Appendix 2

These are the National Energy Board's (Board) reasons for its decisions in its letter of 12 October 2018 related to the List of Issues, the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012* (Amended Factors Document), the design of the hearing process, and which government departments or bodies the Board will require information from during the hearing.

These reasons also cover other matters raised in comments received.

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1. General matters

1.1 Reconsideration of overall recommendation

The Board heard comments that it would have to reconsider its overall recommendation on the Project after taking Trans Mountain Expansion Project- (Project-) related marine shipping into account under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), as well as recommendations concerning the significance of effects and whether any likely significant adverse effects can be justified in the circumstances. The Board also heard that it should reconsider its recommendations in light of the requirements of subsection 79(2) of the *Species at Risk Act* (SARA) for all of the SARA-listed species that would be affected by Project-related marine shipping.

In this Reconsideration hearing, the Board will carry out an environmental assessment (EA) of Project-related marine shipping under the CEAA 2012.[1] In carrying out this EA, the Board will consider new or updated evidence related to the List of Issues that is filed in this hearing, along with evidence from the OH-001-2014 Certificate hearing. The Board will make its recommendations under subsection 30(4) of the CEAA 2012 and, if required, it will also make recommendations on whether any significant adverse environmental effects are justified. The Board will also consider the measures to avoid or lessen the adverse effects of Project-related marine shipping under the CEAA 2012 and section 79 of the SARA.

This approach reflects the direction contained in the Governor in Council's (GIC) Order in Council P.C. 2018-177 (OIC). The OIC directed the Board to conduct a reconsideration of the recommendations and terms or conditions set out in its OH-001-2014 Report for the Project that are relevant to addressing paragraph 770 of the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*[2]. That paragraph made reference to the EA of the Project and the Board's recommendation under the CEAA 2012, as well as the application of section 79 of the SARA.

The Board will then consider whether its recommendation under the CEAA 2012 results in changes or additions to the recommendations (including recommended terms or conditions) that it set out in its OH-001-2014 Report. This is consistent with the OIC, and the explanatory note accompanying the OIC.[3] After completing its Reconsideration Report, the Board will submit it to the GIC for decision.

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[1] Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit will be included in the "designated project" assessed under the CEAA 2012.

[2] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 770 [*Tsleil-Waututh*].

[3] The explanatory note, under "Implications," states that "[a]t the conclusion of the reconsideration process, the Board may revise its OH-001-2014 Report …to reflect its environmental assessment of Project-related marine shipping under CEAA, 2012, its recommendation under subsection 29(1) of the CEAA, 2012, the application of section 79 of SARA, and its recommendation under the NEB Act on whether a certificate should be issued…"

This approach is also set out in the List of Issues (Appendix 1 of Hearing Order MH-052-2018), as it includes issues related to the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012, subsection 19(3) of the CEAA 2012, and section 79 of the SARA. Considerations relating to recommendations concerning significance and justifications are covered by Issue Nos. 2 and 7 in the List of Issues.[4]

2. List of Issues

2.1 Whether effects were actually "thoroughly canvassed"

The Board's draft List of Issues for the Reconsideration, issued on 26 September 2018, stated that certain issues – particularly the environmental effects of Project-related marine shipping – were thoroughly canvassed in the OH-001-2014 Certificate hearing and may not require additional evidence. The Board received comments that questioned whether the effects of Project-related marine shipping were actually thoroughly canvassed. Some comments specifically questioned why the Board made this statement in the draft List of Issues.

The Board remains of the view that its OH-001-2014 Report extensively canvassed certain issues set out in the List of Issues; for example, the environmental effects of Project-related marine shipping. Despite the fact that the Board did not include Project-related marine shipping under its CEAA 2012 EA and its recommendations in the OH-001-2014 Report, it did determine that potential environmental and socio-economic effects of Project-related tanker traffic (including the potential effects of accidents or malfunctions) were relevant under the *National Energy Board Act* (NEB Act).

When carrying out its analysis under the NEB Act, the Board followed an approach similar to the EA conducted for the pipeline component under the CEAA 2012. As a result of this approach, the Board collected extensive evidence relevant to Project-related marine shipping. For example, Chapter 14 of the Board's OH-001-2014 Report extensively considered the effects of Project-related marine shipping, and the significance of those effects. Chapter 8 considered the environmental behaviour of spilled oil, and related environmental effects. This is reflected in the Federal Court of Appeal's decision in *Tsleil-Waututh*, when it stated that the Board, among other things, considered the effects of Project-related marine shipping on Southern resident killer whales (SRKW) and the significance of those effects,[5] and that the OH-001-2014 Report was adequate for the purposes of informing the GIC about the effects of Project-related marine shipping on SRKW and their use by Indigenous groups, and of the significance of these effects.[6]

The Board has indicated that the entirety of the evidence filed in the OH-001-2014 Certificate hearing will be included as part of its record for this Reconsideration hearing, and will be considered by the Board to the extent it is relevant to the List of Issues for the Reconsideration hearing. Parties are not required to re-file or re-test evidence on the record of the OH-001-2014 Certificate hearing.

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[4] On its own initiative, and to provide further clarity, the Board has updated Issue No. 7 to more closely mirror the wording of the OIC.

[5] *Supra* note 2 at para 438.

[6] *Ibid* at para 439.

Given the above, the Board's focus during the Reconsideration hearing will be on gathering information relating to the issues in the List of Issues that, in its view, were not fully canvassed in the OH-001-2014 Certificate hearing. The Board's Filing Requirements for Trans Mountain, and requests for specialist or expert information or knowledge in the possession of Federal Authorities further show the Board's focus in the Reconsideration hearing.

Notwithstanding the views above, the Board remains open to **new or updated evidence** (including comments from the public, community knowledge, and Indigenous traditional knowledge) **relevant to its List of Issues**. This includes new or updated evidence regarding matters that were extensively canvassed in the OH-001-2014 Certificate hearing. However, the Board recommends that Parties focus their evidence on aspects of the List of Issues that were not fully canvassed in the OH-001-2014 Certificate hearing, and reminds Parties to take into account the Board's analysis and recommendations in its OH-001-2014 Report. For example, the OH-001-2014 Report made findings of significant adverse effects related to Project-related marine shipping. The Board is interested in measures that may avoid or reduce those significant adverse effects.

The Board has amended the wording in the List of Issues to better reflect the above.

2.2 Additional consideration of spills

The Board received comments that the List of Issues should be amended to reflect the need for the consideration (or re-consideration) of the potential effects and risks of spills from Project-related marine shipping, including the fate and behavior of any spilled product and the potential effectiveness of response. The Board heard, for example, that there are new scientific reports concerning spills, the fate and behavior of oil in marine environments, and the use of dispersants. The Board heard comments that the assessment of spills should include not only large or credible worst case spills, but also smaller spills and chronic oil pollution, and spills in different seasons and under adverse weather conditions. The Board also heard comments that effects of spills on United States' (U.S.) water, shorelines, and interests should be considered.

For clarity, the Board has updated Issue No. 1 to include **environmental effects of malfunctions or accidents that may occur,** as noted in paragraph 19(1)(a) of the CEAA 2012. The Board is of the view that the other matters raised by Parties are already covered by the List of Issues. For example, the wording in Issue No. 1 includes the effects of all spills (including smaller spills), as well as the effects of spills from Project-related marine shipping that may extend into the U.S. (the words "environmental effects" used in the List of Issues include those effects set out in section 5 of the CEAA 2012).[7]

That said, the Board notes that its OH-001-2014 Report extensively considered the environmental behavior of spilled oil, the effects of spills, and the risks associated with spills that might occur. The evidence filed in the OH-001-2014 Certificate hearing is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, Parties are expected to restrict their submissions to **new and updated evidence** only.

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[7] Effects of spills from Project-related marine shipping on the U.S. is covered by sub-paragraph 5(1)(b)(iii) of the CEAA 2012.

2.3 Specific or broader reference to SRKW

The Board received comments that the List of Issues should explicitly address the effects of Project-related marine shipping on SRKW, including cumulative effects, new data, potential mitigation measures, potential marine protected areas, and alternative routing of the shipping lanes. All of these matters are included under the List of Issues, particularly under Issue Nos. 1 through 5.

In the Board's view, its OH-001-2014 Report extensively considered the potential for effects on SRKW, including physical and acoustic disturbance, vessel strikes, chemical and biological contaminants, and reduction in the availability or quality of prey (primarily chinook and chum salmon). The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. The Board has added a note at the bottom of the List of Issues to explain that Parties are expected to limit their evidence filings to **new or updated evidence** only.

2.4 Addition of other species (besides SRKW)

The Board received comments that the List of Issues should include species in addition to the SRKW. It also heard comments about the potential for Project-related marine shipping to affect other species at risk, including those that have been recently listed or re-designated since the issuance of the Board's OH-001-2014 Report. Other comments talked about the importance of considering effects on other species, including salmon species, species of importance to Indigenous peoples, and species not yet at risk but with declining populations. The Board heard concerns about the importance of considering cumulative effects, and to consider the potential introduction and spread of invasive species.

These matters are already covered by the List of Issues. For example, Issue No. 1 includes potential effects on all species, including cumulative effects, Issue No. 5 explicitly mentions any newly listed species or species that have seen a change to their designation. Issue No. 6 speaks to potential impacts of Project-related marine shipping on Indigenous interests.

Notwithstanding the above, the Board has decided to adjust Issue No. 1 to more explicitly note that it includes **cumulative effects**, consistent with paragraph 19(1)(a) of the CEAA 2012. The wording in Issue No. 5 has also been changed in order to clarify that both measures and **monitoring** will be considered.

2.5 Specific reference to Indigenous rights and interests

Comments were received suggesting that the List of Issues explicitly include reference to the rights and interests of Indigenous peoples,[8] including section 35 Indigenous[9] and Treaty rights. The Board also heard concerns about how the Reconsideration hearing will account for the significance of effects on Indigenous people.

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[8] The Board's use of the term "Indigenous" or "Indigenous peoples" in this hearing has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*.

[9] "Indigenous rights" has the meaning assigned by the definition of "aboriginal rights" in subsection 35(1) of the *Constitution Act, 1982*.

The Board has amended the List of Issues to include Issue No. 6 – **The potential impacts of Project-related marine shipping on Indigenous interests.** This amendment more clearly reflects that the Board must carry out its responsibilities in a manner consistent with the *Constitution Act, 1982*, including subsection 35(1).

The Board's OH-001-2014 Report extensively considered the potential impacts from Project-related shipping on Indigenous interests, consistent with its constitutional obligations under section 35. In addition, the Federal Court of Appeal, in *Tsleil-Waututh*, stated that it was satisfied that the Board's OH-001-2014 Certificate process was "adequate for fulfilling its consultation obligations."[10]

In the Reconsideration hearing, the Board will assess evidence on, among other things, the potential impacts of Project-related marine shipping on Indigenous interests and mitigation measures to avoid, reduce, or offset potential adverse effects. The Board's Reconsideration Report will consider whether there has been adequate consultation and accommodation for the purposes of this Reconsideration hearing, consistent with the recognition of the rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. The Board will also have to decide whether any of its conclusions on consultation, accommodation, and section 35 regarding the Reconsideration will result in changes or additions to its recommendations (including recommended terms or conditions) that it had set out in its OH-001-2014 Report.

The Board generally expects that evidence filings related to Issue No. 6 will be limited to **new or updated evidence**. However, the Board recognizes that systems of Indigenous traditional knowledge often adopt a holistic approach to issues, particularly so when delivering evidence through the oral traditional evidence process that the Board offers (and more generally for evidence addressing impacts to Indigenous interests). The Board's approach to gathering oral traditional evidence is discussed in subsequent sections.

2.6 Alternate locations for the marine terminal

The Board heard comments that the List of Issues should provide for the reconsideration of the suitability of the location of the marine terminal at Westridge. Certain comments argued that the Board will now have to consider alternative means for Project-related marine shipping under the CEAA 2012, and whether any significant adverse effects of that shipping are justified under the CEAA 2012. They questioned how justification can be given if other alternatives have not been fully considered.

The Board has decided to remove Footnote 7 from the draft List of Issues which said that "the Board does not intend to reconsider alternate locations for the Westridge Marine Terminal as this was previously considered." However, the Board is of the view that the technical and economic feasibility of alternative terminal locations was extensively considered in the OH-001-2014 Certificate hearing. That evidence will be used by the Board in its consideration of the issues relevant to the Reconsideration. As noted at the bottom of the List of Issues, Parties are expected to restrict their submissions to **new and updated evidence** only.

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[10] *Supra* note 2 at para 531.

2.7 Greenhouse Gas (GHG) emissions from Project-related marine shipping

The Board received comments suggesting that GHG emissions from Project-related marine shipping should be included in the List of Issues. Some comments said that consideration of such emissions should extend to the destination port.

The List of Issues already covers issues relating to GHG emissions from Project-related marine shipping. Issue No. 1 includes GHG emissions from Project-related marine shipping and Issue No. 2 includes consideration of mitigation related to those emissions.

The Board is of the view that its OH-001-2014 Report exhaustively considered the GHG emissions from Project-related shipping to the limit of Canada's territorial sea, as well as the resulting increase in marine GHG emissions in the region, in British Columbia, and in Canada. The Board's OH-001-2014 Report also noted that any incremental contribution from Project-related marine shipping would increase the burden at a global scale, regardless of how large or small the contribution. The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** on GHG emissions from Project-related marine shipping.

2.8 Upstream and downstream effects, including GHG emissions

The Board received comments that the List of Issues should address effects of other upstream and downstream activities. Comments said that upstream oil production and downstream refining and end-use should be considered in addition to the GHG emissions from such activities. A number of comments referenced the Board's List of Issues for the Energy East Project, which included incremental indirect GHG emissions from any incremental upstream oil production and upgrading, incremental downstream refining and end-use, and incremental third-party electricity generation. Some comments said that there is a constitutional obligation under the *Canadian Charter of Rights and Freedoms* (Charter) to consider the total contribution of the Project to climate change, taking into account the fact that the Crown will now own the Project.

During the OH-001-2014 Certificate hearing, in Ruling No. 25, the Board denied motions requesting that the Board include in the List of Issues the environmental and socio-economic effects associated with upstream activities and downstream use. The Board provided several reasons for doing so, including that the effects from upstream production are not directly linked or necessarily incidental to the Project. Similarly, the Board stated that the Project is not tied to, or dependent on, any particular use in any particular destination. Leave to appeal Ruling No. 25 was subsequently dismissed without reasons by the Federal Court of Appeal.[11] The Board is of the view that the analysis in Ruling No. 25 applies in this case.

The CEAA 2012 does not require the Board to consider upstream or downstream effects. Paragraph 5(2)(a) of the CEAA 2012 requires the Board to take into account changes in the environment that are directly linked or necessarily incidental to the Project. The Project does not include upstream production and is not dependent on any particular upstream development. As

[11] *City of Vancouver v National Energy Board* (16 October 2014), Ottawa 14-A-55, (FCA).

was stated in Ruling No. 25, shippers cannot ship all of their oil on the existing Trans Mountain pipeline, yet oil sands projects continue to be built or are in development. No commenter provided submissions addressing these facts, or otherwise explained why upstream development is directly linked or necessarily incidental to the Project.

Similarly, the effects of downstream refining and end use are not directly linked or necessarily incidental to the Project. The Board continues to be of the view expressed in Ruling No. 25 that the Project does not include downstream use and is not tied to, or dependent on, any particular use in any particular destination. Oil will go where the demand is, whether or not the Project proceeds. No commenter provided submissions that directly rebutted these points.

In the case of the Energy East Project, the Board determined that upstream and downstream effects were relevant to the EA under paragraph 19(1)(j) of the CEAA 2012, due to "increasing public interest in GHG emissions, together with increasing governmental actions and commitments," and because indirect GHG emissions are an "environmental concern." For the reasons described above, the Board is not persuaded by the rationale provided for the Energy East Project, or the submissions arguing that it should adopt that rationale. In any event, the Board is not bound by the decisions it made during the Energy East Project proceeding, which were specific to that project.

The Board is also not persuaded that it has a constitutional obligation under the Charter to consider the total contribution of the Project to climate change. While Parties indicated that there was a possibility that sections 7 and 15 of the Charter could be breached, they failed to provide appropriate detail as to how, or relevant case law from a Canadian jurisdiction on these points.[12]

For the reasons above, the Board declines to amend the List of Issues to address effects of upstream and downstream activities proposed by the comments received.

2.9 Section 79 of the SARA – monitoring of measures

The Board heard comments that Issue No. 5 does not accurately reflect the wording in subsection 79(2) of the SARA. For example, under that subsection, it is necessary to both ensure that measures are taken to avoid or lessen adverse effects, and to monitor those effects.

The Board has decided to amend Issue No. 5 to more closely reflect the words of subsection 79(2) of the SARA.

2.10 Socio-economic issues and human health effects

The Board received comments that socio-economic issues should be included explicitly in the List of Issues. The Board also received comments that the socio-economic issue of human health should be included explicitly in the List of Issues. Some comments pertained to the potential effects on human health from Project-related marine shipping, including comments concerning

[12] The Board previously considered section 7 of the Charter in Ruling No. 29, dated 19 August 2014, where Mr. L.D. Harvey filed a motion on this issue that was dismissed by the Board. Leave to appeal was dismissed by the Federal Court of Appeal, *Harvey v National Energy Board* (24 October 2014), Ottawa 14-A-59 (FCA). Any further motions on section 7 would need to address Ruling No. 29.

health risks from increased marine vessel traffic, and health impacts from exposure to a marine oil spill on residents, water users, and first responders. Some also suggested that Health Canada be involved in the process.

As noted above, the Board will be carrying out a CEAA 2012 EA of Project-related marine shipping. Accordingly, certain socio-economic issues will be included in the assessment due to the definition of "environmental effects" in section 5 of the CEAA 2012. That definition includes, among other things, the effects of any change that is caused to the environment on health and socio-economic conditions and physical and cultural heritage. The Board has clarified the List of Issues by adding a footnote to explain that **all references to environmental effects in the List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.**

The Board is of the view that its OH-001-2014 Report adequately considered the potential socio-economic effects and the potential effects on human health from Project-related shipping, including the effects on human health from the routine operations of marine transportation associated with the Project and on human health in the event of a spill in the marine environment during shipping. The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** on health and socio-economic matters as described in section 5 of the CEAA 2012.

The Board will not carry out an assessment of socio-economic effects under the NEB Act. As noted below in Section 2.13, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the OH-001-2014 Certificate hearing.

2.11 Questions as to why mitigation is for only four significant effects

The Board received comments that it was not appropriate that Issue No. 2 limited mitigation to just four significant adverse effects. Other comments suggested that Issue No. 2 (as well as other issues) should be amended to clarify that they apply to measures that were not previously considered by the Board.

The Board confirms that it is not limiting its consideration of mitigation measures to the four matters referenced in Issue No. 2 (i.e., GHG emissions, SRKW, traditional Indigenous use associated with SRKW, and the potential effects of a large or credible worst-case spill). The Board will be taking into account **all** mitigation measures that are technically and economically feasible (whether or not previously considered) and that will mitigate **any** significant adverse environmental effects of Project-related marine shipping, as required by paragraph 19(1)(d) of the CEAA 2012.

In light of the comments received, the Board has amended Issue No. 2 to indicate that its consideration of mitigation measures will **include** GHG emissions, SRKW, traditional Indigenous use associated with SRKW, and the potential effects of a large or credible worst-case spill. Issue No. 2 continues to note that, as part of its assessment, the Board will consider whether mitigation measures will change the Board's previous significance findings for these four matters.

2.12 Navigation, including collision with bridges

The Board received comments that its List of Issues should include reference to difficult navigation and potential bridge collisions associated with tankers.

The Board is of the view that this issue is covered by Issue Nos. 1 and 2. Issue No. 1 was amended to include the environmental effects of malfunctions and accidents that may occur. Issue No. 2 was amended to clarify that the Board will consider mitigation measures for all significant adverse environmental effects of Project-related marine shipping. The Board does not consider it necessary to make further changes to the List of Issues.

The Board notes that the issues of difficult navigation and potential bridge collisions associated with tankers were extensively covered in Chapter 14 of the Board's OH-001-2014 Report and, in particular, the TERMPOL review process. The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** that pertains to these issues.

2.13 Reconsideration of the need for the Project, economic feasibility, and other financial matters

The Board received comments that, due to the lapse of time and the federal government's purchase of the Project, the List of Issues should include a re-evaluation of the economics of the Project, including the need for the Project and its economic feasibility. Comments were also received that there should be corrections made to the OH-001-2014 Report due to either changed facts or errors in certain aspects of the report. In some cases, comments were of the effect that the views of Parties in the OH-001-2014 Report were incorrect and, in other cases, that there were factual errors within the Board's views.

The Board does not consider it necessary to make any changes to the List of Issues as a result of these comments. The Board is also not persuaded that it should re-examine issues that are outside of the GIC's direction in the OIC. In the Board's view, it is consistent with the purpose of section 53 of the NEB Act for the GIC to direct the Board to conduct a reconsideration focused on a specific issue or issues.[13] To interpret section 53 as requiring new evidence or *de novo* findings on all issues, despite the direction in the OIC, would not be consistent with the statutory scheme of the NEB Act, including the requirement for expeditious proceedings under subsection 11(4). In this case, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the

[13] In *Tsleil-Waututh* the Federal Court of Appeal recognized, at paragraph 769, the GIC's ability to direct the Board to conduct a reconsideration taking into account any factor specified by the GIC.

OH-001-2014 Certificate hearing, nor does paragraph 770 of the Federal Court of Appeal's decision speak to all issues.[14] The Board accepts that, as time passes, there will always be some changes in facts and short-term changes in markets. However, the need for the Project is not negated by short-term market fluctuations. As the Board stated in its OH-001-2014 Report, "[t]here is always a degree of uncertainty in projecting the long term utilization of transportation facilities since utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall."

In this context, the Board responded to concerns about shipper contracts discussed during the OH-001-2014 Certificate hearing by imposing Condition 57, requiring Trans Mountain to file with the Board, 90 days prior to construction, signed confirmation that secured agreements or contracts remain in force with shippers for a minimum 60 per cent of its total capacity of 141 500 m^3/d (890,000 bbl/d) and any rights to terminate held by shippers that may have existed in any agreements or contracts between Trans Mountain and shippers (which may have reduced the Project's contracted total capacity to less than 60 per cent for a minimum term of 15 years) have lapsed and or expired because their conditions precedent have been satisfied or waived. This "commercial support" condition ensures that the pipeline will be used and useful. If Trans Mountain cannot maintain support for the pipeline at the level specified in Condition 57, it may not construct the pipeline.

Those that requested that the Board re-evaluate the economics of the Project did not sufficiently address Condition 57, or the terms of the OIC. Comments also did not sufficiently consider a purposive approach to the NEB Act, including section 53. As a result, the Board is not persuaded to make changes to the List of Issues based on comments received about economic and financial issues.

2.14 Other requested issues

The Board heard comments that the List of Issues should reflect a reconsideration of the safety of the Burnaby tank farm, watercourse crossing construction methods for the pipeline with regard to chinook salmon, and the risks of transporting oil by rail absent alternate routes by pipeline, and to consider the conversion of the oil to anhydrous ammonia or to bitumen pellets or "pucks" prior to transport. The Board heard comments that it should also consider "alternatives to" the Project pursuant to paragraph 19(1)(j) of the CEAA 2012.

The Board declines to make any changes to the List of Issues as a result of these comments.

As noted above, the Board was not directed by the GIC to reconsider all issues from the OH-001-2014 Certificate hearing. As a result, the Board will not reconsider the safety of the Burnaby tank farm, or watercourse crossing construction methods for the pipeline with regard to chinook salmon, all of which were considered by the Board in its OH-001-2014 Report.

[14] *Supra* note 2 at 770.

The OIC was specific that the Board was to reconsider Project-related marine shipping under the CEAA 2012 and the SARA. The conversion of oil to anhydrous ammonia or bitumen pellets, the transportation of oil by rail, and other "alternatives to" the Project are not relevant to the scope of the OIC and to the Reconsideration hearing, both of which focus on Project-related marine shipping.

2.15 Number of tankers

The Board heard comments that the evidence relating to Project-related tanker traffic on the hearing record, upon which the Board's OH-001-2014 Report relied, is materially flawed because it suggests 29 tankers per month as the incremental Project-related tanker traffic. One commenter was of the view that the incremental volume is more accurately 32 tankers per month, and that an incremental volume of 32 tankers per month would show that a large spill from Project-related tankers is likely.

The OH-001-2014 Report states that the existing Westridge Marine Terminal *typically* loads five tankers per month and that the expanded system associated with the Project would require *approximately* 34 Aframax class vessels per month, with actual demand driven by market conditions. The Board also heard evidence during the OH-001-2014 Certificate hearing that actual tanker numbers *could vary* depending on whether Panamax or Aframax class tankers were used. Similarly, the TERMPOL Review Committee report notes an average number of tanker transits. Given the above, the Board is of the view that project-related variations in incremental tanker shipments above the base/current project tanker shipments has been addressed in the OH-001-2014 Report.

The Board is of the view that the List of the Issues for the Reconsideration hearing does not require amendments as a result of these comments.

The Board has stated that the entirety of the evidence filed in the OH-001-2014 Certificate hearing will be included as part of its record for this Reconsideration hearing. The Board has noted in its List of Issues that **new or updated relevant evidence** that pertains to the List of Issues would be considered. However, the Board reminds Parties to take into account the Board's analysis and recommendations in its OH-001-2014 Report.

3. Scope of the factors and Amended Factors Document

The Board heard comments that the Board's Filing Manual does not explicitly address the marine components associated with the Project, and that more details should be provided in the Amended Factors Document, similar to the document prepared by the Canadian Environmental Assessment Agency titled *Scope of Factors – Northern Gateway Pipeline Project*. The Board also heard that the Board's Amended Factors Document omitted mention of certain other matters noted in the CEAA 2012, such as community knowledge, Indigenous traditional knowledge, sustainable development, and the precautionary principle.

The Board does not consider it necessary to make any changes to the List of Issues or the Amended Factors Document as a result of these comments, other than to add a reference to subsection 19(3) of the CEAA 2012 in the List of Issues (to clarify that the Board will be considering community knowledge and Indigenous traditional knowledge).

The Board has issued Filing Requirements for Trans Mountain, and is requesting specialist or expert information or knowledge in the possession Federal Authorities. These documents were developed after considering the requirements of the CEAA 2012, section 79 of the SARA, and the evidence that already exists on the Board's record. The evidence filed by Trans Mountain and Federal Authorities as a result of these documents, as well as any evidence filed by intervenors, will allow the Board to fully address the requirements of the CEAA 2012 and section 79 of the SARA.

As noted above, the Board will carry out a CEAA 2012 EA of the Project through the Reconsideration hearing. To do so, it must take into account the relevant provisions under the CEAA 2012, including subsection 4(2), which requires the Board, in the administration of the CEAA 2012, to exercise its powers in a manner that applies the precautionary principle. The Board must also consider the purposes of the CEAA 2012, which include sustainability. Community knowledge and Indigenous traditional knowledge will also be taken into account by the Board under subsection 19(3).

The List of Issues and Amended Factors Document are both express and clear that all factors in paragraphs 19(1)(a) through (h) of the CEAA 2012 are relevant to the Reconsideration. While the Board may determine, based on the existing record, that it requires differing degrees of additional *evidence* with respect to each of these factors, all factors are relevant to the Reconsideration and Parties may lead **new or updated evidence** on them should they choose to do so.

All other comments on the scope of the factors are addressed in the Board's comments on the List of Issues in Section 2.

4. Legal matters

4.1 Alleged bias of the Panel

The Board received a few comments suggesting that the Panel is biased.

All comments concern the background and knowledge of the Panel Members. Several of the comments express a view that the Panel is "one-sided" or not balanced enough because their background involves energy owners and operators. There was also a suggestion that the Panel ought to have more Indigenous or environmental experience or representation.

The Supreme Court of Canada set out the test for reasonable apprehension of bias in *Committee for Justice and Liberty et al. v. National Energy Board et al.:*[15]

[15] [1978] 1 SCR 369 at 394, in dissent, but subsequently adopted by the Court, for example: *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 46.

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

There were no detailed comments about why a reasonable and fully informed person would consider that the Panel or its individual Members would have a reasonable apprehension of bias. Allegations of bias are a serious allegation and must be supported by evidence. As the Federal Court of Appeal has stated, they cannot rest on mere suspicion, conjecture, or impressions.[16] In this case, there is no detailed evidence supporting the allegations.

Having considered the comments, the Panel Members are each of the view that they can continue to objectively review the evidence and materials for this Reconsideration in an open-minded manner. The Panel notes that all three Panel Members have had significant experience at the Board related to Indigenous and environment issues. The Panel is also supported by technical experts from a broad variety of backgrounds.

The Board, therefore, dismisses these concerns.

4.2 Potential conflicts of interest

The Board heard comments that there is a potential conflict of interest if federal agencies are called to provide expert information, given that the federal Crown now owns the Project.

The Board is an expert quasi-judicial tribunal that operates at arms-length from the government.

With respect to experts working at federal government departments, it is worth noting that acceptance and adherence to the *Values and Ethics Code for the Public Sector* is a condition of employment for every public servant in the federal public sector, regardless of their level or position. In particular, the value of integrity includes the expected behavior to:

- act at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law; and
- never use their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.

The Board recognizes the federal government's ownership of the Project and has set out a process that it considers to be fair to all Parties in this circumstance. This includes written questioning by intervenors of federal government departments and agencies responding to the Board's requests for information under paragraph 20(a) of the CEAA 2012. Eligible intervenors are being provided participant funding and all intervenors will have the opportunity to bring forward their own expert information.

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[16] *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8.

The Board will consider all evidence filed on the record before making its recommendation in this Reconsideration. Tribunals make decisions involving a government proponent from time to time, and no comments included legal authority to support the claim that this creates a potential conflict of interest. The Board will review the evidence in a manner that is free from the influence of extraneous factors.

4.3 *De novo* process

The Board received comments that a *de novo* hearing is required because the Panel undertaking the Reconsideration did not *hear* the original evidence.

It is important to state up front that most evidence in the OH-001-2014 Certificate hearing was filed in writing. This included responses to information requests. Indigenous traditional evidence, as well as summary argument, was heard orally in the OH-001-2014 Certificate hearing, and this was recorded in written transcripts. All other evidence was filed in writing.

The rule that "he who hears must decide" does not apply where legislation expressly, or by necessary implication, ousts its application.[17] In this case, the legislative scheme ousts the application of this rule. The addition of the reconsideration provision in the NEB Act in 2012 indicates Parliament's intention to have an option that is distinct from a new project application. Subsection 53(2) provides specific authorization for the GIC to "direct the Board to conduct the reconsideration taking into account any factor specified in the order." It is clear from this wording that Parliament intended that the Board could be directed to reconsider specific issues only, in which case there is no requirement for a *de novo* hearing or for all previous evidence heard orally to be reheard.

A careful reading of the NEB Act suggests that the legislation does not *require* a reconsideration to be carried out by the same Panel, but it does not prevent it either. Section 53 does not refer to the Board Panel, but says only that any recommendation can be referred back to "the Board." Under the NEB Act, any quorum[18] of the Board is "the Board" and can carry out the statutory obligations of the Board. The fact that an exception to quorum requirements exists for the original section 52 proceeding (see subsection 7(2.1)), but not for the section 53 reconsideration, also indicates that the reconsideration does not require the same Panel.[19]

The rule that "he who hears must decide" can also be ousted by necessary implication in these circumstances. The legislation does not set a limit on the number of times that a report can be reconsidered. It would not be practical to expect the original Panel Members to remain available through an unlimited number of reconsiderations.

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[17] *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 329-30.

[18] Subsection 7(2) of the NEB Act states that three Members constitute a quorum of the Board. By implication, fewer than three Members is not a quorum and, therefore, is not "the Board," unless there is a statutory exception.

[19] In a scenario where a single Member is appointed by the Chair to ensure a section 52 time limit is met using subsection 7(2.1), it is unlikely that this single Member could carry out the responsibilities of the Board in respect of a reconsideration as there is no statutory exception to quorum for section 53 reconsiderations.

As regards the hearing of oral traditional evidence, the Board issued Procedural Direction No. 1 on 12 October 2018. The procedural direction noted that the Board Members assigned to undertake the Reconsideration will have read the transcripts of the oral traditional evidence provided in the OH-001-2014 Certificate hearing. This relieves Indigenous intervenors of the requirement to repeat the oral traditional evidence previously provided.

However, the Board emphasizes that decisions as to whether to present oral traditional evidence, how to do so, and what evidence to provide in the Reconsideration hearing are ultimately for each Indigenous intervenor to make, taking into account the guidance provided by the Board here, as well as the discussion above in Section 2.5.

5. Departments to consult

5.1 Indigenous groups

The Board received comments that it should consult with Indigenous groups and that, under the CEAA 2012, the Board is under a legal obligation to consult and cooperate with other jurisdictions.

The Board notes that more than 40 Indigenous groups are participating in the Reconsideration hearing as intervenors. Many of these groups were intervenors in the OH-001-2014 Certificate hearing and provided valuable evidence in that proceeding. The Board anticipates they will do so again in this proceeding.

In addition, as required by section 18 of the CEAA 2012, the Board posted on the Canadian Environmental Assessment Registry Internet Site an offer to consult and cooperate with other jurisdictions with respect to the EA of the designated project.[20]

5.2 Canadian government departments

The Board received comments that it should seek input into the Reconsideration from a broad range of government agencies. Under paragraph 20(a) of the CEAA 2012, the Board can request specialist or expert information or knowledge from federal departments and agencies. In this hearing, on 12 October 2018, the Board asked for such information from the following:

- Fisheries and Oceans Canada
- Environment and Climate Change Canada
- Transport Canada
- Vancouver Fraser Port Authority
- Pacific Pilotage Authority
- Health Canada
- Parks Canada
- Natural Resources Canada

[20] The definition of “jurisdiction” is found in section 2 of the CEAA 2012. It includes Indigenous groups as defined under part (f).

The Board's 12 October 2018 letter identifies the basis for its requests of the various federal departments and agencies. The requests identify specifically what the Board is interested in receiving, which was guided by the scope of its review outlined in the List of Issues and Amended Factors Document.

5.3 Other third party / external experts

The Board heard suggestions that it should seek information from various other entities, such as provincial and municipal government agencies, the Western Canada Marine Response Corporation, non-government organizations, researchers and other subject matter experts.

The Board notes that individuals and groups with expertise have been accepted as intervenors in this Reconsideration hearing. The Board is of the view that the process will be enhanced by their involvement.

5.4 U.S. government departments and experts

The Board heard suggestions that it should seek information from various U.S. entities, such as U.S. federal and state government agencies.

The Board notes that individuals and groups from the U.S. have been accepted as intervenors in this Reconsideration hearing. The Board is of the view that the process will be enhanced by their involvement.

6. Hearing process

6.1 Need for more time

The Board received comments stating that the timeline for the hearing, including the time allotted for the initial comment process, is too short. Others commented that the Board should extend the timeline or seek an extension from the GIC.

The Board acknowledges that the timeline is not lengthy. This requires an expedited process and the need for Parties to stay focused on the hearing steps and to work diligently. Section 53 of the NEB Act authorizes the GIC to direct the Board to undertake a reconsideration based on any factor specified, and to specify a time limit for the Board to complete its reconsideration. In this focused Reconsideration, it is not necessary that the Board have the same timelines as a new application. There is already significant evidence on the record on numerous topics being examined. Many of the Parties will also be familiar with the record from the OH-001-2014 Certificate hearing. Consistent with subsection 11(4) of the NEB Act, there is a need for proceedings to be conducted expeditiously and fairly and, in any case, within the time limit set by the GIC.

The Board has set out a process that, while expedited, is fair to all Parties, given the focused nature of the Reconsideration, and would allow the Board to deliver its Reconsideration Report to the GIC on or before 22 February 2019.[21]

While the Board must meet the 22 February 2019 deadline, it is also required to conduct a hearing that is procedurally fair. As determined recently by the Federal Court of Appeal, the content of the duty of procedural fairness in this case is significant.[22] This required that:

> The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case.

The Board accepts that the same is required for the Reconsideration and that similar opportunities are provided. In the OH-001-2014 Certificate hearing, there were instances where Trans Mountain filed new evidence on specific topics, and intervenors were provided an opportunity to challenge that evidence, including by providing their own evidence in response within reasonably expedited time lines.[23]

If a Party feels there are particular circumstances requiring additional time, the Board will consider such individual requests. Any requests should be made reasonably ahead of the deadline and, unless and until an extension is granted, Parties should continue to work toward the existing deadline. Parties should not assume that deadlines can be adjusted materially, given the time limit specified. In many cases, moving one Party's deadline could create prejudice for another Party, which the Board would consider when an extension request is filed.

6.2 Oral cross-examination

The Board heard many comments from those who wanted a process that includes oral cross-examination. Some suggested that cross-examination could be limited by subject matter or that only certain Parties could take part.

In Ruling No. 14, the Board said:

> "In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board."

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[21] The Federal Court of Appeal also had an expedited pre-hearing process with respect to the consolidated judicial reviews.

[22] *Supra* note 2 at para 235.

[23] For instance, Ruling No. 61 dated 15 April 2015 accepted late evidence from Trans Mountain regarding a Seismic Hazard Update and provided a schedule for intervenors to test this evidence and file evidence in response.

After reviewing Ruling No. 14, the Federal Court of Appeal concluded that the duty of fairness was not breached by the Board's decision not to allow oral cross-examination and that the Board's procedure did allow the Parties "a meaningful opportunity to present their cases fully and fairly.[24] The Board is of the view that the reasoning in Ruling No. 14 applies equally in this case. A mostly written process provides a fair opportunity to test the evidence, and is relatively predictable and manageable in the time permitted.

In this Reconsideration hearing, the Board already has a more limited scope of issues to cover. It has over 100 intervenors and approximately 5 months to consult on and set a hearing process; to gather and test evidence, and to receive argument.[25] It must also write and submit a Reconsideration Report.

6.3 Collaborative and open hearing process

The Board received comments that it should design a process that allows for collaboration between those interested, and that is open to the public. Some comments said that the process should include oral statements from the public as was done in the hearing for the Enbridge Northern Gateway Project. Some felt that the hearing itself should be designed through a collaborative process.

The Board acknowledges that bringing Parties together to discuss and resolve certain issues during a hearing process can be effective. The Board has used this "conference" approach in the past. It is used to complement the required hearing steps that must be implemented to meet the rules of natural justice and the requirements of the NEB Act. Such an approach cannot substitute for certain required hearing steps such as filing new evidence.

In this case, it is not possible to build in time for a "conference" approach. The Board has set out a process that, while it does not include any opportunities for "conferences," is fair to all Parties and that allows the Board to deliver its Reconsideration Report to the GIC on or before 22 February 2019. The Board also provided early comment opportunities for Indigenous groups and members of the public, and took the comments received into consideration in designing the hearing process.

The Board is of the view that hearing from a broad range of people and groups would be beneficial. Given the time constraints, the Board cannot take these submissions in person via oral statements. However, the Board will consider all letters of comment that are filed on or before the 20 November 2018 deadline.

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[24] *Supra* note 2 at para 257.

[25] While there are fewer intervenors registered for the Reconsideration hearing, 100+ intervenors is a significant number and a greater percentage may be active in comparison to the OH-001-2014 Certificate hearing.

6.4 Oral Indigenous traditional evidence

The Board heard comments that Indigenous intervenors wanted the opportunity to provide traditional evidence orally. Some of the comments requested that these oral sessions take place in the communities where the evidence holders reside. The Board also heard comments that Indigenous knowledge should not be restricted to oral traditional evidence, and should be meaningfully incorporated into the review *process.*

Hearing oral traditional evidence from Indigenous peoples and groups was very helpful to the Board in the OH-001-2014 Certificate hearing. The Board has scheduled time to hear oral traditional evidence in central locations. In the circumstances of this case, it is not possible to travel to each of the individual Indigenous communities. Indigenous intervenors may also choose to provide oral traditional evidence by remote means if that is more convenient. See the Board's Procedural Direction No. 1 for more information on this hearing step. Indigenous intervenors are reminded that participant funding is available to travel to hearing locations.

In addition to participating in the oral traditional evidence sessions, the Board encourages Indigenous intervenors to also participate in other hearing steps to facilitate the incorporation of Indigenous knowledge throughout the entire hearing process.

6.5 Lack of funding for commenters

The Board received comments that it should provide funding to groups that wish to provide written comments to the Board, as opposed to only providing funding for intervenors.

The Participant Funding Program is independent from the Board's regulatory hearing process. For information and questions about participant funding, please visit the Board's website or contact a Participant Funding Program Coordinator at 1-800-899-1265.

6.6 Matters for future letters of comment

Many comments received provided substantive comments on the matters to be considered in the hearing itself. The Board will consider these comments in its consideration of the broader issues in the hearing, just as it will consider all evidence filed. These comments do not need to be re-filed.

6.7 Break in hearing process over Christmas

The Board heard comments that participants want a break from the hearing process over the Christmas period.

While the time limit does not allow the Board to schedule a break *per se*, the Board has devised a schedule that should require relatively limited work for intervenors during this period.