of the *United Nations Declaration of Indigenous People*. These are all public knowledge. This is all matters that you must consider when considering what is in the public

interest.

18589. **THE CHAIRMAN:** You have your five minutes still, Ms. Gaertner.

18590. **MR. GAERTNER:** Yes, I'm not finished yet.

18591. Finally, it is in the interest of all Canadians to ensure that the Constitution is respected through the reconciliation of section 35 Aboriginal rights with the assertion of Crown sovereignty.

18592. In both its written and oral summary arguments, Trans Mountain stressed that public interest considerations is not site-specific and it's not local and it's not provincial. Implicit in those submissions, in my submission, is this idea that local impacts and section 35 rights do not weigh into and are not part of the interests of all Canadians.

18593. It's incorrect to characterize the impact of this project on Indigenous groups simply as local in nature. Rather, as the rights of Tsawout are enshrined in the Constitution, any impact that would unjustifiably infringe upon those rights is a matter of national public interest and it is in the interest of all Canadians to ensure that the Constitution is honoured and respected, and that this process of reconciliation is upheld and promoted.

18594. I refer you to paragraphs 444 onward of our written submissions that review the recent Canadian jurisprudence in support of that position.

18595. Whether the Crown has met its constitutional duty to justify infringements, consult, and accommodate, is a matter of public interest.

18596. Reconciliation is not a simple consideration of how one Indigenous group is impacted at any one time in any discrete instance. It's not a burden to be born by any one Indigenous group. Reconciliation is between all Indigenous peoples, the Government of Canada, and all Canadians.

18597. In conclusion, the Proponent has not established that this project is in the public interest. It's the Proponent's obligation to do that. It's not our obligation to show you that it's not in the public interest. It's in the Proponent's obligation to prove that it's in the public interest.

18598. All of the information we've put forward to you is for you to assess

whether you can rely on the Proponent's information. And in our strong submission you cannot. There is enough strong and reliable information that we've put forward to say that the Proponent is not admitting the impacts it's having on Tsawout or would have on Tsawout, is not addressing those, and has made no effort to mitigate them.

18599. Frankly, I am not sure how you could mitigate the impacts to Tsawout. Tsawout has not been able to identify how you can mitigate the impacts to their people as a result of this project. And the Crown has made no efforts yet to justify those impacts and infringements.

18600. The Board must find that the probability of an oil spill within the marine waters is high and that the adverse impacts of a spill are significant. The Crown must justify those infringements. I'm not standing in front of you arguing questionable law. Tsawout is standing here with established treaty rights and clear law that says the Crown must justify those infringements. The Crown has not begun that work; we're waiting.

18601. Given the project's impacts on Tsawout's exercise of their established rights to fish as formerly, and given the project's impacts on their title and rights, and given the lack of reliable assessments and the lack of reliable evidence to support a conclusion that the project is in the public interest, the Panel has no other choice, in our submission, but to recommend that a certificate not be issued.

18602. Those are our submissions.

18603. **THE CHAIRMAN:** We'll just take a five minute recess to consider any questions. Thank you.

--- Upon recessing at 3:16 p.m./L'audience est suspendue à 15h16
--- Upon resuming at 3:24 p.m./L'audience est reprise à 15h24

18604. **THE CHAIRMAN:** I apologize -- keeping myself together here.

18605. With that, perhaps Ms. Scott has a question to begin with, if you're prepared to entertain them.

18606. Ms. Scott.

18607. **MEMBER SCOTT:** Thank you, Ms. Gaertner. I would -- wanted to

just clarify, if I could, my understanding of your argument about Crown consultation and the responsibilities of the NEB at this stage in the process.

18608. I thought I understood you this morning to say that we have an obligation to some preliminary conclusions about adequacy of Crown consultation and recognizing that there is consultation yet to take place. Is that correct?

18609. **MS. GAERTNER:** That's correct.

18610. **MEMBER SCOTT:** Okay. So, then, my follow-up -- my follow-up question is -- I want to understand the purpose of that for our process, how you see that relating to our process, just focusing, not on the quality of the information that's in front of us in terms of the evidence that we have to weight to meet -- to reach various conclusions, but how it fits in our process.

18611. **MS. GAERTNER:** So your process is dependent on -- must stay within section 35 of the Constitution. And the law is clear that consultation and accommodation is required if infringements are there before a Crown decision can be made.

18612. The law is also clear in the case of established rights, as we have here, that justification is required before a Crown decision could be made that infringes on the rights.

18613. And so in your assessment of the evidence, you can clearly see that that has not occurred yet. And so when considering the project you can, as part of your information that you provide to the Crown, confirm that that has not occurred and must occur before a project could proceed.

18614. **MEMBER SCOTT:** So it's just the -- it's the acknowledgment of the incompleteness that you're looking for on our record? Or is it a qualitative assessment you're looking for beyond the fact of complete or not complete?

18615. **MS. GAERTNER:** Well, in this case, because the Crown has made no efforts to justify their infringements to say, "We don't have to get into a qualitative discussion" -- if there had been efforts we might have had that discussion and we'd need to go through it. But the record is empty of any efforts of the Crown to justify the infringements, so you don't need to asses that.

18616. You know, if I needed that finding of fact, I would ask you for it. But it's so obvious, I don't need that finding of fact; the Crown needs to do that work.

18617. **MEMBER SCOTT:** And would your answer be the same if we were dealing with a First Nation that perhaps didn't have a treaty right or a determined Aboriginal right, if that's possible? But anyway ---

18618. **MS. GAERTNER:** Sure. I mean it's fair. You could have asked that question when I spoke on behalf of Upper Nicola today. Although I stressed the importance of their strong *prima facie* evidence, that in that situation the Crown still must consult and accommodate the concerns.

18619. And again, because the Crown has decided to rely on your process to the extent possible, they haven't done anything yet. And so what is that "extent possible"? I think that becomes the question. And if you'd like me to speak on that, I could you ask then, but I don't think I get to do that.

18620. **MEMBER SCOTT:** I would like to hear your views on that.

18621. **MS. GAERTNER:** Thank you. In my view, the "extent possible" would be whether you've gathered sufficient information to assess it. And that's why we've had so much concerns around the information that's been gathered.

18622. **MEMBER SCOTT:** All right. I think can appreciate that position. Thank you.

18623. **THE CHAIRMAN:** With that, we would like to thank you, Chief Underwood, Ms. Claxton and Ms. Gaertner for your -- you look like you want to add something.

18624. **MS. GAERTNER:** I recognized I had 30 seconds on there and if I could just take -- when we broke -- and this is the importance of traditional knowledge. When we broke for those 10 minutes, both the Chief and Elder Belinda Claxton immediately raised, in addition to everything we've said, concerns around climate change.

18625. And so I'll say -- I didn't those specifically in the lists of information that remain outstanding, but when we think of all the impact and we think of all the changes, and we think of that tipping point, this community has extreme

concerns around the assessment of this project and the implications of climate change. And we all felt that as we concluded so I just wanted to say that on the record. Thank you.

18626. **THE CHAIRMAN:** Well, with that, we thank both the Chief, Ms. Claxton and you, Ms. Gaertner, for Tsawout's First Nation presentation. And I wish you safe travels home to SENĆOŦEN.

18627. We'll now take a very short recess and we will hear from the last group this afternoon -- intervenors this afternoon will be the Board of Friends of Ecological Reserves.

--- Upon recessing at 3:30 p.m./L'audience est suspendue à 15h30
--- Upon resuming at 4:00 p.m./L'audience est reprise à 14h00

18628. **THE CHAIRMAN:** We're now prepared to hear from the Board -- the Board of Friends of the Ecological Reserves.

18629. So we're pleased to hear your presentation. I think you've been briefed on our timing system, so the floor is all yours, sir.

--- FINAL ARGUMENT BY/ARGUMENT FINALE PAR THE BOARD OF THE FRIENDS OF ECOLOGICAL RESERVES:

18630. **MR. FENGER:** Thank you very much.

18631. I'm Mike Fenger. I'm President of Friends of Ecological Reserves with training in ecosystems and applying it to regulation, policy and best management practices.

18632. There are 19 ecological reserves along the tanker route and we have focused on the cumulative effects: issue four, potential effects of accidents and malfunctions; issue five, and spill contingency planning; issue 11, as identified by the Natural Energy Board.

18633. We recommend to the Natural Energy Board that, in the public interest, the Natural Energy Board ensures that there's long-term investment in marine ecosystem research and monitoring.

18634. We believe that this a legitimate internal cost to this project and must

be funded by Kinder Morgan as such. We also recommend that future marine research and monitoring funds from Kinder Morgan be at arms-length from Kinder Morgan and guided by a multiple stakeholder agency trustee council so the public interests along the tanker route will be addressed over the long term and in a transparent manner.

18635. I'm going to go on and hope to convince you of the wisdom of that.

18636. So point number 2, I'm going to start with a lesson from the Exxon Valdez spill -- happened. Three years after the spill, they had a major symposium in Anchorage and they asked -- and the keynote speaker posed the following questions -- or statement, and then answered his own question.

18637. "Since the" -- and I quote here:

> *"Since the consequence of being unprepared seem to be greater costs and greater uncertainty about injured resources, their recovery and the need for restoration, what should we be doing now in order to better prepare to assess damages resulting before the next oil spill?"*

18638. And I think that's a relevant question for British Columbians today, and for you.

18639. And then he proceeds to answer his own question.

> *"The answer seems clear in retrospect: ongoing monitoring programs collecting data on intertidal and subtidal zones, annual counts of sea otters, eagles, other sea birds, gathering more experimental information on oil toxicology on common species. [And if we do that] we might get better injury information at a lower cost."*

18640. Today, the U.S. Alaskan Oil Trustees Council spends $9 million annually doing just that, 26 years after the spill. So we're looking for something similar from this Panel and for this Board to put in as a permanent condition. So who pays for the future investments in marine monitoring? We argue that it's an internal cost for the Kinder Morgan project.

18641. We argue that we're as unprepared as the Alaskans were in the pre-

spill situation with regards to baselines monitoring of, and a reasonable research program anticipating a spill.

18642. So who should invest in this relatively inexpensive project? And I'm going to quote from Kinder Morgan here in their final oral arguments on page 424. And this is addressed from Kinder Morgan to you, and I'm quoting them.

> *"The Board [and that's you] expects applicants to identify burdens associated with the project and to implement measures aimed at reducing the risk and impacts of burdens. In many cases, the National Energy Board will make the approval of the project conditional on the implementation of measures designed to further mitigate the burdens of the project. Projects should be built in a way that protects the public interest."*

18643. And we wholeheartedly agree.

18644. But Kinder Morgan did not identify a monitoring and research burden for themselves over the life of the project as a mitigation measure, and we respectfully submit that it should have. There are no mitigated measures for this at all.

18645. Currently, Kinder Morgan has made some commitments to longer-term research and monitoring. I'm on point 4 in my speaking notes. Kinder Morgan states:

> *"Trans Mountain has entered into a funding agreement with Vancouver Fraser Port Authority, wherein Trans Mountain has agreed to contribute $1.6 million to Port of Metro Vancouver ECHO Program."*

18646. And Trans Mountain is also, in another statement later on,

> *"Is currently engaging in various organizations with various organizations regarding initiatives to study marine mammals in the Salish Sea, includes Ocean Networks and participating with International Quiet Ocean Experiment to learn what noise levels large mammals can tolerate."*

18647. Now, that's laudable, and -- but what's flawed about the Kinder

Morgan investments and the approach that Kinder Morgan takes currently to investments -- currently future -- all future investments by Kinder Morgan, are managed so that Kinder Morgan decides what research is in their best interest. Kinder Morgan sets the terms of reference for the research. Kinder Morgan sets the funding limit and duration. Kinder Morgan decides who's worthy of funding. And Kinder Morgan decides on information availability and where their findings are proprietary.

18648. And this, I think's been one of the problems with this process, that some of the information that we've wanted has been deemed proprietary. So this approach, to us, is inadequate and we would not like it to carry on from the -- over the life of this project, this approach.

18649. The Board has developed some permit conditions to try to change this balance in who manages longer-term research so that it shifts from discretionary funding to mandatory funding with set budgets over the term and the direction is not solely controlled by Kinder Morgan, but provided by multiple stakeholders at arm's length, but together with Kinder Morgan. So we're looking for partnerships and cooperation over the long term.

18650. We have reviewed the 150 National Energy Board draft conditions with regard to research and monitoring. We made some suggestions on some of these. I've listed them: 44, 50, 78, 114, 128, 140, 142. I don't have time to go through these now.

18651. Basically, the thrust of our recommendations on wording is to make the information more transparent, more available to the public, as I think that's a legitimate concern. Some of these -- some of the information has been based on who needs to know and when they need to know, and it's decided by somebody else.

18652. However, we found, in your conditions, that there were no conditions to address research and monitoring needs for marine ecosystems over the life of the project, even though these were part of the Enbridge Northern Gateway conditions.

18653. There were no provisions for -- to resolve many of the existing knowledge gaps linked to the issues 4, 5 and 11, despite -- and they were still outstanding despite the reports submitted by Kinder Morgan in this process.

18654. So we have drafted some additional permit conditions that we hope that you will take to heart and examine closely.

18655. The first of these -- well, common sense tells us that we're not going to know as much as we need to know, should you recommend this permit go ahead, so the Royal Society of Canada report identified a number of gaps just recently, and these are complex questions.

18656. But common sense also, I think, tells us that to solve these problems requires cross-agency, cross-stakeholder forums, and they have a better success at solving complex problems in this regulatory environment with three or four government levels and a number of stakeholders who can all bring information to the process.

18657. So our first recommended permit condition is that Kinder Morgan must file with National Energy Board at least one year prior to commencing operations, placement of funds for at least $450 million for research and monitoring and environmental endowment fund.

18658. We think that this fund will be capable of generating sufficient annual budgets for a program about equal to that that the Alaskans are running, still trying to catch up with the Exxon Valdez spill. We're just recommending that it go on in advance of the spill so we don't repeat their -- I guess their message that they wish they'd done it first.

18659. This endowment will be permanent and directed to conduct and collect and maintain monitoring research shore zone inventory for as long as oil is being transported in the Salish Sea and the Strait of Juan de Fuca.

18660. Could I have the first exhibit? It's C33-14-1, page 15, line 25. That one there, yes.

18661. This is the National Energy Board here and this is Kinder Morgan over here and here is the list of stakeholders that we see advising and being trustees to this process. There's First Nations, Kinder Morgan, Department of Fisheries and Oceans, B.C. Environment, State of Washington and some NGOs. And when they get together, they can decide where the biggest gap is in this kind of thing.

18662. Below that, you'll see there's a marine and research environment monitoring program and that requires some dedicated staff, small staff, and they

will be able to formulate, at the direction of the trustees' council, a strategic five-year plan, programs, work plans, budgets in and have some in-house expertise to do environmental monitoring, modelling for improvements in spill, habitat compensation in the event that there is a spill and it can't be restored, shore zone mapping and research on impacts and recovery.

18663. And here's where things are a little different now. Once this is known, universities should be able to apply to this fund, researchers, even people like ourselves if we have a project that's worthy and able to answer a strategic direction. It opens the project up. There are some people now that I feel -- the whale watchers do a lot of -- have a lot of observation. They have been excluded from some of this.

18664. So I want to go on then to point number 12 in my speaking notes: ability for Kinder Morgan to meet the endowment fund condition.

18665. Kinder Morgan tells us that they have signed contracts for 15 to 20 years and they are willing and able to meet or exceed any Board requirement. Kinder Morgan says they're from a big family of companies and have approximately $105 billion behind them, so we needn't fear that they're going to fail in their endeavour.

18666. Trans Mountain has financial wherewithal to ensure the project and they repeat it again:

"Meets or exceeds any Board requirements."

18667. I anticipated significant netbacks. Western Canadian oil producers, and I'm quoting,

"...are expected to see an increase in netbacks of approximately 73.5 billion over 20 years."

18668. So what are we asking for? Four hundred and fifty (450) million sought for an endowment is 6/100th of one percent of the netbacks. Likely, it's not enough to do all the research.

18669. However, right now there is zero percent of the netbacks that are dedicated to helping us learn how to deal with this complex problem and we think, therefore, it’s an external cost and if anything’s going to be done, it’s going

to be done by the Canadians. And we don't think it should be. We believe it's an internal cost. There's also an ability to structure this so that there is -- to take a tax advantage.

18670. So in conclusion, we think that Kinder Morgan has said they have the financial wherewithal to meet and exceed current National Energy Board conditions, and they expect to carry the internal costs of this project on their own. We hope you concur.

18671. The other thing that we're trying to do, as I've said, is shift this from a sort of paper exchange in the future to a more cooperative trustee approach where we can still have professional disagreements. But we'll probably get closer to building a solution that's going to work in the long term.

18672. **THE CHAIRMAN:** Would you entertain questions as you go through, Mr. Fenger?

18673. **MR. FENGER:** Yes. Yeah, absolutely.

18674. **THE CHAIRMAN:** Understanding the model and I understand the impetus and what you would like to achieve by this. But I'm wondering -- we're hearing throughout our evidence that's in front of it -- is integration all the partner at the table, everyone involved in the big aspect of this issue, on marine research and monitoring and the whole -- wouldn't you think it would be more than Trans Mountain's responsibility to be involved in this or are you looking at it as Trans Mountain being the vehicle to start this? But shouldn't you think it could be bigger to fund it because it's bigger than just Trans Mountain?

18675. **MR. FENGER:** To us, the risk increased 680 percent and principally linked to the oil spill, the dilbit situation. In an ideal world, I mean, I wouldn't expect Kinder Morgan to go back and look to the western oil producers and saying, "You all stand to benefit here; you should ante up."

18676. So yes, I would agree with you that it is a bigger problem. But it is principally Kinder Morgan that is bringing this level of risk to the coast.

18677. **THE CHAIRMAN:** And the element of the National Energy Board then, if I'm following you then, probably your answer to my question will be, "Well, because it's this project, they're bringing the dilbit to ships, then the National Energy Board should be regulating that."

18678. Now, you are aware that our regulation capacity stops at the marine terminal. And so conditioning beyond that and how we can influence that -- I know I'm not saying -- I'm just trying to influence that. I'm trying to -- how it would work. I'm a very practical guy and I know it's not an easy solution and it may be complicated. But I wanted to make sure that we've addressed all the players that should be in this process and what each player's role brings to it. I'm just trying to clarify that in my mind, Mr. Fenger.

18679. **MR. FENGER:** Well, we believe that there's a role before there's an oil spill. And right now we see most of the obligations awaiting until there is an oil spill and Western Canada Marine Resource Corporation to come and do something and then get into litigation. The Alaskans have said that's too late.

18680. And so we took your Terms of Reference to say malfunctions in tanker traffic meant that your mandate does extend to the tanker route.

18681. **THE CHAIRMAN:** Well, that's part of our consideration whether we can regulate that because there's other bodies that legislate that tanker movement -- Transport Canada, Fisheries and Oceans, all those as well. So that's something that we have to be considering as well as we move forward.

18682. **MR. FENGER:** We're asking you to regulate; we're asking you to put together a forum so that regulators can actually get together and solve this complex problem because the current status quo is not working on this file.

18683. **THE CHAIRMAN:** I understand that. Thank you. And it didn't go to your time, so you're okay.

18684. **MR. FENGER:** Okay.

18685. Could I have C33-14-1? I believe it is at page 19, line 5. There we go.

18686. That area in red is from a report that was done by the Government of Canada. It's the high-risk zone for tanker spills. This should be the future study area. We found the regional study area identified by Kinder Morgan too narrow. Even their own oil spill shore zone went beyond the regional study area. So in future of trying to solve difficult problems, that's what we're looking at.

18687. I'm not going to have time to go over all of the details, but we tried as

much as we could to look at what the conditions were on the Enbridge Northern Gateway and basically detail them out as well as we could. And I'm sure that there are improvements that could be made and there's cross-referencing that should be made. But we did our best to supply as many as the words and as much as the direction to get transparency and clarity.

18688. So basically the scope of the program I've already mentioned was sort of five areas.

18689. I want to skip on because I'm getting this sort of, "Oh, I'm going over."

18690. We're worried about -- and I've skipped to point 19, Permit Condition 7, Marine Habitat Compensation Plan. We are concerned about the proprietary nature of the information held by Western Canada Marine Resources Corporation, and we asked them about what they're doing with regards to sensitive zones and productive ecosystems. And I'm quoting:

> *"WCMRC initiated the development of a new coastal mapping system. [The] new system [...] under development, will house not only coastal sensitivities and [information on logistical support]...[The plan will be] used for [...] initial nearshore response in [...] emergency [situations]."*

18691. Good to hear. However, when we go and look at the Kinder Morgan statements on policy:

> *"[E]mergency management plans are proprietary [...] of a sensitive nature and due to the security concerns are not publicly available nor will they be made available."*

18692. We find that troubling and we don't think that the project should go ahead until that information is in front of the public. And we would like that information put in front of a stakeholder or a trustee council such as the one that we're suggesting.

18693. I'm going to skip over a bit more. We have 12 Permit Conditions, Oil Spill Response Plan.

18694. I'm going to go to my third one, C33-14-1, page 29, line 1, Tanker

Route Staging Areas. Yeah, that little map there. This is from the Kinder Morgan.

18695. I draw your attention to point F, Brotchie Pilot drop-off area. We suggested in our questions to Transport Canada that they straighten the transport route here with the simple logic that the further a tanker is from shore, the greater the opportunity to correct a malfunction should be the one. Transport Canada cited TERMPOL as saying that wasn't necessary and, as a previous speaker said, they thought you should dismiss the TERMPOL Report. And we sort of concur with that.

18696. We cannot understand why they wouldn't want to take a closer look at this. We think it is a mitigation strategy. And Race Rocks is here, Oak Bay Islands, the Trial Islands. And the entire Victoria waterfront and population are all there.

18697. So it's something that we haven't quite been willing to let go and hope any review can again address the proximity of the entire tank route to the shore. The further off-shore the better is our thoughts.

18698. I'm going to now skip to support from other intervenors. We were very impressed with Cowichan Tribes. And could I go to the Cowichan Tribe's C86-33-1, Table of Contents and their written argument-in-chief. And I'm going to read some of these.

18699. The chapter is called "Failure to Consider and Address Marine Tanker Spill Risks". "Increased traffic increases risk"; "Trans Mountain conclusions are incomplete and misleading"; "Lack of transparency"; "Overstated risk reduction effectiveness"; "Risk assessment unsubstantiated"; "Failure to fully simulate relevant conditions"; "Inadequate considerations of oil spill effects"; "Quantitative ecological risk assessment insufficient"; "Omission of kelp forests"; and so on. And they have quite a few of these.

18700. We don't think it's appropriate for Kinder Morgan to go back if it's the mood of the National Energy Board to try to answer to some of these questions. We think what we put on the table is superior, a more cross-agency cross-sectoral look at it. Exactly how do we -- if we can agree on the methods how can we do that?

18701. So coming to my conclusions point 27, the Board of the Friends of

Ecological Reserves recommends to the National Energy Board that the Kinder Morgan project should not be approved. The environmental reports submitted by Kinder Morgan Trans Mountain have failed to address the issues identified by the National Energy for the marine ecosystems along the tanker route.

18702. The 150 National Energy Board draft conditions also are inadequate to address these deficiencies.

18703. Now, if the National Energy Board recommends the Kinder Morgan Trans Mountain project proceed, then the Board strongly recommends that you put in place something along the lines we have recommended.

18704. We're a small organization but we have consulted with other environmental organizations, and have support of Sierra Club and the Pacific Salmon Foundation in the limited time we had for those consultations. So there are other environmental groups and other stakeholders who think it would be good to get in the same room to try to tackle some of these problems should you decide to go ahead.

18705. Thank you very much. I will turn it over to my fellow speaker Garry Fletcher.

18706. **MR. FLETCHER:** Thank you, Mike. And thank you, Board, for your patience during this long tedious process, I'm sure.

18707. My name is Garry Fletcher. I live in Metchosin on the southern tip of Vancouver Island. In fact, I can see the tanker route out my window every day.

18708. We're intervenors for the Board of the Friends of Ecological Reserves because we felt that the 19 ecological reserves impacted along the tanker route would be seriously damaged in the case of catastrophic and chronic even oil spills.

18709. I've listed on the page of the handout, I've given 10 items. And I won't go through each of them in detail right away. I'll just deal with one at a time.

18710. So I'll start with number one, and this is environmental risk is being seen as necessary for economic opportunity. The Board of the Friends of Ecological Reserves rejects this. Kinder Morgan has capitalized on the culture of

fear, which our previous government generated to threaten the loss of economic opportunity unless we are prepared to compromise our environment. We reject that false dichotomy.

18711. Kinder Morgan has spent millions of dollars trying to convince Canadians that we do not face a trade-off between environment and the economy. The risk reality is that we do stand to lose both ecologically and economically in pursuit of an oil expert economy. The citizens of Canada know there are other ways to pursue energy sustainability.

18712. We reject this fear scare tactic and are unwilling to accept the consequences of a future for us and our children where Kinder Morgan has failed to measure the real values.

18713. Secondly, the contribution of ecosystem services to the economy of Canada can be as important as energy transport projects. And I know economists probably who work for Kinder Morgan don't place a lot of faith in ecosystem services, and traditionally they've not been seen to be that important. Meanwhile our environment has been ignored.

18714. A priority now has to be placed on ecosystem services provided by the marine environment of the Salish Sea. If the ecosystem services of a marine near shore areas and the areas surround the Salish Sea were appropriately valued, some estimates place the value between 10 and 80 billion provided each year in benefits. We run the risk of a similar amount in lost value from the cumulative effects of increased oil tanker transport through the Salish Sea.

18715. Thirdly, the cumulative effects of an increase in marine vessel transport and the denial of responsibility as outlined in the original set of issues to be dealt with in the application. We're quite concerned that several of the issues that were put in place before the board and before Kinder Morgan to respond to have been ignored. And the one dealing with marine transport we feel especially has been given short shrift.

18716. How can Kinder Morgan keep promoting that the incidents of marine vessel accidents is low or rare? You know, in the past year alone we've just had here January 16th -- you barely heard about it but there was a bulk carrier off my back door that had to be towed from around Race Rocks from the entrance of the Strait of Juan de Fuca. Sure, it was a bulk carrier; it wasn't an oil tanker, but it had great potential for disaster.

18717. Then the Marathassa oil spill; we don't have to mention that one. Another little-heard one was the M/V Amakusa Island, a 750-foot coal carrier that ran aground outside Prince Rupert Harbour in July of 2014. These accidents do little to install confidence in the public that all the responsibilities being carried out by regulatory agencies are adequate in the face of human error.

18718. Trans Mountain has stated that once a tanker has completed loading and leaves the Westridge loading terminal the responsibility for the ship and its cargo fall under the jurisdiction of the *Canada Shipping Act*, 2001 and associated marine transport regulation.

18719. Several times we hear that kind of denial that they don't have responsibility after it leaves the shipping terminal.

18720. The inadequacy of the research done on such things as simple as does dilbit float or doesn't it are -- it's unbelievable to think how we can keep entertaining these problems when there's research being done on it, there's research currently coming out that of course can't be accepted all the time because it's after the deadline.

18721. Notably, all of Canada's oil spill response capacity is based on the critical but false assumption that oil can be recovered as it will float when spilled, and that wind and wave conditions will be low. Well, anyone who ventures beyond Pedder Bay and into the Strait of Juan de Fuca will know the situation with wind and water conditions.

18722. I'd like you to refer to the Exhibit 2, and I don't have the list here -- C33-14-1, page 19 -- showing the future marine related monitoring. Mike showed this already. And I don't think that one is it.

18723. Anyway, that's where the red "U" shape occurs at the bottom of Vancouver Island. That's the one I'm looking for. Anyway, that was one time when I first became concerned about the impact. And that was a federal report that was done, and yet it's rarely referred to in any of Kinder Morgan's concerns.

18724. I'm now on number four, risks of ship/mammal collisions to the SARA threatened species of humpback whales and killer whales, and they have not been mitigated by Kinder Morgan. And this was pointed out in the DFO's sufficiency review, the seriousness of what would happen with risk or injury and

mortality, and problems with communication in marine mammals. So that's one thing that really has to be addressed.

18725. And the risk of -- number five, the risk of elimination of the ability for whales to communicate due to increased ship traffic has not been mitigated. For the issue of marine noise by increase in tanker traffic, the DFO had likewise critical condemnation of the research and modelling done by Kinder Morgan. And I've numbered a few of the problems that DFO had with that.

18726. And both killer whales and humpback whales have already lost substantial proportions of their communication space in Haro Strait to shipping noise, and in other parts of the Salish Sea.

18727. To put this into perspective, a killer whale call that might normally be heard by other whales up to eight kilometres away actually fills a communication space of 200 square kilometres. When ships are present, they average area over which this killer whale will be heard shrinks to 75 square kilometres. At the noisiest times, its call fills only six square kilometres.

18728. Well, killer whales have evolved in that environment of darkness relying on echolocation to do almost everything in their life from communication with each other to food resources, and without that ability they're pretty well doomed, I would think.

18729. Kinder Morgan's assessment of underwater noise -- they agreed that there would be residual effects from the increase in project-related traffic. And they further admitted that humpback whales within four to seven kilometres of the shipping lanes are expected to be disturbed by vessel traffic; that this noise would likely be detectable over much greater distances; and that humpback whales will experience some degree of project-related sensory disturbance while in the Marine RSA.

18730. But then came the statement from Trans Mountain that despite this predicted residual effect and the higher density area in the western region of these animals, they recognize that this Marine RSA overlaps only a small portion of the identified Canadian critical habitat. Furthermore, the predicted residual effects will affect a relative small localized component of the population and only during periods of the year they are present within the Marine RSA.

18731. For these population status reasons, the magnitude of the predicted

residual effects was rated as medium. I'm not sure what they used as a scale to rate that as medium.

18732. Making its determination of significance for humpback whales, Trans Mountain also recognized that although it's a SARA-threatened species, the increase of project-related marine vessel traffic were deemed to have a negative impact balance. And that's considered insignificant.

18733. Certainly, this should be a red flag for the assumptions and conclusions of Kinder Morgan. There's no logic to this statement and there's no rationale for why if there is a negative impact it's considered to be insignificant. This is a SARA-protected species and that should be enough to dismiss Trans Mountain's claims of lack of impact.

18734. Number 6. The recognition by Kinder Morgan of the dynamic population change in marine mammal populations has not been taken into account.

18735. Kinder Morgan has really relied on outdated information from Stantec to profile humpback populations. Just in some of the data that we've collected from Race Rocks and the Strait of Juan de Fuca there, we just have observations on the number of days that humpback whales were sighted. And we just went back over our logs and looked at that from 2009 to 2015. And you can almost find an exponential curve in the increase of the population of humpback whales sighted in that area.

18736. The point of this graph is to highlight how there's been a rapid increase of presence of this species in the marine traffic lanes since the data used by Stantec was reported. And if you add the 2015 results, an exponential increase is obvious.

18737. The ultimate in convoluted thinking and denial of project impact is summed up by Stantec thus:

> *"While traffic in the Marine RSA is predicted to increase [...] the number of project-related vessels will stay the same. As a result, the Project's relative contribution to encounter risk will decrease over time."*

18738. Try to explain that to a child. They'll have problems following it.

18739. One might question how Stantec Reports have given so much credence in the Trans Mountain submissions on this project when they were based so much on outdated data and convoluted conclusions, and ones drawn from computer-generated resources and simulation models without any on-the-ground work.

18740. And in Information Request 2 that we've submitted, there was no reference made to the new report from DFO, dated January 2015. We asked Kinder Morgan to re-evaluate their responses to these questions based on this report since it lays bare the wide range of deficiencies in information that so far have been provided by Kinder Morgan.

18741. But the same way that humpback whales have increased, sightings of orcas have also increased. And I have there an Exhibit 8, which is C33-14-1, page 50, I think it is.

18742. Is that right?

18743. **THE REGULATORY OFFICER:** 36.

18744. **MR. FLETCHER:** That's the right one.

18745. Anyway, that's again just an observation of orcas in the area of Race Rocks, which by the way is just a few kilometres from the tanker traffic lanes.

18746. So we trust that NEB will through its Permit Conditions find that Kinder Morgan should be held to account so that there's no addition from their operation to the interference in the soundscape of the area; that Kinder Morgan's operation will be able to show practices that guarantee zero collisions with marine mammals; Kinder Morgan's operations will cause no addition to atmospheric emissions. And you might question number 2, that zero emissions. My goodness, if you can have self-driving cars you can tell when a killer whale is in your path.

18747. Kinder Morgan has indicated it is contributing to the ECHO program as Mike mentioned. We're really confused as to why the Port of Vancouver, which had 265 projects done in 2014, none of which had anything to do outside of Vancouver -- why they've been given the go-ahead to do this work. I hope that ECHO program would first of all need to find out what's going on outside their own area. We'd argue that until scientific proof is forthcoming, there can be no prejudgements on what recommendations should be made to NEB.

18748. Number 7. The refusal to recognize sea-mammal birthing colonies, especially the new colony of elephant seals and their sensitivities to oil in the water has not been recognized.

18749. **THE CHAIRMAN:** Just note, Mr. Fletcher, you have five minutes remaining.

18750. **MR. FLETCHER:** As you know, they chose a set of representative sea mammals in order to deal with the key indicator species. And they chose Steller sea lions. I've worked in the area with Steller sea lions and other marine mammals for years. To say that they represent that whole category of pinnipeds is rather unfortunate.

18751. They've never mentioned river otters at all. They've never mentioned sea otters. We had two living at Race Rocks all last summer. And they've never mentioned -- the most important part, I think, is the birthing colonies of elephant seals and harbour seals.

18752. You know that yesterday morning the second pup was born at Race Rocks. I don't know if you heard in the news or not; it should have been in the Vancouver Sun because it's rather important stuff because that's the only colony in Canada. It's a new colony established in 2009. These things are very vulnerable to the effects of oil, especially in their pupping phase, which happens from January to -- the pups go into the water in about April.

18753. But if you look at the graph there, also on Exhibit -- I don't know where your numbers here have gone. It must be Exhibit 6, C33-06-1, page 69. I went back and looked at the reports of the numbers of elephant seals out there in the last few years and again it's almost a logarithmic increase. And I haven't even included the 2015 which show a further continuation.

18754. So skipping on there several places, several areas.

18755. Oh, I mentioned how many marine mammals have been photographed in the area there and in other ecological reserves. I mentioned five reserves and how they're all pupping colonies as well. So it's a significant thing that's happening that's been totally ignored.

18756. Number 8. Kinder Morgan's inadequate choice of sea bird indicators

does not adequately reflect all the categories of birds. And suffice it to say that seas birds are not just seagulls flying around. There are nesting sea birds; there are migratory sea birds; there are winter residents; and there are the raptors that are pursuing those sea birds.

18757. Kinder Morgan again dismissed our call for better selection of sea bird indicators.

18758. And I've got lots of information there that I won't pursue any further, but it details some of those migratory birds. For instance, the one is the SARA-listed species of the red knot. They stop annually on their annual migration. If they just happen to be there in the intertidal zone when there were chronic oil from boats or a catastrophic spill, it would be very serious.

18759. Another point is Rockfish Conservation Areas. The Stantec report is number 9, has been the only source of environmental values and impacts submitted by KM and has significantly understated or ignored many of the well-known ecological assets. So rockfish areas, salmon habitat protection, concern for forage fish -- that's a big one because they use herring as a representative, and they're totally different types of forage fish than the other ones.

18760. And they've ignored invertebrates. My goodness, if you do any level of underwater work around here, you'll find the importance of invertebrates in all levels of food webs.

18761. And I've detailed some of the levels of -- and if I could just ask for just a few more minutes to sum up here.

18762. **THE CHAIRMAN:** We'll give you two more minutes and you can sum up, please, Mr. Fletcher.

18763. **MR. FLETCHER:** So the other thing which was mentioned by a previous speaker was the absence of anything to do with marine plants. Kelp are a really important part. I mean, if we were to do an assessment of what was going on in a forest and left out Douglas fir it would be about the equivalent. They've left out kelp, they've left out sea grasses.

18764. And Exhibit 9 -- you don't need to put it up, it's a rather long one. It's just there for your reference. But it's the distribution of SARA and other rare-listed species in our 19 reserves. And it's a huge list.

18765. Based on our participation and the inadequate set of responses to our information requests concerning the welfare of our 19 ERs, we're not willing to support the KM application on this project.

18766. If the NEB approves this application from KM, then NEB must include permit conditions as we've recommended in order to protect the public interest in maintaining the integrity of marine ecosystems.

18767. Further, we have urged NEB to seek the most up-to-date information before it makes decisions on the increase of pipelines and increased tanker traffic. This project cannot be considered in isolation of other energy projects proposed for this coast. Cumulative effects, as Mike has mentioned -- the cumulative effects of all the energy projects going on here must be taken into consideration and not just Kinder Morgan's in isolation.

18768. Thank you.

18769. **THE CHAIRMAN:** Mr. Fletcher, Mr. Fenger, on behalf of the Board, we'd like to thank you for your participation today and providing your oral summary argument, which we will be considering along with all of the other submissions that we have on our record and still yet to hear.

18770. And in that vein, we will be hearing tomorrow morning from the Fraser Valley Regional District, followed by the Township of Langley, and concluding in the morning with Kwantlen First Nation.

18771. With that we're adjourned until 9:00 a.m. tomorrow morning.

--- Upon adjourning at 4:26 p.m. /L'audience est ajournée à 16h26