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CANADA ENERGY REGULATOR
RÉGIE DE L'ÉNERGIE DU CANADA

Trans Mountain Pipeline ULC
Trans Mountain Expansion Project
Certificate of Public Convenience and Necessity OC-065
Application pursuant to section 211 of the Canadian
Energy Regulator Act
Segment 5.3 (Pipsell area)

VOLUME 3

Hearing held at
L'audience tenue à

Canada Energy Regulator
517 Tenth Avenue SW
Calgary, Alberta

September 20, 2023
Le 20 septembre 2023

1 IN THE MATTER OF Trans Mountain Pipeline ULC Application
2 for Approval of Deviation Application CER File
3 OF-Fac-Oil-T260-2013-03 61

4 **HEARING LOCATION / LIEU DE L'AUDIENCE**

5
6 Hearing held in Calgary, Alberta, Wednesday, September
7 20, 2023

8 Audience tenue à Calgary (Alberta), mercredi le 20
9 septembre 2023

10

11 **COMMISSION PANEL / COMITÉ D'AUDIENCE DE LA COMMISSION**

12 Kathy Penney Presiding Commissioner /
13 Commissaire president l'audience
14 Stephania Luciuk Commissioner/Commissaire
15 Mark Watton Commissioner/Commissaire

16

17 **APPEARANCES/COMPARUTIONS**

18 **Canada Energy Regulator/Regie de l'energie du Canada**

19 Carol Vats Counsel
20 Keerat Sidhu Counsel
21 Carrie Randall Regulatory Officer

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ERRATA

1		
2	Monday, September 18, 2021 - Volume 1	
3	PDF Page/Paragraph Reference:	Should read:
4	Page 2, Lines 1-4	
5	IN THE MATTER OF Trans-Northern	IN THE MATTER OF Trans Mountain Pipeline
6	Pipelines Inc. Application for Approval	ULC Application for Approval of Deviation
7	of Incentive Tolls Settlement Agreement	Application CER File
8	Hearing RH-001-2023	OF-Fac-Oil-T260-2013-03 61
9	Page 43, Line 11	
10	Mr. Baker: "...execution -- excuse me,	Mr. Baker: "...execution -- excuse me,
11	execution officer for Trans..."	chief execution officer for Trans..."
12	Page 56, Line 19	
13	Mr. Goulet: "...replied on -- on its view	Mr. Goulet: "...commented on -- on its view
14	of the feasibility."	of the feasibility."
15	Page 60, Line 10	
16	Mr. Wilson: "reset a new jacking	Mr. Wilson: "reset a new jacking
17	location. It was of the..."	location. It was the..."
18	Page 60, Line 20	
19	Mr. Wilson: "Certainly the shaft would	Mr. Wilson: "Certainly the shaft would
20	make a..."	mitigate the..."
21	Page 63, Lines 13-15	
22	Mr. Nock: "...trenchless construction. So	Mr. Nock: "...trenchless construction. So
23	it was a combination of unable to meet	it was a combination of unable to meet the
24	the scheduled increase and the costs	schedule increase and the costs that went
25	that went along with not being able to	along with not being able to meet..."
26	meet..."	
27	Page 69, Line 3	
28	Mr. Wilson: "So we also in..."	Mr. Wilson: "We also in..."
29	Page 70, Line 12	
30	Mr Wilson: "associate with the tunnel	Mr Wilson: "associated with the tunnel
31	for being stopped for so..."	for being stopped for so..."
32	Page 75, Line 24	
33	Mr. Goulet: "Ms. Walker, you know, you	Mr. Goulet:
34	got to put ..."	"Ms. Walker, you know, you've got to put..."
35	Page 85, Line 16	
36	Mr. O'Neill: "...ground	Mr. O'Neill: "...ground disturbance work
37	Service work within the Pipsell area."	Within the Pipsell area."

1	Page 91, Line 13	
2	Mr. Goulet: "service - the surface disturbance area would"	Mr. Goulet: "surface - the surface disturbance area would"
3	Page 96, Line 22	
4	Mr. O'Neill: "...with paleolithic material or artifacts that are..."	Mr. O'Neill: "...with paleolithic material or artifacts that are..."
5	Page 102, Line 1	
6	Mr. Nock: "...Chief Ryan Nees (phonetic) at that time."	Mr. Nock: "... Chief Ron Ignace (phonetic) at that time."
7	Page 102, Line 17	
8	Mr. Nock: "took us over to some burial mounds. Those weren't..."	Mr. Nock: "took us over to some burial mounds. Those weren't..."
9	Page 115, Line 8	
10	Mr. Wilson: "...RCJP, and there won't be any in any of the soft..."	Mr. Wilson: "...RCJP, and there won't be any in any of the soft..."
11	Page 115, Line 16	
12	Mr. Wilson: "...through there, they're enforced bending between the..."	Mr. Wilson: "...through there, they're induced bending between the..."
13	Page 116, Line 1	
14	Mr. Wilson: "...rings, as it would bend between two pipes was - "	Mr. Wilson: "...rings, as it would bend between two pipes if it -- "
15	Page 116, Line 17	
16	Mr. Wilson: "have a tighter bending radii then anticipated, it ..."	Mr. Wilson: "have a tighter bending radii than anticipated, it ..."
17	Page 118, Line 9	
18	Mr. Goulet: "...geometry, we needed a wider temporary workspace on..."	Mr. Goulet: "...geography, we needed a wider temporary workspace on..."
19	Page 122, Line 1	
20	Mr. Wilson: "...through the (Indiscernible) and unfavourable..."	Mr. Wilson: "...through the gravel and Unfavourable..."
21	Page 122, Line 15	
22	Mr. Wilson: "...as right next to two boreholes that were completed..."	Mr. Wilson: "...are right next to two boreholes that were completed..."
23	Page 122, Line 16	
24	Mr. Wilson: "...for -- at the entry and exit locations so we have..."	Mr. Wilson: "...for -- at the entry and exit locations so we have..."
25	Page 128, Line 9	
	Mr. Nock: "...project and the termination	Mr. Nock: "...project and the determination

1	of feasibility, whether..."	of feasibility, whether..."
2	Page 129, Line 5	
3	Mr. Nock: "...of the rows, the sizes of the workspaces, the..."	Mr. Nock: "...of the roads, the sizes of the workspaces, the..."
4	Page 131, Line 14	
5	Mr. Goulet: "Sure. I don't see a reason why we would conceivably..."	Mr. Nock: "Sure. I don't see a reason why we would conceivably..."
6	Page 140, Line 5	
7	Mr Goulet: "because for every month that we have delayed, we..."	Mr Goulet: "because for every month that we have delay, we..."
8	Page 140, Line 10	
9	Mr. Goulet: "...because we lose \$200 million a year of revenue. So..."	Mr. Goulet: "...because we lose \$200 million per month of revenue. So..."
10	Page 141, Line 4	
11	Mr. Wilson: "...costs to facility the end of the project."	Mr. Wilson: "...costs to facilitate the end of the project."
12	Page 142, Line 3	
13	Mr. Goulet: "...open cut's very predictable, and the HDD, as..."	Mr. Goulet: "...open cut's is very predictable, and the HDD, as..."
14	Page 143, Line 24	
15	Mr Goulet: "case was 25.7. We're tending towards more ..."	Mr Goulet: "case was 25.7. We're trending Towards more ..."
16	Page 146, Line 9	
17	Mr. Goulet: "...were a number of different methodologies s and..."	Mr. Goulet: "...were a number of different methodologies and..."
18	Page 147, Line 22	
19	Mr. O'Neill: "... (indiscernible) flake rock material or something to..."	Mr. O'Neill: "...flaked rock material or something to..."
20	Page 149, Line 24	
21	Mr. Goulet: "...you'd have to go to the open cut HDD sooner, and..."	Mr. Goulet: "...you'd have to go to the open cut and HDD sooner, and..."
22	Page 152, Line 13	
23	Mr. Wilson: "...tunnelling, so it's not in new conditions by any..."	Mr. Wilson: "...tunnelling, so it's not in new condition by any..."
24	Page 153, Line 11.	
25	Mr. Wilson: "...are -- required are much greater or too high than..."	Mr. Wilson: "...that are -- required are much greater or too high than..."

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Page 154, Line 12

Mr. Wilson: "go get it. There is wear
equipment on the TBM for..."

Mr. Wilson: "go get it. There is wear on
equipment on the TBM for ..."

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1 (PROCEEDINGS COMMENCED AT 9:30 A.M.)

2 CHAIR PENNEY: Good morning, everyone. We're a little
3 bit delayed this morning because we had to check
4 with counsel on a matter. So welcome to our last
5 day, the third and last day, of the oral hearing
6 regarding Trans Mountain Pipeline Inc.'s August
7 10th application for deviation to the Trans
8 Mountain Expansion Project route in the
9 Pipsell/Jacko Lake area of British Columbia.

10 For those who weren't here or weren't
11 listening yesterday, my name is Kathy Penney, and
12 I'm the chair of the panel assigned to assess the
13 application. Next to me here are Stephania Luciuk
14 and Mark Watton, co-commissioners. I'd like to
15 acknowledge our presence of the traditional
16 territories of the people of the Treaty 7 nation in
17 southern Alberta, which includes the
18 Blackfoot Confederacy, comprising the Siksika,
19 Piikani, and Kainai First Nations. Treaty 7
20 traditional territory also includes the Tsuut'ina
21 Nation and the Stoney Nakoda, including the
22 Chiniki, Bearspaw, and Goodstoney Nation. The City
23 of Calgary is also home to Métis Nation Number 3.
24 And to those joining, watching or listening, I'd
25 like to honour your traditional territories

1 wherever you are in the country.

2 Cross-examination concluded yesterday.

3 Today's session will be dedicated strictly to
4 hearing the parties' oral final argument and then
5 Trans Mountain's reply. We're streaming the oral
6 hearing live on our website in both video and
7 audio. After we're finished, only the audio will
8 be available. Each day's recording will be
9 uploaded to our registry, and daily transcripts are
10 available on our public registry.

11 Once the parties begin their submissions,
12 I'd ask respectfully that filming and photography
13 cease. It's a distraction, and because we are
14 streaming video live on our website, it's also
15 unnecessary.

16 For those here in person, if you're new to
17 the room, there are no planned evacuations, but if
18 something comes up, please exit the room through
19 the door you came in, turn right, follow the green
20 signs, go downstairs, leave the building and our
21 staff will call you back when it's safe to come
22 back.

23 So before we get started, I'm going to ask,
24 does any party have any preliminary matters to
25 raise? I'll start with Mr. Duncanson.

1 MR. DUNCANSON: Just one small matter for me, Madam
2 Chair, which is just that Trans Mountain filed some
3 minor transcript corrections this morning. That
4 was Exhibit Filing C26261. Thank you.

5 CHAIR PENNEY: Thank you, Mr. Duncanson. Ms. Walker?

6 MS. WALKER: No. Thank you, Madam Chair.

7 CHAIR PENNEY: Thank you, Ms. Walker.

8 So before we pass things over to
9 Mr. Duncanson, I'll note that while the parties are
10 not able to question each other during argument, it
11 is possible that the panel will have questions for
12 each party after they conclude. So at the end of
13 each party's presentation, we will take around a
14 20-minute break to just make sure we understand the
15 questions we all have and move forward.

16 I'd also remind the parties that, of course,
17 new evidence can't be introduced at the final
18 argument stage, so please be mindful of that. And
19 lastly, the Commission has received the parties'
20 books of authorities filed yesterday. Appreciate
21 that. I would encourage you to highlight passages
22 from your authorities as you present your argument.

23 So, Mr. Duncanson, over to you.

24 **SUBMISSIONS BY MR. DUNCANSON:**

25 **A. INTRODUCTION**

1 MR. DUNCANSON: Thank you, Madam Chair, and good morning
2 again, Commissioners. I'm pleased to present oral
3 argument this morning on behalf of Trans Mountain.
4 As is customary in proceedings before the
5 Commission, I have provided a copy of my notes to
6 the court reporter, and I would ask that the
7 headings and references from my notes be included
8 in the transcript so I don't need to read them out
9 as I go along. Where I deviate from my notes,
10 however, I would ask that my oral remarks be what
11 is included in the transcript.

12 Trans Mountain's deviation application in
13 this proceeding concerns a 1.3-kilometre section of
14 the route for the Trans Mountain Expansion Project,
15 or TMEP, which has encountered significant
16 technical challenges, delays, and associated cost
17 increases and which now jeopardizes Trans
18 Mountain's ability to complete the TMEP without
19 significant further delays and additional cost
20 increases. Trans Mountain has determined that it
21 is no longer technically or economically feasible
22 to proceed with the current approved route and
23 construction methodology and seeks urgent approval
24 from the Commission to modify the route back to
25 what the Commission previously approved for the

1 project so that Trans Mountain can complete the
2 TMEP in a timely and efficient manner, consistent
3 with the public interest.

4 By way of outline for my remarks this
5 morning, I will first outline the legal
6 requirements, principles that apply to the
7 Commission's consideration of this application. I
8 will then explain why the requested deviation meets
9 those legal requirements and should be approved as
10 soon as possible. In doing so, I will start by
11 explaining why the current microtunnel approach is
12 not feasible. Then I will discuss the proposed
13 deviation and why, in our submission, it represents
14 the best route, methods, and timing for
15 construction. And then I will discuss the other
16 alternative routes that have been considered and
17 why they are all inferior to Trans Mountain's
18 proposed route. Finally, I will make a few short
19 submissions about Indigenous consultation before
20 concluding my remarks.

21 **B. Legal Test**

22 **(i) Section 203 of the CER Act**

23 Under Section 203 of the *CER Act* [*Canadian*
24 *Energy Regulator Act*, SC 2019, c 28, s 10], the
25 Commission may approve a plan, profile, and book of

1 reference, or PPBOR, setting out the detailed route
2 for a portion of a pipeline if it determines that
3 the PPBOR represents the best possible detailed
4 route of the pipeline and the most appropriate
5 methods and timing of its construction.

6 Trans Mountain bears the burden of proving
7 to the Commission, on a balance of probabilities,
8 that its proposed route is the best possible
9 detailed route and that its proposed methods and
10 timing of construction are the most appropriate.
11 **[CER, Letter Decision MH-013-2020, C13835-1 (30**
12 **June 2021) at 21 [Letter Decision MH-013-2020]]**

13

14 **(ii) The best possible route**

15 The NEB previously found that when seeking
16 approval of a PPBOR, Trans Mountain is required to
17 demonstrate that it considered alternative routes
18 and that those routes are inferior to the proposed
19 route. The NEB stated in its MH13-2020 decision at
20 page 28, and I quote: (as read)

21 "Trans Mountain's burden of proof
22 requires consideration of proposed
23 alternate routes, considering
24 reasonable modifications, to prove
25 on a balance of probabilities that

1 they are unfeasible or inferior to
2 its own proposed route."

3

4 **(iii) The public interest and the Crown's duty to consult**

5 The Commission's decisionmaking in this and
6 most other cases must also be guided by the overall
7 public interest.

8 In its reconsideration report for the TMEP,
9 the NEB stated that the public interest is a
10 complex, flexible, and multifaceted inquiry that
11 requires a thorough and scientific examination of
12 evidence relating to economic, environmental, and
13 social factors; to consider the impacts of the
14 project on Indigenous rights; to weigh and balance
15 the overall benefits and burdens of the project;
16 and to draw conclusions. The NEB further stated
17 that the various factors the Commission considers
18 when determining the public interest cannot be
19 understood in isolation from one another or
20 divorced from the specific context and
21 circumstances surrounding the project. **[NEB,**
22 **Application for the Transmountain Expansion Project**
23 **Reconsideration Report MH-052-2018, A98021-1**
24 **(February 2019) [Reconsideration Report] at 3]**
25 Applying this approach to the TMEP, the NEB

1 and the federal Governor in Council found the
2 project to be in the overall public interest of all
3 Canadians [**Reconsideration Report; Order in Council**
4 **P.C. 2019-820 (June 18, 2019)**]. The NEB emphasized
5 that the project's benefits would include:

6 "...increased access to diverse
7 markets for Canadian oil; jobs
8 created across Canada; the
9 development of capacity of local
10 and Indigenous individuals,
11 communities, and businesses;
12 direct spending on pipeline
13 materials in Canada; and
14 considerable revenues to various
15 levels of government."

16 Commissioners, realizing these benefits requires
17 timely and orderly execution of the project.
18 Delays and increased construction costs, to the
19 extent they can be reasonably avoided, are not in
20 the public interest [***Clyde River (Hamlet) v***
21 ***Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1**
22 **S.C.R. 1069 at para 40**].

23 The Commission's consideration of the public
24 interest in the circumstances of the present
25 application also requires the Commission to ensure

1 that the Crown has met its constitutional duty to
2 consult with and, where appropriate, accommodate
3 the interests of Indigenous peoples whose
4 established Aboriginal and Treaty rights may be
5 adversely affected by the Commission's decision.
6 The Supreme Court of Canada held in *Clyde River*
7 that a decision that violates Indigenous rights
8 cannot be said to be in the public interest.

9 However, the law is also clear that
10 Indigenous peoples do not hold a veto over Crown
11 decisions [For example, *Roseau River First Nation v*
12 *Canada (Attorney General)*, 2023 FCA 163 [Roseau
13 River] at para 32; *Coldwater First Nation v Canada*
14 *(Attorney General)*, 2020 FCA 34 at para 53
15 [Coldwater] citing *Haida Nation v British Columbia*
16 *(Minister of Forests)*, 2004 SCC 73 at paras 62-63;
17 *Ktunaxa Nation v British Columbia (Forests, Lands*
18 *and Natural Resource Operations)*, 2017 SCC 54 at
19 para 83 [Ktunaxa]]. The Federal Court of Appeal
20 confirmed as much in its *Coldwater* decision, which
21 denied a challenge to the Governor in Council's
22 second approval for the TMEP and, again, just 2
23 months ago in its *Roseau River* decision.
24 Similarly, Indigenous groups cannot refuse to
25 participate in good faith in the consultation

1 process or only commit to part of that process and
2 subsequently complain of inadequate Crown
3 consultation [***Coldwater*** at paras 50 and 56]. And
4 Courts have also recognized that meaningful Crown
5 consultation is a process that may result in
6 various outcomes [***Roseau River*** at 34; ***Ktunaxa*** at
7 **para 83**]. A failure to accommodate in one
8 particular, preferred way does not mean that the
9 Crown has failed to meet its duty to consult
10 [***Coldwater*** at para 51; ***Ktunaxa*** at para 83]. An
11 authority for that can be found in the *Coldwater*
12 case at paragraph 51, as well as the *Ktunaxa*
13 Supreme Court decision at paragraph 83.

14 In short, Commissioners, when assessing the
15 public interest, you should balance SSN's interests
16 in this case with those of Trans Mountain and all
17 Canadians [***Reconsideration Report*** at 3]. "The law
18 does not require that the interests of Indigenous
19 peoples prevail" [***Coldwater*** at para 53] in Crown
20 decisionmaking.

21 With respect to the United Nations
22 Declaration on the Rights of Indigenous Peoples, or
23 UNDRIP, which SSN cited at length in its written
24 submissions in this proceeding, UNDRIP does not
25 displace the legal tests for whether the Crown owes

1 a duty to consult in given circumstances or the
2 content of that duty, as set out in the Canadian
3 case law. After Canada signed on to UNDRIP, our
4 courts reiterated that the law in Canada does not
5 give Indigenous groups a veto, and decisionmakers,
6 like the Commission, must balance the public
7 interest of all Canadians in its decisions [**For**
8 **example, *Roseau River* at 34]**.

9 So to summarize the legal test for this
10 application, your decision must be based on whether
11 the requested deviation represents the best
12 possible route and the most appropriate methods and
13 timing for constructing the TMEP through this area.
14 In doing so, you should determine whether the
15 proposed deviation is in the overall public
16 interest. This requires you to satisfy yourself
17 that consultation with Indigenous groups has been
18 adequate in the circumstances. But beyond that,
19 your decision should balance the interests of SSN
20 with those of all Canadians.

21 **(iv) The Mutual Benefits Agreement between Trans**
22 **Mountain and SSN**

23 Before turning to our submissions on why the
24 evidence supports approval of the proposed
25 deviation, I want to briefly address the Mutual

1 Benefits Agreement, or MBA, between Trans Mountain
2 and SSN that was jointly filed in this proceeding.
3 And I will just pause briefly, Madam Chair, to note
4 that I will be making a few references to the MBA
5 this morning. I've already conferred with
6 Ms. Walker about the nature of the references I
7 intend to make, and she has no concern with those
8 being shared in a nonconfidential format.

9 The MBA is a private agreement between Trans
10 Mountain and SSN. Private agreements cannot bind
11 statutory tribunals such as the Commission and
12 cannot fetter the Commission's discretion [**See**
13 ***Donald Frederick Angevine v Her Majesty the Queen,***
14 ***in Right of Ontario, 2011 ONSC 4523 at paras***
15 **14-15**]. And an example of the legal authority to
16 support that point is the *Donald Frederick Angevine*
17 case from Ontario that we included in our
18 authorities.

19 The Commission also has no mandate or
20 jurisdiction to enforce private agreements like the
21 MBA. As a result, in our submission, the MBA is
22 evidence that SSN provided its consent and support
23 for the project through the Pipsell area and the
24 text of the MBA is evidence of the basis for SSN's
25 support in this regard, but the MBA does not impact

1 the legal framework that applies to the
2 Commission's decision on the application.

3 **C. The Application represents the best route, methods**
4 **and timing, and is in the public interest**

5 Having summarized the law that governs this
6 application, I'll turn now to why the Commission
7 should grant the deviation Trans Mountain is
8 requesting.

9 In short, the evidence in this proceeding
10 demonstrates that Trans Mountain's proposed
11 deviation represents the best route, methods, and
12 timing of construction and that it is consistent
13 with the overall public interest.

14 **(i) Trans Mountain understands the Importance of the**
15 **Pipsell Area**

16 Trans Mountain understands that the area of
17 the proposed deviation is within an area known as
18 the Pipsell area, which is a culturally and
19 spiritually important area for SSN. On behalf of
20 Trans Mountain, I would again like to thank
21 Ms. Jules for sharing her knowledge of SSN's
22 history on these lands and the importance of them
23 as part of this proceeding.

24 Since the fall of 2019, Trans Mountain has
25 worked closely with SSN to develop a construction

1 methodology that SSN supports through this area.
2 Even though the Commission had already approved a
3 detailed route and open trench methodology on these
4 lands [**by CER Order OPL-003-2020 (C06126-1)**], Trans
5 Mountain worked collaboratively to address SSN's
6 concerns. That process led to an agreed
7 microtunnelling methodology that Trans Mountain
8 reasonably thought at the time would be feasible,
9 despite the fact that it would be more expensive
10 than other construction methods [**Transcript,**
11 **vol. 1, 18 September 2023 (C26250-1) at PDF 134,**
12 **lines 3-12]**. That microtunnelling methodology was
13 the basis for the previous deviation which Trans
14 Mountain has been working diligently to execute
15 over the past 2 years [**Approved by CER Order**
16 **AO-001-OPL-003-2020 (C17990-3)**].

17 For the roughly 4.2 kilometres of route
18 through the Pipsell area, Trans Mountain proposed
19 four microtunnel drives. Three of the four drives
20 have either been successful or are on track for
21 successful completion shortly. However, the reason
22 why we are here in this hearing is that one of the
23 four tunnel drives, the tunnel drive known as
24 Tunnel Drive 2, has encountered significant
25 unforeseen challenges that are now putting that

1 tunnel drive, as well as the overall TMEP schedule,
2 at risk.

3 **(ii) Micro-tunneling is no longer feasible**

4 The evidence is that Tunnel Drive 2 is one
5 of the longest tunnels of this nature that has ever
6 been attempted in a hard rock formation anywhere in
7 the world [Trans Mountain's Deviation Application
8 (C25832) at 3; Trans Mountain Response to CER IR
9 1.2 (c) (C25972-2) at 7]. Before even entering the
10 hardest rock section of the drive, the drive
11 experienced upward migration of the reinforced
12 concrete jacking pipe, which forced a complete
13 shutdown of the tunnelling operations lasting about
14 4 months [Trans Mountain Response to CER IR 2.1 (d)
15 (C26152-2) at 3]. During this time, Trans Mountain
16 attempted a series of corrective measures. The
17 first two measures failed, and we don't yet know if
18 the third will be completed successfully or not
19 [Trans Mountain Response to CER IR 1.2 (c)
20 (C25972-2) at 5-6].

21 Trans Mountain's trenchless installation
22 experts have attested to the high risks inherent in
23 continuing to pursue microtunnelling construction
24 in these circumstances; and those include
25 installing a shaft above an already existing

1 section of tunnel, something Trans Mountain has
2 never before attempted, and restarting tunnelling
3 after an approximate 4-month shutdown, during which
4 time the annular space around the jacking pipe has
5 likely been partially or entirely filled in [**Trans
6 Mountain Response to CER IR 1.2 (c) (C25972-2) at
7 6**]. These risks, among others, mean that there is
8 now a high risk that the microtunnel will fail if
9 Trans Mountain continues with it.

10 The evidence is also that the costs of
11 Tunnel Drive 2 have already significantly exceeded
12 the typical costs of trenchless pipe installations
13 and could increase much more. Trans Mountain
14 initially projected that microtunnelling in Tunnel
15 Drive 2 would cost around \$24 million [**Trans
16 Mountain's Response to SSN IR 1.2 (C26163-2) at 2**].
17 To date, the costs Trans Mountain has incurred in
18 its attempts just to mitigate the upward migration
19 of the jacking pipe are approximately \$32 million.
20 In the worst-case scenario presented in the
21 evidence, continuing with microtunnelling could
22 incur more than \$85 million of additional costs
23 [**Trans Mountain Response to CER IR 2.3, table 2.3-1
24 (C26152-2) at 10**]. As Mr. Goulet explained on
25 Monday, Trans Mountain could end up spending up to

1 three to five times the costs of typical trenchless
2 construction if it continues with microtunnelling
3 on Tunnel Drive 2 [Transcript, vol. 1, 18 September
4 2023 (C26250-1) at PDF 134, lines 13-24]. And
5 these are just the direct costs of the tunnel
6 installation. The knock-on costs of delays to
7 completing the TMEP are expected to be nearly
8 \$400 million for each month of delay to the
9 project's in-service indicate up to March 31, 2024,
10 and more in the months following, accounting for
11 higher financing costs and reductions in revenue
12 due to not having the project in service, as well
13 as additional overhead costs to facilitate the
14 completion of the project [Trans Mountain's Reply
15 Evidence (C26029-2) at para 15; Trans Mountain
16 Response to CER IR 2.3 (C26152-2) at 12;
17 Transcript, vol. 1, 18 September 2023 (C26250-1) at
18 PDF 140, line 4 - PDF 141, line 4].

19 And all of this is to say nothing of the
20 impacts that a delay to the TMEP would have on
21 Trans Mountain's shippers and the industry as a
22 whole [Transcript, vol. 1, 18 September 2023
23 (C26250-1) at PDF 136, lines 19-24].

24 As discussed during questioning of Trans
25 Mountain's witnesses on Monday, the microtunnelling

1 scenario is already trending towards the worst case
2 that Trans Mountain outlined in its response to the
3 Commission's IRs [**see Trans Mountain Response to**
4 **CER IR 2.3 (C26152-2) at 10-12**]. But we also heard
5 there is the potential for a worst-worst case, in
6 which Trans Mountain continues pursuing
7 microtunnelling and attempts to complete
8 construction using this methodology, only to be
9 ultimately unsuccessful. In that scenario, Trans
10 Mountain would then have to incur further
11 additional costs and create additional surface
12 disturbance to complete construction with the
13 methodology that it is now proposing in the
14 deviation application. As Mr. Goulet indicated in
15 his testimony, in this "worst, worst case"
16 scenario, the costs and surface disturbance, shown
17 in Trans Mountain's response to the Commission's
18 IR, would be additive and construction could be
19 delayed well into 2025 [**Transcript, vol. 1, 18**
20 **September 2023 (C26250-1) at PDF 112, lines 7-9 and**
21 **PDF 148, line 24 – PDF 150, line 14**]. That outcome
22 would clearly be contrary to the public interest.

23 Trans Mountain's witnesses in this hearing
24 have extensive experience with microtunnels and
25 other trenchless installations for large diameter

1 pipelines. They are the only witnesses who
2 appeared before you in this hearing who can
3 credibly assess the feasibility of proceeding with
4 construction of the TMEP under different risks,
5 cost scenarios, and scheduling delays. Their
6 evidence is that continuing with microtunnelling
7 for Tunnel Drive 2 is highly risky [**Trans Mountain**
8 **Response to CER IR 1.2 (c) (C25972-2) at 7**], it
9 will incur highly significant financial costs, and
10 it will cause delays that could extend the overall
11 TEMP in-service date by almost a year [**Trans**
12 **Mountain Response to CER IR 2.3, table 2.3-2**
13 **(C26152-2) at 12**]. If certain risks materialize,
14 the tunnel drive will fail entirely and the TMEP
15 could be delayed for even longer [**Trans Mountain**
16 **Reply Evidence (029-2) at para 25**].

17 While Mr. Hornbruch for SSN suggested
18 yesterday during questioning that there is no
19 factual support for Trans Mountain's risk
20 assessments for microtunnelling [**Transcript,**
21 **vol. 2, 19 September 2023 (C26253-1) at PDF 69**],
22 that statement ignores the substantial evidence
23 before you in this proceeding. Trans Mountain has
24 previously identified in its application, its
25 response to CER IR number 1, its reply evidence,

1 and its response to CER IR number 2, the physical
2 impediments, the financial impediments, the
3 technical challenges, and the critical risks that
4 may occur during its attempts to complete Shaft 6,
5 restart the tunnel, and continue microtunnelling
6 through 800 more metres of very hard rock.

7 While Mr. Hornbruch claimed yesterday that
8 the circumstances Trans Mountain now finds itself
9 in with respect to microtunnelling once Shaft 6 is
10 complete are the same as what Trans Mountain
11 previously assessed and accepted for Tunnel Drive 2
12 **[Transcript, vol. 2, 19 September 2023 (C26253-1)**
13 **at PDF 75]**, that claim also ignores the evidence.
14 The circumstances have changed in at least five key
15 ways. First, tunnelling was initially expected to
16 take 7 and a half months **[Trans Mountain's Response**
17 **to SSN IR 1.4 (C26163-2) at 5-6]**. Instead, the
18 tunnel machine has now been in the ground for
19 almost a year and there is still 5 to 6 months of
20 tunnel work required in the hardest rock on the
21 tunnel drive, even in a best-case scenario. This
22 longer duration of tunnelling and the associated
23 wear and tear on the tunnelling equipment is a key
24 difference from the original tunnelling plan that
25 Trans Mountain assessed.

1 Second, as noted in Trans Mountain's
2 response to CER IR 1.2(c), the tunnelling equipment
3 already displays signs of wear and tear, thereby
4 increasing the risk that the equipment will be
5 unable to complete the drive.

6 Third, as I previously noted, continuing
7 tunnel operations at Tunnel Drive 2 will involve
8 using a shaft above an already installed section of
9 tunnel, which Trans Mountain has never done before,
10 and it would also involve retrofits to Shaft 1 to
11 accommodate a new tunnelling approach. These
12 configurations create operational challenges that
13 may result in damage to the jacking pipe and
14 tunnelling equipment as described in Trans
15 Mountain's response to CER IR 1.2(c).

16 Fourth, as Mr. Wilson explained on Monday,
17 the approximate 4-month shutdown in tunnelling has
18 likely impacted the annular space around the tunnel
19 and will increase the friction against the jacking
20 pipe if and when Trans Mountain tries to restart
21 operations. Even if Trans Mountain is able to
22 apply enough jacking force to advance the tunnel,
23 which is uncertain, the increased jacking forces
24 could damage the jacking pipe and will cause
25 additional wear and tear on the equipment [Trans

1 **Mountain Response to CER IR 1.2 (c) (C25972-2) at**
2 **6].**

3 And fifth, as Mr. Goulet stated on Monday,
4 Trans Mountain recently gained access to the
5 tunnelling machine and discovered that a failure
6 has occurred inside of the tunnel, resulting in the
7 interior of the tunnel filling with water
8 **[Transcript, vol. 1, 18 September 2023 (C26250-1)**
9 **at PDF 143, lines 11-17, and PDF 152, lines 16-18].**
10 This may have resulted in damage to the tunnelling
11 equipment and could further complicate restarting
12 tunnel operations.

13 For all of these reasons, the circumstances
14 Trans Mountain finds itself in now are not the same
15 as what it previously assessed. As Mr. Wilson
16 stated on Monday: (as read)

17 "It's not the crossing that we
18 initially assessed as being a
19 feasible crossing." **[Transcript,**
20 **vol. 1, 18 September 2023**
21 **(C26250-1) at PDF 152, lines**
22 **19-20]**

23 In summary, Commissioners, Trans Mountain has
24 provided clear and credible evidence that Tunnel
25 Drive 2 has encountered significant technical

1 challenges to date. Tunnel Drive 2 is taking far
2 longer and is now much more expensive than Trans
3 Mountain expected, and Tunnel Drive 2 is now facing
4 serious new technical risk that render the
5 likelihood of successfully completing the tunnel
6 drive as low. We submit SSN has not presented any
7 evidence that credibly challenges these findings.

8 SSN and its expert Mr. Hornbruch have taken
9 the position that Trans Mountain should continue
10 with microtunnelling no matter how long it takes
11 and no matter how much it costs, and only "when the
12 tunnel definitely fails, if it fails" should Trans
13 Mountain pursue alternative construction methods
14 **[Transcript, vol. 2, 19 September 2023 (C26253-1)**
15 **at PDF 73]**. Mr. Hornbruch also confirmed yesterday
16 that cost is not a consideration for SSN in
17 determining whether continuing with microtunnelling
18 is feasible for the project **[Transcript, vol. 2, 19**
19 **September 2023 (C26253-1) at PDF 65]**.

20 That approach, Commissioners, is not
21 consistent with Trans Mountain's obligations as a
22 prudent pipeline operator. It is not consistent
23 with the public interest in completing the project
24 in a timely and efficient manner, and it is not
25 consistent with the MBA between the parties, which

1 expressly contemplates that Trans Mountain may
2 determine that trenchless construction is not
3 technically or economically feasible and that Trans
4 Mountain may proceed with trenched construction
5 through the Pipsell area in such circumstances
6 **[Mutual Benefits Agreement between Trans Mountain**
7 **and SSN, c1 7.4 and 8.5(c)]**, while paying
8 additional compensation to SSN **[Mutual Benefits**
9 **Agreement between Trans Mountain and SSN, c1 7.4]**.
10 And I will discuss those MBA obligations more in a
11 few minutes.

12 SSN relies on the opinions from two
13 individuals that suggest microtunnelling may still
14 be viable. First, SSN relies on a report authored
15 by Dr. Peter Uffmann. Dr. Uffmann's short report
16 opined on the technical limits of the
17 microtunnelling machine being used for Tunnel Drive
18 2. But he did not assess the risks, costs, of
19 schedule impacts of proceeding with microtunnelling
20 in the specific circumstances being encountered in
21 the tunnel drive. In fact, Dr. Uffmann himself
22 noted in his report that his work was conducted
23 without any "detailed documentation on the geology,
24 hydrology, and the machine" used for executing the
25 drive, and he specifically pointed out that he,

1 quote: (as read)

2 "Only had extremely limited
3 informative material, especially
4 on the geology, to work with."

5 **[SSN Submissions, Appendix D,**
6 **Volume 1 (C26001-2) at PDF 14 and**
7 **17]**

8 Further, Dr. Uffmann was not made available for
9 cross-examination during the hearing, so Trans
10 Mountain had no ability to test his evidence. For
11 all of those reasons, we submit the Commission
12 should give Dr. Uffmann's evidence about the
13 feasibility or viability of continuing with
14 microtunnelling, very little, if any, weight. SSN
15 also relies on Mr. Hornbruch's comments regarding
16 the feasibility of continuing with microtunnelling
17 for Tunnel Drive 2 **[SSN Submissions, Appendix I**
18 **(C25999-17)]**. However, as we heard yesterday,
19 Mr. Hornbruch conceded that he is not as qualified
20 as Trans Mountain's team to assess the feasibility
21 of potential construction methodologies in the
22 Pipsell/Jacko Lake area **[Transcript, vol. 2, 19**
23 **September 2023 (C26253-1) at PDF 14]**. He would not
24 characterize himself as an expert in
25 microtunnelling and has no experience with

1 microtunnelling for pipeline projects [Transcript,
2 vol. 2, 19 September 2023 (C26253-1) at PDF 13-16].

3 He also agreed that he has never been
4 responsible for actually executing a microtunnel or
5 horizontal directional drill project of this nature
6 or evaluating construction risks for a project like
7 this one [See SSN Submissions, Appendix D, Volume 1
8 (C26001-2) at pdf 4; SSN Response to CER IR 1.4
9 (C26182-2) at 8-9; Transcript, vol. 2, 19 September
10 2023 (C26253-1) at PDF 18 - 21]. For these
11 reasons, Commissioners, you should give his views
12 on the feasibility of microtunnelling very little
13 weight as well.

14 SSN is also taking the position that
15 schedule impacts are the driving concern behind the
16 requested deviation and that Trans Mountain should
17 have started its trenchless plans for the Pipsell
18 area sooner. However, the evidence is that Trans
19 Mountain has reasonably advanced its construction
20 plans for the Pipsell area, having regard to the
21 extent of work required to assess feasibility for
22 trenchless options, the various other work spreads
23 on the project that needed to be planned and
24 advanced at the same time, and external factors,
25 such as the atmospheric flood in 2021 that impacted

1 the entire project schedule [Trans Mountain's Reply
2 Evidence (C26029-2) at paras 33-36].

3 But in any event, this issue is a red
4 herring. Regardless of when Trans Mountain started
5 construction in this area, it doesn't change the
6 fact that microtunnelling is no longer technically
7 feasible, given the significant challenges that
8 have been encountered with Tunnel Drive 2 to date.
9 It doesn't change the material risks associated
10 with attempting to restart and continue with this
11 tunnel drive, and it doesn't change the magnitude
12 of the costs that have already been incurred by
13 Trans Mountain or the possibility of significantly
14 higher costs still to come [Transcript, vol. 1, 18
15 September 2023 ((C26250-1) at PDF 134, line 1 – PDF
16 136, line 12; Trans Mountain Response to CER IR
17 2.3, table 2.3-1 (C26152-2) at 10 and table 2.3-2
18 at 12].

19 With no credible evidence showing that
20 microtunnelling remains viable; uncontroverted
21 evidence regarding the technical difficulties and
22 cost increases experienced by Trans Mountain to
23 date, and Trans Mountain's detailed explanations as
24 to why continuing with microtunnelling for Tunnel
25 Drive 2 is high risk, unreasonably costly, and

1 could cause significant delays to the overall
2 project. The record supports Trans Mountain's
3 determination that continuing with microtunnelling
4 is no longer feasible and that efficient and
5 orderly execution of the project requires a new
6 construction methodology.

7 **(III) The proposed route, method, and timing**

8 In terms of what Trans Mountain is proposing
9 in the deviation application, the application
10 proposes a combination of a 455-metre HDD and open
11 trench construction for the remainder of the
12 1.3-kilometre section of the project route. As I
13 noted already, Commissioners, the Commission
14 already previously approved the same route in May
15 of 2020 [**By CER Order OPL-003-2020 (C06126-1)**].
16 The only change from that previous approval is
17 Trans Mountain's proposal to employ HDD for a
18 portion of the route to reduce surface disturbance.

19 Mr. Goulet explained on Monday that
20 open-trench construction is very, very predictable
21 [**Transcript, vol. 1, 18 September 2023 (C26250-1)**
22 **at PDF 90, line 14**]. No one has questioned the
23 feasibility of the proposed open trench.

24 With respect to the proposed HDD, Trans
25 Mountain's evidence is that this HDD is feasible

1 and expected to be successfully installed [See
2 **Attachment 1.2 to Trans Mountain Response to CER IR**
3 **1 (C25972-6) and Trans Mountain's Reply Evidence**
4 **(C26029-2) at para 28]**. Mr. Wilson explained on
5 Monday that, quote: (as read)

6 "The current proposed HDD provides
7 the lowest possible risk for a
8 trenchless installation."

9 [Transcript, vol. 1, 18 September
10 2023 (C26250-1) at PDF 123, lines
11 6-8]

12 That view is based on extensive sampling data and
13 Trans Mountain's experience with similar HDDs that
14 have been successfully executed across the TMEP in
15 similar ground conditions [Transcript, vol. 1, 18
16 September 2023 (C26250-1) at PDF 123, lines 6-8].

17 SSN makes two claims about the feasibility
18 of the HDD for the proposed deviation, and these
19 claims contradict one another. First, SSN submits
20 that the proposed 455-metre HDD is not technically
21 feasible. Second, SSN submits that Trans Mountain
22 should instead consider a longer HDD of
23 approximately 1,250 metres from pad 2 to pad 6, and
24 that this longer HDD could conceptually be viable.

25 Respectfully, neither of these claims is

1 credible, and I will address the first one of those
2 claims now and I will address the second one later
3 in my submissions when I discuss SSN's alternative
4 route proposals.

5 SSN's claim that Trans Mountain's proposed
6 HDD is not feasible relies on three documents.
7 First, it relies on Dr. Uffmann's short report,
8 which again was based on extremely limited and
9 outdated material [**Appendix D, Volume 1 of 4 to**
10 **SSN's Written Submissions (C26001-2) at pdf 17**].
11 Dr. Uffmann concluded that HDD is not feasible for
12 a bore hole with a nominal diameter of 2,000
13 millimetres in soil or in rock. However, Trans
14 Mountain's proposed HDD would have a final borehole
15 diameter of 48 inches, which equates to 1,219
16 millimeters [**Trans Mountain's Reply Evidence**
17 **(C26029-2) at para 29**]. That is well below the
18 2,000 millimeters discussed by Dr. Uffmann, and
19 again, Trans Mountain itself has extensive
20 experience successfully executing HDDs of this size
21 on the project.

22 The second document SSN relies on is a
23 presentation that Trans Mountain gave to SSN in
24 March of 2021, roughly 2 and a half years ago
25 [**Appendix E to SSN's Written Submissions**

1 **(C25999-13)]**. That presentation considered a much
2 longer HDD option and predated Trans Mountain's
3 geotechnical work in the area. So the information
4 in the March 2021 slide deck, in my submission, is
5 simply not relevant to the HDD proposed in the
6 deviation application that is before you.

7 And the final document that SSN relies on is
8 a report from Trans Mountain's consultant, Thurber,
9 in 2023 [**Appendix F to SSN's Written Submissions**
10 **(C25999-14)]**, which Trans Mountain commissioned for
11 the HDD proposed in the application. The Thurber
12 report noted that the primary risk with the
13 proposed HDD is the coarse material near the
14 surface if the drill is not cased down to bedrock
15 [**Trans Mountain's Response to SSN IR 1.11**
16 **(C26163-2) at 14; Transcript, vol. 1, 18 September**
17 **2023 (C26250-1) at PDF 121, line 23 – PDF 122, line**
18 **7]**. However, Trans Mountain is proposing to case
19 the HDD down to bedrock. Thurber assessed the risk
20 of drilling through the bedrock itself as low to
21 moderate [**Thurber Report (2023), Attachment 1.2-1**
22 **to Trans Mountain's Response to CER IR 1 at**
23 **(C25972-6) at 7]**, which is consistent with Trans
24 Mountain's assessment of risk and its evidence that
25 drills of this nature on the project have been

1 successful. According to Mr. Hornbruch yesterday,
2 that Thurber risk assessment of low to medium risk
3 is a, quote:

4 "...get out of jail sentence. The
5 sentence means, yes, we say it's
6 feasible, but if it fails, don't
7 blame us." [Transcript, vol. 2, 19
8 September 2023 (C26253-1) at PDF
9 49, lines 16-17]

10 So the evidence about feasibility of the proposed
11 HDD from Thurber is that the proposed HDD is
12 feasible, which supports Trans Mountain's evidence.

13 **Trans Mountain has reasonably and in good faith sought**
14 **to mitigate impacts to SSN**

15 In addition to being technically sound,
16 Trans Mountain's proposed route and methods of
17 construction are consistent with its long history
18 of engagement with SSN and reasonably accommodate
19 SSN's concerns.

20 Contrary to SSN's submissions, Trans
21 Mountain has adhered to the terms of its MBA with
22 SSN, has made best efforts to implement trenchless
23 construction in the Pipsell area, and has
24 reasonably and in good faith sought to mitigate
25 project impacts on SSN.

1 in excess of the construction
2 costs until associated with
3 trenchless construction." [MBA c1

4 **1.1 "Economically Infeasible"]**

5 As I've already noted, Trans Mountain's evidence in
6 this proceeding is that microtunnelling for Tunnel
7 Drive 2 has already cost more than double what
8 trenchless construction would typically cost. And
9 given the technical risks associated with this
10 particular drive, continuing with microtunnelling
11 could end up costing Trans Mountain up to five
12 times the construction costs normally associated
13 with trenchless construction [Transcript, vol. 1,
14 **18 September 2023 (C26250-1) at PDF 134**]. Based on
15 the evidence, Trans Mountain was entitled under the
16 MBA to determine that Tunnel Drive 2 was
17 economically infeasible in these circumstances, and
18 proceed with trench construction subject to
19 providing additional compensation to SSN.

20 Similarly, the definition of "technically
21 feasible" that the parties agreed to in the MBA was
22 "in respect of trenchless construction, that in
23 utilizing current and currently contemplated
24 methodologist, materials, technologies, equipment,
25 and practices, there is no significant physical,

1 geological, or financial impediment to utilizing
2 trenchless construction, including the geotechnical
3 hazards described in Schedule D to the MBA, and
4 provided that the financial impediment could not
5 include the higher costs of trenchless construction
6 relative to ordinary course construction costs.

7 Trans Mountain's evidence demonstrates that
8 there are significant and -- pardon me, significant
9 physical and geological impediments to continuing
10 to use microtunnelling for Tunnel Drive 2, and
11 there are certainly significant financial
12 impediments to doing so [MBA c1 1.1 "Technically
13 Feasible"].

14 With respect to financial impediments, based
15 on the definition in the MBA, this can include
16 costs of microtunnelling that are higher than other
17 trenchless installations, which I've just outlined.
18 But it could also include broader financial
19 impediments, such as those associated with delays
20 to the project. As I've already explained, there
21 are several financial impediments associated with
22 continuing microtunnelling for Tunnel Drive 2.

23 With respect to physical and geological
24 impediments, while the list of hazards in
25 Schedule D to the MBA is not an exhaustive list of

1 the impediments contemplated in the definition, the
2 evidence before you is that the so-called "hump"
3 that required tunnel operations to shut down was
4 caused by the presence and unexpected influence of
5 a soft ground formation immediately above the
6 tunnel [**Attachment 1.9 to Trans Mountain's Response**
7 **to SSN IR 1 (C26163-3) at PDF 4. See also Trans**
8 **Mountain's Response to SSN IR (C26163-2) at PDF**
9 **14]**. The combination of these ground conditions,
10 the extended shutdown of the tunnel, the presence
11 of water now in the tunnel, and the very hard rock
12 remaining to be tunneled through create physical
13 and geological impediments to continuing to use
14 microtunnelling for this section. As a result,
15 under the MBA, Trans Mountain was entitled to
16 determine that Tunnel Drive 2 was not technically
17 feasible in the circumstances and proceed with
18 trenched construction, subject to providing
19 additional compensation to SSN.

20 For these reasons, Commissioners, any
21 arguments you may hear later from SSN's counsel
22 that the proposed deviation is inconsistent with
23 the MBA or that any trenched construction in the
24 Pipsell area lacks SSN's consent are not credible,
25 and they are contrary to the evidence. The MBA

1 represents SSN's express consent to the project
2 through this area, including its consent for Trans
3 Mountain to use trenched construction in the
4 circumstances described in the evidence.

5 Best Efforts to Use Trenchless Construction

6 Similarly, the record demonstrates that
7 Trans Mountain has employed best efforts to install
8 the pipeline along the Pipsell/Jacko Lake corridor
9 using trenched methods. As Ms. Walker discussed
10 with the Trans Mountain panel on Monday, Trans
11 Mountain evaluated a variety of different types of
12 trenchless methods, including HDD, down-the-hole
13 hammers, and microtunnels [**Transcript, vol. 1, 18**
14 **September 2023 (C26250-1) at PDF 77, lines 9-11,**
15 **and PDF 78, lines 8-18]**. Trans Mountain worked
16 collaboratively with SSN to develop a method that
17 SSN's joint council supported, and Trans Mountain
18 then took reasonable steps to execute that approach
19 [**See e.g., the Deviation Application (C25832-1) at**
20 **paras 11-12]**. As I've noted, three of the four
21 microdrive tunnels have been successful or are on
22 track to being successful shortly. Those tunnels,
23 combined with Trans Mountain's proposed HDD in the
24 application, will result in more than 80 percent of
25 the Pipsell/Jacko Lake corridor being installed

1 using trenchless methods [**Deviation Application**
2 **(C25832-1) at para 23**]. Further, the evidence
3 shows that when the hump issue arose on Tunnel
4 Drive 2, Trans Mountain spent considerable time and
5 money, and attempted several mitigation approaches
6 to address that issue prior to bringing this
7 application [**Trans Mountain's Response to CER IR**
8 **No. 1.2(c) (C25972-2) at 5; Trans Mountain's Reply**
9 **Evidence (C26029-2) at paras 13-14; Trans**
10 **Mountain's Response to SSN IR 1.5 (C26163-2) at 7**].
11 So any claim that Trans Mountain did not use best
12 efforts to construct the project through this area
13 using trenchless methods is contrary to the
14 evidence.

15 Efforts to Minimize Impacts

16 In addition to employing trenchless
17 construction where feasible, Trans Mountain has
18 taken other measures to minimize the impacts of
19 construction in the Pipsell area. These efforts
20 include using national park standards for
21 reclamation, which was something the parties agreed
22 to in the MBA, employing an SSN Indigenous monitor,
23 and working closely with SSN experts and knowledge
24 keepers to identify sites of particular significant
25 and sensitivity within this spiritual and

1 culturally important area [**Trans Mountain's**
2 **Response to CER IR No. 1.1 (C25972-2) at 1-3**]. As
3 we heard on Monday, Trans Mountain has also
4 proposed to reduce the footprint for open trench
5 construction to 25 to 30 metres for most of the
6 proposed deviation route, and to employing rig
7 matting across the proposed deviation to reduce
8 surface disturbance [**Transcript, vol. 1, 18**
9 **September 2023 (C26250-1) at PDF 97 and 121**].

10 During cross-examination on Monday,
11 Ms. Walker asked a number of questions to the Trans
12 Mountain witnesses about the possibility of chance
13 finds, including burial mounds, as supporting the
14 need for trenchless construction. However, the
15 evidence is that Trans Mountain has undertaken
16 extensive work along the proposed deviation route
17 to identify potential archeological sites,
18 including extensive surveys of the right-of-way
19 with knowledge keepers associated with SSN,
20 extensive archeological studies specifically in
21 this area, tours of the area with SSN and Trans
22 Mountain representatives [**Transcript, vol. 1, 18**
23 **September 2023 (C26250-1) at PDF 94, lines 10 –**
24 **18**], and cultural walks with SSN knowledge keepers
25 [**Transcript, vol. 1, 18 September 2023 (C26250-1)**]

1 **at PDF 102, lines 10 – 20; PDF 128, line 4 – PDF**
2 **129, line 25; PDF 131, line 22 – PDF 132, line 8].**
3 Mr. Nock explained during the hearing that SSN has
4 identified burial mounds in the general area to
5 him, but none of these sites are along the proposed
6 route [**Transcript, vol. 1, 18 September 2023**
7 **(C26250-1) at PDF 102, lines 10 – 20]**. The
8 evidence is that all of the archeological sites,
9 culturally modified trees, and burial mounds
10 identified to date by SSN will be avoided by the
11 proposed deviation [**Deviation Application**
12 **(C25832-1) at para 25]**.

13 Nonetheless, on Monday, Mr. O'Neill
14 described Trans Mountain's established chance find
15 procedure. That procedure will be followed for the
16 proposed deviation to ensure that in the unlikely
17 event previously-unidentified sites are encountered
18 during construction, they will be appropriately
19 avoided [**Transcript, vol. 1, 18 September 2023**
20 **(C26250-1) at PDF 94, line 10 - PDF 97, line 13 and**
21 **PDF 147, line 2 – PDF 148, line 19]**. This
22 procedure has been approved by the CER [**See**
23 **Condition 72 Environmental Protection Plan**
24 **(C20382), referenced in Deviation Application**
25 **(C25832-1) Table 3 at p 11]** and will include

1 engagement and collaboration with SSN [Transcript,
2 vol. 1, 18 September 2023 (C26250-1) at PDF 94 -
3 PDF 97 and PDF 147 – PDF 148].

4 Mr. Goulet also explained on Monday that
5 chance finds can be addressed relatively quickly
6 and inexpensively [Transcript, vol. 1, 18 September
7 2023 (C26250-1) at PDF 98, lines 5 – 21]. So,
8 Commissioners, there is no evidence that chance
9 finds would have any impact on Trans Mountain's
10 evidence comparing the proposed deviation to
11 continuing with microtunnelling [See Trans Mountain
12 Response to CER IR 2.3 (C26152-2) at 10-12], and
13 there is no evidence that chance finds render the
14 proposed deviation inferior to any other option.

15 There is also no evidence that SSN has
16 requested specific mitigation for the proposed
17 deviation that Trans Mountain is not proposing to
18 implement, with the only exception of SSN's
19 alternative construction proposals, which for the
20 reasons I will now explain are inferior to Trans
21 Mountain's proposed routes.

22 **SSN's alternative proposals are inferior and are not**
23 **feasible**

24 With respect to SSN's suggestion for the
25 project to be entirely rerouted around the Pipsell

1 area, this would be a multi-kilometre reroute
2 outside of the previously approved project corridor
3 **[Transcript, vol. 1, 18 September 2023 (C26250-1)**
4 **at PDF 132, lines 19-21]**. The Commission has
5 previously held that alternative route proposals
6 that deviate from the approved project corridor are
7 outside the scope of a detailed route determination
8 **[See CER Letter Decision MH-013-2020 (30 June 2021)**
9 **(C13835-1) at 23 and 26]**. And you can find that in
10 the CER's MH13 2020 decision in our materials.

11 Regardless, there is no evidence before the
12 Commission to suggest that this would be a better
13 route or a more appropriate method than what Trans
14 Mountain is proposing in the application, and it
15 would certainly not be more appropriate timing.

16 The Commission can take judicial notice
17 based on its experience with the TMEP as well as
18 other projects that a brand-new multi-kilometre
19 route would require new engineering and
20 constructability assessments, environmental
21 studies, new regulatory approvals, including, in
22 this case, a variance to the certificate of public
23 convenience and necessity from the CER, as well as
24 a variance to the environmental assessment
25 certificate from the B.C. Environmental Assessment

1 Office, and new land acquisition. And that is all
2 even assuming that this route is even technically
3 feasible to construct. Those processes would take
4 many months before construction could even begin.
5 Based on the evidence, this delay would result in
6 many hundreds of millions of dollars in additional
7 costs to Trans Mountain, as well as additional
8 costs to third parties such as Trans Mountain's
9 shippers and "the industry as a whole."
10 **[Transcript, vol. 1, 18 September 2023 (C26250-1)**
11 **at PDF 136, lines 13-24]** For these reasons alone,
12 this is not a better route than what Trans Mountain
13 is proposing.

14 With respect to the conceptual alternative
15 of a long HDD between pads 2 and 6, which SSN
16 raised for the first time last week and had never
17 previously presented to Trans Mountain **[Transcript,**
18 **vol. 2, 19 September 2023 (C26253-1) at PDF 49-50]**,
19 this proposal lacks credibility and does not
20 account for realistic construction timelines.
21 There has been no feasibility assessment conducted
22 for this HDD **[Transcript, vol. 2, 19 September 2023**
23 **(C26253-1) at PDF 48-49]**, so the Commission simply
24 has no evidence before it that this option is
25 technically feasible. According to Mr. Hornbruch

1 yesterday, this long HDD option was just a
2 conceptual idea, and I quote: (as read)

3 "There was no technical
4 assessment. It's -- I would call
5 it an idea. No plan, no concept,
6 no study." [Transcript, vol. 2,
7 **19 September 2023 (C26253-1) at**
8 **PDF 51, lines 9-14]**

9 Trans Mountain's evidence is that a longer HDD than
10 the one proposed in the application would be
11 riskier from a geotechnical perspective, and it
12 would also be difficult, if not impossible, to
13 execute given the lack of area available to use for
14 the pull back [**Trans Mountain's Response to CER IR**
15 **2.2(b)**]. As Trans Mountain's witnesses explained
16 on Monday, a longer HDD option would also require a
17 much wider footprint to accommodate multiple drag
18 sections, as well as two simultaneous drills,
19 resulting in additional surface disturbance
20 [**Transcript, Vol. 1, 18 September 2023 (C26250-1)**
21 **at PDF 126, lines 20 - 22 and PDF 124, line 11 -**
22 **PDF 125, line 10]**. During questioning,
23 Mr. Hornbruch acknowledged that he has no reason to
24 dispute the issues identified by Trans Mountain
25 with this longer HDD option [**Transcript, vol. 2, 19**

1 **September 2023 (C26253-1) at PDF 53]**. He also
2 noted that this option was simply an idea and that
3 SSN Joint Council may not even agree to it.

4 Further, like SSN's reroute proposal, the
5 long HDD would require extensive feasibility and
6 engineering assessments [**See Transcript, Vol. 1, 18**
7 **September 2023 (C26250-1) at PDF 123, line 2 – PDF**
8 **125, line 10]**, environmental studies, regulatory
9 approvals, and likely new land acquisition prior to
10 Trans Mountain even commencing the drill. The
11 drill itself would also take substantially longer
12 than the HDD proposed in the application, on
13 account of it being almost three times longer
14 [**Transcript, Vol. 1, 18 September 2023 (C26250-1)**
15 **at PDF 126, line 22 – PDF 127, line 6]**. Mr. Wilson
16 estimated that the drilling alone would take
17 roughly 200 days for this option [**See Transcript,**
18 **Vol. 1, 18 September 2023 (C26250-1) at PDF 127]**.
19 As a result, like the reroute proposal, the long
20 HDD option proposed by SSN would take many
21 additional months to execute, and that would
22 significantly delay the TMEP and cause Trans
23 Mountain to incur many hundreds of millions of
24 dollars in additional costs.

25 For these reasons, that option -- like SSN's

1 proposed reroute option -- would impair Trans
2 Mountain's ability to construct the project in a
3 timely and orderly way. It is therefore clearly
4 inferior to Trans Mountain's applied-for deviation.

5 So, Commissioners, the evidence demonstrates
6 that out of all of the alternatives considered, the
7 proposed route, methods, and timing of construction
8 in the application represent the best option for
9 executing the project. All other route options
10 that have been considered, including the current
11 microtunnel option, are not feasible in the
12 circumstances and inferior to the route, methods,
13 and timing of construction Trans Mountain has
14 proposed.

15 Further, having regard to the benefits of
16 the TMEP, which has already been found to be in the
17 national public interest by federal cabinet; the
18 impacts to Trans Mountain, third parties, and the
19 Canadian energy industry more broadly associated
20 with additional cost increases and delays to the
21 TMEP; as well as the material risks that
22 microtunnelling will not be successful for Tunnel
23 Drive 2 at all; and balancing those considerations
24 against the impacts of the proposed deviation on
25 SSN, which Trans Mountain has minimized through

1 implementing a variety of mitigation measures and
2 following the mechanisms agreed to in the MBA, I
3 respectfully submit that approval of the proposed
4 deviation appropriately balances all parties'
5 interests and is in the overall public interest.

6 **(IV) Indigenous Consultation**

7 Finally, with respect to Indigenous
8 consultation, the record is that Trans Mountain
9 notified all potentially affected Indigenous groups
10 about this proposed deviation [**Deviation**
11 **Application (C25832-1) at paras 53-54; Appendix D**
12 **to Trans Mountain's Deviation Application**
13 **(C25832-5)]**. The only Indigenous group to express
14 any concerns has been SSN. And I will note that
15 the Indigenous Caucus of the Indigenous Advisory
16 and Monitoring Committee, or IAMC, did provide
17 comments on the application last week, and I will
18 respond to those in a minute.

19 With respect to SSN, the record demonstrates
20 that Trans Mountain has engaged extensively with
21 SSN on routing and construction methodology options
22 through the Pipsell area since at least 2019 [**See**
23 **Engagement Summary, Appendix C to Trans Mountain's**
24 **Deviation Application (C25832-4)]**. SSN has had
25 meaningful opportunities to understand Trans

1 Mountain's proposed activities in the area and
2 provide input into them. The parties engaged in
3 extensive two-way dialogue on TMEP construction in
4 this area leading up to the MBA, which again
5 provided SSN's express consent for the activities
6 proposed in this application, and the record shows
7 that meaningful two-way dialogue has continued
8 since the MBA was executed. I encourage you,
9 Commissioners, to review the engagement log that
10 was included with the application to see just how
11 hard Trans Mountain worked over the past few months
12 to develop a mutually agreeable alternative option
13 to microtunnelling with SSN. That included Trans
14 Mountain's president and CEO flying to meet SSN
15 Joint Council in early July and repeated offers for
16 site tours of the proposed deviation route
17 **[Engagement Summary, Appendix C to Trans Mountain's**
18 **Deviation Application (C25832-4) at 93 – 109. See**
19 **also SSN Submissions (C25999-2) at paras 38, 62,**
20 **116].**

21 Regarding Trans Mountain's engagement with
22 SSN, I will note two things specifically as well.
23 First, the chronology of engagement that SSN filed
24 in this proceeding **[Appendix B, Volume 1, to SSN's**
25 **Response to CER IR 1 (C26182-4) at PDF 1-4]** is not

1 an accurate representation of the engagement
2 between the parties because, among other things, it
3 selectively excluded certain engagement activities.
4 For example, SSN's chronology does not include any
5 of the exchanges between SSN and Trans Mountain
6 that occurred between December 2020 and April 2021.
7 Further, Trans Mountain was not able to test this
8 evidence because while Mr. Rattai yesterday adopted
9 this evidence, he testified that he was not
10 involved in the engagement for much of the history
11 on this file, and he took no steps to ensure that
12 the chronology was complete and accurate
13 **[Transcript, vol. 2 (C26253-1) at PDF 181, line 1 –**
14 **PDF 182, line 6].**

15 The second point I will make about Trans
16 Mountain's engagement with SSN is that the record
17 does not support Mr. Hornbruch's suggestion
18 yesterday that Trans Mountain should have
19 collaborated more with SSN instead of acting like,
20 in his view, it was Trans Mountain's way or the
21 highway. When you look at the engagement record,
22 you will see that Trans Mountain went above and
23 beyond to try to collaborate with SSN in this case.
24 That was the reason why Trans Mountain initially
25 presented options as being "preferred" and "not

1 preferred" as opposed to "proposed" and "not
2 feasible" [**Trans Mountain's Reply Evidence**
3 **(C26029-2) at para 37**]. Trans Mountain's use of
4 this terminology was based on a suggestion by SSN's
5 consultant in early May that Trans Mountain should
6 not approach SSN with decisions that had already
7 been made [**Appendix 4 to Trans Mountain's Deviation**
8 **Application (C25832-4) May 4, 2023 conference call**
9 **entry at 82**]. Trans Mountain respected that, and
10 despite the urgency of this matter, Trans Mountain
11 tried to engage for months with SSN to collaborate
12 on an alternative construction method prior to
13 filing the application.

14 Unfortunately, as indicated in the
15 application [**Deviation Application (C25832-4) at**
16 **paras 44 - 49**] and confirmed during questioning of
17 SSN's witnesses yesterday [**Transcript, vol. 2, 19**
18 **September 2023 (C26253-1) at PDF 70, line 21 - PDF**
19 **71, line 6**], SSN chose not to engage with Trans
20 Mountain regarding an alternative option to
21 microtunnelling. But engagement is a two-way
22 street. SSN's choice not to engage with Trans
23 Mountain on these issues does not demonstrate any
24 deficiency in Trans Mountain's process [**Coldwater**
25 **at paras 50 - 58**].

1 At the end of the day, reasonable people can
2 and do disagree, but SSN does not have a veto over
3 the Commission's decisionmaking, and the Commission
4 is required to make a decision that reasonably
5 balances SSN's interests with those of Trans
6 Mountain and all Canadians. For the reasons I've
7 set out, we respectfully submit that the record
8 demonstrates that Trans Mountain's engagement with
9 SSN has been more than adequate, and approval of
10 the application strikes the right balance in the
11 circumstances.

12 And going forward, the Commission can take
13 comfort that Trans Mountain remains committed to
14 continuing to reasonably engaging with SSN on
15 execution of the deviation, including through
16 utilizing Trans Mountain's practices of working
17 with SSN knowledge keepers, employing SSN
18 Indigenous monitors, and engaging with SSN in the
19 implementation of any HDD contingency plans in the
20 event a contingency HDD is required [**Transcript,**
21 **Vol. 1, 18 September 2023 (C26250-1) at PDF 128,**
22 **line 8 – PDF 131, line 25]**. These commitments will
23 allow SSN to have input into the execution of the
24 deviation even though it has chosen not to provide
25 that type of input to date.

1 With respect to the letter filed by the IAMC
2 last week [**Letter from Mr. Cardinal, Chair of the**
3 **Indigenous Caucus of the Indigenous Advisory and**
4 **Monitoring Committee on Trans Mountain to CER dated**
5 **13 September 2023 (C26190-1)**], with all respect,
6 this letter should be given no weight by the
7 Commission. The IAMC's letter misunderstands or
8 mischaracterizes the evidence by suggesting that
9 Trans Mountain is abandoning an accommodation to an
10 Indigenous group on the basis of cost overruns and
11 delays. That is not correct. I have already
12 explained why Trans Mountain is proposing the
13 deviation and why costs and delays are not the sole
14 drivers for Trans Mountain's decision. The IAMC's
15 letter entirely ignores the technical issues with
16 microtunnelling that are central to this
17 application.

18 I have also explained why the deviation is
19 consistent with a scenario that was expressly
20 contemplated and agreed to in the MBA between SSN
21 and Trans Mountain. The parties always understood
22 and agreed that trenchless construction may not be
23 feasible for the entire 4.2 kilometres of the
24 Pipsell/Jacko Lake corridor and that Trans Mountain
25 could proceed with trenched construction in these

1 circumstances. Trans Mountain is by no means
2 abandoning its obligations under the MBA.

3 Finally, the IAMC's letter includes factual
4 statements that have no support on the record of
5 this proceeding and were not adopted by the IAMC or
6 any other party as evidence. Trans Mountain had no
7 opportunity to test these statements or respond to
8 them with reply evidence.

9 For all of those reasons, in my respectful
10 submission, the IAMC's letter cannot be given any
11 weight by the Commission.

12 **D. Conclusion**

13 In conclusion, Commissioners, the evidence
14 before you demonstrates that the proposed deviation
15 represents the best possible route, best
16 construction, and best timing for executing the
17 TMEP, and that it is in the public interest. While
18 the proposed deviation and construction methodology
19 are economically and technically feasible,
20 continuing with microtunnelling is not. And there
21 are simply no credible alternatives to
22 microtunnelling that are before you besides the
23 proposed deviation. The Trans Mountain Expansion
24 Project, which has been found to be in the national
25 public interest, is at risk of being significantly

1 delayed if the Commission does not approve the
2 proposed deviation. Approval from this Commission
3 is required as soon as absolutely possible to avoid
4 delays to the project and unnecessary financial
5 harm to Trans Mountain, third parties, and the
6 Canadian energy industry more broadly. For those
7 reasons, Commissioners, we respectfully ask that
8 you render a decision on the application as soon as
9 you possibly can, with reasons to follow if
10 necessary.

11 So thank you, Commissioners. That concludes
12 my oral argument, subject to any questions you may
13 have, which I understand will be after the break.

14 CHAIR PENNEY: Perfect. Thanks very much,
15 Mr. Duncanson. So we're going to take a 20-minute
16 break to just get our heads around what you've said
17 and propose questions when we come back. Thank
18 you.

19 **(ADJOURNMENT)**

20 **QUESTIONS BY THE COMMISSION**

21 CHAIR PENNEY: Mr. Duncanson, the panel does have
22 questions for you, but first I'm going to put out
23 there around timing, just in case it takes us, I
24 don't know, half an hour to get through our
25 questions, just wanted to put Ms. Walker on notice

1 that I'm -- I'll come to you and ask you your
2 preference to continue with your final before lunch
3 or wait to after lunch, right? Depending on how
4 long you think you'll take. So I'll just give you
5 some notice there. Thanks.

6 Mr. Duncanson, yeah. I'm going to turn to
7 Commissioner Luciuk first.

8 COMMISSIONER LUCIUK: Good morning, Mr. Duncanson. I'd
9 like to go back to submissions that you made this
10 morning and two references to risks that I would
11 like to clarify with you. Early on in your
12 submissions, as you were explaining some of the
13 efforts that have occurred over the 4.2 kilometres,
14 you eventually arrived at a discussion of risks
15 with the third mitigation stage and noted -- this
16 is what I have recorded, and I want to test that
17 I've understood it correctly - that there were
18 outstanding risks, looking ahead, related to the
19 shaft above the existing tunnel, risks associated
20 with restart after 4 months, and then referred to
21 those risks among many others, and I wanted to give
22 you an opportunity to clarify that sort of catchall
23 statement, "among many others," and particularize
24 that for me, if you could, or let me know if
25 there's some other part of your submissions in

1 which you feel you did so.

2 MR. DUNCANSON: Thank you, Commissioner Luciuk. So I
3 did elaborate on that to a certain extent when I
4 was responding to Mr. Hornbruch's suggestion that
5 circumstances hadn't changed, and I provided five
6 examples of why circumstances have changed in a way
7 that does impact the original risk assessment. So
8 I talked about things like the tunnel now being
9 full of water as being a new risk, for example. I
10 think that the most detailed discussion on the
11 record of all of the risks that Trans Mountain,
12 prior to this relatively recent issue with water in
13 the tunnel, the discussion around the key risks
14 around restarting the tunnel and proceeding into
15 the hard rock are outlined in IR 1.2(c), Trans
16 Mountain's response to CER IR 1.2(c). So there
17 certainly are details in there that I did not go
18 through this morning. I summarized some of them,
19 but that would be, I think, the best starting point
20 in terms of full narrative on the risks associated
21 with proceeding with microtunnelling.

22 COMMISSIONER LUCIUK: Okay. Thank you. I appreciate
23 that. I wanted to make sure that you had an
24 opportunity to identify anything that wasn't
25 otherwise captured, and I -- I did note that those

1 other risks might have been encompassed in the five
2 points you raised with respect to Mr. Hornbruch's
3 evidence.

4 I'd like to actually go there next. At the
5 end of your review of those five points raised in
6 rebuttal, I heard you make a general statement that
7 the overall risk of successfully completing the
8 tunnel drive would now be assessed as low, and I
9 wanted to ask you whether that is a conclusion that
10 you're urging the Commission to draw, with a view
11 to the evidence in aggregate, or if you can point
12 me to that specific conclusion reached in the Trans
13 Mountain evidence, or both.

14 MR. DUNCANSON: Certainly. I mean, off the top of my
15 head, I'm not aware of whether those specific words
16 were put in the evidence, and if that's the case,
17 then that's an argument that I'm putting to you and
18 a conclusion that I'm asking you to draw from the
19 evidence. Certainly there is evidence on the
20 record in writing, and I think we heard it again on
21 Monday verbally, that Trans Mountain's assessment
22 is that completion of the microtunnel is high risk;
23 so whether that translates into low probability of
24 success, I guess that's an argument I'm making on
25 that. But certainly there are several statements

1 on the record that it is now viewed as high risk of
2 successfully completing the tunnel drive if Trans
3 Mountain were to proceed. And I guess I should --
4 I can point you to some of that evidence, if you'd
5 like. Again, I believe response to CER IR 1.2(c)
6 does include that statement.

7 COMMISSIONER LUCIUK: Thank you. Actually, that's a
8 useful clarification, as well as the reference to
9 the evidence.

10 Turning to a different topic, I would like
11 to go back to some of your comments regarding the
12 Commission's role in interpreting the MBA. I heard
13 you say that the MBA, insofar as it is relevant to
14 the proceeding before us, is that it provides
15 evidence of consent and evidence of the basis for
16 consent. And I note that you clarified Trans
17 Mountain's position that the Commission is not here
18 to enforce a private agreement, but I would like to
19 understand Trans Mountain's submissions about what
20 it urges the Commission to do in interpreting three
21 particular terms, and those are: "Best efforts,"
22 "economic feasibility," and "technical
23 infeasibility," within the scope of authority you
24 assert we as a Commission have.

25 MR. DUNCANSON: Certainly. So I think it's fair to say,

1 Commissioner Luciuk, that this Commission has very
2 broad jurisdiction. There are certain, I'll call
3 them, hard lines that I would suggest the
4 Commission should not cross. One of them that I
5 stated in my remarks was the Commission does not
6 have a role or a mandate or jurisdiction to enforce
7 private agreements, so to the extent that not only
8 are you looking at the MBA but you're taking it one
9 step further and getting into assessing compliance
10 and consequences of potential noncompliance, things
11 of that nature; in my view, that would be crossing
12 a line. But in the context of this proceeding, I
13 mean, the MBA, I think both parties recognize it is
14 important, because it is -- you know, it was the
15 culmination of quite a lot of work between Trans
16 Mountain and SSN around the conditions for moving
17 forward in this area. And I expect we're going to
18 hear a fair bit from my friend in her argument
19 about the MBA, and we wanted to make sure that we
20 put our full position forward in advance so that we
21 were not accused of waiting for a reply.

22 My view is you're not legally precluded
23 from, you know, reading the MBA and interpreting it
24 to some degree, again, so long as you're not
25 crossing that line into, you know, getting into

1 enforcing a private agreement. But certainly
2 looking to see what it says and how the information
3 in that contract relates to the other evidence on
4 this hearing record around whether the proposed
5 route, methods, and timing of construction are the
6 best possible in the circumstances and whether it's
7 in the public interest. That's, in my submission,
8 what you should be doing with it. It is one of the
9 factors that you should be looking at in your
10 assessment of the overall evidence before you and,
11 essentially, the fact that -- I don't think it's a
12 matter of interpretation to say this scenario of
13 the project, in at least some circumstances, not
14 being able to be constructed using trenchless
15 methods through the area, that was expressly
16 contemplated and negotiated between the parties.
17 That was the whole point of those definitions that
18 I walked you through. That alone, I think, is
19 important evidence for you to be aware of in your
20 decisionmaking. The extent to which you get into
21 the details of the definitions in the agreement and
22 feel like you're straying into interpreting the
23 terms of a private agreement between parties,
24 that's, I think, your call to make, how far you're
25 comfortable going and whether you need to do that

1 to discharge your mandate of assessing the merits
2 of this route and whether it's in the public
3 interest.

4 But again, my submission is you certainly
5 have the legal jurisdiction to look at those things
6 if you choose to, so long as you're not straying
7 into enforcing the terms of a private agreement.

8 COMMISSIONER LUCIUK: But to clarify, it's Trans
9 Mountain's position, I think I heard in your
10 submissions, that best efforts have been made to
11 the level contemplated in the agreement. And I see
12 you nodding, Mr. Duncanson. Is it also Trans
13 Mountain's position, then, that we test for
14 economic infeasibility and technical infeasibility
15 have also been crossed in conjunction with the best
16 efforts language that you've encouraged the
17 Commission to consider?

18 MR. DUNCANSON: I would say, Commissioner Luciuk, that
19 that is somewhat of a judgement call that you need
20 to make, whether you feel like you need to make
21 those determinations or not. I wanted to give you
22 the evidence that we submit supports our position
23 that Trans Mountain has fully complied with the MBA
24 and we expect that we're going to hear from my
25 friend that Trans Mountain has not. So I wanted to

1 make sure that you had that evidence before you
2 when you're considering those arguments.

3 My view is you do not, as a Commission, need
4 to determine whether Trans Mountain is in
5 compliance with the MBA to render your decision on
6 this application. Your mandate is to decide
7 whether this is the best possible route in the
8 circumstances and whether it's in the public
9 interest. The fact that the MBA exists and that it
10 contemplates a scenario of trenched construction
11 and that SSN supported that expressly, I think that
12 is a relevant consideration for you when deciding
13 those key points. But the extent to which you go
14 into the MBA is really up to you, I suppose, but we
15 certainly submit that if you go there, you have
16 sufficient evidence to be comfortable that Trans
17 Mountain is in compliance.

18 COMMISSIONER LUCIUK: And one more topic that I'd like
19 to address, and that is the relief sought. Trans
20 Mountain is seeking urgent approval. What are
21 Trans Mountain's views about the suite of options
22 that the Commission may avail itself of when
23 granting relief? There might be an urgent
24 approval; there might be a denial of the
25 application. Does Trans Mountain have views about

1 any others?

2 MR. DUNCANSON: In terms of the suite of options that
3 are legally available to the Commission, again, I
4 think the Commission has quite broad jurisdiction
5 and certainly has jurisdiction to grant a
6 conditional approval if it -- if it determined that
7 that was the right thing to do in the
8 circumstances. I submit that there -- based on the
9 evidence, there is no need for conditional approval
10 in this case, that the evidence supports approval
11 of the requested relief in the application as
12 applied for with nothing added to it. And the
13 real, I think, concern that Trans Mountain would
14 have, this is now getting quite urgent. To the
15 extent that the Commission decides that the
16 applied-for deviation is the best route, and is in
17 the public interest and should be approved, but
18 imposes conditions that would delay Trans
19 Mountain's ability to execute on that route, that
20 would be problematic because that does create real
21 schedule risk for the expansion project. And for
22 the reasons I stated, I submit that is not in the
23 public interest. So if the Commission is looking
24 at potentially approving this application subject
25 to conditions, I submit it is critical that those

1 conditions be crafted in a way that does not
2 prevent Trans Mountain from being able to get going
3 right away.

4 COMMISSIONER LUCIUK: Thank you, Mr. Duncanson. Those
5 are my questions.

6 CHAIR PENNEY: Thank you, Commissioner Luciuk.
7 Commissioner Watton?

8 COMMISSIONER WATTON: Thank you, Commissioner Penney. I
9 think I'm down to two.

10 We heard evidence from the witnesses
11 regarding how they might attribute the cause of the
12 4-month delay, and I didn't hear many submissions
13 from you this morning on that. I'd just like to
14 ask what -- and feel free to take me to the
15 evidence on the record, if you wish, but to what
16 should we -- I guess there's a dispute as to what
17 or who is responsible for the 4-month delay that
18 you mentioned this morning, and I was wondering if
19 you could perhaps take me to the key evidentiary
20 references that would lead to your position.

21 MR. DUNCANSON: Certainly. I'll have my colleague dig
22 up the specific references, but I'll get going in
23 the meantime. I guess, first of all, Commissioner
24 Watton, we were not aware that that was actually in
25 dispute, the cause of the 4-month delay. I mean,

1 at its core, the cause of the 4-month delay was the
2 so-called hump issue. There's evidence on the
3 record that Trans Mountain was working with its
4 technical consultant in early 2023, became aware of
5 this hump issue developing and started working with
6 its consultant about how can we mitigate this. The
7 evidence is, then, that there was a mitigation plan
8 developed with Trans Mountain's consultant. It was
9 a three-stage mitigation plan. That stage involved
10 stopping tunnelling work to employ mitigation
11 measures to see whether that would work, and it was
12 the -- the time that it took to try Stage 1 of the
13 mitigation, determine that that was not successful,
14 move to Stage 2, determine that that was also not
15 successful, and then start with this Stage 3
16 mitigation, which is construction of this brand-new
17 Shaft 6. That is what has caused the delay.

18 And I know there was some discussion over
19 the past couple days in, I would say, general terms
20 about some original expectations that the tunnel
21 would be ready to start up again sometime in August
22 or perhaps September, and now the evidence is that
23 that is being pushed into October. The evidence on
24 that is that that was primarily caused by
25 wildfires. I believe Mr. Goulet may have also

1 referenced some other factors that contributed to
2 it. But air quality was noted as the primary
3 factor that caused delay. I will note this water
4 issue in the tunnel, I think it is reasonable to
5 expect - although this is all very new - that that
6 could result in some delays as well. But I'll
7 pause there and see what my colleague came up with
8 in terms of specific references.

9 COMMISSIONER WATTON: Sure, if you wish. I'll leave it
10 to you. I think the references to what we heard
11 yesterday were helpful, but if you have others,
12 that's helpful as well.

13 MR. DUNCANSON: Okay. I think we'll leave it at that,
14 Commissioner Watton. It will take a while to go
15 through the whole record and find all the
16 references for you if you needed that.

17 COMMISSIONER WATTON: Okay. Thank you very much. And
18 my second question, which I think is my last, is
19 you took us this morning to the test for the
20 granting of -- for a decision on a detailed route
21 hearing under Section 203 of the *CER Act*, noting
22 that this is a deviation application under
23 Section 211. I just wanted to perhaps get your
24 submissions on why we should apply the same test in
25 211 as we would in 203.

1 MR. DUNCANSON: Certainly. My view is when you are
2 assessing a deviation application, you are
3 essentially being asked to replace a previous PPBOR
4 approval with a new PPBOR approval. And
5 Section 203 is what governs -- what should govern
6 your decisionmaking for a PPBOR approval. So in my
7 submission, that is the right section for you to be
8 applying in the context of a deviation, is really
9 determining whether there is -- because the test
10 for PPBOR approval is whether it is the best
11 possible route, if in a deviation application the
12 applicant can demonstrate that there is a new route
13 that is better than the one that was previously
14 approved, based on Section 203, that should govern
15 approval of that application.

16 COMMISSIONER WATTON: Okay. Thank you. I don't think I
17 have any further questions.

18 CHAIR PENNEY: Thank you, Commissioner Watton. And
19 Mr. Duncanson, I have no questions for you so thank
20 you very much, you can take your seat.

21 So, Ms. Walker, I think it's early enough
22 that we can probably proceed, as long as you agree.
23 So you'll be presenting the final argument for
24 Stk'emlúpsemc te Secwépemc -- and I had to
25 pronounce it again to see if I got it right.

1 Thanks.

2 **SUBMISSIONS BY MS. WALKER**

3 MS. WALKER: Thank you, Madam Chair. Just as a matter
4 of housekeeping, unlike Mr. Duncanson, I don't have
5 a outline in notes to provide to - for the purpose
6 of noting on the transcript. So I thought perhaps
7 it would be helpful just to outline those
8 particular documents that I anticipate I will be
9 referring to more frequently. So the first is the
10 transcript of Day 1, which is filing number
11 C26250-1; the transcript from Day 2, which is
12 C26253-1; SSN's book of authorities, Part 1,
13 C26255-2; SSN's book of authorities, Part 2,
14 C26255-3; and SSN's supplemental book of
15 authorities, which is 26259 -- sorry, 26259-2.

16 So at the outset, I would like to start by
17 stating that we repeat and rely on what was in our
18 written submissions filed August 28th, that is
19 C25999, as forming part of our arguments, and I
20 don't intend to repeat much of those submissions
21 today. We heard a lot from Mr. Duncanson on behalf
22 of Trans Mountain this morning that was very
23 technical. I would like to spend my time in oral
24 submissions bringing a bit of the SSN perspective
25 to these proceedings. We've heard a lot about

1 Western science. What we haven't heard a lot
2 from -- or about other than from knowledge keeper
3 Jeanette Jules is really about Secwépemc law,
4 Secwépemc knowledge and how that should be brought
5 to bear on the decision that's being made here by
6 this panel.

7 So knowledge keeper Jules opened this
8 hearing on Monday, and in doing so, she invited us
9 into Secwépemc law and Secwépemc knowledge,
10 stating: (as read)

11 "Pipsell is an extremely sacred
12 site to us, because it comes from
13 one of our creation stories. And
14 when you destroy anything along
15 there, then you're destroying a
16 piece of the Secwépemc people."

17 That's in the transcript Day 1 at page 27.

18 **[Transcript, vol. 1, 18 September 2023 (C26250-1)]**

19 Knowledge keeper Jules detailed SSN's peoples'
20 obligations of stewardship that lead them as
21 individuals and as people, reminding us we need to
22 make sure that everything is looked after:

23 (as read)

24 "When you go and you see the deer
25 that are within that area, they're

1 bigger than anywhere else, and
2 it's because that area is
3 protected, and it's looked after.
4 There are very few spots that
5 still have our grasslands, that
6 our native grasses, and that can
7 be looked after."

8 That's in the Day 1 transcript, page 28, line 19
9 **[Transcript, vol. 1, 18 September 2023 (C26250-1)]**.

10 In our submission, knowledge keeper Jules'
11 words must be the starting point for the panel's
12 consideration of Trans Mountain's applications. As
13 we know, SSN and its constituent First Nations
14 oppose the application being brought, and that
15 opposition is based on the following. The
16 deviation application seeks to reverse and
17 contravene the very conditions on which SSN's
18 support for the previous deviation application, as
19 well as SSN's support for the project, expressed
20 through withdrawal of its 2019 statement of
21 opposition, was obtained. The impacts of a change
22 in construction methodology of the deviation
23 application, if approved, will cause significant
24 and irreparable harm to SSN's culture and the
25 integrity of the Pipsell/Jacko Lake corridor.

1 Further and importantly, SSN has not provided its
2 free prior and informed consent in respect of the
3 deviation application as required pursuant to
4 Articles 19, 26, and 32 of the United Nations
5 Declaration on the Rights of Indigenous People
6 **[United Nations Declaration on the Rights of**
7 **Indigenous Peoples Act, SC 2021, c 14, including**
8 **Schedule]**.

9 SSN submits that the central fact to keep
10 front of mind with the Pipsell area is the
11 interconnectedness of all aspects of the physical
12 land, the ancestral spirits, and the cultural
13 practices that weave together in sacred form. This
14 application is not about isolated sacred features
15 or one culturally modified tree. It is about the
16 land as a whole, inseparable and irreplaceable,
17 from SSN's perspective. Because of the spiritual
18 nature of the land, remediation is not possible.
19 As described by knowledge keeper Jules, once
20 disturbance has taken place, the land is forever
21 desecrated. That desecration, we say, is the
22 adverse effect that this Commission must consider
23 when making a decision on this application. The
24 reference with respect to Ms. Jules's statements on
25 desecration are in the transcript, day 1, page 34,

1 line 11 [Transcript, vol. 1, 18 September 2023
2 (C26250-1)].

3 With that in mind, I would like to take some
4 time to write further detail of the significance of
5 Pipsell and how it informs the Secwépemc law that
6 must be considered by this panel. As knowledge
7 keeper Jules stated: (as read)

8 "So when you talk of Pipsell and
9 the sacredness of Pipsell, it
10 comes from one of our stsptekwles.
11 Your creation story gives you who
12 you are, what you are, where you
13 are from, and the Trout Children
14 story gives us our relationship to
15 every living being that is on
16 Mother Earth. It tells us how
17 we're related to each and every
18 animal, to each and every fish,
19 and other water being that lives
20 in -- in the water and to the
21 plants, to the grasses, to the
22 trees, it tells us all of that."

23 And that's at her transcript, Day 1, page 20,
24 line 12 [Transcript, vol. 1, 18 September 2023
25 (C26250-1)].

1 Since time immemorial, Secwépemc have had an
2 ancestral, cultural, and spiritual connection in
3 the Pipsell area. It is a cultural keystone place.
4 Pipsell means "Trout Place" in the Secwépemc
5 language, and Secwépemc law derives from their
6 ancient stories. The narratives about past events
7 and the actions of the ancestors inform that law.
8 SSN's laws of land tenure, of relations with
9 others, of relations with nations, of good social
10 conduct, and of good conduct of land, and
11 environmental ethic are informed by the land. The
12 precise location of the Pipsell area is known to
13 the SSN through the Secwépemc way of knowing, that
14 which is marked on the land and is recorded in the
15 Trout Children story. The Trout Children story
16 encapsulates and expresses SSN's connection to the
17 area, and it sustains its laws about the conduct of
18 the land and reciprocal accountability. Knowledge
19 keeper Jules stated: (as read)

20 "So every time you go through,
21 every time you walk, there are
22 sites that show themselves.
23 That's how I see them. They show
24 themselves to us. They bring
25 themselves forward to let us know

1 that they're in existence." [Trout
2 Children Story (as excerpted and
3 abridged in SSN's response to
4 Trans Mountain's Deviation
5 Application, filed on August 28,
6 2023) (C25999)]

7 She also spoke about how the Trout Children story
8 gives SSN relationship to every living being, right
9 down to the centre of the fire that comes from
10 Mother Earth, to the water, to the wind. She
11 states: (as read)

12 "It tells us how we're related to
13 each and every animal, to each and
14 every fish and other water being
15 that lives in the water and to the
16 plants, to the grasses, to the
17 trees.

18 The relationship of Secwépemc as described by
19 knowledgeable individuals is an instance of
20 reciprocal accountability, where causing harm to
21 such a place violates the past and present
22 responsibility to protect those places. This
23 responsibility, in turn, derives from the
24 historical, spiritual, and cultural connection to
25 these places, as they are inscribed in Secwépemc

1 law and place names that anchor past experiences to
2 the land and create responsibility of
3 caretakership.

4 The spiritual connection is inseparable from
5 the physical place. This too was made clear by
6 knowledge keeper Jules: (as read)

7 "It talks about the fog, which
8 people don't think that there's a
9 spirit. And when you go and you
10 look at this room and what I'm
11 doing here today and speaking
12 about my connection to the land
13 and to everything that is there in
14 Pipsell, it's our perspective, as
15 Secwépemc people."

16 Knowledge keeper Jules also told us about the
17 plants in the area: (as read)

18 "Those plants to help people who
19 have arthritis or some other joint
20 issues, broken bones, and getting
21 that. So I know plants that grow
22 in that area, and the getting and
23 the collecting. And that is
24 something that I always did with
25 my grandparents, and my aunts, and

1 my uncles. And it's something I
2 still do today."

3 She went on to describe the continued use of this
4 area by the members of SSN. She talked about
5 numerous ceremonies that are still performed to
6 this day. She stated: (as read)

7 "There's also places that people
8 cry for a vision. The medicinal
9 plants are extremely important to
10 us. Same with our food sources
11 that we gather from there. There
12 are numerous altars, and each of
13 the altars looks like small
14 medicine wheels. There are other
15 sites where people have put up
16 their fasting sites. The gift of
17 the copper also brings medicine,
18 and brings healing to us."

19 She spoke about the grass and the deer. In light
20 of the ecological significance of the Pipsell area
21 and the flora and fauna they're in, in light of the
22 zoological diversity of species, SSN also considers
23 it utmost importance to the integrity of the area
24 and its cultural and economic practices, now and in
25 the future, to ensure that it is protected.

1 Now, the panel has asked about the MBA and
2 the role that the MBA plays in these proceedings.
3 Now, the one thing that Mr. Duncanson and I agree
4 on is that it is not for this panel to interpret
5 and imply -- excuse me, apply the MBA. However, we
6 say that the purpose of the -- bringing forward the
7 MBA in this context and the reason it should be
8 looked at is that it formed the basis for SSN's
9 support of the project, its withdrawal of the
10 statement of opposition, and provided the
11 interpretive lens through which agreement and
12 engagement was to occur between SSN and Trans
13 Mountain. So while it is not for this panel to
14 interpret or apply it as a commercial agreement, it
15 is important to understand it contextually and some
16 of its key terms.

17 Now, Mr. Duncanson, of course, has taken you
18 to the definitions of technical feasibility and
19 economic infeasibility. I would like to highlight
20 another section of the MBA, and that is
21 Section 2.1, which relates to interpretation. In
22 our respectful submission, the interpretation
23 section, while again, we're not asking this panel
24 to apply it, demonstrates that this MBA and the
25 relationship between SSN and Trans Mountain was

1 aimed at ensuring the elevation and protection of
2 Indigenous peoples' self-governance and
3 self-determination. Under Section 2.1 of the MBA
4 **[Mutual Benefits Agreement between Trans Mountain**
5 **and SSN, c1 7.4 and 8.5(c)]**, it requires that the
6 MBA be interpreted in a manner consistent with the
7 provisions of the *United Nations Declaration on the*
8 *Rights of Indigenous Peoples Act* [SC 2021, c 14],
9 concerning the lands, territories, and resources of
10 Indigenous peoples, Calls to Action Number 92 of
11 the Truth and Reconciliation Commission of Canada.
12 Secwépmc cultural and traditional interests,
13 including recognition that SSN is governed by its
14 own laws, and the calls to action for extractive
15 and development industries from the final report of
16 the National Inquiry Into Missing and Murdered
17 Indigenous Women and Girls.

18 We note that with respect to the Calls to
19 Action Number 92 of the Truth and Reconciliation
20 Commission, which is included in those interpretive
21 principles, Call to Action Number 92(i) under the
22 heading "Business and Reconciliation" states:

23 (as read)

24 "We call upon the corporate sector
25 in Canada to adopt UNDRIP as a

1 reconciliation framework and to
2 apply its principles, norms, and
3 standards to corporate policy and
4 core operational activities
5 involving Indigenous peoples and
6 their lands and resources, which
7 includes obtaining the free,
8 prior, and informed consent of
9 Indigenous peoples before
10 proceeding with economic
11 development projects." **[Truth and
12 Reconciliation Commission of
13 Canada, Calls to Action 92 (2015)]**

14 Now, it should come as no surprise to this panel
15 that with respect to the definitions of technical
16 feasibility and economic infeasibility, it is SSN's
17 position that those thresholds have not been met,
18 and that in line with the argument put forward by
19 Mr. Duncanson, those definitions cannot be relied
20 on in these circumstances to imply that consent has
21 been given. In addition, we would submit that his
22 use of the interpretation of those and the ability
23 in certain onerous circumstances for Trans Mountain
24 to not move forward with trenchless construction,
25 in light of the interpretive principles of the MBA,

1 cannot be used in which to imply free, prior, and
2 informed consent as those words are used and as
3 they're meant to be used. Consent in the form of
4 FPIC cannot be implied from a contract.

5 I'll just need one moment. I've lost my
6 extremely well-placed sticky notes.

7 I think I would -- the next section I would
8 like to take the panel to in our oral submissions
9 and that has not been addressed thus far is while
10 we have dealt with UNDRIP in our written
11 submissions, we did not deal with the impact of the
12 *United Nations Declaration Act* and what it means
13 for this panel when looking at its governing
14 legislation and what it must consider under
15 Section 211 and Section 56 of the Canada Energy
16 Regulator Act [SC 2019, c 28, s 10 (Sections 11,
17 56, 211)]. Now, in our respectful submission, the
18 Commission should decline to grant the deviation
19 application on the grounds of adverse effects under
20 Section 56 that are such that require further
21 action before Trans Mountain can be granted the
22 deviation application in respect of the area. And
23 before I get into the adverse effects, I'd like to
24 take you through the application of UNDA and why we
25 say the adverse effects should be interpreted in a

1 particular way in the context of this application.

2 So the *United Nations Declaration Act*, it's
3 federal legislation which has application to all
4 Canadian law, which includes the *CER Act*.

5 Section 2(3) of the *United Nations Declaration Act*,
6 which is in our volume -- sorry, our authorities at
7 Filing Number C26255-2, page 831, states in
8 Section 2(3) that: (as read)

9 "Nothing in this act is to be
10 construed as delaying the
11 application of UNDRIP in Canadian
12 law."

13 Section 4(a) of UNDA states that: (as read)

14 "The legislations purpose is to
15 affirm UNDRIP as a universal,
16 international human rights
17 instrument with application in
18 Canadian law."

19 Further, the preamble of UNDA states both that:
20 (as read)

21 "The Government of Canada
22 recognizes that all relations with
23 Indigenous peoples must be based
24 on the recognition and
25 implementation of the inherent

1 right to self-determination,
2 including the right to
3 self-government."

4 It also states: (as read)

5 "UNDRIP is affirmed as a source
6 for the interpretation of Canadian
7 law."

8 Accordingly, UNDA applies the standards of UNDRIP
9 to the Crown's relations with Indigenous people and
10 its interpretation of Canadian law, including the
11 *CER Act*, as the *CER Act* is federal legislation and
12 Canadian law.

13 Now, Subsection 56(1) of the *CER Act*
14 requires the Commission, when making a decision or
15 an order, including those under Section 211, to
16 consider any adverse effects that the decision or
17 order may have on the rights of Indigenous peoples
18 of Canada, recognized and affirmed by Section 35,
19 the *Constitution Act*. Thus, the Commission's duty
20 pursuant to Section 56, in light of UNDA, must be
21 interpreted through the UNDRIP lens, which requires
22 meaningful recognition and reflection of the right
23 to self-determination throughout the Commission's
24 consideration of any adverse effects that the
25 decision, order, or recommendation may have on the

1 rights of SSN. Further, any adverse effect must be
2 considered from SSN's perspective and not from
3 Trans Mountain's perspective. The right to
4 self-determination is at the core of this analysis
5 and is informed by the relevant articles in UNDRIP.
6 The right to self-determination is considered the
7 founding principle of Indigenous peoples' rights
8 and the central guiding principle of UNDRIP. Many
9 provisions in the declaration relate to the right
10 to participate in decisionmaking, highlighting the
11 centrality and importance of this right, including
12 Articles 3 to 5, 10 to 17, 14, 15, 17 to 19, 22,
13 23, 26 to 28, 30 to 32, 36, 38, 40, and 41.

14 Pursuant to articles 26(1) and 32(1), they
15 formally affirm the rights of Indigenous peoples to
16 self-determination over lands, resources, and
17 territories, which is exactly what is at stake in
18 the present application. In addition, Articles 27,
19 28, and 29 of the declaration confirm Indigenous
20 peoples' right to resources within their
21 traditional territories. Article 27 clearly
22 establishes that any processes involving the lands,
23 territories, and resources of Indigenous peoples
24 must be the result of a collaboration between
25 Indigenous peoples and the Crown and must reflect

1 Indigenous customs, laws, and traditions. The
2 rights guaranteed in UNDRIP constitute the minimum
3 for the survival, dignity, and wellbeing of
4 Indigenous peoples, including SSN.

5 Given the right to self-determination, given
6 the articles of UNDRIP, given the application of
7 UNDA to the laws of Canada, it is SSN, not Trans
8 Mountain and not this Commission, who is best
9 positioned to determine whether and how a project
10 or measure affects them. And therefore, whether
11 there are any adverse effects of this deviation
12 application on SSN's rights, either under Canadian
13 law or Secwépemc law. Accordingly, an assessment
14 of Section 56 in the application under Section 211
15 must be considered in a legally plural manner that
16 is consistent with UNDRIP, and begins with the
17 presumption that sovereignty has always been shared
18 with Indigenous peoples [**Canadian Energy Regulator
19 Act, SC 2019, c 28, s 10 (Section 211)**].

20 So with that, I'd like to highlight from
21 SSN's perspective what those adverse effects here
22 are and are not. The adverse effects here are not,
23 as Trans Mountain submits, temporary and even
24 possibly -- or, sorry, and even possibly limited to
25 additional ground or area disturbance that can be

1 remediated to national park standards - standards,
2 we would add, that are only developed jointly by
3 federal representatives of the Crown and Trans
4 Mountain, representatives who do not have input or
5 perspective of SSN. The land, once disturbed and
6 destroyed, as knowledge keeper Jules noted, cannot
7 be put back, and it cannot be remediated, no matter
8 how beautiful it is made to look, according to what
9 was done Jasper National Park. Knowledge keeper
10 Jules noted in the transcript at Day 1, page 34,
11 line 16: (as read)

12 "If you go and destroy things, how
13 are you going to put it back? It
14 doesn't matter if you are saying
15 it will be restored to the area,
16 reclaimed to the area, or, you
17 know, remediated to the area. All
18 of those cannot replace what would
19 be destroyed, and for me that is
20 the biggest concern that I have,
21 is the destroying of our -- of who
22 we are and having the stories that
23 go along." [Transcript, vol. 1,
24 18 September 2023 (C26250-1)]

25 It is also not this Commission's view of the

1 adverse effects which ought to carry the day.
2 Rather, under the principle of self-determination
3 and the elevation of Indigenous legal orders
4 through UNDRIP, the adverse effects are what we
5 have been made clear on the record by SSN.

6 Now, from SSN's perspective, there are three
7 overarching adverse effects. First, granting this
8 application will desecrate sacredness of the
9 Pipsell area. The sacredness of the Pipsell area
10 was previously outlined in our written submissions.
11 Most importantly, however, the sacredness of the
12 area is set out in Secwépemc law, in the Trout
13 Children story, and in the song of the lost child
14 which we heard from knowledge keeper Jules on
15 Monday.

16 I'd like to now highlight for you a few
17 other statements made by knowledge keeper Jules
18 during her oral Indigenous knowledge evidence. The
19 first is in the transcript day 1, page 20, line 12
20 **[Transcript, vol. 1, 18 September 2023 (C26250-1)]:**
21 (as read)

22 "So when you talk about Pipsell
23 and the sacredness of Pipsell, it
24 comes from our creation stories."

25 Line 22: (as read)

1 "It is an extremely sacred site to
2 us, because it comes from those
3 stories, and when you destroy
4 anything along there, then you are
5 destroying a piece of Secwépemc
6 people."

7 Page 25, line 21: (as read)

8 We do not want anyone destroying,
9 touching any of the sacred sites
10 that we have, and throughout the
11 whole area, there are numerous
12 burial mounds.

13 Page 27, line 8: (as read)

14 "I've prayed at the different
15 sacred sites, and when you're
16 walking, there are other areas
17 within there that have not been
18 put out because of the sacredness
19 of them."

20 Page 34, line 16: (as read)

21 "It doesn't matter if you're
22 saying it will be restored to the
23 area, be reclaimed to the area.
24 All of those cannot replace what
25 would be destroyed. To SSN, the

1 land is the source of law and life
2 and all relations. To Trans
3 Mountain, the land is a commodity
4 and a source of capital."

5 The second adverse effect I would like to highlight
6 is that granting this application will prevent SSN
7 people from exercising their rights and stewardship
8 obligations in the area. Importantly, as a
9 component of its assessment of the potential
10 impacts to Section 35 rights, the Commission must
11 consider the effect of approving this deviation
12 application and the effect that will have on the
13 exercise of rights. With respect to this, we again
14 highlight the enlightenment we received on Monday
15 from knowledge keeper Jules. In talking about the
16 exercise of SSN's rights in the area, she states in
17 the transcript, Day 1, page 24, line 9 [**Transcript,**
18 **vol. 1, 18 September 2023 (C26250-1)**]: (as read)

19 "There is also places that people
20 cry for a vision."

21 Page 30, line 17: (as read)

22 "The medicinal plants are
23 extremely important to us. Same
24 with our food sources that we
25 gathered from there."

1 Page 26, line 3: (as read)

2 "There are numerous altars, and
3 each of the altars looks like
4 small medicine wheels."

5 The third adverse effect that I would like to
6 highlight is the impact that it will have on the
7 exercise of SSN's obligation, which were expressly
8 spoken about by knowledge keeper Jules and the
9 importance of that and her role in maintaining the
10 line of the generations. In speaking of the
11 obligations to the future generations, she stated
12 in the transcript, page 28, line 9 [**Transcript,**
13 **vol. 1, 18 September 2023 (C26250-1)**]: (as read)

14 "Our children need to be taught
15 our songs, our dances, our
16 stsptekwles, and they can only be
17 taught that if they're brought
18 directly to the place and where
19 they are. You can tell them the
20 story, but it's not the same as
21 being physically on the ground."

22 She goes on at page 37, line 3 [**Transcript, vol. 1,**
23 **18 September 2023 (C26250-1)**]: (as read)

24 "And those are the stories, the
25 knowledge that I carry within my

1 heart, in my mind, in my body, and
2 my spirit, because I was entrusted
3 with that sacred responsibility to
4 ensure that it was passed on to
5 the generations in the future."

6 She also spoke to what would happen if she fails to
7 carry out her stewardship responsibilities,
8 stating: (as read)

9 "It means that the earth will turn
10 on you if you don't look after and
11 you don't show proper protocol and
12 you don't respect, and that is
13 something that all of us have
14 always done."

15 That's at page 32, line 24 [Transcript, vol. 1, 18
16 September 2023 (C26250-1)].

17 She spoke to the obligation to the past
18 generations, stating at page 23, line 3: (as read)

19 "So there are numerous sites
20 within there. The ancestors come
21 and they speak to us."

22 She spoke of prayer sites. She spoke of burial
23 mounds. She spoke of the cultural heritage
24 treasures that need to be looked after.

25 Finally, as I've stated at the outset, what

1 this panel also needs to be concerned with is not
2 just the regulatory law that gives it its
3 jurisdiction or the Canadian law or the
4 constitutional law. It must also look at Secwépemc
5 law and SSN's legal orders. In the decision of the
6 Federal Court in *Pastion v Dene Tha' First Nation*
7 **[*Pastion v Dene Tha' First Nation*, 2018 FC 648]**,
8 which is in our brief of authorities, Volume 1,
9 page 78, at paragraph 8, the Federal Court stated
10 that Indigenous legal traditions are among Canada's
11 legal traditions. They form part of the law of the
12 land.

13 So I would just again urge this panel to
14 look at adverse effects not in terms of a single
15 tree or mitigation but what it means to SSN, what
16 it means to the breaking of their traditions, what
17 it means to the breaking of their laws, and those
18 laws that have been passed on, and to which someone
19 like knowledge keeper Jules is a steward here, for
20 past, present, and future generations.

21 Now, if I can ask -- I note that we are
22 getting close to the lunch hour. I know that I am
23 going to run a little bit longer and then you may
24 have questions, so I thought it might be -- if it's
25 acceptable, if we could take a short lunch break

1 now and come back, and I can finish up? I probably
2 have about half an hour or so to conclude, but I do
3 have some issues that were raised in my friend's
4 submissions that I would like to be able to ensure
5 that I have some time to address before I conclude
6 mine.

7 CHAIR PENNEY: Mr. Duncanson, do you have any objection
8 to an early lunch, followed by finishing up SSN's
9 argument and then questions from the panel?

10 MR. DUNCANSON: I'm in your hands, Madam Chair. The
11 only thing I'll say is we will need time to prepare
12 our reply as well. So to the extent we were able
13 to use the lunch break for that time -- we will to
14 the extent we're replying to things we've already
15 heard from Ms. Walker, but to the extent Ms. Walker
16 provides additional submissions after lunch, that
17 could require a longer break sometime this
18 afternoon before our reply.

19 CHAIR PENNEY: And we did set aside the full day, so I
20 do hear you. Given your request, Ms. Walker, and
21 it's quarter to 12, I think -- looking at my
22 colleagues...

23 So, Ms. Walker, if we come back at 12:30, is
24 45 minutes enough?

25 MS. WALKER: Absolutely. I only need a short break. I

1 just want to ensure that I can wrap up some of my
2 friend's submissions into mine. As I said, I don't
3 anticipate being too much longer.

4 CHAIR PENNEY: Yeah, we'll come back at 12:30; you'll
5 finish up your argument; we'll have some questions;
6 we will need a pause to make sure we've got all our
7 questions on your submissions; and then we'll give
8 Mr. Duncanson adequate time to prepare his reply.

9 Okay. Hopefully everybody's lunch is ready
10 to take early. Okay. We'll see you at 12:30.

11 Thanks.

12 **(PROCEEDINGS ADJOURNED AT 11:43 A.M.)**

13 **(PROCEEDINGS RECONVENED AT 12:32 P.M.)**

14 CHAIR PENNEY: Hopefully everyone had an opportunity to
15 get something to eat. It was brief.

16 But back over to you, Ms. Walker.

17 MS. WALKER: Thank you. I did see some pizzas being
18 carried into the building, so I think at least some
19 of the people in the gallery are satisfied.

20 CHAIR PENNEY: I just want to say they weren't ours.

21 MS. WALKER: So I would like to thank the panel for
22 indulging my submissions before the break. I
23 recognize that was a very thorough review of SSN
24 law as it is understood by SSN and how it was
25 articulated by knowledge keeper Jules in her oral

1 Indigenous knowledge. My purpose of doing so was
2 twofold: First, to outline how those laws should
3 be interpreted, understood, and, most importantly,
4 applied in determining the issues before this
5 panel, in particular in considering Section 56 and
6 adverse effects from the perspective of SSN,
7 bearing in mind its laws and legal orders. But
8 secondly, it is critical for SSN to have a voice
9 here that is heard and recognized; that as much
10 time and care is spent on its evidence, how it
11 views the lands, how it determines what can or
12 should be done to those lands as is spent on
13 borehole diameters. Feasibility for SSN is not
14 just what can be done but what should be done.

15 Now, I said I would address some additional
16 points raised by Mr. Duncanson, and this arises
17 again in the context of the MBA and in the context
18 of the terms "technical feasibility" and "economic
19 infeasibility. And I just wanted to spend some
20 time on the phrase "best efforts," as that term is
21 used. And under Section 7(1) of the MBA, this
22 entire article relates to the protection of the
23 Pipsell/Jacko Lake corridor. It states that:

24 (as read)

25 "Trans Mountain acknowledges and

1 agrees that its obligations under
2 this Article 7 in respect to the
3 protection of the area in and
4 around Pipsell/Jacko Lake shall be
5 made on a best-efforts basis,
6 which shall be interpreted to
7 impose on Trans Mountain a higher
8 obligation than reasonable efforts
9 or commercial efforts and shall,
10 at a minimum, mean taking in good
11 faith all reasonable, available
12 steps to achieve the objective,
13 carrying the process to its
14 logical conclusion."

15 And I would just like to a case cited in our brief
16 of authorities [C26259-2]. And that's a decision
17 in *Atmospheric Diving Systems* of the B.C. Supreme
18 Court [*Atmospheric Diving Systems Inc. v.*
19 *International Hard Suits Inc.*, 1994 CanLII 16658
20 (BC SC)] that was just recently cited in Sutter
21 Hill Management [*Sutter Hill Management Corporation*
22 *v Mpire Capital Corporation*, 2022 BCCA 13], a 2022
23 B.C. Court of Appeal decision that is also in our
24 brief of authorities. And the Court wrote that:
25 (as read)

1 "Best efforts means taking in good
2 faith all reasonable steps to
3 achieve the objective, carrying
4 the process to its logical
5 conclusion and leaving no stone
6 unturned."

7 It is SSN's submission and based on the evidence it
8 has filed in these proceedings and was put forward
9 by SSN's witnesses yesterday that Trans Mountain
10 has left reasonable and available stones unturned,
11 specifically in seeking to abandon microtunnelling
12 in and through the remaining portion of the Pipsell
13 area before that mitigation measure has been fully
14 realized.

15 I'd also like to bear in mind the definition
16 or the idea of best efforts, and not necessarily
17 even as it arises in interpreting the contract, but
18 we can refer back to the case law that I just
19 brought the panel's attention to. And that relates
20 to the delay in implementation of trenchless
21 construction and determination of feasibility with
22 respect to trenchless construction.

23 Now, as has been set out substantially in
24 our evidence, Trans Mountain did delay in taking
25 adequate steps to determine feasibility of

1 trenchless construction. Now this was despite an
2 express term of the MBA which required Trans
3 Mountain to have determined feasibility of
4 trenchless construction on or before December 31st,
5 2019, in the Pipsell area. Ultimately, this was
6 not done until June 2021. In fact - and this was
7 in the evidence of Mr. Goulet, and I would direct
8 the panel to the transcript, Day 1, Page 78, line
9 21, to page 70, line 10 [**Transcript vol. 1, 18**
10 **September 2023 (C26250-1)**] - that it was not until
11 July 7th, 2021, according to Mr. Goulet, very soon
12 after his introduction to the project, that Trans
13 Mountain introduced a microtunnelling approach.
14 Shortly thereafter, it was approved by SSN
15 leadership. However, the feasibility with respect
16 to that had still not gotten up and running in
17 full -- in full implementation until June of 2021.
18 Now, the requirement to do geotechnical work prior
19 to assessing feasibility was highlighted by
20 Mr. Wilson in response to Commissioner Watton's
21 question on Monday, and the reference to that is in
22 the transcript Day 1, page 144, line 23, to page
23 144 [sic], line 17 [**Transcript, vol. 1, 18**
24 **September 2023 (C26250-1)**].

25 This amount of time, almost 2 years from

1 execution of the MBA and a significant amount of
2 time after the deadline for commencing technical
3 feasibility work had commenced, was almost the
4 amount of time that Ms. Farrell, the CEO and
5 president of Trans Mountain acknowledged if she
6 could turn back the clock, they may have been able
7 to complete microtunnelling. So despite the
8 delays, despite the risks that have been identified
9 by my friend, the facts of the matter is that Trans
10 Mountain did not leave enough time to ensure that
11 it was able to carry microtunnelling through to its
12 logical conclusion, leave no stone unturned.

13 We would also note that Trans Mountain's
14 willingness to pursue mitigation of the so-called
15 hump through what we've referred to -- or what
16 we've heard is the construction of Pad 6 did not
17 change because the land changed - it changed
18 because the schedule did. Now, if I can refer the
19 panel to Transcript Day 1, page 67, line 4
20 **[C26250-1]**, questions were put to Mr. Nock, and the
21 reason for this questioning is also highlighted in
22 Mr. Nock's evidence, was because sometime between
23 April 27th, 2023, when Dr. Erez Allouche, Trans
24 Mountain's subject matter expert, stated that he
25 had a very high degree of confidence that the

1 Stage 3 mitigation would be successful and that
2 microtunnelling could continue. Mr Nock confirmed
3 that was said in April. However, by the time we
4 get to May 25th, when Trans Mountain made it clear
5 to SSN that it did not intend to continue with
6 microtunnelling, the only thing that had changed in
7 relation to the feasibility of microtunnelling in
8 the Pipsell area was the priority instruction from
9 the board of directors and executives of Trans
10 Mountain regarding the schedule, and I'd like to
11 read directly from the transcript of the
12 cross-examination from Day 1, page 63, beginning at
13 line 19: (as read)

14 Q Do you recall advising SSN during
15 that meeting that the executive
16 had made it clear, that the board
17 of directors had made it clear,
18 and it was made clear to us very,
19 very recently that we are really
20 down to having no other choice
21 but to move to a different form
22 of construction? Do you recall
23 saying that or something along
24 those lines?

25 A MR. NOCK: Yes, I do.

1 Q And so when were you advised?

2 Because it does say you were
3 advised very, very recently.

4 Those were your words. So when
5 was that made clear to you from
6 the executive or by the board of
7 directors?

8 A MR. NOCK: It would have been
9 days, perhaps a week or so before
10 then.

11 Q So as of April 2027 [sic], when
12 the contingency is being
13 suggested, the option 3 as your
14 colleague referred to, was there
15 any mention of any pressure from
16 the board or the executive with
17 respect to scheduling?

18 A MR. NOCK: Not that I recall, no.

19 Q But in between that period of
20 time and to your recollection,
21 perhaps a week before the meeting
22 at the end of May, it was clear
23 and it was made very clear to --
24 it was made clear to SSN that
25 this was a very pressing issue?

1 A MR. NOCK: Yes.

2 Q And you and I assume your
3 colleagues were getting
4 instructions straight from the
5 top that scheduling was the top
6 priority?

7 A MR. NOCK: Scheduling was a
8 priority. There were several
9 priorities, but yes, scheduling
10 was one of them.

11 In light of Trans Mountain's delays in undertaking
12 to engage on proper trenchless construction methods
13 and the significant delay to even commence
14 feasibility work, the question must be asked, had
15 this been done earlier, when it was meant to, and
16 had they brought forward microtunnelling -- the
17 microtunnelling option earlier, would we be here?
18 Trans Mountain asks you to decide that at the 11th
19 hour on its over-budget and delayed project, SSN's
20 lands and its past, present, and future generation
21 bear the cost of that delay and the inability to
22 complete microtunnelling within a certain timeframe
23 and not Trans Mountain.

24 Now, I do want to also address the issue of
25 engagement. During the cross-examination yesterday

1 and again during his submissions this morning,
2 Mr. Duncanson attempted to have this panel
3 essentially infer that SSN has not -- has been
4 misleading in its evidence on engagement, and he
5 referred to a specific table that was prepared.
6 Counsel for Trans Mountain asked Mr. Rattai if he
7 was aware that the chronology put to him did not
8 include all of the meeting and correspondence
9 between Trans Mountain and SSN between roughly 2020
10 and 2021 [Transcript, vol. 2, 19 September 2023
11 (C26253-1), page 181]. What was not made clear in
12 the course of that examination, that that was in
13 fact a selective engagement log. The express title
14 of that was as an appendix to an IR, Filing Number
15 C25832, Appendix C -- or excuse me, sorry.
16 C26156-1, Appendix B, pdf 13 was titled "Chronology
17 Leading to Microtunnelling Decision and
18 Construction." It was a specific chronology
19 prepared, related to a specific issue, and it was
20 prepared in response to an information request
21 directly from this panel regarding how the decision
22 was made by SSN to proceed with microtunnelling.
23 So I just want to be clear that on the evidence,
24 there was no intention to mislead. It was not as
25 though portions of engagement were removed for

1 nefarious purposes. It was a table prepared on a
2 particular topic and at the request and in response
3 to an information request.

4 The other issue that I would like to address
5 that I think has taken on a bigger or outsized role
6 in these proceedings over the last few days than is
7 warranted was, again, a response to an information
8 request specifically made by this panel. And that
9 is with respect to the conceptual HDD that was put
10 forward by SSN on September 11th. Now, my friend
11 says they have just only recently put this forward,
12 and they haven't done feasibility, and they haven't
13 done anything. That was conceptual. It was purely
14 conceptual. That is clear from the information
15 request response. They were asked to consider
16 other potential options by this panel, and that's
17 what was done. It was conceptual only. The filing
18 number for that is C26156-1, PDF page 5, and it was
19 CER IR Response No. 1.3.

20 It raised the conceptual idea in specific
21 and direct response. There was no technical
22 assessment because it was a hypothetical question
23 posed. It is misleading to now state that SSN has
24 failed to do the adequate engineering, or technical
25 work, or feasibility work with respect to that

1 option. That is clear in the information response
2 that that hadn't been done.

3 In conclusion, my friend spoke to the public
4 interest, and I would like to speak to the public
5 interest from the perspective of SSN. Now, my
6 friend talks of public interests in the interest of
7 all Canadians. Of course, SSN members are also
8 Canadians. So I think SSN is part of that equation
9 when we're looking at the benefit and the public
10 interest for the entirety of the country. But we
11 also have other considerations that this panel must
12 take into account when looking at the public
13 interest, and in particular reconciliation. We are
14 at a tipping point in terms of how this country
15 treats reconciliation, our relationships with
16 Indigenous people, and there's a fundamental public
17 interest in ensuring that those reconciliation
18 efforts, that legal plurality, that relationships,
19 that the history of colonialism in this country are
20 things that we move forward with together. So
21 recognizing and affirming SSN's jurisdiction, its
22 laws, and its ability to give direction with
23 respect to its lands is part of that process, it is
24 part of reconciliation, and it is something that
25 needs to be taken into account.

1 And on that point, I would like to direct
2 the panel to some authorities that we have in our
3 brief of authorities. In the decision of Dilico
4 Family Care and Her Majesty the Crown, which is a
5 decision of the Ontario Supreme Court, Filing
6 reference C26255-1, page 187, paragraph 70 [***Dilico***
7 ***Anishinabek Family Care v Her Majesty the Queen***
8 ***(Ontario), 2020 ONSC 892***] and in the Ahousaht First
9 Nation decision, a decision of the Federal Court
10 ***[Ahousaht First Nation v Canada (Fisheries, Oceans***
11 ***and Coast Guard), 2019 FC 1116***], which is at
12 page 60, paragraph 146, the courts both recognized
13 the clear and significant public interest in
14 reconciliation.

15 In another decision of the B.C. Supreme
16 Court in Cowichan Tribes and Canada Attorney
17 General in 2020 [***Cowichan Tribes v Canada (Attorney***
18 ***General), 2020 BCSC 1507***] which is also in Volume 1
19 of the authorities, page 170, paragraph 98, the
20 Court stated: (as read)

21 "There is a public interest in
22 avoiding harm to the functioning
23 of reconciliation."

24 In the Williams and Taseko Mines Limited case, a
25 2019 decision of the BC Court of Appeal at page 783

1 of the brief of authorities, paragraph 131
2 **[Williams v Taseko Mines Limited, 2019 BCSC 1507]**,
3 the B.C. Court of Appeal and the B.C. Supreme Court
4 referred to the imperative of reconciliation. In
5 another decision in *Ahousht Indian Band v Canada*
6 *(Minister of Fisheries and Oceans)* in 2014 **[2014**
7 **F197]**, the Court noted that reconciliation benefits
8 the public interest. The reference for that is
9 page 846 of the brief of authorities, paragraph 31.
10 And finally, in *Restoule and Canada (Attorney*
11 *General)* **[Restoule v. Canada (Attorney General),**
12 **2018 ONSC 7701]**, a 2018 Ontario Superior Court
13 decision in the brief of authorities page 48,
14 paragraph 56, the Court noted, "there is a deep and
15 broad public interest in reconciliation."

16 In SSN's respectful submission, granting the
17 deviation application, for all of the reasons that
18 have been put forward in the evidence and
19 submissions of SSN to date, would do great harm to
20 the Constitutional imperative of reconciliation,
21 both broadly and more specifically in respect of
22 SSN. It is therefore not in the interest to grant
23 the deviation application.

24 And SSN would like to commend the Commission
25 and this panel for the steps it has taken to

1 recognize Indigenous traditions and cultural
2 protocols - for example, the opening prayer, the
3 giving of tobacco, land acknowledgements, all of
4 the attempts to ensure that the language was
5 properly pronounced [sic] - and the significance
6 of this in the advancement of reconciliation within
7 what has historically been a colonialist-based
8 regulatory process. However, all of these gestures
9 are hollow and hollowed if we do not couple them
10 with a very robust application and understanding of
11 UNDRIP and Indigenous law within the context of
12 this regulatory world and a willingness to consider
13 what that means when the Commission exercises its
14 jurisdiction to make decisions. It is not only
15 mandated by UNDA, but it is also required by the
16 action and the words of the Commission itself and
17 by giving meaning to them.

18 In paragraph 23 of the deviation
19 application [C25832-1], Trans Mountain expresses
20 that microtunnelling would be completed in
21 approximately 80 percent of the approximately
22 4-kilometre Pipsell/Jacko Lake corridor. SSN
23 entered the MBA with Trans Mountain and
24 subsequently withdrew its opposition to the project
25 and its opposition before this Commission to ensure

1 the protection of this corridor in its entirety.
2 SSN does not consent or support Trans Mountain only
3 fulfilling 80 percent of its obligations to
4 undertake microtunnelling as previously agreed to
5 by the CER in the previous deviation application.

6 SSN's knowledge keeper Jules said to this
7 panel on Monday that to know the land is to walk
8 the land. Knowledge keeper Jules and her ancestors
9 have walked the land long before there were
10 pipelines. It is the obligation of this Commission
11 to ensure that she and the generations to come can
12 do so, and not the lands as Trans Mountain may put
13 them back but the lands as they have always been
14 and as SSN has always known them.

15 Those are my submissions.

16 CHAIR PENNEY: Thank you very much, Ms. Walker. As we
17 had indicated, we are going to take 20 minutes and
18 then the panel will have questions for you. So
19 we'll be back in 20 minutes.

20 **(ADJOURNMENT)**

21 MS. WALKER: Somewhat of a point of order here. I
22 realized on Monday, Commissioner Penney, you had
23 asked a question with respect to the weight of the
24 letter from IAMC, and I realized that I did not
25 address that in the course of my submission. So

1 perhaps prior to asking your questions, I can do
2 so?

3 CHAIR PENNEY: Yes, go ahead.

4 MS. WALKER: So the IAMC's letter [C26191-1] sets out
5 its terms of reference, which provides that IAMC
6 shall provide input and advice to regulators with
7 respect to issues of concern to the Committee as
8 well as regulatory standards applicable to the
9 construction of the Trans Mountain Expansion
10 Project. The letter was provided in that context.
11 Given the express mandate that has been given to
12 IAMC and its ongoing role in relation to this
13 project to serve in an advisory capacity, the views
14 expressed by the IAMC should be considered in
15 determining the deviation application.

16 CHAIR PENNEY: And those are your submissions?

17 MS. WALKER: Those are my submissions.

18 CHAIR PENNEY: Okay. Perfect. Thanks. Go ahead,
19 Commissioner Luciuk.

20 **QUESTIONS BY THE COMMISSION**

21 COMMISSIONER LUCIUK: Thank you for your submissions,
22 Ms. Walker, today. I'd like to start with your
23 book of authorities, and I'm going to ask a
24 question right at the outset - maybe one that we
25 come back to at the end of my questions. But I

1 note as I was following through your submissions
2 and through the book of authorities that I think
3 there are a number of tabs in your materials that
4 you have not taken us to. On behalf of the panel,
5 I know we'd like to be sure that we are turning our
6 minds to and considering all of the most relevant
7 portions that you would urge us to take into
8 account. So I'll put the question to you now:
9 Would you be able to walk us through anything that
10 is remaining or clarify if there are any gaps. And
11 if you'd like to answer that question last - I know
12 that you have a team working with you to share some
13 of the work of preparing that answer - we could
14 come back to that question at the end.

15 MS. WALKER: Thank you. I appreciate that. I will have
16 my wonderful team take a look at that. But I can
17 say for now if I haven't highlighted those
18 expressly in the course of my oral submissions, I
19 was not intending to give additional homework to
20 the panel to take away, nor obviously would that be
21 fair to Mr. Duncanson to have authorities that were
22 referred to or relied on that I had not raised in
23 the course of the submissions. That being said, to
24 the extent that I do need to reference anything
25 that I haven't already brought you to in the course

1 of answering these questions, my response may
2 change.

3 COMMISSIONER LUCIUK: Certainly. Okay. That's very
4 helpful as a clarification. We will, of course,
5 take into account anything further that's
6 highlighted and we wanted to make sure that the
7 opportunity was there for you to do so.

8 Moving on to a more substantive line of
9 questions, thank you for your attention and your
10 detailed review of the laws and legal orders that
11 you are urging the Commission to consider outside
12 of the Canadian and Western ways of knowing, laws,
13 and standards. I'd like to take a moment to make
14 sure that we have understood SSN's submissions of
15 how to consider both of those in an appropriate way
16 with respect to the evidentiary record before us.

17 And I'd like to begin by understanding and
18 asking you to expand on how the Commission should
19 balance or understand the remarks that we have
20 heard or the evidence that we have heard about the
21 integrity of the land as a whole, knowing it as a
22 whole, recognizing that there are many, as
23 knowledge keeper Jules called them, individual
24 cultural heritage treasures as well within that
25 whole. How should the Commission balance that

1 understanding of the lands with the work that had
2 been done between SSN and Trans Mountain to achieve
3 a place where some degree of disturbance on the
4 land was acceptable to SSN? And in particular, I
5 note that some of the evidentiary record shows that
6 the number of hectares of disturbed land between
7 scenarios related to microtunnelling and scenarios
8 related to the deviation proposal are potentially
9 not as significant, just from a purely numerical
10 perspective, as I'm sort of able to reconcile when
11 I'm listening to that evidence. So I would like to
12 understand that better and particularly from the
13 perspective, as you've noted, of the SSN
14 understanding of the lands.

15 MS. WALKER: I think with respect to you noting the work
16 and the engagement that Trans Mountain has done to
17 understanding the lands, we have to put that in the
18 context of where that work ultimately went, and
19 that was to a microtunnelling option. It was the
20 understanding of the lands as communicated by SSN,
21 SSN's legal orders and laws with respect to
22 stewardship, caretaking of the land, which is why
23 when certain construction options were put forward
24 by Trans Mountain, they said that is not acceptable
25 because it will interfere with those duties, with

1 our laws. And that's how we got to
2 microtunnelling.

3 And if we can go back even further in time,
4 if we look at the statement of opposition that was
5 filed in 2017 and that was filed in the repeat
6 statement of opposition that was filed in 2019,
7 those were again based on SSN's directions and
8 decisions that it had made with respect to the
9 lands and the fact that the construction
10 methodology being proposed by Trans Mountain
11 interfered with that. So when we're looking at
12 Trans Mountain's evidence around archeological
13 assessments and walking the land, that was in the
14 context of the microtunnelling. There were
15 ceremonies that took place on the land when that
16 microtunnelling was starting, kind of as part of
17 that, as a recognition that the parties had
18 collaborated and come together in a way to provide
19 the utmost safeguard to those lands. So that
20 was -- that's kind of the context.

21 I think a transition to any other -- or a
22 deviation to any other form of construction
23 methodology that has a greater disturbance will
24 require additional engagement, will require further
25 study and consideration by SSN. At this stage,

1 from SSN's perspective, the mitigation measure of
2 the construction of Shaft 6 has not run its course,
3 and the work that has gone into ensuring the
4 protection of the lands has not been completed.

5 COMMISSIONER LUCIUK: Thank you. Along that line, I
6 wanted to go back to some of your comments about
7 consent, and certainly we have an MBA before us
8 with quite a few submissions about how we are to
9 use it. But I -- I note that the MBA provisions,
10 based on my read of it, contemplate a situation
11 where discretion may be exercised to move from a
12 methodology that is conventional -- or trenchless
13 back to conventional, following the best efforts
14 discussion that we've had. I also see article 11
15 in the context of the MBA as shedding some light on
16 the parties' intentions regarding consent that
17 would arise from the collaboration through the
18 Mutual Benefits Agreement. In your submissions,
19 you noted that consent cannot be implied, and I
20 wanted to make sure that I understood why SSN
21 submits that consent is not in fact provided
22 directly, either through reading the MBA as a whole
23 or, in particular, in Article 11 of the agreement.

24 MS. WALKER: On the consent cannot be implied, I think
25 what I was attempting to explain in response to

1 Mr. Duncanson was there seemed to be a connection
2 of because we are potentially allowed to pursue an
3 alternative means in the exercise of our
4 discretion, if we decide to do that, ergo the
5 consent that you have given to support the project
6 is essentially inferred and, in my submission, in
7 particular in circumstances like this where SSN has
8 said in no uncertain terms we do not think you have
9 met the threshold set out in the MBA and have not
10 outside of that given their free prior and informed
11 consent.

12 COMMISSIONER LUCIUK: Thank you. That's helpful. I
13 think -- again, the questions sort of flow in a
14 sequence. Regarding the measures that would have
15 to be explored, we have heard evidence about
16 measures that have been attempted and could yet be
17 attempted. You spoke this morning about a
18 best-efforts test and incorporating in the context
19 of leaving no stone unturned. I would like to hear
20 a little bit more about, in the context of the
21 evidentiary record we have before us, what more do
22 we know about what further measures would have to
23 be explored in order to meet the best efforts test
24 that you've urged the Commission to adopt? And in
25 particular, you were speaking about mitigation 3 as

1 yet not exhausted, but I'd like to make sure that I
2 understand whether the submission is that that
3 outstanding effort is what would be required, or
4 what we make of the additional future potential
5 risks that were identified by Trans Mountain, even
6 if mitigation 3 succeeds. So we heard evidence
7 that there would be further risks associated with
8 the remaining 800 metres. What would you urge the
9 Commission to do with that information and SSN's
10 interpretation of what best efforts means?

11 MS. WALKER: I'm -- I -- I think I've captured your
12 question, but please feel free, if I miss a
13 component of it. I think with respect to the best
14 efforts, as you've stated, our position is that has
15 not been exhausted. And if we look at what would
16 occur if the deviation application, for example,
17 were denied, and there were still risks associated
18 with that and mitigation of those risks had to
19 occur. That's the engagement that's happened thus
20 far. There has been engagement. We recognize
21 Trans Mountain has engaged with SSN and that there
22 has been collaboration. There's been collaboration
23 about the size of the pads, where roads are
24 located, where bore holes are located, et cetera.
25 So if there were risks that arose as

1 microtunnelling proceeded, I would anticipate that
2 the parties would engage to discuss how to address
3 those risks in the same way that they have done
4 since they started kind of looking at the -- since
5 they started their engagement following execution
6 of the MBA. I think -- I can't be much more
7 specific of what would be required because there
8 are a lot of risks and assumptions, and we don't
9 know what will arise.

10 COMMISSIONER LUCIUK: Okay. And if I've understood, at
11 a minimum, ongoing engagement on the laws and legal
12 orders and the lands with respect to those next
13 steps is what you've identified with respect to the
14 risks already identified but not yet explored.
15 Okay.

16 I know that my panel colleagues have
17 questions. I think that I will hand over to them
18 just with a reminder that, at the end, if we could
19 just confirm that there is nothing further with
20 respect to the cases and I'll leave that to you,
21 Commissioner Penney. Thank you very much,
22 Ms. Walker.

23 CHAIR PENNEY: Thank you, Commissioner Luciuk.

24 Commissioner Watton?

25 COMMISSIONER WATTON: I will have a couple of questions.

1 Just give me a second to find my place in my notes.

2 Okay. Thank you very much, Ms. Walker, for
3 your submissions today. The first question I
4 have -- I'm just going to take you to a couple of
5 references that you made today that I think were
6 interim references citing the evidence we heard
7 from our knowledge keeper who appeared before us on
8 Monday in reference to the need to consider the
9 land as a whole. The discussion -- the submissions
10 you made from the SSN's perspective about getting
11 and collecting in that area, the reference to
12 numerous altars and fasting sites. And I just --
13 one thing I've struggled a little bit with this
14 over the past couple of days is trying to determine
15 whether all of those references to the lands are
16 meant to be specific to the lands required for the
17 deviation right-of-way, or do they speak more
18 broadly to the general Jacko Lake and the Pipsell
19 area?

20 MS. WALKER: I think it's a combination of both. I
21 mean, this particular corridor is protected for a
22 reason. It was subject to an MBA for a reason,
23 because of its sacred and cultural values. And so
24 I don't want to speak on behalf of knowledge keeper
25 Jules, but she's very much aware of this corridor,

1 that it is subject of this MBA; it is the subject
2 of this deviation application. So I think while
3 she is recognizing the broader land as a whole, the
4 broader Pipsell/Jacko Lake area, in terms of when
5 she was talking about the exercise of SSN's rights
6 and title, it was in relation to what happens
7 within this particular protected corridor and why
8 it is so significant.

9 COMMISSIONER WATTON: And in a similar vein, another
10 quote that you cited to us today was her line that
11 said, "every time you walk, the sites show
12 themselves." So a question I have for you is, in
13 light of what we've heard from Trans Mountain with
14 respect to their processes for surprise
15 discoveries, the application of the *BC Heritage*
16 *Resources Act*, the potential presence of Indigenous
17 monitors, and the mitigation practices generally
18 that Trans Mountain has, either on the record in
19 this proceeding or -- but leaving up -- I mean, I
20 think they're generally applied in most of the
21 route or potentially covered in the MBA. Can I
22 just hear from you on whether -- whether or why you
23 think those -- the mitigation practices would be
24 insufficient with respect to the sites showing
25 themselves along the route?

1 MS. WALKER: I think knowledge keeper Jules's point was
2 the sites show themselves. The sites are not dug
3 up. I think that what she was trying to get at is
4 they reveal themselves to her and to others who
5 walk the land, who know the land, who are present
6 on the land. You or I could walk the same corridor
7 that knowledge keeper Jules walks and miss a
8 hundred different things that she sees. So I think
9 while I recognize there are mitigation measures,
10 from SSN's perspective, in terms of the sacredness
11 of the site, the cultural integrity of the site,
12 again, we go back to that is why microtunnelling
13 was determined to be the best option. Because you
14 mitigate the risk of chance finds. Because it
15 is -- it is not just about the mitigation that
16 happens after you hit a burial mound that has not
17 previously been identified, or you find an artifact
18 that was previously identified. From the
19 perspective of SSN, the damage, the harm that has
20 been caused by that has already occurred. So as
21 great as it is that there are protections in place
22 in those circumstances, the perspective of SSN is
23 the -- those exact circumstances that are mitigated
24 are to be avoided in the first place.

25 COMMISSIONER WATTON: Another question I wanted to take

1 you back to, one of Mr. Duncanson's submissions
2 this morning about the reference to engagement with
3 respect to the deviation being a two-way street, or
4 the requirements of engagement and consultation
5 being a two-way street. And I just wondered if you
6 had any submissions on -- what your position would
7 be on with respect to whether or not, in your view,
8 SSN -- to the extent you accept that it is a
9 two-way street, has lived up to what would be
10 reasonable expectations in that context?

11 MS. WALKER: SSN has consulted significantly with Trans
12 Mountain with respect to the 3A option, the
13 mitigation measure, how that would be put forward.
14 The issue from SSN's perspective, again - and I'm
15 sorry to keep repeating this - is that that
16 mitigation measure has not completed its course,
17 and what SSN wants to direct its technical team and
18 its capacity to, is ensuring that best efforts, no
19 stone is left unturned in ensuring that mitigation
20 measure can move forward. So it is not and should
21 not be characterized as a refusal by SSN to engage
22 on the alternative methodology or to engage with
23 respect to this deviation application.

24 To the contrary - requests for information
25 were made about the progress with respect to

1 construction on pad 6, meetings were held to
2 discuss what Trans Mountain was proposing and the
3 fact that it was opposed by SSN, and the fact that
4 SSN is disagreeing with Trans Mountain and saying,
5 we want to focus on the mitigation measure that is
6 in front of us, that we agreed to, that was --
7 should be continuing, before we spend our resources
8 and our capacity looking at an option that we don't
9 agree with. That's not a refusal to engage. They
10 can have a different perspective than Trans
11 Mountain, and they can take a different perspective
12 with respect to engagement. In my submission, SSN
13 has lived up to its obligations on engagement. It
14 simply has a different perspective on how and what
15 the parties should be engaging with respect to at
16 this point in time.

17 COMMISSIONER WATTON: Thank you. And I think this is my
18 last question. You had noted this morning that
19 Trans Mountain had not obtained consent for the
20 deviation, and then you cited the requirements of
21 Articles 19, 26, and 32 of the UN Declaration. And
22 I just wanted to know your view on whether the
23 requirements for FPIC, as described in Articles 19
24 and 32, whether they require that the Crown obtain
25 consent or rather that the Crown consult and

1 cooperate in good faith with the aim of securing
2 FPIC consent of Indigenous peoples.

3 MS. WALKER: I think in the circumstances where we have
4 SSN, a First Nation, that asserts jurisdiction with
5 respect to its lands and in particular with respect
6 to this sacred corridor, consent is required. And
7 in the circumstances, it was given. FPIC was given
8 on the basis of a certain methodology. SSN came to
9 the table, collaborated with Trans Mountain in
10 order to support the project, in order to ensure
11 the project could move forward, but there were
12 parameters with respect to the FPIC that was given.
13 And those parameters, in SSN's perspective, are not
14 being respected. And so it is not here to delay or
15 halt the project as a whole. It is here to oppose
16 the deviation which is contrary to the basis in
17 which it put forward its free prior and informed
18 consent in the first place.

19 COMMISSIONER WATTON: Just to clarify on that, are you
20 relying on Articles 19 and 32 for that submission?
21 Or any other article, for that matter, of UNDRIP?

22 MS. WALKER: Let me just double-check that I have my
23 list of articles correct. I don't want to miss
24 one, I know I gave you a very long list this
25 morning, but I'll try to pare it down a bit. Yes,

1 you're correct. It's 19 and 32. We don't have
2 anything to add to them.

3 CHAIR PENNEY: Thank you, Commissioner Watton. Yeah, I
4 have a couple of questions, and then we may go back
5 to Commissioner Luciuk. We don't want you to put
6 you through the -- too much. Okay. Really
7 appreciated knowledge keeper Jules's input in the
8 OIK session. Really valued her telling us about
9 the Pipsell/Jacko Lake area. The Lost Child song,
10 the Trout Children story, the creation stories, the
11 fasting sites, the crying for a vision and the
12 coyote markers, and that's just -- that's not an
13 exhaustive list. But it was very helpful for us to
14 get her perspective on it, combined with your
15 interpretation of the law. And the worldview is
16 something we hear quite often, and I guess my
17 question for you, Ms. Walker, is how do I balance
18 that off against Canadian law and geotech studies,
19 and put it all together? You know, how do I
20 balance it?

21 MS. WALKER: That's the -- that's the million-dollar
22 question, if you will. I think, and what I was
23 hoping to highlight in my submissions this morning
24 and really bringing us back to what knowledge
25 keeper Jules said, is that there is a way of

1 communicating, of laws, of stories, of places of
2 value that is unique to SSN and SSN's perspective,
3 and it is different from the Western technical
4 science that we are used to. But in my submission,
5 when looking at the issue of -- the potential
6 damage to the land, the harm to the land, what that
7 looks like based on their worldview, based on their
8 laws, that should be very heavily weighted. It's
9 not just necessarily about mitigation measures or
10 minimization of the damage. It has to be, what
11 does this do to the integrity of SSN as a people,
12 knowing what you've learned here over the last
13 couple of days? And I recognize that that is a
14 difficult exercise. And I recognize that most
15 adjudicative bodies in this country who apply
16 Canadian law, it's something that needs to be
17 transitioned to. It's not -- it's not the way that
18 it has been practiced for, you know, hundreds of
19 years.

20 So I would encourage the panel to review the
21 articles of UNDRIP that were referred to. I would
22 encourage the panel to consider, in looking at
23 weight, to look again and consider my submissions
24 on UNDA and the application of UNDRIP to Canadian
25 law; in particular, when you are looking at your

1 mandate under Section 11 of the CER Act and looking
2 at adverse effects under Section 56 of the CER Act,
3 how is that informed by this new layer which has
4 been added by Canadian law, which forces us to
5 focus on UNDRIP as part of the determinations that
6 we're making within this legal landscape.

7 CHAIR PENNEY: Okay. Thank you for that. And another
8 level of kind of complication is, of course, we're
9 dealing with a Crown entity here. And I think I
10 remember from the evidence you making some
11 submissions around how we should treat Trans
12 Mountain differently because they are a Crown
13 entity. Can you help me understand that?

14 MS. WALKER: Yes, absolutely. Yes. Trans Mountain is a
15 Crown corporation, and Crown corporations are
16 subject to the honour of the Crown. And that must
17 be first and foremost in all of their dealings with
18 Indigenous peoples. We are not getting into
19 contract interpretation here, but I would say, for
20 example, if you were to sit down in a -- or put
21 forward in a court of law an interpretation of that
22 MBA, that would also be subject to recognition of a
23 Crown corporation and how is that to be interpreted
24 in accordance with the honour of the Crown. So I
25 do think in looking at Trans Mountain's conduct, in

1 Looking at how it's making decisions - in
2 particular, the rush on the schedule that is
3 significantly having an impact on SSN - I do
4 believe that its position as a Crown corporation
5 and the obligations that come with that should be
6 taken into account.

7 CHAIR PENNEY: Okay. Thank you for that. Commissioner
8 Luciuk, back to you? You're going to -- okay.
9 Commissioner Watton.

10 COMMISSIONER WATTON: Back for a sequel unexpectedly.
11 It dawned on me that in your submissions this
12 morning and this afternoon we haven't heard much
13 about the weight we should give to Trans Mountain's
14 submissions with respect to the costs of delay.
15 And I wondered, first off, what weight you think we
16 should give to those submissions and, secondly,
17 whether you take issue with the quantification of
18 those submissions based on what's in the evidence
19 before us.

20 MS. WALKER: I think with respect to the quantification
21 of those numbers, what we've seen are assumptions.
22 I believe Trans Mountain's panel said that.
23 They -- you know, best and worst-case scenarios.
24 When we are looking at the project costs overall
25 and the carrying costs if there is further delay,

1 we don't have any underlying financial data to
2 verify that, to probe that. Those are numbers that
3 are put forward by Trans Mountain. But just with
4 respect to those costs and how those should be
5 considered, in our view, those costs, what it costs
6 Trans Mountain in the context of this project that
7 is behind schedule, that is over budget, and we are
8 now at the very end, and we have a segment, a 1.3
9 kilometre segment that SSN has done everything to
10 protect since the inception of this project, and so
11 I think in the grand -- the grand scheme of the --
12 of all that has occurred here, the -- Trans
13 Mountain's costs, based on the situation it has
14 been in as a result of various things that have
15 nothing to do with SSN, that are outside of SSN's
16 control, that should not be something that is
17 heavily weighted that would impact on what SSN has
18 worked 4 years to make sure it has protection of.
19 SSN cannot control how Trans Mountain has managed
20 its budget or its schedule over a multiyear
21 project. So if there is a burden to be borne as a
22 result of that, now that we're -- now that they're
23 in a situation where there's additional financial
24 obligations, that burden should not shift to SSN
25 and its rights and title.

1 COMMISSIONER WATTON: Thank you.

2 CHAIR PENNEY: I think we're done. Thank you very much
3 for your submissions and your responses, and --
4 yeah.

5 MS. WALKER: I will confirm we have no other authorities
6 that we're going to make you take home and read.
7 Thank you.

8 CHAIR PENNEY: Oh, that's too bad. All my lawyer
9 panelists are really disappointed. They were
10 looking forward to more to read.

11 Mr. Duncanson, how much of a break do you
12 need?

13 MR. DUNCANSON: Thank you, Madam Chair. Less now that
14 we know we don't have to deal with a lot of those
15 authorities. I think 30 minutes would be
16 sufficient for us to be able to get everything
17 ready.

18 CHAIR PENNEY: Okay. Perfect. Well, we will take a
19 30-minute break. I think I see the clock saying 10
20 to 2:00, so we'll be back at around 20 after 2:00,
21 okay. Thank you.

22 **(ADJOURNMENT)**

23 CHAIR PENNEY: Mr. Duncanson, please proceed.

24 **REPLY BY MR. DUNCANSON**

25 MR. DUNCANSON: Thank you, Madam Chair.

1 For my reply submissions this afternoon, I'm
2 not going to repeat things that I've already
3 submitted this morning. Many of the issues and
4 arguments presented by my friend, Ms. Walker, I
5 submit were already covered off in my argument this
6 morning, and I'm going to continue to reply on
7 those prior submissions without repeating them
8 again.

9 Before getting into specific points of
10 reply, I will observe that Ms. Walker's submissions
11 did not even mention many of the arguments that we
12 did make this morning, particularly around
13 technical and economic feasibility. And I submit
14 to you that is very telling, considering that the
15 evidence before you on technical and economic
16 feasibility should be central to your
17 decisionmaking on this application.

18 I will also observe as just a preliminary
19 point that Ms. Walker's comments right at the end
20 of her responses to questions from the Commission
21 about not being privy to Trans Mountain's financial
22 information and having no ability to probe that
23 information, in my submission, should be given no
24 weight by the Commission, considering the fact that
25 Trans Mountain's financial information, to the

1 extent it was relevant to this application, was put
2 in evidence prior to the hearing. Ms. Walker had
3 the ability to ask questions about that during
4 cross-examination, and she did not.

5 I'm going to start with one of the key
6 arguments raised in Ms. Walker's comments, which
7 was around the impacts of the proposed deviation on
8 SSN's rights. And Ms. Walker made a number of
9 submissions around this general theme. First, she
10 claimed that impacts on SSN's rights must be
11 considered by the Commission under Section 56 of
12 the CER Act, and she also claimed that those
13 requirements in Section 56 of the Act should be
14 interpreted consistent with UNDRIP. Now, first of
15 all, with respect to Section 56 of the Act, we
16 agree that that section does require the Commission
17 to consider impacts of any application before it on
18 Indigenous rights, and this application is no
19 exception. That's consistent with the submissions
20 I made this morning about how impacts on Indigenous
21 rights are one of the things that the Commission
22 needs to be mindful of when assessing the overall
23 public interest.

24 I also made submissions this morning about
25 how courts have interpreted the legal requirements

1 in Canadian law, after UNDRIP and the *United*
2 *Nations Declaration on the Rights of Indigenous*
3 *Peoples Act* was enacted. One of the cases I cited
4 this morning was the *Roseau River* [2023 FCA 163]
5 case from the Federal Court of Appeal, which was
6 only 2 months old. And the Federal Court of Appeal
7 was clear in that decision that many of the
8 concepts I discussed this morning about Indigenous
9 groups not having a veto under Canadian law, that
10 those principles in the case law continue to apply,
11 notwithstanding what UNDRIP says about FPIC and the
12 *UN Declaration on the Rights of Indigenous Peoples*
13 *Act*. But perhaps most importantly on this issue of
14 impacts on SSN rights, the claims that my friend
15 made about how this deviation will desecrate the
16 sacredness of the Pipsell area, and it will prevent
17 SSN from exercising its obligations around
18 stewardship and maintaining a line for future
19 generations, none of that is supported by the
20 evidence before you. And there's a number of
21 points here based on the evidence that are
22 important for you to be mindful of.

23 First, all of the land we're talking about
24 here is private land. There are other types of
25 disturbances in this area, including roads and an

1 open-pit mine. And you can see, based on the
2 images that have been filed in the evidence showing
3 the general route map that this is by no means
4 going to be the only disturbance feature on the
5 landscape. The evidence is that the
6 microtunnelling plan that SSN expressly agreed to
7 with Trans Mountain includes more surface
8 disturbance in the Pipsell area than what Trans
9 Mountain is applying for in the application. And
10 I'll give you the specific reference to that
11 because that's important, in my submission. That's
12 the reply evidence, Exhibit C26029-2 at paragraphs
13 17 through 19.

14 As I explained at some length this morning,
15 the evidence is that the MBA that SSN entered into
16 with Trans Mountain expressly contemplated trenched
17 construction in the Pipsell area. Contrary to the
18 suggestion that we heard from my friend that
19 impacts in the Pipsell area cannot be reclaimed
20 once they've occurred, the parties expressly
21 negotiated a reclamation standard that would apply
22 to surface disturbance in the Pipsell area, that
23 being the national park standard. So the parties
24 agreed in the MBA that surface disturbance could
25 occur in this area, and they agreed on how that

1 work would be done. And that's consistent with
2 what Trans Mountain is proposing in the
3 application.

4 It's also important, Commissioners, to
5 recognize that while there are some statements on
6 the record in SSN's written submissions prior to
7 the hearing about impacts on rights, none of those
8 statements were adopted by members of the SSN
9 community during the hearing. What we heard from
10 SSN's witnesses yesterday is that those statements
11 were written by legal counsel, and SSN's technical
12 representatives were unable to answer questions
13 about that evidence. So Trans Mountain had no
14 ability to meaningfully test that evidence, to
15 assess the credibility of the claim that this
16 proposed deviation will have significant impacts on
17 SSN's rights but the other disturbances in the area
18 have not.

19 For all of these reasons, I submit there is
20 no credible or reliable evidence that the proposed
21 deviation would result in significant and
22 irreparable harm relative to other disturbances in
23 the Pipsell area, which SSN has expressly agreed
24 to. And, Commissioners, you must base your
25 decision on the application on the evidence.

1 The next theme of argument that I'm going to
2 reply to are a number of comments that relate to
3 interpretation of the MBA. And again, some of that
4 was covered off this morning, including in my
5 responses to Commissioner Luciuk's questions. I'm
6 not going to repeat those again. But my first
7 point of reply is my friend suggests that the
8 definitions of technical feasibility and economic
9 infeasibility that we took you to this morning
10 should not be relied by the Commission, but the
11 Commission should rely on various other sections of
12 the MBA, such as Section 2.1 regarding
13 interpretation as well as other provisions that
14 Ms. Walker specifically referenced. I submit there
15 is no basis for the Commission to consider certain
16 sections of the MBA and not others. The MBA as a
17 whole was filed on the record, subject to redaction
18 of confidential financial information. The
19 Commission should review the MBA as a whole and
20 consider that agreement in its entirety to see for
21 itself what the parties agreed to.

22 On this same theme, we heard quite a lot
23 from my friend about this concept of best efforts,
24 which is a standard in the MBA that Trans Mountain
25 agreed to follow. Again, this comes down to

1 effectively interpreting whether Trans Mountain is
2 complying with its obligations under the MBA or
3 not, which, as I submitted this morning, I submit
4 that does cross that line into an area that the
5 Commission does not have jurisdiction. But
6 regardless, I do have some comments about best
7 efforts.

8 My friend first cited the *Atmospheric Diving*
9 case from the B.C. Supreme Court [**1994 CanLII 16658**
10 **(BC SC)**], and she specifically referenced paragraph
11 71 of that decision. I'm not suggesting that my
12 friend misquoted that paragraph. She didn't. But
13 what she did not say was that that paragraph,
14 paragraph 71, includes a number of indicia for what
15 best efforts means in the context of a contract.
16 And one of the other things that the Court said in
17 that context, which my friend did not mention, is
18 that best efforts is not boundless. It must be
19 approached in light of the particular contract, the
20 parties to it, and the contract's overall purpose
21 as reflected in its language. That's what that
22 case says. SSN's suggestion that best efforts in
23 this case means proceeding with microtunnelling to
24 its natural conclusion because, in my friend's
25 words, that method has not yet been exhausted. And

1 the implication is in doing so that Trans Mountain
2 should effectively incur limitless cost and delays
3 until such time as the tunnel actually fails. That
4 is not consistent with what the parties agreed to
5 based on the express language of the agreement, and
6 so that does not mean best efforts as described by
7 the B.C. Supreme Court in *Atmospheric Diving*.

8 And similarly, in the *Sutter Hill Management*
9 [2022 BCCA 13] case that Ms. Walker referenced, at
10 paragraph 41, the B.C. Court of Appeal held that
11 best efforts do not require a party to take steps
12 that are commercially unreasonable. And the
13 evidence before you is that continuing with
14 microtunnelling in these circumstances would be
15 commercially unreasonable, so it is not consistent
16 with the best efforts standard for Trans Mountain
17 to proceed with that method in these circumstances.

18 Now, my friend claimed that specifically
19 Trans Mountain did not use best efforts because it
20 started the work on the microtunnel too late and
21 did not leave enough time for the microtunnel to be
22 completed. And she quoted from Trans Mountain's
23 CEO, Ms. Farrell, and she paraphrased her statement
24 in a meeting with SSN to mean that if the
25 microtunnel had started earlier, it could have and

1 perhaps would have been completed by now.

2 Now, that is, in my submission, a gross
3 mischaracterization of the evidence. We do not
4 have a transcript from the meeting with SSN and
5 Trans Mountain to have Ms. Farrell's exact words.
6 But Trans Mountain did address this in its reply
7 evidence - again, this is Exhibit C26029-2 at
8 paragraph 38 - that this characterization of
9 Ms. Farrell's comments is taken out of context, and
10 the way that SSN is portraying that statement is
11 not what Ms. Farrell meant. Ms. Farrell did not -
12 and neither did anybody else at Trans Mountain -
13 ever suggest that if Trans Mountain had started the
14 microtunnel earlier that it would have moved
15 forward with the microtunnel in the face of the
16 technical risks, delays, and cost increases that it
17 has now faced on the tunnel drive, Tunnel Drive 2.
18 So for those reasons, Commission, I maintain that
19 this issue about Trans Mountain waiting too long to
20 get started on the microtunnel is a red herring,
21 for the reasons I explained this morning.

22 Sticking with this theme of best efforts,
23 Ms. Walker talked about representations that Trans
24 Mountain made about how the Stage 3
25 mitigation - i.e., construction of Shaft 6 - is

1 likely to be successful. She says those
2 representations were made, I believe, in late April
3 of 2023, and for Trans Mountain to make those
4 representations and shortly thereafter claim that
5 microtunnelling is not feasible, demonstrates that
6 this change in position is all about schedule
7 delay, not technical risks. And again, this is a
8 mischaracterization or a misunderstanding of the
9 evidence.

10 To be clear, the likelihood of Shaft 6 being
11 successfully completed is not the same thing as the
12 likelihood of the microtunnel being successfully
13 completed. Trans Mountain has explained that even
14 if Shaft 6 is completed successfully, there remain,
15 in Mr. Wilson's words from Monday, a plethora of
16 risks with continuing with the tunnel. I
17 summarized those risks in my submissions this
18 morning, and I won't repeat them. But to be clear,
19 those are separate and apart from the risks
20 associated with simply constructing Shaft 6.

21 Similarly, Ms. Walker's claim that the only
22 thing that changed in April and May of 2023 was
23 direction from Trans Mountain's board of directors
24 around the need for schedule, that is not
25 consistent with what the actual evidence before you

1 says. The evidence is clear that certainly
2 schedule was one of the things that was discussed.
3 That was one of the considerations that was
4 mentioned in discussions with SSN. But when
5 Mr. Goulet was asked that question specifically on
6 Monday, he stressed that the technical risks and
7 cost increases were key reasons for the decision
8 that was ultimately made that proceeding with the
9 microtunnel is not technically or economically
10 feasible.

11 Again, sticking with this theme of
12 compliance with the MBA and interpretation of the
13 MBA's requirements, Ms. Walker cited a requirement
14 in the MBA for Trans Mountain to complete certain
15 feasibility work by late 2019. That was the first
16 time that this issue has been raised in this
17 proceeding. If it had been raised earlier, Trans
18 Mountain could have and would have explained how it
19 took reasonable steps to comply with that
20 requirement. But regardless, that argument goes
21 squarely to the issue of whether Trans Mountain has
22 complied with the MBA, which as I explained
23 earlier - and I think my friend agreed to - that
24 goes beyond the Commission's jurisdiction in this
25 proceeding, and it is also irrelevant to the issue

1 of whether the proposed deviation represents the
2 best possible route, methods, and timing for
3 constructing the project.

4 And finally on this theme, we heard in
5 response to questions from the Commission
6 Ms. Walker discussed the concept of the honour of
7 the Crown and that being a concept that would apply
8 if and when a body is asked to actually interpret
9 the MBA, but again, that's not what we're doing
10 today. You do not have jurisdiction to interpret
11 and enforce the MBA, so that concept of the honour
12 of the Crown, as Ms. Walker described it, has no
13 application in this proceeding.

14 The next theme in my friend's argument that
15 I'd like to respond to is the argument around
16 applying SSN law to the legal framework that I
17 walked through in my submissions this morning. And
18 Ms. Walker in this regard started by citing a case
19 from the Federal Court in *Pastion* [2018 FC 648],
20 which is a case from 2018 about the law that
21 applies to band council elections. Now, the
22 general proposition that Indigenous legal
23 traditions are part of the inherent -- their
24 inherent Aboriginal rights under the Constitution,
25 that concept is well established, and I would

1 submit that was not something that was new law when
2 the Federal Court decision in *Pastion* was released.
3 But neither the *Pastion* case nor any other case
4 says that Indigenous laws should overrule or modify
5 the specific words of a statute that has been
6 passed by Parliament. As you know, Commissioners,
7 the CER is a creature of statute, and it is
8 required to follow the CER Act as that act is
9 written. The Commission has no jurisdiction to
10 modify its legislative requirements for reasons of
11 Indigenous law or any other reason. And I will
12 also note, Commissioners, that post *Pastion*, the
13 Federal Court released a decision last year in
14 *George v. Heiltsuk First Nation* [**George v. Heiltsuk**
15 **First Nation, 2022 FC 1786**]. That decision was
16 recorded as 2022 FC 1786, and at paragraph 71 of
17 that decision, the Federal Court stressed that
18 Indigenous law and domestic Canadian law must be
19 read together, and Indigenous law may need to be
20 altered in some situations to align with Canadian
21 domestic law. There is certainly no legal
22 authority that would allow this Commission to
23 replace the CER Act with SSN's law and decide the
24 application on the basis Ms. Walker has suggested,
25 particularly when Ms. Walker's submissions, if

1 accepted, would effectively give SSN a veto over
2 routing decisions in the Pipsell area, which is a
3 proposition Canadian courts have consistently
4 rejected.

5 The next aspect of my friend's submissions
6 that I will reply to relatively briefly was the
7 point that FPIC, or free prior and informed
8 consent, under UNDRIP cannot be implied from a
9 contract and the suggestion that the MBA does not
10 necessarily constitute FPIC, certainly not in the
11 circumstances of the application. Now, as I
12 explained this morning, firstly, this concept of
13 FPIC, or free prior and informed consent, that is
14 not a legal requirement in Canada. But I also
15 disagree with the suggestion that the MBA does not
16 represent free prior and informed consent, or that
17 it does not apply in the circumstances of the
18 application. At paragraph 61 of SSN's written
19 submissions in this proceeding, SSN expressly
20 stated that it gave its free prior and informed
21 consent through the MBA. Clearly, the MBA was an
22 agreement between the parties that was freely
23 entered into by SSN. It was entered into prior to
24 the activities in question taking place, and SSN
25 was informed when it entered into the MBA through

1 its legal representation. We disagree that somehow
2 entering into the MBA does not represent free prior
3 and informed consent. And importantly, when the
4 MBA was entered into in October of 2019, the
5 evidence is the parties did not know whether
6 trenchless construction in the Pipsell area would
7 be feasible or not. That work had not yet
8 happened. The concept of microtunnelling and all
9 the details around what various trenchless methods
10 could be employed, none of that work had been done
11 either.

12 So it is not the case, as my friend might
13 have you believe, that SSN entered into the MBA
14 based on commitments that Trans Mountain would
15 employ trenchless or microtunnelling for
16 100 percent of the length in the Pipsell area.
17 Instead, the MBA represents a process that the
18 parties agreed to follow to evaluate the
19 feasibility of trenchless construction. And it was
20 on that basis that SSN executed the agreement and
21 gave its consent to the project. Again, I don't
22 think you need interpret the MBA in reaching your
23 decision, and you certainly don't need to determine
24 whether Trans Mountain has complied with its
25 obligations under the MBA, but I submit it is

1 important to understand that SSN's consent as
2 reflected in the MBA was not premised on any
3 particular construction method being used or
4 trenchless construction ultimately being feasible.

5 Next point of reply is in response to
6 statements that my friend made in answering
7 questions from the Commission around the need for
8 additional engagement and other activities to occur
9 if this Commission approves the proposed deviation
10 and prior to that deviation being constructed.
11 Ms. Walker claimed that the archeological and
12 cultural work that has been done to date in that
13 area was all associated with the microtunnelling
14 approach and that additional work would need to be
15 done if Trans Mountain were to proceed with the
16 deviation. That is not correct, Commissioners, and
17 it's not supported by the evidence that is before
18 you.

19 The evidence that is before you - and I
20 encourage you to look at Mr. Nock's testimony on
21 Monday - was that the archeological and cultural
22 work that was done, was done specifically along the
23 proposed deviation route. With reference to
24 Ms. Walker's suggestion that culturally important
25 sites present themselves to SSN knowledge keepers,

1 Trans Mountain has respected that view, and that is
2 why it has walked the route already with knowledge
3 keepers, and Mr. Nock explained that there were
4 sites identified, but none of those sites will be
5 along the proposed route for the deviation.
6 Mr. Nock also explained and committed on Monday
7 that Trans Mountain will continue to work with SSN
8 if the deviation is approved, and that would
9 include, again, walking the route with SSN
10 knowledge keepers before any shovel goes into the
11 ground. That's the approach that Trans Mountain
12 has followed with SSN to date in the area, and
13 Trans Mountain remains committed to it. But in my
14 submission, it would be unreasonable to impose
15 conditions on any approval of this deviation that
16 would hold up construction to allow for further
17 engagement with SSN when the evidence is that SSN
18 has had extensive opportunities since last spring
19 to engage with Trans Mountain on the details of the
20 proposed deviation, and it chose not to avail
21 itself of those opportunities.

22 And the last theme that I would like to
23 reply to from my friend is the suggestion that
24 approval of the proposed deviation would somehow
25 harm reconciliation. Now, in making those

1 submissions, my friend cited a number of cases for
2 the general proposition that reconciliation with
3 Indigenous groups is part of the overall public
4 interest, and to be clear, Commissioners, we do not
5 dispute that. What we do dispute is Ms. Walker's
6 implication that Trans Mountain should effectively
7 be required to pursue a construction method that it
8 now views as high-risk, that will require
9 significant additional costs, and that will delay
10 completion of the TMEP. That approach, the
11 evidence shows, would also cause greater overall
12 disturbance to the Pipsell area, if and when the
13 tunnel fails.

14 Mr. Goulet for Trans Mountain explained on
15 Monday that that approach would not, in Trans
16 Mountain's view, be prudent. And I also submit it
17 would be contrary to the overall public interest,
18 which, as I explained this morning, is inclusive
19 not only of reconciliation with Indigenous groups
20 but includes the interests of all Canadians. There
21 is no prioritizing of Indigenous interests versus
22 other interests. Public interest encompasses it
23 all.

24 As I referenced this morning, the NEB was
25 clear in its reconciliation report for the TMEP

1 that any one aspect of the public interest, such as
2 reconciliation, should not be applied in isolation
3 from the rest of the factors regarding public
4 interest. And, in fact, one of the cases that
5 Ms. Walker cited around reconciliation and the
6 public interest was the *Dilico* case [**2020 ONSC**
7 **892**], which was a 2020 decision from the Ontario
8 Supreme Court. And at paragraph 72 of that
9 decision, the Court states that the public interest
10 includes a high level of respect for decisions of
11 the executive branch. In this case, that would be
12 the executive's decision that the Trans Mountain
13 Expansion Project is in the nation's public
14 interest, and as I explained this morning, that
15 means it is in the public interest to execute this
16 project in a timely and orderly way. And again,
17 that is just one aspect of the public interest.
18 Reconciliation is another, but this is a
19 multifaceted approach, and the Commission must be
20 alive to all aspects of the public interest in
21 making its decision.

22 At the end of the day, the Commission must
23 decide: What is in the best interests of Canada?
24 Is that forcing Trans Mountain to proceed with a
25 construction method that it views as high risk of

1 failing and that will delay the in-service date for
2 this nationally important project? Or is it
3 allowing for timely completion of the project
4 through alternative, low-risk construction methods
5 which have been designed to minimize impacts to SSN
6 and which are aligned with the terms of consent to
7 the project that SSN provided? For the reasons I
8 set out this morning, we submit the proposed
9 deviation is in the overall public interest, and it
10 would be contrary to the public interest to force
11 Trans Mountain to continue with microtunnelling in
12 the present circumstances. Forcing Trans Mountain
13 to proceed with microtunnelling would put at risk
14 the key benefits of the TMEP that formed the basis
15 for the federal government's approval of the
16 project, and that included specific benefits to
17 Indigenous groups. Diminishing the benefits to
18 certain Indigenous groups while giving SSN the
19 ability to control the construction methodology for
20 1.3 kilometres of the project route would, in my
21 respectful submission, not advance reconciliation,
22 and it would effectively amount to a veto for SSN,
23 which is contrary to Canadian law and the interests
24 of many other Indigenous groups across the pipeline
25 route.

1 So with that, Commissioners, those are my
2 reply submissions, and I'm happy to take any
3 questions you may have.

4 CHAIR PENNEY: Okay. Mr. Sanderson -- Mr. Duncanson,
5 sorry. I knew I was going to do that eventually.

6 MR. DUNCANSON: Happens at least once every hearing.

7 CHAIR PENNEY: Okay. Mr. Duncanson, we have no
8 questions, no further questions. So that concludes
9 argument and all procedural steps in this
10 proceeding. I officially declare the record
11 closed.

12 So on behalf on my colleagues I would like
13 to thank Trans Mountain and Stk'emlúpsenc te
14 Secwépemc for the time and effort that their
15 representatives have put into this very important
16 hearing. I'd like to offer a special thank you to
17 knowledge keeper Jeannette Jules for travelling
18 here and sharing her love of the land with us on
19 Monday.

20 The Commission will issue its decision on
21 Trans Mountain's application in due course once it
22 has fully considered all of the parties'
23 submissions. So thank you very much, everyone, and
24 take care.

25 **(PROCEEDINGS CONCLUDED AT 2:55 P.M.)**

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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 20th day of September, 2023.



Joanne Lawrence, RPR, CSR(A)
Court Reporter