

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7 as amended, and the regulations made thereunder;

IN THE MATTER OF the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 37, as amended, and the regulations made thereunder;

IN THE MATTER OF an application by Trans Mountain Pipeline ULC for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III and Part IV of the *National Energy Board Act*; and

IN THE MATTER OF Hearing Order OH-001-2014 and National Energy Board File Number OF-Fac-Oil-T260-2013-03 02.

TRANS MOUNTAIN EXPANSION PROJECT

Final Argument of Squamish Nation

January 12, 2016

TO: The Secretary of the Board
National Energy Board
517 10th Avenue SW
Calgary, Alberta T2R 0A8

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PART 1 OVERVIEW

1. The lands and waters in and around Burrard Inlet are the home and traditional territory of the Squamish Nation (“Squamish”). Squamish relies on their traditional territory to support their way of life and for the meaningful exercise of their aboriginal rights. Squamish take their sacred role as protectors and stewards of their territory seriously and wish to ensure that it is able to support future generations of Squamish people.
2. Trans Mountain Pipeline ULC (“Trans Mountain”) proposes to expand the existing Trans Mountain pipeline system within the heart of Squamish territory. Trans Mountain proposes to almost triple the capacity of the current system – with two new delivery lines, 13 new tanks at the Burnaby Mountain Terminal, and a new dock complex at the Westridge Marine Terminal (the “Project”). The expansion will result in an exponential increase in shipping in Squamish waters from 5 tankers per month to 34 tankers per month.
3. Squamish territory is at the epicenter of the Project. The Project represents very significant potential infringements of the aboriginal title of Squamish and impacts to their aboriginal rights.
4. In light of the honour of the Crown and section 35(1) of the *Constitution Act, 1982*, the Crown owes a duty to meaningfully consult with and if necessary accommodate Squamish in regards to the potential impacts and infringements to their asserted aboriginal rights and title arising from the Project before the decision to recommend whether the Project is in the public interest is made by the National Energy Board (the “Board” or the “NEB”).
5. The Crown has proposed a staged approach to consultation for the Project – relying to the extent possible on the NEB process – that precludes the impacts of the Project from being the subject of consultation and accommodation until after it is too late to be meaningful. The Board’s decision under s. 52 of the *National Energy Board Act* is the key strategic decision to be made in relation to the Project. It is the decision that will determine whether the Project is in the public interest, after which, the Project

will inevitably gain, or lose, momentum. The Governor in Council in practice defers to the Board's recommendation, and is bound by the Board's conditions.

6. Despite the significance of the recommendation to be made by the Board, the Crown has not endeavored to meet its constitutional obligations to Squamish before the Board's decision, and only proposes to begin meaningful consultation after the fact. The Crown admits that consultation after the Board's recommendation is needed in order to discharge the duty to consult Squamish – leaving the duty unfulfilled.
7. The NEB process has further proved to be an inappropriate and inadequate forum for discharging the constitutional obligations owed to Squamish. The Board's process has been driven by Trans Mountain, and has not provided the opportunity to meaningfully assess the impacts of the Project on the unique interests of Squamish. The federal government has recognized the need to modernize the Board's process in order to be able to account for impacts on First Nations. This modernization has yet to occur, leaving Squamish to participate in a process that has been recognized as incapable of assessing impacts on its interests. The Board must either reject the Project or, at a minimum, hold off considering the Project until the modernization of the process has occurred.
8. As a result of the inadequate process, the extent of the Project impacts on Squamish is largely unknown at this time. Squamish has not had the opportunity to undertake any kind of rigorous assessment of the Project's impacts on Squamish title, rights and interests, nor has Trans Mountain, or the Crown done so. However, the evidence that has been presented indicates that Squamish has a very strong claim to aboriginal rights and title to the lands and waters that stand to be affected by the Project, and that the Project presents very significant potential adverse impacts on Squamish. There is no question that the Project would interrupt the meaningful exercise of Squamish aboriginal rights, and have a very serious long-term impact on Squamish.
9. The impact of a spill of diluted bitumen from the Project within Squamish territory would be catastrophic, causing harm to Squamish people, lands and waters, with the potential to permanently impact on the ability of Squamish to support its way of life.

Trans Mountain has not shown that it has the ability to respond to such a spill, or remediate Squamish lands and waters in the aftermath of such a spill.

10. The historical imposition of the Trans Mountain pipeline system and facilities on Squamish, without their consent, in the 1950s, does not justify their expansion today. Given the potential for the Project to pose significant risks and impacts to Squamish people, rights and interests, and the failure of the process to properly assess the extent of these risks and impacts, and accommodate Squamish's concerns, Squamish has determined that the Project is not in the interests of Squamish, and does not consent to the Project going through the territory of Squamish. Squamish requests that the Board recommend that the Project is not in the public interest.

PART 2 SQUAMISH NATION

A. SQUAMISH PEOPLE

11. Squamish is an Aboriginal people within the meaning of s. 35 of the *Constitution Act* 1982. Squamish is a "band" as defined in the *Indian Act*, R.S.C. 1985, c. I-5.
12. Squamish has more than 4,000 registered members. A large percentage of the population – more than 50% – is under the age of 30. Approximately half of these members live on Squamish reserves, with a majority living on the North and West Vancouver reserves. The remainder of the Squamish population is spread throughout Squamish and Coast Salish territory. Both on and off reserve members rely on the land, waters and resources within Squamish territory to sustain their way of life.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5338

13. Squamish people speak their own language, Skwxwú7mesh Sníchim, and are connected to the larger Coast Salish community through culture and kinship ties. The Coast Salish people inhabit the areas stretching from the northern reaches of the Strait of Georgia to the Lower Mainland and lower Fraser River area, across to Vancouver Island, and south to Puget Sound in the United States.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 6, PDF 15; 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5269

B. SQUAMISH TERRITORY

14. Squamish asserts aboriginal rights and title to its traditional territory, which covers significant portions of the Lower Mainland. Squamish traditional territory includes some of the present day cities of Vancouver, Burnaby and New Westminster, all of the cities of North Vancouver and West Vancouver, Port Moody and all of the District of Squamish and the Municipality of Whistler. The boundaries of Squamish traditional territory embrace all of Howe Sound, Burrard Inlet and English Bay as well as the rivers and creeks that flow into these bodies of water.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 1, PDF 10; C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 7, PDF 16

15. In addition to its traditional territory, Squamish has a broader consultation area that reflects areas where Squamish has long-term historical and cultural ties and where they continue to exercise their rights today. This consultation area includes regions outside the identified traditional territory.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 7, PDF 16; C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 4, PDF 13

16. The Squamish traditional use and occupancy study identifies 501 traditional use and occupancy sites in Southern Howe Sound, Burrard Inlet and Indian Arm, and the lower Fraser River. These sites illustrate the extensive and intensive nature of Squamish use and occupation of these areas, and the dependency of Squamish culture and identity on the marine and aquatic environment.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 104, PDF 38

17. Squamish has used and occupied its territory for thousands of years, and continues to do so today. First contact with Squamish was in the late 18th century. At least sixteen Squamish village sites have been identified in records dating back to the 19th century. Most of the inhabitants of these villages also had summer residences in southern Howe Sound, the area around Burrard Inlet, and what is now Greater Vancouver.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 9-10, PDF 18-19 and 27-31

18. Archeological sites show the depth and intensity of Squamish traditional use and occupation within their territory. Although incomplete, the existing archeological record spans millennia:

Currently, the oldest known archaeological site in Squamish territory dates to approximately 10,000 years ago. In the Burrard Inlet region, specifically, dated archaeological sites reveal 4,000 years of continuous occupation. Distinctive lithic materials sourced to Howe Sound are widely distributed within archaeological sites throughout the Pacific Northwest region, including Burrard Inlet, and even as far south as Puget Sound and alpine areas in the Olympic Peninsula, providing evidence of wide trade networks.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 9-10, PDF 18-19 and 27-31

19. Numerous ancestral seasonal villages are located in the Burrard Inlet region showing the importance of this area to Squamish. These villages are located close to important harvesting sites, including *iyálmexw* (Jericho), *í7íyelshn* (English Bay Beach), *st'it'ewekw* (Second Beach), *schílhus* (Prospect Point), *xwáyxway* (Lumberman's Arch), *senákw* (Kitsilano), *xáywá7esks* (False Creek), *xwmelechstn* (Capilano), *eslha7an* (Mission) and *ch'ich'elxwi7kw* (Seymour).

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 81, PDF 15

20. The geographic location of Squamish village sites and harvesting areas reflects the Squamish seasonal round, which was used to efficiently access the resources in Squamish territory throughout the year. While most villages remained at least partly occupied throughout the year, many people moved between winter villages on the Squamish and Cheakamus Rivers to sites on Howe Sound, Burrard Inlet, and the Fraser River to continue harvesting local resources through the spring, summer, and fall.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 19-26

21. Squamish members continue to practice a seasonal round today travelling throughout their traditional territory to access a wide variety of resources, and engage in cultural activities. Squamish people continue to use their territory for fishing, hunting, and gathering traditional foods for sustenance and ceremonial purposes. However, people must now travel farther afield to access resources as the quality, purity and abundance of resources has been adversely impacted by development in Squamish territory.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 25-26

C. SQUAMISH RESERVES

22. Squamish has 24 reserves located throughout its traditional territory that are extensively used and occupied by its member today. Seven of Squamish's reserves would be impacted by the Project: Mission Reserve No. 1 (*eslhá7an*), Capilano Reserve No. 5 (*xwmelchstn*), and Seymour Creek Reserve No. 2 (*ch'ich'elxwi7kw*) on the north shore of Burrard Inlet; Kaikalahun Reserve No. 25 (*k'ik'elxn*), Chekwelp Reserve No. 26 (*Ch'kw'elhp*) and Schaltuuch No. 27 (Keats Island) in the Howe Sound region; with Kitsilano Reserve No. 6 (*senákw*) located on the southern shore of False Creek.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 2, PDF 11; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 90, PDF 24

23. However, not all Squamish villages in the Project area were designated as reserves. For example, Squamish sites in what is now Stanley Park were never granted reserve status. Further, Squamish people were removed from certain sites as the City of Vancouver expanded. In 1913, the reserve at *senákw*, near what is now the Burrard Street Bridge, was eliminated and the Squamish inhabitants were removed from the site and relocated to the villages of *xwmelchstn* (Capilano) and *eslha7an* (Mission), on the north shore of Burrard Inlet.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 81, PDF 15.

D. SQUAMISH GOVERNANCE

24. An important aspect of Squamish rights and title to their territory is their ability to govern and act as stewards of the lands, waters and resources within territory. Squamish has governed, protected and defended its territory since time immemorial.
25. Squamish was traditionally governed by its hereditary Chiefs. In 1981, following a referendum, Squamish made the decision to switch to a custom election system. Currently, sixteen Councillors are elected by eligible members over the age of 18 and serve four year terms. Each of these 16 Councillor positions is directly related to the

16 hereditary Chiefs that joined together in 1923 to form Squamish's traditional government.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5333-5334, 5337

26. Squamish Nation continues to exercise governance over its traditional territory in a variety of ways, including by: managing development in its territory to ensure an abundance of safe traditional resources and foods; undertaking rehabilitation of areas within the territory that have been contaminated by development; partnering with neighbouring First Nations and the Coast Salish community to jointly share and manage resources; and transmitting the principles of stewardship and resource conversation to the next generation.
27. Squamish has further partnered with government, and proponents, to ensure responsible development within its territory. An example of this is the *Xay Temixw* Land Use Plan – a government to government agreement between Squamish and the Province of British Columbia that incorporates portions of the *Xay Temixw* into the provincial Land and Resource Management Plan (LRMP). Under the LRMP, Squamish and the Province have agreed to implement protective measures to safeguard over 50,000 hectares of Squamish's traditional territory and processes to make collaborative land use decisions.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5382

28. Squamish has been an active member in the Coast Salish Gathering. This gathering is a trans-boundary collective of approximately 60 First Nations/tribes engaged in revitalizing the health and long-term sustainability of the Salish Sea by using marine use planning based on scientific and traditional ecological knowledge.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5390-5392

29. Squamish has established a fisheries department, and enacted a fishing by-law to ensure sustainable fishery resources for generations to come. First enacted by Squamish Council in 1977, and subsequently revised in 1992, the by-law regulates fishing through the use of Fisheries Guardians that oversee the use of the fishing resources in particular areas within the territory and educate Squamish youth with

regard to fishing practices. The Squamish Nation also has engaged in hatchery projects to aid in the rehabilitation of fish stocks. These efforts are a small part of the active role Squamish plays as a steward of its waters and fisheries resources.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5509, 5586-5589; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 92, PDF 26; 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5575 – 5582

PART 3 PROJECT IMPACTS ON THE SQUAMISH NATION

A. THE PROJECT

30. The Project is a proposal to expand the existing capacity of the Trans Mountain pipeline system between Edmonton, AB and Burnaby, BC from 300,000 bbl/d to 890,000 bbl/d. The Project will include a substantial expansion of the current infrastructure in Squamish territory, and a substantial increase in shipping in Squamish waters, including:
- (a) a new pipeline along a new route to the Burnaby Terminal;
 - (b) 13 new tanks, and one replacement tank, at the Burnaby Terminal;
 - (c) two new delivery lines connecting the Burnaby Terminal to the Westridge Marine Terminal;
 - (d) a new dock complex with three new berths at the Westridge Marine Terminal; and
 - (e) an increase in tanker traffic from 5 to 34 vessels per month.

Reference: B1-1 - V1 SUMM - A3S0Q7

31. The completed Project will have the ability to transport diluted bitumen from Alberta's oil sands to prospective markets on the Pacific Rim. After arriving in Burnaby, up to 100,200 m³/d (630,000 bbl/d) of product will be loaded onto tankers at the Westridge Marine Terminal in Burrard Inlet and shipped by sea to final destination points, putting Squamish people, territory and waters at risk.

Reference: B1-1 - V1 SUMM - A3S0Q7, at 1-4, PDF 31; B18-19 - V8A 1.0 TO 1.4.2.6 MAR TRANS ASSESS - A3S4X3, at 8A-34, PDF 37

32. In a typical month, the current system loads only five Aframax vessels with diluted bitumen at the existing Westridge Marine Terminal. After the planned expansion, the

new system will be capable of loading as many as 34 Aframax vessels per month that will travel through Squamish waters – the access to which is critical to Squamish’s meaningful exercise of their aboriginal rights.

Reference: B18-19 - V8A 1.0 TO 1.4.2.6 MAR TRANS ASSESS - A3S4X3, at 8A-34, PDF 37; B18-19 - V8A 1.0 TO 1.4.2.6 MAR TRANS ASSESS - A3S4X3, at 8A-35, PDF 38

B. THE LONGSTANDING IMPORTANCE OF THE PROJECT AREA TO SQUAMISH NATION

33. Squamish has a wide set of title, rights and interests that would be impacted by the Project. Squamish land and waters to be impacted by the Project contribute to the Squamish way of life and culture, providing Squamish with physical, cultural and spiritual sustenance. Squamish people rely on the Project area for food, education, cultural and ceremonial purposes, medicine, and economic development. Squamish take their role as stewards of their territory seriously, and wish to protect their lands and waters for future generations.

1. Harm to Squamish’s Connection to the Land and Waters

34. Burrard Inlet, and the surrounding areas, have been home of the Squamish people since time immemorial. Elder David Jacobs, *Paitsmauk*, spoke of this connection to the land and waters in his testimony before the Board – Burrard Inlet is, and will always be, the home of the Squamish people:

All we see outside from our windows looking down the beach are freighters, ships, in and out. That’s why I’m afraid today what the damage that if anything happened, it would destroy our home because that harbour, that bay there that’s the home of the Squamish people. It’s always been a home, our home.

We look at the maps. We show the territories of the Squamish. I don’t like to use the word “territory”. I say, “That is our home. That is our home”. That land will never go away. Our Squamish people will never go away, so we got to be careful what we do today.

[...]

Just one thing that I always think about. I think about love and our homelands and our villages. It's love for that. It's like the wind. It's still with us. It'll never go away.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5439-5440, 5505

35. Squamish territory has important cultural significance. Squamish use and occupation of their territory and waters features heavily in Squamish stories, and spiritual practices. The loss of access to Squamish territory and waters from the increased shipping from the Project, or from an accident or malfunction associated with the Project, would be devastating to Squamish's way of life, and would put Squamish culture at risk.

36. Chief Ian Campbell (*Xálek'/Sekyú Siyám*) noted the particular importance of water to Squamish: "that [Squamish] believe water is sacred, that it is life giving, that it has a spirit..."

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5349

37. The waters in and around Burrard Inlet are used as points to realize this spiritual connection. Sloughs and marshes are portals that connect to the aqueous spiritual realms. These portals are found in several locations throughout the Lower Mainland, including a portal that connects Bedwell Bay with lakes in the north Burnaby region, and a portal – *skwácháys* – near the village of *xáywá7esks* in what is now False Creek.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 17, PDF 26

38. These stories are central to Squamish beliefs and mythology, and cement the importance of the water in Squamish culture. *Xwech'tál*, a prominent figure in Squamish oral history, was transported through one of these underwater portals after being abducted by the seal people. *Xwech'tál* brought back the connection of these realms to the living world and the sacredness of that connection when he returned four years later.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 17, PDF 26

39. One of the Wild People, known to the Squamish as the *smàýlilh*, trained Squamish warriors in the Capilano River. The Squamish were instructed to carry heavy stones underwater through the pools on the river, and in so doing, were transcended into the spirit world.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 16, PDF 25

40. Many of the people in the Squamish community have learned of the different spiritual sites in Squamish territory from their parents and grandparents, as knowledge of these sites is passed down from one generation to the next by visiting the sites.
41. The rivers and creeks within Squamish territory have been, and continue to be, important sites for spiritual training and bathing. The Squamish presenters at the NEB's oral hearing chose to bathe at one of those sites in Lynn Creek before giving their testimony:

You have Xa7élcha, which is a creek that we swim in today known as Lynn Creek. It's a beautiful bathing creek. A few of us were there this morning to purify ourselves at daybreak, preparing ourselves to have a strong mind, strong body, connect to nature and to the keke7nex Siyám, Creator, and give thanks.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 16, PDF 25; 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5362

42. The bathing practice is also related to the longhouse, which is a focal point of Squamish culture. The bathing practices are more than a ritualistic cleansing – they also serve as a means to re-awaken the person to their past, in the same way that practices in the longhouse itself wake up a person to their past. Elder Jacobs (Paitsmauk) explained this relationship in his testimony to the Board:

You see, you have to put yourself back a long ways, that everything that there is there today that you made use of is because this is the way it is. This -- you try to understand. At times it's difficult, but even now, when I say you bath and you cleanse yourself, well, yes, you do that today, but not in the fashion that we do our cleanse. To get that cold, cold water, what is the first thing you do? You holler. You scream "cold".

You see, I am a mask dancer. I have a mask; I dance. I go back. I holler. I wake it up. I wake up what was given to me a long time ago. It's here. And I only understand it as being S wx wú7mesh.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5492

43. The longhouse is the hub of Squamish culture, religion, beliefs, and practices. There are currently two longhouses located on Squamish territory – one at *xwmelech'stn* (Capilano Reserve) and one at *ch'ich'elxwi7kw* (Seymour Reserve), but there was historically a number throughout Squamish territory.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5470-5471

44. The practices in the longhouse reflect the entirety of a Squamish person's life – from birth to after death. Elder Jacobs (Paitsmauk) explains:

The longhouse for our people celebrates from birth to death, our whole lives, things of origin from the longhouse where we blessed children with one of the most sacred -- the most sacred things that our Squamish people we own, the *sxwayxway* mask. That is the importance of our people that -- this *sxwayxway* mask.

We bless babies, puberty rights, namings that match the names that we hand down family to family, all with the *sxwayxway* mask.

And after life, we celebrate when we have -- we show the picture we call memorials. We gather the people and celebrate an individual's four years after the passing, a big celebration. And in the longhouse, there's so much talk about unity, respect, togetherness because our people invited to other longhouses, we bring something, a gift to help the family who are celebrating, sharing.

When we go to the longhouse the families that are celebrating, they look at us, acknowledge us. That's a sign of respect. The old people used to say, "You have respect for yourself, other people will have respect for you".

You always hear those words in the longhouse, respect one another, especially honour your Elders. That is so important. That's the importance of learning, as I said earlier, *snewayelh*. That's what you learn, you teach.

I today, I emphasize with my children about a longhouse. It's been here for 1,000 years, 1,000 years.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5451-5456

45. The resources needed to support the longhouse tradition are drawn from the waters and lands in and around Burrard Inlet: the masks are made from local cedar; feathers harvested from local waterfowl are used to welcome the new *xekselkwelh* dancers (the longhouse dancers) upon their first entry into the longhouse; and the food used for ceremonial and sustenance purposes is harvested from the territory. Continued access to these resources is integral to the longhouse tradition enduring.
46. For Elder Jacobs (Paitsmauk), the longhouse tradition is a thread connecting thousands of years of Squamish practice and culture:

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

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5457

47. As with the institution of the longhouse, the importance of Squamish territory must be viewed within the larger context of Squamish culture and society. Specific acts that take place on the lands and waters within Squamish territory represent more than just individual, discrete events. Activities such as fishing or seafood gathering are an active expression of Squamish culture.
48. The connection between territory and culture is an essential component of Squamish identity. Harvesting in the same places as Squamish ancestors and relatives allows for the transmission of site-specific Squamish teachings and history. Being on and learning from Squamish territory expresses and reinvigorates Squamish identity. Squamish remain critically concerned that the Project will interrupt their cultural practices, and impact sites of cultural importance.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 103, PDF 37.

2. Continued Reliance on Resources to be Impacted by the Project

49. Squamish people continue to depend on the resources within their territory that will be impacted by the Project to exercise their aboriginal rights and maintain their way of life. Squamish people enjoy a variety of benefits from their territory, including economic benefits, and manage their territory to ensure the continued availability of these benefits.
50. Squamish's seasonal round has been modified in contemporary times. However, Squamish members continue to use their territory to fish, hunt and gather resources for sustenance, and to fulfill their social and ceremonial needs. This harvesting is an essential part of Squamish identity and heritage.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 25, PDF 34.

51. Elder Jacobs (*Paitsmauk*) spoke of the how conservation is a foundation of Squamish culture that has ensured access to resources in Squamish territory for generations to come:

Our traditions and values that we've been taught are with us, they're still with us today. Our families and others, we always talk about, you know, well, they say, "Well, gee, that's nice of you to bring one or two sacks of clams to help them for the work, some salmon, some ducks, deer meat".

But they always talk about, is there still a lot of deer left, is there a lot of fish left, the clams. Make sure you leave enough for the next peoples to come along. Don't take it all.

So we just said, "Ah" -- to the people, we shake our head, "Ah, we're listening; we're listening". But then when they destroyed the clam beds in front of our village, no one was listening.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5458-5460

52. The Squamish people continue to rely on Burrard Inlet, Howe Sound and the Fraser River, and the surrounding areas, as places to exercise their aboriginal rights to fish, hunt and gather marine, aquatic and terrestrial resources. For example, Squamish exercises its rights to harvest:

- fish including, salmon, herring, smelt, sturgeon, trout, cod, flounder, rockfish, halibut, and eulachon;
- shellfish including, sea urchins, crab, clams, oysters, prawns, and mussels;
- birds including, ducks, pheasant, grouse, and seagull eggs;
- mammals including, deer, elk, seals, and sea lions; and
- cultural and medicinal plants, clay, berries, broadleaf maple and cedar.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 83, PDF 17; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 83, PDF 17; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 99-101, PDF 33-35.

53. The rivers and streams entering into Burrard Inlet have also served as important harvesting, transport, and cultural locations for Squamish, including, but not limited to, Lynn Creek, Mackay Creek, Mosquito Creek, Mahon Creek, Sister Creek, the Seymour River and the Capilano River. These waterways provide a number of resources, including:

- Lynn Creek is known for trout and pink and chum salmon.
- Mosquito Creek is known for the Dungeness crab that moult near its mouth. Flounder and cod are caught off the end of Mosquito Creek and trout and coho are fished within the creek itself.
- Capilano River supported all species of salmon except sockeye.

- Seymour River is known for steelhead, coho, pink, chum and chinook salmon.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4 at 92, 96-97, PDF 26, 30-31. 14-10-24; International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5362, 5365, 5565, 5566, 5568, 5575, 5586

54. Salmon are integral to Squamish culture both for food and ceremonial purposes. Squamish continue to harvest salmon throughout their territory, but salmon stocks have been on the decline, and Squamish worry about maintaining continued access to this valuable resource. Squamish have historically fished for Sockeye salmon in the Fraser River and currently have a licence to fish for Sockeye in Johnston Strait. Squamish are also in active negotiations, and ongoing litigation, with the federal government to re-establish their food fishery on the Fraser River.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4 at 101

55. The area of Burnaby Mountain is known in the Squamish community as *lhekhlukwaytn*, which when translated refers to the peeling bark of the local arbutus trees. *Lhekhlukwaytn* is along the water route used by Squamish people to travel between Capilano and Indian Arm, and was known for bear, deer, elk, migrating ducks that inhabited its coves and inlets, sea urchins that covered its foreshore, and orcas that used the surrounding waters as a calving ground. The availability of many of these resources has been impacted by the surrounding development. However, the area continues to have significance to Squamish.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 95, PDF 29; 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5343 – 5345

56. The Project has the potential to extensively impact the key areas that Squamish relies on for harvesting resources, and further industrialize areas that Squamish has historically relied on to harvest resources, removing any chance of rehabilitation. Squamish has lived with the imposition of the current Trans Mountain pipeline system for the past sixty years, and has seen the impacts of the facilities and shipping on the environment and resources. Squamish cannot condone the expansion of such a system in the precarious and valued environment of Burrard Inlet, and is highly concerned about the impact of the expansion on already depleted resources.

57. Squamish remain concerned about all the resources within their territory. However, Squamish are critically concerned that the Project will interrupt their access to salmon. The Project has the potential to interrupt access to all the areas that Squamish rely on to catch salmon, and a spill has the potential to permanently affect the sustainability of salmon populations within Squamish territory.

3. Interruption of Travel throughout the Territory

58. In addition to supporting harvesting activities, Squamish communities have traditionally, and continue to, rely on the water ways in and around Burrard Inlet, Southern Howe Sound, and the lower Fraser River as important transportation corridors. This movement is seasonal and important for maintaining familial ties, participating in community activities, accessing sacred sites and transmitting information about cultural practices from one generation to the next.
59. Transportation routes were and are specific with respect to location, directionality, and timing, reflecting the essential aquatic orientation of Squamish. Examples include:
- The use of specific marine waypoints, visible only from the water, as navigation and safety aids. An example being the Squamish name for Point Atkinson, *sk'iw itsut*, translated to English means “knife your canoe 90 degrees” in reference to the right angle taken to and from Howe Sound;
 - Ancestral villages in Howe Sound, like *ch'kw'elhp* and *k'ik'elxn*, along with a burial ground on Keats Island are stopover sites at which location-specific stories are told;
 - Water-based vantages are important sites from which to teach important cultural norms. For instance, “the whale’s tail” site on southern Gambier Island is the site of an ancestral potlatch among spirit beings that “‘is a teaching place about how to treat family and relatives’; it remains prominent ‘in stories that we tell the children to this day.’”;
 - Water-based vantages are also important for teaching water safety and respect. Squamish paddlers are still instructed to stop and touch their paddle to the stone in

an area near Point Grey to acknowledge and request safe passage from non-human beings – the Transformer Brothers – who transformed a medicine man on account of his malevolent actions; and

- Canoe races that cement and maintain intra-tribal and inter-tribal relations continue to take place both at Ambleside and between Roche Point and Belcarra. Canoe sheds and clubs are based at *eslha7an* and paddlers of both war and travel canoes continue to train between villages on the north shore, and across to *xwáyxway* or *papiyok* (Brockton Point).

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 84, PDF 18; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 98, PDF 32; C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5, at 2-3, PDF 6 -7

60. The Project, with the exponential increase in shipping, has the potential to interrupt the transportation routes relied upon by Squamish, particularly in the event of an accident or malfunction.

4. Threat to Marine Dependent Economic Interests

61. The marine and aquatic resources in Squamish territory also play an important economic role for Squamish. Squamish traditionally harvested marine and aquatic resources for sustenance, ceremonial and commercial purposes, including trade.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 25-26

62. Today, Squamish has many businesses that are dependent on a healthy marine and aquatic environment. Squamish owns Mosquito Creek Marina on IR No. 1 and Lynnwood Marina on IR No. 2. By the Lynnwood Marina, there are a number of leases of the foreshore to third party businesses and a restaurant owned by the Nation. Squamish further has economic development aspirations for a stretch of foreshore on IR No.5 – being one of the last large undeveloped waterfront properties in the Vancouver area.
63. Squamish marine dependent businesses and properties would be severely impacted in the event of a spill from the Project.

5. Undermining of Rehabilitation Efforts in the Project Area

(a) The impacts of industrial development in Squamish territory

64. Squamish territory has been subject to extensive industrial development and environmental degradation. The scope and nature of this development has had a detrimental effect on Squamish people, lands, waters, culture and rights.
65. Squamish is seriously concerned about further industrialization, and the effect that this will have on the ability to revitalize Burrard Inlet and Howe Sound, and regain the meaningful exercise of Squamish aboriginal rights in certain areas. The current cumulative adverse impact of industrialization to the exercise of Squamish aboriginal rights must be taken into account in any consideration of the impacts of the Project on Squamish.
66. The existing Trans Mountain pipeline system, and the associated shipping, has contributed to this industrialization. A Squamish member emphasized the importance of considering the proposed expansion in the context of the historic development of Squamish territory:

[...] this issue on Kinder Morgan is certainly of utmost concern to our people in this modern era. Contemplation of exponential expansion of the industrialization of our lands and waters, the contamination, threat that that poses to our territories is the top of our Aboriginal rights and title. The encroachment of settlers into this region expands. I think it's important perhaps that we look at not only the historic accounts of our Coast Salish people and the use of this region of our territory, but how that led to first contact with European cultures and subsequent relationships. Or lack of a functioning relationship between First Nations and the Crown, leading to this [P]roject and how it represents the Crown's attempts to, again, just run rough-shod over rights and title and impose the interests of these international corporations to contaminate our lands and waters. So, it's a big concern for us.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 57, PDF 66.

67. Industrial development has threatened the existence of the Squamish subsistence economy with many resources becoming scarce, contaminated or inaccessible. In testimony before the Board, Squamish Elder David Jacobs (Paitsmauk) spoke of his experience with the harvest of seafood near the Capilano Reserve:

In my wildest dreams I would never have thought they would destroy that, take our food away from our mouths. But that happened. It's -- I can't tell -- I can't teach my

grandchildren, my great grandchildren how to dig clams, get crab, cook the crab, dry the seaweed. I can't do that. It's gone. I don't know how to explain that to my grandchildren.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5437-5438; see also 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at line 5436

68. The environment in Burrard Inlet and Howe Sound is compromised, and is in desperate need of revitalization. Squamish are dedicated to ensuring the return of environmental conditions in Burrard Inlet and Howe Sound that would support the exercise of their full suite of title, rights and cultural interests. The success of some of Squamish's initial revitalization efforts demonstrates that the restoration of meaningful exercise of Squamish rights in impacted areas is possible.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5437, 5566-5568; C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 26, PDF 35; C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at 55-56, PDF 64-65; 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5566, 5569-5571, 5580-5581, 5582

69. Revitalization efforts and development are not mutually exclusive concepts. However, in order for development to not compromise territory and culture, it must be done responsibly in partnership with First Nations. It must be grounded in processes that “truly bring First Nations to the table as decision makers and as governments, as stewards and incorporating our laws, incorporating western-based science because we're not here to impede [the] economy.”

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5636-563

70. The Project has not been developed in partnership with Squamish. Squamish has had no input in Trans Mountain's application. As a result, the application does not reflect Squamish's approach to responsible and sustainable development, and poses a threat to the well-being of Squamish's territory and people.

(b) Squamish has taken steps to restore and protect the ecosystem in Burrard Inlet and Howe Sound

71. Squamish has actively engaged in rehabilitating the marine and terrestrial environments in both Howe Sound and Burrard Inlet in an attempt to counteract the effects of industrialization. Squamish actively strives to ensure that the resources within its territory will be available for future generations.

72. Active rehabilitation projects in both Burrard Inlet and Howe Sound are focused on restoring important species to sustainable and healthy levels. The tangible benefits of these efforts include the return of herring, orcas, porpoises and grey whales within Squamish territory. In addition, the area between Gower Point and Robert's Creek has supported clam and mussel beds, and in recent years has once again been the site of crab and prawn harvesting by Squamish members.

Reference: 14-10-24 International Reporting Inc. – OH-001-2014 Hearing Transcript Vol. 12 (A63843), at lines 5393-5395; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 87, PDF 21

73. Squamish Nation is further supporting salmon enhancement and habitat restoration at both the *ch'kw'elhp* reserve and on McNair Creek.

Reference: C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4, at 87, PDF 21

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

C. SUMMARY: SQUAMISH HAS THE POTENTIAL TO BE SIGNIFICANTLY ADVERSELY IMPACTED BY THE PROJECT

75. The importance of the lands, waters and resources in Squamish territory to Squamish cannot be overstated – Burrard Inlet and Howe Sound are the home of the Squamish people. Squamish continue to rely on the lands waters and resources for sustenance, ceremonial, educational, medicinal and economic purposes. Squamish does not have the ability to relocate if these lands, waters and resources are impacted or contaminated by the Project.
76. The loss of access to, or availability of, the land, aquatic and marine resources within Squamish territory would be devastating to Squamish identity and culture. The sustainability of Squamish territory is of paramount importance to Squamish. The proposed Project threatens the sustainability and vitality of Squamish territory by increasing the storing and shipping of diluted bitumen within Squamish territory, and increasing the potential for accidents or malfunctions with catastrophic consequences.

The Project puts the Squamish people, territory and culture at an unacceptable level of risk, with no benefits to Squamish.

PART 4 – LEGAL CONTEXT

A. REGULATORY FRAMEWORK

77. Trans Mountain has applied for a certificate of public convenience and necessity pursuant to s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the “NEB Act”) for the Project.
 78. The factors that the Board may consider in determining whether to recommend issuance of the certificate are set out in s. 52 of the NEB Act, and include “any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.”
 79. The List of Issues that the Board has determined are relevant to its public interest determination for the Project is as follows:
 1. The need for the proposed project.
 2. The economic feasibility of the proposed project.
 3. The potential commercial impacts of the proposed project.
 4. The potential environmental and socio-economic effects of the proposed project, including any cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB’s *Filing Manual*.
 5. The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed project, including the potential effects of accidents or malfunctions that may occur.
 6. The appropriateness of the general route and land requirements for the proposed project.
 7. The suitability of the design of the proposed project.
 8. The terms and conditions to be included in any approval the Board may issue.
 - 9. Potential impacts of the project on Aboriginal interests.**
 10. Potential impacts of the project on landowners and land use.
 11. Contingency planning for spills, accidents or malfunctions, during construction and operation of the project.
 12. Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.
- Reference: A15-3 - Hearing Order OH-001-2014 - A3V6I2 (emphasis added)

80. Notably, the NEB's Filing Manual has as its goal for consultation for the Project, including for aboriginal consultation:

- that all persons and groups potentially affected by the project are aware of: the project, the project application to the Board, and how they can contact the Board with outstanding application-related concerns;
- that those potentially affected by the project have been adequately consulted, and
- that any concerns raised have been considered, and addressed as appropriate.

Reference: National Energy Board, "Filing Manual" (26 June 2015) online:
<https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/flngmnl-eng.pdf>, s. 3.4

81. The Board is also the responsible authority for carrying out the environmental assessment for the Project under the *Canadian Environmental Assessment Act*, SC 2012, c. 19 ("CEAA 2012"). The factors and scope of the factors to be considered in the environmental assessment for the Project include the factors described in paragraphs 19(1)(a) through (h) of CEAA 2012, as well as community knowledge and Aboriginal traditional knowledge.

Reference: A13-1 - Letter - Application for Trans Mountain Expansion Project - Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012 - A3V6J1

82. At the conclusion of the review process, the NEB Panel must make a recommendation to the Governor in Council on whether the Project is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation. Regardless of the recommendation, the Board must provide the Governor in Council with terms and conditions for Project approval.

Reference: NEB Act, s. 52

83. The Governor in Council may approve the Project with the conditions, reject the Project or refer the Project back to the Board for reconsideration. The Governor in Council has no power to unilaterally amend the conditions set by the NEB in the recommendation.

Reference: NEB Act, s. 53

B. CONSTITUTIONAL FRAMEWORK: THE DUTY TO CONSULT

84. The NEB must not only ensure that its review is in accordance with its statutory and regulatory obligations under the NEB Act and CEAA 2012, but that the review is in

accordance with the Constitution, including the constitutional obligations owed to Squamish, pursuant to s. 35 of the *Constitution Act, 1982*.

Reference: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 185; *Beckman v. Little Salmon/ Carmacks First Nation*, 2010 SCC 53 at paras. 45-48; *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

85. The duty to consult arises from and recognizes the prior occupation of First Nations. That prior occupation gives rise to aboriginal claims to rights and title which the Crown is honour bound to resolve. In the meantime, the Crown is prohibited from managing resources and land while ignoring those prior, unresolved claims. The Crown must consult with First Nations to protect, and respect, their asserted aboriginal rights and interests, which are recognized and affirmed under s. 35 of the *Constitution Act, 1982*, prior to any decisions about proposed projects.

1. The Origin and Nature of the Duty to Consult

86. As set out by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, the Crown has a legal obligation to consult with First Nations whenever the Crown is contemplating a decision that has the potential to adversely affect or infringe Treaty or asserted aboriginal rights.

Reference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 20, 26-27

87. The fundamental purpose of consultation and the modern law of aboriginal and treaty rights is “the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.” Reconciliation is not a mere interest but a constitutional imperative for the Crown.

Reference: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1

88. When reconciling aboriginal and treaty rights with other interests, the Crown must act honourably. In such circumstances, the honour of the Crown gives rise to a constitutional duty to consult and, if appropriate, accommodate the holders of the aboriginal or treaty right.

Reference: *Haida* at para. 20; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 34.

89. In *Haida*, the SCC stated:

... The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

Reference: *Haida* at paras. 25 and 27; see also *Rio Tinto* at para. 50

90. And that:

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted...

Reference: *Haida* at para. 42.

91. In *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* the B.C.

Court of Appeal described consultation this way:

Consultation requires an interactive process with efforts by both the Crown actor and potentially affected First Nation to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations.

Reference: *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at para. 68

92. Consultation requires that both parties attempt to understand and address each other's concerns. As the Supreme Court of Canada said in *Mikisew*:

Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

Reference: *Mikisew* at para. 54

93. Consultation must occur early, at the planning stages of the project, and not after the decision has essentially been made. It must take place before the project is defined and decisions have been made.

Reference: *Kwikwetlem* at para. 70; *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 at para. 74.

2. Squamish is Owed a Duty to Consult at the High End of the Spectrum

94. The content of the duty to consult in relation to conduct that may affect aboriginal or treaty rights depends upon the factual context. In particular, the content varies with the strength of the aboriginal group's rights claim and the seriousness of the impact on the asserted aboriginal right caused by the Crown's proposed course of action.

Reference: *Haida* at para. 39

95. The Crown has acknowledged that it owes Squamish a duty to be consulted in relation to the Project. In its "preliminary depth of consultation assessment", the Crown determined the "preliminary depth of consultation" owed to Squamish to be "High".

Reference: C249-9-2 - NRCan Written Evidence ANNEX A-K 27 May15 - A4Q0V3, Annex E at 120

96. The Crown's preliminary assessment of the content of the duty to consult Squamish in relation to the Project as "High", accords with the available evidence. While there is limited evidence of the particulars of Squamish aboriginal rights or the impacts on those rights before the Board, the evidence that was presented indicates Squamish's very strong claim to aboriginal rights and title to the lands and waters that stand to be affected by the Project, and that the Project presents a very severe potential adverse impact on Squamish aboriginal rights and title.
97. The duty to consult at the high end of the spectrum has been held to require extensive discussions and accommodation with the "the intention of substantially addressing [Aboriginal] concerns" and "finding a satisfactory interim solution".

Reference: *Haida* at paras. 42-45

3. The Role of the NEB Process in the Duty to Consult

98. It is well established that regulatory tribunals, such as the NEB, in considering projects that have the potential to impact upon Aboriginal interests may be given the duty to adjudicate upon consultation. The mandate of a particular tribunal is dependent upon whether the tribunal's enabling legislation empowers it to consider questions of law and what remedial powers the tribunal possesses.

Reference: *Rio Tinto* at paras. 55-65

99. It is clear that the NEB must consider whether consultation has been discharged before recommending whether the Project is in the public interest. The duty to consult is a constitutional obligation invoking the honour of the Crown – it cannot be relegated to an afterthought in the review process, and must be met before the Project gains momentum.

(a) Reliance on the NEB Process to Discharge the Duty to Consult

100. The Crown has not delegated the duty to consult to the NEB, but has indicated that it will be relying on the NEB process to the extent possible to discharge the duty to consult Squamish in relation to the Project.
101. While the Crown may be entitled to rely on regulatory processes, at least in part, to discharge the duty to consult in certain circumstances, that reliance is “subject always to the Crown’s overriding duty to consider their adequacy in any particular situation.” Where an aboriginal group’s concerns cannot be dealt with in the course of the regulatory process, that process is not sufficient to fulfill the Crown’s duty to consult and the Crown has an independent obligation to address the deficiencies in order to discharge the duty to consult.

Reference: *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at paras 25, 29, 44; *Rio Tinto* at paras. 55-57

102. Whether a particular regulatory process can discharge the duty to consult will depend on the factual context. For pipeline projects that significantly impact aboriginal interests, such as this Project, “the Crown would almost certainly have an independent obligation to consult”.

Reference: *Beckman* at para. 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, at para. 177

103. Quasi-judicial processes by their nature are inherently adversarial and contrary to the intended purpose of consultation – being reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. It is critical to achieving reconciliation that the Crown engages with First Nations directly, in good faith with the goal of addressing their concerns.

Reference: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 59

(b) **The Obligation of the NEB to Determine Whether the Duty to Consult has been Discharged in its Recommendation**

104. The consideration of the duty to consult is clearly within the mandate of the NEB. The NEB must ensure that there has been adequate consultation and accommodation of Squamish, and the constitutional obligations discharged, prior to any recommendation to the Governor in Council.

Reference: *Beckman* at para. 45

105. The Supreme Court of Canada in *Rio Tinto* determined that the British Columbia Utilities Commission (BCUC) had the power to make the determination of whether the duty to consult had been discharged, given that it had the power to determine questions of law, as follows:

It is common ground that the Utilities Commission Act empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. **The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power** (Conway, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": Conway, at para. 6.

Reference: *Rio Tinto* at para. 69

106. The SCC further considered it relevant that, beyond its general power to consider questions of law, the BCUC's legislation required the BCUC to consider "any other factors that [it] considers relevant to the public interest". The SCC held that:

The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the Utilities Commission Act. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"

Reference: *Rio Tinto* at para. 61

107. In terms of the remedial powers of tribunals, the SCC noted that:

A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. **The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in Haida Nation.**

Reference: *Rio Tinto* at para. 70 (emphasis added)

108. The NEB is empowered to consider questions of law, including constitutional questions. The NEB, like the BCUC, may consider under the NEB Act “any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.”

Reference: NEB Act, ss. 11-13; see also A097 - National Energy Board - Ruling No. 40 and Order MO-122-2014 - Trans Mountain notice of motion and Notice of Constitutional Question dated 26 September; *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140 at paras. 42-43

109. The NEB also has a broad remedial power to ensure that the Project is not recommended to be in the public interest before meaningful consultation is undertaken. This power is more than sufficient to ensure that Aboriginal rights and interests are protected, and that the reconciliation of interests called for in *Haida* is promoted.

Reference: NEB Act, s. 52

110. Whether the duty to consult has been discharged in relation to Squamish is squarely before the NEB in relation to the Project. The Crown, through NRCAN, has participated in the review process for the Project.¹ NRCAN has filed evidence on the Crown's proposed consultation process and asked information requests of Squamish, and other First Nations, on the adequacy of the “accommodation” measures proposed by Trans Mountain throughout the process.

Reference: C249-09 - NRCAN - NRCAN's Written Evidence May 27, 2015 (A70313); C249-11 - Natural Resources Canada (MPMO) - Information Requests to Intervenors (Part 1/2) (A70837); C249-12 - Natural Resources Canada (MPMO) - Information Requests to Intervenors (Part 2/2) (A70838)

111. The NEB has further acknowledged in its List of Issues that the impacts on Aboriginal interests will be considered in its public interest determination.

Reference: A15-3 - Hearing Order OH-001-2014 - A3V6I2

112. The NEB cannot make a recommendation that the Project is in the public interest until it is satisfied that the duty to consult has been discharged. The constitutional dimension of the duty to consult gives rise to a special public interest, which must be satisfied, and supersedes any economic interest of Trans Mountain.

¹ This process is distinguished from the process in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222 (leave to appeal applied for) where the Crown did not participate in the review process – see para. 39 where the Court said this is significant.

(c) **The Duty to Consult Cannot be Postponed**

113. The consideration of whether the duty to consult has been discharged cannot be postponed. The Board's decision under s. 52 of the *National Energy Board Act* is the key regulatory decision to be made in relation to the Project. It is the decision that will determine whether, based on the evidence, the Project is in the public interest. In practice, the Governor in Council invariably defers to the Board's recommendation.
114. The recommendation of the Board represents a strategic higher level decision for the Project, after which, the Project will inevitably gain momentum. In order to be meaningful, consultation must occur early, at the planning stages of the project, before the project is defined and decisions have been made:

The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once [sic] important preliminary decisions have been made and relied upon by the proponent and others, there is a clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation.

Reference: *Squamish Nation* at para. 74; see also *Kwikwetlem* at para. 70; *Rio Tinto* at para. 44

115. Even if the recommendation of the Board is not a strategic higher level decision, it is a strategic higher level recommendation, upon which the Governor in Council will rely in making its decision about the Project, that will impact on Squamish. The Board's report will form the factual basis for the Governor in Council's decision, and will not be impacted by any proposed consultation after the hearing record is closed. As set out in *Rio Tinto*:

Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District* (District Manager), 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada* (Minister of Environment), 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years*, Re, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether

government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

Reference: *Rio Tinto* at para. 44

116. The recommendation of the Board will substantially impact on the ability of Squamish to have the adverse impacts of the Project on its rights avoided, mitigated or accommodated. As stated in *Mikisew*, “[c]onsultation that excludes from the outset any form of accommodation would be meaningless.”

Reference: *Mikisew* at para. 54

117. One of the most obvious opportunities to accommodate Squamish aboriginal rights is through the establishment of conditions on the approval of the Project. Those conditions, however, will be determined by the Board and set out in the Board’s report. The Governor in Council will have no power to amend those conditions. As such, consultation that occurs after the Board has released its report cannot provide this important form of accommodation.
118. The NEB must determine whether the duty to consult has been discharged at this stage, prior to any recommendation of whether the Project is in the public interest. Consultation that occurs after the Board has released its report and the key substantive decisions in relation to the Project have been made cannot be meaningful. The Crown’s proposal to substantially defer consultation to this stage is fundamentally flawed.

PART 5 – THE NEB PROCESS NEEDS TO BE RESTRUCTURED

A. INTRODUCTION

119. The NEB process is fundamentally flawed, and needs to be restructured in order to be able to assess the impacts of the Project, and projects like this one, on Squamish.
120. The NEB process will not allow the Board to discharge the statutory or procedural obligations for the review of the Project, and has not provided a sufficient foundation for discharging the constitutional obligations owed to Squamish. The NEB process has failed to provide a thorough review of the Project that assesses the impacts and risks of the Project to Squamish and the surrounding communities.

121. The NEB cannot assess the Project in a vacuum against a notional “public interest”. The NEB process needs to be structured from the outset to take into account the interests of affected First Nations and communities.

B. PROMISED REFORM OF THE NEB PROCESS

122. The federal government has recognized the need to reform the NEB process, and that the process for projects such as this one needs to be developed in partnership with First Nations. Prime Minister Trudeau recently stated that:

We need to be consulting with communities, we need to be partnering with indigenous peoples, we need to be reassuring Canadians that the science and the environmental impacts and the risks are being properly monitored so that any project is truly in the best interest of Canadians.

Reference: Ian Bickis, “Kinder Morgan presses on with review process while waiting on word from Ottawa” *The Vancouver Sun* (17 December 2015) online: http://www.vancouversun.com/business/kinder+morgan+presses+with+review+process+while+waiting+word/11597130/story.html?_lsa=efbb-56e4; see also 16-01-11 – Natural Resources Canada – Written Argument in Chief – Jan 11, 2016 – A4X3Y1, at 2

123. The mandate letter from the new federal government for the Minister of Natural Resources, James Carr, further has as one of the top priorities:

Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.

Reference: Letter from the Honourable Justin Trudeau, Prime Minister of Canada, to the Honourable James Carr, Minister of Natural Resources re: Mandate online: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

124. Natural Resources Canada has confirmed the federal government’s commitment to renew the relationship with Aboriginal peoples in its argument filed with the NEB, and recognizes that there are outstanding issues that need to be addressed by consultation.

Reference: 16-01-11 Natural Resources Canada - Natural Resources Canada - Written Argument-in-Chief (A75045) at pp. 2 and 4

125. It is abundantly clear that the NEB process needs to be completely overhauled in order to be able to assess and address First Nations’ concerns. The NEB – a tribunal dominated by panelists from the energy sector – is completely inadequate for assessing the impacts of the Project on Squamish’s unique interests. Unless First

Nations are involved in the design of the review process from the beginning, the process will not be able to adequately assess impacts to their interests.

126. The NEB process has lost the trust of Squamish. The 2012 amendments to the federal environmental assessment process and the NEB Act, including the removal of the joint review panel and the imposition of the legislated timeline for the review, stripped the NEB process of all credibility. The NEB process is now viewed as facilitating the approval of projects such as this one as quickly as possible, with as little scrutiny as possible. It is no more than a rubber stamp for industry.
127. The promised reforms of the NEB process have yet to take place. Leaving Squamish and other First Nations, with having to participate in a process for the Project, and expend valuable resources, that has been recognized as not capable of addressing their interests, and that they had no input in developing. This does not promote reconciliation or a “renewed, Nation-to-Nation relationship with Indigenous Peoples, one based on recognition of rights, respect, co-operation, and partnership.”

Reference: Letter from the Honourable Justin Trudeau, Prime Minister of Canada, to the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs re: Mandate online: <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

C. SQUAMISH NEEDS TO BE ENGAGED ON A GOVERNMENT TO GOVERNMENT BASIS AT THE OUTSET

128. Squamish needs to be engaged on a government to government basis at the outset of the review process to ensure that the review process is designed in a manner that is able to address their unique interests and constitutionally protected rights. There are clear differences between how Squamish manages its lands and waters, and how the Crown and proponents manage resources. These differences need to be recognized in the structure of the review process.
129. It is not sufficient to impose a process on Squamish, without their input, and then force them to participate in it at their own expense. First Nations need to be treated as partners in the review process with their own decision-making authority.
130. The current pipeline review process does not provide the ability to assess projects from the perspective of First Nations, instead it assumes that First Nations interests

are the sum of biophysical measurements, ignoring impacts to cultural values. This flawed approach is evident in review for the Project:

- (a) **The process has been proponent drive.** Trans Mountain unilaterally determined the location of the Project without consultation with Squamish or consideration of Squamish land management objectives, or areas of unique cultural value that the Project may put at risk. Consultation on Project siting must occur at the outset in order to meaningfully accommodate Squamish concerns.
- (b) **The process is adversarial.** The review process is inherently adversarial and counterintuitive to the intended ethos of consultation, and the relationship between the Crown and First Nations. As set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, “[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship” (at para. 59). A quasi-judicial process in which the only recognized form of interaction is through formal information is not conducive to promoting a dialogue between the Crown and First Nations or to promoting reconciliation.
- (c) **The process failed to consider cultural value.** The focus of the review process has been overly narrow and failed to provide an assessment of cultural value. Squamish does not separate culture from nature – these two concepts are intrinsically linked for Squamish people. Trans Mountain failed to provide an assessment of the impacts of the Project on Squamish rights, practices and culture, and instead provided a generic assessment for all First Nations to be impacted by the Project, and broadly concluded without any evidentiary basis that the impacts to traditional use could be mitigated using generic measures focused solely on biophysical components, ignoring cultural values. This is not sufficient and has resulted in an assessment that has not accounted for the impacts of the Project to Squamish.
- (d) **The process failed to consider impacts to Aboriginal rights and title.** The review process did not engage in any way with the specific impacts to Aboriginal rights and title of Squamish. Trans Mountain did not provide an assessment of

how the Project would impact on Squamish use of their territory. It is not sufficient to assume that Squamish can just use other locations within its territory to harvest resources – Squamish practices are location specific and dependent on access to certain parts of their territory.

- (e) **The information sharing for the Project was restricted** by Trans Mountain's failure to provide complete information, and by the NEB's failure to demand that Trans Mountain provide complete information or allow cross-examination. Trans Mountain unilaterally developed its application without engagement with Squamish, and refused to provide Squamish with complete responses to information requests made throughout the review process. The NEB in turn refused to demand that Trans Mountain clarify its responses to Squamish. The NEB also allowed Trans Mountain to file a substantial portion of its evidence late, reducing the time available for Squamish to review the evidence, and the level of scrutiny of the evidence. The late evidence was only subject to one round of information requests. Squamish similarly was not able to obtain full responses to its information requests to Natural Resources Canada and Fisheries and Oceans Canada, and the NEB did not demand that they provide full responses. Without full information about the Project, Squamish has not been able to undertake an assessment of the impacts of the Project to Squamish.
- (f) **The legislated timeline restricted participation by Squamish.** Throughout the review process for the Project, Squamish participation was restricted by the timelines for reviewing large volumes of material filed by Trans Mountain. Squamish was not able to engage in any substantive dialogue about the Project to be able to assess the impacts of the Project and to begin to develop Squamish specific mitigation measures. As a result, the mitigation measures proposed by Trans Mountain are generic and in no way address Squamish's concerns.
- (g) **There is no shared decision-making for the Project.** Not only did the review process for the Project exclude Squamish from fully participating in the process, but the current process does not provide Squamish with the opportunity to make any decisions about the Project regarding potential impacts on their rights and

interests. The conditions for the Project have been developed without Squamish input, without a full assessment of the impacts of the Project on Squamish, and do not provide any Squamish specific accommodation. Squamish does not have a formal role in deciding whether the Project proceeds within its territory.

131. The Supreme Court of Canada has recognized the need to get the consent of First Nations for major developments in areas where they have strong claims to Aboriginal title.

Reference: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 92

132. The recently elected federal government has further committed to implementing the United Nations Declaration on the Rights of Indigenous People. This commitment requires the government to engage with Squamish, in good faith, at a government to government level, to obtain Squamish's free, prior and informed consent before Crown decisions are made that affect Squamish aboriginal rights and title and other interests.

Reference: Letter from the Honourable Justin Trudeau, Prime Minister of Canada, to the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs re: Mandate online: <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

133. In order to get to consent, two key objectives must be met: a comprehensive review process with meaningful input from First Nations, allowing for an informed decision; and a shared decision-making process. Neither of these objectives have been satisfied by the current review process for the Project.
134. At the very least, the Panel that assesses the project needs to be comprised of people with traditional knowledge, who have the capability of assessing projects from a cultural perspective. This Panel does not have such expertise and the review process has not provided for consideration of such values.
135. Squamish, and other impacted First Nations, need to be involved in setting the scope of the review process for projects that have the potential to impact their lands and constitutionally protected rights from the outset. The review process for the Project was unilaterally set by the NEB and has not provided for engagement with Squamish. This has completely undermined the processes' ability to contribute in any way to

discharging the duty to consult and has breached the procedural obligations owed to Squamish.

D. CONCLUSION ON THE NEB PROCESS

136. The review process for the Project must not continue until the NEB process is restructured in order to be able to meaningfully consider and address the interests of First Nations. The recognition by the federal government that the current process is deficient in this respect is a recognition that the current process cannot assist in anyway in discharging the constitutional duty to consult Squamish, or provide an accurate assessment of Squamish interests to be impacted by the Project. These are factors that are integral to the NEB's public interest determination. Without meaningfully considering these factors, the NEB must not make a recommendation on whether the Project is in the public interest.

PART 6 THE DUTY TO CONSULT AND ACCOMMODATE SQUAMISH HAS NOT BEEN DISCHARGED

A. INTRODUCTION

137. The Crown has failed to discharge its duty to consult with Squamish throughout the NEB review process for a number of reasons including that the Crown did not discuss a process for consultation, the Crown did not share or provide adequate information, the Crown did not seek to understand the scope of Squamish aboriginal rights to be impacted by the Project and the Crown did not act in good faith.
138. The Crowns' approach to consultation relies heavily on a speculative consultation process occurring following the close of the Board's hearing record. There is no guarantee that this process will happen, and no guarantee that it will adequately address Squamish's concerns. The Crown cannot begin meaningful consultation after the significant decision has been made about whether the Project is in the public interest. The proposed consultation after the NEB process constitutes an admission that consultation to date has not been adequate. How can the Board recommend that the Project is in the public interest without knowing that the constitutional obligations to consult and accommodate Squamish have been discharged?

B. THE CROWN ADMITS THAT CONSULTATION TO DATE HAS NOT BEEN ADEQUATE TO DISCHARGE THE DUTY TO CONSULT

139. The Crown has indicated that it will be relying on the NEB process to the extent possible to discharge the duty to consult. Natural Resources Canada has proposed a staged consultation process for the Project in which consultation will occur in four “phases”:

- I. Initial engagement, from submission of project description to the start of NEB review process;
- II. NEB hearings, from the start of the NEB review process to the close of the hearing record;
- III. Post-NEB hearings, from the close of the hearing record to a Governor in Council (GIC) decision on the project; and
- IV. Regulatory permitting, from the GIC decision on the project to issuance of departmental regulatory approvals (if required).

Reference: C249-9-1 - NRCAN Written Evidence Submission TMX 27May2015 - A4Q0V2 at 5-12

140. The first two phases include the initial filing of the project description and the NEB process. Natural Resources Canada proposes two “phases” of consultation after the NEB process from the close of the hearing record to a Governor in Council decision on the project (Phase III), and from the Governor in Council decision on the project to issuance of departmental regulatory approvals (Phase IV). The Crown has stated that Phase III consultation will include meeting with First Nations to address outstanding concerns, and to consider proposals for accommodation.

Reference: C249-9-1 - NRCAN Written Evidence Submission TMX 27May2015 - A4Q0V2 at 5-12

141. The Crown has acknowledged that consultation after the NEB process has closed is needed to understand and address the impacts of the Project to First Nations. NRCAN in its written argument before the Board lists the outstanding issues related to the Project that have not been addressed in the NEB process. This is an acknowledgement that consultation to date has not been adequate.

Reference: 16-01-11 Natural Resources Canada - Natural Resources Canada - Written Argument-in-Chief (A75045) at 5

142. The Crown has not met with Squamish during the NEB process to substantively discuss the scope of Squamish aboriginal rights and the potential impacts of the

Project on Squamish aboriginal rights, and only proposes to do so after the NEB hearing record is closed. This is wholly inadequate to discharge the duty owed to Squamish.

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

C. NO ASSESSMENT OR ENGAGEMENT ON THE PROJECT IMPACTS ON SQUAMISH ABORIGINAL RIGHTS AND TITLE

144. Ascertaining the scope and nature of the aboriginal rights that stand to be affected by the contemplated Crown conduct is an essential first step in discharging the duty to consult:

It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed.

Reference: *Halfway River* at para. 180.

145. This basic step was never undertaken in the course of the Board's hearing. Squamish repeatedly advised the Board that the hearing process would not and did not provide for the identification of Squamish aboriginal rights that stand to be affected by the Project, or the Project's impacts on those rights. Among the obstacles identified by Squamish as preventing these issues from being addressed were inflexible time limits on oral evidence, lack of capacity by Squamish to participate, and inadequate responses to information requests.

Reference: C319-1-1 - Squamish Nation - Letter re. response to Notices of Motion and Hearing Order (00875348) - A3W0Q6; C319-6-1 - Letter to NEB re. oral traditional evidence - A3X7T2; C319-9-1 - Squamish to NEB re Participant Funding Deadline - A4A5X7; C319-14-1 - Squamish Nation to NEB re Oral Traditional Evidence on Route 1 and 2 - A4G3X0; C319-36-1 - Response to NEB August 21 - A4T1L9.

146. To understand the full scope of the aboriginal rights, the Crown must consider the perspective of the First Nation. The Crown took no meaningful steps to understand Squamish's rights to be impacted by the Project. Throughout the process the Crown failed to engage Squamish in even the most cursory discussions about the scope of Squamish rights, never mind substantive discussions.

Reference: C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7 at 3

147. The Crown instead chose to base its preliminary assessment on a desktop review – for which it then refused to provide Squamish with the material relied upon in coming to that assessment. Squamish cannot have a dialogue about the scope of its rights, if it does not have access to the material that the Crown used to preliminarily and arbitrarily ascertain their scope. This does not represent a good faith effort on the part of the Crown to understand Squamish’s rights. The NEB then condoned this inaction on the part of the Crown in refusing to direct that the Crown provide a full response in relation to the notice of motion of Squamish.

Reference: C319-29 - Squamish Nation - Information Requests to Natural Resources Canada and Department of Fisheries and Oceans Canada (A70811); C319-32 - Squamish Nation - Notice of Motion Information Requests to Other Intervenors (A71395); C319-33 - Squamish Nation - Reply to responses of DFO and NRCan to the motion (A71641); A200 - National Energy Board - Ruling No. 85 - Motions to compel full and adequate responses from intervenors to information requests from other intervenors (A71779)

148. While aboriginal peoples do have a responsibility to share information about their aboriginal rights, they must be given an adequate opportunity to do so. The NEB review process did not provide that opportunity, and, as noted above, the Crown failed to engage Squamish outside that process.

Reference: *Halfway River* at para. 182; C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7

149. Squamish provided oral evidence to the Board that identified some of Squamish’s interests and rights in the Project area. However, that process was severely circumscribed by the strict time limits imposed by the Board, and was not adequate to identify the full scope of Squamish aboriginal rights.

Reference: C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7

150. As such, the full scope of Squamish rights remains unknown. This is a legal prerequisite to a properly founded consultation process, which has not been satisfied to date.

D. PROJECT IMPACTS ON SQUAMISH ABORIGINAL RIGHTS AND TITLE NOT ASSESSED

151. Once the scope and nature of the aboriginal rights that stand to be affected by the contemplated Crown conduct have been ascertained, the next step in the consultation process is to assess the impacts of that conduct on those aboriginal rights. In the course of the Board's hearing, the Project impacts on Squamish aboriginal rights were never assessed.
152. In its "Draft Issues Tracking Table for TMX: Squamish Nation", Natural Resources Canada purported to set out the "key issues" of Squamish in relation to impacts on Squamish aboriginal rights and interests. In relation to impacts on Squamish aboriginal rights, Natural Resources Canada articulated the following "key issues": impacts on fishing activity, impacts on killer whale and herring populations, and impacts on Squamish re-assertions of governance.

Reference: C249-11-45 - IR44 - Squamish Nation - ITT - A4Q8L6 at 8-10.

153. Natural Resources Canada's articulation of Squamish's concerns is extremely vague and did not accurately capture Squamish's concerns. This articulation was not based on an assessment of Squamish aboriginal rights but rather largely on Squamish oral traditional evidence, which the Board limited to a total of three hours and was expressly not intended to exhaustively articulate Squamish aboriginal rights or the Project impacts on those rights.
154. Natural Resources Canada's articulation of Squamish's concerns further relied heavily on biophysical indicators such as marine life populations as proxies for aboriginal rights rather than on evidence dealing directly with impacts to aboriginal rights. This extremely reductionist articulation of Squamish's concerns fell well short of what would be required to discharge the duty to consult Squamish in relation to the Project.
- Reference: C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7 at 2-3, 13-15.
155. Squamish further repeatedly raised the issue of Trans Mountain's failure to assess Project impacts on Squamish aboriginal rights and provide full information. Trans Mountain did not provide an assessment of the impacts of the Project specific to

Squamish. Trans Mountain refused to correct this critical deficiency in its application in the course of the hearing.

Reference: C319-16-1 - Squamish Nation - Notice of Motion - IR No. 2 - A4I4H8; C319-18-1 - Reply - Notice of Motion Squamish IR No. 2 - A4J7L2; C319-21-1 - Squamish Notice of Motion - IR 2(c) - A4K6C1; C319-22-1 - Squamish Nation - Reply to Notice of Motion IR 2(c) - A4K7Q4; C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7; C319-32-1 - Squamish Nation Notice of Motion Intervenor Information Request Responses - A4R6K4.

156. The Draft Issues Tracking Table confirms the Crown's failure to ascertain the scope of Squamish aboriginal rights and the impacts on those rights from the Project.

E. OTHER ISSUES WITH THE CONSULTATION PROCESS

1. No Consultation on the Scope of the Project Review

157. The first step in a consultation process is to discuss the process itself. After the process has been discussed, the Crown then is obligated to establish a process that meets the needs of the First Nation and can discharge the duty to consult before any decision on the project is made. The requirement for this two-step process was set out in *Huu-Ay-Aht First Nation v. The Minister of Forests*, 2005 BCSC 697, as follows:

The first step in the process is to discuss the process itself (Gwasslam at para. 8). The Crown is then obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made.

Reference: *Huu- Ay-Aht First Nation v. The Minister of Forests*, 2005 BCSC 697 at para. 113

158. The Federal Court has further confirmed that First Nations must be consulted about decisions that establish the parameters for environmental assessments, and their concerns incorporated into the design of an environmental assessment and regulatory process related to a major pipeline.

Reference: *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 114-115, affirmed 2008 FCA 20

159. Consultation must start when "the project is being defined and continue until the project is completed."

Reference: *Kwikwetlem* at para. 70

160. Squamish was not involved in or in any way consulted regarding the hearing process to be followed by the Board, and the consultation process to be followed by the

Crown. In particular, Squamish had no opportunity to comment on the April 2, 2014 decisions of the Board – including the Hearing Order, List of Issues, Completeness Determination and Legislated Time Limit, Designated Project decision and Scope of the Factors to Considered in the Environmental Assessment – that set the scope of the Board’s review of the Project.

Reference: A15-3 - Hearing Order OH-001-2014 - A3V6I2; A13-1 - Letter - Application for Trans Mountain Expansion Project - Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012 - A3V6J1; A016 - National Energy Board - Letter to Trans Mountain Pipeline ULC - Application for the Trans Mountain Expansion Project - Completeness Determination and Legislated Time Limit (A59502)

161. The April 2, 2014 decisions severely circumscribed the parameters for the assessment of the Project without any notice to Squamish, or discussion with Squamish. Particularly, the scoping decision for the environmental assessment excludes marine shipping activities and environmental effects of concern to Squamish from the environmental assessment. The Hearing Order excludes the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline from the List of Issues. The completeness determination then determines that Trans Mountain’s application is complete, despite it failing to assess matters of concern to Squamish.
162. These decisions are final ones, which have had significant impacts on Squamish being able to raise matters of concern before the NEB and have those matters considered. The NEB erred in making the April 2, 2014 decisions before ensuring that sufficient consultation with Squamish had occurred.²
163. From its earliest correspondence with the Board and the Crown, Squamish raised concerns about the unilaterally determined review process, the inappropriately narrow list of issues to be considered in that process, and the incomplete information provided by Trans Mountain. The Board did not respond to these concerns.

² Tsleil-Waututh Nation has appealed the April 2, 2014 decisions of the Board to the Federal Court of Appeal (FCA) (Court File No. A-386-14). This matter has been reserved for judgment. Squamish is of the view that the NEB should not proceed with its recommendation until the FCA has ruled on whether the NEB properly scoped the review process.

Reference: C319-1-1 - Squamish Nation - Letter re. response to Notices of Motion and Hearing Order (00875348) - A3W0Q6; C319-4 - LT Squamish Nation to NEB re. response to City of Vancouver Notice of Motion - A3X3E2

2. The Crown did not Establish a Transparent Process

164. In order for consultation to be meaningful, the First Nation must know who is responsible for carrying out consultation and discharging the duty on behalf of the Crown. It was noted in *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 that:

Since it is the Province that (by necessity) divides its mandate among Ministries and agencies, it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.

Reference: *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para. 147

165. The Crown has never made it clear to Squamish who was responsible for carrying out consultation in respect of the Project. Throughout the process, Squamish was not provided with sufficient information about what role the NEB, the Crown Ministries and Trans Mountain were to play in discharging the duty to consult.
166. The Crown communicated that it would be relying on the NEB process to the extent possible, but did not explain the role of the NEB, Trans Mountain or the various Crown ministries in consultation. Squamish was left to implore the Crown about the role Trans Mountain was to play in the consultation process through information requests to Natural Resources Canada – and in response to those requests Squamish did not receive the necessary clarification – with Natural Resources Canada responding that the Crown relies on the NEB process to fulfill its duty, a process that requires the proponent to engage with Aboriginal groups.

Reference: C319-33 - Squamish Nation - Reply to responses of DFO and NRCan to the motion (A71641)

167. As a basic procedural requirement for meaningful consultation, the Crown needs to set out who is responsible for discharging the duty to consult with the First Nation. The Crown failed to satisfy this requirement in this case, leaving Squamish in the dark about who to address their concerns to.

3. Squamish was not Provided with Complete Information

168. Information sharing is essential to meaningful consultation. The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

Reference: *Halfway River* at para. 160; *Mikisew* at para. 64; *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348 at para. 294, reversed on appeal, but not on this point (2015 BCCA 89)

169. The information sharing through the NEB process was severely circumscribed. The Board decided to not allow cross-examination of Trans Mountain, and instead only allow two rounds of information requests on Trans Mountain's evidence. Trans Mountain did not participate in the information request process in good faith, instead provided evasive and unhelpful answers.

Reference: A15-3 – Hearing Order OH-001-2014 – A3V6I2; A32-1 - Ruling No. 14 - Notices of motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross-examination of witnesses - Trans Mountain Project - A3W5J1

170. The information sharing process was further restricted by the fact that intervenors were given a limited time to review evidence, and ask requests, and by the fact that Trans Mountain filed a substantial portion of its evidence late, including evidence on seismic and geotechnical risk for the Project. The late evidence was only subject to one round of information requests without any opportunity for intervenors, including Squamish, to ask follow-up questions or seek clarification of the answers provided.

Reference: B358-1 – Trans Mountain Notice of Motion regarding Seismic Hazard Update – March 31, 2015 – A4K0Z2.

171. On May 12, 2014, Squamish filed Information Request No. 1 to Trans Mountain. On June 18, 2014, Trans Mountain responded to Information Request No. 1 of Squamish, which response failed to adequately respond to a number of Squamish's requests. In general, Trans Mountain's responses evaded the question, did not respond to the central request, referred to general parts of the application that did not reference Squamish specific interests, referred to responses to others that were not relevant to

the request, stated that the information requested is not relevant to the review of the Project, or made the provision of information contingent upon Squamish engaging with Trans Mountain.

Reference: C319-7-1 - Notice of Motion on Trans Mountain s Response to IR No. 1 - A3Y8K5, Attachment "A"

172. On July 4, 2014, Squamish filed a notice of motion with the Board seeking an order compelling Trans Mountain to provide further and better responses.

Reference: C319-7-1 - Notice of Motion on Trans Mountain s Response to IR No. 1 - A3Y8K5

173. In a decision of September 26, 2014, the Board ordered Trans Mountain to provide further and better responses in relation to only 7 of the 30 responses alleged by Squamish to have been inadequate.

Reference: A81-1 - Ruling No. 33 - Motions to compel full and adequate responses to the first round of intervenor information requests - A4C4H5; A81-3 - Appendix 1 - A4C4H7

174. On January 16, 2015, Squamish filed Information Request No. 2 to Trans Mountain. On February 18, 2015, Trans Mountain responded to Information Request No. 2 of Squamish.

Reference: C319-15-2 - Information Request No. 2 - A4G5Z2; B317-32 - Trans_Mountain_Response_to_Squamish_Nation_IR_No._2 - A4H9D0

175. On February 16, 2015, Squamish filed a notice of motion to compel full and adequate responses to its Information Request No. 2 to Trans Mountain, noting that approximate three quarters of the requests made by Squamish remained outstanding. Of particular concern to Squamish was Trans Mountain's refusal to indicate the Project's potential impacts on Squamish rights and interests, responding instead with broad assertions based on information not specific to Squamish.

Reference: C319-16-1 - Squamish Nation - Notice of Motion - IR No. 2 - A4I4H8

176. In a decision of April 27, 2015, the Board ordered Trans Mountain to provide further and better responses in relation to only 3 of the 79 responses alleged by Squamish to have been inadequate.

Reference: A155-1 - Ruling No. 63 - A4K8G2; A155-3 - Appendix 1 - A4K8G4

177. On April 7, 2015, Squamish filed Information Request No. 2(c) to Trans Mountain in relation to Trans Mountain's February 27, 2015, filings. On April 13, 2015, Trans Mountain responded to Information Request No. 2(c) of Squamish.

Reference: C319-20-1 - Squamish Nation - Information Request 2(c) to Trans Mountain - A4K3T5; B372-10 - Trans_Mountain_Response_to_Squamish_Nation_IR_No._2(c) - A4K5C4

178. On April 17, 2015, Squamish filed a notice of motion to compel further and better responses to Information Request No. 2(c), noting that approximately 90% of the information requests remained outstanding.

Reference: C319-21-1 - Squamish Notice of Motion - IR 2(c) - A4K6C1

179. On May 8, 2015, the Board ordered Trans Mountain to provide further and better responses in relation to 2 of the 24 responses alleged by Squamish to have been inadequate.

Reference: A163-1 - Ruling No. 69 - A4L1U5; A163-3 - Appendix 1 - A4L1U7

180. On May 4, 2015, Squamish filed Information Request No. 2(d) to Trans Mountain in relation to the Seismic Hazard Update. On May 11, 2015, Trans Mountain responded to Information Request 2(d) of Squamish.

Reference: C319-23 -1 - Squamish Nation to NEB - IR No 2(d) - A4L0C9; B387-4 - Trans_Mountain_Response_to_Squamish_Nation_IR_No._2(d) - A4L1W8

181. On May 15, 2015, Squamish filed a notice of motion to compel further and better responses to Information Request No. 2(d), noting that approximately 77% of the information requests remained outstanding. Squamish noted in particular its concern that Trans Mountain deferred undertaking site-specific geotechnical assessments of seismic susceptibility sites with "high" and "moderate" liquefaction potential and other faulting hazards in Squamish territory until 2015/2016, which information is critical to a risk assessment in relation to the Project.

Reference: C319-24-1 - Squamish Nation Notice of Motion IR No. 2(d) - A4L3H1

182. On May 28, 2015, the Board denied Squamish's motion to compel further and better responses to Information Request No. 2(d).

Reference: A173-1 - Ruling No. 74 - A4Q2U5; A173-3 - Appendix 1 - A4Q2U7

183. On June 22, 2015, Squamish filed Information Requests to Natural Resources Canada and to the Department of Fisheries and Oceans Canada. On July 14, Natural Resources Canada responded to the information requests of Squamish.

Reference: C319-29 -1- Squamish Information Requests to DFO and NRC - A4Q7Y3;
C249-13-11 - 10. NRCan_on_behalf_of_Government_of_Canada_-
_Responses_to_Squamish_Nation_IRs - A4R4A3

184. On July 22, 2015, Squamish filed a notice of motion to compel further and better responses to Information Requests to Natural Resources Canada and to the Department of Fisheries and Oceans Canada. Squamish highlighted key requests that had not been fully and adequately answered about the failure to discuss the consultation process for the Project and about the sufficiency of the NEB process to assist in discharging the duty to consult for the Project. Squamish asked Natural Resources Canada to specifically clarify how the proposed “after the fact” consultation will accommodate Squamish.

Reference: C319-32-1 - Squamish Nation Notice of Motion Intervenor Information Request Responses - A4R6K4

185. On August 12, 2015, the Board denied Squamish’s motion to compel further and better responses to Information Requests to Natural Resources Canada and ordered Fisheries and Oceans Canada to provide further and better responses in relation to 1 of the 24 responses alleged by Squamish to have been inadequate.

Reference: A200-1 - Ruling No. 85 - A4S1H0; A200-3 - Appendix 1 - A4S1H2

186. In summary, over the course of the hearing, Squamish made a number of information requests to Trans Mountain in addition to requests to Natural Resources Canada and Fisheries and Oceans Canada. In every case, the responses provided were inadequate and in every case Squamish applied to the Board to compel adequate responses. The Board dismissed the overwhelming majority of Squamish’s requests for adequate responses. As a result, the vast majority of Squamish’s information requests were not adequately answered.

187. As Squamish advised the Board, Squamish required the information requested to understand, evaluate and respond to the Project. Without the information requested, Squamish was unable to assess the impacts of the Project on its interests, and to provide evidence to the Board in relation to such impacts. The failure of the hearing

process to adequately facilitate information sharing precludes the Crown from relying on the process to discharge the duty to consult Squamish.

Reference: C319-7-1 - Notice of Motion on Trans Mountain s Response to IR No. 1 - A3Y8K5 at 4

4. Squamish did not have the Capacity to Fully Participate in the Review Process for the Project

188. In the context of consultation between the Crown and First Nations, “appropriate funding is essential to a fair and balanced consultation process, to ensure a ‘level playing field’.”

Reference: *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 2214; [2007] 3 C.N.L.R. 22 at para. 27, supplemental reasons [2007] 3 C.N.L.R. 181

189. On May 22, 2014, Squamish submitted an application for participant funding to the Board’s Participant Funding Manager in which Squamish sought \$293,350 in funding to participate in the hearing process.
190. In response to repeated requests from Squamish, on August 26, 2014, the Board indicated that Squamish’s application for participant funding would not be reviewed until after November 28, 2014. Moreover, under the terms of the Board’s funding rules, any funding awarded by the Board could only be applied to work conducted after funding is granted and a funding agreement is executed by the intervenor and the Board.
191. In a letter to the Board of August 27, 2014, Squamish indicated that delaying funding until after November 28, 2014, would prejudice Squamish’s ability to participate in the hearing, in particular by preventing Squamish from collecting and presenting traditional knowledge in relation to the Project to assess potential impacts on Squamish aboriginal rights.

Reference: C319-9-1 - Squamish to NEB re Participant Funding Deadline - A4A5X7

192. On January 22, 2015, the Board offered Squamish participant funding of \$44,270 upon the execution of a contribution agreement. The terms of the offer restricted funding for expert fees to those incurred to produce a “spill modelling report” and/or a “Valued Component” report. No funding was offered to investigate and report on Squamish interests or traditional use values in relation to the Project. In a letter to the

- Board of February 18, 2015, Squamish accepted the Board's offer but raised the concern that the limitations on the funding offered would not facilitate the identification of Squamish aboriginal rights that stand to be affected by the Project, without which meaningful consultation in relation to the Project could not occur.
193. On May 25, 2015, the Canadian Environmental Assessment Agency on behalf of Major projects Management Office offered Squamish \$12,000 to participate in the "after the fact" consultation on the conditions set by the Board in Phase III. Squamish accepted the offer. However, as noted above, consultation on the conditions after they have been set by the Board, and there is no opportunity to amend them, cannot be meaningful.
194. In a letter of August 21, 2015, the Board advised that, due to his appointment to the Board, the evidence of Steven Kelly prepared on behalf of the proponent would be struck from the hearing record.
- Reference: A208-1 - Letter - A4S8Y8
195. On September 30, 2015, the Board announced via email that supplemental funding would be made available to address the implications of the Board's decision to strike the evidence of Mr. Kelly, but such funding would only be made available to those intervenors who "have filed evidence, information requests and/or responses to information requests on the hearing record that is directly impacted by the decision to strike the evidence prepared by Mr. Kelly from the hearing record."
196. In a letter to the Board of September 30, 2015, Squamish indicated that the decision of the Participant Funding Manager to severely restrict supplemental funding to deal with the implications of the Board's decision to strike the evidence of Mr. Kelly was prejudicial and unfair as it would mean no additional funding for Squamish despite that the decision to strike the evidence of Mr. Kelly resulted in additional costs to Squamish. The Board did not respond to this letter and struck it from the hearing record.
197. At the outset of the hearing, the Crown indicated that it intended to rely on the Board's hearing process to discharge the duty to consult Squamish. For that process to be meaningful, Squamish must have the opportunity and capacity to engage in the

- hearing process to fully understand the Project and its potential impacts upon Squamish, and to communicate its concerns to the Board. Given the formal, adversarial nature of the hearing process and the enormous volume of evidence adduced in the hearing, much of which is highly technical in nature, participating in the hearing process required significant resources, including the assistance of legal counsel and technical advisors.
198. Squamish provided a carefully itemized estimate of the costs it would incur to adequately participate in the hearing process. Without challenging or discussing any aspect of Squamish's estimate, the Board unilaterally offered Squamish roughly 15% of its estimated costs, which offer was subject to strict conditions on how funds provided were to be spent. The funding eventually provided by the Board fell well short of covering the costs incurred by Squamish to participate in the hearing process and severely curtailed the extent of Squamish's participation.
199. Squamish has a limited budget, which is fully subscribed to meet the needs of its members, such as housing and social services. Squamish is not the proponent of the Project and, unlike the federal and provincial governments, does not stand to gain from the Project through the collection of taxes or royalties. The sole purpose of Squamish's involvement in the hearing process is defensive: to protect its rights and interests from infringement and incursion as a result of the Project. In the circumstances, it was neither fair nor realistic to expect Squamish to provide the kind of funding required to meaningfully participate in the Board's hearing process.
200. The inadequate and restrictive funding provided by the Board was unfair and inconsistent with the honour of the Crown. The lack of adequate funding significantly impaired Squamish's ability to meaningfully participate in the hearing process and in part explains why so little progress was made in relation to the identification of Squamish aboriginal rights and the Project impacts on those rights.

5. The Crown's Proposed Consultation Process after the NEB Process is Complete will not assess Impacts to Squamish Rights and Title

201. Leaving aside that future consultation proposed by Natural Resources Canada will be too late to be effective; it is also deficient in that the nature of the consultation contemplated is inappropriate.
202. The Phase III consultation contemplated by Natural Resources Canada consists of the establishment of a dialogue “to determine if there are any concerns related to the Project that have not been fully addressed by the NEB’s draft conditions”. Phase IV as described by Natural Resources Canada does not include any specific consultation activities.

Reference: C249-9-1 - NRCan Written Evidence Submission TMX 27May2015 - A4Q0V2, at 9-12

203. The Phase III consultation contemplated by Natural Resources Canada presumes that the NEB process was effective in beginning the consultation process. This is clearly not the case. As noted above, to-date there has been no assessment of the scope of Squamish aboriginal rights that stand to be affected by the Project, nor any assessment of the Project impacts on those rights.
204. It would be premature for Squamish and the Crown to discuss “concerns related to the Project that have not been fully addressed by the NEB’s draft conditions” until such time as there has been an assessment of the Project’s impacts on Squamish rights and interests. Until that has occurred, Squamish will not be in any position to articulate its concerns related to the Project in any comprehensive way, let alone determine the appropriate avoidance, mitigation or accommodation measures to address those concerns. The NEB process has not provided an appropriate foundation for meaningful consultation to even begin.

Reference: C249-9-1 - NRCan Written Evidence Submission TMX 27May2015 - A4Q0V2, at 9

**PART 7 THE RISKS AND IMPACTS OF THE PROJECT ARE
UNDERREPRESENTED BY TRANS MOUNTAIN**

A. INTRODUCTION

205. Trans Mountain has underrepresented the risks and impacts of the Project in its application, failing to assess alternative locations for the Project, worst case scenarios for accidents and malfunctions, and impacts on cultural and environmental values of concern to Squamish. The extent of the risks and impacts of the Project to Squamish are not accurately represented in Trans Mountain's evidence before the NEB.
206. Trans Mountain has done this in an attempt to push the Project through as an "expansion" – ignoring the fact that the proposed terminus for the Project poses the greatest relative spill risk, due to the high volume of marine traffic in Burrard Inlet, and will have the greatest relative impacts, due to the dense population, environmental values, cultural values and economic values located in close proximity to the Project.
207. Trans Mountain has further not shown that it has the capability to effectively prevent or respond to spills associated with the Project. Trans Mountain has refused to provide detailed emergency response plans, and not shown that either it or the Western Canada Marine Response Corporation (WCMRC) has the capability of recovering submerged or sunken diluted bitumen.
208. The historic imposition of the Project in the heart of Squamish territory in the 1950s does not justify the expansion of the Project today. Once the risks and impacts of the Project are accurately accounted for, and properly scrutinized, it is clear that the expansion of the Project in the location proposed is not in the public interest generally, and not in the interests of Squamish particularly.

B. FAILURE TO CONSIDER ALTERNATE LOCATIONS FOR THE PROJECT

209. Trans Mountain has failed to provide an assessment of alternate locations for the Project as required by CEAA 2012 and the NEB Act, and the relative risks and impacts of those locations.

210. Trans Mountain justifies locating the expansion in the heart of Squamish territory – in the most densely populated area in British Columbia, with high environmental, cultural, economic values – on the basis that relocating the Project would amount to greater costs to Trans Mountain. This is not sufficient justification for putting Squamish territory and people at such extreme risk.

Reference: CEAA 2012, s. 19(g); NEB Act s. 52; NEB Filing Manual, s. 4.2.2; A13-1 – National Energy Board - Letter - Application for Trans Mountain Expansion Project - Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012 (A3V6J1)

211. Squamish has a sacred duty to protect and defend the lands, water and resources within their territory. It is a duty that Squamish has exercised since time immemorial in partnership with other Coast Salish Nations. As a part of that duty, Squamish has, to the extent able, reviewed the risks and impacts of the Project and concluded that there must be an extraordinarily compelling need to justify putting Squamish people, lands, waters and resources at such high risk of extreme impacts – Trans Mountain has failed to show such a need.

212. Squamish territory has been heavily impacted by development. However, Squamish has been working to rehabilitate the lands and waters within its territory, and to promote responsible development. These efforts must not be undermined by the imposition of a Project that has the potential to decimate areas of critical environmental and cultural importance to Squamish, and put the Squamish people at extreme risk.

213. The Fraser River Estuary, Burrard Inlet and Salish Sea, is considered “one of the most ecologically important coastal marine habitats along the entire Pacific coast of North America.” This area must be protected, and preserved, and not subject to the risks of an almost seven-fold increase in shipping of diluted bitumen.

Reference: C214-18-2 - Attachment A to written evidence of Living Oceans - Fate and effect of oil spills in Burrard Inlet and Fraser River Estuary - Dr Short (A4L9R7) at17.

214. The evidence of intervenors demonstrates how the proposed location for the terminus of the Project within Squamish territory severely exacerbates the risks and impacts of the Project. The relevant factors include:

- (a) the extensive sites used and occupied by Aboriginal groups around the Terminals, and along the shipping route, for the practice of Aboriginal rights;
- (b) the diverse marine and aquatic life supported by the ocean and the Fraser River;
- (c) the extensive and highly valued shoreline;
- (d) the unique marine conditions within Burrard Inlet and the Fraser River resulting in the potential for diluted bitumen to sink;
- (e) the high level of traffic within the Port of Vancouver;
- (f) the high seismic risk near the Westridge Marine Terminal and Burnaby Terminal;
- (g) the dense population in proximity to Burrard Inlet; and
- (h) the marine-dependent economy.

Reference: C358-13-2 - Vol 1 Tab 1 Affidavit of Leonard George - A4L5Z3; C214-18-2 - Attachment A to written evidence of Living Oceans - Fate and effect of oil spills in Burrard Inlet and Fraser River Estuary - Dr Short (A4L9R7); C41-8-1 – Seismic Hazard Assessment – Molnar – A4L6U4; C77-27-1 – Written Evidence – A4L7V8, at 6-11; C77-31-8 – Appendix 83 – A4L9G4; C77-55-2-10 – Revised Nuka Report – Clean – Part 1-9 – A4W1L4-A4W1Q2

215. Despite these factors, Trans Mountain has completely failed to provide an assessment of alternate locations for the Project in its application. Trans Mountain attempts to frame the application as an “expansion”, and undermine the level of scrutiny required under CEAA 2012 and the NEB Act. Trans Mountain asks the NEB to weigh the public interest in a vacuum, as if there were no other location or no other means to transport diluted bitumen to the west coast.

216. The NEB must not consider the Project to be in the public interest in the location proposed as Trans Mountain has failed to provide critical information that would justify its location in Squamish territory.

C. FAILURE TO PROPERLY ASSESS THE RISKS AND IMPACTS OF ACCIDENTS AND MALFUNCTIONS

1. Introduction

217. Trans Mountain has failed to provide a complete risk assessment for the Project that analyzes all hazard potentials. Trans Mountain severely underrepresents the risks of a

spill by failing to have regard to realistic worst case scenarios and by focusing on the likelihood of occurrence, as opposed to the potential consequences of spills.

218. The evidence of intervenors shows that the risk of a spill of diluted bitumen is potentially catastrophic to Squamish territory and people. Trans Mountain has not shown that there is the capacity to respond to such a spill.

2. Importance of Burrard Inlet, Fraser River, Howe Sound and the Surrounding Territory

219. Squamish use and occupy all of Burrard Inlet, Fraser River and Howe Sound and the waters draining into those bodies. Squamish's practice of their aboriginal rights depends on access to, and the health of, the marine and aquatic ecosystem in their territory.
220. Squamish takes their responsibility as stewards of their land and waters very seriously and has worked to maintain and restore the environmental, cultural, spiritual and economic foundation in their territory for the continuation of their way of life.
221. Squamish people continue to live and work on the shores of Burrard Inlet and the surrounding area, and would be severely impacted by a potential spill in the area.

3. The Oil Spill Risk is Intolerably High

222. Trans Mountain has failed to accurately assess the risk of an oil spill –failing to have due regard to the congested environment of the proposed shipping route and failing to analyze a worst case spill scenario.
223. The Port of Vancouver is the busiest port in the country, and one of the five busiest ports in North America. The high level of traffic within Burrard Inlet will increase the potential for accidents or malfunctions to occur.
224. Trans Mountain has failed to take into account the most basic point that spills do, and will happen for the Project, and provide an assessment of risks, and develop emergency response plans based on that basic premise. The City of Vancouver put forward evidence of Trans Mountains' spill record – confirming that spills have happened in the past, with random and sporadic causes, including human error, and will continue to happen.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8), p. 21; C77-27-1 – City of Vancouver - Written Evidence - Appendix 18 (A4L7X6); see also the City of Vancouver’s review of the risk assessment undertaken by Trans Mountain C77-27-1 – City of Vancouver - Written Evidence (A4L7V8), Appendix 22 (A4L7Y0)

225. The City of Vancouver report notes that between 1961 and 2013, Trans Mountain has reported 81 oil spills to the NEB with a total volume of nearly 5.8 million litres. This figure does not include those spills that do not meet the criteria for reporting, but that nevertheless have impacts on the environment and surrounding community.

Reference: C77-27-19 – Written Evidence of the City of Vancouver – Appendix 18 – Written Evidence of Sean Kheraj (A4L7X6) at 40

226. Squamish territory has been particularly impacted by spills from the current Trans Mountain pipeline system. In 2007, 234,000 litres of oil spilled due to a pipe burst caused by human error in the City of Burnaby and drained into the Burrard Inlet. In 2009, 277,000 litres of oil spilled from the tanks at the Burnaby Terminal. If the current pipeline system has proven to be a substantial threat, and shown that accidents do happen, tripling the amount of crude oil to be transported through that system and shipped in the precarious environment of Burrard Inlet cannot be in the public interest or the interest of Squamish.

Reference: C77-27-19 – Written Evidence of the City of Vancouver – Appendix 18 – Written Evidence of Sean Kheraj (A4L7X6), pp. 31-32

227. The application of Trans Mountain spill history data to proper spill risk methodology results in an assessed risk of 58% to 98% chance of a tanker spill over a 50 year period, whereas Trans Mountain erroneously assumes this risk to be only 16% – once mitigation measures are factored in. However, even on Trans Mountain’s assessment of risk, the risk of an oil spill affecting Squamish is too high.

Reference: C358-13-15 – Tsleil-Waututh Written Evidence - Vol 5 Tab 4A Appendix 1 Assessment of Spill Risk Report (A4L6A6) at iv

228. More recently, on April 8, 2015, there was an oil spill from the M/V Marathassa, a Panamax-sized bulk grain carrier at anchor in English Bay. After the initial clean-up, it was estimated that 2700 L of oil remained on the surface of the water and the estimated area of on-water oiling was 6.1 square kilometres. The incident highlighted major issues with the effectiveness of the emergency response assumed by Trans Mountain in its application.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8) at 36

229. A further study undertaken by Genwest Systems Inc. on the behalf of the Tsleil-Waututh Nation, City of Vancouver, and City of Burnaby shows the extent of four spill scenarios in Burrard Inlet. The spill volumes for the four-scenarios are supported by another report prepared for Tsleil-Waututh Nation and the City of Vancouver by Nuka Research that concludes that the spill volumes represent reasonable worst case scenarios for oil spills at the four sites.

Reference: C69-44-4 – Oil Spill Trajectory Modelling Report in Burrard Inlet for the Trans Mountain Expansion Project (A4L8F8); C77-55-2-10 – Revised Nuka Report – Clean – Part 1-9 – A4W1L4-A4W1Q2

230. The Genwest report initially reviewed Trans Mountain’s modelling effort in Burrard Inlet and concluded that it has two major shortcomings: (i) the model used by Trans Mountain—SPILLCALC—does not allow for refloating of beached oil; and (ii) Trans Mountain’s consultant made unrealistic modeling scenario assumptions to model oil spill trajectory at the Westridge Marine Terminal, assuming that the containment boom is always in place, resulting in the spill trajectory model processing a “hypothesized” much smaller spill, not a worst-case spill scenario for Burrard Inlet.

Reference: C69-44-4 – Oil Spill Trajectory Modelling Report in Burrard Inlet for the Trans Mountain Expansion Project - A4L8F8

231. The report then undertook its own modelling of the four spill scenarios in Burrard Inlet:

- (a) an oil spill of 8,000 m³ at the WMT;
- (b) an oil spill of 16,000 m³ at Second Narrows under the Canadian National Railway Bridge;
- (c) an oil spill of 16,000 m³ at First Narrows; and
- (d) an oil spill of 16,000 m³ in the Outer Harbour at Anchorage #8.

232. The modelling shows that: (i) a significant portion of Burrard Inlet is potentially threatened by oil spills at the Terminal, Second Narrows, and First Narrows; (ii) a substantial amount of oil was beached on shorelines; and (iii) the highest probability regions for floating oil disappear relatively quickly (because most of the oil is at least

temporarily on beaches) but that oil in areas subject to lower, but still significant, percentages of the spill tends to spread covering many tens of square kilometers.

Reference: C69-44-4 – Oil Spill Trajectory Modelling Report in Burrard Inlet for the Trans Mountain Expansion Project (A4L8F8) at 8

233. The report concluded that:

Oil spreads quickly in the confined geophysical setting in Burrard Inlet. The combined results of all the scenarios demonstrate that oil has the potential to spread throughout Burrard Inlet, from the Indian and Port Moody Arms to the Outer Harbour and beyond.

Reference: C69-44-4 – Oil Spill Trajectory Modelling Report in Burrard Inlet for the Trans Mountain Expansion Project (A4L8F8) at 3

234. Trans Mountain filed a reply report to the Genwest study. Trans Mountain in its reply did not address the fundamental gaps pointed out in its assessment of worst case scenarios of oil spills in Burrard Inlet, but attacked the model relied upon in the report, as only a model that was recognized as providing information for spill response “on the fly”, and again focused on the probability of worst case scenarios, ignoring the potential consequences of such events. Trans Mountain completely disregarded the potential for the congested environment of Burrard Inlet to increase spill risk and impacts.

Reference: B418-7 – Reply Evidence-Attachment 1.08-Reply to Oil Spill Trajectory Modeling Genwest – A4S7K5

235. A proper risk assessment must take into account both the likelihood of a spill occurring and the impacts of a spill. Low probability, high consequence events pose some of the greatest planning and response challenges for communities, but are among the most important to understand and plan for. This is a critical deficiency in Trans Mountain’s application, and has serious implications for sufficiency of the emergency plans as set out below.

Reference: C77-27-23 –Appendix 22 – A4L7Y0; see also C86-12-5 –Appendix G to Written Evidence of Cowichan Tribes - A4L9Z8 at 3

236. Trans Mountain cannot assess the risk of an oil spill in a vacuum without regard to the environment in which it proposes to ship the oil, and without regard to the consequences of a spill in such a densely populated and highly valued area. The evidence of intervenors clearly shows that the risks of a spill are intolerably high for the Project.

4. Environmental Impacts of a Spill are Severe

237. Intervenors have filed a significant amount of evidence to support the acute short-term impacts as well as the persistent long-term impacts of a diluted bitumen spill in Burrard Inlet and the Fraser River Estuary to invertebrates, fish, mammals, marine birds and vegetation of importance to Squamish.
238. The City of Vancouver points to a report commissioned by Transport Canada that ranked the entire Georgia Strait, including the Squamish territory, as “very high” on the Environmental Risk Index for crude oil spills within a range of volumes from 10 m³ to 10,000 m³.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8) at 53-54, 69

239. The impacts of a spill to invertebrates, fish, mammals, marine birds and vegetation of importance to Squamish include acute toxicity and mortality; oiling of fish, mammals and birds; oiling of the shorelines creating long term oil exposure to flora and fauna; the ingestion of diluted bitumen by species, contaminating the food chain; increased growth of cancer; reduced growth, nerve function, immunity to disease and reproductive success; suffocation and drowning; and habitat alteration.

Reference: C214-18-2 - Attachment A to written evidence of Living Oceans - Fate and effect of oil spills in Burrard Inlet and Fraser River Estuary - Dr Short (A4L9R7); C319-27-6 – Squamish Nation – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report (A4L7E7); C234-15-2 – Written Evidence of Metro Vancouver - Revised #30, Zoetica Environmental – Clean Version Part 1 (A4T0R6); C234-15-3 – Written Evidence of Metro Vancouver - Revised #30, Zoetica Environmental – Clean Version Part 2 (A4T0R7); C291-1 – Ecojustice – Attachment B to written evidence of Raincoast – Potential effects on salmon of an oil spill into the Lower Fraser River – Logan et al. (A4L9F4)

240. Squamish adopts the evidence of the other intervenors in this regard. Squamish relies extensively on the lands and waters within its territory, and these impacts would restrict Squamish’s use and access to the territory and resources in the short term, with potentially severe long term impacts on the ecosystem, species of importance to Squamish and the meaningful exercise of Squamish aboriginal rights.

5. The Fate and Behavior of Diluted Bitumen Exacerbates Project Impacts

241. Trans Mountain has further not adequately accounted for the unique behavior and risks of diluted bitumen when released into the environment – including the propensity of diluted bitumen to become submerged or sink – in its evidence. This alone is a reason to hold off recommending that the Project is in the public interest, until more is known about how to respond to a spill of diluted bitumen.
242. The unique risks of a spill of diluted bitumen have been set out in a number of reports, including in relation to the experience of the Kalamazoo River spill. The reports identify two potentially exacerbating factors associated with a spill of diluted bitumen (i) the potential for diluted bitumen to submerge when spilled with the consequent environmental impacts and (ii) the risk posed to air quality and human health by the toxic plume created by evaporating diluents. These risks are not adequately accounted for in the application of Trans Mountain, including the emergency response plans of Trans Mountain.

Reference: C77-27-1 – City of Vancouver - Written Evidence - A4L7V8, at 46; See, for example, B279-5 – Attachment 2.3 Trans Mountain Pipeline ERP (Publish Date July 2014) - A4D3F2, which states at 55 that "it is possible to have sunken or submerged oil in marine and freshwater environments"; See also National Transportation Safety Board, Accident Report NTSB/PAR-12/01 PB2012-916501, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release - Marshall, Michigan, July 25, 2010, submitted by E. May as written evidence, C228-5-7 Appendix F - A4L8R8

243. Trans Mountain maintains that the likelihood of diluted bitumen becoming submerged or sinking is low. However, Trans Mountain does not address the particular environmental factors for the Project, particularly in the Fraser River, that would increase the chances of this behavior occurring for the Project.

Reference: B316-34, Trans Mountain response to BC IR No. 2 - A4H8W6, IR No. 2.33, at 161-163; See also B316-11, Matsqui FN IR No. 2 – A4H8U3, IR No. 2.08 a), at 40

244. A report prepared by Jeffrey W. Short, Ph.D., for Tsleil-Waututh Nation, the City of Vancouver and the Living Oceans Society, entitled “Fate and Effect of Oil Spills from the Trans Mountain Expansion Project in Burrard Inlet and the Fraser River Estuary”, provides an assessment of the fate and effects of oil spills of diluted

bitumen in Burrard Inlet and the Fraser River estuary. The report makes the following findings about the behavior of diluted bitumen:

- (a) The bitumen component of diluted bitumen consists essentially of highly biodegraded petroleum that is naturally prone to submerging in fresh and brackish water.
- (b) Under near worst-case ambient conditions of warm summer temperatures and moderate winds, spilled diluted bitumen may begin to submerge in the surface layer of the Fraser River plume and Burrard Inlet about 24 hours following initial release.
- (c) Diluted bitumen is a mixture of high-volatility, low-density hydrocarbon diluent, such as benzene, with low-volatility, high-density bitumen and once spilled, rapidly loses the high-volatility components, in marked contrast with normal crude or heavy refined oils.
- (d) The large tidal excursion range is conducive to spilled diluted bitumen stranding on shorelines, particularly on the long, flat shorelines in Burrard Inlet and at Sturgeon Bank and the South Arm marshes. An oil spill anywhere in the Burrard Inlet would almost certainly result in considerable shoreline oiling, which in itself forms an important habitat for organisms. Once incorporated beneath the surface of the shoreline, diluted bitumen can persist for considerable periods of time in the absence of physical disturbance.
- (e) If diluted bitumen submerges in the waters of Burrard Inlet or elsewhere in the Fraser River estuary, species inhabiting the water column or on adjacent shorelines may ingest oil directly. Once ingested, these species become an indirect route for oil exposure to predatory species.

Reference: C77-27-1 – Written Evidence - A4L7V8, at 46-47; C77-27-4 Appendix 3 - A4L7W1; See also Dr. Short's analysis of the risk to the Salish Sea, Strait of Juan de Fuca and west coast of Vancouver Island, C214-18-3 – Attachment B to written evidence of Living Oceans – Fate and effect of oil spills – Dr Short – A4L9R8.

245. The report concludes that a credible worst-case scenario oil spill of 16,000 m³ near the Fraser River estuary could rank within the top ten bird mortality events from an oil spill, and have impacts on marine mammal populations. Small to medium sized oil spills in the order of 100 to 1,000 m³ can further cause substantial mortalities to seabirds, and estimated effects for small to medium spills have the potential to contaminate tens of kilometers of shorelines for decades.

Reference: C77-27-1 – Written Evidence - A4L7V8, at 46-47; C77-27-4 Appendix 3 - A4L7W1

246. Natural Resources Canada acknowledges in its evidence that it is currently developing and expanding its capabilities to do research on the specific of behaviour of diluted bitumen in water environments. NRCan states that it “will have the capability of reviewing both the chemical composition of oils as well as the fate and behaviour of those oils in water environments in future.” This is an acknowledgement that Natural Resources Canada currently does not have the capability to understand the fate and behavior of diluted bitumen.

Reference: C249-09 - NRCan - NRCan's Written Evidence May 27, 2015 (A70313) at 17

247. Trans Mountain states that the reports on the behavior of diluted bitumen are consistent, and show that it has similar propensities as other crude oil. This is clearly not the case, given the extensive contradictory evidence of intervenors. Trans Mountain’s focus on the similarities between diluted bitumen and conventional crude oil ignores the fact that even small chemical changes could have substantial environmental ramifications.

Reference: B417-2 – Trans Mountain Pipeline ULC-Reply Evidence-Part1 (stricken in part) – A4S7E9, at 25-8; C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7, at 16

248. The studies put forward by intervenors support that diluted bitumen has a propensity to become submerged or sink. This unique behavior of diluted bitumen presents additional risks to the environment, first responders and the public and has implications for the speed and effectiveness of any oil spill response and recovery measures. Trans Mountain has not addressed these risks in its emergency response plans.

6. Trans Mountain has not Assessed the Impacts of a Spill of Diluted Bitumen to Squamish

249. The impacts of a spill within Squamish territory have the potential to be catastrophic damaging not only the environment, but the ability of Squamish to meaningfully practice its aboriginal rights for years to come. However, the specific impacts of a spill on Squamish valued components were not assessed in the application of Trans Mountain or throughout the review process, and as such, the extent of the particular impacts of a spill from the Project to Squamish aboriginal rights remain unknown.

250. Squamish retained PGL Environmental Consultants to prepare two reports identifying the information gaps in the application in relation to the potential spill impacts from the Project on Squamish (i) a report on the potential effects of accidents and malfunctions, including a spill of diluted bitumen, on Squamish (ii) a report on the effects of diluted bitumen on salmonid species.

Reference: C319-27-6 – 3. Potential Adverse Effects to Squamish Interests – Accidents and Malfunctions Associated with Trans Mountain Expansion Report – A4L7E6;
C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7.

(a) No assessment of impacts to Squamish valued components

251. The first report provided a framework to assess the impact of potential accidents or malfunctions on the valued components of Squamish, and the unique pathways of effects for Squamish. Squamish does not separate culture from nature, so many of the effects to the environment will have cultural and spiritual effects on Squamish. The report concludes that the effects to the valued components of Squamish are not adequately assessed in the application of Trans Mountain.

Reference: C319-27-6 – 3. Potential Adverse Effects to Squamish Interests – Accidents and Malfunctions Associated with Trans Mountain Expansion Report – A4L7E6

252. Trans Mountain erroneously assumes throughout the application that “the absence of a significant biophysical effect automatically implies the absence of an adverse cultural effect.” The report highlights the gaps in the analysis of Trans Mountain as follows, but notes that the report does not substitute as a complete assessment of effects to Squamish:

1. The full suite of potential Squamish interests have not adequately been described in the Application.
2. Potential adverse effects on Squamish interests associated with Project accidents and malfunctions have not been adequately identified.
3. Failure to identify effects has led to insufficient collection of appropriate baseline data.
4. Failure to collect appropriate baseline data makes it methodologically impossible to predict potential adverse effects.
5. The absence of predicted effects means that it is not possible to determine the significance of potential adverse effects associated with accidents and malfunctions on Squamish interests.

6. In the absence of a significance determination of adverse effects from accidents and malfunctions on Squamish interests, the Application is deficient with respect to the requirements of CEAA 2012.

Reference: C319-27-6 – 3. Potential Adverse Effects to Squamish Interests – Accidents and Malfunctions Associated with Trans Mountain Expansion Report – A4L7E6 at 21-23

253. In response to this report, Trans Mountain has not undertaken an assessment of the risks of accidents and malfunctions for the Project specific to Squamish valued components. As a result, many of the risks and impacts remain unknown, and there is not sufficient information before the NEB to assess the impacts of the Project to Squamish or to address the concerns of Squamish.

(b) Spills from the Project have the potential to significantly impact salmonid species

254. The second report from PGL sets out the potential impacts of a diluted bitumen spill to salmonid species, including salmon, trout, char, and whitefish.

Reference: C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7

255. Squamish rely heavily on salmonid species for food and cultural purposes. Burrard Inlet is home to several salmonid species including Pink, Coho, Chum, Chinook and Sockeye salmon, as well as Cutthroat and Steelhead trout. These populations spawn in the streams feeding the Inlet, including the Indian, Capilano, and Seymour Rivers and multiple smaller creeks, with juveniles abundant in the near-shore areas between early spring and fall. The Fraser River is also an important source of Sockeye salmon.

Reference: C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7

256. The report sets out that the known adverse effects of crude oil on salmonid species are significant, but that the effects of diluted bitumen may be more toxic and more persistent, given its propensity to remain in the environment longer; its propensity to emulsify more than crude oil; its propensity to submerge; the heavier nature of the product left in the water; and the lack of effective clean up techniques.

Reference: C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7

257. The known impacts of crude oil for salmonid species that will be exacerbated in the case of diluted bitumen include:

- (a) crude oil may coat salmonid species' gills causing suffocation and death;
- (b) crude oil may coat salmonid eggs, preventing gas exchange across the yolk sac, resulting in suffocation and death;
- (c) crude oil residues adhering (stuck to) on habitat features may make them unsuitable for egg adhesion or retention;
- (d) ingesting crude oil reduces salmonid growth rates by reducing appetite and affecting fish metabolism;
- (e) chemical residue (in the form of PAH) in the water column or entering the water after flowing through oiled soils or sediments may affect salmonid species in a number of ways:
 - (i) by causing cellular ion imbalance, leading to reduced nerve function and circulation; or
 - (ii) by altering gene expression, leading to, or adverse effects on, immunity to disease or changes in growth.
- (f) chemical residue (in the form of PAH) in the water column or entering the water after flowing through oiled soils or sediments may be metabolized, leading to increased incidences of cancer; and
- (g) chemical residues of crude oils (in the form of PAHs) can affect salmonid populations by reducing reproductive success.

Reference: C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7 at 14-15

258. Other intervenor evidence supports that diluted bitumen is acutely toxic to salmon and is lethal within 24 hours of exposure.

Reference: C234-15-3 – Written Evidence of Metro Vancouver - Revised #30, Zoetica Environmental – Clean Version Part 2 (A4T0R7) at108

259. The report of PGL concludes that there are significant knowledge gaps in relation to the interaction of diluted bitumen with the environment that may have significant

environmental ramifications, and need to be investigated further, before the assessment of the risks and effects of spills for the Project can be considered reliable. The report notes that Trans Mountain's broad conclusion that "due to the generally low potential for the spill scenarios to cause wide-spread mortality to fish, recovery of the marine fish community would be expected to be rapid" does not disaggregate or acknowledge a number of potential adverse effects, or consider specific shore types or species within Squamish territory.

Reference: C319-27-6 – 4. Potential Effects of Diluted Bitumen Spills on Salmonid Species Report – A4L7E7, at 16-18

260. The assessment of the Project must meaningfully address Squamish's concerns with the potential adverse effects. In the absence of effects identification and determination, the application cannot demonstrate that its proposed mitigation is adequate to safeguard Squamish's interests with respect to salmonid species.
261. Salmonid species are a species of critical importance to Squamish. The known effects of a spill to the salmonid population on which Squamish depends have the potential to be long-term and significant, and militate against increasing the volume of oil shipped through Squamish territory. However, when combined with the knowledge gaps, and potential for diluted bitumen to be even more toxic, and remain in the environment potentially indefinitely, it is abundantly clear that the location of the Project in this precarious environment poses an unacceptable level of risk, and will have significant impacts on Squamish access to salmonid species.

7. Failure to Develop Effective Emergency Response Plans

262. Squamish has a duty of care to its members and has a responsibility to protect the lands and waters within its territory from risks and hazards. There have been a number of shortcomings pointed out in the emergency response plans of Trans Mountain the most concerning of which include (i) response capacity to oil spills and other hazard events and (ii) the ability to respond to sunken diluted bitumen.

(a) Trans Mountain has not shown that it has the capability to respond to emergencies associated with the Project

263. Trans Mountain relies heavily in its application on municipal support to be able to effectively respond to accidents and malfunctions associated with the Project.

However, a number of the municipalities that would play key roles in providing such support, including the City of Burnaby and the City of Vancouver, have put forward evidence that they currently do not have the capability to do so.

264. The City of Burnaby's evidence from the Fire Department is that they currently do not have the capacity or resources to provide specialized hydrocarbon firefighting, and to protect the public in the event of fire associated with the Project. The City of Vancouver's evidence is that there are significant gaps in spill response plans and preparedness, and that the Vancouver Fire Department does not have the capability to fight shipboard fires on tankers.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8) at 53-54, 69;
C69-44-2 – City of Burnaby - Burnaby Fire Department - Trans Mountain Tank Farm Tactical Risk Analysis – Part 1 – Report and Appendix A (A4L8F6)

265. The City of Vancouver has put forward a resolution to the Union of British Columbia Municipalities (UBCM) entitled “Requiring Consequence and Response Capacity Assessment for Sunken or Submerged Diluted Bitumen in Local Communities” to call on “the provincial and federal governments to expand the scope of oil and hazardous and noxious substances (HNS) risk assessment and response planning to include all impacts and consequences on local communities and governments, and introduce additional funding for the resources and locally-specific capacity building required to ensure that municipalities are in the best possible position to plan for and protect communities and the environment in the event of fires, explosions, spills and related incidents as a result of increasing transportation of oil and HNS.” This capacity currently does not exist.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8) at 44-45

266. The City of Vancouver, Tsleil-Waututh Nation and Tsawout First Nation commissioned an expert to assess the oil spill response capabilities and limitations in areas of Southern British Columbia that are vulnerable to potential oil spills from the

Project. The report modelled spills along the tanker route to estimate oil recovery during the first 72 hours of a spill. The report's conclusions notably included that the spill response forces currently available in Southern B.C. have the capacity to recover only 10-20% of a worst case oil spill under favourable conditions; and that there would be a gap in spill response for 34% of the time during the summer months and for 57% of the time during the winter months due to unfavourable conditions.

Reference: C77-55-2-10 – Revised Nuka Report – Clean – Part 1-9 – A4W1L4 - A4W1Q2, at iv, ix

267. The report pointed out particular challenges for spill response in the Lower Fraser River from the Port Mann Bridge to the Fraser Delta including that: there may not be time to mobilize and deploy equipment in time to control the spill before it reaches the Lower Fraser Delta; response equipment inventories along the Lower Fraser River are limited; existing river response equipment is meant for floating oil, and would not be effective in the event that a diluted bitumen spill submerged or sank in the Lower Fraser River; and Trans Mountain's application lacks critical detail on oils spill response in fast moving river conditions.

Reference: C77-55-2-10 – Revised Nuka Report – Clean – Part 1-9 – A4W1L4 - A4W1Q2 at xii

268. The City of Vancouver's recent experience with the Marathassa oil spill confirmed the gaps in the oil spill response capability in the region, including that: there was a delay in the response to the spill, a delay in notification of Vancouver, insufficient capacity to deploy protective boom when requested to Stanley Park and other sensitive sites identified by Vancouver, incomplete information about the volume of oil spilled and recovered, and a number of challenges with the reporting of information at the Incident Command Post.

Reference: C77-27-1 – Written Evidence – A4L7V8 at 36-44, 86-91

269. Trans Mountain has not provided any comprehensive plans to respond to accidents or malfunctions, including oil spills, for the Project. Trans Mountain has further failed to show that the resources and capacity needed to respond to such events would be available for the Project.

(b) Trans Mountain admits that it does not have the capability to respond to submerged or sunken diluted bitumen

270. The unique properties of diluted bitumen, including that it has the propensity to become submerged or sink, only exacerbate the risks posed by a spill and the gaps in spill response capacity. Trans Mountain has not shown that it has the capability to respond effectively to diluted bitumen spills that have become submerged or sunk, or adequately assessed the potential adverse environmental effects of such an event.
271. Squamish in its information requests to Trans Mountain asked about the capability to respond to sunken diluted bitumen. Trans Mountain did not fully answer the initial request, but a full answer was compelled by the Board, which noted the following limitations in recovering oils that are suspended in the water column or have sunk:
1. Locating the area within the water column or sea floor that is transporting or has received submerged or sunken oils.
 2. Gaining access to oil that is undetected but is being transported in the water column or has settled to the sea floor.
 3. Once 1 and 2 have been satisfied, applying the appropriate measures to recover the oil under such circumstances keeping in mind that NEBA (Net Environmental Benefit Assessment) principles must be followed.
- Reference: A155 - National Energy Board - Ruling No. 63 – Motions to compel full and adequate responses to the second round of intervenor information requests (A69687); C319-18 - Squamish Nation - Reply to TM Response to Notice of Motion re Squamish IR No. 2 (A68925), IR 2(a) at 4-7; B384-21 Trans_Mountain_Responses_to_Squamish_Nation_F-IR_No._2 - A4L0A8 at 5
272. Trans Mountain expressly acknowledges that “[n]either Trans Mountain nor WCMRC maintains equipment to specifically recover sunken oil.”
- Reference: B384-21 Trans_Mountain_Responses_to_Squamish_Nation_F-IR_No._2 - A4L0A8 at 8
273. Trans Mountain described the following methods for recovering sunken oil including: agitation of sediment to release the oil by rake, excavation, and hydraulic dredges. However, Trans Mountain did not indicate whether these technologies would be utilized for the Project – only noting that they would be developed by the responsible party and regulatory authorities using NEBA. Trans Mountain did note that “[i]n some cases, the risk of disturbing contaminated sediments exceeds the benefit of

removing them” – meaning that the diluted bitumen would be left in the environment in some cases if the environmental effects of removing it are too great.

Reference: B384-21 Trans_Mountain_Responses_to_Squamish_Nation_F-IR_No._2 - A4L0A8

274. The report by Lauri Solsberg of Counterspil Research Inc. evaluates technologies for their ability to deal with viscous oils that have submerged. The report concludes that “if spilled oil becomes suspended between the water’s surface and the bottom, it is unlikely that any commercially available response technologies can be successfully applied to significantly control the spill.”

Reference: C214-18-1 – Ecojustice - Statement of Written Evidence of Living Oceans Society - A4L9R6, at 11; See also C214-18-6 - Attachment E to written evidence of Living Oceans – Review of Countermeasures Technologies for Viscous Oils that Submerge – Solsberg – A4L9S1.

275. The National Academy of Science’s “Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects and Response” confirms that (i) there are few effective techniques for detection, containment, and recovery of oil that is submerged in the water column, and (ii) available techniques for responding to oil that has sunken to the bottom have variable effectiveness depending on the spill conditions. The U.S. Congress tasked the U.S. Department of Transportation to commission this study to better prepare for diluted bitumen spills after the disastrous Kalamazoo River spill in 2010.

Reference: C214-31-3 - Appendix A - National Academy of Sciences - Spills of Diluted Bitumen from Pipelines – (A4W3Z0)

276. This report was attempted to be admitted into evidence for the Project by Living Oceans Society and Raincoast Conservation Foundation. However, the NEB rejected it – noting the prejudice to Trans Mountain. The findings of this study directly contradict those cited by Trans Mountain. Given the uncertain state of the knowledge surrounding the behavior of diluted bitumen, it is critical the NEB have regard to all available information. The NEB’s decision to refuse to accept the report shows a complete disregard for the safety of the surrounding population, and adds force to the argument that the Project should not be considered until more is known about the behavior of diluted bitumen.

Reference: A241 – National Energy Board – Ruling No. 105 Living Oceans Society and Raincoast Conservation Foundation – Notice of Motion to file late evidence (A4X0Z7)

277. It has not been shown that there is the capability to respond to a spill of diluted bitumen that has submerged or sunk for the Project, particularly in the fast-moving waters of the Fraser River where there are sensitive spawning grounds. Trans Mountain has not developed a comprehensive plan for the recovery of submerged or sunken diluted bitumen, or assessed the environmental impacts of such a spill and the environmental impacts of recovery techniques. Squamish implores the NEB to not wait for a “Kalamazoo River spill” in British Columbia before considering the impacts of such an event, and ensuring that adequate response measures exist.

Reference: See also, C289-13-1 - Province of BC Final Argument - Jan. 11, 2016 – A4X3T4

8. Summary

278. Trans Mountain has failed to provide evidence that there is the necessary capability to respond to an oil spill in Squamish territory, particularly to one involving submerged or sunken diluted bitumen.

Reference: C77-27-1 – City of Vancouver - Written Evidence (A4L7V8) at70-71

279. The consequences of spills or other accidents or malfunctions on Squamish members, and Squamish territory, have the potential to be catastrophic. Spilled oil is likely to impact shorelines in Burrard Inlet, or travel great distances along the Fraser River to the Fraser River Delta, impacting salmonid spawning grounds. Trans Mountain has not developed a comprehensive response plan, or shown that there are sufficient resources to respond to such spills effectively and protect Squamish territory.
280. The Province of British Columbia has relevantly concluded that the record before the NEB is not sufficient to show that world class spill response capability would be in place in advance of the Project, and asked the NEB to not recommend approval of the Project.

Reference: C289-13-1 - Province of BC Final Argument - Jan. 11, 2016 – A4X3T4

281. It is imperative that effective spill response strategies are in place. This is not a matter that can be considered post-approval. The NEB must have as its top priority the

protection of the public – no economic need can justify putting Squamish territory and people at such extreme risk. The NEB must recommend that the Project is not in the public interest based on the lack of emergency response planning and capacity presented by Trans Mountain.

D. TRANS MOUNTAIN HAS NOT PROPERLY ASSESSED THE HEALTH IMPACTS OF THE PROJECT

282. Trans Mountain's risk assessment to human health is deficient. The health risks to the Squamish population of routine operations, and of accidents and malfunctions, have the potential to be significant.
283. Squamish has a duty to protect its people. Squamish is particularly concerned about the impacts of operations, and accidents and malfunctions, to health, given the proximity of Squamish members to the facilities in Burnaby, and to the shipping route for the Project.
284. Vancouver Coastal Health and Fraser Health reviewed the assessment undertaken by Trans Mountain in relation to human health and concluded that it was incomplete, given: the assumptions in the air dispersion models may be incorrect; the omission of identified key air pollutants in the Metro Vancouver / Fraser Valley regions in the air dispersion models; the exclusion from spill scenarios of products other than Cold Lake Winter Blend diluted bitumen that would also be carried by the expanded pipeline system (refined products such as gasoline, jet fuel); the exclusion from spill scenarios of exposure pathways other than air inhalation; and the absence of an assessment on the human health risks from the construction phase activities of the Project.

Reference: C69-44-21 – City of Burnaby - Health Impacts - VCH and FH to City of Vancouver and City of Burnaby (A4L8H5); see also C404-3-3 – Simon Fraser University - PGL Report - May 21, 2015 (A4Q0X8); C214-18-5 - Attachment D to written evidence of Living Oceans - Health Risks - Dr Batterman (A4L9S0)

285. There is further evidence that shows that Trans Mountain has severely underrepresented the air emissions from the Westridge Marine Terminal by assuming a near perfect 99.9999% collection efficiency. Assuming a credible collection

efficiency of 95% or 99%, Westridge Marine Terminal would exceed the maximum allowable emissions for Benzene of 30 µg/m³.³

Reference: B316-16 - Trans Mountain Response to Metro Vancouver IR No. 2 - A4H8U8, IR No. 2.2.1c), at 69-72; C234-7-21 – Exhibit 16, Novus Metro Vancouver AQ Modelling Final Report - A4L8A2; 234-7-7 - MV Evidence Submission Final - A4L7Y3; see also C214-4 – Attachment C to written evidence of Living Oceans – Review of Facilities Application – Focus on Air Quality – Dr Simpson – A4L9R9

286. A number of intervenors have further submitted evidence on the seriousness of the impacts of accidents or malfunctions associated with the Project to the health of the surrounding community. Many of these impacts could be lessened, or even avoided, if petroleum storage and shipping was located in a remote area further from densely populated areas.
287. The direct impacts of a fire or spill to the surrounding population could result in massive loss of life, and severe health impacts. Further, an oil spill or fire presents the potential for exposure to poisonous hydrogen sulfide and sulphur dioxide release. Smoke outfalls from a fire event may contain sulphur dioxide (SO₂) with potential health concerns to be felt up to 5.2 kms downwind.

Reference: C69-44-2 – City of Burnaby - Burnaby Fire Department - Trans Mountain Tank Farm Tactical Risk Analysis – Part 1 – Report and Appendix A (A4L8F6)

288. Metro Vancouver provided air dispersion modelling for four spills – English Bay, First Narrows Bridge, Second Narrows Bridge and Westridge Terminal. The conclusions of that report included that in the event of a spill there were predicted benzene exceedances, causing “irreversible or other serious health effects that could impair the ability to take protective action”, in areas where people may be present, including Stanley Park, Lions Gate Bridge, Second Narrows Bridge. The acute inhalation exposure benzene limit was exceeded in large areas affecting a range of 133,100 to 1,077,700 people for each of the spills considered.

Reference: C234-7-21 – Exhibit 03, Air Quality Impacts from Simulated Oil Spills in Burrard Inlet and English Bay - A4L7Y8, at iii.

³ Benzene is listed on the *Canadian Environmental Protection Act* (CEPA) 1999 List of Toxic Substances (Schedule 1), Metro Vancouver’s 2007 “Air Toxics Emission Inventory & Health Risk Assessment” and the more recent 2015 Canadian Lower Fraser Valley “Toxic Air Pollutants Risk Assessment”. See 234-7-7 - Metro Vancouver Written Evidence and Exhibits – MV Evidence Submission Final (A4L7Y3), p. 23.

289. A study by BROKE looks at the human health effects of the exposure to the chemicals contained in the diluted bitumen to be shipped by the Project – benzene and 1,3-butadiene. Exposure to 1,3-butadiene can result in leukemia, cancer of haemolymphatic organs, adverse cardiovascular and respiratory effects, and damage to the central nervous system. Acute exposure to benzene can cause dizziness, drowsiness, rapid/irregular heartbeat, loss of consciousness, tremors, convulsions, and death. Chronic exposure to low levels of benzene can cause destruction of the red blood cells (aka haematotoxicity), toxicity to the immune system (aka immunotoxicity), and the formation of tumours (aka neoplasia).

Reference: C41-8-2 – BROKE - Human Health Impacts Report TMEP - Takaro (A4L6U5) at 6-7

290. The exposure pathways for Squamish to benzene and 1,3-butadiene have the potential to occur directly or through the consumption of contaminated traditional foods within Squamish territory. This represents a severe risk to the Squamish population who practice their aboriginal rights in specific locations throughout their territory.
291. The potential health impacts from the Project are much greater than represented by Trans Mountain. The NEB has recognized that Trans Mountain's health assessment for the Project is critically deficient in a number of respects by making post-approval conditions that further assessments are undertaken, including on air and fugitive emissions from the Burnaby Terminal and the Westridge Marine Terminal (Conditions 19, 23, 47, 54 and 95). These are matters that are integral to the NEB's public interest determination, and cannot be relegated to after approval. The NEB must ensure that full information is provided by Trans Mountain, and that information is scrutinized, prior to consideration of the Project.
292. Squamish cannot condone the severe and potentially fatal health impacts of the Project to its people. This is but another reason for the NEB to recommend that the Project is not in the public interest.

E. TRANS MOUNTAIN HAS FAILED TO PROPERLY CONSIDER EFFECTS OF ROUTINE OPERATIONS TO SQUAMISH

293. Trans Mountain has failed to provide an assessment of the impacts of routine operations, and increased shipping, on Squamish.

Reference: C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5

294. Squamish depends on the waters in its territory to be able to travel throughout its territory, and practice Squamish aboriginal rights. Movement through the territory by boat is important for gathering food, maintaining familial ties, participating in community and inter-tribal activities, and transmitting information about cultural practices from one generation to the next. The ability to move freely over the waters of Squamish territory is integral to Squamish culture and identity.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3, at ii

295. Further, harvesting throughout the territory is location specific and depends on the ability to access certain areas at specific times of the year.

Reference: C319-27-2 - 1-1. Squamish TUOS - Part 1 - A4L7E3; C319-27-3 - 1-2. Squamish TUOS - Part 2 - A4L7E4

296. Squamish extensively uses Burrard Inlet, and areas to be impacted by the shipping route for the Project, which travels out through Burrard Inlet to the Strait of Georgia, then south to East Point on Saturna Island, southwest and south through Boundary Pass and Haro Strait to Discovery Island, before finally heading south and west out Juan de Fuca Strait to the Pacific Ocean.

Reference: C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5 at 2-3

297. Despite this extensive use, Trans Mountain has not assessed the impacts of the increased shipping on Squamish, instead providing a generic assessment of traditional marine resource use from Project-related marine traffic for all First Nations across the Project. The Project proposes to increase the vessel transits from 60 to 408 per year, and this does not include tug and other support vessel traffic – a significant effect to one or more of the uses of Squamish cannot be discounted, and must be properly assessed.

Reference: C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5 at 4-5

298. Trans Mountain has not committed to altering the construction or shipping for the Project to accommodate Squamish harvesting and cultural practices during particular times of the year.

Reference: B317-32 - Trans Mountain Response to Squamish Nation IR No. 2 - A4H9D0, IR No. 2.18e-f) 76, 80; C319-15-2 - Information Request No. 2 - A4G5Z2; C319-16-1 - Squamish Nation - Notice of Motion - IR No. 2 - A4I4H8; B347-2 - Response to Squamish Nation IR No. 2 Notice of Motion - A4J5H8

299. The application notes that “[i]nformation gathered during ongoing TMRU studies will be considered for incorporation into Project planning”. However, “incorporation” into project planning is not sufficient. Rather, a full assessment of specific adverse effects on Squamish, and their ability to meaningfully practice their aboriginal rights, and a determination of significance of those effects must be undertaken, prior to consideration of whether the Project is in the public interest.

Reference: B19-10 – V8B TR 8B5 MAR TRAD RESOURCE – A3S4K3, at ii; C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5 at 6

300. The failure to consider the broad range of potential effects of the increased shipping as they relate to specific Squamish interests, practices, and locations renders the application deficient with respect to determining effects of routine operations on Squamish. Trans Mountain did not file any reply evidence in response to Squamish’s report identifying this deficiency.

Reference: C319-27-4 - 2. Potential Adverse Effects of Shipping On Squamish Interests - Increased Volume Effects on Travel Report - A4L7E5 at 6

301. It is not sufficient that the NEB proposes to make it a condition of approval that Trans Mountain provide traditional land use and traditional marine resource use investigation reports, and proposed mitigation measures 60 days before commencing construction (Condition 84). These are matters that are critical to discharging the duty to consult, and to determining whether the Project is in the public interest, and cannot be relegated to after approval.

302. Deferring these matters is tantamount to the NEB saying that no matter the degree of the impact to affected First Nations, the Project may still be considered in the public interest and be recommended to proceed. This approach does not promote

reconciliation and is not in accordance with the NEB's legal and constitutional obligations.

**PART 8 THE PROPOSED CONDITIONS DO NOT ACCOMMODATE
IMPACTS ON SQUAMISH**

303. Squamish is owed a duty to be consulted and accommodated at the high end of the consultation spectrum. The draft conditions proposed by the NEB were not developed in consultation with Squamish, and do not provide any Squamish specific accommodation.
304. The NEB process cannot even begin to develop appropriate accommodation for Squamish because the first fundamental steps in the consultation process were not taken. It is not possible to gauge what appropriate accommodation should entail, when the scope of Squamish aboriginal rights has not been ascertained, and when there has not been an accurate determination of potential impacts. In this case, neither of these two foundational steps has been taken.
305. Even at the lowest end of the consultation spectrum, there remains an obligation to minimize potential adverse impacts to rights and title (here we are at the high end). However, appropriate accommodation to achieve such minimization of impacts can only follow proper consultation, including at a bare minimum "careful listening" to concerns. The NEB process has not provided Squamish with the opportunity to express their interests and concerns, and to have those interests and concerns considered and integrated into the proposed conditions.

Reference: *Mikisew* at paras. 54 and 64

306. None of the conditions specifically address impacts to Squamish people, lands, waters, rights or title (nor could they given the failure to properly assess those impacts to date), or require that impacts to Squamish be mitigated or accommodated prior to Project commencement. The conditions do not constitute true conditions in the sense that they are not clear binding obligations that would prevent the Project from proceeding if they were not satisfied – most of the conditions merely require the filing of plans with the NEB, without any requirement for review or approval.

307. The few aboriginal specific conditions are inadequate and insulting. For example, the proposed provision of employment opportunities for aboriginal groups does not accommodate Squamish for the potentially significant impacts of the Project on its people, lands, waters and constitutionally protected rights (Condition 14).
308. Further, to make matters worse many of the conditions defer matters of importance to Squamish to after approval, including:
- (a) traditional land use and traditional marine resource use investigation report (Condition 84);
 - (b) a complete risk assessment for the Project (Conditions 29, 111 and 112);
 - (c) geotechnical and seismic risks (including for the Westridge Marine Terminal and Burnaby Terminal) (Conditions 26, 27, 71 and 72);
 - (d) air and fugitive emissions at Westridge Marine Terminal and Burnaby Terminal (Conditions 19, 23, 47, 54 and 95);
 - (e) emergency preparedness and response for the Burnaby Terminal and the Westridge Marine Terminal (Conditions 76, 119, 121, 123, 124);
 - (f) emergency release system for the Westridge Marine Terminal (Condition 76); and
 - (g) Westridge Marine Terminal, pipeline and facilities environmental protection plan (Condition 62-64).
309. The requirement of the Board for further information on these matters that are of critical importance to Squamish in protecting their people, lands and waters, and ability to meaningfully practice their rights is an admission that information currently before the Board is not adequate. These are matters that need to be considered, and sufficient information provided on them, before the Board makes its recommendation, and before the duty to consult can be discharged.
310. Further, the mitigation measures set out by Natural Resources Canada in its Tracking Table were not developed in consultation with Squamish, and are general measures developed by Trans Mountain. Trans Mountain's bold assertion in its reply evidence that the effects of the Project on Squamish traditional land resource use and

traditional marine resource use would not be significant, and can be accommodated with these generic measures is not supported by any evidence.

Reference: C319-31-1 - Squamish Nation Response to Information Request of Natural Resources Canada - A4R4D7; Squamish Nation Confidential Reply Evidence

311. Trans Mountain asserts that Squamish “did not request site-specific mitigation for the traditional use sites identified in the study”. However, Trans Mountain never asked Squamish about this issue, or filed any information requests of Squamish throughout the review process. Squamish is constitutionally entitled to specific mitigation measures for impacts to its aboriginal rights and title.

Reference: Squamish Nation Confidential Reply Evidence

312. The generic mitigation measures proposed do not represent enforceable commitments, or even begin to address Squamish’s concerns. For instance, the intention of Trans Mountain to make best efforts or to educate its employees about potential aboriginal sites to be impacted by the Project does not ensure that those sites are protected in any way, particularly given that this process has not provided for adequate identification of Squamish interests. This is not meaningful accommodation.
313. The known impacts of the Project have not been mitigated or accommodated in the draft conditions. The process has not even provided for a thorough identification or assessment of the impacts to Squamish to begin consideration of conditions. Squamish’s position is that the Board cannot recommend approval of the Project on the basis of the record before it.
314. The Board’s recommendation must be accompanied by clear, measurable and enforceable conditions that take into account Squamish interests. The NEB review process for the Project has not provided for the development of such conditions. As such, the Project must be referred back for further review to enable Trans Mountain to cure the information deficiencies in the application and to allow for the development of appropriate conditions in a process designed to meaningfully engage with First Nations.

PART 9 CONCLUSION: THE PROJECT IS NOT IN THE PUBLIC INTEREST

315. The NEB process is fundamentally flawed. The federal government has expressly recognized the deficiency of the NEB process to address the concerns of First Nations. The review of the Project must not continue until that deficiency has been addressed and a proper assessment undertaken that considers the risks and impacts of the Project to Squamish, and provides for appropriate mitigation and accommodation.
316. The NEB may only recommend approval of the Project once it is satisfied that the duty to consult and accommodate Squamish with respect to the Project has been discharged. This is a constitutional obligation, which must be satisfied prior to the recommendation of the Board with respect to the Project. For the reasons offered above, the review process for the Project has proved wholly inadequate in discharging the duty to consult and accommodate Squamish. The Crown itself acknowledges that further consultation is needed to discharge the duty, and that there are outstanding concerns.
317. The Project will have significant known adverse impacts on Squamish people, lands, waters and aboriginal rights and presents an unknown and unacceptable risk of causing very severe adverse impacts on Squamish people, lands, waters and aboriginal rights. It is not in the public interest to recommend approval of the Project without a complete assessment of the impacts to Squamish aboriginal rights and title, and without ensuring that those impacts can be mitigated or accommodated.
318. Squamish has many outstanding concerns about the risks and impacts of the Project to its people, lands, waters and rights that have not been addressed throughout the review process, or in the draft conditions. Trans Mountain has not fully or accurately represented the risks or impacts of the Project in its evidence before the Board, or shown that the capability exists to effectively prevent and respond to accidents or malfunctions associated with the Project – particularly a spill of diluted bitumen.
319. Squamish cannot condone a Project that poses such a significant threat to Squamish's way of life. As such, Squamish does not consent to the Project going through

Squamish traditional territory, and requests that the NEB recommend that the certificate for the Project not be issued, as the Project is not in the public interest.

PART 10 RECOMMENDATIONS AND FINDINGS REQUESTED

320. Squamish requests that the Board:

1. Decline to recommend the issuance of a certificate of public convenience and necessity in respect of the Project pursuant to s. 52 of the *National Energy Board Act*, RSC 1985, c N-7; or
2. In the alternative, defer making the recommendation as to whether or not the certificate should be issued pursuant to s. 52 of the *National Energy Board Act*, RSC 1985, c N-7 until Trans Mountain has cured the information deficiencies in the application, the Project has been subject to a thorough review process that accounts for First Nation interests, and the Crown has discharged its duty to consult and accommodate Squamish in relation to the Project.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 12th day of January, 2016.



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APPENDIX “A”
to the Argument of the Squamish Nation

LIST OF AUTHORITIES

CASES	
1.	<i>Beckman v. Little Salmon Carmacks First Nation</i> , 2010 SCC 53
2.	<i>Brokenhead Ojibway First Nation v Canada (Attorney General)</i> , 2009 FC 484
3.	<i>Burnaby (City) v. Trans Mountain Pipeline ULC</i> , 2015 BCSC 2140
4.	<i>Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.</i> , 2015 FCA 222
5.	<i>Dene Tha’ First Nation v. Canada (Minister of Environment)</i> , 2006 FC 1354
6.	<i>Haida Nation v. British Columbia (Minister of Forests)</i> , 2004 SCC 73, [2004] 3 S.C.R. 511
7.	<i>Halfway River First Nation v. British Columbia</i> , 1999 BCCA 470, 64 B.C.L.R. (3d) 206
8.	<i>Huu-Ay-Aht First Nation v. The Minister of Forests</i> , 2005 BCSC 697
9.	<i>Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)</i> , 2008 BCSC 1505
10.	<i>Kwikwetlem First Nation v. British Columbia (Utilities Commission)</i> , 2009 BCCA 68
11.	<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , 2005 SCC 69, [2005] 3 S.C.R. 388
12.	<i>Moulton Contracting Ltd. v. British Columbia</i> , 2013 BCSC 2348
13.	<i>Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation</i> , [2007] 3 C.N.L.R. 181
14.	<i>Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation</i> , [2007] 3 C.N.L.R. 221
15.	<i>Quebec (Attorney General) v. Canada (National Energy Board)</i> , [1994] 1 S.C.R. 159
16.	<i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council</i> , 2010 SCC 43
17.	<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075
18.	<i>The Squamish Nation et al v. The Minister of Sustainable Resource Management et al</i> ,

	2004 BCSC 1320
19.	<i>Tsilhqot'in Nation v. British Columbia</i> , 2014 SCC 44
STATUTES	
20.	<i>Constitution Act 1982</i> , being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 35
21.	<i>Indian Act</i> , R.S.C. 1985, c. I-5, s. 2
22.	<i>National Energy Board Act</i> , R.S.C. 1985, c. N-7, ss. 11-13, 52, 53