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 38

Hearing held at
L'audience tenue à

National Energy Board
517 Tenth Avenue SW
Calgary, Alberta

February 4, 2016
Le 4 février 2016

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

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

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Calgary, Alberta, Thursday, February 4, 2016
Audience tenue à Calgary (Alberta), jeudi, le 4 février 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
Sunchild First Nation
- Mr. Kennedy Bear Robe

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

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LIST OF EXHIBITS/LISTE DES PIÈCES

No.	Description	Paragraph No./No. de paragraphe

--- Upon commencing at 1:31 p.m./L'audience débute à 13h31

20179. **THE CHAIRMAN:** Good afternoon and welcome to this afternoon's session here in Calgary, which is part of the Nation Energy Board's hearing regarding the Trans Mountain Expansion Project.

20180. We will continue to hear intervenor oral summary argument.

20181. 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.

20182. Just a brief housekeeping matter. I maybe don't need to say it today because everybody that's in the room is aware of our emergency procedure. So I will just skip that.

20183. And we're hearing -- final argument as a whole is an opportunity to express your views and opinions about the project based on the evidence filed by Trans Mountain and intervenors on the hearing record. It is also the opportunity to make recommendations to the Board about matters within the List of Issues or any terms and conditions to which the project should be subject if it is approved.

20184. The Board will not give any weight to new evidence introduced during oral summary argument or any submissions made that do not address the List of Issues.

20185. Before we begin, I would ask the counsel for Trans Mountain to introduce themselves.

20186. **MS. OLENIUK:** Good afternoon. My name is Terri-Lee Oleniuk; I'm counsel to Trans Mountain. With me is Lesley Matthews who's the regulatory lead for the project.

20187. **THE CHAIRMAN:** This afternoon we are hearing from the Sunchild First Nation and I'm just confirming that they are on the line -- it will be by telephone -- and that they can hear us.

20188. **MR. BEAR ROBE:** Yes, that's correct.

20189. **THE CHAIRMAN:** Thank you for that.

20190. And before we hear from your oral summary argument, I'll just ask if there are any preliminary matters from anyone this afternoon?

20191. I recognize -- please, could you go right to the podium, please? And for the record could you introduce yourself, please?

20192. **MR. NEIL:** Yes, thank you Chair. It's Ross Neil. I am the Crown consultation coordinator with Major Projects Management Office of Natural Resources Canada.

20193. Just a very quick preliminary matter. I just wanted to note that the Crown has been participating as an intervenor, as you're aware, in these oral summary arguments for the past several weeks. And I am attuned to the number of questions that the Panel has asked about the Crown consultation process to other intervenors.

20194. And if it would assist the Panel, I just wanted to note that the Crown is available to answer any questions that the Panel may have about the consultation process.

20195. **THE CHAIRMAN:** Could you just give us a moment, please? Thank you.

20196. **MR. BEAR ROBE:** Sure.

--- (A short pause/Courte pause)

20197. **THE CHAIRMAN:** You've raised a number of questions the Panel may have on how that would occur in our process. So what I'm proposing to do is that we will hear from Sunchild First Nation and then the Panel will take a break and then we may ask you to come back and clarify some questions that we may have on how that process will unfold this afternoon.

20198. **MR. NEIL:** And my offer was not intended to necessarily be today. In my capacity here I'm happy to answer any questions you do have, particularly as I'm losing my voice today. But that offer stands; we're at your service.

20199. **THE CHAIRMAN:** Thank you. You will return after our break after we've heard from Sunchild First Nation and we may have some other clarification questions for you for that. Thank you.

20200. With that, we are now ready to hear the oral summary argument on behalf of the Sunchild First Nation. So you are participating on the telephone. You are aware you have 40 minutes to present your oral summary argument, so I hope you can hear us well and if necessary see us. But as long as we can hear you that's the main thing.

20201. So please introduce yourselves and proceed.

20202. **--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR THE SUNCHILD FIRST NATION:**

20203. **MR. BEAR ROBE:** Okay. Good afternoon, Chairman, and Members of the Panel.

20204. First, I would like to thank you in advance for hearing Sunchild First Nation's oral summary argument regarding the proposed Trans Mountain Expansion Project.

20205. My name is Kennedy Bear Robe and I'm appearing remotely as Sunchild counsel in this matter.

20206. Before I provide you with Sunchild's final arguments, I must note that members of the Sunchild Leadership wanted to present to you directly on some of the topics that I'll cover here today. Unfortunately, due to capacity constraints, they had no other option but to proceed more efficiently.

20207. Ideally, Sunchild wanted to present information regarding its unique rights and interests and further identify the project's specific impacts since the oral traditional evidence hearing, which took place over a year ago.

20208. Additionally, Sunchild would have liked to provide the Panel with a status update on how its identified concerns have or have not been addressed since that time.

20209. Despite its stifled participation throughout this process, it was important to Sunchild to continue its attempts at having its significant concerns heard and considered by this Panel prior to making its recommendations.

20210. To be clear, Sunchild will not be seeking that the National Energy

Board supervise Crown consultation nor engage in consultation directly with Sunchild.

20211. Sunchild is requesting that recommendations be made related to the inadequate level of consultation and accommodation to date, and the consultation duties owed to Sunchild.

20212. That being said, in these submissions Sunchild will outline the reasons and the rationale for why the Board should not recommend the required Certificate of Public Convenience and Necessity. Alternatively, should the project be recommended for approval, unique conditions related directly to Sunchild should be recommended and implemented.

20213. In support of its position, Sunchild submits that the Panel cannot make a determination that the project is within the public interest, let alone the special public interest related to Sunchild's constitutionally protected Aboriginal and Treat No. 6 rights.

20214. In making these submissions, I'm mindful of the time set by the Panel pursuant to Procedural Direction No. 20 and I have a stopwatch in front of me. Unfortunately, I didn't turn it on. So perhaps someone at your end could notify me how much time I took off of the clock.

20215. **THE CHAIRMAN:** You have 37 minutes remaining.

20216. **MR. BEAR ROBE:** Okay, thank you.

20217. As an overview, I'm going to briefly discuss the following; one, Sunchild's unique rights and interests; two, Sunchild's limited participation in the hearing for the project and the consultation process for the project with Sunchild to date; and three, recommendations to the Board on a potential collaborative path forward.

20218. With that, I'll move on to the first topic area, Sunchild's rights and interest. Sunchild is made up of Ojibway and Cree people. Their territory underlies the central portions of Alberta and includes the geographic boundaries of Treaty No. 6.

20219. Today I will not go into great detail on Sunchild's Aboriginal and Treaty No. 6 rights as Sunchild has already put on the record extensive evidence

regarding its continued use and reliance upon its territory in order to carry on its way of life. These rights have been guaranteed and protected through solemn promises formalized by treaty, meaning they are existing rights and not assertions.

20220. I will note for the Panel that Sunchild holds existing rights, yet these have somehow been discounted by the Board as demonstrated through the paltry amount of participant funding program resources allocated to Sunchild and other Alberta First Nations for that matter.

20221. Simply put, Sunchild's leadership felt disrespected by the maximum contribution of $1,250 towards its costs and for this reason, Sunchild felt obliged to decline this gesture.

20222. Instead, and because Sunchild views itself as a steward and advocate of Treaty No. 6 territory, it decided to dedicate some of its own source revenues away from critical social spending initiatives to participate in this hearing for Kinder Morgan's project application requesting approvals which will ultimately impact Sunchild's Aboriginal and Treaty No. 6 rights.

20223. At the oral traditional evidence hearing, Sunchild leaders, elders and knowledge-holders expressed to you its significant concerns regarding these impacts. In particular, Sunchild explained the interconnectedness between Sunchild's way of life and the lands, waters, and resources within its territory.

20224. In doing so, Sunchild articulated many concepts related to its Indigenous legal orders and laws. Following the hearing, Sunchild elders expressed how it was difficult for Sunchild to even provide this very basic introductory seminar to the Panel as its process is so far removed from Sunchild's understanding, methodology, and the government-to-government relationship that they hold with the Crown through Treaty No. 6. In short, the artificial OTE hearing process was confining.

20225. Notwithstanding, valuable teachings were presented to you at this hearing. As Ms. Doreen Daychief Frencheater explained at the OTE hearings in Edmonton;

> *"When our Council member spoke in the beginning, he talked about the God-given right to be on this land. And when our Elders in the past, when they sign treaties, they refer to the natural law of things where the Creator gave us this right to be*

> *here on this land. He moulded us from the land and, in general, they say we have an unwritten history, but our history is written right within the land, the landscapes, the sites. The symbols are all over on the landscape.*
>
> *You go to Jasper, you look to the mountains, you'll see four […] ladies sitting right in the mountains, but you have to have that spiritual connection and that understanding of the land and the landscapes to recognize those."*

20226. Ms. Daychief Francheater's concise explanation is a statement that should not be overlooked as it discusses both generally and specifically how Sunchild's natural laws engage in respect of the proposed project.

20227. It should also indicate to the Board the significance of the spiritual and governance valued components held by Sunchild within the proposed project area that are now at risk of being directly and adversely affected by the project should it be recommended for approval.

20228. In light of the Panel potentially having a basic understanding of Sunchild's natural law, the forthcoming recommendations and the project should take all measures necessary to avoid ascending such laws.

20229. With respect, Sunchild is not optimistic that measures will be taken by either the Crown, NEB, or Trans Mountain Kinder Morgan to avoid this outcome and is disheartened as a result.

20230. In particular, the increased level of encroachment that it will have on Sunchild's *de facto* shrinking land base on purportedly provincial Crown land, Sunchild leadership, elders and members are stricken with concern.

20231. Encroachment include all non-Sunchild activities, policies and regulations that places limits on Sunchild's land and resource use and the exercise of Aboriginal and treaty rights. In other words, immediate impacts to the land are not necessary for one to offend Sunchild's resource laws. Therefore, the Panel's recommendations have a potential to offend Sunchild's laws. This must be avoided.

20232. Elder Sidney Beaverbones expressed his deep concerns at the OTE hearing in Edmonton when he stated:

> *"The reason why I came here is try to protect my grandparents, their ceremonial things that they did along Highway 16 from Spruce Grove all the way to Hinton. And my relatives still live along [the] Highway 16, and I just came from there yesterday. I stayed where they used to hunt.*
>
> *I stayed there a couple days teaching my kids how to hunt, and other kids. But my feet were sore for the last couple days. The reason why they're sore is because my -- our Mother Earth is sore. She's being disturbed too much. We're not helping her as much as -- like she's too much disturbing -- disturbance on the ground."*

20233. This is a powerful statement by Elder Beaverbones. And Sunchild's elders are physically affected to bear witness to the existing cumulative impacts within their territory, and are clearly disturbed by the fact that they feel helpless to a certain extent in preventing further proposed encroachments and protecting what is rightfully theirs and theirs for the future.

20234. I won't delve any further into the rich constitutional dimensions of Sunchild's laws, Sunchild Treaty No. 6 rights and its strongly asserted Aboriginal rights as I am mindful of the time and I still have lots to run through today.

20235. I will, however, provide a brief summary of Sunchild's project specific concerns, which include but not limited to, a decrease in wildlife and change to migratory patterns, a decrease in availability of herbal medicines, an increase of access by recreational hunters, a disturbance of sacred and ceremonial sites and corresponding impact on Sunchild's abilities to sustain traditional teachings, and impacts to sacred mountain landscapes.

20236. Additionally, as a final note on this topic, Sunchild expresses its disappointment in the position that Kinder Morgan took in respect of its late evidence motion. With respect, the Board should not have allowed Kinder Morgan to dictate any further this process.

20237. As Kinder Morgan was allowed to provide late evidence to address potential conflicts existing internally within the National Energy Board structure directly tied to this process, Sunchild ought to have been afforded a minimal amount of latitude and put on the record its further evidence that it collected for

your benefit, not for the benefit of Sunchild.

20238. The Sunchild citizens are on the land every day exercising their existing Treaty No. 6 rights and asserted Aboriginal rights. They do not need any studies to prove their inherent connection, nor should Kinder Morgan deficiencies on this topic within its project application cast any doubt on Sunchild's rights and interests along the proposed pipeline right-of-way.

20239. These are Sunchild's brief submissions on its unique rights and interests. For the reasons stated, and due to significant adverse effects and residual impacts to Sunchild Aboriginal and Treaty No. 6 rights, the Panel should not recommend the project for approval.

20240. In the alternative, Sunchild wants to remind the Panel that it remains willing to work collaboratively with the Board to assess, review, and develop appropriate measures that can be recommended to the Crown during the final approval processes subject to it being provided a sufficient consultation process.

20241. In any event, Sunchild looks to this Panel to create recommendations that are specific to Sunchild's unique rights and interests given that Sunchild has already invested so much already into this process.

20242. Sunchild hopes that the recommendations will not be broad and force less generalizations that will require further advocacy at its implementation stage opposite Kinder Morgan.

20243. The second topic which I'd like to move on to is Sunchild's limited participation in the hearing and the consultation process to date.

20244. It has been communicated by Parliament and other Aboriginal intervenors participating in this hearing for the proposed project that there are significant process-related concerns. Sunchild shares in these concerns.

20245. For the project and up to this point, Sunchild has not been provided sufficient consultation process. Specifically, the Crown has not created a consultation process with the requisite badges of consultation, including the consultation process must be accessible; the consultation process must be adequate; the consultation process must provide Sunchild an opportunity to participate in a meaningful way; and the consultation process must be discharged by final decision makers with the authority to consider and advance all possible

forms of accommodation necessary to foster and promote reconciliation.

20246. Early in the impugned consultation process, Chief Jonathan Frencheater of Sunchild wrote to the Board to express his concerns regarding the Participant Funding Program, the duty of the Crown to provide a sufficient competition process, and Sunchild's capacity constraints.

20247. Two months later and already deep into the environmental assessment process for the proposed project, the Board provided a bald response to Chief Frencheater and offered the already stated amount of $1,250 without any explanation or comments on Sunchild's detailed work plan and budget that they put a lot of thought and time into preparing. I repeat, the Crown offered $1,250 to participate in these complex proceedings that have stretched out for a long period of time.

20248. As already communicated, it is unclear why the amount available to First Nations whom have established treaty rights were provided much lower amounts than those who do not. I trust that this is not due to the incorrect assumption of the Crown that this is surrendered land and we can do whatever we want with it.

20249. I remind the Panel that this position is not supported by any authority and indeed is contrary to the main objective of consultation, which is advancing reconciliation of divergent Indigenous interests with broader societal interests.

20250. Subsequently, Chief Frencheater took the time to provide a thoughtful reply to the Board's letter enclosing the proposed funding amount. Chief Frencheater has not yet received a response to this letter and is still expecting one as communication from the Chief's desk must not be allowed to go unanswered if the Crown intends to rely upon the Board and this process to discharge its duty to consult. Certainly, the Board would not ignore a correspondence from Prime Minister Trudeau or Premier Notley.

20251. I pause here for a moment to present a question, which Mr. Ross may or may not be able to address later, and a question for which I do not have an answer for.

20252. How does the Crown expect to rely upon the Board's process in discharging its duty to consult in a manner that is consistent with the honour of the Crown in light of the recent 2015 decision of the Federal Court of Appeal in

Chippewas of the Thames First Nation v. Enbridge Pipelines?

20253. This is a question that I hope the Panel will squarely consider in writing when making its recommendations in order to allow all interested parties to provide comments on. It is an important question and should be dealt with almost as a preliminary matter by the Crown before the Panel provides its recommendations.

20254. Returning back to Sunchild's submissions on the adequacy of consultation, I note that it is clear from *Rio Tinto* that to carry out consultation on behalf of the Crown the consulting entity must have the authority to:

> *"[E]ffect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests."*

20255. As the Board was unable to provide any response to Chief Francheater on a very important feature of developing a process of consultation through the development and acceptance of a work plan and budget, it is clear that there still needs to be direct interactions between the Crown and Sunchild, notwithstanding the content of the Panel's recommendation.

20256. This is but one demonstration of the Board's many shortfalls in this process, which invites warranted questions and concerns regarding the lack of direct involvement on the part of the Crown.

20257. Due to capacity constraints, Sunchild has not had the opportunity to meaningfully participate in the NEB's hearing processes.

20258. The Board should consider the consultation efforts to date as both inadequate and unfinished in its assessment of both the public interest and special public interest. The latter applies to Sunchild.

20259. For these reasons, the Board should conclude that the proposed project is not in the public interest and should not recommend the project for approval.

20260. Moving on to the final topic area, recommendations on a path forward.

20261. Should the project be recommended for approval, it should only proceed in a manner which is consistent with the honour of the Crown, the Crown's Treaty No. 6 rights and obligations, and in a way that does not offend

Sunchild's Indigenous laws. The Panel already has Sunchild's concerns regarding the potential conditions. With respect, the potential conditions are insufficient and further work is required.

20262. As stated by Councillor Edwin Frencheater at the OTE Hearings in Edmonton:

> *"I'm [...] Anishinabe. That's who I am. [...] And I want to explain where I came from, the connection that we have, the land [...] the ties. Why is it so important for us Anishinabe to preserve and protect what's out there. I want to speak on that, but like I said, I want the elderly, the knowledge-keepers to speak. I want to speak some more. I want to speak more.*
>
> *Like I said, I repeat, I'm not here to oppose, I want Kinder Morgan to come to the table, work in an agreement, how we can move forward, to understand who I am, Anishinabe, to understand the ties and that connection.*
>
> *You can educate me and I can educate you at the same time but we got to move forward. Together we can preserve and protect what's out there. The only way I see that is for us to work together. It cannot be one-sided. It [can't] be. It's been off balance for so many years, so many years. We have to bring that up. We have to bring that to a balance where we can move forward, together [...] in the future, for the future generations.*
>
> *Together we can build those bridges in the future. The only way we can do that is by working together, how we can move forward. It cannot be one-sided. That's the only way I can see it."*

20263. Councillor Frencheater's comments touches upon the emerging legal concepts in the common law of consent. It is also a statement on how the Panel must view this hearing as an opportunity to rectify the past failings and actions that offended Sunchild laws when the original Trans Mountain Pipeline facilities were completed.

20264. In light of this, Sunchild reminds this Panel that the honourable way of

dealing with Sunchild is through the advancement of the objective of reconciliation. The path toward reconciliation should be one that seeks the support of Sunchild. Receiving the support of Sunchild is a way that the Crown can avoid offending Sunchild laws.

20265. Without Sunchild's support, which will only be reached through a collaborative working relationship based on respect, Sunchild cannot allow a project that offends its laws and poses a significant risk to Sunchild's way of life to be constructed and operated within its territory.

20266. In closing, Sunchild does not support the project and seeks that the Panel does not recommend that the certificate be issued as it is not in Sunchild's interests. Alternatively, should the project be recommended for approval, that jointly determined and adequate conditions are established and implemented.

20267. These are Sunchild's submission today. Again, I thank you for your time and I'm open to any questions that the Panel may have for Sunchild.

20268. **THE CHAIRMAN:** Thank you, Mr. Bear Robe, if you'd just give us a second.

--- (A short pause/Courte pause)

20269. **THE CHAIRMAN:** Mr. Bear Robe, the Panel have no questions of you on behalf of Sunchild First Nation. We would like to thank you for your oral summary argument and participation today. And we can assure you that we will consider your submissions along with all of the others we have received during this hearing.

20270. **MR. BEAR ROBE:** Thank you.

20271. **THE CHAIRMAN:** With that we will, as indicated in response to Mr. Neil -- and I'll just confirm that I have it right, Mr. Neil. Mr. Neil is the Crown consultation coordinator for the Major Project Management Office with the Department of Natural Resources Canada. So that's correct so that the record is clear on that.

20272. The Panel will take a recess until 2:30 and we'll come back to deal with this matter.

--- Upon recessing at 2:04 p.m./L'audience est suspendue à 14h04
--- Upon resuming at 2:46 p.m./L'audience est reprise à 14h46

20273. **THE CHAIRMAN:** Perhaps Mr. Neil you could come forward and -- so in response to your preliminary matter, the Board would like to know specifically what you are requesting so that the Panel and other parties can understand the request you raised as a preliminary matter.

20274. We are in the final days of this hearing. The evidentiary record is closed and we are not hearing new evidence without a motion. Natural Resources Canada did file written argument. They chose not to present oral summary argument. If you have a specific request of this Panel, you must file a motion before 9:00 a.m. Mountain Time tomorrow.

20275. With that, we are adjourned until 9:00 a.m. Mountain Time tomorrow morning when we will be hearing from the City of Vancouver, followed by the Alberta Federation of Labour, and then finishing up with Mr. Edward Farquhar.

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