

**NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the National Energy Board Act, R.S.C. 1985, c. N-7, as amended (“NEB Act”) and the Regulations made thereunder;

**AND IN THE MATTER OF** an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively “Trans Mountain”) for a Certificate of Public Convenience and Necessity (“CPCN”) and other related approvals pursuant to Part III of the NEB Act for the Trans Mountain Expansion Project (“Project”);

**AND IN THE MATTER OF** the National Energy Board’s (“NEB”) reconsideration of aspects of its OH-001-2014 Report as directed by the Governor in Council through Order in Council P.C. 2018-1177.

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**ARGUMENT-IN-CHIEF**

**LOUIS BULL TRIBE, TSUUT'INA NATION, DRIFTPILE CREE NATION, AND WHITEFISH LAKE FIRST NATION #459**

**JANUARY 22, 2019**

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To: The Secretary  
National Energy Board  
517-10th Avenue S.W  
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## INTRODUCTION

1. The National Energy Board (the “Board”) found that Louis Bull Tribe (“Louis Bull”), Tsuut’ina Nation (“Tsuut’ina”), Driftpile Cree Nation (“Driftpile”) and Whitefish Lake First Nation #459 (“Whitefish”), collectively the “Nations”, are either directly affected by the Trans Mountain Expansion Project (the “Project”), or are in possession of relevant information or expertise that will assist the Board and as such granted them Intervenor status in this hearing (the “Reconsideration”).
2. This Argument in-Chief of the Nations is submitted jointly and in solidarity with each other. The Project is located within the traditional territories of each of the four Nations, and as such Project-related activities will have serious direct and cumulative effects on each of the Nations, and the ability of their members to exercise their Aboriginal and Treaty rights.
3. The Project proposes to expand an existing pipeline system with approximately 987 kilometres of new pipeline segments for the purpose of transporting diluted bitumen from Edmonton, Alberta to the Westridge Terminal in Burnaby, British Columbia and thereon to markets in the Pacific Rim. The capacity to move petroleum product would increase from the current 300,000 barrels per day to 890,000 barrels per day, almost tripling the capacity of the existing pipeline system.
4. Trans Mountain submits the significant adverse environmental effects of Project-related marine shipping found by the Board in the OH-001-2014 Report are justified in the circumstances given the critical need for the Project and its important benefits for Canada. Particularly, Trans Mountain proposed three main mitigation measures to potentially reduce the effects of marine shipping, namely, route deviation, escort tugs, and working with Project shippers. Trans Mountain urges the Board to approve the Project now in order to ensure the long term success of the Canadian energy industry, and Canada itself. As such, Trans Mountain maintains the Project is in the public interest and requests the Board recommend the issuance of a Certificate of Public Convenience and Necessity (CPCN) pursuant to section 52 of the *National Energy Board Act*.
5. The Nations submit that Trans Mountain has not established that, in the context of the issues for review in this Reconsideration and the evidence that it has filed on the record as part of the Reconsideration, that the Project is needed or in the public interest or that the significant adverse environmental effects of Project-related marine shipping are justified. In the Nations’ view, Trans Mountain has overstated the benefits of the Project and the imminent need for the Project while significantly downplaying the submitted evidence of the Nations and many other intervenors of negative long term and environmental impacts of the Project to the marine environment, and the environment generally. Alternatively, if the Board takes a different view, the Project should only be approved in keeping with the proposed mitigation and avoidance measure and revised or additional conditions proposed by the Nations, and other intervenors, which have the objective of mitigating adverse impacts of the Project and engaging Indigenous Nations in all aspects of project

oversight and monitoring. In most instances, the Intervenor evidence surrounding mitigation and avoidance measures have been unjustly cast aside by Trans Mountain as being unhelpful or irrelevant.

6. The Nations submit that Trans Mountain's assessment of environmental effects of Project-related to marine shipping, and its proposed mitigation and monitoring measures, are simplistic and deficient and fail to adequately consider cumulative effects of the Project, or account for the detrimental effects on the Nations' health and socio-economic conditions, physical and cultural heritage, and current use of lands and resources by Aboriginal people, including the Nations, as required by the *Canadian Environmental Assessment Act*, 2012 ("CEAA,2012").
7. It is within this context that the Nations will raise both procedural and substantive concerns in relation to the Project and the Reconsideration hearing.
8. In particular, the Nations intend to address the following material concerns in this written argument:
  - (a) the flawed approach to environmental assessment and justification under CEAA, 2012 of Project-related marine shipping and its concomitant cumulative effects on the Nations' Aboriginal and Treaty rights;
  - (b) the procedural shortcomings of the Reconsideration, namely, unreasonable timelines, overly narrow scope, and concerns over the Board's potential conflict of interest; and
  - (c) the Crown's deficient consultation with the Nations to date in respect of the Project and the issues for Reconsideration.
9. The Nations also provide the Board with comments and advice on the draft conditions should the Board recommend approval of the Project.

## **NATIONS' ABORIGINAL AND TREATY RIGHTS**

### ***Nature of Aboriginal and Treaty Rights***

10. The Nations claim and exercise both Aboriginal and Treaty rights. Section 35(1) of the *Constitution Act, 1982*<sup>1</sup> recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." Those aboriginal rights exist because they were never extinguished upon European arrival in North America.<sup>2</sup> Such rights are *sui generis* in nature<sup>3</sup> and arise from Aboriginal peoples' prior occupation of the land and control over the land. Aboriginal rights must be interpreted flexibly; they are not frozen in time; they are to be given broad and liberal interpretation; and rights are to be construed in a purposive way.<sup>4</sup> Since aboriginal rights evolve, are dynamic, and

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<sup>1</sup> being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

<sup>2</sup> *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 [*Van Der Peet*] at para. 30.

<sup>3</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 3.

<sup>4</sup> *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106.

are not frozen in time, determining whether a right exists involves assessing continuity with pre-contact history based on a “generous though realistic approach to matching pre-contact practices to the claimed modern right.”<sup>5</sup>

11. The Supreme Court of Canada has stated the following test to identify whether an applicant has established an aboriginal right protected by s. 35(1): “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>6</sup> “Rights,” by their nature, must be of central significance to an aboriginal group’s culture, but they do not have to be unique to that culture. Survival or subsistence practices may also qualify as aboriginal rights.<sup>7</sup>
12. In addition to inherent Aboriginal rights, the Nations assert and exercise their Treaty rights. The Supreme Court of Canada has held that a treaty is an agreement whose nature is sacred.<sup>8</sup> The Nations have treaty rights flowing directly from the language of the numbered treaties they signed. In *R. v Marshall* (1999), the Supreme Court of Canada stated that rights may extend beyond the written text of a treaty, and that the context of the treaty must be considered, including (i) the historical, cultural and political context; (ii) oral histories of the Indigenous signatories; and (iii) Indigenous laws.<sup>9</sup>
13. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Supreme Court of Canada confirmed that treaty interpretation is not constrained by a strict literal approach to the text, or by rigid rules of construction.<sup>10</sup> The Court must instead look for the natural, common understanding of the parties at the time the treaty was entered into. The Supreme Court of Canada has stated that the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests, particularly in a treaty context.<sup>11</sup>
14. Courts have interpreted Treaty rights broadly to include rights to hunt, trap, harvest and fish, as well as exercise traditional religious practices and ceremonies.<sup>12</sup> Treaty rights encompass rights which are incidental to the rights granted by the Treaty, including environmental conservation required to ensure that the Aboriginal peoples can continue to exercise their rights and traditional way of living for the benefit of the current members and the future generations.<sup>13</sup>

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<sup>5</sup> *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535 at para. 46.

<sup>6</sup> *Van Der Peet* at para. 46.

<sup>7</sup> *Van Der Peet* at para. 45.

<sup>8</sup> *R v Sioui*, [1990] 1 SCR 1025 at p 1063; *Simon v The Queen*, [1985] 2 SCR 387 at p 401.

<sup>9</sup> *R v. Marshall*, [1999] 3 SCR 356.

<sup>10</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 29.

<sup>11</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at paras 78-79.

<sup>12</sup> *R v Sundown*, [1999] 1 SCR 393, *R. v. Lefthand*, 2007 ABCA 206, *C.U.P.E., Local 3197 v. Muskawchees Ambulance Authority Ltd.*, [2006] Alta. L.R.B.R. 243, [2006] A.L.R.B.D. No. 68.

<sup>13</sup> *Simon v The Queen*, [1985] 2 SCR 387.

15. Louis Bull is a signatory to Treaty No. 6 signed in 1876. Tsuut'ina signed Treaty No. 7 in 1877. Whitefish and Driftpile are signatories to Treaty No. 8.
16. Treaty No. 6 preserves Louis Bull's rights to fish and hunt throughout their traditional territory.<sup>14</sup> The aim of Treaty 6 was to preserve the traditional Indian way of life.<sup>15</sup> Treaty No. 7 protects Tsuut'ina's members right to hunt and to carry out activities incidental to hunting, fishing, and trapping.<sup>16</sup> Treaty No. 8 provides Whitefish and Driftpile rights to hunt, trap and gather within the traditional territories.<sup>17</sup> The intent of Treaty 8 was to protect "'continuity in traditional patterns of economic activity' and respect for 'traditional patterns of activity and occupation.'"<sup>18</sup>

### ***Nations' Aboriginal and Treaty Rights***

17. In their technical evidence and the oral traditional evidence hearings, the Nations' provided extensive evidence of their Aboriginal and Treaty rights, their interest in the issues for Reconsideration and the direct and adverse impact the Project will have to their rights. They provided evidence of the endangered state of their lands as a result of the cumulative impacts of development and they articulated concern about how these impacts would impact intergeneration transfer of knowledge and the exercise of their constitutionally protected Aboriginal & Treaty rights.
18. The Nations and neighbouring First Nations share stewardship and responsibility for their traditional territories. In many instances they are connected with other First Nations that are impacted by the Project, including those First Nations on the coast of British Columbia through kinship and marriage. The Nations have also expressed concern and provided evidence on how marine related impacts will directly and adversely impact the ability to exercise their Aboriginal and Treaty rights.
19. Within their traditional territories the Nations continue to exercise rights which include, but are not limited to, the following rights: fishing, trapping, harvesting, gathering berries and medicinal plants and the carrying out of spiritual and ceremonial practices.<sup>19</sup> The exercise of these rights, and participation in the traditions and customs remain central to the distinctive cultures of the Nations and their members' traditional way of life.

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<sup>14</sup> "Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions", online: Indigenous and Northern Affairs Canada, <<https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>>.

<sup>15</sup> *R. v. Jones*, 2000 CarswellAlta 591, at para. 35 as cited in *Native Law*, looseleaf (Toronto: Carswell, 1994) at chapter 21.6(j).

<sup>16</sup> "Treaty and Supplementary Treaty No. 7 between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod", online: Government of Canada < <https://www.aadnc-aandc.gc.ca/eng/1100100028793/1100100028803>>.

<sup>17</sup> "Treaty No. 8 Made June 21, 1899", online: Indigenous and Northern Affairs Canada < <https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>>.

<sup>18</sup> *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 137 (per Finch C.J.).

<sup>19</sup> insert all hyperlinks?

20. The Nations view themselves as stewards of their lands and the environment, which includes the area of the Project. In exercising their rights the Nations follow their natural laws, which mandate stewardship and diligence in protecting the environment, and natural resources for the benefits of future generations.<sup>20</sup>

### ***Louis Bull***

21. Louis Bull is one of the Four Nations of Maskwacis and is a Treaty 6 Nation. Louis Bull has a population of approximately 2,380 tribe members and is led by an elected Chief and eight Council members.
22. The community of the Four Nations of Maskwacis encompasses 3,127 hectares (7,727 acres) and is surrounded by the Ermineskin Indian reserve to the east and south-east, and the County of Wetaskiwin No. 10 to the north and west, and County of Ponoka on to the South. Louis Bull operates several business including a gas bar and convenient store, a golf course and hotel, and truck stop.
23. Louis Bull is located approximately 90 kilometres south of Edmonton. Edmonton is the site of Segment 1 of the Project, as such the Project runs directly through the traditional territory of Louis Bull. Louis Bull members exercise their Aboriginal and Treaty rights throughout their traditional territory. Many Louis Bull members have familial ties with First Nations on the coast of British Columbia. At least 12 Louis Bull members reside near or along the coast of British Columbia where they continue to exercise their Aboriginal and Treaty rights.

### ***Tsuut'ina***

24. Tsuut'ina is a Treaty 7 Nation whose reserve is located in the Calgary Region of Alberta, bordering the City of Calgary to the northeast, east and southeast. It borders the Municipal District of Foothills No. 31 to the south and Rocky View County to the west and north.
25. Tsuut'ina's traditional territory is expansive and includes roughly 130 000 km<sup>2</sup> of land as part of Treaty 7 from the Rocky Mountains to the west, the Cypress Hills to the east, the Red Deer River to the north, and the United States border, and beyond, to the south. As a result, the route of the pipeline for the Project traverses in and around Tsuut'ina's traditional territory on which Tsuut'ina continues to exercise its Aboriginal and Treaty 7 Rights.

### ***Driftpile***

26. Driftpile is signatory of Treaty 8 and is a member of the Lesser Slave Lake Indian Regional Council, in conjunction with Kapawe'no First Nation, Sawridge Band, Sucker Creek First Nation and Swan River First Nation. From 1899-1910, these communities were collectively known as a single Band, Kinasayoo's Band, and community members moved freely between reserves until 1929. At this point in time,

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<sup>20</sup> insert all hyperlinks?



the Band was officially split into the respective five First Nation communities under the directive of the Department of Indian Affairs.

27. Driftpile's reserve is located approximately 74 km west of the town of Slave Lake and 50 km east of High Prairie, on the south shore of Lesser Slave Lake. As of February 2018, Driftpile had a population of approximately 2,800 members.
28. Driftpile has about 200 members living and harvesting traditional resources in B.C. (for example, Prince George, Chetwynd and Dawson Creek).

### **Whitefish**

29. Whitefish is a Cree Nation located in northern Alberta, approximately 63 km north of High Prairie. Whitefish's reserve encompasses 8,300 hectares and is home to approximately 2,700 members. Whitefish is affiliated with Kee Tas Kee Now Tribal Council and is part of the Treaty 8 First Nations of Alberta.
30. Whitefish is situated about 260 km north of the proposed corridor of the Project. The Project traverses 120 km of Whitefish traditional territory. There will be further direct and cumulative impacts of the Project to Treaty 8 territory upon which Whitefish continues to exercise its Treaty and inherent Aboriginal rights.

### **NATIONS' EVIDENCE**

31. The Nations' affidavit evidence, oral traditional evidence, and Technical Reports confirm significant concerns in respect of the welfare of their respective traditional lands, the resources thereon, the Nations' health and socio-economic conditions, physical and cultural heritage due to Project-related activities.

### **Louis Bull Evidence**

32. Louis Bull presented evidence on environmental and traditional resource use impacts of the Project through oral traditional evidence,<sup>21</sup> affidavit evidence<sup>22</sup> and a Technical Report.<sup>23</sup>
33. The affidavit and oral traditional evidence of Louis Bull demonstrates strong familial connections that tie Louis Bull members to their relatives in coastal areas of British Columbia. These familial connections engender and sustain continued traditions of resource exchange between Louis Bull members and British Columbia Nations. Trade includes, but is not limited to, plants, herbs, preserved food and meats. Such resources are employed by Louis Bull, *inter alia*, in ceremony and as medicine.

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<sup>21</sup> [A95970](#)

<sup>22</sup> Affidavit of Melanie Daniels ([A96416-3](#)), Affidavit of Ivy Raine ([A96416-4](#)), Affidavit of Helen Bull ([A96416-5](#)), Affidavit of Travis Adams ([A96416-6](#)), Affidavit of Allison Adams-Bull ([A96416-7](#)), Affidavit of Trevor Laroque ([A96416-8](#)).

<sup>23</sup> [A96416-9](#).



34. Another common theme from Louis Bull's affidavit evidence relates to the noticeable influx of oil and gas projects in and around Louis Bull territory. Louis Bull members are increasingly concerned and anxious over incremental and cumulative impacts to the environment and its Aboriginal and Treaty Rights. This is often termed as "death by a thousand cuts". Assessing multiple oil and gas projects in isolation of one another cannot meaningfully account for the cumulative and compounding degradation to the environment and way of life of Louis Bull members.
35. Louis Bull members have witnessed detrimental effects to their environment from multiple oil and gas projects. Nation members find that they must forage and hunt further away from their lands to sustain their traditional practices and way of life. There is a significant concern that the Project will spur further oil and gas projects to transport bitumen given the increased capacity of the new pipeline.
36. Further, Louis Bull's members are increasingly distressed over the devastation that would befall their family members and their relatives' way of life in British Columbia in the event of a breach along the pipeline or a spill.
37. Currently, there are no conditions that would require Louis Bull to be notified of a breach along the Project route or a spill into the waters off the coast of the Westridge Terminal. Aside from hearing news from traditional media sources, it is unclear how, if at all, Louis Bull would receive emergency communication from the Proponent and federal and/or provincial agencies.
38. Louis Bull seeks to be involved in the monitoring and mitigation of adverse impacts to the terrestrial and marine environment in the event that the Project proceeds.
39. Louis Bull's Technical Report studied: (a) potential impacts of increased tanker traffic to endangered Southern Resident Killer Whales, and (b) the linkages amongst whales, salmon, and bears and the potential implications of increased tanker traffic on these species and other issues and concerns raised by Louis Bull residents.
40. The health and population of the Southern Resident Killer Whales (the "SRKW") is dependent on the availability of chinook salmon as a source of food. Chinook salmon, in turn is dependent on the population of west coast bears, as the nutrients required for juvenile salmon during their migration inland is completed by bears.
41. This foundational ecosystem links the marine, aquatic, and terrestrial ecosystems, whereby the fate of the SRKW and the Pacific salmon are clearly linked to the cedar, sage, sweet grass, and berries collected as "cultural necessities" by Louis Bull.
42. In respect of cumulative impacts, increased tanker traffic will implicate the fate of salmon, which is inextricably linked to the fate of the SRKW and the terrestrial ecosystems used by the Louis Bull Tribe for their cultural requirements. In this sense, these species are keystone to Indigenous culture, and their fate is not only linked to marine, freshwater, and terrestrial ecosystems, but also to the cultural health of affected Indigenous groups.

43. Louis Bull members share familial and cultural ties to nations on the west coast of British Columbia, as such they identify significant impacts on the SRKW as indirectly affecting their families and cultural identity.<sup>24</sup>
44. Indigenous knowledge and belief systems link all species in the ecosystem not only through biological connections and links through food channels, but also through spiritual and non-material connections. All things in the natural world are connected, and if one thing is affected, everything is affected.<sup>25</sup> Thus any impact on the SRKW or any other species at risk identified in this Project will have cumulative and potentially direct impacts on the species within the traditional territories of Louis Bull.
45. The Project impacts on Louis Bull's Aboriginal and Treaty rights stems from the decrease in bio-diversity and impacts Louis Bull's socio-economic and cultural practices, thus impacting their traditional way of life. As such, direct and cumulative impacts of the Project are of importance to Louis Bull's ability to exercise its Aboriginal and Treaty rights.
46. Louis Bull is particularly concerned with the increase in greenhouse gas emissions ("GHGs"), which will lead to climate change affecting the aspen forest that currently dominates much of Louis Bull's traditional territory. Louis Bull has and continues to practice its traditions and culture amongst the aspen forests of Alberta. Climate change linked to increased resource extraction is slowly but certainly causing notable cumulative impacts to Louis Bull members' way of life.
47. The Project's cumulative effects include those on the marine ecology at the Westridge Marine Terminal. They also include cumulative effects on the habitat and persistence of associated species (e.g., salmon and their ecological linkages), thus indirectly impacting the Albertan landscape encompassing Louis Bull's traditional territory.

### ***Tsuut'ina Evidence***

48. Tsuut'ina submitted oral traditional evidence,<sup>26</sup> affidavits of the elders, knowledge keepers and technicians<sup>27</sup>, and a Technical Report delineating environmental and traditional resource use impacts of Project related activities.<sup>28</sup>
49. The affidavit evidence of Tsuut'ina's Elders delineates Tsuut'ina's history and connection to its Treaty and traditional territory and the natural resources thereon. The Elders depose on invaluable lessons on land stewardship and sustainability passed down to them from their foremothers and forefathers. The Elders underscore

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<sup>24</sup> Affidavit evidence Travis Adams ([A96416-6](#)) and Allison Adams-Bull ([A96416-7](#)).

<sup>25</sup> Affidavit evidence of Ivy Raine ([A96416-4](#)).

<sup>26</sup> [A96047](#)

<sup>27</sup> Affidavit of Harley Crow Child ([A6L6Z2](#)), Affidavit of Anthony (Tony) Starlight ([A6L6Z3](#)), Affidavit of Violet Meguinis ([A6L6Z4](#)).

<sup>28</sup> [A96469-6](#)

Tsuut'ina's guiding principle to protect and monitor their traditional territory for future generations. They set out their familial connections to neighbouring First Nations and the activities of trade that continues today. The Elders list in detail the varieties of herbs, plants, fruits and wild game they historically and presently gather, trap and hunt, including the concomitant uses of such resources. These resources are employed by Tsuut'ina, *inter alia*, in ceremony and as medicine.

50. Given their personal and historic interaction with the land over the past decades, the Elders are well positioned to give evidence on the changes they have seen to the land and water including the current state of plant and wildlife. The Elders each give their unique account of the degradation they have witnessed on their traditional territory and the significant decline in the health and abundance of plant and wildlife.
51. The Elders express profound concern over the sustainability of their natural resources and lifestyle. They see no end in sight in respect of the Project and other oil and gas development, which is unfolding at a speed and in a manner that is contrary to their traditional desire to promote land stewardship and sustainability. The Elders also repeat much of the same evidence that is being submitted by other First Nation Intervenor in this hearing being that Tsuut'ina members find that they must forage and hunt further away from their traditional lands to sustain their traditional practices and way of life.
52. The same themes and concerns were echoed by other Tsuut'ina Elders, members and staff at the oral traditional evidence hearings. Notably, Ms. Saddleback, Tsuut'ina's Consultation Coordinator, testified that Tsuut'ina has not been given the opportunity or capacity funding to conduct a TLU survey in and around the corridor of the Project. She recounted numerous examples of negative cumulative effects from oil and gas development in and around Tsuut'ina's traditional territory. In her role, she has found it overwhelming to keep up with the pace of oil and gas projects on Tsuut'ina's traditional lands.
53. Tsuut'ina's Technical Report studied the area within the Eastern Slopes of Alberta, an area used extensively by Tsuut'ina Nation members and many other Indigenous peoples to exercise their Aboriginal and Treaty rights. These Eastern Slopes are being impacted by the effects of climate change, and therefore the cumulative impacts contributed to by Project-related marine shipping GHGs, which will negatively impact Tsuut'ina's ability to exercise its Aboriginal and Treaty rights.
54. Tsuut'ina participated in a field assessment and Traditional Knowledge Study (TKS) of selected locations along Alberta's Eastern Slopes, near Grande Prairie, Edson, and Rocky Mountain House. The results of this study point to diminishing populations of various plants and wildlife as listed in the study within Tsuut'ina's traditional territories.
55. The increased GHGs caused by increased Project related activities will contribute to the cumulative impacts of climate change within Tsuut'ina's traditional territories and Tsuut'ina's members must increasingly travel further to access food and medicines

that were once in their vicinity. They are troubled by the continued destruction of habitat from linear development for natural gas and oil projects. They feel they must now “chase” their harvest. It was also noted that a lot of human activity is now being concentrated into a smaller area, making it more difficult for harvesting quality plants. Similar effects have been observed to wildlife, necessitating Tsuut’ina’s members to travel further to hunt and trap.

### ***Driftpile Evidence***

56. Driftpile presented its evidence on environmental and traditional resource use impacts of the Project through oral traditional evidence,<sup>29</sup> and a Technical Report.<sup>30</sup>
57. The following is a summary of Driftpile members’ oral traditional evidence at the hearing. Elder Ross Giroux Sr. relayed how he teaches Driftpile youth traditional knowledge as well as protocols for hunting, trapping and fishing as part of his responsibility to foster the inter-generational transfer of knowledge. As a trapper he spoke of his concerns about the impacts of pipelines to fur-bearing animals and the impacts from vibrations which come from pipelines. He testified about how pipelines have disrupted breeding patterns and led to the movement and decline of such animals. He also discussed how pipelines, and development generally, has impacted the ability of Driftpile members to gather.
58. Elder Paula Giroux discussed her concern that progress impacts wildlife habitat and she observed how her family’s use of the land for traditional purposes has diminished with development, including uses such as hunting and gathering. She also expressed concerns about how the intergenerational transfer of knowledge is becoming diminished due to the impacts of development on Driftpile’s Aboriginal and Treaty Rights.
59. Elder John H. Giroux testified about changes to the environment in his lifetime and how they have impacted his traditional way of life and the rights of other Driftpile members. He elaborated on how the cumulative impacts of the Project will impact his rights and his community. As a hunter, Elder J.H. Giroux gave evidence with respect to the demise of wild game and fish during his lifetime. He also spoke of the Nation members’ roles as stewards and keepers of the land, and the desire to maintain this important connection to the land.
60. Mr. Karl Giroux testified about how, as a residential school survivor, he lost his language. He shared a story of hunting with his parents and grandparents as a child and how he learned that for important matters you need to raise your voice, which he and Driftpile representatives were doing at the Project hearings. Mr. Giroux expressed concerns about the cumulative impacts of pipelines, and other developments, to the lands, air and waters upon which Driftpile members rely for the exercise of their Aboriginal and Treaty Rights.

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<sup>29</sup> [A95993](#)

<sup>30</sup> [A96450-3](#)

61. Below is a summary of the key findings from Driftpile's Technical Report.

***Evidence about Impacts of the Project to the Terrestrial and Marine Environment***

62. The Technical Report identified potential negative impacts of Project related marine shipping on the following species including Basking Sharks, Western Grebe and Horned Grebe, Tope, Green Sturgeon, Longspine Thornyhead, Roughye Rockfish, Northern Abalone, and Olympia Oyster. The Technical Report states that Trans Mountain has not adequately addressed the strategies and actions to be undertaken to ensure proper monitoring and provide mitigation measures to preserve these species. Driftpile recommends that Trans Mountain engage with and provide resources to the Federal Department of Fisheries and Indigenous groups to implement population monitoring and mitigation measures to protect the endangered species.
63. Driftpile submits that Trans Mountain inadequately assessed impacts of the Project-related marine activity on GHGs. Trans Mountain is only accounting for GHG emissions from tankers within the Marine Air Quality RSA. This RSA includes the Westridge Marine Terminal (WMT) and extends out to the 12-mile nautical limit of Canada's territorial zone. The choice of limiting calculations to within 12-nautical miles is completely arbitrary and captures only a fraction of the true tanker miles required for transporting oil products associated with the Project. Trans Mountain should evaluate how potential increases in the value of Western Canada Select may result in increased production of the oil-sands, leading to additional shipping needed for transporting the products to international markets.
64. The geographic response plans prepared as a part of the development of the mitigation strategies to limit the impact of potential spills caused by the Project only included participation of selected coastal Indigenous groups. The plan included a 3 day training course that provided operational-level information on the scope of roles and responsibilities should a spill occur. Such emergency response plan is inadequate because it does not provide for measures to assess and limit the impact of spills on inland territories and does not adequately engage the cooperation and assistance of Indigenous communities.

***Traditional Resource Use***

65. Driftpile members continue to hunt large game such as moose, deer, and elk as well as smaller game like rabbits, grouse (chickens), and waterfowl. Historically Driftpile would have also harvested bison (now extirpated from the area) and woodland caribou (now a Species at Risk). Moose meat is a mainstay of Driftpile's diet and they are hunted year-round. Fish has always been an important resource to Driftpile members. Nets are set on Lesser Slave Lake adjacent to Reserve 150 primarily for walleye, whitefish, and northern pike and are also set in a variety of smaller lakes in their territory. Many of the smaller rivers and the creeks in their territory are fished for species like Arctic grayling with angling also occurring in larger rivers in their territory.

66. Plant resources are very important to Driftpile livelihood not only in the form of dietary and medicinal resources but also for structures for temporary shelters, tipis, cabins, material culture like birch bark containers, canoes, snowshoes, sleds, meat and hide processing, artistic expression, etc. Some critical berry resources to Driftpile include blueberries, low bush cranberries, Saskatoons, pin cherries, high bush cranberries, gooseberries, strawberries, and raspberries. Berries are often frozen or canned for use throughout the winter.
67. Accidental releases are a main concern with pipeline development for Driftpile members. A spill will significantly impact wildlife, fish, vegetation, surface water, soils, etc. and Driftpile traditional land and resource use.

### **Whitefish Evidence**

68. Whitefish presented its evidence on environmental and traditional resource use impacts of the Project through oral traditional evidence,<sup>31</sup> and a Technical Report.<sup>32</sup>
69. The following is a summary of the oral traditional evidence. Elder Herman Sutherland testified on his use of traditional medicines that come from mountainous areas. He has seen such resources diminish with increased pipeline activity. He acknowledged that pipelines have a limited life, yet the destruction they cause to the environment lasts permanently. He expressed concern over the Project serving as a catalyst for further oil and gas infrastructure development. Elder Sutherland is resolved to preserve his traditional medicines and herbs as best as he can for future generations.
70. Elder Sutherland also expressed a concern over the quality of water for Whitefish and the high risks of oil and gas projects contaminating underground fresh water reserves, especially in the event of a breach along the Project route.
71. Elder Pat Gray testified about his concern over the route of the Project as it traverses traditional gathering places including lakes, berry-picking, camping and hunting locations. In the event of a pipeline rupture, he expressed concern over the damage that would occur to these places including land and marine animals. He reiterated Elder Sutherland's concern for preserving the land for future generations. His primary concern is for the grandchildren and great-grandchildren to come.
72. Elder Henry Grey has witnessed the significant death and decline of fish populations in Utikuma Lake, while a neighboring lake to the west, Little Lake (next to the Saskatoon Island Provincial Park in Alberta) has plenty of fish since there is little to no pipeline activity in or around that area. In comparison to last year when he found abundant fish, he has been unable to find any more this year.
73. Elder Dennis Grey supported and adopted the oral testimony of the other elders in the hearing as his own.

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<sup>31</sup> [A96047](#)

<sup>32</sup> [A96463-3](#)



74. Mr. Fabian Grey gave evidence that Whitefish members trade or exchange resources with neighbouring First Nations from mountainous areas and from coastal British Columbia. Current petroleum industry projects in and around Whitefish include, but are not limited to, oil sands projects in the Peace River area to the west of Whitefish, Wabasca to the east, and Fort McMurray to the north. Should the Project proceed to the south of Whitefish, Mr. Grey explained the impediment and threat to his traditional way of life.
75. He gave various examples of Whitefish members finding no animals or fish for the purposes of hunting and fishing. Whitefish was informed by the Alberta Fish & Game Association to not fish in or around Utikuma Lake. He recalled there were leaks of contaminants into the lake, but Alberta Fish & Game Association has not specified why exactly Whitefish Nation members cannot fish at Utikuma. Mr. Grey specified that fish spawn from the larger Utikuma Lake to the smaller Utikumasis Lake. He noted barely any fish spawned this autumn due to fish having died last spring.
76. Alberta Fish & Game Association has also told Whitefish members, without providing a reason, that they cannot fish in the river that crosses their reserve or else they will be fined.
77. Mr. Grey testified that according to his experience, industry proponents are hesitant to inform Whitefish of any spills in or around their territory. The Alberta Energy Regulator informs Whitefish if there has been a spill. Often Whitefish members find out indirectly as they witness the spills; for example, Whitefish members have found leaking oil heads. They then notify the company responsible for that well. There is deficient communication between field operators in respect of spills, which results in no communication to Whitefish.
78. Mr. Grey implored the Board to direct and pay heed to environmental studies that identify cumulative effects such that corrective action be taken. Mr. Grey queried the environmental and human cost of delivering bitumen to international markets and whether the Project is indeed in the Canadian public interest. Mr. Grey highlighted a potential conflict of interest in that the federal and provincial governments may be animated by industry interests, but a balancing of interests needs to occur. He expressed concern over the rather paltry fines imposed against industry members who breach environmental regulations or fail to properly clean up the environment post-spill. He advocated for a change in policy in this area.
79. Mr. Grey suggested that the Proponent consider making First Nations part owners of and partly responsible for the Project. This is a way to permit continued surveillance and monitoring of the pipeline and to make First Nations Intervenor know they are part of the Board's decision should the Project be approved. Such a condition may also serve as mitigation against malfunctions and accidents along the Project route.



80. In its Technical Report, Whitefish took issue with Trans Mountain's assessment<sup>33</sup> of localized cumulative impacts of the Project-related activities. Such impacts cannot be adequately assessed and analyzed without considering the overall contribution of the Project and its direct and cumulative impact on the interests of the inland as well as onshore First Nations.
81. The Technical Report identified the following impacts of the Project on its member's ability to exercise their Aboriginal and Treaty rights, as well as their social and economic wellbeing:
- (a) impact to trap line holders due to depletion of furbearers, and impairment of access to trap lines;
  - (b) reduction in hunting success due to influx of non-aboriginal hunters and depletion of local moose populations;
  - (c) restriction of local and area lake fishing;
  - (d) limited to no real opportunity Whitefish members employment or contracts or training associated with the advent of local and area oil and gas activity and the resulting absence of economic benefits of the Project to Whitefish members.

## **ARGUMENT**

82. As aforementioned, there are three significant issues that the Nations intend to address in this written argument:
- (a) the flawed approach to environmental assessment and justification under CEAA, 2012 of Project-related marine shipping and its concomitant cumulative effects on the Nations' Aboriginal and Treaty rights;
  - (b) the procedural shortcomings of the Reconsideration, namely, unreasonable timelines, overly narrow in scope, and concerns over the Board's potential conflict of interest; and,
  - (c) the Crown's deficient consultation with the Nations.

### **A) The flawed approach to environmental assessment and justification under CEAA, 2012 of Project-related marine shipping and its concomitant cumulative effects on the Nations' Aboriginal and Treaty rights;**

83. The Nations submit two central points on the flawed environmental assessment in this Reconsideration.

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<sup>33</sup> [A95280](#)

84. First, Trans Mountain's assessment of environmental effects of Project-related marine shipping and its proposed mitigation and monitoring measures is deficient and fails to adequately consider cumulative effects, or account for the detrimental effects on the Nations' health and socio-economic conditions, physical and cultural heritage, and current use of lands and resources by Aboriginal people, including the Nations, as required by the *Canadian Environmental Assessment Act*, 2012 ("CEAA, 2012").
85. Second, the Nations submit that the Board was incorrect in its Ruling No. 24<sup>34</sup> where it declined to conduct a proper risk assessment of Project-related marine shipping that includes all SARA-listed species that may be affected by Project-related marine shipping.

### ***Trans Mountain's Flawed Environmental Assessment***

86. CEAA, 2012 requires an assessment of adverse effects on the "current use of lands and resources by Aboriginal people for traditional purposes".<sup>35</sup> In the context of First Nations' rights and the "public interest", this consideration goes beyond simply assessing the impacts on the environment, but should also consider the impacts on the meaningful exercise of the constitutionally protected Aboriginal and Treaty rights that must be considered by both the Board, the Minister and the Governor in Council in determining whether the approval of a project is justified.
87. An assessment of Project-related marine shipping must include an assessment of the cumulative effects of the Project on the Nations' ability to meaningfully exercise their rights. The Nations', as well as the majority of Indigenous Intervenor in this proceeding, have repeatedly raised the issue of cumulative effects. The failure to adequately account for cumulative effects of development has led to a "death by a thousand cuts".
88. Trans Mountain's approach to environmental assessment does not take into account a consideration of the cumulative impacts on Indigenous communities from the Project and the ever growing natural gas and oil projects in and around their territories. As a result, Indigenous communities are at risk of being further marginalized in their ability to exercise their inherent Aboriginal rights and Treaty rights, without appropriate mitigation and avoidance measure being in place.
89. Trans Mountain's approach to its environmental assessment of Project-related marine shipping uses the existing environment as the baseline to measure Project-related effects as it did in the first hearing.<sup>36</sup> However, this approach fails to account for both retrospective and prospective effects. Indeed, we do not see Trans Mountain accounting for the existing environmental effects and risks that have accrued from

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<sup>34</sup> [A97046-1](#)

<sup>35</sup> CEAA, 2012, s. 5(1)(c).

<sup>36</sup> [A95280](#).

the existing pipeline and then determining how those effects would be compounded by the introduction of the expansion.

90. The Project must be situated within the existing physical environment, which in this case is already heavily impacted. The assessment must be cognizant of the physical activities that will be carried out. This does not mean only those activities as a result of the Project, such as increased oil sands production and increased greenhouse gas emissions, but also assessment of the compounding effect of other projects along the pipeline route that exist or that are likely to be carried out in the future.
91. It is important to recall that in the first hearing, the Board decided that it would not consider either the upstream activities or the downstream use of the oil transported by the pipeline, such as increased oil sands production and increased greenhouse gas emissions. This has significant implications for the validity of the cumulative effects assessment undertaken and ultimately the justification of the Project under CEAA, 2012.<sup>37</sup>
92. As set out in Louis Bull's Technical Report, cumulative effects management requires the linking of increased tanker traffic near Vancouver with the connected indirect, secondary, short or long-term cumulative effects of the Project, rather than the localized impact approach as adopted by Trans Mountain.
93. In respect of assessing effects of Project-related marine shipping on *Species At Risk Act* listed species, Trans Mountain adopted an "indicator species approach" to assess effects of Project-related marine shipping on SARA-listed marine species. This approach categorizes species in such a way that risks treating all terrestrial and marine mammals at risk equally, and crucial details are lost by lumping them together, including cumulative effects on such species.<sup>38</sup>
94. In the Nations' Information Request No. 1 to Trans Mountain<sup>39</sup>, they inquired whether the Recovery Strategies, Action Plans or Management Plans relied upon by Trans Mountain for SARA listed species, including those listed at Table 4.0 of its Direct Evidence, permit assessment of before and after Project population levels of species at risk. Trans Mountain's response to this request was, "Trans Mountain is not responsible for preparing Recovery Strategies, Action Plans, or Management Plans for species listed on Schedule 1 of SARA. This responsibility falls to the federal competent ministers (i.e., Minister of Fisheries and Oceans, Minister of Environment and Climate Change, and Minister responsible for Parks Canada Agency)."<sup>40</sup> The Nations' made the same information request to Parks Canada Agency,<sup>41</sup> and Parks Canada pointed responsibility back on Trans Mountain as follows, "Specifically

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<sup>37</sup> NEB Report, Trans Mountain Expansion Project, May 2016, p. 160.

<sup>38</sup> [A96416-9](#), p. 18.

<sup>39</sup> [A6Q1V3](#)

<sup>40</sup> [A6Q5Z3](#)

<sup>41</sup> [A6Q1Z0](#)

monitoring pre-project and post-project effects on population levels of species at risk is the responsibility of the project proponent.”

95. Notwithstanding the differing positions of Trans Mountain and the federal Ministries and Agencies, it is absolutely crucial that environmental assessment of SARA listed species include comprehensive measures for monitoring pre and post-Project population levels and action plans in response to declining numbers. This approach permits recovery strategies, action and management plans that account for the cumulative impacts on species’ population levels as a result of multiple and ever increasing resource development projects.
96. In respect SARA-listed species, the basking shark, Parks Canada Agency confirmed in their response to Information Request No. 1 from the Nations that neither they nor the Department of Fisheries and Oceans Canada has identified the critical habitat for the basking shark, and no specific mitigations regarding effects of project-related marine shipping have been implemented in Parks Canada managed waters. The responsibility for identifying the critical habitat falls on the Department of Fisheries and Oceans (the “DFO”).
97. Subsection 79(2) of SARA requires the Board to identify the adverse effects of the Project on SARA-listed species and their *critical habitat*. The Nations question how the Board can fulfill this mandate in view of the DFO’s failure to identify the basking shark’s critical habitat and Trans Mountain’s superficial assessment of this endangered marine species.
98. Despite not knowing the critical habitat of this endangered species, Trans Mountain was confident enough to state in its response to the Nations’ Information Request No.1 that, “Trans Mountain concluded that residual effects on Basking Shark would be negligible in magnitude, low in probability, and not significant. Given that Project-related marine transportation is not likely to adversely affect Basking Shark..”.<sup>42</sup>
99. Again, we see Trans Mountain adopting an approach to environmental assessment that is localized and not retrospective nor prospective; for example, we simply do not know what will be the effects of chronic and minor spills of bitumen into the ocean and Salish Sea on SARA-listed species, including the basking shark.
100. Further, Trans Mountain in its Direct Evidence estimates the impact on SARA-listed species as those that may be in the risk of “serious harm” or “least risk” as determined by Fisheries and Oceans Canada. Such units of measurement are opaque and leave no room to account for cumulative effects on such species and Indigenous input on the same.
101. Additionally, the Nations’ Technical Reports made numerous findings wherein Trans Mountain failed in its evidence submitted in this hearing to account for ongoing adverse cumulative effects ranging from human health risks, barriers to harvesting,

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<sup>42</sup> [A6Q5Z3](#)

climate change induced impacts to species of cultural importance, ecosystems and habitats; for example,

- (a) failure to account for the cumulative impacts due to other industrial development projects in concert with the Project;
  - (b) in its “consultation update”,<sup>43</sup> Trans Mountain has not mentioned how cumulative effects raised by Indigenous groups will be addressed;
  - (c) how increased shipping will further lead to increased land-use development in Alberta to exploit the pipeline’s capacity.
102. The Nations’ traditional territories are located in close proximity to the proposed Project route and the Nations’ resources and traditional way of life has already been impacted by Project-related activities in concert with ongoing natural gas and oil development. Trans Mountain states that the Project is economically beneficial for Canada, although it is unapparent how, if at all, the Nations have been extended an opportunity to share in the purported benefits of the Project.
103. Should the Project be approved, the Nations’ Aboriginal and Treaty rights will be impacted, and the scope and extent of these impacts need to be fully understood, acknowledged and addressed. Indigenous communities should be allowed opportunities and funding for direct involvement in all environmental and cultural monitoring programs, as well as emergency response programs.
104. Undoubtedly, the Project will have adverse direct and cumulative impacts on the ability of the Nations to exercise their Aboriginal and Treaty rights, as well their ability to transfer traditional skills and knowledge, as many their traditional ways of living and learning are inherently connected to the ability to perform practices and exercise traditional rights on the land.
105. Among the most significant impacts on the Aboriginal and Treaty rights as identified in the Nations’ evidence and technical reports are:
- (a) Impacts on hunting and trapping:
  - (b) impacts to quality and quantity of wildlife including impacts to sensitive areas such as salt licks, beaver dams, bear dens, game trails, eagles nests, etc;
  - (c) Impacts to fishing: diminishing of habitat of fish due to warming temperatures of inland water sources;
  - (d) Impacts to gathering: decrease in quality and quantity of vegetation including impacts to berry species and medicinal plants;
  - (e) Impacts to camps, cabins, burial and spiritual ceremonial sites;

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<sup>43</sup> [A95280](#).

- (f) Impacts to the quality of the drinking water in the traditional territories of the Nations;
  - (g) Impacts to familial and cultural connections and trading between the Nations and their British Columbian kin
106. As a result of these impacts, the members of the Nations are forced to travel longer distances to be able to exercise their Aboriginal and Treaty rights.
107. Should the Project be approved, the Nations submit that the NEB must include Conditions for approval that will provide for a proper assessment of its impacts, including impacts to SARA-listed species, as well as mitigation and accommodation measures to compensate for the diminished ability of the Nations to exercise their Treaty rights, *prior to the commencement of construction of the Project*.

***The Board erred in Ruling No. 24***

108. With respect, the Nations submit that the Board erred in denying Living Oceans and Raincoast's Notice of Motion to require Trans Mountain to identify effects and measures with respect to SARA subsection 79(2)<sup>44</sup> requirements for each SARA-listed marine species. In this Reconsideration, the Board identified 35 specific SARA-listed species that are likely to be affected by Project-related marine shipping. Trans Mountain did not provide a new risk assessment in this Reconsideration and continued to rely on the generic, indicator species approach to SARA S. 79(2) requirement to identify and ensure measures with respect to every SARA-listed species.
109. The Board cannot rely on its conclusions in its OH-001-2014 Report in its evaluation of Trans Mountain's Ecological Risk Assessment of Project-related marine shipping.
110. It must be recalled that the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, found that by defining the Project not to include Project-related marine shipping under the CEAA 2012, the Board failed to consider its obligations under SARA when it considered the Project's impact on the SRKW (see paras. 454-456).
111. Subsection 79(2) of the SARA required the Board to ensure, if the Project was carried out, that "measures are taken to avoid or lessen" the Project's effects on SRKW and to monitor those measures. In order to substantially comply with section 79 of the SARA, the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on SRKW.

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<sup>44</sup> 79(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

112. The above point above applies equally to all other SARA-listed species that may be affected by Project-related marine shipping and that section 79 refers to requirements at the individual species level. The Federal Court of Appeal in *Tsleil-Waututh Nation* expressly stated that it was focused on the SRKW because that was the primary focus of the applicants; therefore, the Board cannot simply focus on one species and assume that it has discharged its duty. By including project related marine shipping under the definition of “designated project”, it is now incumbent on the Board to ensure the requirements of s. 79(2) of SARA are met for each listed species.
113. In this Reconsideration, many Indigenous intervenors emphasized the importance of specific SARA-listed species and the health of the marine environment in relation to their constitutionally protected rights, cultural practices, and values. Certain Indigenous intervenors also submitted that, without a new risk assessment, they will not know the extent to which their rights may be affected by the Project.
114. In sum, the Board ought to have required Trans Mountain to conduct a new risk assessment of Project-related marine shipping. The Board should seek to rectify this deficiency, by seeking additional time from the Governor in Council for this Reconsideration, prior to making its decision in respect of this Reconsideration. We have outlined our concerns in respect of the process for this hearing in the following section.

**B) The procedural shortcomings of the Reconsideration, namely, unreasonable timelines, overly narrow in scope, and concerns over the Board’s potential conflict of interest**

***Reasonableness of timelines***

115. The abbreviated nature of the Reconsideration has diminished the Nations’ ability to meaningfully engage in the process and as such compromised the procedural fairness of the process by:
  - (a) Failing to allow Nations adequate opportunity and time to collect technical evidence, notwithstanding the extension of time afforded by the NEB;
  - (b) Failing to provide the Nations sufficient time to review and consider evidence submitted by other parties;
  - (c) The evidence was presented through Information Requests and affidavit evidence and such procedures do not allow adequate opportunities for the NEB to consider the credibility of the witnesses and properly assess the weight to be allocated to their evidence; and,
  - (d) The NEB failed to provide the parties adequate time to comment on the draft conditions for the Project approval.



116. Pursuant to s. 52(7) of *National Energy Board Act*, the Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time. The Nations submit that in the circumstances of the Reconsideration, the Board Chairperson ought to have sought an order from the Minister to amend the compressed timeframe of this hearing to avoid having a procedurally flawed, hurried and incomplete hearing.
117. The decision maker in an administrative hearing owes all participants of the hearing a duty to act fairly, which includes the fundamental principle of natural justice – the right to hear the other side, and an adequate opportunity to correct or contradict such evidence.<sup>45</sup> A party that will be directly affected by an adverse decision must possess sufficient information in its possession to make representations on its own behalf and to effectively prepare its own case and answer the case to be met.<sup>46</sup>
118. The extensive nature of the Aboriginal and Treaty rights and title affected by this Reconsideration, not only for the Nations, but for other Indigenous Intervenors, required the NEB to provide them with reasonable timelines to meet the Board's hearing deadlines. Many of the Intervenors simply do not possess the capacity to engage at the rapid pace the Board required in this Reconsideration.
119. Throughout each day of the Reconsideration, Intervenors were met with an unyielding barrage of submissions, evidence and rulings relating to the Applicant, numerous Intervenors and other parties. The depth and volume of the evidence submitted by the parties could not adequately be reviewed and responded to within the short timelines. In order to keep pace with the Reconsideration, an Intervenor could easily have employed a full-time team to manage, review and respond to all NEB, parties' and other Intervenors' filings.
120. Trans Mountain has an entire team including multiple experts and consultants at their immediate disposal and the Federal agencies are amply resourced to engage in the Reconsideration. That cannot be said for the numerous Indigenous Intervenors who will see adverse effects on their constitutionally protected Aboriginal and Treaty rights should this Project be approved. Further, given the hurried nature of this hearing process, the full extent of those effects will not be understood, thus negating the possibility of the issues under Reconsideration being addressed with approval conditions and recommendations that will meaningfully avoid, mitigate and accommodate impacts to the Aboriginal and Treaty rights and title of impacted Aboriginal groups.
121. The goal of the Reconsideration was to allow the NEB an opportunity to adequately assess all potential impacts of the Project, and the Nations took on a significant undertaking of assisting the NEB by participating in the Reconsideration process to assess potential issues and impacts of the Project and provide recommendations for

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<sup>45</sup> *Kane v. University of British Columbia*, 1980 CarswellBC 599, [1980] 1 S.C.R. 1105 at para 33.

<sup>46</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 ("*Charkaoui*") at para 63.

avoidance, mitigation and accommodation. Nevertheless, unavoidably, there will be material gaps and areas in which the Nations were unable to provide evidence leading to a deficient evidentiary record wherein the opportunity to “hear the other side” was truncated.

122. Due to the short deadlines for the provision of evidence and related capacity constraints, the Nations were unable to undertake full traditional resource use research and technical reports. They often had to rely on the environmental assessment and research from past studies in preparing their submissions.
123. As a result, the evidence presented by the Nations may not fully address the scope of the direct and cumulative effects of the Project on their Aboriginal and Treaty rights. More comprehensive studies are required to adequately estimate the impact of the Project over an extended period of time.
124. The Nations and other Intervenor were given only 12 days to review and comment on NEB draft conditions. Worst still, the final arguments of the Applicant and the Federal Agencies were due only five days before the Intervenor had to submit their final written argument. This is hardly enough time to read and fully respond to Trans Mountain’s final submissions in this hearing.
125. This hearing only permitted submission of evidence in the form of an oral traditional evidence hearing, affidavits, Information Requests and written evidence. The hearing process did not allow for the cross examinations of witnesses and experts on their evidence. Being able to do so would have also afforded Intervenor an avenue to test any reasonable apprehensions of bias for the Project as displayed by the Board and experts relied upon by Trans Mountain and the Federal agencies, who must maintain neutrality at all times. In *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, the Court held that “The Board’s Procedure did allow the applicants a meaningful opportunity to present their cases fully and fairly” [para. 257]. However, the Nation’s submit that the severely truncated nature of this hearing did not provide the Intervenor the opportunity to present their evidence fully and fairly. A limited process of cross-examination would have contributed to the fairness of the Project, particularly given the federal government’s purchase of the Project and the resulting heightened risk of a reasonable apprehension of bias on the part of the Board.
126. Given the preceding context, the Nations argue that their procedural rights to know the case to be met and to have adequate opportunity to respond to it and provide fulsome comment on conditions were compromised in this Reconsideration. The Nations’ public trust and confidence in the NEB procedural process is endangered and this Reconsideration risks appearing as simply a “rubber stamp” on a predetermined political decision to approve the Project.

### ***Overly Narrow in Scope***

127. The Nations acknowledge the Board's Ruling No. 22 on the Applications for review from Living Oceans Society and Raincoast Conservation Foundation, and Tsleil-Waututh Nation.<sup>47</sup>
128. In respect of the Board's decision to deny the Spatial Limits Review, the Nations maintain their position that the Board missed an opportunity to adopt a precautionary and preventative approach in its spatial assessment of the Project for the purposes of assessment pursuant to CEAA 2012. Such an approach would have better accounted for the cumulative impacts of the Project, especially in respect of GHG emissions. In its reasons, the Board makes no mention at all of accounting for the significant increase in GHGs due to increased tanker traffic. Indeed, there is a material difference between 12 and 200 nautical miles in terms of ecological effects from either GHGs, massive spill or cumulative effects from minor leaks and acoustic impacts on marine life.
129. In the Board's Ruling No. 22, it also declined to engage in a Socio-Economic Effects Review. The Nations repeat the requirements of s. 5(1)(c) of CEAA, 2012, in respect of Aboriginal peoples, an environmental effect occurring in Canada of any change that may be caused to the environment includes, *inter alia*, consideration of (i) health and socio-economic conditions and (ii) physical and cultural heritage. Consequently, any assessments of the Project under CEAA mandates a review of health and socio-economic conditions as captured under s. 5(1)(c) relating to impacts to cultural heritage.
130. As First Nations from Alberta, the Nations are directly and acutely impacted by the rapid pace of development that is causing detrimental socio-economic and socio-cultural effects that need to be meaningfully considered by the Board in their justification analyses under CEAA 2012 and in asking whether the Project is indeed in the public interest pursuant to the National Energy Board Act, R.S.C. 1985, c. N-7 ("NEBA").
131. Ultimately, it is prudent and in keeping with the purpose and intent of the CEAA 2012, and the Crown's duty to consult, to permit Intervenor to provide evidence on the socio-economic impacts to them and to the lives of their members as revealed by the evidence submitted thus far. It would be inconsistent with procedural fairness obligations and legal jurisprudence to ignore the relevance of such evidence in this hearing.

### ***Reasonable Apprehension of Bias and Conflict of Interest***

132. The common law duty of fairness requires the Board to perform its functions free from both a material interest in the outcome, and from bias or from creating a

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<sup>47</sup> [A96969-1](#)

reasonable apprehension of bias.<sup>48</sup> The Board must be institutionally independent, meaning that the Board must arrive at its decisions wholly independent of outside and improper influence or considerations, not only in fact, but also by appearance to the outside world.<sup>49</sup>

133. The authors of *Judicial Review of Administrative Decisions in Canada*, write, "...the law requires not only that adjudicative decision-makers be impartial in fact, but also that they appear to be impartial, so that parties can have confidence that their participation in the process was meaningful, which in turn will enhance the acceptability of the resulting decision.<sup>50</sup> It is unnecessary for a party raising a reasonable apprehension of bias to furnish direct evidence of a decision-maker's subjective state of mind, rather they must point to evidence that will show a real likelihood of bias as viewed by an outsider's perspective.<sup>51</sup>

134. Whether certain circumstances are sufficient to disqualify decision-makers on the ground of reasonable apprehension of bias depends on the following general test:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude...<sup>52</sup>

135. The Nations submit that when applying the above test to context, circumstances, and optics of this Reconsideration, an informed person, viewing the matter realistically and practically – and having thought the matter through – would easily conclude that a reasonable apprehension of bias exists in this Reconsideration.

136. The Nations' concerns do not rest merely on empty suspicion, but are grounded in the practical reality that is facing the Board at this moment in time. The context and circumstances are such that the probability and likelihood of the Project *not* being recommended for approval to the Governor-in-Council would truly be remarkable and unprecedented. All indicia point to the conclusion that the Board is biased towards recommendation of the Project's approval to the Governor-in-Council.

137. The Board responded to comments on a potential conflict of interest from various Intervenor in this Reconsideration in its reasons for its decisions in its October 12, 2018 letter related to the List of Issues, the Amended Factors and Scope of the

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<sup>48</sup> *R. v. S. (R.D.)*, 1997 CarswellNS 301, [1997] 3 S.C.R. 484.

<sup>49</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264, [1995] 1 S.C.R. 3 at p. 49

<sup>50</sup> Donald J. M. Brown and Professor John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, vol. 2 (Toronto: Canvasback, 1998), at 11:1200 [*Judicial Review of Administrative Action in Canada*].

<sup>51</sup> *Judicial Review of Administrative Action in Canada*, at 11:1200.

<sup>52</sup> *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, [1978] 1 S.C.R. 369 at pp. 394-5, per de Grandpré J., dissenting.

Factors for the Environmental Assessment pursuant to the CEAA, 2012. The Board claimed that it is aware of the federal government's ownership of the Project and stated that it is an expert-quasi-judicial tribunal that operates at arms-length from the government.

138. In response to claims of a potential conflict of interest if federal agencies are called to provide expert information, given that the federal Crown now owns the Project, the Board pointed to a code of conduct that all public sector employees must adhere to. The Board also noted that from time to time tribunals make decisions involving a government proponent.
139. Unfortunately, the Board's claims of impartiality do not quell the concerns of the Nations. To an outsider, the proponent, the federal agencies and the Board seem aligned in their positions to see the Project approved. Any motions by Intervenor to place further and legally required obligations on Trans Mountain and to expand the Board's duty in this Reconsideration were defeated by the Board.
140. At this point in time, the Nations simply do not have full confidence in the Board to execute its task completely at arms-length from the proponent and free from any influence by the proponent, the federal agencies and the Governor-in-Council. The size of this Project is significant and rare and the circumstances in which the applicant for the Project became a government proponent is highly peculiar and unprecedented. The Board cannot pretend that it is uninfluenced by the heavily charged and political context of this Reconsideration. This context simply cannot be ignored and must be openly acknowledged.
141. The federal government purchased the Project for \$4.5 billion in the Spring of 2018. This is \$4.5 billion of public money. There is understandably public pressure on the government to see a return on its investment. The Prime Minister has on various occasions made remarks to connote that the Project's approval is a pre-determined outcome. The Prime Minister has openly stated during this Reconsideration that, "We believe the Trans Mountain pipeline expansion is in the best interest of all Canadians. We are committed to upholding the national interests."<sup>53</sup> It is also common knowledge that Alberta's current provincial government is pushing to increase transportation of Albertan oil and natural gas to markets and has openly expressed frustration of the stalled Project and the damage it is purportedly causing Alberta's economy.<sup>54</sup>
142. Especially in the context of the Board's prior recommendation of the Project and multiple concerns over bias in the first hearing<sup>55</sup>, the Nations submit the obvious,

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<sup>53</sup> "Trudeau committed to building Trans Mountain despite new legal challenges." CBC News, August 31, 2018, <<https://www.cbc.ca/news/politics/tasker-trans-mountain-trudeau-1.4806361>>.

<sup>54</sup> "Notley says Alberta will buy rail cars to move oil, wants Ottawa to chip in." CBC News, November 28, 2018, <<https://www.cbc.ca/news/politics/notley-alberta-rail-cars-move-oil-trudeau-1.4923976>>

<sup>55</sup> Recall the delay caused to the first hearing due to a conflict of interest that developed when one of Trans Mountain's consultants (Stephen Kelly) was appointed to the Board, which resulted in his evidence being revoked on August 21, 2015 and the need for Trans Mountain to file replacement

being that the Board faces an immense amount of political and public pressure to recommend the Project for approval such that it is hard to conceive of a situation where the Board would not recommend the Project's approval. This is relevant in light of the Board's reputation of making decisions favourable to the resource development industry.<sup>56</sup> Such a reputation, whether founded or unfounded, is relevant in so far as the optics and context is presented to an outside observer.

143. By ordering that the Reconsideration be completed within five months, the federal government created the impression that it simply required the Board's bureaucratic "stamp of approval". The Prime Minister's open remarks about the Project being in the public interest in concert with the Board's new draft conditions for approval and recommendations raise reasonable concerns whether the outcome of this Reconsideration was pre-determined such that all the Board needed to do was "tweak" conditions and add recommendations to support the Project's approval.
144. The Board's mandate is to promote safety and security, environmental protection and economic efficiency in the Canadian public interest, in the regulation of pipelines, energy development and trade. The evidence submitted in this Reconsideration by the Nations and other Intervenor casts serious doubt whether this Project is in the interests of Canada in terms of further engraining reliance on fossil fuels and the economic boom and busts associated with it and exacerbating climate change. This is separate and apart from the overwhelming evidence on the environmental degradation and assault on Aboriginal and Treaty rights.
145. This Reconsideration may be a situation wherein the Board is or will be unduly pressured or influenced to recommend approval of the Project by government, the resource development industry and the general public that want to see a return on the government's purchase of the Project.
146. Having regard to the full context, circumstance and optics of this Reconsideration, the Nations submit that an informed person, viewing the matter realistically and practically—and having thought the matter through would conclude that the Board's decision to recommend approval of the Project, as it likely will, was a decision based on disqualifying bias. At this juncture, there is little, if anything that the Board may do to reverse such a finding short of recommending that the Project not be approved.

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evidence, NEB Report, Trans Mountain Expansion Project, May 2016, p. 7; see also public withdrawal of prominent economist as Intervenor from first hearing due to allegations of biased process: "Expert drops out of 'biased' NEB Trans Mountain pipeline review." CTV News, May 20, 2015, <<https://www.ctvnews.ca/business/expert-drops-out-of-biased-neb-trans-mountain-pipeline-review-1.2383251>>; see also research results that showed only 10% of Intervenor in the first hearing believed that the Board would fully consider all the evidence and make an unbiased recommendation: "Evaluation of the Regulatory Review Process for Pipeline Expansion in Canada: A Case Study of the Trans Mountain Expansion Project." by Katherine Zmuda, <<http://summit.sfu.ca/item/17788>>.

<sup>56</sup> "NEB pipeline plan slammed for pro-oil industry 'bias'". Vancouver Sun, January 14, 2019, < [NEB Pipeline plan slammed for pro-oil industry 'bias'](#)>.



**C) The Crown's deficient consultation with the Nations**

147. It is common ground that the Crown's duty to consult has been triggered in this Reconsideration. The Crown's duty to consult, grounded in the honour of the Crown, requires a process that provides meaningful consultation, and where appropriate, accommodation, in the spirit of reconciliation. In *Haida*, the SCC held that while the Crown may delegate "procedural" elements of its duty to consult, "the ultimate legal responsibility for consultation and accommodation rests with the Crown and the Crown alone."<sup>57</sup>
148. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* confirmed that regulatory processes must directly examine impacts on treaty rights, not just environmental effects, if the Crown intends to rely on these processes to discharge its duty to consult.<sup>58</sup> Where the impact of a proposed project on Aboriginal and treaty rights is not adequately considered, the court may quash the decision of the regulatory body.<sup>59</sup>
149. In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, the Court held that where affected Indigenous groups have raised concerns about the adequacy of consultation before a tribunal or regulatory agency, the tribunal or regulatory agency must consider and address those concerns in written reasons. There needs to be an indication that they considered the asserted Aboriginal and treaty rights and any negative consequences on those rights and accommodated them where appropriate.
150. Aside from voluntarily choosing to participate as Intervenor in this Reconsideration, to date the Nations have not been independently and separately consulted by Trans Mountain or any federal or provincial government agency or representative. Ms. Norine Saddleback, on behalf of Tsuut'ina expressed concerns over the lack of engagement with Tsuut'ina at the oral traditional evidence hearing.<sup>60</sup> There have been no direct discussions regarding consultation and accommodation between the Nations and the Crown during this proceeding.
151. It appears that Canada in its submissions is relying on the Indigenous Advisory and Monitoring Committee (IAMC) to accommodate Indigenous concerns about the Project.<sup>61</sup> Ms. Norine Saddleback from Tsuut'ina is an IAMC member of the Indigenous Caucus representing Alberta First Nations. While the Nations will engage with IAMC to whatever extent possible, the IAMC cannot replace or diminish the right of individual Indigenous communities including the Nations to be consulted and accommodated by Canada.

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<sup>57</sup> *Haida Nation*, 2004 SCC 73 at para 53.

<sup>58</sup> *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

<sup>59</sup> *Clyde River (Hamlet)*, paras. 43-53.

<sup>60</sup> [A96047-1](#)

<sup>61</sup> [A95292-2](#)



152. The Nations submitted an Information Request to Trans Mountain<sup>62</sup> asking whether it will engage with the Nations to explore avoidance, mitigation and accommodation measures or agreements in respect of impacts to each Nations' rights and interests. Despite Trans Mountain's response<sup>63</sup> to the Nations that it is committed to ongoing and meaningful consultation throughout the life cycle of the Project, the Nations have yet to receive any communication from Trans Mountain. In its response to the request, Trans Mountain seems to have simply deferred this responsibility onto IAMC.
153. The Nations took initiative and engaged in this Reconsideration while the Crown took a passive role appears to be materially relying on this hurried process to discharge any duty owed to consult with the Nations. The potential infringement on the Nations' Aboriginal and Treaty rights is not trivial as supported by their evidence. As set out above, there are numerous concerns raised by the Nations supporting the fact that the Project will significantly impact their traditional territories and impinge on the maintenance of their culture and way of life. Some of the harm to the Nations is potentially irreparable and likely cannot be mitigated.
154. The Crown ought to have engaged with the Nations early, directly and proactively. The Nations are completely bombarded by a never ending string of resource development projects. The Nations evidence confirmed that the Project's proximity traverses their traditional territories. Nevertheless, the record of the Project reflects inadequate engagement by Trans Mountain or the Board such that the Crown cannot rely on the this process for discharging its constitutional duty to consult with the Nations. The Crown must develop its own record with the objective of addressing and adequately avoiding or mitigating the concerns raised by the Nations.
155. The duty to consult is a cornerstone of Crown-Indigenous relations. The honour of the Crown requires the government to consult with and, if appropriate, accommodate Indigenous groups whenever it contemplates an action that could affect Indigenous interests.<sup>64</sup> The government must ensure that the Indigenous representations are "seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action".<sup>65</sup>
156. In order to fulfil this duty, the Crown must provide an appropriate process in which the Indigenous group has a reasonable opportunity to assess the potential impacts of the Project and to provide feedback that is well-reasoned and capable of contributing meaningfully to the government's decision. The Nations argue that a "deep duty" of consultation is owed in respect of the Project and the issues for Reconsideration.

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<sup>62</sup> [A97008-8](#).

<sup>63</sup> [A97008-8](#)

<sup>64</sup> *Haida*.

<sup>65</sup> *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 160.

157. The Board hearing process, with its tight timelines, limited oral hearings, lack of funding, absence of cross examination and lack of direct engagement between the Nations and the Crown has thus far proven itself inadequate to fulfill that objective.
158. While the Board and Trans Mountain have failed to engage in any meaningful manner with the Nations, in respect of the Project's impacts to their Aboriginal and Treaty rights, the Nations submit that there is still an opportunity for this to be rectified. The Nations remain willing to work with Trans Mountain and the Crown, *within the context of a meaningful process*, to address their concerns before determination of whether the Project should be approved. In particular, the Nations invite the Crown to design a unique and meaningful Crown consultation process which appropriately and fully discharges the deep duty of consultation that is owed to the Nations in the context of the issues raised in this Reconsideration, with the objective of substantially resolving and accommodating their concerns.
159. Should the Project be approved despite the serious concerns raised by the Nations and other Intervenor in this Reconsideration, the Nations seek that the Board to adopt its proposed conditions and recommendations as set out below and accept the Nations' comments on the Board's draft conditions and recommendations.

### **Proposed Conditions & Recommendations**

160. The Nations propose the following conditions and recommendations in respect of consultation, environmental, and socio-economic matters. All the proposed conditions and recommendations should occur *prior* to the start of construction where applicable.

#### ***Consultation Matters***

- (a) Having not engaged in any discussions with the Nations, Trans Mountain ought to be obliged by way of a condition to meet individually with each Nation to review their evidence. Where appropriate, Trans Mountain will implement avoidance, mitigation and accommodation measures or agreements in respect of impacts to each Nations rights and interests. This should occur in the near future and certainly before any construction begins on the Project.
- (b) While the Board cannot instruct Canada on how to discharge its duty to consult, it can by way of a recommendation to the Governor-in-Council recommend and highlight that during this hearing process none of the Nations were consulted by the Crown and they should be prior to the Project's construction.
- (c) The Board shall recommend to the Crown and require Trans Mountain to engage with the Nations and other potentially affected Indigenous groups to explore mitigation and accommodation measures to compensate for the diminished ability of the Nations to exercise their Treaty rights, *prior to the commencement of construction of the Project*.

- (d) The hurried nature of this Reconsideration did not permit complete TLUs to be completed by the Nations. The Nations should be permitted and funded to complete TLUs on an expedited basis. Trans Mountain should account for the results of the studies where appropriate as required by the conditions for the Project where they relate to Indigenous interests and rights.
- (e) Separate and apart from the IAMC, Trans Mountain should be required to establish a corporate department that is dedicated to engraining a relationship of Indigenous led guardian style and long term environmental and cultural monitoring for the Project.
- (f) The Board should require adequate allocation of funds and resources to directly engage Indigenous communities and individuals in the monitoring and emergency response programs for the lifetime of the Project and that Indigenous communities are provided equipment and training to meaningfully engage in these activities. Where appropriate, this work should be done in a manner that collaborates with and supports the objectives of the IAMC.

### ***Environmental Matters***

- (a) Having not required Trans Mountain to provide a new risk assessment in this Reconsideration to identify and ensure measures are in place for each of the 35 identified SARA-listed species pursuant to s. 79(2) of SARA, the Board ought to require Trans Mountain to do so as part of its Marine Mammal Protection Program. Any and all risk assessments must permit an assessment of the before and after population levels of all SARA-listed species.

This new risk assessment should employ a less generic approach to assessing the impacts from Project-related marine shipping than the indicator species approach.

Trans Mountain cannot defer this condition to the DFO, but should strive to align its work with the DFO's marine mammal Recovery Strategies and Action Plans.

- (b) Having failed to identify the critical habitat of the basking shark, the Board ought to recommend to the Governor-in-Council that the DFO complete this task and revise and update the Recovery Strategy and Action Plan for this specific species. The Governor-in-Council should ensure that the DFO's Recovery Strategies and Action Plans for all the 35 identified SARA-listed species likely to be affected by Project-related marine shipping be as complete as possible prior to the Project's construction.
- (c) The Board ought to recommend that the Governor-in-Council require the DFO and any other applicable federal department to monitor the before and after population levels of all SARA endangered species throughout the life cycle of the Project in all DFO Recovery Strategy and Action Plans for all SARA-listed species.

- (d) The Board should recommend that the Governor-in-Council require the DFO to regularly communicate its findings to Trans Mountain. Trans Mountain must then reassess and, at regular intervals, revise its Marine Mammal Protection Program.
- (e) The Board should recommend that the Governor-in-Council require Parks Canada and the DFO to revise the Multi-species Action Plans for the Gulf Islands National Park Reserve of Canada to address the effects of (1) dissolved, mixed and sinking bitumen and (2) floating oil slicks and emulsified oil on the sea surface on the western grebe and horned grebe.

### ***Socio-economic Matters***

- (a) The Board should make it a condition of Project approval that Trans Mountain assess and report on the effectiveness of new oil spill response technology developments and whether adoption of such measures is appropriate at regular intervals, including a requirement for all tanker vessels to be equipped with such technology.
- (b) The Western Canada Marine Response Corporation ("WMERC") confirmed in its response to the Nations' Information Request<sup>66</sup> that it is not responsible for emergency response for spills in freshwaters, as such there is no emergency response planning around freshwater sheds and points across Provincial borders.

There are no conditions attached to this Project to establish emergency response protocols in respect of spills into freshwater environments. This is simply unacceptable for a Project of this size and scope.

The Board must impose similar conditions on this Project as it has for spills into the marine environment. Any and all such conditions must require public reporting with affected Aboriginal groups within a reasonable amount of time after a spill occurs.

### ***Comments on Board's draft conditions and recommendations***

<b>Comments on Draft Conditions</b>	
<b><i>Condition No.</i></b>	<b><i>Comments and Proposed revisions</i></b>
91	<p><b><i>Comment:</i></b></p> <p>In order to be responsive to Indigenous Knowledge and Indigenous participation in monitoring, a marine spill prevention and response plan should be developed with the Nations and other potentially affected Indigenous groups.</p>

<sup>66</sup> [A97014-9](#)

	<p><b>Proposed revision:</b></p> <p>Trans Mountain must file with the NEB, <b>at least 2 months prior to commencing construction</b>, a plan describing how it will ensure that it will meet the requirements of Condition 133 regarding marine spill prevention and response. The plan must be prepared in consultation with Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia, <u>interested Indigenous groups, either directly or through the IAMC</u>, and must identify any issues or concerns raised and how Trans Mountain has addressed or responded to them.</p>
132	<p><b>Comment:</b></p> <p>Trans Mountain should consider <i>and</i> incorporate relevant TLU and TEK information.</p> <p><b>Proposed revision:</b></p> <p>f) a description of how Trans Mountain has <del>taken</del><u>incorporated</u> available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the program, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding, MH-052-2018 Reconsideration proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.</p>
151	<p><b>Comment:</b></p> <p>Valued components must not be set without appropriate engagement of potentially affected Indigenous groups.</p> <p><b>Proposed revision:</b></p> <ul style="list-style-type: none"> <li>• ...“description of the valued components or issues that were assessed or monitored;</li> <li>• <u>a description of how potentially affected Indigenous groups were engaged in the development of the valued components and how their input was incorporated</u></li> </ul> <p>...</p>

Comments on Draft Recommendations	
Recommendation No.	Comments and Proposed Revisions:
1	<p><b>Comment:</b></p> <p>Revisions have been proposed to enhance consideration of Indigenous knowledge.</p> <p><b>Proposed revision:</b></p> <p>d) any monitoring necessary to help determine the extent of cumulative <u>effects, including effects to both ecological and socio-ecological systems</u>, the success of measures to manage those effects, and progress towards meeting targets</p>
2	<p><b>Comment:</b></p> <p>Revisions and additions have been proposed to highlight and strengthen the scope of Indigenous consultation.</p> <p><b>Proposed revision and additions:</b></p> <p>f) <del>consultation</del> <u>engagement on</u> activities related to these initiatives and measures <u>with marine users</u>, <del>including with Indigenous peoples and other marine users;</del></p> <p>g) <u>meaningful consultation and accommodation with Indigenous peoples with the objective of integrating socio-ecological issues and TEK into cumulative effects planning; and</u></p> <p>h) <u>steps taken to facilitate compliance with recommendation 2(g).</u></p>
4	<p><b>Comment:</b></p> <p>Strong commitments are required in respect of a Marine Conservation Area.</p> <p><b>Proposed revision:</b></p> <p>The Governor in Council should expedite the work in <del>completing the feasibility study for</del> establishing a Southern Strait of Georgia National Marine Conservation Area, publicly report on the outcomes of that study, and (if considered feasible) proceed to establish <del>it</del> <u>the new Marine Conservation Area with the objective of these measures being in place, no later than the first quarter of 2021.</u></p>
5	<p><b>Comment:</b></p> <p>It is appropriate to monitor noise levels on a seasonal basis and</p>

	<p>more emphasis should be placed on mitigating impacts of underwater noise.</p> <p><b>Proposed revision:</b></p> <p>“...There should be <del>periodic</del> <u>quarterly</u> reporting that includes measured or estimated underwater noise and strike risk due to Project-related marine shipping, and the extent over time to which that additional noise and strike risk has been offset by measures that apply to all appropriate vessels. <u>Effective monitoring of these efforts will include evidence-based targets for mitigating underwater noise and the monitoring should report quantitative analyses on whether these targets were achieved and whether they were effective.</u></p>
6	<p><b>Comment:</b></p> <p>Stronger commitments are proposed.</p> <p><b>Proposed revision:</b></p> <p>As part of Recommendation 5 to offset the underwater noise and strike risk added by Project-related marine shipping, the Governor in Council should <u>develop a plan to implement</u> each of the following specific measures, each applicable to all appropriate vessels (i.e., not limited to Project-related vessels), and publicly report on <del>the feasibility of</del> <u>progress with respect to</u> each (including consideration of socio-economic effects):</p> <ul style="list-style-type: none"> <li>• slowdowns in each section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Juan de Fuca Strait, and out to the 12-nautical-mile territorial sea limit) and that apply to all appropriate vessels;</li> <li>• <del>potential</del> <u>applicable</u> limits on the number of whale watching boats (and/or their time on water);</li> <li>• explicit noise reduction targets for <del>regularly operating ferries</del> <u>all vessels operating</u> in the area;</li> <li>• identification of specific whale congregation and migration areas (including for resident killer, humpback, grey, and fin whales, as well as basking shark) and consideration of specific routing and speed restrictions in those areas; and</li> </ul> <p>further incentives and requirements for quiet vessel design to address underwater noise over the long term.</p>
11	<p><b>Comment:</b></p> <p>The commitment to engage the IAMC should be mandatory.</p> <p>The proposed assessment respects the definition of environmental effect, pursuant to CEAA 2012 Section 5(1)(c) with respect to Aboriginal cultural heritage and current use of lands and resources for traditional purposes. It also respects the</p>

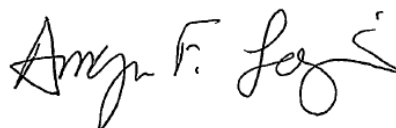


	<p>rights to the land, self-determination, and the right of cultural integrity guaranteed in the Constitution Act 1982, Section 35.</p> <p><b>Proposed revision:</b></p> <p>“The Governor in Council <del>should</del><u>shall</u>, in conjunction with Transport Canada and the Canadian Coast Guard, <del>facilitate opportunities, as appropriate, to engage, and seek</del> <u>and be responsive to</u> feedback from the Indigenous Advisory and Monitoring Committee ...”</p> <p><u>As part of this engagement valued socio-ecological relationships of Indigenous culture should also be identified and assessed for impact by the Project.</u></p>
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## CONCLUSION

161. The Project will have adverse direct and cumulative impact on the Nations' Aboriginal and Treaty rights and their ability to exercise the rights, as well as their ability to transfer traditional skills and knowledge between generations. If the Project is approved notwithstanding the Nations preceding procedural and substantive arguments in respect of the Reconsideration and the Project, the NEB must impose conditions to address these adverse impacts of the Project to the Nations and other intervenors. Such conditions must recommend steps to avoid any adverse impacts of the Project, and establish mechanisms to mitigate any adverse impact of the Project by providing Indigenous groups with means and resources to engage in continuing monitoring and emergency response for the lifetime of the Project. Additionally, the Conditions must accommodate the interests of First Nations by providing their members with opportunities to benefit from the new economies created by the Project, including awarding contracts to perform work on the Project and providing other forms of participation and sharing of the economic benefits of the Project which is far more extensive than may have been proposed by Trans Mountain or the Crown to date.

All of which is respectfully submitted, this 22<sup>nd</sup> day of January, 2019.



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Aryn F. Lalji