

Dockets: A-78-17 (lead file); A-217-16; A-218-16;
A-223-16; A-224-16; A-225-16; A-230-16;
A-232-16; A-68-17; A-73-17; A-74-17;
A-75:17; A-76-17; A-77:17; A-84-17; A-86:17

FEDERAL COURT OF APPEAL

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF
BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH
INDIAN BAND), XÁLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on
his own behalf and on behalf of all members of the Squamish Nation,
COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as
Chief of the Coldwater Indian Band on behalf of all members of the Coldwater
Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE,
SHXWÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION,
TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAU-KWAU-APILT,
CHIEF DAVID JIMMIE on his own behalf and on behalf of all member of
the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON
IGNACE, and CHIEF FRED SEYMOUR on their own behalf and on
behalf of all other members of the STK'EMLUPSEMC TE SECWETEMC of the
SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION
and LIVING OCEANS SOCIETY

Applicants

and

ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

AFFIDAVIT OF KEVIN JARDINE

I, Kevin Jardine, of the City of Victoria in the Province of British Columbia, SWEAR THAT:

1. I am the Associate Deputy Minister and Executive Director of British Columbia's Environmental Assessment Office. In that capacity, I instructed legal counsel for the Province of British Columbia in the National Energy Board ("NEB") hearing regarding the Trans Mountain Pipeline Expansion Project (the "Project"). As such, I have personal knowledge of the facts and matters deposed to in this affidavit, except where stated to be

based on information and belief, in which case I verily believe them to be true.

2. The Province of British Columbia participated in the NEB hearing regarding the Project. Attached as **Exhibit "A"** to this my affidavit is a copy of British Columbia's Application to Participate in the NEB hearing regarding the Project.

3. The Province of British Columbia submitted final written argument with the NEB. A copy of the Final Argument of the Province of British Columbia filed with the NEB is attached as **Exhibit "B"** to this my affidavit.

4. Attached as **Exhibit "C"** to this my affidavit is a copy of an NEB summary regarding the Project.

5. On April 11, 2017, writs of election were issued in British Columbia, resulting in the dissolution of the Legislative Assembly and initiating a general election. The Province's current government was not sworn in until July 18, 2017.

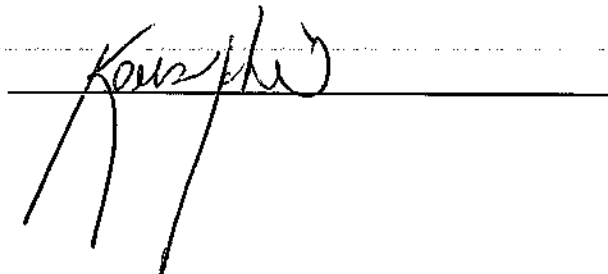
6. By Order dated May 15, 2017, this Court granted the Attorney General of Alberta ("Alberta") leave to intervene in these proceedings. I have reviewed the submissions of Alberta and note Alberta intends to make submissions on a number of topics, including the benefits of the Project from the perspective of Alberta's economy given the allegation that the NEB or the Governor in Council failed to discharge their obligation to balance the costs and benefits associated with the Project in determining the public interest. Attached as **Exhibit "D"** to this my affidavit is a copy of Alberta's written representations in support of their motion for leave to intervene.

7. I make this affidavit in support of British Columbia's motion for leave to intervene in these proceedings.

SWORN BEFORE ME
at Victoria, British Columbia,
the 22nd day of August, 2017

A commissioner for taking affidavits
for British Columbia

Keith Phillips
Barrister and Solicitor
1405 Douglas Street, 3rd Floor
Victoria BC V6W 9J6
250-356-8523



National Energy
Board



Office national
de l'énergie

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Application to Participate(A57275)

Filing Date: 2014-02-07

Hearing Information

Project Name: Trans Mountain Pipeline Expansion Project

Company: Trans Mountain Pipeline ULC

File Number: OF-Fac-Oil-T260-2013-03 02

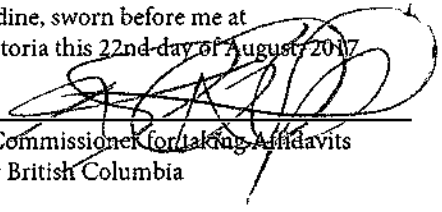
I am Applying as:

- ☐ An Individual
- ☐ Authorized Representative on Behalf of an Individual
- ☒ A Group

Select which one best describes your group:

- ☐ Company
- ☐ Association (Special Interest Group)
- ☐ Aboriginal
- ☐ Federal Government
- ☒ Provincial Government
- ☐ Territorial Government
- ☐ Municipal Government
- ☐ Others

This is Exhibit "A" referred to in the Affidavit of Kevin
Jardine, sworn before me at
Victoria this 22nd day of August, 2017


A Commissioner for taking Affidavits
for British Columbia

- ☒ My group is an organization that will represent its own interests
- ☐ My group is a collection of individuals with common interest

Contact Information:

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<http://www.neb-one.gc.ca>
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1

- If you apply as individual, the contact information is for the Person Applying to Participate.
- If you apply as Authorized Representative, the contact information is for the Individual you are representing.²
- If you apply as Group, the contact information is for the Group's main contact.

Salutation: Mr.

Last Name: Jones

First Name: Christopher

Title: Counsel for the Province of British Columbia

Organization: Province of British Columbia

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Victoria, British Columbia V8W 2G5
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Authorized Representative(s) Information:

If you do not have an authorized representative this section will be blank.

Method of Participation

I wish to participate as a:

- ☐ Commenter
- ☒ Intervenor

Interest or Expertise

- ☒ The Group I am representing is **directly affected** by the proposed Project
- ☐ The Group I am representing has **relevant information or expertise**

Connection to Project Issues

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1. The need for the proposed Project.
2. The economic feasibility of the proposed project.
3. The potential commercial impacts of the proposed Project.
4. The potential environmental and socio-economic effects of the proposed project, including any cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB's Filing Manual.
5. The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that may occur.
6. The appropriateness of the general route and land requirements for the proposed project.
7. The suitability of the design of the proposed project.
8. The terms and conditions to be included in any approval the Board may issue.
9. Potential impacts of the project on Aboriginal interests.
10. Potential impacts of the project on landowners and land use.
11. Contingency planning for spills, accidents or malfunctions, during construction and operation of the project.
12. Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.

The Province of British Columbia would be directly affected by the proposed project in many ways. These include the following. First, much of the proposed project would traverse Crown land (see s. 5.3 of volume 2 of the application). Second, in the event of a spill or other malfunction the proposed project, provincial land or other property could be adversely impacted. As a result, the Province is keenly interested in the means by which accidents associated with the proposed project will be avoided, and where they may occur, effectively addressed. In addition, the Province is interested in the impacts the proposed project may have on highway or other infrastructure operated by the Province. For example, it is proposed that the project will parallel certain provincial highways (see for example s. 4.2.3.3 of volume 2 of the application). Further, the Province would be directly impacted by the project's economic activity, including that which would result in revenues to the Province. Finally, as a representative of all British Columbia residents, including First Nations, the Province has a direct interest in the effect the proposed project would have on the lives of its citizens, including potential environmental, economic, social and health effects.

Access, Notification and Service

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Which official language do you wish to use in correspondence with the Board and at the public hearing?

English ☒ French ☐

4

Documents submitted electronically are available on the Board's electronic document repository, (Click 'View' under 'Regulatory Documents' at www.neb-one.gc.ca). If you have the capability to access the repository, the Board and other Participants in this proceeding may serve you by notifying you that a document has been filed and is available in the repository, instead of serving you with a hard copy of the document.

Are you able to access the Board's electronic document repository?

Yes ☒

No ☐

Notification by email advising that a document has been filed will be sent to the following email addresses:

Christopher Jones [christopher.h.jones@gov.bc.ca]

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Calgary, Alberta T2P 0X8

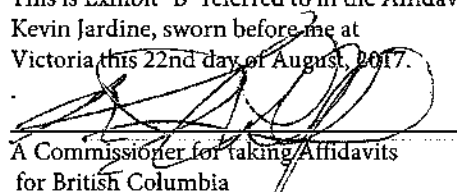
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This is Exhibit "B" referred to in the Affidavit of
Kevin Jardine, sworn before me at
Victoria this 22nd day of August, 2017.


A Commissioner for taking Affidavits
for British Columbia

Hearing Order OH-001-2014

Board File: OF-Fac-Oil-T260-2013-0302

NATIONAL ENERGY BOARD

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

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

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

Final Argument of the Province of British Columbia

January 11, 2016

Introduction

1. Her Majesty the Queen in Right of British Columbia (the “Province”) makes the following argument with respect to the application by Trans Mountain for a Certificate of Public Convenience and Necessity (“CPCN”) for the project referred to in the hearing order referenced above (the “Project”).
2. The Province supports bringing Canada’s oil to international markets. However, this must be accomplished in an environmentally responsible and appropriate manner. Therefore, in July 2012, the Province identified five requirements that must be met in order for it to consider supporting a heavy oil pipeline project within British Columbia.¹ The requirements are:
 - Successful completion of the environmental review process. With respect to the Project, this means a positive recommendation by the Board;
 - World-leading marine oil spill response, prevention and recovery systems for B.C.’s coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;
 - World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
 - Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and
 - British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers.

¹ A3S0Q7, Application Volume 1, Summary, Section 4.0: Provincial Interests, PDF p. 103.

3. The second and third requirements are closely related in subject matter to issues to be considered by the NEB during this review process, as set out in the List of Issues released on July 29, 2013.²
4. Therefore, throughout this proceeding, the Province's chief focus has been on Trans Mountain's ability to effectively prevent and respond to spills from the proposed pipeline itself, or from tankers calling at the Westridge Marine Terminal. Accordingly, the Province has filed three sets of detailed information requests pertaining to those matters³, and has insisted that Trans Mountain provide full and adequate answers to such requests.⁴
5. In particular, in an effort to evaluate the strength of Trans Mountain's spill planning and preparedness, the Province has asked that Trans Mountain file detailed information regarding the Emergency Management Program in place for the existing pipeline, which the Province has consistently asserted is directly relevant to the issues to be considered by the Board in this proceeding.⁵ However, Trans Mountain has not filed the information required by the Province in order to assess its ability to respond to a spill in a timely and effective manner. The heavily redacted Emergency Management Program documents Trans Mountain has filed do not enable the Province to determine whether Trans Mountain is prepared and able to respond to a Project-related spill.⁶
6. The Province can of course only base its position in this proceeding on what has been filed in it, and within the parameters set by the Board for its consideration of the Project. Had Trans Mountain provided sufficient information in this proceeding to enable the Province to conclude that it would have world-class marine and terrestrial spill prevention and response capacity, then the Province would have been in a position to support the issuance of a certificate for the Project. However, this is not the case.

² In particular, issues No. 5, 11 and 12.

³ A3W7T3, BC Information Request (IR) No. 1; A4G5Y0, BC IR No. 2; and A4H8E1, BC TERMPOL IR.

⁴ A3Y8R3, BC Notice of Motion No. 1.

⁵ *Ibid.*, PDF p. 4-5. See also A4F7Q9, BC Notice of Motion No. 2, PDF p. 5-8, and A4C3Y5, Ruling No. 31, in which the Board found at PDF p. 4 that "Trans Mountain has not shown that its interest in confidentiality of the entire EMP documents outweighs the public interest in disclosure".

⁶ BC Notice of Motion No. 2, *ibid.*, PDF p. 18-19.

While the Province will continue outside this proceeding to evaluate the Project against the requirements referenced in paragraph 2 above, including requirements No. 4 and 5, the evidence on the record in this proceeding is not sufficient to address the Province's concerns with respect to potential Project-related spills. Therefore, the Province cannot support Trans Mountain's application based on the evidence it has filed in this proceeding.

7. In the alternative, should the Board recommend approval of the Project, the Province urges the Board to impose clear, measurable and enforceable certificate conditions. The Province's comments on the draft conditions released by the Board on August 12, 2015, and its recommendations for additional conditions, are set out in Appendices A and B.

The structure of this argument

8. Following a brief discussion of the relevant statutory framework, this argument will set out, in turn, the Province's outstanding concerns with respect to the following aspects of the Project:
 - pipeline spill prevention through pipeline design features;
 - leak detection;
 - particular challenges in responding to a pipeline spill;
 - pipeline spill preparedness and spill response planning; and
 - marine spill preparedness and response.

The statutory framework

9. In making its recommendation with respect to the issuance of a CPCN, the Board may take into consideration a very broad array of factors.⁷

⁷ *Emera Brunswick Pipeline Co. (Re)*, 2007 LNCNEB 3, para. 41-48; *Nakina (Township) v. Canadian National Railway Co.* [1986] F.C.J. No. 426 (C.A.).

10. Section 52(2) of the *National Energy Board Act*⁸ provides that the Board “shall have regard to all considerations that appear to it to be directly related to the pipeline”. The issues of principal concern for the Province, referenced above, namely the prevention of and response to spills from the Project, fall squarely within the scope of considerations “directly related to the pipeline”.
11. The Board also has broad authority with respect to the recommendations it will make under the *Canadian Environmental Assessment Act, 2012*.⁹

The pipeline

Spill prevention through pipeline design

12. The Application states as follows with respect to spill prevention:

KMC, as the operator of the TMPL system, considers the prevention of spills to be the primary goal and will employ the necessary management systems and resources to ensure that this goal is achieved on the TMEP. The measures available to prevent and mitigate spills from new pipelines and facilities will be appropriate to the nature of the threat and the associated consequences of a spill.¹⁰ [emphasis added]

13. Trans Mountain has adopted a risk-based pipeline design approach. On numerous occasions, the evidence given by Trans Mountain refers to this approach as an “industry-leading, world class design approach”.¹¹ Risk-based design, Trans Mountain states, aims to identify potential risks and to define and adopt mitigation measures so as to both reduce the likelihood of a failure and mitigate its consequences. One of the principal methods of mitigating the consequences of a failure is “the optimization of valve placement and design”.¹²
14. However, despite its stated commitment to the use of industry-leading, world-class pipeline design practices, Trans Mountain has, without adequate justification, declined to implement

⁸ R.S.C., 1985, c. N-7.

⁹ S.C. 2012, c. 19, s. 52, ss. 5, 19.

¹⁰ A3S0Q7, Application Volume 1, Summary, Section 2.8: Risk Assessment and Management of Pipeline and Facility Spills (Volume 7), PDF p. 71.

¹¹ A4H8W6, Trans Mountain response to BC IR No. 2.08 a), PDF p. 31.

¹² *Ibid.*, PDF p. 32.

measures to limit the maximum possible volume of oil that would flow from the new pipeline in the event of a loss of containment. When asked by the Province whether it would commit to installing isolation valves so as to limit maximum outflow to 2,000 m³, Trans Mountain states that it would not, citing the “practical limitations with respect to the siting of valves, such as the presence of rivers, steep ravines, avalanche slopes, accessibility, landowner constraints, and practical feasibility of bringing power into a valve site”.¹³ No specific evidence is offered to substantiate the assertion that setting a threshold outflow volume is impractical.

15. This ignores the fact that the proponent of another heavy oil pipeline project designed to pass through British Columbia, Northern Gateway Pipelines Inc. (NGP), has committed to installing valves to limit potential outflow volumes to 2,000 m³ for watercourses identified as having a high fish sensitivity ranking or where a watercourse leads to a high fish sensitivity ranked watercourse.¹⁴
16. Trans Mountain describes the identification of valve placement as an iterative process, involving a “sensitivity analysis” which considers “the marginal benefit on outflow volume among other factors in the decision-making process that is incorporated into the finalization of valve placements”.¹⁵ However, the analysis conducted by Trans Mountain – including the identification and weighting of various considerations and their balancing against each other – has not been made available to the Board, intervenors, and the public. Without any further information regarding the decision-making process employed by Trans Mountain in identifying valve placements, the Province is not satisfied that Trans Mountain’s decision not to set a threshold outflow volume for Line 2 is reasonable.
17. Even if, as Trans Mountain asserts, the goal of limiting potential outflow volumes to 2,000 m³ is not “achievable in a practical sense” for the entirety of the pipeline, it is acknowledged that “watercrossings may lend themselves to this goal”¹⁶. However, Trans Mountain has not alleviated the concerns underlying the Province’s information request – it has not committed to limiting outflow to 2,000 m³ at watercrossings and where reasonably practicable. Nor has it,

¹³ A4H8W6, Trans Mountain response to BC IR No. 2.13 g) and h), PDF p. 59-61.

¹⁴ *Ibid.*, PDF p. 60.

¹⁵ A4K4W3, Trans Mountain response to NEB IR No. 4.17 b.2), PDF p. 85-86.

¹⁶ *Supra* note 13, PDF p. 60.

for locations where such an objective may not be reasonably attained, provided sufficient information for the Province to fully understand why that is so.

18. As a result, maximum spill volumes under the current design remain as high as 4,600 m³.¹⁷ The risk posed by a project capable of releasing 4,600,000 litres of diluted bitumen into the environment is significant, and the Province would have expected Trans Mountain to offer, in its application and in responses to information requests, a more fulsome description of the reasons why, as it alleges, implementing measures that further limit potential spill volumes is not practically feasible. In short, Trans Mountain has not shown that, in this regard, it has adopted world-class design methods for the Project.¹⁸

Spills from the pipeline may occur

19. As noted above, one of the Province's principal concerns is the potential for spills from the pipeline itself, and the ability of Trans Mountain to effectively respond to a spill so as to mitigate its effects.
20. The focus of the Application and of the evidence it has placed on the record is on the alleged infrequency of spills and the improbability of a significant release. The reader is repeatedly reminded of the unlikelihood of a release.¹⁹ However, pipeline spills can occur and have occurred, and Trans Mountain acknowledges that fact.

The effects of a spill could be severe

21. Trans Mountain does not dispute the fact that "substantial adverse environmental and socio-economic effects could result if a credible worst-case or smaller spill were to occur".²⁰ Trans Mountain further concedes that the effects of a pipeline spill could last for decades. Trans Mountain admits, for instance, that site remediation and reclamation following the 2005

¹⁷ A4H8W6, Trans Mountain response to BC IR No. 2.13 d), PDF p. 59.

¹⁸ See also A4H8W6, Trans Mountain response to BC IR No. 2.13 I), PDF p. 61., in which Trans Mountain declines to undertake the requested review of outflow volume thresholds for comparable heavy oil pipelines across North America and Europe.

¹⁹ See, for example, references to the "unlikely event of a release/pipeline release" in Trans Mountain's response to BC IR No. 2, *ibid*, PDF p. 35, 50, 149, 156, 165, 168, 171, 174, 176, and 193.

²⁰ A4H8U3, Trans Mountain response to Matsqui First Nation IR No. 2.04 g), PDF p. 19.

Ward Road release has just been completed²¹, and that the remediation of groundwater contamination in the event of a release could span over two decades.²²

22. The evidence on the record shows that crude oil released from the pipeline could enter a watercourse, and, even if such watercourse is not fish-bearing or a source of drinking water, it is likely to eventually reach a watercourse with high sensitivity for fish and fish habitat, or a watercourse that may be used as a source for drinking water.²³ This potential for adverse impacts on human health and the environment has caused Trans Mountain to highlight the need for a prompt and effective response to a pipeline spill.

Spill response planning is essential

23. Trans Mountain does not take issue with the proposition that spill response planning is vital to the mitigation of the effects of a spill:

... [S]pill prevention, preparedness, and effective response activities must always be a primary focus to reduce the probability of an oil spill, and to have adequate oil spill response plans and procedures in place that have proven capability to reduce the magnitude and extent of actual effects on people and the environment. [sic]²⁵

24. Consistent with that goal, Trans Mountain has committed to achieving “world leading land oil spill preparedness and response”²⁶:

KMC must have the necessary resources and plans to ensure the safety of the public and the environment in the event of an oil spill, and ensure that clean-

²¹ A4H8W6, See Trans Mountain response to BC IR No. 2.41 j), PDF p. 194, where Trans Mountain states: “At the end of the emergency response phase, KMC continued with site remediation and reclamation for several years. Remediation is not complete and KMC is in the process of removing the groundwater monitoring wells in order to receive formal closure from the National Energy Board”.

²² See A4H8W6, Trans Mountain response to BC IR No. 2.09 e), PDF p. 38, in which Trans Mountain estimates that returning contaminated groundwater to applicable standards for agricultural and drinking water could take from “under a year to over a decade”, and g), PDF p. 39-40, in which Trans Mountain states that “[r]emediation of the aquifer at [the Trans Mountain facility in Jasper, Alberta] has been ongoing since 1994”.

²³ A4H1V2, Trans Mountain response to NEB IR No. 3.044 a), PDF p. 336.

²⁵ A4H9D0, Trans Mountain response to Squamish First Nation IR No. 2.5 a), PDF p. 26.

²⁶ A3S0Q7, Application Volume 1 – Summary, section 4.3 – World Leading Land Oil Spill Preparedness and Response, PDF p. 108.

up is timely and effective. Accordingly, KMC has an established Emergency Management Program that is central to KMC's response to an emergency.²⁷

25. However, for reasons further discussed below, the Province submits that the evidence Trans Mountain has put on the record can only lead to the conclusion that the Project falls short of a "world leading" standard.

Leak detection

26. The ability to promptly detect a release from the pipeline is the first element of an effective spill response system. However, the evidence on the record does not demonstrate an overall ability to consistently detect a release from the pipeline in a timely manner. Each leak detection method Trans Mountain refers to in the evidence is discussed in turn below.

In-line inspections

27. The standard interval between in-line inspections (ILIs) is five years, and Trans Mountain considers this frequency to be adequate to ensure the integrity of its pipeline system.²⁹ Yet in the event of a slow leak that remains undetected by other means, 100 m³ to 200 m³ of oil would be released from the pipeline during this five year interval.³⁰
28. Trans Mountain's response to any concerns in that regard is that a spill of 100 m³ to 200 m³ of oil would likely be detected by other means long before five years: regular aerial patrols, personnel working on the pipeline, or members of the public would be quick to identify such a sizable spill.³¹
29. The Province does not consider Trans Mountain's reliance on a release becoming sufficiently large to become easily visible on the ground to constitute an appropriate leak detection approach. Beyond the prevention of leaks, Trans Mountain's focus ought to be on their prompt discovery. Mere reliance on visual observation to detect leaks of a significant size has

²⁷ *Ibid.*

²⁹ A3S1L1, Application Volume 4C, Project Design and Execution – Operations and Maintenance, Section 8.1.4, PDF p. 52.

³⁰ A4H8W6, Trans Mountain response to BC IR No. 2.18 c), PDF p. 102.

³¹ *Ibid.*, PDF p. 103.

no place in an industry-leading, world-class leak detection program – particularly when a significant portion of the pipeline is obscured by snow cover for a large part of each year.

Automated leak detection

30. The sensitivity thresholds of the computational pipeline monitoring (CPM) system Trans Mountain will use for Line 2 are expected to be in the range of 2% to 5% of the pipeline flow rate.³² Trans Mountain expects a full bore rupture to be detected within five minutes, while a small leak nearing the minimum detectable threshold could require up to two hours to be detected. Assuming normal CPM function and appropriate human response to system alarms, these timeframes produce an estimated released volume in the range of 314 m³ to 377 m³ for Line 2 (and even higher for the delivery lines).³³ Such volumes are significant.
31. Although Trans Mountain asserts that the CPM system has become increasingly sophisticated, and refers to a number of technology improvements, it offers no evidence to support the assumption that such improvements have, in reality, resulted in improved leak detection.³⁴ Similarly, while Trans Mountain has committed to the use of a second, complementary CPM system that will operate in parallel with the existing system, it provides no evidence to support the claim that this will indeed “maximize[...] CPM leak detection capability”.³⁵
32. Moreover, Trans Mountain concedes that slack flow conditions decrease the reliability, sensitivity and accuracy of the CPM system³⁶, thus resulting in increased estimated release volumes. Slack flow conditions may occur downstream of the Coquihalla summit³⁷, which, as is stated below, happens to be a less accessible, highly sensitive area.
33. Trans Mountain remains confident that a leak falling below the CPM sensitivity threshold is very unlikely to go unnoticed for twelve hours or more, since “the CPM system is used in combination with other monitoring methods, such as Control Centre Operator (CCO)

³² A4H8W6, Trans Mountain response to BC IR No. 2.15 b), PDF p. 72.

³³ A4K4W3, Trans Mountain response to NEB IR No. 4.38 d), PDF p. 150.

³⁴ A4H9J8, Trans Mountain response to A. Weaver IR No. 2.11, PDF p. 65.

³⁵ A4H8I9, Trans Mountain response to City of Vancouver IR No. 2.09.2 i., PDF p. 333.

³⁶ A4K4W3, Trans Mountain response to NEB IR No. 4.38 f.4), PDF p. 151.

³⁷ A3Z4T9, Trans Mountain response to NEB IR No. 2.090 a), PDF p. 361.

monitoring using the supervisory control and data acquisition (SCADA) system, scheduled line balance calculations, and surveillance patrols”.³⁸

34. However, a review of Trans Mountain’s spill history shows that SCADA has not proven to be fully effective in detecting leaks on the pipeline system. In fact, only one of the seven spills reported over the past ten years was initially identified by SCADA.³⁹ Further, none of the remaining six leaks triggered CPM system alarms: five of them fell below the CPM detection threshold, and the last one occurred on the Westridge Delivery Line, which was not included in the CPM model at the time.⁴⁰
35. With a leak going undetected by CPM and SCADA a substantial possibility, visual observation and/or odour complaints remain Trans Mountain’s dominant leak detection method. Of the six leaks that were not identified by SCADA and/or CPM, one was reported by an emergency call to the Control Centre, and two were discovered while investigating odour complaints.⁴¹ In other words, half of the releases came to Trans Mountain’s attention thanks to third party reports.
36. In sum, in light of the evidence on the record, the Province is not satisfied that the leak detection methods on which Trans Mountain currently relies are sufficient to detect a pipeline release in a timely manner. Although Trans Mountain commits to reviewing complementary leak detection systems and to evaluating technology advancements and improvements to existing technology⁴², it makes no firm commitment to the use of such technologies. Similarly, Trans Mountain describes its participation in joint industry projects aimed at investigating the “viability” of commercially available external leak detection systems and aerial surveillance systems.⁴³ Trans Mountain does not, however, commit to the use of such systems.

³⁸ A4H8S4, Trans Mountain response to Katzie First Nation IR No. 2.05 c), PDF p. 15.

³⁹ A3Z2A6, Trans Mountain response to BC motion to compel full and adequate answers to BC IR No. 1 – IR No. 1.4 b), PDF p. 4.

⁴⁰ A4H8W6, Trans Mountain response to BC IR No. 2.15 f), Table 2.15F-1, PDF p. 74.

⁴¹ *Ibid.*

⁴² A4H8W6, Trans Mountain response to BC IR No. 2.15 g) and i), PDF p. 74-76.

⁴³ *Ibid.*, PDF p. 74-75.

37. The Province submits that this lack of a commitment to the use of state-of-the-art systems and technologies falls short of an “industry-leading, world-class” standard. Therefore, in Appendix A, the Province proposes the addition to draft certificate condition No. 125 of a requirement to implement any additional leak detection technology that has been proven to be effective and feasible.

Response to alarms and pipeline shutdown

38. Trans Mountain claims that it would shut down the pipeline immediately if a potential leak were identified or suspected⁴⁴, and that a report of a release would result in the immediate shutdown of pumps⁴⁵. The evidence does not bear out those statements. Following the 2005 Ward Road release, the pipeline, then operated by Terasen, was not shut down for an entire week following the first odour complaint, despite repeated complaints.⁴⁶
39. The 2012 Tank 121 release at the Sumas Tank Farm further demonstrates Trans Mountain’s slow response to an indication of loss of containment. Although in that particular instance no shutdown was required, since the tank was, at the time, inactive and isolated, Trans Mountain did not react to an alarm at the Control Centre for over three hours, and the release was not confirmed until more than four hours after the alarm was triggered.⁴⁷
40. There is, therefore, no evidence on the record to suggest that Trans Mountain’s practice is in fact to shut down the line or take otherwise appropriate action as soon as a leak is suspected or indicated. Instead, Trans Mountain’s response to previous incidents indicates that action would not be taken until confirmation of a leak, which, in some instances, is a lengthy process.
41. Even when shutdown has been prompt, it has not always been carried out appropriately.⁴⁸
42. Although it will review and revise its Control Centre procedures⁴⁹, Trans Mountain has not committed to a prescribed specific shutdown initiation time to be applied during the

⁴⁴ A3Y2Z1, Trans Mountain response to BC IR No. 1.4 c), PDF p. 14.

⁴⁵ A3Y2Z1, Trans Mountain response to BC IR No. 1.17 a), PDF p. 54.

⁴⁶ A4H8W6, Trans Mountain response to BC IR No. 2.20 h), PDF p. 115.

⁴⁷ *Ibid.*, PDF p. 117.

⁴⁸ See the improper shutdown at the Westridge delivery line in 2007, *ibid.*, PDF p. 116, due to the improper identification of the precise location of the leak and the valves to be closed, all of which exacerbated the spill.

operation of Line 2. It simply states that it will “consider” introducing a rule directing Control Centre Operators to perform a controlled shutdown when a leak cannot be ruled out in “a given time period after initial indication”.⁵⁰ In the Province’s submission, this vague commitment does not provide the required assurance that Trans Mountain would appropriately respond to pipeline leaks. Therefore, and as discussed in further detail in Appendix A, the Province supports the imposition of a certificate condition requiring Trans Mountain to introduce a rule directing the Control Centre Operator to perform a controlled shutdown of the pipeline if a leak cannot be ruled out within a prescribed time period after initial indication that a leak may have occurred.

Particular challenges in responding to a spill from the pipeline

Access

43. It is a well-known fact, recognized by Trans Mountain, that following the detection of a release, the ability to quickly reach the site of a spill is critical to the mounting of an effective response.⁵¹
44. Trans Mountain acknowledges that, though an unlikely event, a spill could occur at a remote, difficult to access location:

Acute effects were evaluated following an assumption of no mitigation ... This is not to say that effective oil spill response efforts would not be mounted. Rather it is a conservative assumption that reflects the fact that spills could occur at remote locations, and that substantial environmental effects could occur within 24 hours of a large oil spill occurring.⁵²

⁴⁹ A4H8W6, Trans Mountain response to BC IR No. 2.20 b), PDF p. 112.

⁵⁰ A4H8W6, Trans Mountain response to BC IR No. 2.20 c), PDF p. 113. This lack of a firm commitment contrasts with the clear commitment by NGP to “enforce a strict “10-minute rule” to begin shutting down the lines within that period if an unexpected reading occurred” (Connections – Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1, Section 3.5, How would the project operate?, PDF p. 45).

⁵¹ A3W9H8, Trans Mountain response to A. Azevedo IR No. 2.2.1 d), PDF p. 12.

⁵² A3W9H8, Trans Mountain response to A. Azevedo IR No. 2.2.1 e), PDF p. 12.

45. The evidence on the record shows that access to a spill from the pipeline would be particularly challenging in at least two locations: at KP 501-505 (Rearguard Falls and Fraser River)⁵³, and near the Coquihalla River.⁵⁴ Those two locations also happen to be home to particularly sensitive fish habitat.⁵⁵
46. Trans Mountain concedes that a pipeline spill has the potential to make its way into bodies of water.⁵⁶ It is also clear that the recovery of crude oil from water bodies is especially difficult.⁵⁷
47. Trans Mountain further concedes that the recovery of oil from fast-moving rivers poses specific challenges, since “vertical and horizontal mixing and other forms of turbulence distribute spilled oil and often restrict response and recovery efforts”⁵⁸. In other words, oil spilled in a fast flowing waterway is difficult to recover and may ultimately become entrained in the water column:

Where flow velocities are excessively high, river banks are too steep, or where there are other concerns, safety becomes the overriding factor that will preclude response efforts at a particular site. Sometimes the same conditions

⁵³ See Trans Mountain’s response to NEB IR No. 4.18, which at PDF p. 89 states: “Other locations in the vicinity of KP 501 to 504 that have poorer access to potential spill sites are in close proximity to a larger watercourse, such as the Fraser River (figure on PDF page 5 of 7).”

⁵⁴ See A3W9H8, Trans Mountain’s response to NEB IR No. 1.71, which states at PDF p. 405-406: “The most difficult section of the rights-of-way to access under all seasons is the Coquihalla Canyon. The pipeline enters the Coquihalla Canyon at about kilometer 963 and exits the difficult to access areas and rejoins Highway 5 at about kilometre 984 During the winter months a response in the Coquihalla Canyon may be slowed by high snowfall conditions. KMC is committed to the safety of employees and contractors; as such the area in the Coquihalla Canyon would first require an aerial evaluation for avalanche risk. If there is a potential for avalanche in the vicinity of the response, or along the access routes, avalanche control may be required.... Spring, summer and fall response is easier by comparison to winter response in the Coquihalla Canyon, but also has the potential risk of slides, and rapidly changing meteorological conditions..... This response specifically addresses the Coquihalla Canyon as potentially difficult to access during any time of the year”.

⁵⁵ See A3W9H8, Trans Mountain’s response to NEB IR No. 1.52 a), PDF p. 290, for a discussion of white sturgeon presence in the Upper Fraser River up to Rearguard Falls. See also the response to NEB IR No. 1.53 i), PDF p. 315: “One important spawning site is the Fraser mainstem downstream (0.5 km) from the confluence with the Coquihalla River (COSEWIC 2003).”

⁵⁶ See A3S4V6, Application Volume 7 – Risk Assessment and Management of Pipeline and Facility Spills, section 5.3.2 – Release to Water; A3S4V8-A3S4W6, Application Volume 7, Appendix C – Overland and Stream Flow Modeling of Potential Full-bore Ruptures; and A3S4W7, Application Volume 7, Appendix D – Simulations of Hypothetical Oil Spills from the Trans Mountain Expansion Project Pipeline – P1 V6 Route.

⁵⁷ See A4H8W6, Trans Mountain Response to BC IR No. 2.35 a), PDF p. 168, and 2.48 c), PDF p. 234.

⁵⁸ A4H8I7, Trans Mountain response to City of Richmond IR No. 2.15, PDF p. 18.

of high flow velocity, turbulent mixing, and other forces also result in oil being entrained and not amenable to recovery or cleanup.⁵⁹

Spilled diluted bitumen may sink

48. One particular challenge to the recovery of diluted bitumen from water arises when the product becomes submerged or sinks. The evidence shows that this may occur in freshwater⁶⁰, and has occurred. This is most notably evidenced by the significant oil sinking process observed following Enbridge's Marshall, Michigan spill.⁶¹
49. Trans Mountain attributes the presence of sunken oil in the Kalamazoo River following the Marshall, Michigan spill to "soil interactions as well as weathered oil interaction with suspended sediment in the river".⁶²
50. Trans Mountain maintains that the likelihood of diluted bitumen released from its facilities becoming submerged or sinking in river waters is low, owing mainly to the fact that suspended sediment concentrations in British Columbia rivers are not typically sufficiently high to cause significant sediment uptake and to cause an oil density change.⁶³
51. What Trans Mountain does not address in this particular context is the likelihood of sediment uptake, and resulting density changes, being caused by the spilled oil travelling on land and through wetlands before reaching a watercourse, weathering and picking up sediment along the way.⁶⁴ Though Trans Mountain points out that this soil interaction process occurred in Michigan, it does not appear to recognize the potential for this process to take place in British Columbia.⁶⁵

⁵⁹ *Ibid.*, PDF p. 17.

⁶⁰ See, for instance, A4D3F2, Trans Mountain's Pipeline Emergency Response Plan, which states at PDF p. 55 that "it is possible to have sunken or submerged oil in marine and freshwater environments".

⁶¹ A3S4V6, Application Volume 7 – Risk Assessment and Management of Pipeline and Facility Spills, section 5.3.2, Release to Water, PDF p. 14. See also A4L8R8, Written Evidence of E. May, Appendix F – National Transportation Safety Board, Accident Report NTSB/PAR-12/01 PB2012-916501, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release – Marshall, Michigan, July 25, 2010.

⁶² A4K4W3, Trans Mountain response to NEB IR No. 4.12, PDF p. 60.

⁶³ A4H8W6, Trans Mountain response to BC IR No. 2.33, PDF p. 161-163. See also A4H8U3, Trans Mountain response to Matsqui First Nation IR No. 2.08 a), PDF p. 40.

⁶⁴ *Supra* note 62, PDF p. 60-66.

⁶⁵ *Supra* note 63, PDF p. 162: "It is also important to note that during the Marshall spill, the spilled oil travelled on land and through wetlands where it could pick up a significant amount of sediment before reaching the

52. In the absence of further information distinguishing the British Columbia context from the Michigan context, Trans Mountain has not convinced the Province that diluted bitumen becoming submerged or sinking in British Columbia rivers is improbable.
53. In its current Pipeline Emergency Response Plan (the "Pipeline ERP"), Trans Mountain describes post-emergency recovery techniques for sunken and submerged oil, which involve "actions to re-mobilize the product so that it surfaces where skimmers and sorbents can be used to collect it". Techniques for the agitation of bottom sediments include raking, boats dragging sediment-disturbing devices, compressed air lances, and dredging.⁶⁶
54. The Province submits that the effectiveness of these techniques has not been proven, particularly in British Columbia's rivers. Since these techniques have only had limited success in low-gradient rivers such as the Kalamazoo River⁶⁷, and even in lake waters⁶⁸, the Province questions their usefulness in fast-moving rivers with sensitive spawning areas such as the Fraser or Thompson Rivers. Beyond the rudimentary information, quoted above, contained in its current Pipeline ERP, Trans Mountain has not developed a detailed, customized plan for the recovery of submerged or sunken oil from British Columbia rivers.

Trans Mountain has not demonstrated an ability to effectively respond to pipeline spills

55. In light of the possibility of a spill from the Project's facilities, and considering the serious consequences a significant spill could have, Trans Mountain must demonstrate – through the disclosure of sufficiently detailed evidence regarding its spill response plans

watercourse. The significance of the sinking process observed during the Marshall spill was not only due to high suspended sediments in the river, but also likely due to sediments that got attached to the oil before reaching the watercourse".

⁶⁶ *Supra* note 60, section 4.8.3 – Recovery of Sunken and Submerged Oil, PDF p. 56.

⁶⁷ See A4Q1T6, Written Evidence of Upper Nicola Band, NUKA Research and Planning, *Inland Oil Spill Response Logistics Analysis*, at PDF p. 8: "The 2010 diluted bitumen spill into the Kalamazoo River, which migrated 40 miles (65 km) downstream and impacted Morrow Lake, illustrated the potential for diluted bitumen to submerge and sink in fresh water environments, and presented a significant challenge to responders both in terms of locating the submerged oil and remediating it. Response techniques were intrusive and labour-intensive, and five years after the spill, oil remains in the lake bed and river sediments (USEPA, 2013; Mueller, 2015)".

⁶⁸ See the case study of the 2005 spill of Bunker C oil and pole-treating agent into Lake Wabamun, in which the Acquisition Directorate – Research and Development Centre states: "The success of removing the oil from the lake bottom was limited" (A4H7Y5, Trans Mountain response to A. Azevedo IR – Attachment 2.2.1 b-Attachment 1, Development of Bottom Oil Recovery Systems – Final Project Report – Appendix B, Sunken Oil Incidents and Case Studies, PDF p. 9).

and resources – that it does indeed have the capability to effectively respond to a spill. As is articulated in further detail below, the Province submits that the evidence Trans Mountain has placed on the record does not do so. Similarly, Trans Mountain’s assertion that it has “endeavored to address” the Province’s five requirements that must be met in order for it to consider supporting a heavy oil pipeline, including the implementation of “world-leading practices” for land oil spill prevention, response and recovery⁶⁹, is not borne out by the evidence on the record.

Trans Mountain’s safety record

56. The Province’s concerns with respect to Trans Mountain’s ability to respond to a spill are compounded by Trans Mountain’s spill history and its previous responses to spills.
57. Trans Mountain states as follows: “The existing TMPL system has been operating successfully for 60 years and will be safe and reliable for many more as a result of continuing proactive maintenance and integrity programs.”⁷⁰
58. However, in the past ten years, Trans Mountain has reported seven hydrocarbon releases from its facilities in Canada.⁷¹ Of those releases, three exceeded 1,300 bbl.
59. Similarly, Trans Mountain’s emergency response history is a cause for concern, which the evidence on the record fails to alleviate. Trans Mountain’s (then Terasen’s) response to the 2005 Ward Road release, for instance, points to serious faults in its ability to respond to a suspected leak in a timely and effective manner. The company received five odour complaints, but did not identify the source of the odours until one week after the first complaint.⁷² The source of the leak was ultimately identified by the City of Abbotsford’s Police and Fire Rescue Service (FRS). As was found by the Transportation Safety Board,

... the majority of the initial response, including locating the source of the leak, determining the extent of migration of the crude oil, and initiating

⁶⁹ A4W6L8, Trans Mountain Revised Final Argument, PDF p. 90.

⁷⁰ A4H8W6, Trans Mountain response to BC IR No. 2.14 b), PDF p. 66.

⁷¹ A3W9H8, Trans Mountain response to NEB IR No. 1.70 a), PDF p. 397-403.

⁷² A3Z8C3, Trans Mountain follow-up response to BC IR No. 1.16(b), Attachment 1 – Pipeline Investigation Report P05H0044.

containment (constructing three weirs) was completed by the FRS The initial response of FRS personnel was very effective, but because they had not been adequately informed by Terasen of the potential hazards of the products released from the pipeline, they lacked proper detection equipment to protect against potential occupational safety and health issues.⁷³

60. As the Transportation Safety Board concluded, “Terasen’s response and identification of the leak was delayed by a number of factors that were within the company’s capacity to manage and remediate”.⁷⁴ In sum, the Ward Road release demonstrates a failure to adequately react to odour complaints, to identify the source of a release, and to inform emergency personnel of potential occupational health and safety risks.
61. Of particular concern is Trans Mountain’s characterization of its response to that particular incident. The evidence filed in response to the Board’s information request omits the fact that the first odour complaint had been received on July 8, 2005, one week prior to the stated date of release of July 15, 2005, and that Terasen failed to identify the source of the odours and to commence emergency response operations for an entire week, despite repeated odour complaints.⁷⁵ The response also omits to mention the significant role played by Abbotsford FRS in responding to the emergency.⁷⁶
62. When asked by the Province to explain the discrepancy between the information contained within the Transportation Safety Board’s Investigation Report and the evidence supplied in response to the Board’s request, Trans Mountain acknowledges “the odour complaint information presented in [the Investigation Report] which, in hind-sight, suggests the release most likely commenced on or before July 8, 2005”. However, Trans Mountain explains, the Ward Road release was described to the Board as having occurred one week later as “that is

⁷³ *Ibid.*, PDF p. 15-16.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 71, PDF p. 399. When asked by the Board to identify, for each reported hydrocarbon release, the time it took for Trans Mountain personnel to get to the site and complete an initial assessment and the time it took Trans Mountain to mobilize equipment to the site, set up an incident command post, and commence emergency phase activities, Trans Mountain indicates a time of initial assessment of 7:30 am, an equipment arrival time of 10:40 am on July 15, 2005 and a time of incident command post activation of 11:10 am. The stated date of the release is July 15, 2005.

⁷⁶ *Ibid.*

when the release was verified by one of the pipeline operators”.⁷⁷ Trans Mountain goes on to describe the emergency response to the Ward Road release as “appropriate”.⁷⁸

63. In the Province’s submission, emergency response begins at the first indication of a loss of containment, or when an imminent spill risk is identified. That is why Trans Mountain’s response to the Ward Road release exemplifies a problematic approach to emergency response – one rooted in the belief that response need not begin until a release has been verified or confirmed. Given not only the delay in taking appropriate action at the time of the Ward Road event, but also Trans Mountain’s subsequent characterization of its response as prompt and adequate, the evidence concerning the Ward Road release reveals an overall approach to emergency response that falls short of first-rate spill response standards.
64. The Province’s concerns with respect to Trans Mountain’s spill response techniques are further heightened by the evidence filed by the City of Abbotsford. In his affidavit, Donald Beer, Fire Chief for the City of Abbotsford, states that despite the joint emergency preparedness exercises held by the company and the city, which had been committed to and conducted following the Ward Road release, “virtually none of the protocols for communications and emergency response that had been developed between the City and Kinder Morgan were actually carried out by Kinder Morgan employees” during the response to the release at Sumas Mountain Tank Farm in 2012.⁷⁹
65. Trans Mountain’s reluctance to provide the requested details of its response to previous incidents further diminishes the Province’s confidence in its ability to respond to a spill. When asked by the Province to detail the equipment deployed in response to the seven releases

⁷⁷ A4H8W6, Trans Mountain response to BC IR No. 2.41 d), PDF p. 192.

⁷⁸ A4H8W6, Trans Mountain response to BC IR No. 2.41 j), PDF p. 194.

⁷⁹ A4L6D3, Written Evidence of the City of Abbotsford, Affidavit of Donald Beer, para. 18. See also para. 23-24, in which Mr. Beer states: “Kinder Morgan’s operations and emergency response staff did not share immediate and accurate information with the City’s emergency responders despite the fact that in the table top exercises the City had participated in, a requirement for such notification had been established as a protocol for emergency response. Instead, City staff were forced to rely on media information to know what was happening at the Tank Farm. The only reliable basic information about the incident was received several hours into the incident through the City making contact with the BC Ministry of Environment. My observation was that the Kinder Morgan staff who were provided the training and table top exercises were not the same staff relied on with respect to the on ground emergency responses to the Tank 121 release. A related observation is that the City of Abbotsford was not notified of the incident by Kinder Morgan despite the protocols established through the table top exercises”.

referred to above and the source of such equipment, Trans Mountain states: “The specific source and type of equipment that was first on scene is not within the scope of this proceeding and not relevant to the National Energy Board’s List of Issues”.⁸⁰

66. There is no question that Trans Mountain’s response to previous incidents is relevant to the Board’s List of Issues.⁸¹ The Board itself has shown a keen interest in the company’s response to previous incidents.⁸² Information pertaining to the type and source of equipment deployed in response to a spill falls squarely within the scope of the List of Issues. Trans Mountain’s unwillingness to provide the information requested by the Province results in an inability to evaluate Trans Mountain’s ability to effectively respond to a land-based spill. In sum, the limited evidence Trans Mountain has filed regarding its past performance does not provide for confidence in the effectiveness of Trans Mountain’s response to an emergency or in its ability to effectively mitigate the effects of a spill.

Spill preparedness and response

67. The Province acknowledges and welcomes the commitments Trans Mountain has made with respect to terrestrial spill preparedness and response.⁸³ However, in the absence of detailed evidence on the record that shows precisely how Trans Mountain would respond to a spill from its pipeline, Trans Mountain’s commitment to an enhanced emergency management program is not sufficient to alleviate the Province’s concerns with respect to the Project.

⁸⁰ A4H8W6, Trans Mountain response to BC IR No 2.41 a), PDF p.190.

⁸¹ See Issues No. 11 (“Contingency planning for spills, accidents or malfunctions, during construction and operation of the project”) and No. 12 (“Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third party damage prevention”).

⁸² A3V8V6, NEB IR No. 1.70.

⁸³ For instance, Trans Mountain has committed to creating Geographic Response Plans for each TMPL administrative district (A4S7F1, Trans Mountain Reply Evidence, section 63 – Emergency Management Program, PDF p. 234-235), to reviewing the geographic locations and inventories of its Oil Spills Containment And Response (OSCAR) units (*ibid.*, PDF p. 238), and to creating and implementing a consultation plan so as to ensure affected parties are given the opportunity to provide input in the development of the new Emergency Management Program (*ibid.*, PDF p. 232-233).

Insufficiency of the evidence on the record

68. Naturally, access to emergency management information is required in order to understand how prepared a company is to respond to an emergency. In fact, the Board itself has taken an interest in increasing public access to the emergency management information held by pipeline companies, and has launched a review and “public consultation process on the transparency of emergency management information”.⁸⁴
69. In the specific context of this proceeding, it is equally clear that the strength of Trans Mountain’s spill preparedness and response cannot be adequately evaluated without a comprehensive review of Trans Mountain’s Emergency Management Program (EMP).
70. Trans Mountain has explained that the EMP for the expanded pipeline system will be founded upon the EMP currently in place for Line 1, which will be both modified and enhanced:

In the application for the Trans Mountain Expansion Project (TMEP), KMC has committed to review and revise the EMP to address the needs of the expanded pipeline system should it be approved. The existing EMP will form the foundation of the revised program. [emphasis added]⁸⁵

71. Therefore, the Province asked that Trans Mountain file detailed information regarding the EMP in place for the existing pipeline, which is directly relevant to the issues to be considered by the Board in this proceeding.⁸⁶ However, citing security concerns, Trans Mountain has sought to preserve the confidentiality of its EMP documents.
72. The Board has sided with the Province and other intervenors who have sought disclosure of the EMP documents, as evidenced by the following passage in Ruling No. 31:

Trans Mountain has not shown that its interest in confidentiality of the entire EMP documents outweighs the public interest in disclosure.

The public interest includes the requirement for an open and transparent process, and confidentiality is an exception to this requirement. The evidence

⁸⁴ <http://www.neb-one.gc.ca/bts/nws/nr/2015/nr20-eng.html>.

⁸⁵ A4D3F4, Follow-up to Intervenor Information Request No. 1 Motions – Redacted Emergency Management Program Documents, Attachment 3, Review and Revision of the Emergency Management Program for Trans Mountain Expansion Project, PDF p. 1.

⁸⁶ *Supra* note 4. See also A4F7Q9, BC Notice of Motion No. 2, PDF p. 4-8.

upon which the Board relies to come to a decision must be as open and accessible as possible.⁸⁷

73. Following Ruling No. 31, Trans Mountain filed extensively redacted copies of its existing EMP documents, again citing vague, undefined security concerns in an attempt to justify the redactions. Most notably, Trans Mountain declined to file the Field Guide and Control Points Manual – two documents which, as is set out in further detail below, are of critical importance in the evaluation of Trans Mountain’s spill response plans.
74. In doing so, Trans Mountain overlooked the fact that those very documents are publically available in largely unredacted form in the United States, for the southern extension of the pipeline whose expansion forms the subject of this proceeding.⁸⁸ Undoubtedly, if the information contained within those documents posed a significant threat to the security of Trans Mountain’s operations, then the Board’s American counterpart, the Pipeline and Hazardous Materials Safety Administration, would not have posted them on its public website. In short, Trans Mountain’s repeated reliance on security concerns to justify withholding important information is unfounded.
75. The effect of the extensive redactions Trans Mountain made to the EMP documents it placed on the record is that the Province, and the Board, are unable to determine whether Trans Mountain is prepared and able to respond to a Project-related spill.⁸⁹
76. Pre-identified control points and site-specific tactical plans, for instance, are critical components of an effective spill response plan – a fact which Trans Mountain acknowledges.⁹⁰ Trans Mountain states that it “has identified and documented control points in its Control Point Manual, part of its EMP”⁹¹. The existing Control Points Manual is said to contain information such as detailed control point location information, access directions, descriptions

⁸⁷ A4C3Y5, Ruling No. 31 – Trans Mountain Pipeline ULC – Request to file Emergency Management Program documents confidentially, PDF p. 4.

⁸⁸ http://www.phmsa.dot.gov/staticfiles/PHMSA/ERR/Kinder_Morgan_Trans_Mountain-Puget_Sound.pdf.

⁸⁹ A4F7Q9, BC Notice of Motion No. 2, PDF p. 18-19.

⁹⁰ In A4H8I7, Trans Mountain’s response to City of Richmond IR No. 2.15, PDF p. 18, Trans Mountain states: “Using pre-planned points where response and recovery operations can be conducted will usually result in greater safety for responders and a higher potential for success”.

⁹¹ *Supra* note 83, PDF p. 234.

of the available workspace, water body information, and logistical and strategic information⁹², all of which form precisely the type of information the Province requires in order to evaluate the strength of Trans Mountain's spill response preparedness.

77. However, as Nuka Research and Planning Group notes,

The Trans Mountain Expansion Project application indicates that Control Point planning has been or will be done for the entire pipeline route, but no specific information was provided about the location of these Control Points or the tactical plans for oil containment at each site.⁹³

78. Trans Mountain has committed to confirming the existing control points, developing additional control points where required, and consolidating all of this information, including that contained within the Field Guide, into Geographic Response Plans (GRPs).⁹⁴ As a whole, the proposed GRPs, if developed as described by Trans Mountain⁹⁵, should contain information that would be very valuable in guiding spill response operations. However, since the GRPs are not on the record for the parties to review and evaluate, and the existing plans are also absent from the record, the Province cannot be assured that such plans will be adequate.
79. Other critical evidence, which the Province notes is absent from the record, includes, but is not limited to, details pertaining to the nature and level of training of company staff⁹⁶, the location of staff⁹⁷, the pre-designated Incident Command Posts and staging areas⁹⁸, the availability of third party contractors⁹⁹, including the time required to mobilize personnel and equipment, and potential evacuation zones¹⁰⁰.

⁹² A4H8W6, Trans Mountain response to BC IR No. 2.32, PDF p. 159.

⁹³ A4Q1T3, Written Evidence of Upper Nicola Band, NUKA Research and Planning, *Inland Oil Spill Response Logistics Analysis*, PDF p. 13.

⁹⁴ *Supra* note 83, PDF p. 234-235; *supra* note 88, PDF p. 2.

⁹⁵ *Supra* note 83, PDF p. 234-237.

⁹⁶ See the reference in A4H8W6, Trans Mountain response to BC IR No. 2.25 a), PDF p. 133, to "current, valid training", without further elaboration regarding the precise nature of such training (e.g. level of ICS training). Of further concern is the fact, stated in A4H7Z9, Trans Mountain response to City of Abbotsford IR No. 2.3.10, PDF p. 41, that only 19 of 92 employees located within British Columbia appear to have received HAZWOPER training, without which one is unable to participate in in the field response operations.

⁹⁷ The only information provided is that approximately 92 employees are located in British Columbia (Trans Mountain's response to the City of Abbotsford, *ibid.*, PDF p. 40.

⁹⁸ A4H8W6, Trans Mountain response to BC IR No. 2.26, PDF p. 135-136.

80. What the evidence on the record does show, however, is a general lack of preparedness. Many of the detailed plans that form part of an effective emergency response plan not only remain unprepared, but will, Trans Mountain tells us, be left to be formulated at the time of an incident:

Additional documentation referred to in the Emergency Response Plans such as communication plans, security plans, initial health and safety plans, health and safety plans, refuelling plans, lodging and food plans, medical plans, etc. are documents that are produced at the time of an incident as part of the overall Incident Action Plan.¹⁰¹

81. The Province takes issue with this approach. World-leading spill response preparedness demands that such details be addressed in advance of an incident occurring so as not to impair decision-making during an incident and encumber response operations. Trans Mountain's suggestion that Incident Command ought, for instance, to locate suitable lodging or identify and hire security contractors in the midst of the response to an incident amounts to shifting planning responsibilities from the company (pre-incident) to Incident Command (during an incident), which would undermine the efficiency and effectiveness of emergency response and oil recovery. Similar concerns, though arising from the marine spill response context, are articulated in more detail by EnviroEmerg Consulting, whose report states as follows:

A basic weakness in Trans Mountain's Project application ... is its emphasis on the role of the Incident Command System ... What has been overlooked is that Incident Commanders and Incident Management Team members require

⁹⁹ See, for example, A4H8W6, Trans Mountain responses to BC IR No. 2.23 c), PDF p. 125, 2.24 c), PDF p. 129, and No. 2.28 c), PDF p. 139, which, despite the statement that "KMC is confident that private personnel and equipment ... will be available as and when needed", do not provide any information from which to draw any conclusions with respect to contractors' ability to respond to an incident immediately – for instance, it remains unknown whether contractors are on retainer to ensure that their services can be mobilized as soon as possible in the event of an incident.

¹⁰⁰ Those have not yet been identified. See A4H8W6, Trans Mountain response to BC IR No. 2.30 a), PDF p. 143, despite the acknowledgement that they would "provide a means to expedite decisions by the unified command or incident commander in the early stages of an incident".

¹⁰¹ A4H8W6, Trans Mountain response to BC IR No. 2.27 a), PDF p. 137, and 2.28 a), PDF p. 139. In addition to the plans identified in the quoted passage, Trans Mountain has no detailed oiled wildlife plan (see response to BC IR No. 2.37 a), PDF p. 176), no volunteer management plan (see response to BC IR No. 2.37 f), PDF p. 177-178), and no detailed waste management plan identifying oily waste disposal and treatment locations and means to transport waste to those locations (see A4H8W6, Trans Mountain response to BC IR No. 2.36 c), PDF p. 172). The absence of such a plan could result in a complete halt in oil recovery operations.

guidelines and manuals to do their job effectively. Complex assignments require situation-specific plans to be written during the pandemonium of a major incident. This necessitates pre-developed operational guidelines and manuals ... One cannot readily prepare plans on-the-fly without a template, defined process, previously identified tactical considerations, and more.¹⁰²

82. In sum, the limited evidence Trans Mountain has placed on the record is insufficient to substantiate its assertion that it will bring “world-leading” spill preparedness and response to bear on the Project. The Province concurs with Nuka Research and Planning when it concludes that “the information presented in the TMEP application paints a very generalized and vague picture of how spill response would be implemented for inland oil spills”.¹⁰³
83. Moreover, Trans Mountain’s new Emergency Response Program for the expanded pipeline system remains to be formulated, and, as such, is not available for the Board’s and the parties’ review in this proceeding. As a result, the evidence on the record does not demonstrate that Trans Mountain currently has, or will develop, the ability to mount an effective response to any spill from its pipeline.

Inferences the Board should draw from the insufficiency of the evidence on the record

84. There is no question that the Board’s broad mandate under the *National Energy Board Act* allows it to consider the presence or absence of detailed information in deciding whether or not to recommend approval of the project. As the Board stated in *Emera Brunswick Pipeline Co. (Re)*, what should be considered in formulating an opinion with respect to whether a given project is in the public interest will vary according to the circumstances, and may vary as a result of the application, the location, the commodity involved, the various segments of the public affected by the decision, societal values at the time, the purpose of the applicable section of the *National Energy Board Act*, and other things.¹⁰⁵

¹⁰² A4Q1L5, Written Evidence of Cowichan Tribes, EnviroEmerg Consulting, *A Technical Analysis of Project Application Related to Marine Transportation Submitted to the National Energy Board for the Trans Mountain Pipeline Expansion Project* (“EnviroEmerg report”), PDF p. 15.

¹⁰³ *Supra* note 93, PDF p. 4.

¹⁰⁵ *Supra* note 7 at para. 48.

85. In Ruling No. 50, the Board determined that Trans Mountain had filed sufficient information from the existing EMP documents to “meet the Board’s requirements at this stage of the process”. However, the Board went on to emphasize the following:

... [P]roject applicants are required to substantiate any claims made in their applications through facts or other documentary evidence filed. The Board may give less or no weight to claims or assertions made that lack a sufficient evidentiary basis. Through final argument, parties can ask the Board to draw relevant inferences regarding any such unsubstantiated claims made by Trans Mountain or other intervenors.¹⁰⁶ [emphasis added]

86. Therefore, although the Board reached the preliminary conclusion that Trans Mountain should not be compelled to file additional evidence regarding its EMP, it remained open to Trans Mountain to do so, at any stage of the hearing process. Indeed, the Province would have expected Trans Mountain to provide the kind of detailed information that could have demonstrated the practicability of the proposed spill response measures. Having operated the existing pipeline for many years, it of course has plans in place to respond to spills. Some parts of these plans have been produced in this proceeding. As noted above, Trans Mountain asserts that these plans will form the basis for the improved plans that would address spills from the expanded system. Having plans already in hand, it would have been possible for Trans Mountain to produce the enhanced plans for consideration in this proceeding, or at least to provide detailed information with respect to exactly what those plans would contain.
87. In the Province’s submission, this distinguishes the Project from the Enbridge Northern Gateway project. In that case, the Joint Review Panel did not require the proponent to produce fully realized response plans at the certification stage.¹⁰⁷ However, Northern Gateway has not yet been built, and had no existing spill response plans. Trans Mountain, by contrast, has operated the existing pipeline for decades, and the bulk of the Project would be built in the same right of way. In that light, it is entirely reasonable to expect Trans Mountain to

¹⁰⁶ A4G5I9, Ruling No. 50 – Province of British Columbia notice of motion dated 5 December 2014, PDF p. 4-5.

¹⁰⁷ Report of the Joint Review Panel for the Enbridge Northern Gateway Project – Considerations, Section 7.4, Northern Gateway’s emergency preparedness and response planning (<http://www.gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprtvm2chp7-eng.html>).

clearly demonstrate now the concrete steps it would take to respond to a spill from the pipeline.

88. In fact, if Trans Mountain wishes the Board to accept the assertions it has made concerning its ability to respond to a spill and to bring “world-leading” spill response to bear on the Project, then it ought to have provided the evidentiary basis required to support such assertions. Since, as is outlined in paragraphs 68-83 above, it has not done so, the Province asks that the Board give no weight to such assertions. To borrow the Board’s words in Ruling No. 50, the only “relevant inference” that may be drawn from the “unsubstantiated claims” made by Trans Mountain is that Trans Mountain has not provided the evidence required to demonstrate that it “will be prepared to respond in an expeditious and effective manner”¹⁰⁸ to a spill from its pipeline.

Summary respecting the pipeline

89. As set out above, the evidence on the record does not demonstrate an ability to respond adequately to spills from the pipeline. In order for the spill response measures it has proposed to be relevant to the exercise of the Board’s discretion, Trans Mountain must demonstrate that they would in fact be practicable and effective. Instead, Trans Mountain’s contention that a world-leading spill response capability would be in place remains unsupported by the evidence on the record.

Marine transportation

90. The Province also has outstanding concerns with respect to the marine aspects of the project. While Trans Mountain states that it has “endeavored to address” the Province’s five requirements that must be met in order for it to consider supporting a heavy oil pipeline, including having “world-leading” marine oil spill response capabilities in

¹⁰⁸ *Supra* note 69, PDF p. 177.

place¹⁰⁹, the Province submits that the evidence on the record does not show this to be the case.

The evaluation of spill likelihood

91. Very large spills from oil tankers are relatively rare occurrences. However, understanding just how rare such an event would be, in the context of the Project, is an important consideration for the Board in deciding on its recommendation in this matter.
92. In this regard, Trans Mountain has produced a risk assessment (the “RA”) prepared by Det Norske Veritas (DNV)¹¹⁰ describing, amongst other things, the likelihood of spills from tankers related to the Project. The RA concludes that the likelihood of what it has characterized as the “credible worst case” and “mean case” spills from in-transit tankers is low, particularly if additional proposed risk-reduction measures are adopted.¹¹¹
93. The Province acknowledges that that DNV is recognized for its expertise in marine risk assessment.¹¹² However, the Province is concerned that the RA lacks sufficient foundation to be confidently relied upon by the Board. When the Province asked Trans Mountain to provide the information supporting the frequencies and return periods set out in the RA, the Province was effectively referred back to the RA itself.¹¹³ Trans Mountain has also stated that the methodology resulting in the Marine Accident Risk Calculation System (MARCS) model estimates of incident frequencies is commercially valuable intellectual property that cannot be disclosed, beyond what is already stated in the DNV RA.¹¹⁴ Trans Mountain further states that any data not described in the RA or set out in IRs cannot be shared as they are DNV’s intellectual property.¹¹⁵

¹⁰⁹ *Ibid.*, PDF p. 90.

¹¹⁰ A3S5F4-A3S5F8, Application Volume 8C – TERMPOL Reports, TERMPOL 3.15 – General Risk Analysis and Intended Methods of Reducing Risks.

¹¹¹ *Ibid.*, A3S5F6, PDF p. 47 and 66. See also A4G3U5, Trans Mountain Responses to Information Requests regarding the TERMPOL Report and Outstanding Filings from National Energy Board, PDF p. 21.

¹¹² *Supra* note 83, PDF p. 132.

¹¹³ A3Y2Z1, Trans Mountain response to BC IR No. 1.48.

¹¹⁴ A3Y3T9, Trans Mountain response to Tsawout First Nation IR No. 1.30(f).

¹¹⁵ A3Y3T9, Trans Mountain response to Tsawout First Nation IR No. 1.30(j); see also A4H8L1, Trans Mountain responses to Cowichan Tribes IRs 2.1.04 (v), (x) and (dd).

94. This lack of foundation or transparency is evident in the updated information provided in the Responses to Information Requests regarding the TERMPOL Report and Outstanding Filings from National Energy Board (the “DNV Update”).¹¹⁶ In the DNV update, updated analysis with respect to spill frequencies is provided with, it is submitted, little or no explanation of the underlying data supporting this analysis.
95. The Province’s concerns are reflected in criticisms of the DNV RA made by Dr. Kirtley on behalf of the Cowichan Tribes.¹¹⁷ While she has found no major flaws in the methodology of the RA, she notes that certain elements cannot be verified based on the available documentation.¹¹⁸ Dr. Kirtley states that data sources in the RA are often vague or proprietary, are poorly documented and in many cases used without derivation, justification or validation.¹¹⁹ With respect to MARCS, she opines that a full understanding of the logic, underlying incident probabilities and sensitivity to input variables within the MARCS model cannot be gained from the RA.¹²⁰
96. The Province submits that while it is generally accepted that large oil spills from in-transit tankers are rare, the conclusions in the DNV RA cannot be regarded as conclusive in light of the limited foundation for the conclusions expressed in it. As is the case with any expert report, in order to be probative and useful to the decision-maker, the facts and assumptions underpinning the conclusions expressed must be fully set out. As a result, the Province submits that the Board should accord limited weight to DNV’s conclusions in the RA.

Marine spill response

97. It is obvious that a spill in the marine environment could have significant effects. In light of that fact, Trans Mountain has proposed an enhanced response regime for the marine portion of the Project. This regime includes a two hour response time for spills up to

¹¹⁶ *Supra* note 111.

¹¹⁷ A4L9Z8, Written Evidence of the Cowichan Tribes, Appendix G – The Glosten Associates, Expert Opinion on Marine Transport Risk Analysis.

¹¹⁸ *Ibid.*, PDF p. 2.

¹¹⁹ *Ibid.*, PDF p. 5 and 15.

¹²⁰ *Ibid.*, p. 6.

2,500 tonnes in size within the Port of Vancouver; six hours to commence response to a spill up to 2,500 tonnes size outside the Port of Vancouver to Buoy Juliet; and additional equipment necessary to deal with a 20,000 tonne oil spill within 36 hours of initial notification for the entire Increased Response Area.¹²¹ Trans Mountain has also committed to supporting the enhancement of the existing resources of the Western Canada Marine Response Corporation (WCMRC) with an investment of \$100M.¹²²

98. The Province is supportive of these commitments, and in themselves they are laudable. However, the Province submits that Trans Mountain has not provided sufficient evidence in this proceeding to show how a major spill in the marine environment would be addressed. That is, no marine spill response plans, or other detailed information, have been put on the record to show the means by which a marine spill would be responded to. In the absence of this information, the Province is not satisfied that a “world-leading” marine spill response capability will in fact be in place.
99. In this regard, the EnviroEmerg report¹²³, in respect of which Trans Mountain has expressed its appreciation¹²⁴, highlights the many improvements required for an effective spill response capability for the areas in which ships carrying product related to the Project would travel. For example:
 - There is no evidence that WCMRC has undertaken any exercises respecting sourcing and managing the large shoreline workforce that would be required to respond to a major spill¹²⁵;
 - There is currently no meaningful offshore response capability, with containment/skimming vessels that are specialized for this challenging environment, in British Columbia. WCMRC’s purpose-built oil spill response

¹²¹ A4H9D0, Trans Mountain response to Squamish First Nation IR No. 2.48 (c), PDF p. 124; A3S4Y6, Application Volume 8A – Marine Transportation, Table 5.5.3, PDF p. 34; *supra* note 90, section 62 – Marine Emergency Preparedness and Response, PDF p. 203.

¹²² *Supra* note 83, section 62 – Marine Emergency Preparedness and Response, PDF p. 200.

¹²³ *Supra* note 102.

¹²⁴ *Supra* note 83, PDF p. 159.

¹²⁵ *Supra* note 102, PDF p. 12.

vessels are mainly suitable for semi-protected areas, but are not necessarily suitable for sustained offshore operations¹²⁶; and

- Additional evidence is required to demonstrate that the logistics for equipment and personnel transport, as well as the process of setting up oil recovery equipment (e.g., containment, skimming, pumping and storage) for on-water response to recover mobile oil, will be sufficient to ensure such operations result in actual oil removal.¹²⁷

100. Certain assertions made by Trans Mountain in its reply evidence do not allay the Province's concerns with respect to the capability to respond to a spill in the marine environment. For example, in the reply evidence Trans Mountain contends that there have been many technological advances with respect to the ability to recover spilled oil during nighttime. The authors then assert that these advances led to the recovery of "more than 80% of released oil during the Marathassa spill in early April 2015."¹²⁸ It is not clear to the Province how this figure is derived, and Trans Mountain offers no detailed information regarding the effectiveness of the technological advances referred to in the reply evidence. Therefore, the basis for the asserted success of nighttime recovery techniques remains unknown.

101. The Canadian Coast Guard's review report concerning the Marathassa incident, attached to the reply evidence¹²⁹, refers to 667L of oil¹³⁰ remaining on the water¹³¹ from an estimated 2800L on the water on April 9. Taken out of context, this would indicate

¹²⁶ *Ibid.*, PDF p. 65-6. The Province notes that at PDF p. 52 of its report (A3S5I9, Application Volume 8C –TERMPOL Reports, Future Oil Spill Report Approach Plan – Recommendations on Bases and Equipment), WCMRC recommends the acquisition of two 27.5m mobile skimmers with the ability to transit in Beaufort Scale 6 conditions and "accommodations that allow for extended time at sea in open water conditions". However, Trans Mountain has, to date, not explicitly committed to supporting the acquisition of these additional vessels.

¹²⁷ *Ibid.*, PDF p. 103.

¹²⁸ A4S7K7, Reply Evidence, Attachment 1.10 – Reply to the City of Vancouver, Tsleil-Waututh Nation, City of Burnaby, Metro Vancouver, "Technical Analysis of Oil Spill Response Capabilities and Limitations for the Trans Mountain Expansion Project", PDF p. 24.

¹²⁹ A4S7J6, Reply Evidence, Appendix 62B – Canadian Coast Guard, Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation, PDF p. 47 fd.

¹³⁰ The Province notes that this spill did not involve the release of diluted bitumen, whose properties may differ from those of the oil spilled.

¹³¹ *Supra* note 129, PDF p. 12.

the recovery of about 76% of the oil. In fact, the “subjective estimate” of the “total actual fuel oil recovered” is 1400L from the estimated 2800L of fuel on the water.¹³² Whether or not this equates to the recovery of half of the spilled oil is unclear, because the 2800L figure may not represent the amount spilled – that too could have been reduced by environmental forces, and the 2800L figure does not include amounts recovered the previous night.¹³³ The Coast Guard’s report acknowledges that the “nature and amount of fuel oil released from the vessel will be the subject of further investigation by” Transport Canada.¹³⁴ In short, it is unclear from the report what portion of spilled oil was recovered. Trans Mountain’s unsupported assertion that 80% of the released oil was recovered does not provide the Province with confidence that this proportion of oil could in fact be recovered in the event of a spill.

Summary respecting marine transportation

102. In sum, the Province submits that the evidence on the record is not sufficient to show that world class spill response capability would be in place in advance of the Project commencing operations, though ultimately this may be achieved. However, if the Board were to recommend the issuance of a CPCN for the Project, the Province recommends the improvement of several draft conditions, as set out in Appendix A, so as to ensure that the requirements placed on Trans Mountain with respect to marine spill response are clear, measurable and enforceable.

First Nations involvement

103. An important issue for the Province in this proceeding is the extent to which First Nations have had the opportunity to fully participate. It is important that the interests of First Nations be fully considered by the Board. Many First Nations have been involved in these proceedings. Indeed, the Province has relied on evidence submitted by them in

¹³² *Ibid.*, p. 58.

¹³³ *Ibid.*, p. 57.

¹³⁴ *Ibid.*, p. 58.

the preparation of this argument. This argument does not include any submissions on whether the Board process has satisfied the honour of the Crown or other obligations to First Nations.

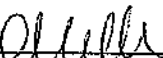
Draft certificate conditions

104. If the Board decides to recommend that the Project be approved, then it is of the utmost importance that such approval be accompanied by clear, measureable and enforceable conditions.
105. The Province strongly supports the conditions the Board has proposed regarding leak detection systems (draft condition No. 125), Trans Mountain's Emergency Management Program (draft conditions No. 88, 117, 122, 123, and 124), and emergency response training and exercises (draft conditions No. 116, 119, 120, and 136). That said, the Province suggests improvements to the wording of these conditions, so as to ensure they are clear and enforceable. In some instances, the Province also recommends the addition of certain requirements to increase the effectiveness of the conditions.
106. With respect to the marine aspects of the project, Trans Mountain has proposed a number of measures to reduce the potential for marine incidents, including the use of escort tugs. Trans Mountain has also committed to enhanced marine spill response capacity. The Province is supportive of these commitments. The Province has also reviewed the conditions proposed in respect of these commitments, and is supportive of them as well. While these have largely been included in draft condition No. 114, the Province submits that the way in which this condition has been drafted lacks the necessary clarity, measurability and enforceability that would make it effective – and, therefore, suggestions are made for its improvement. The Province also recommends the addition of certain requirements to increase the strength of the condition.
107. The Province's recommendations for improvements to the proposed conditions, with respect to both the pipeline and marine aspects of the Project, are attached as Appendix A.


108. In addition, the Province recommends the addition of a number of other conditions with respect to the operation of the pipeline. The Province regards these as important means to help ensure, as much as possible, that spills are prevented, or if they occur, spill response is effective and timely. These additional conditions are set out in Appendix B.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED: January 11, 2016



Elisabeth Graff



Christopher Jones

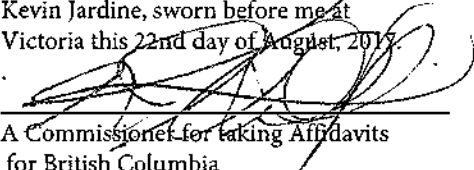
Counsel for the Province of British Columbia

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This is Exhibit "D" referred to in the Affidavit of
Kevin Jardine, sworn before me at
Victoria this 22nd day of August, 2017.


A Commissioner for taking Affidavits
for British Columbia

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ABJ0021

Dockets: A-78-17 (lead file); A-217-16, A-218-16,
A-223-16, A-224-16, A-225-16, A-230-16,
A-232-16, A-68-17, A-73-17, A-74-17,
A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

FEDERAL COURT OF APPEAL

BETWEEN:

**TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF
BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH
INDIAN BAND), XÀLEK/SEKYÚ SIY AM, CHIEF IAN CAMPBELL on
his own behalf and on behalf of all members of the Squamish Nation,
COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as
Chief of the Coldwater Band on behalf of all members of the Coldwater
Band, KWANTLEN FIRST NATION, CHEAM FIRST NATION,
CHAWATHIL FIRST NATION, MUSQUEAM INDIAN BAND,
AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE,
SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE,
SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own
behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE,
UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED
SEYMOUR on their own behalf and on behalf of all other members of the
STK'EMLUPSEMC TE SECWEPENMC of the SECWEPENMC NATION,
RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS
SOCIETY**

Applicants

and

**ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC**

Respondents

**WRITTEN REPRESENTATIONS OF
ATTORNEY GENERAL OF ALBERTA
FOR LEAVE TO INTERVENNE PURSUANT TO RULE 110**

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WRITTEN REPRESENTATIONS

1. The Attorney General of Alberta ("Alberta") seeks to intervene in this appeal under Rule 110 of the *Federal Courts Rules* as questions of general importance are raised. Alberta intends to abide by all applicable timelines and will not delay these proceedings. Alberta seeks leave to file written submissions and, as well, to make oral submissions.
2. This application is made in writing pursuant to Rule 369 of the *Federal Courts Rules*, as directed by the Court in its Order issued March 9, 2017.

PART I STATEMENT OF FACTS**A) Alberta's involvement before the National Energy Board**

3. The Government of Alberta participated in the National Energy Board's ("NEB") section 52 Trans Mountain Pipeline Expansion Project ("Project") hearings to assess the environmental effects of the Project and whether it recommended that a certificate of public convenience and necessity should issue for the Project. As noted in Alberta's *Application to Participate* in the NEB hearing process:¹
- a) Alberta will be affected by this expansion application, as approval or denial of this application will impact on the timely marketing of Alberta's energy resources;
 - b) Alberta is responsible for the management of significant Crown energy resources in the public interest, including responsibility for the administration of royalties. In 2012/13, Alberta collected approximately \$6 Billion in crude oil and natural gas royalties. In 2012, approximately 69 per cent of Alberta's marketable natural gas production and approximately 76 per cent of Alberta's crude oil production were exported beyond Alberta's borders to supply demand markets;
 - c) Alberta has a mandate to ensure responsible energy development and Alberta is directly involved in ensuring Alberta's energy resources are developed and transported to markets responsibly. Consequently, as the owner of a significant Crown resource, Alberta has an interest in the safe, responsible and efficient transportation of crude oil and refined energy products supplying both Canadian demand and world energy markets; and
 - d) Alberta is interested in the economic need for the Project.

¹ Exhibit "1" to the Affidavit of Douglas Robert Lammie executed April 10, 2017 (Lammie Affidavit)

B) Alberta's interest in the Project

4. On January 12, 2016, the Government of Alberta submitted written final argument under direct signature of the Honourable Rachel Notley, Premier of Alberta, supporting increased tidewater market access for crude oil, asking the NEB to recommend that the federal Cabinet provide timely approval of the Project and further asking that the NEB attach sufficient conditions to address genuine concerns to avoid delay.²
5. As noted in Alberta's submissions to the NEB, the Project will significantly increase access to premium North East Asian markets, resulting in higher prices for both Western Canadian heavy and light crude oil. The Project provides "market optionality" – the ability to react quickly to market conditions, moving crude supplies to higher priced markets as supply and demand conditions change. Alberta's interest in supporting the pipeline Project is strong.³ As Premier Notley explained, interprovincial pipeline energy infrastructure that helps get Western Canadian energy resources to world markets is in the Canadian public interest.⁴
6. Alberta also has an interest in the development of the law as it pertains to the NEB and future interprovincial pipeline proposals, including the Energy East Pipeline Limited Partnership Project ("Energy East") that will be considered and decided by the NEB. As the federal government has exclusive jurisdiction over interprovincial pipelines, Alberta is essentially dependent on the federal government in order to get its natural resources to market, at least via pipelines. This makes any review of these types of projects of significant general importance to Alberta, its citizens, workers and businesses.⁵

C) The court proceedings

7. The Applicants in these proceedings are challenging the NEB Report and Recommendation and the federal Governor in Council's Order in Council. Alberta has an ongoing interest in the Project and seeks to intervene as the proceedings raise questions of general importance.

² Lammie Affidavit Exhibit "2"

³ Lammie Affidavit para 7 and Exhibit "2" page 4

⁴ Lammie Affidavit para 6

⁵ Lammie Affidavit para 8

PART II POINTS IN ISSUE

8. The question is whether the Attorney General of Alberta has established under Rule 110(c) that there is a matter of general importance before the court which permits the Attorney General of Alberta to participate as an intervener in these proceedings.
9. Alberta's position is that Alberta should be granted intervener status in these proceedings.

PART III SUBMISSIONS**A) Special role for attorneys general**

10. Alberta applies under Rule 110(c) of the *Federal Courts Rules* for leave to intervene in these proceedings. Rule 110 provides:

<p>Questions of General Importance</p> <p>Notice to Attorney General</p> <p>110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,</p> <p>(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;</p> <p>(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and</p> <p>(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.</p>	<p>Question d'importance générale</p> <p>Signification au procureur general</p> <p>110 Lorsqu'une question d'importance generale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :</p> <p>a) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;</p> <p>b) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;</p> <p>c) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.</p>
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11. Where the Court finds that there are questions of **general importance**, the Attorney General of Canada and the attorney general of a province may apply for intervenor status.⁶
12. In *Mikisew*, Strayer J.A. stated that, "... Rule 110 contemplates a special role for attorneys-general in addition to those contemplated under section 57 of the *Federal Courts Act* and Rule 109."⁷
13. Historically, intervention in a case, particularly in the federal courts, was very narrow. The common law restricted intervention to those who could demonstrate the litigation would interfere with proprietary interests.⁸
14. Under the pre-1998 *Federal Court Rules*, there was no general provision for intervention in the rules however a person could apply to be a party in an action if they could demonstrate they had a *direct interest* in the case under Rule 1716. That rule only applied to actions but the courts drew analogies from the rule to add parties to motions and other proceedings.⁹
15. At the Federal Court of Appeal, the attorneys general had an additional option to apply under Rule 1101 to become interveners "where any constitutional question or any question of general importance" was raised. The rule was in place since 1971 and until 1992 it was the only provision which addressed notice of constitutional questions. Section 57 of the *Federal Court Act* was then introduced requiring notice to the attorneys general on constitutional questions – leaving Rule 1101 relevant to broader questions of general importance.¹⁰

⁶ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2002 FCA 306; 2002 CarswellNat 2188 (*Mikisew*) at para 8 [TAB 1]; Rule 110, *Federal Courts Rules* [TAB 2].

⁷ *Mikisew* at para 8 [TAB 1]

⁸ Williston and Rolls, *The Law of Civil Procedure* (1970), p. 258 as cited in the *Annotation* by W.A. Bogart in *Energy Probe v Canada (Atomic Energy Control Board)*, 1984 CarswellNat 26, 1984 CarswellNat 637, [1984] 2 FC 138, affirmed 1984 CarswellNat 660 [1985] 1 FC 563 (*Energy Probe*) [TAB 3]

⁹ Sgayias, Kinneer *et al.*, *Federal Court Rules* extracts [TAB 4]

¹⁰ Sgayias, Kinneer *et al.*, *Federal Court Rules* extracts [TAB 4]

16. Former *Federal Court Rule* 1101 provided:¹¹

Where any constitutional question or any question of general importance is raised by any matter before the Court,

(a) any party may serve a notice on the Attorney General of Canada or the Attorney General of any province who may be interested,

(b) the Court or the Chief Justice may direct the Registry to bring the matter to the attention of the Attorney General of Canada or the Attorney General of any province who may be interested, and

(c) the Attorney General of Canada or the Attorney General of any province may apply for leave to intervene or for leave to file a memorandum of facts and law and to appear by counsel and take part in the hearing.

B) Rule 109 test is not applicable to a Rule 110 application

17. Rule 109 specifically requires that interveners under that Rule describe how they wish to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. The test for Rule 109 is as set out in *Pictou*¹² and aligns with the statutory provision and policy considerations to limit the scope of proceedings and minimize intermeddling. This requirement is not found in Rule 110, nor is it required as the numbers of attorneys general are manageably finite. The context and history of Rule 110 suggest that it is intended to be broadly interpreted to give the attorneys general significant opportunity to address all questions of general importance in the proceeding.

¹¹ Sgayias, Kinnear *et al.*, *Federal Court Rules* extracts [TAB 4]

¹² *Canada (Attorney General) v Pictou Landing Band Council* (2014), 2014 FCA 21, 2014 CarswellNat 149 at para 11 [TAB 5]

18. Although not numerous, the cases determined under the old Rule 1101 (which did not involve constitutional questions) elucidate what a court might find to be of "general importance" under Rule 110. Intervener status was granted to the Attorney General of Canada under Rule 1101 and 1716(2)(b) in cases involving the creation of a national potato marketing agency,¹³ workplace safety,¹⁴ the Atomic Energy Control Board,¹⁵ trademarks¹⁶ and the Canadian Radio-Television Commission.¹⁷

C) Requirement for attorney general to intervene

a) Protecting the public interest

19. An attorney general *may* intervene to protect a Crown interest as it is not quantitatively different from the right of any other person appearing before a court to make representations when their interests may be affected by a court decision.¹⁸ However, a *direct* public interest is not required.
20. In *Vancouver Wharves*, it was argued that the Attorney General had no "direct public interest" in the proceeding and that the Attorney General must have such an interest in the outcome of the case in order to be added as a respondent. The Court rejected this argument and found that "workplace safety is important generally and is certainly in the public interest".¹⁹ Similarly, the Court in *Mikisew* found matters were of general importance even though they did not "directly affect" the provincial government.²⁰

¹³ *Irving Pulp & Paper Ltd v National Farm Products Marketing Council*, 1988 CarswellNat 805, 21 FTR 226 at paras 2 and 3 No reasons were given. [TAB 6]

¹⁴ *Vancouver Wharves Ltd v Canada (Regional Safety Officer)*, 1996 CarswellNat 164, 107 FTR 306 at para 42 (*Vancouver Wharves*) [TAB 7]

¹⁵ *Energy Probe* FC at paras 17 and 18; FCA at paras 13, 14 and 34 [TAB 3]

¹⁶ *The Molson Companies Limited v Beaugregard*, 1986 CarswellNat 1038, 36 ACWS (2d) 12 at paras 5 to 8 (*Beaugregard*) [TAB 8]

¹⁷ *CRTC v Teleprompter Cable Communications Corp.*, [1972] FC 1265 (CA) at para 2. The Federal Court on its own motion added the Attorney General as a party to the action for a declaration against the CRTC. FCA affirmed. [TAB 9]

¹⁸ *Energy Probe* FC at para 18 [TAB 3]

¹⁹ *Vancouver Wharves* at paras 36, 37, 41 and 42 [TAB 7]

²⁰ *Mikisew* at para 8 [Tab 1]

b) No “genuine or clear” public interest required

21. In *Beauregard*, the Attorney General of Canada applied to be a party under old Rule 1716(2)(b). The Court found that there was a public interest in the appeal as the nature of the application (an appeal under s. 44 of the *Trademark Act*), was to consider what was in fact in the public interest. The argument was made by the applicant that the interest must be “clear or genuine” for the Attorney General to participate but the Court disagreed and said it simply needed to be in the public interest. This is analogous to the NEB’s role to determine that the Project satisfies the need for public convenience and necessity. Who better to speak to the convenience and necessity than one of the provinces impacted?²¹

c) Public interest found where one speaks on behalf of a broad segment of public

22. The reasoning of Justice Stratas in the *Northern Gateway/Gitxaala* case is also informative. The analysis of the Canadian Association of Petroleum Producer’s (“CAPP”) intervention is particularly instructive as the Court recognized that the association appeared to be doing nothing more than advancing submissions that the project proponent could advance. Nonetheless, the Court tied the intervention to the “public interest” aspect of the approval and found that the association was well placed to speak on behalf of a broad segment of the public affected by the decision. The Court noted (i) the need to be exposed to perspectives beyond those offered by the parties; (ii) the fact that there was “an array of voices on one side and relatively few on the other side”; and (iii) the association’s significant involvement in the process below. Although CAPP applied under Rule 109, the analysis is also suitable to an application by Alberta to participate under Rule 110.²²

²¹ *Beauregard* at paras 5 to 8 [TAB 8]

²² *Gitxaala Nation v Canada*, 2015 FCA 73 at paras 32, 34, 36 to 38 (*Northern Gateway/Gitxaala*) [TAB 10]

D) The questions of general importance

23. Leave will be granted where an issue before the Court is one of general public importance and of such a nature that the Court deems it beneficial to hear the attorney general on the matter.²³

24. In reviewing the judicial review applications the following matters are of general importance to Alberta.

a) Important national and provincial economic impact

25. Alberta is impacted because this Project is partially located in Alberta (Edmonton to the British Columbia border), and the Project will facilitate material access to new markets. The approved Project will impact the timely marketing of Alberta's energy resources. Alberta is best positioned to speak to the potential impacts of this decision on Alberta's economy and market access, and can offer a provincial perspective on the benefits of the Project that may not be expressed by either Respondent, Trans Mountain or Canada.²⁴

26. Further, the appropriate assessment of upstream greenhouse gases ("GHG") emissions as part of major interprovincial pipeline projects is a question of general importance, and one which Alberta is uniquely situated to address in terms of provincial regulation.²⁵ The Governor in Council's Order in Council expressly refers to Alberta's *Climate Leadership Plan*, and the commitment to cap oil sands emissions, as part of its decision. Alberta is in the best position to speak to the relevance of Alberta's *Climate Leadership Plan* to the assessment of upstream GHG emissions.

²³ *Energy Probe* at para 18 [TAB 7]

²⁴ It is alleged that the NEB or Governor in Council failed to discharge its obligations under ss. 52 or 54 of the *NEB Act* by failing to balance the costs and benefits in determining the public interest. (See Burnaby A-224-16 at paras 56-59; Burnaby A-75-17 at paras 37, 42-45; TWN A-78-17 at para 61) *NEB Act* Excerpts [Tab 15]. See also Lammie Affidavit at para 5

²⁵ It is alleged that the NEB failed to consider upstream effects of the project, including greenhouse gas (GHG) emissions. (See Burnaby A-224-16 at para 58; Vancouver A-225-16 at para 42) See also Lammie Affidavit Exhibit "2" at page 2

b) Certainty of process is in the public interest

27. It is of general importance to Alberta that there are clear, consistent and predictable rules and processes to facilitate the consideration of resource development projects in the public interest. There must be certainty in the process. Predictability of process fosters certainty.

(i) Implications for future interprovincial pipeline projects

28. The Applicants' ability to challenge the NEB's Recommendation Report and its consideration of the "public interest" under the *National Energy Board Act* ("NEB Act") is a question of general importance. The NEB has exclusive jurisdiction to review and make recommendations on interprovincial pipelines; the ability to challenge the NEB's Recommendation Report will impact future interprovincial pipeline applications, including Energy East, which will have direct impacts on the timely marketing of Alberta's energy resources. Alberta's interest is grounded in the need for regulatory certainty, particularly as it relates to energy resource development.²⁶

(ii) Certainty in consultations

29. Several of the applicants identify a wide range of issues around the duty to consult. It is of general importance that there are clear, consistent and predictable rules and processes to facilitate the consideration of resource development projects in the public interest in a manner that respects section 35 of the *Constitution Act 1982*.
30. Alberta has sought and obtained leave to intervene at the Federal Court of Appeal and Supreme Court of Canada in numerous cases raising important aboriginal law questions involving the Crown's duty to consult as well as the role of regulatory tribunals. Examples include:

²⁶ Lammie Affidavit at para 8

- a) *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2004 FCA 66
 - b) *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc.*, 2009 FCA 308
 - c) *Daniels v Canada (Minister of Indian and Northern Affairs)*, 2014 FCA 101
 - d) *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
 - e) *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74
 - f) *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69
 - g) *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43
31. Governments need a level of flexibility in determining how to meet consultation obligations, and governments need latitude to organize their regulatory schemes to meet governmental objectives. Flexibility and practicality are important considerations in order to balance the public interest in resource development generally with the need to reconcile the interests of aboriginal communities with other interests in society.
32. Several of the applicants also advocate for a determination of potential infringement of aboriginal or treaty rights, reverting to a pre-*Haida*²⁷ framework (i.e. *Sparrow*²⁸) that removes certainty in the NEB process. Substantive aboriginal and treaty rights litigation, including infringement litigation, is of general importance to First Nations and Canadian society as a whole. These issues are serious and require proper adjudication to reflect the importance of section 35 rights, while at the same time recognizing that constitutional rights are not absolute. The *Haida* framework can appropriately address the First Nations concerns, and balance and reconcile these concerns with the broader public interest, while taking into account risks and potential impacts to rights. There is no principled reason to revert back to the *Sparrow* framework analysis. Project specific regulatory processes and summary judicial review proceedings are not the appropriate venue to address substantive rights issues.

²⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73

²⁸ *R v Sparrow*, [1990] 1 SCR 1075

33. Alberta is responsible for the management of provincial Crown land and resources and is responsible for discharging consultation obligations that may be owed under Alberta's historical treaties. Alberta has a First Nations consultation policy (and related guidelines) concerning land and resource dispositions within Alberta.²⁹ Alberta has a significant legal interest in the development of section 35 jurisprudence. Alberta can offer this Court a provincial perspective on the consultation and infringement questions raised in this proceeding.

(iii) Certainty in the interpretation of CEAA 2012 and SARA

34. Alberta supports the position that:
- i. responsible authorities have broad discretion to scope a project;³⁰ in fact, *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") is explicit that a responsible authority may consider the scope of various factors under s. 19(1) of CEAA 2012;³¹ and
 - ii. it is proper and reasonable to include conditions which contemplate further studies as part of the CEAA 2012 process.³² CEAA 2012 is an assessment tool; it does not require complete information on all aspects of the project before a recommendation or decision is made to proceed with the project. To impose such a requirement on joint review panels would mean that finality in the environmental assessment process will never be achieved.³³

²⁹ Lammie Affidavit at para 10

³⁰ *Greenpeace Canada v Canada (Attorney General)*, 2016 FCA 114 at paras 41 and 58. (*Greenpeace Canada*) [TAB 11]

³¹ Section 19(2)(a) of CEAA 2012 [TAB 12]

³² *Greenpeace Canada*, 2014 FC 1124 at paras 56-60, upheld on appeal 2016 FCA 114 [TAB 11]

³³ *Alberta Wilderness Assn v Express Pipelines Ltd*, 1996 CarswellNat 961 (Fed CA), at paras 10, 13-14 [TAB 13]

35. Several applicants raise issues around the NEB's scope of review of the Project and imposition of conditions.³⁴ The Court's interpretation of *CEAA 2012* is a question of general importance that has implications for current and future projects subject to *CEAA 2012*:
- i. where Alberta is the project proponent;
 - ii. for joint review panels involving Alberta regulatory tribunals; and
 - iii. for future interprovincial pipeline applications under *CEAA 2012* and the *NEB Act* which will impact Alberta.
36. Alberta is the project proponent for two projects currently under *CEAA 2012* review. Further, there are currently three joint review panels involving Alberta regulatory tribunals and *CEAA 2012* with respect to oil sands, coal development, and hydro-electric power generation. Alberta has also applied to intervene in the Energy East NEB review under *CEAA 2012* and the *NEB Act*.³⁵ It is important that the NEB's discretion to determine the scope of pipeline projects be upheld, and that this scope is within areas of its jurisdiction. Certainty in the interpretation of *CEAA 2012* is of importance to Alberta.
37. Likewise, some applicants advocate broadening the scope of the *Species at Risk Act* ("SARA").³⁶ The court's interpretation of ss. 77 and 79 of *SARA* are questions of general importance that have implications for future *CEAA 2012* reviews, such as Energy East. Section 79 of *SARA* should not be used to determine or broaden the scope of a project designated under *CEAA 2012*. Once the scope of a project is determined under *CEAA 2012*, the responsible authority (such as the NEB) can then determine whether s. 79 of *SARA* applies. Section 77 of *SARA* is only triggered if a person or body authorizes an activity under a federal act that destroys critical habitat of a listed species.

³⁴ See Burnaby A-224-16 paras 48-51; Burnaby A-75-17 paras 34-41; Squamish A-77-17 at paras 61-63; Raincoast A-218-16 at paras 15-19; Raincoast A-84-17 at paras 27-34.

³⁵ Lammie Affidavit para 9

³⁶ *SARA* excerpts [TAB 14] See Raincoast A-218-16 at paras 20-33; Raincoast A-84-17 at paras 25-37.

E) Conclusion

38. With respect to these proceedings, the NEB's role is analogous to the trademark panel in *Beauregard*,³⁷ as the point of the process is to determine if the Project satisfies the need for public convenience and necessity – i.e. a consideration of the public interest. Alberta should be granted intervener status as:

- i. the process is intended to address public convenience and necessity – Alberta has a unique and broader perspective to bring than the parties to the actions;
- ii. Alberta's perspective in support of the Canada Order in Council balances out the array of voices on the other side; and
- iii. Alberta was involved in the process below.³⁸

Alberta has a stake in protecting Alberta public interests.

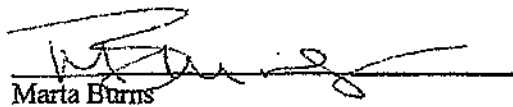
39. The Project is of general public importance and Alberta respectfully requests this Court to hear the Attorney General of Alberta on this matter.

PART IV ORDER OUGHT

40. Alberta requests an order granting the Attorney General of Alberta leave to intervene in the within proceedings, leave to file written submissions and leave to present oral argument at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2017.

JUSTICE AND SOLICITOR GENERAL


Marta Burns
Counsel for the Attorney General of Alberta

³⁷ *Beauregard* at para 5 [TAB 8]

³⁸ *Northern Gateway/Gitxaala* at paras 36 to 38 [TAB 10]

PART V TABLE OF AUTHORITIES

TAB	AUTHORITY
1	<i>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)</i> , 2002 FCA 306; 2002 CarswellNat 2188
2	<i>Federal Courts Rules</i> , Rule 109 & 110
3	<i>Energy Probe v Canada (Atomic Energy Control Board)</i> , 1984 CarswellNat 26, 1984 CarswellNat 637, [1984] 2 FC 138, affirmed 1984 CarswellNat 660 [1985] 1 FC 563
4	Sguyias, Kinnear <i>et al.</i> , <i>Federal Court Rules</i> extracts Rules 1101 & 1716
5	<i>Canada (Attorney General) v Pictou Landing Band Council</i> , 2014 FCA 21, 2014 CarswellNat 149
6	<i>Irving Pulp & Paper Ltd v National Farm Products Marketing Council</i> , 1988 CarswellNat 805, 21 FTR 226
7	<i>Vancouver Wharves Ltd v Canada (Regional Safety Officer)</i> , 1996 CarswellNat 164, 107 FTR 306
8	<i>The Molson Companies Limited v Beaugregard</i> , 986 CarswellNat 1038, 36 ACWS (2d) 12 (FC)
9	<i>CRTC v Teleprompter Cable Communications Corp</i> , [1972] FC 1265 (CA)
10	<i>Gitxaala Nation v Canada</i> , 2015 FCA 73
11	<i>Greenpeace Canada v Canada (Attorney General)</i> , 2014 FC 1124 at 41, 56-50, upheld on appeal 2016 FCA 114
12	<i>Canadian Environmental Assessment Act 2012</i> SC 2012, c 19 s 19(2)(a)
13	<i>Alberta Wilderness Assn v Express Pipelines Ltd</i> , 1996 CarswellNat 961 (FCA)
14	<i>Species at Risk Act</i> , SC 2002, c 29 ss 77 and 79
15	<i>National Energy Board Act</i> , RSC, 1985, c N-7 ss 52 and 54