

**NATIONAL ENERGY BOARD**

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

AND IN THE MATTER OF THE *Canadian Environmental Assessment Act*, 2012, S.C., c. 19, s. 52, as amended and the Regulations made thereunder;

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

**FINAL ARGUMENT OF UNIFOR**

January 11, 2016

1. Unifor’s evidence in this proceeding was presented Ms. Joie Warnock, who serves as its Western Director.<sup>1</sup> As that evidence describes, Unifor represents approximately twelve thousand members employed in oil and gas exploration, transportation, refining and conversion in the petrochemical and plastics sectors. In respect of the Trans Mountain Expansion Project (“TMX”), Unifor members work in production and refining facilities in Alberta that produce the bitumen and oil products that would be transported on the Pipeline. Unifor members also work in refining and oil handling facilities in British Columbia that would

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<sup>1</sup> Evidence of Unifor (Revised) (A4L7F0) – as confirmed by Ms. Joie Warnock (A4R8W2) - hereinafter “Unifor Evidence”.

receive energy goods transported on the Pipeline. The jobs and economic interests of these Unifor members would be directly affected by the Project.

2. In the fisheries sector, UFAWU-Unifor represents over 5,000 fisheries workers on both the east and the west coasts of Canada, and on Lake Erie. On the west coast, Unifor members rely on healthy fish stocks and fish habitats in their region. The jobs and communities of these members would be directly affected by both terrestrial and marine oil spills arising from, or in consequence of, the TMX Project.
3. Unifor supports the regulated, sustainable development of the oil sands. A well-managed petroleum industry can provide good, stable jobs, and create wealth for producing communities and all Canadians. However, for the reasons set out in its evidence, Unifor opposes approval of the TMX because:
  - i) it will undermine investment in a value-added, diversified and more stable oil and gas sector;
  - ii) it will pose very serious risks to BC commercial fisheries and to the livelihoods of those who depend upon them; and
  - iii) it is proposed in the absence of a realistic and enforceable policy framework for the regulation of greenhouse gas emissions from the petroleum industry.
4. In respect to the role the TMX will play in facilitating the wholesale export of bitumen, this Panel wrongly condoned Trans Mountain's failure to consider the potential adverse impacts of the TMX on domestic processing and refining activities when it ruled that a consideration of the potential adverse impact of the Project on Canadian refiners was beyond the scope of this hearing.<sup>2</sup> Not only is such a decision impossible to reconcile with the public interest mandate of the National Energy Board, but as described more fully below, it is also at odds with

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<sup>2</sup> See discussion paras. 23-35.

the recognition by panels in previous hearings that the impact of pipeline projects on value-added production (Canadian refineries) is a valid public interest concern.

5. On the matter of the potential ruinous impacts of the TMX on the commercial fisheries of British Columbia; on the communities that depend on a healthy fishery; and on the food security of the people of the province, Trans Mountain failed to adequately address or quantify these impacts. It therefore failed to provide the Panel with the means for properly comparing the benefits and burdens of the TMX, or for determining whether approval of the pipeline project would be in the public interest.

### **The TMX Project**

6. The Kinder Morgan Trans Mountain pipeline system (TMPL) currently has an operating capacity of 300,000 bbl/d and transports crude oil and petroleum products from Western Canada to locations in central and southwestern British Columbia, Washington State and offshore. The TMX Project will nearly triple the capacity of the TMPL system to 890,000 bbl/d. As described by Trans Mountain, the TMX will primarily transport diluted bitumen to export markets.
7. In presenting the economic rationale for the project, Trans Mountain placed great emphasis on expanding markets for Canadian bitumen in Asia, and in particular, China. These markets were mentioned repeatedly throughout the evidence of Steven J. Kelly of IHS Global Canada Limited, Kinder Morgan's initial and primary expert on the business case for TMX. In making that case, Mr. Kelly discusses China's growing investment interests in the oil sands ventures that he expects will support the expansion of domestic bitumen upgrading and refining capacity in China.<sup>3</sup>
8. As we know, pursuant to the Panel's order disqualifying Mr. Kelly, Trans Mountain retained other consultants to address the issues he had previously dealt with. It also amended Conference Board of Canada evidence which had

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<sup>3</sup> Direct Evidence Prepared by Mr. Steven Kelly for the Project (A72774).

relied on Mr. Kelly's views. However, while the experts changed, the emphasis on the capacity of foreign markets to upgrade and refine Canadian bitumen exports did not.<sup>4</sup>

### **Exporting Jobs**

9. As is well known, the development of oil sands resources is undergoing unprecedented and rapid expansion. According to some forecasts, oil sands production in Alberta is to triple by 2035 over 2010 levels (although these forecasts will need to be adjusted in light of the impact of lower oil prices on new projects). This development has prompted several pipeline projects to transport this increased flow of bitumen and oil products from western Canada to some domestic, but primarily international markets.
10. These developments represent a major restructuring of both Canadian and US oil and gas infrastructure, with the very large majority of Canadian oil sands production being destined for export markets. The pace and scale of these projected developments is incompatible with even the most conservative notions of sustainable development, and have the potential to cause profound damage to the environment and to the economy of Canada.<sup>5</sup>
11. As set out in its evidence, Unifor is also particularly concerned about the development model for this expansion of Canada's oil and gas sector that, in the absence of a national energy strategy for our country, simply reflects the priorities of large energy companies, mostly foreign owned and controlled. According to industry plans, an ever growing proportion of unprocessed bitumen will be exported to foreign markets, which means that Canada will forego the

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<sup>4</sup> Exhibit B427 - Trans Mountain Pipeline ULC - Evidence to Replace the Direct Evidence Prepared by Mr. Steven Kelly for the Project (A72774); Exhibit B434 - Trans Mountain Pipeline ULC - Response to Metro Vancouver Notice of Motion dated October 29, 2015 (September 25, 2015) (A73619), 2.

<sup>5</sup> Unifor Evidence paras. 10-13.

enormous economic and employment benefits of adding value to Canadian resources through upgrading, refining, and secondary manufacturing.<sup>6</sup>

12. The TMX is just the latest of several pipeline projects primarily intended to facilitate the export of bitumen for upgrading and refining in other countries. The result undermines the full-cycle value which Canadians are able to derive from the natural resources they own, leaves us dangerously dependent on oil sands extraction, and ignores the environmental and social impacts of this unbalanced development model.<sup>7</sup>

### **Threatening Supply to Canadian Refineries**

13. Not only does the bitumen export model undermine investment in value-added production over the long term, it actually threatens the security of supply to existing Canadian refineries. In fact, the preoccupation of the industry and the National Energy Board with the development of export markets provides no assurance that the TMX will even serve the needs of the only remaining refinery operating in the lower mainland of British Columbia. That worrying prospect emerges all too clearly from the manner in which the Board has dealt with efforts by Chevron, the operator of the Burnaby refinery, to secure a sufficient supply of oil from the current Trans Mountain Pipeline to keep the refinery running at capacity.
14. The Burnaby refinery has been reliant on the TMPL system since it began operations in the early 1950s, but competition from refineries operating in the northwestern US for discounted oil supplies from Western Canada has often left the Chevron facility squeezed out of the market for the supply it needs.<sup>8</sup>
15. The cause of the problem isn't that Chevron is unwilling to bid competitively for TMPL supply. Rather, it arises from a pipeline tariff scheme approved by the Board, that allows larger US refiners to "game" the system to maximize their own

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<sup>6</sup> Idem.

<sup>7</sup> Idem.

<sup>8</sup> Unifor evidence paras. 14-16.

access to supply, and in so doing limit Chevron's ability to guarantee the supply it needs. Confounding any notion of fairness, the Board-approved tariff scheme actually puts the Canadian refinery at a competitive disadvantage relative to the US refiners.<sup>9</sup> Moreover, the manner in which the Board has addressed the proposed tariff for the TMX, including by isolating that issue from the current hearing, provides no confidence that the TMX will provide a secure and adequate oil supply to the Burnaby Refinery or the people of British Columbia.

### **The Economics of Value-Added Production in the Petroleum Sector**

16. Canada is blessed with an abundance of non-renewable mineral wealth, including vast petroleum reserves (estimated as being the second-largest of any country in the world). The extraction and processing of those resources, if done in an environmentally and socially responsible manner, offer great potential opportunity for Canadians in all parts of the country.
17. However, to maximize the potential benefits of this resource, and minimize the negative side-effects, requires an active policy and regulatory context to guide the decisions of producing firms in more beneficial directions. This is true of requirements to minimize adverse environmental and social effects from petroleum developments. It is also true of the manner in which the economic effects of petroleum production are managed, a task which should aim to generate maximum benefits for Canadians in terms of employment opportunities, incomes, royalty revenue, technological spin-offs, export revenues, and other broader economic effects.<sup>10</sup>
18. The extraction of petroleum constitutes just one link in a long chain of value-added activity, in which GDP is created in a range of functions related to the discovery, production, transportation, processing, and ultimate use of petroleum. The various sub-sectors which all contribute to Canada's employment and GDP outcomes related to the extraction of the resource include: exploration and

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<sup>9</sup> Idem.

<sup>10</sup> Unifor evidence paras. 17-23.

development, other petroleum services, petroleum-related construction, extraction, transportation, upgrading and refining, secondary manufacturing of petroleum products, wholesale distribution, and retail sale. Of all the workers employed in this long value-added chain, only a minority work in the actual task of extraction; most are employed in other related activities and functions. And hence most of the GDP produced through that entire chain of activity is produced in sectors other than extraction (once appropriate adjustment is made to GDP statistics to reflect the exhaustion of non-renewable natural capital through the extraction of petroleum).<sup>11</sup>

19. It is thus a matter of primary economic importance to ensure that the extraction of the non-renewable resource translates into as much overall activity, employment, and income as possible. This is especially true during times of widespread unemployment and underutilization of productive inputs (as has prevailed in Canada as a whole for several years, and as now prevail even in Alberta). Moreover, some aspects of the petroleum value-added chain are typified by uniquely high-productivity, innovation-intensive, and well-paying jobs, which offer more income possibilities and other economic benefits than typical jobs. These include specialized functions in exploration and development, petroleum services, construction, and refining and processing jobs.<sup>12</sup>
20. For example, the average worker in Canada's refining and processing industry produces about \$300,000 worth of value-added in the course of a year's work – well over three times the Canadian average. Average incomes are twice as high. The refining and upgrading sector is technology-intensive, generating skills and capacities that are transferable to other high-value occupations. For all of these reasons, there are broad social and economic benefits from sustaining Canada's refining industry.<sup>13</sup>

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<sup>11</sup> Unifor evidence, paras. 18-24.

<sup>12</sup> Idem.

<sup>13</sup> Unifor evidence para. 21.

21. However, left solely to the decisions of private firms, there is no guarantee at all that Canada's refining sector will benefit from the surge in raw extraction of bitumen. To the contrary, real GDP in this sector has actually declined in Canada since the take-off of the global commodities boom in the early 2000s. Over half of Canada's refineries have closed since the 1980s (the most recent victims being refineries in Montreal and Dartmouth). Others (including the Chevron refinery in Burnaby) face uncertain futures, in the face of policy neglect and the side-effects of an all-encompassing effort to extract and export as much raw bitumen as possible, as quickly as possible. Incredibly, in 2014 Canada actually became a net importer of refined petroleum products, with imports of products now more than offsetting our own exports. This is a shocking indicator of the extent to which Canadian policy-makers (including this Board) have abandoned their responsibility to maximize the potential value-added spin-offs from the production of our own non-renewable resources.
22. In simple terms, the TMX will exacerbate problems that have already created an unfavourable market for Canadian upgrading and refining in Alberta and eastern Canada. This project will add to the momentum of an energy strategy premised almost exclusively on the extraction and export of unprocessed bitumen. It will further undermine the prospects for sustaining and expanding Canada's already challenged capacities in upgrading and refining. It could contribute directly to the future loss of additional refining capacity.

### **Jobs, Value-added Production and the Board's Public Interest Mandate**

23. Unfortunately, even before receiving the evidence of interveners, and in a sharp departure from its approach in previous hearings, this Panel determined that consideration of potential adverse impacts of the TMX on job creation, Canadian energy security, and diversification of the oil and gas sector was beyond its mandate.
24. Thus, during the first round of information requests, Unifor posed the following simple questions to Trans Mountain:



- i. Would Trans Mountain agree that it is in the broader public interest to ensure that Canadians receive the highest possible value for the non-renewable natural resources they own? If not, why not?
- ii. Would Trans Mountain agree that increasing the number of people employed in the oil and gas sector is important to achieving that highest value? If not, why not?
- iii. Would Trans Mountain agree that enhancing employment in Canada is a valid public interest?
- iv. Would Trans Mountain agree that it is in the public interest for Canada to have a diversified Canadian oil and gas sector in which Canadian bitumen and oil resources are upgraded and processed? If not, why not?
- v. Would Trans Mountain agree that it is in the public interest for Canadians to have the security of being able, where possible, to meet their own energy service needs with respect to oil products, without having to rely on foreign imports? If not, why not?
- vi. Please explain the relationship between oil pipeline export capacity and domestic Canadian investment in bitumen upgrading?
- vii. Please indicate whether the need for condensate to dilute and export bitumen may impact the availability of condensate needed by the Canadian petrochemical industry?
- viii. Please explain how capital investment in China and the U.S., which will be needed to enhance upgrading and refining capacity in those jurisdictions to process diluted bitumen, [which is one of the touted benefits of the project] will be in the Canadian public interest?<sup>14</sup>

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<sup>14</sup> C362-1-1 - Unifor IRs No. 1 - A3W8C4.

25. Instead of answering questions (i) – (v) with the simple and direct responses the questions obviously call for, Trans Mountain referred Unifor to answers given in response to IRs posed by another intervener.<sup>15</sup> Those responses were entirely unresponsive to the questions posed by Unifor, and represented no more than evasions.
26. Even more problematic was its responses to questions (vi) to (viii), which was simply that: “The information request is not relevant to one or more of the issues identified in the National Energy Board’s List of Issues for the Trans Mountain Expansion Project.”
27. When Unifor filed a motion for an order compelling Trans Mountain to properly answer its questions, the Board dismissed its motion.<sup>16</sup>
28. In doing so, the Panel excused Trans Mountain from having to adduce evidence concerning the potential adverse impact of the TMX on job creation, energy security or industry diversification as valid public interest concerns. Thus relieved of any obligation to address these issues, Trans Mountain also relies upon the Panel’s decision to dismiss Unifor’s evidence concerning these issues as “largely outside the scope of this proceeding.”<sup>17</sup>
29. What is perhaps most remarkable about this Panel’s ruling that it was beyond its mandate to consider the impacts of the TMX on domestic refiners and Canadian energy security was the fact that this decision was entirely at odds with those of previous panels on the same question.
30. For example, in the Alliance Pipeline case the Board acknowledged the importance of considering the potential for commercial impacts on persons other than the owners and users of the pipeline:

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<sup>15</sup> Trans Mountain Pipeline Responses to Information Request from Unifor.

<sup>16</sup> C362-3-1 - Reply Unifor IR Motion - A3Z3U8, National Energy Board A81-1 - Ruling No. 33 - Motions to compel full and adequate responses to the first round of intervenor information requests - A4C4H5.

<sup>17</sup> Trans Mountain Final Argument (A4W6L8), p. 429 – 431.

*A large-scale project such as that proposed by Alliance inevitably raises the potential for commercial impacts on persons other than the owners and users of the pipeline. Paragraph 52(e) [public interest] of the NEB Act enables the Board to consider these potential impacts in its overall assessment of whether the applied-for project is in the public convenience and necessity. Other aspects considered under this paragraph include environmental protection, socio-economic impacts, and public safety. [emphasis added]*<sup>18</sup>

31. The Keystone XL decision provides another example, and one that Trans Mountain actually recites in its final argument.<sup>19</sup> In that hearing, the Board explicitly acknowledged the relevance of the potential impacts of a pipeline project on the Canadian bitumen and oil processing industry, noting that:

*In final argument, the CEP and AFL expressed concern that shipping raw bitumen by pipeline to the U.S. has an impact on domestic investment in upgraders and refineries in Alberta and Canada. The Board accepts these perspectives as valid public interest considerations.*<sup>20</sup>

32. Similarly, in the Northern Gateway hearing, the Joint Review Panel recognized the relevance of concerns raised by the Alberta Federation of Labour and the Communications, Energy and Paperworkers Union “that exporting raw bitumen by pipeline has a detrimental impact on domestic investment in upgraders and

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<sup>18</sup> Sumas Energy 2, Inc., EH-1-2000, March 2004, at p. 11.

<sup>19</sup> Trans Mountain Final Argument (A4W6L8), p. 431.

<sup>20</sup> OH-1-2009 Keystone XL Reasons for Decision, p. 53.

refineries in Alberta and Canada”, and accepted that they raised “valid public interest considerations”.<sup>21</sup>

33. In failing to acknowledge or take into account the impact of the TMX on the development of a diversified oil and gas sector and security of supply to Canadian refiners, this Panel clearly failed to exercise its public interest mandate by ensuring that it had the necessary evidentiary foundation to determine whether the TMX project is in the public interest.
34. Moreover, in so clearly failing to exercise its public interest mandate, the Panel undermines public confidence in National Energy Board proceedings, and that is true not only for those in Canada who would have to live with the impacts of its decisions, but for many in foreign markets as well. As the recent rejection of the Keystone XL Pipeline illustrates, when the National Energy Board gives short shrift to legitimate public interest concerns, it also jeopardizes foreign markets for Canadian oil and gas products.<sup>22</sup>
35. As noted, Unifor is fully committed to ensuring that Canadian oil and gas resources are developed sustainably, with respect for rights, and in a manner that optimizes the benefits to Canadians from the extraction of their own non-renewable resources. But Unifor also understands the importance of export markets for these resources (preferably in value-added form). The Board’s chronic failure to address issues of important public concern is putting these markets at risk. Even leaders of the petroleum industry now acknowledge publicly that the absence of a comprehensive climate change policy, the failure to successfully engage First Nations in development planning, the helter-skelter nature of development approvals in Alberta and other policy failures have all undermined the industry’s international credibility and potential.<sup>23</sup>

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<sup>21</sup> JRP Report, Vol 2, p. 335. <http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprtvlm2-eng.pdf> .

<sup>22</sup> Unifor evidence para. 33.

<sup>23</sup> Idem.

## **The BC Fisheries and Commercial Fishing Industry**

36. As noted, UFAWU-Unifor also represents workers in all facets of the fishing industry in British Columbia. As its evidence describes, the commercial fishing industry plays an important role in BC's coastal economy and provides jobs and income to many smaller communities that have few other economic opportunities. There are approximately 1000 boats in the salmon fleet of the south coast area of the province. There are also 80-100 crab boats and 150 prawn boats that fish this area. These vessels provide over two thousand well-paid jobs for skilled workers. In addition to the fishing fleet itself, there is also a fleet of packers that transport the catch from the fishing boats to fish plants which employ another 2,000 to 3,000 workers. 30% to 40% of the people working in the industry are First Nations fishermen and shore workers.<sup>24</sup>

37. The fishing industry generates over one billion dollars of revenue per year for BC. A large portion of the catch is exported, contributing to Canada's international balance of payments.<sup>25</sup>

38. The rivers of the province, and the seas off the BC coast, thus provide the people of BC with a large and sustainable harvest that is critical to their food security. The harvest from coastal BC waters helps feed the whole regional population high quality protein at a reasonable price. There are a number of community-supported fisheries, and fishermen sell their catch directly to the members of their communities in other ways. First Nations have harvested from the ocean for at least 10,000 years.<sup>26</sup>

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<sup>24</sup> Unifor evidence paras 37 – 45.

<sup>25</sup> Idem.

<sup>26</sup> Idem.

### **The TMX Threat to Fish and Commercial Fishing**

39. The TMX has the potential to cause extremely serious harm to the south coast fisheries because the pipeline runs parallel to the Fraser River from Kamloops to the sea.<sup>27</sup>
40. The Fraser River has the largest runs of salmon in North America: sockeye , pink, springs, coho and chum salmon all spawn in the Fraser. The different runs and species of salmon take advantage of all parts of the river, some spawning close to the ocean, others traveling hundreds of miles inland to their spawning grounds. Each run takes advantage of a different unique aspect of the Fraser and its many tributaries; the watercourse is constantly evolving.<sup>28</sup>
41. An oil spill on land anywhere along this portion of the pipeline's route would result in contamination of the Fraser River. The effect of a diluted bitumen spill into the Fraser would be devastating to salmon stocks. In the summer and fall it would affect adult salmon returning to the spawning beds and their eggs. A spill in spring / summer would affect the even more sensitive juvenile salmon.
42. Experience with previous oil spills in river environments (such as the devastating diluted bitumen spill from the Enbridge line 6B pipeline into Michigan's Kalamazoo River in 2010) proves they are very hard to clean up, and the cleaning process its self is likely to cause further damage to the rivers and river beds. This problem is more acute in the case of bitumen than other forms of petroleum, because it sinks.<sup>29</sup>
43. In Vancouver, TMX transported oil is to be loaded onto tankers and pass right in front of the Fraser river estuary, a huge area that is a crucial juvenile fish rearing habitat. The tankers will then pass through Boundary passage and Juan De Fuca Strait, an area of rich crab and prawn grounds and a migration route for salmon on

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<sup>27</sup> Unifor evidence paras 46 – 55.

<sup>28</sup> Idem.

<sup>29</sup> Idem.

- their way to the Fraser. The shellfish industry in BC and Washington state is also based along this route, and would also be severely affected by an oil spill.<sup>30</sup>
44. The tanker route itself runs through some of the richest marine environments on the south coast, which produces millions of salmon and provides a crucial rearing habitat in the estuary of the Fraser river. The tanker traffic lane is also only two miles off shore from the wetlands at the mouth of the river.<sup>31</sup>
45. Further along, tankers will pass right over important fishing grounds for the crab and prawn fishery and a number of dive fisheries. It is quite possible that these fisheries will be closed to ensure that the tankers are not impeded in any way by the small fishing vessels.
46. Even the very small recent spill of engine oil into Vancouver harbor and English Bay provides a timely warning of the potential scale of the effects of an oil spill in this region. Among other impacts, that engine oil spill resulted in DFO closing the local prawn fishery, leaving boats and their workers idle.
47. Trans Mountain makes only one reference to Unifor's evidence in its 452 page final argument, and that appears in footnote 1213 concerning the impact of increased tanker and tug traffic on access by commercial fishers to fishing areas. No other reference is made to Unifor's evidence concerning the potential impacts of TMX on commercial fisheries or food security.<sup>32</sup>
48. The TMX Project certainly offers no benefit to those who work in or depend upon the fishing industry in BC. But increased tanker traffic required to ship the bitumen and oil the TMX will carry will disrupt certain fisheries, and an oil/bitumen spill, whether on land or at sea, could be ruinous for many in the industry. The disruption to certain fisheries by tanker traffic will be a burden for fishers alone to bear, and while compensation may be available to those impacted by spills, the disruption to livelihoods and communities may nevertheless be

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<sup>30</sup> Idem.

<sup>31</sup> Idem.

<sup>32</sup> Idem.

severe. When considered in light of the other burdens of the project, the risks and potential impacts of the TMX on the commercial fishing industry of British Columbia further tip the scales against project approval.

### **Conclusion**

49. It has been the consistent practice of the National Energy Board to approve virtually all pipeline projects put before it, and it has been reluctant to look beyond the commercial arrangements of pipelines companies and shippers to find that such projects serve the public interest. Unfortunately, in dismissing the question of value-added processing early in the hearing process, this Panel has retreated even further from its obligation to consider the public interest by weighing the burdens, as well as benefits, of this pipeline project. The failure of this hearing process to fairly assess the risks and impacts that TMX poses for other parties and communities, provides no reasoned basis upon which the Project can be considered to be in the public interest and it must therefore be rejected.

50. A similar problem exists concerning the deficiency of evidence presented by Trans Mountain concerning the risks that the TMX poses for the commercial fishing industry in British Columbia.

51. In light of these failures, the Panel does not have the evidence necessary to determine whether the TMX is in the public interest. It may not therefore recommend approval of the Project.

All of which is respectfully submitted.