

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 L.P. 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 Tsawwassen First Nation

January 12, 2016

To: The Secretary
National Energy Board
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1 **1. INTRODUCTION**

2 **1.1 Overview**

3 The people of Tsawwassen have occupied their territory, including lands and waters, sustaining
4 themselves for thousands of years. As was the case of their forebears, Tsawwassen people
5 continue to pursue their traditional activities, which include the harvest of resources from the
6 Salish Sea, rivers, and lands around them. In Canada, it is common knowledge that with the
7 onset of European settlement within the traditional territories of First Nation peoples, there was a
8 resultant reduction of the resources important to them. The experience of the Tsawwassen people
9 was no different. Now, with the proposed expansion of the Trans Mountain Expansion Project
10 (“Project”), the Tsawwassen people face the likelihood of an even greater adverse impact on not
11 only increasingly scarce resources, but on sea-life important to them, posing the threat of
12 irreparable harm to their Indigenous or Aboriginal way of life. Simply put, the greater the
13 adverse impact on traditional resources, the greater the impact on the ability of the Tsawwassen
14 people to practice their traditions. As importantly though, would be interference with the ability
15 to pass down traditional cultural knowledge and activities to the next generation. Inter-
16 generational teaching and knowledge transfer is at the heart of the well-being and sustainability
17 of Tsawwassen culture.

18 The Lower Mainland, in which the majority of lands and waters of Tsawwassen’s Traditional
19 Territory lies, has been almost fully subsumed by non-Aboriginal settlement and industrial
20 expansion. In part, in an effort to protect its Aboriginal interests, including rights to land and
21 water around them, and to access increasingly scarce resources, the Tsawwassen people
22 embarked on a journey that culminated in a modern-day Treaty; the Tsawwassen First Nation
23 Final Agreement (“TFNFA” or “Treaty”).¹

24 The Treaty, which came into effect in 2009, modified the Aboriginal rights of the Tsawwassen
25 people within Canada.² The Canadian Constitution and legal systems protect Tsawwassen’s way
26 of life and rights set out in the Treaty. Among other things, the Treaty sets out the right to land,

¹ *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39 and S.C. 2008, c. 32

² Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl. 13–14, A3W8G0, Adobe page 36, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

27 as well as to rights of access to sea and land resources upon which the Tsawwassen people are
28 dependent.

29 Tsawwassen First Nation (“TFN”) sought Intervenor status in relation to the Project in an effort
30 to not only better understand it, but also to consider the adverse impacts the Project may have on
31 their Aboriginal way of life and the potential for impacts on their constitutionally protected
32 rights. Now, after careful review and dedicated participation, supported largely by its own
33 financial resources, the TFN has no choice but to conclude that the Project has not been shown,
34 on the information to date, to be safe or in harmony with the Tsawwassen peoples’ aboriginal
35 way of life. It is TFN’s view that the Project has serious potential to cause a detrimental change
36 in the current use of lands and resources for traditional purposes by Aboriginal persons,
37 including TFN.

38 The Project footprint directly bisects TFN fishing areas; a spill, accident or malfunction there, or
39 in other harvesting areas, will likely result in significant adverse impacts to important sea and
40 terrestrial resources. While TFN expected that the Proponent would have done more to assess
41 TFN’s Treaty rights and the impacts the Project may have on those rights, since its participation
42 in these proceedings, TFN has observed a near complete lack of any such assessments. In its
43 participation in the process, TFN has attempted to encourage the Proponent to inform itself about
44 the content of the Treaty so it can properly consider and measure how the Project poses long-
45 term risks and impacts to them. Unfortunately, the analysis that TFN has always maintained was
46 necessary by the Proponent remains seriously deficient.

47 It is the role of the Joint Review Panel (“JRP”) is to ensure that constitutionally protected
48 Aboriginal and Treaty rights are properly assessed and in doing so, ensure that any
49 recommendations and decisions that may be made about the Project are done so in a manner that
50 upholds the duty and honour of the Crown.

51 So far, the emphasis by the Proponent has been largely on the economic values from a wider
52 public interest perspective. What the process lacks is the appropriate overlay of the constitutional
53 and environmental assessment that the law requires; that the rights and traditional practices of
54 Aboriginal people such as the Tsawwassen are given a real understanding, with actual weight
55 placed on them, commensurate to the potential adverse environmental consequences on them.

56 TFN concerns must be seriously taken into consideration as to whether or not the Project ought
57 to be approved.

58 We know that Canada's Constitution requires that the Crown seriously consider the views,
59 interests and rights of First Nations and the impacts of the Project on those interests and rights.
60 At a minimum, those considerations must be understood, analyzed and factored into decision
61 making in a meaningful way that ensures Canada's Constitutional obligations under s. 35 of the
62 *Constitution Act, 1982* are upheld.

63 This exercise is not merely figurative; rather, it is an accepted tenant in our laws – based on the
64 concept of reconciliation of the interests of Aboriginal peoples with those of broader Canadian
65 society. The concept of reconciliation is grounded in the reality that for too long the interests of
66 Aboriginal people have been ignored, overlooked and discounted, over the interests of others,
67 particularly as it relates to resources and the impact development has on them. The Supreme
68 Court of Canada has given us clear direction that reconciliation lies at the centre of contemporary
69 Aboriginal law, and must therefore be at the centre of understanding how the JRP ought to
70 approach the question of what recommendation to make to the Governor in Council. In the
71 context of a modern Treaty First Nation, Justice Binnie in *Little Salmon/Carmacks* reminds us
72 that:

73 The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful
74 long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The
75 modern treaties, including those at issue here, attempt to further the objective of
76 reconciliation not only by addressing grievances over the land claims but by creating the
77 legal basis to foster a positive long-term relationship between Aboriginal and non-
78 Aboriginal communities. Thoughtful administration of the treaty will help manage, even
79 if it fails to eliminate, some of the misunderstandings and grievances that have
80 characterized the past. Still, as the facts of this case show, the treaty will not accomplish
81 its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it
82 were an everyday commercial contract. The treaty is as much about building
83 relationships as it is about the settlement of ancient grievances. The future is more
84 important than the past. A canoeist who hopes to make progress faces forwards, not
85 backwards.³

³ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103 [*Little Salmon*]

86 Ultimately, the position of the TFN is that the information before the JRP can lead to only one
87 recommendation from the Panel, and that is, for reasons set out below, that the Project should not
88 be approved.⁴

89 The application for the Project (“Application”) and other information filed in this proceeding
90 show that central questions remain unanswered. On top of the inadequate information to answer
91 these questions, is the lack of meaningful consultation by the Proponent and the Crown resulting
92 in their failure to properly understand the impacts of the Project on TFN’s Treaty rights and
93 traditional Aboriginal practices. Without that knowledge and understanding, the Proponent and
94 the Crown cannot properly understand, let alone address TFN’s concerns.

95 On the whole, the information shows that effects and risks of a spill, accident or malfunction by
96 tanker traffic are not fully understood, and that the means of addressing these concerns have not
97 been well thought out, particularly in environmentally sensitive areas found within the TFN
98 Traditional Territory.

99 Furthermore, while it is the case that the views and knowledge of TFN and other Aboriginal
100 people have been all but excluded from the formal upfront analysis of risk, in the case of TFN,
101 neither the Proponent or the Crown have properly engaged or consulted as is required by clauses
102 4(a) to 4(c) of Chapter 15, Environmental Management of the TFNFA.⁵ Rather, the Proponent
103 and the Crown has come to TFN in the same, seemingly parochial “get-the-deal-done” approach
104 as it has with other First Nations. TFN has objected throughout this process to the lack of proper
105 consultation by the Proponent and the Crown, particularly in light of the Chapter 15
106 requirements. Notwithstanding the Proponent’s claim that they have provided Aboriginal
107 participants a variety of ways in which they can be *heard*, that is simply not the case for TFN.
108 Now, nearing the close of the hearing process, the Crown is said to be ready to deal with specific
109 concerns of TFN; after the close of evidence and final submissions having been made. This not
110 the up-front approach to consultation that is required.

⁴ TFN supports the recommendations of the Province of British Columbia, Exhibit C289-13-2, Province of BC Final Argument, A4X3T3

⁵ Exhibit C356-2-3, ch. 15, clause 4, Tsawwassen First Nation Final Agreement, A3W8G0, Adobe pages 145–146

111 TFN's concerns center not only on impacts on their ability to practice their culture given the
112 likely impacts of the Project, but also their concerns with the Proponent's scientific analysis and
113 its analytical gaps. TFN's greatest concern is a spill, accident or malfunction on the South Arm
114 of the Fraser River or in the Salish Sea – particularly in the southern Strait of Georgia. The
115 concerns span those associated with the immediate and acute impacts caused by a spill, accident
116 or malfunction, right through to the long-term, chronic effects. The scientific studies filed to date
117 do not go far enough in understanding these potential impacts on the Tsawwassen people or on
118 their Treaty rights.

119 In its written evidence, TFN raised concerns with the conclusions of the Proponent in the event
120 of a spill. Regarding the Proponent's methodology, TFN shows that the Proponent's projections
121 regarding a spill are not reflective of the worst case scenario TFN would face to the exercise of
122 their Treaty rights. It is clear that the Proponent's assessments of impacts on resources important
123 to TFN still lack the requisite meaningful content required of them to actually understand the
124 adverse impacts identified by TFN.

125 Below, TFN sets out in more detail the adverse impacts that they fear will result upon a spill,
126 accident or malfunction in connection with the Project, including the long-term effects caused by
127 those events.

128 In the Application, it is also clear that the Proponent made no genuine attempt to assess or
129 determine what rights exist for TFN, how Tsawwassen people exercise those rights, or otherwise
130 incorporate use information into the environmental assessment in a meaningful way. Instead,
131 what little treatment there was of TFN rights were generic and sparse, to say the least. This
132 underwhelming treatment by the Proponent does not go anywhere near the level of
133 understanding required to comprehend in a concrete way, the possible concerns of TFN, or how
134 those concerns could be addressed, let alone mitigated.

135 In the end, the near absence of TFN-specific information in the Application, the narrow approach
136 of the Proponent throughout this process, the adverse rulings made in respect of TFN's
137 information requests by the JRP, the failure by the Crown to ensure proper consultation has taken
138 place, including the proper implementation of clauses 4(a) to 4(c) of Chapter 15 of the TFNFA,
139 and the inadequacy of the evidence filed to date, all stand in the way of understanding and

140 assessing impacts, and addressing, mitigating and accommodating the concerns of TFN. None of
141 the above comes close to the level of honour required and demanded down the path of
142 reconciliation.

143 **1.2 Overview of Submissions**

144 TFN wishes to set out its perspectives and opinion on whether the JRP ought to recommend to
145 the Governor in Council that a Certificate of Public Convenience and Necessity (“Certificate”)
146 be issued for the Project pursuant to section 52 of the *National Energy Board Act* (“NEB Act”).⁶

147 Based on the submissions in this Final Argument, TFN’s position is firmly that the JRP must
148 recommend against approval of the Project.

149 TFN’s position is based on many variables, including the inadequacy of the information in the
150 Application to allow for a proper assessment of the adverse impacts from the Project; the
151 incomplete assessment of impacts by the Proponent to TFN’s Treaty rights to harvesting,
152 governance and culture; the inadequate risk assessment in the Application; the significant
153 adverse effects of the Projects on TFN’s culture and Treaty rights; the lack of meaningful
154 engagement by Trans Mountain regarding concerns raised by TFN; the inadequate responses by
155 the Proponent and federal department intervenors to TFN information requests; and the overall
156 inadequate consultation of the Crown.

157 TFN’s submissions are made in the context of the legislative framework for the JRP process, as
158 well as the filing requirements found in various documents within this process. In TFN’s view,
159 those requirements have not been met in the Application filed by the Proponent. Given this, TFN
160 contends that the JRP is unable to make a recommendation in favour of the Project due to the
161 information gaps upon which information the JRP is supposed to adequately consider the factors
162 required under the *Canadian Environmental Assessment Act* (“CEAA”)⁷ and the *NEB Act*.

⁶ *National Energy Board Act*, R.S.C. 1985, c. N-7.

⁷ *Canadian Environmental Assessment Act*, S.C., 2012, c. 19, s. 52

163 **2. REGULATORY FRAMEWORK**

164 For its part, the Proponent, in bringing forward the Application, is tasked with properly
165 designing its project, gathering information and studies in support of its project, and ensuring
166 there is reliable data and necessary analysis of all of the information in a manner that brings to
167 the JRP the most comprehensive and fulsome information possible upon which it can weigh and
168 determine the statutory obligations on them in assessing the potential impact of the Project. In
169 this process, the Proponent bears the onus of ensuring that their project meets the regulatory
170 requirements, by gathering the necessary information, analyzing that information and presenting
171 its analysis in comprehensive manner that permits the JRP to carry out its functions.

172 As will be shown in more detail below, the Proponent failed to do all the “up-front” work
173 required of it, particularly as it relates to spills, accidents and malfunctions, and the impact it can
174 have on the exercise of Aboriginal and Treaty rights of First Nations. Because of this failure as it
175 relates to TFN, the TFN has been left with doing the analytical work required of the Proponent,
176 which is not the role of an intervenor.

177 Rather, intervenors are to supplement what is supposed to be a rigorous evidentiary record
178 supported by an in-depth review and application of applicable statutes, regulations, terms of
179 reference applicable to the JRP and this process. Due to the Proponent’s failure to file a
180 comprehensive application before the JRP, First Nations reliant on their own scant and scare
181 resources – not covered by the NEB funding program – must undertake work and assessments
182 that is not their obligation to fulfil.

183 **2.1 Legislation and Guidelines**

184 The legislative framework for the review of the Project is set out in the *NEB Act* and *CEAA*. In
185 addition, the issues to be addressed in the environmental assessment and the application filing
186 requirements are set out in various documents including the Hearing Order and the Factors and
187 Scope of Factors for the Environment Assessment (“Scope of Factors”).

188 The relevant provisions of these documents are set out below.

189 **2.1.1 NEB Act Requirements**

190 Section 52(1) of the *NEB Act* provides that:

191 If the Board is of the opinion that an application for a certificate in respect of a pipeline is
192 complete, it shall prepare and submit to the Minister, and make public, a report setting
193 out:

- 194 a. its recommendation as to whether or not the certificate should be issued for all or any
195 portion of the pipeline, taking into account whether the pipeline is and will be
196 required by the present and future public convenience and necessity, and the reasons
197 for that recommendation; and
- 198 b. regardless of the recommendation that the Board makes, all the terms and conditions
199 that it considers necessary or desirable in the public interest to which the certificate
200 will be subject if the Governor in Council were to direct the Board to issue the
201 certificate, including terms or conditions relating to when the certificate or portion or
202 provisions of it are to come into force.⁸

203 Section 52(2) of the *NEB Act* sets out the factors to be considered by the JRP in making a
204 recommendation under section 52 of the NEB Act:

205 Factors to Consider

206 In making its recommendation, the Board shall have regard to all considerations that
207 appear to it to be directly related to the pipeline and to be relevant, and may have regard
208 to the following:

- 209 a. the availability of oil, gas or any other commodity to the pipeline;
- 210 b. the existence of markets, actual or potential;
- 211 c. the economic feasibility of the pipeline;
- 212 d. the financial responsibility and financial structure of the applicant, the methods of
213 financing the pipeline and the extent to which Canadians will have an opportunity to
214 participate in the financing, engineering and construction of the pipeline; and
- 215 e. any public interest that in the Board's opinion may be affected by the issuance of the
216 certificate or the dismissal of the application.

217 **2.1.2 CEEA Requirements**

218 The purpose of *CEEA* is set out in section 4 of the Act:

⁸ *NEB Act*, s. 52(1).

- 219 (1) The purposes of this Act are
- 220 a. to protect the components of the environment that are within the legislative authority
- 221 of Parliament from significant adverse environmental effects caused by a designated
- 222 project;
- 223 b. to ensure that designated projects that require the exercise of a power or performance
- 224 of a duty or function by a federal authority under any Act of Parliament other than
- 225 this Act to be carried out, are considered in a careful and precautionary manner to
- 226 avoid significant adverse environmental effects;
- 227 c. to promote cooperation and coordinated action between federal and provincial
- 228 governments with respect to environmental assessments;
- 229 d. to promote communication and cooperation with aboriginal peoples with respect to
- 230 environmental assessments;
- 231 e. to ensure that opportunities are provided for meaningful public participation during
- 232 an environmental assessment;
- 233 f. to ensure that an environmental assessment is completed in a timely manner;
- 234 g. to ensure that projects, as defined in section 66, that are to be carried out on federal
- 235 lands, or those that are outside Canada and that are to be carried out or financially
- 236 supported by a federal authority, are considered in a careful and precautionary
- 237 manner to avoid significant adverse environmental effects;
- 238 h. to encourage federal authorities to take actions that promote sustainable development
- 239 in order to achieve or maintain a healthy environment and a healthy economy; and
- 240 i. to encourage the study of the cumulative effects of physical activities in a region and
- 241 the consideration of those study results in environmental assessments.

242 (2) The Government of Canada, the Minister, the Agency, federal authorities and responsible

243 authorities, in the administration of this Act, must exercise their powers in a manner that

244 protects the environment and human health and applies the precautionary principle.⁹

245 Section 5 of *CEAA* sets out the meaning of “environmental effects” for the purposes of *CEAA*,

246 as follows:

247 (1) For the purposes of this Act, the environmental effects that are to be taken into account in

248 relation to an act or thing, a physical activity, a designated project or a project are

⁹ *CEAA*, s. 4.

- 249 a. a change that may be caused to the following components of the environment that are
250 within the legislative authority of Parliament:
- 251 (i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,
 - 252 (ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,
 - 253 (iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds*
254 *Convention Act, 1994*, and
 - 255 (iv) any other component of the environment that is set out in Schedule 2;
- 256 b. a change that may be caused to the environment that would occur
- 257 (i) on federal lands,
 - 258 (ii) in a province other than the one in which the act or thing is done or where
259 the physical activity, the designated project or the project is being carried
260 out, or
 - 261 (iii) outside of Canada; and
- 262 c. with respect to aboriginal peoples, an effect occurring in Canada of any change that
263 may be caused to the environment on
- 264 (i) health and socio-economic conditions,
 - 265 (ii) physical and cultural heritage,
 - 266 (iii) the current use of lands and resources for traditional purposes, or
 - 267 (iv) any structure, site or thing that is of historical, archaeological,
268 paleontological or architectural significance.¹⁰

269 Section 19 of *CEAA* provides that the following factors must be taken into account in relation to a
270 reviewable project:

- 271 a. the environmental effects of the designated project, including the environmental
272 effects of malfunctions or accidents that may occur in connection with the designated
273 project and any cumulative environmental effects that are likely to result from the
274 designated project in combination with other physical activities that have been or
275 will be carried out;
- 276 b. the significance of the effects referred to in paragraph (a);
- 277 c. comments from the public – or, with respect to a designated project that requires that
278 a certificate be issued in accordance with an order made under section 54 of the
279 National Energy Board Act, any interested party – that are received in accordance
280 with this Act;

¹⁰ *CEAA*, s. 5(1).

- 281 d. mitigation measures that are technically and economically feasible and that would
282 mitigate any significant adverse environmental effects of the designated project;
- 283 e. the requirements of the follow-up program in respect of the designated project;
- 284 f. the purpose of the designated project;
- 285 g. alternative means of carrying out the designated project that are technically and
286 economically feasible and the environmental effects of any such alternative means;
- 287 h. any change to the designated project that may be caused by the environment;
- 288 i. the results of any relevant study conducted by a committee established under section
289 73 or 74; and
- 290 j. any other matter relevant to the environmental assessment that the responsible
291 authority, or – if the environmental assessment is referred to a review panel – the
292 Minister, requires to be taken into account.¹¹

293 Since the Project was referred to a review panel, the Minister of Environment was required to
294 determine the scope of the factors that must be taken into account in relation to the matters set
295 out in paragraphs (1)(a), (b), (d), (e), (g), (h) and (j).¹² The Scope of Factors for the Project was
296 contained in a letter issued by the NEB on April 2, 2014.¹³ The requirements set out in that
297 document are described in detail below.¹⁴ The wording section 19(2) provides that the Scope of
298 the Factors that “must” be taken in account, thus making these mandatory considerations in this
299 process.

300 Section 29 of *CEAA* requires the JRP to set out recommendations with respect to the decisions
301 that the Governor in Council must make in relation to the Project.¹⁵

302 The Governor in Council is required to decide the following issues:

- 303 a. whether the Project is not likely to cause significant adverse environmental effects,
304 b. whether the Project is likely to cause significant adverse environmental effects that
305 can be justified in the circumstances, or

¹¹ *CEAA*, s. 19(1)

¹² *CEAA*, s. 19(2)

¹³ Exhibit A13-1, NEB Letter, Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012, A3V6J1.

¹⁴ *CEAA*, s. 19(2)

¹⁵ *CEAA*, s. 29(1)

306 c. whether the Project is likely to cause significant adverse environmental effects that
307 cannot be justified in the circumstances.¹⁶

308 Although *CEAA* does not provide the test for determining “significance”, the Canadian
309 Environmental Agency (Agency”) has provided a framework for determining whether a project
310 is likely to have significant adverse environmental effects.

311 **2.1.3 Hearing Order**

312 The Hearing Order issued by the JRP in April 2014 also set out a List of Issues to be considered
313 in the JRP process. Those issues include the following:

- 314 • economic feasibility of the Project;
- 315 • potential environmental and socio-economic effects of the Project, including any
316 cumulative environmental effects that are likely to result from the project, including
317 those required to be considered by the NEB’s Filing Manual;
- 318 • potential environmental and socio-economic effects of marine shipping activities that
319 would result in from the Project, including the potential effects of accidents or
320 malfunctions that may occur;
- 321 • terms and conditions to be included in any approval the Board may issue;
- 322 • potential impacts of the project on Aboriginal interests;
- 323 • contingency planning for spills, accidents or malfunctions, during construction and
324 operation of the project; and
- 325 • safety and security during construction of the Project and operation of the project,
326 including emergency response planning and third-party damage prevention.¹⁷

327 The Hearing Order also provides that the Board does not intend to consider the environmental
328 and socio-economic effects associated with upstream activities, the development of oil sands, or
329 the downstream use of oil transported by the pipeline.

330 TFN is a low-lying community, immediately adjacent to the Salish Sea. As such, the impacts of
331 climate change are a key concern of TFN, despite the decision of the NEB to exclude the
332 consideration of upstream and downstream impact. Notwithstanding this decision of the NEB,
333 there are greenhouse gas (“GHG”) emissions from operations in connection with the Project that
334 ought to be considered. In that regard, TFN has provided some comments related to GHG

¹⁶ *CEAA*, s. 31(1)(a)

¹⁷ Exhibit A15-3, Hearing Order OH-001-2014, A3V6I2

335 emissions in our comments to Draft Conditions No. 106 and 107 found in Appendix A to this
336 Final Argument.

337 The Hearing Order also provides that because the Project involves constructing and operating
338 more than 40 kilometres of new pipeline, such activities are listed in the Regulations Designating
339 Physical Activities, which makes the Project a “designated project” under the *CEAA*. Therefore,
340 the NEB is required to conduct an environmental assessment of the Project under that Act. In
341 doing so, the Board is required to consider the environmental matters under the NEB Act, having
342 regard to the Scope of Factors.¹⁸

343 **2.1.4 Factors and Scope of Factors for the Environment Assessment**

344 As noted, the Scope of Factors sets out the factors that must be taken into account in the
345 environmental assessment process for the Project, pursuant to section 19(2) of *CEAA*.

346 The *CEAA* environmental assessment for the designated project will take into account the factors
347 described in paragraphs 19(1)(a) through (h) of the *CEAA*, as set out above.

348 With respect to the scope of the factors to be considered, the JRP in conducting its environment
349 assessment, will consider the:

350 ...potential effects of the designated project within spatial and temporal boundaries
351 within which the designated project may potentially interact with and have an effect on
352 components of the environment. These boundaries will vary with the issues and factors
353 considered, and will include, but not limited to:

- 354
- 355 • construction, operation and maintenance, foreseeable changes, and site
356 reclamations, as well as any other undertakings proposed by the proponent or that
357 are likely to be carried out in relation to the physical works proposed by the
358 proponent, including mitigation and habitat replacement measures;
 - 359 • seasonal or other natural variations of a population or ecological component;
 - 360 • any sensitive life cycle phases of species (e.g., wildlife, vegetation) in relation to
361 the timing of Project activities;
 - 362 • the time required for an effect to become evident;

¹⁸ Exhibit A13-1, NEB Letter, Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012, A3V6J1.

- 363 • the area within which a population or ecological component functions; and
364 • the area affected by the Project.¹⁹

365 The Scope of Factors also provides that:

366 ...the environmental assessment will consider cumulative environmental effects that are
367 likely to result from the designated project in combination with the effects from other
368 physical activities that have been or will be carried out.²⁰

369 Finally, the Scope of Factors refers to section 2(1) of the *CEAA* which provides definitions
370 potentially relevant to the scope of factors before the JRP:

371 “environment” which means the components of the Earth, including

372 (a) land, water and air, including all layers of the atmosphere;

373 (b) all organic and inorganic matter and living organisms; and

374 (c) the interacting natural systems that include components referred to in paragraphs
375 (a) and (b);

376 and

377 “mitigation measures” which means measures for the elimination, reduction or control of
378 the adverse environmental effects of a designated project, and includes restitution for any
379 damage to the environment caused by those effects through replacement, restoration,
380 compensation or any other means.²¹

381 **2.2 Constitutional Protection of Aboriginal and Treaty Rights**

382 In addition to the legislative and regulatory (policy requirements) governing this JRP process,
383 there are also relevant constitutional requirements.

384 **2.2.1 Aboriginal and Treaty Rights**

385 Section 35 of the *Constitution Act, 1982*, provides that:

¹⁹ Exhibit A13-1, NEB Letter, Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012, A3V6J1.

²⁰ Exhibit A13-1, NEB Letter, Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012, A3V6J1.

²¹ Exhibit A13-1, NEB Letter, Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act, 2012, A3V6J1.

386 The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby
387 recognized and affirmed.²²

388 The courts have recognized that Aboriginal peoples existed on their lands long before Europeans
389 settled in North America and Aboriginal rights exist in Canadian law, not because of government
390 recognition, but because they were not extinguished upon European assertions of sovereignty or
391 government authority. This was affirmed by the Supreme Court of Canada in *R. v. Van Der Peet*
392 in which Chief Justice Lamer stated:

393 In my view, the doctrine of aboriginal rights existed, and is recognized and affirmed by s.
394 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal
395 peoples were already here, living in communities in the land, and participating in
396 distinctive cultures, as they have done so for centuries.²³

397 Aboriginal rights are *sui generis* in nature.²⁴ They arise from the prior occupation of land.²⁵ As
398 such, these rights are afforded priority and constitutional protection through section 35(1) of the
399 *Constitution Act, 1982*. On that basis, the honour of the Crown is engaged in its dealings with
400 Aboriginal people.²⁶

401 Aboriginal rights are not “frozen in time”, but rather, they must be interpreted flexibly in order to
402 permit their evolution. The Supreme Court of Canada has made it clear that Aboriginal rights are
403 to be interpreted in a “generous, liberal” manner, in which, under section 35 requires that rights
404 be construed in a “purposive way”.²⁷

405 TFN modified its Aboriginal rights when it entered into the Treaty on April 3, 2009. As such,
406 TFN now exercises those rights through it. Treaty rights are afforded the same high level of
407 constitutional protections as are given to Aboriginal rights.

²² *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11., s. 35(1)

²³ *R. v. Van Der Peet*, [1996] 2 SCR 507 at para 30, 137 DLR (4th) 289 [*Van Der Peet*]

²⁴ *Guerin v. R.*, [1984] 2 SCR 335 at page 382, 13 DLR (4th) 21, *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 SCR 657, at page 661, 664

²⁵ *Calder v. The Attorney General of British Columbia*, [1973] SCR 313, at page 318, *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App Cas 36, [1888] JCI No 1 (PC)

²⁶ *R. v. Badger* [1996] 1 SCR 771 at para 78, [1996] SCJ No 39 [*Badger*]

²⁷ *R. v. Sparrow* [1990], 1 SCR. 1075 at 1106, 70 DLR (4th) 385 [*Sparrow*]

408 Aboriginal self-government is a form of Aboriginal rights that is protected by section 35 of the
409 *Constitution Act, 1982*.²⁸

410 **2.2.2 The Duty to Consult**

411 As set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of*
412 *Forests)*, the Crown has a legal obligation to consult with First Nations whenever the Crown is
413 contemplating a decision that has the potential to adversely affect or infringe Treaty or
414 Aboriginal rights. The duty to consult is rooted in the principle that the honour of the Crown is
415 always at stake in dealings between Aboriginal peoples and the Crown. The core, underlying
416 purpose of consultation is to reconcile the prior interests of First Nations with the assertion of
417 Crown sovereignty.²⁹

418 When the claim to Aboriginal rights is strong or the degree of impacts is high, the Crown will
419 have an obligation to attempt to accommodate the First Nation's concerns.³⁰

420 The duty to consult is a constitutional obligation of the Crown. Only procedural elements of the
421 duty to consult can be delegated to proponents. The ultimate legal responsibility for consultation
422 and accommodation rests with the Crown.³¹

423 Because Aboriginal rights exist in the general legal system of Canada,³² decision-makers have to
424 confine their decisions within constitutional limits,³³ that is, duty to consult is an implied
425 constraint on the statutory power of any decision-maker based on the concept that the legislature
426 intends to act constitutionally.

427 Given these principles, it would be inconsistent with the honour of the Crown for government to
428 act unilaterally of adversely affect Aboriginal or Treaty rights with proper regard to the issues.³⁴

429 The Supreme Court of Canada has made it clear: for the Crown to act honourably, it must engage

²⁸ *R. v. Pamejawn* [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204; *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123 at paras 180–181, [2000] BCJ No 1524

²⁹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]

³⁰ *Haida* at paras 20, 26–27

³¹ *Haida* at para 53

³² *Van Der Peet*, at para 45

³³ *Little Salmon*, at para 45

³⁴ *Little Salmon*, at para 56

430 in a dialogue with a potentially affected First Nation with a genuine intention of understanding
431 their rights and concerns, with a willingness to adjusting its conduct if required.³⁵

432 The duty of meaningful consultation and information sharing also applies in the context of
433 historical treaties, as described by the Supreme Court of Canada in *Mikisew Cree First Nation v.*
434 *Canada (Minister of Canadian Heritage)*:

435 The duty here has both informational and response components. In this case, given that
436 the Crown is proposing to build a fairly minor winter road on surrendered lands where
437 the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up”
438 limitation I believe the Crown’s duty lies at the lower end of the spectrum. The Crown
439 was required to provide notice to the Mikisew and to engage with them (and not, as
440 seems to have been the case here, as an afterthought to a general public consultation with
441 Park users). This engagement ought to have included the provision of information about
442 the project addressing what the Crown knew to be Mikisew’s concerns, and to attempt of
443 minimize adverse impacts on Mikisew hunting, fishing and trapping rights. The Crown
444 did not discharge this obligation when it unilaterally declared the road realignment would
445 be shifted from the reserve itself to a track along its boundary. I agree on this point with
446 what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159–60.

447
448 The fact that adequate notice of an intended decision may have given does not mean that
449 the requirement for adequate consultation has also been met.

450
451 The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that
452 aboriginal peoples are provided with all necessary information in a timely way so that
453 they have an opportunity to express their interests and concerns, and to ensure that their
454 representations are seriously considered and, wherever possible, demonstrably integrated
455 into the proposed plan of action.³⁶

456 The Supreme Court in *Mikisew* also held that consultation must take place early in a process,
457 observing that the principle of consultation in advance of interference with existing rights “is a
458 matter of broad general importance to the relations between aboriginal and non-aboriginal
459 people.”³⁷

³⁵ *Haida* at paras 26–27, *Little Salmon*, at para 55

³⁶ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para 64 [*Mikisew*]

³⁷ *Mikisew*, at para 3

460 In *Delgamuukw* the Court indicated that the duty of consultation exists along a continuum, with
461 “mere consultation” at one end and full consent of the aboriginal nation at the other end.³⁸

462 In *Haida*, the Supreme Court of Canada determined that the content of the duty to consult and
463 accommodate will vary with the circumstances:

464 ...[t]he scope of the duty is proportionate to a preliminary assessment of the strength of
465 the case supporting the exercise of the right or title, and to the seriousness of the
466 potentially adverse effect upon the right or title claimed.³⁹

467 In general, the stronger the evidence of an aboriginal rights claim, the heavier the burden of
468 accommodation that is placed on the Crown. The Supreme Court of Canada framed it as follows:

469 At one of the spectrum lie cases where the claims to title is weak, the Aboriginal right
470 limited, or the potential for infringement minor. In such cases, the only duty on the
471 Crown may be to give notice, disclose information, and discuss any issues raised in
472 response to notice...

473
474 At the other end of the spectrum lies cases where a strong prima facie case for the claim
475 is established, the right and potential for infringement is of high significance to the
476 Aboriginal peoples, and the risk of non-compensable damage is high. In such cases, deep
477 consultation, aimed at finding a satisfactory interim solution, may be required. While
478 precise requirement will vary with the circumstances, the consultation required at this
479 stage may entail the opportunity to make submissions for consideration, formal
480 participation in the decision-making process, and provision of written reasons to show
481 that Aboriginal concerns were considered and to reveal the impact they had on the
482 decision. This list is neither exhaustive, nor mandatory for every case.

483
484 Between these two extremes of the spectrum just described, will lie other situations.
485 Every case must be approached individually. Each must also be approached flexibly,
486 since the level of consultation required may change as the process goes on and new
487 information comes to light. The controlling question in all situations is what is required to
488 maintain the honour of the Crown and to effect reconciliation between the Crown and the
489 Aboriginal peoples with respect to interests at stake.⁴⁰

³⁸ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108, at para 160 [*Delgamuukw*]

³⁹ *Haida*, at para 39

⁴⁰ *Haida*, at paras 43–45

490 The trigger for the Crown’s duty to consult is low, requiring actual or constructive knowledge by
491 the Crown of an Aboriginal rights claim and the potential for an adverse impact to the rights, or
492 the land and resources that are subject to the rights, as a result of Crown conduct or a Crown
493 decision.⁴¹ In the treaty context, actual knowledge arises where there is a Treaty right that may
494 be impacted.⁴²

495 The first step in the process of consultation is the proper determination of the rights in issue. In
496 determining the scope of the Aboriginal right in issue, the Crown must take into account and
497 give effect to the aboriginal perspective on the rights, and ensure that it gives the Aboriginal
498 people a full and meaningful opportunity to have input into how their rights are described and
499 recognized.⁴³

500 The Courts have also elaborated on the substance of the duty to consult. Consultation is not
501 limited to the operational level of government conduct. Rather, the Crown’s duty to consult
502 extends to strategic, higher level decisions that may have an impact on Aboriginal claims and
503 rights.⁴⁴ As well, to be meaningful, consultation cannot be achieved through sharp dealing or
504 positional bargaining, but must be genuinely responsive to Aboriginal interests and concerns as
505 they arise in the circumstances. The Crown must be open to the interests and positions advanced
506 by aboriginal peoples and demonstrate a genuine commitment to finding solutions.⁴⁵

507 Finally, while mitigation may be a form of accommodation, consultation cannot be reduced to
508 seeking mitigation of adverse impacts to specific aboriginal rights or practices.⁴⁶ It’s broader
509 than that. As the British Columbia Supreme Court in *Wii’litswx* concluded, “[m]eaningful
510 consultation is characterized by good faith and an attempt by both parties to understand each
511 other’s concerns and to move to address them in the context of the ultimate goal of reconciliation

⁴¹ *Haida*, at para 35

⁴² *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 [*Rio Tinto*] at para 40; *Mikisew* at para 34

⁴³ *Rio Tinto*, at paras 36 and 39; *R. v. Van der Peet*, at para 49

⁴⁴ *Haida*, at para 76; *Rio Tinto*, at para. 44

⁴⁵ *Haida*, at para 42; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras 144–151

⁴⁶ *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, aff’d 2008 FCA 20 (“*Dene Tha’*”) at para 82

512 of the Crown’s sovereignty with the aboriginal rights enshrined in s. 35 of the *Constitution*
513 *Act*.⁴⁷

514 The Crown must act honourably in implementing Treaties between Aboriginal peoples and the
515 Crown. The honour of the Crown requires it to act in a way that accomplishes the intended
516 purposes of the treaty. In *Manitoba Metis Federation*, the Supreme Court of Canada concluded
517 that the Crown must: (1) take a broad purposive approach to the interpretation of a treaty
518 promise; and (2) act diligently to fulfill it.⁴⁸

519 In *Mikisew* the Supreme Court of Canada found that, when dealing with a proposed “taking up”
520 it is not correct to move directly to the *Sparrow* infringement / justification analysis. Rather,
521 before determining whether a treaty right has been infringed, the courts must first consider
522 whether the process followed by the government in undertaking the action that led to the
523 potential infringement is compatible with the honour of the Crown.

524 Treaties give rise to both procedural and substantive obligations on the part of the Crown. As the
525 Supreme Court of Canada noted in *Mikisew*:

526 ...the honour of the Crown infuses every treaty and the performance of every treaty
527 obligation. Treaty 8 therefore gives rise to... procedural rights (e.g., consultation) as well
528 as substantive rights (e.g., hunting, fishing and trapping rights). Were the Crown to have
529 barrelled ahead with implementation of the winter road without adequate consultation, it
530 would have been in violation of its *procedural* obligations, quite apart from whether or
531 not the Mikisew could have established that the winter road breached the Crown’s
532 *substantive* treaty obligations as well.⁴⁹

533 Decisions affecting lands and resources that are subject to established Treaty rights must be
534 made in a manner that is consistent with the honour of the Crown. This is achieved through an
535 honourable process of engagement to determine appropriate Crown conduct before it makes a
536 decision.⁵⁰ This process includes the obligation to consult and, if appropriate, accommodate
537 Treaty and Aboriginal rights. The Court in *Mikisew* also noted that the existence of the treaty

⁴⁷ *Wii’litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (CanLII), 2008 BCSC 1139 at para 178

⁴⁸ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623 at para 75 [*Manitoba Metis Federation*]

⁴⁹ *Mikisew*, at para 57

⁵⁰ *Mikisew*, at paras 55 and 57

538 itself does not constitute accommodation of the treaty First Nation’s rights. Rather, treaty making
539 is only one stage in the long process of reconciliation.⁵¹

540 In considering the duty to consult and accommodate in the treaty context, the Crown will always
541 have knowledge of its treaty commitments, and the rights set out in the treaty. The question to be
542 determined on a case by case basis then is the extent to which the conduct contemplated by the
543 Crown adversely affects the treaty rights in order to trigger the duty to consult. This
544 determination must consider the understanding of both the Aboriginal group and the Crown
545 about the treaty rights in issue.⁵²

546 In determining the content of the Crown’s duty to consult in the treaty context, the Supreme
547 Court of Canada outlined a number of factors that are relevant to the analysis, including:

- 548 a. the specificity of the treaty promises made;
- 549 b. the seriousness of the impact of the Crown’s proposed conduct on the First Nation;
550 and
- 551 c. the history of dealings between the Crown and the First Nation.⁵³

552 To exercise the duty to consult meaningfully, the Crown must engage directly with the First
553 Nation by providing them with information about the project or action being proposed and
554 addressing the First Nation’s interests and anticipated potential adverse effects of the Project or
555 action on those interests. As with non-treaty rights, the Crown is not entitled to act unilaterally
556 when dealing with Treaty lands, as this would ignore the mutual promises of the treaty and is the
557 opposite of reconciliation and mutual respect.⁵⁴

558 In *Mikisew*, the Court rejected the Crown’s argument that the terms of the Treaty “constituted the
559 accommodation of the Aboriginal interest”, finding rather that, the entering of the Treaty in 1899
560 was “an important stage in the long process of reconciliation, but it was only a stage.” What

⁵¹ *Mikisew*, at paras 53, 54, 66

⁵² *Mikisew*, at paras 34 and 63–64

⁵³ *Mikisew*, at para 63

⁵⁴ *Mikisew*, at paras 49, 64 and 67

561 occurred in 1899, they said, was “not the complete discharge of the duty arising from the honour
562 of the Crown, but a rededication of it.”⁵⁵

563 In the end, while the Supreme Court concluded that the winter road proposed by the Minister
564 was a permissible purpose for “taking up” lands under Treaty 8, the Crown was still required to
565 consult with the Mikisew in reaching its decision:

566 ...the Crown is nevertheless under an obligation to inform itself of the impact of its
567 project will have on the exercise by the Mikisew of their hunting and trapping rights, and
568 to communicate its findings to the Mikisew. The Crown must then attempt to deal with
569 the Mikisew “in good faith, and with the intention of substantially addressing” Mikisew
570 concerns (*Delgamuukw*, at para. 168)...The duty to consult, as stated in *Haida Nation*,
571 triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of
572 the Crown’s duty. Here the impacts were clear, established and demonstrably adverse to
573 the continued exercise of the Mikisew hunting and trapping rights over the lands in
574 question.⁵⁶

575 The *Little Salmon* case was the first Supreme Court of Canada decision to address modern
576 treaties in relation to the Crown’s duty to consult Aboriginal peoples within the context of the
577 *Haida* consultation spectrum. It is also important in so far as the Court provided its views about
578 the nature of the duty applicable in the modern treaty context.

579 Even though modern agreements are said to be “full and final” settlements, Binnie J. held there
580 still exists a duty on the Crown to act honourably when interpreting these sophisticated contracts,
581 as they are not “complete codes”.⁵⁷ Binnie J. also held that “the honour of the Crown, as a
582 constitutional principle, exists independently of any such treaty or contract.”⁵⁸ As such, where
583 there is a procedural gap, consultation is the proper method to address it.⁵⁹

584 Regarding reconciliation, Binnie J. held that the Treaty would not be able to fulfill its objective
585 of reconciliation if it were interpreted in an “ungenerous” manner, or as if it was treated as an

⁵⁵ *Mikisew*, at para 54

⁵⁶ *Mikisew*, at para 55 [emphasis added]

⁵⁷ *Little Salmon*, at paras 38 and 52

⁵⁸ *Little Salmon*, at para 42

⁵⁹ *Little Salmon*, at paras 38 and 42

586 everyday contract, agreeing with the trial judge’s comments, that the Treaty is a “new departure”
587 from the historical treaties, which is but one step in the “long journey of reconciliation.”⁶⁰

588 So it is, that First Nations with modern day Treaty rights are afforded equal protection and
589 oversight by constitutional legal principles over and above the terms of the Treaties themselves.
590 Consultation in this regard, requires that the Crown begin its process well in advance of the
591 Treaty right being impacted; they will always know the content of the Treaty and are obliged to
592 identify those rights, and the potential impact of those rights in order to fulfil its objective of
593 consulting with the Aboriginal group in a meaningful way.

594 **2.2.3 Regulators to Act Consistently with Constitution**

595 Administrative law decision-makers are bound to act in a manner that is consistent with the
596 Constitution whether or not the decision maker has the power to decide constitutional
597 questions.⁶¹ The JRP and the Board are therefore required to also act in that manner when
598 making its recommendations regarding the issuance of the Certificate.

599 The Supreme Court of Canada applied this principle in the *Little Salmon* case, where the court
600 held that even in discharging administrative law duties, a decision maker is expected to discharge
601 the constitutional obligations imposed by the duty to consult.⁶²

602 The Constitution of Canada imposes two constitutional constraints on the Federal Crown in
603 relation to Aboriginal peoples. Firstly, the federal laws and actions cannot unjustifiably infringe
604 Treaty and Aboriginal rights, as doing so would constitute a breach of section 35 of the
605 *Constitution Act, 1982*.⁶³ Secondly, the Crown is always subject to the limits imposed by the
606 honour of the Crown⁶⁴

607 Therefore, where an administrative body exercises a discretion which carries the potential to
608 adversely affect a section 35 right, the administrative body is required to address two questions:
609 (1) has the decision been made in a manner that adequately discharges the duty to consult, and

⁶⁰ *Little Salmon*, at para. 12

⁶¹ *Slaight Communications Inc v. Davidson*, [1989] 2 SCR 1038 at para 87, [1989] SCJ No 45

⁶² *Little Salmon*, at para 45

⁶³ *Sparrow*, at para 1109; *Delgamuukw*, at para 160

⁶⁴ *Badger*, at para 41; *Manitoba Metis Federation*, at paras 69–70, 77–79

610 (2) has the discretion been exercised in such a way that it does not infringe the section 35 rights
611 in issue?

612 **2.2.4 Tsawwassen First Nation Final Agreement**

613 As stated above, *Little Salmon* directs that the starting point for consultation is to look at the
614 terms of the Treaty in order to determine the parties' respective obligations, and what the
615 agreement requires respecting consultation.

616 The TFNFA is a Treaty and land claims agreement within the meaning of section 35 of the
617 *Constitution Act, 1982*.⁶⁵ It is a "full and final settlement" in respect of Aboriginal rights,
618 including title, in Canada of the TFN.⁶⁶ The agreement is said to exhaustively set out the section
619 35 rights of TFN, their attributes, geographic extent of those rights and the limits on those
620 rights.⁶⁷ The constitutionally protected rights set out in the TFNFA for the Tsawwassen people
621 include, but are not limited to:

- 622 • the right to fish and aquatic plants, including intertidal bivalves;
- 623 • the right to harvest migratory birds;
- 624 • the right to wildlife;
- 625 • the right to harvest plants in Provincial parks; and
- 626 • the right to culture and heritage.

627 Notwithstanding that the TFNFA is exhaustive as to section 35 rights and limits of the TFN, the
628 Crown is still obligated to consult TFN as set out in the Treaty,⁶⁸ as may be provided for in
629 federal or provincial legislation,⁶⁹ as may be provided for in an agreement with TFN other than
630 in the Treaty,⁷⁰ or as may be provided under the common law in relation to an infringement of

⁶⁵ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 1, A3W8G0, Adobe page 35, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁶⁶ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 11, A3W8G0, Adobe page 36, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁶⁷ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 12, A3W8G0, Adobe page 36, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁶⁸ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 45(a), A3W8G0, Adobe page 42, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁶⁹ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 45(b), A3W8G0, Adobe page 43, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁷⁰ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 45(c), A3W8G0, Adobe page 43, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

631 that right.⁷¹ Where an exercise of a power or authority, or an action taken, by the federal or
632 provincial Crown is consistent with or in accordance with the terms of the Treaty, it is not an
633 infringement of the section 35 right of TFN and is not subject to any obligation to consult except
634 as set out above.⁷²

635 The TFNFA provides for the requirements by the Federal government in relation to an
636 environmental assessment under CEAA.⁷³ Section 4 of chapter 15, Environmental Management,
637 is the applicable section:

- 638 4. If a proposed Federal Project may reasonably be expected to adversely affect
639 Tsawwassen Lands or Tsawwassen First Nation rights set out in this Agreement:
- 640 a. Canada will ensure that Tsawwassen First Nation is provided with timely
641 notice of the Environmental Assessment and information describing the
642 Federal Project in sufficient detail to permit Tsawwassen First Nation to
643 determine whether it is interested in participating in the Environmental
644 Assessment;
- 645 b. if Tsawwassen First Nation confirms that it is interested in participating in the
646 Environmental Assessment of the Federal Project, Canada will provide
647 Tsawwassen First Nation with an opportunity to comment on the
648 Environmental Assessment conducted under the *Canadian Environmental*
649 *Assessment Act*, including:
650 i. the scope of the Federal Project;
- 651 ii. the environmental effects of the Federal Project;
- 652 iii. any mitigation measures to be implemented; and
- 653 iv. any follow-up programs to be implemented.
- 654 c. during the course of the Environmental Assessment conducted under the
655 *Canadian Environmental Assessment Act*, Canada will give full and fair
656 consideration to any comments provided by Tsawwassen First Nation under
657
658

⁷¹ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 45(d), A3W8G0, Adobe page 43 [emphasis added], Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁷² Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 2, cl 46, A3W8G0, Adobe page 43, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁷³ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, ch. 15, cl 4, A3W8G0, Adobe page 145–146, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

659 subclause 4.b, and will respond to the comments, before taking any decision
660 to which those comments pertain; and

661
662 d. Canada will provide to Tsawwassen First Nation access to information in
663 Canada's possession related to the Environmental Assessment of the Federal
664 Project, in accordance with the public registry provisions in the *Canadian*
665 *Environmental Assessment Act*.

666 While section 4 of chapter 15 sets out the requirements of the Federal government in respect of a
667 federal project that may reasonably adversely affect Tsawwassen Lands or the Treaty rights of
668 the TFN, the Treaty and its terms are not a "complete code". As a tool of reconciliation, the
669 Supreme Court of Canada has directed that these agreements should not be interpreted in an
670 ungenerous manner. The honour of the Crown, as a constitutional principle, continues to exist
671 independently of the Treaty itself.

672 **3. TSAWWASSEN FIRST NATION IS A TREATY NATION**

673 **3.1 Overview**

674 As indicated in their written evidence, the TFN is the only intervenor to have participated fully in
675 these proceedings that have modern-day Treaty rights pursuant to the TFNFA. The Treaty is a
676 constitutionally protected treaty or land claims agreement as defined in s. 35 of the *Constitution*
677 *Act, 1982*. It came into force on April 3, 2009. It is a full and final settlement of TFN Aboriginal
678 rights.

679 The Traditional Territory of the Tsawwassen First Nation reaches from the southern Gulf
680 Islands, over to the Lower Mainland, encompassing much of Delta, Richmond, moving
681 northward through New Westminster, and up to and including the Pitt River area.⁷⁴ Within the
682 Traditional Territory are "Tsawwassen Lands", which comprise both the former reserve lands as
683 well as former Crown lands adjacent or in the vicinity of the former reserve.

⁷⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 2.1.1., A4L7T2, Adobe page 2, Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, A3W8G0; Exhibit C356 - 2-4, Traditional Territory Map – Appendix A, Tsawwassen First Nation Final Agreement Appendices, A3W8G1, Adobe page 11, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

684 If the Project is approved, there is a real potential for a spill or related mishap that could
685 adversely impact on the TFN constitutionally protected rights to fish, aquatic plants, migratory
686 birds, and to TFN's interest in Southern Resident Killer Whale. There exists the real potential for
687 long-term and catastrophic damage to the land and sea environment along the shipping route,
688 including at Site FR (the Fraser River Crossing), at Site D (Salish Sea), and at Site E (Salish Sea,
689 Arachne Reef).

690 In its written evidence, TFN provided information with respect to the Tsawwassen people, their
691 history, traditions and beliefs, their reliance on the Salish Sea for food, social and ceremonial
692 purposes, and as well their cultural connection to the Salish Sea and to the surrounding areas.
693 The TFN is deeply concerned about the adverse effects on our Treaty rights and on traditional
694 activities in the event of a spill or malfunction from the Project.

695 **3.1.1 Tsawwassen are Coast Salish Sea People**

696 In the Coast Salish language, Tsawwassen means "Land facing the Sea".⁷⁵ The TFN are a Coast
697 Salish people whose Lands are located along the water of the Salish Sea, situated between the
698 Tsawwassen Ferry Terminal and the Metro Vancouver Super Port, and bordering the
699 Corporation of Delta. Just north of the Tsawwassen Lands is the south arm of the Fraser River.

700 TFN is the only First Nation on and fronting the Salish Sea participating as an intervenor in this
701 process.⁷⁶ The current population of the TFN is approximately 470 members, with the majority
702 living on Tsawwassen Lands. The population of TFN is expected to more than double in size, to
703 approximately 1092 by 2050.⁷⁷

704 Tsawwassen have been using and occupying the lands and waters in their Traditional Territory
705 since time immemorial. In the 19th century, when the Dominion Government was "settling"

⁷⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 2.1.1., A4L7T2, Adobe page 2, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁷⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 2.1.1., A4L7T2, Adobe page 2, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁷⁷ Exhibit C356-2-3, Ch. 4, Lands, Tsawwassen First Nation Final Agreement, A3W8G0, Adobe pages 53-73; Exhibit C356-2-4, Appendix B, Tsawwassen Lands, Other Tsawwassen Lands, and Right of Refusal Lands, Tsawwassen First Nation Final Agreement Appendices, A3W8G1, Adobe page 13; Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3, Exhibit C356-7-4, L. Ahlm, Enrolment Registrar, Tsawwassen First Nation Census Forecast to 2050, May 2015, A4L7T3; Exhibit C356-12-2, Affidavit of L. Ahlm, A4S5V5

706 Indian reserves in British Columbia, the commissioners found the Tsawwassen people at the very
707 same location as they are located today; their primary wintering grounds.⁷⁸ Historically,
708 Tsawwassen had – with other First Nations – various summering areas, eastward along the
709 Fraser River, as well as within the southern Gulf Islands.⁷⁹ The history of the Tsawwassen as an
710 ocean-reliant people cannot be overstated. Their future presence must not be adversely impacted
711 by virtue of the Project.

712 **3.1.2 A Fishing People Reliant on the Salish Sea**

713 The Tsawwassen people have always been a fishing people; their heavy reliance on fish,
714 including salmon, eulachon, other finfish, intertidal bivalves and shellfish, for day-to-day
715 sustenance is immeasurable.⁸⁰ The TFN negotiated as part of the Treaty, a percentage based
716 quota of salmon, which is harvested primarily on the south arm of the Fraser River.⁸¹
717 Tsawwassen members also harvest shellfish, including Dungeness crab, in the waters fronting
718 the Tsawwassen Lands for food, social and ceremonial purposes, another staple heavily relied on
719 by them.⁸²

720 Simply put, the sea and the abundance of natural resources offered by it to Tsawwassen people
721 are incalculable, and any loss, limit or adverse impact on those resources will result in a
722 corresponding unjustifiable limit or denial of Tsawwassen Treaty rights.

723 **4. INADEQUATE PROCESS**

724 TFN submits that the NEB process is fundamentally flawed and as such, the Crown is incapable
725 of discharging its lawful obligations with respect to the Project.

⁷⁸ Exhibit C356-7-3, Tsawwassen First Nation Written Evidence, at 2.1.2, A4L7T4, Adobe page 2, Affidavit of C. Ward, A4S5V4

⁷⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 2.1.2., A4L7T2, Adobe page 2, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁸⁰ Exhibit C356-7-3, Tsawwassen First Nation Written Evidence, 3.1.1, A4L7T4, Adobe page 2

⁸¹ Exhibit C356-7-3, Tsawwassen First Nation Written Evidence, 3.1.1, A4L7T4, Adobe page 2

⁸² Exhibit C356-2-3, Ch. 9, Fisheries; Tsawwassen First Nation Final Agreement, A3W8G0, Adobe pages 87–105; Exhibit C356-2-5, Map of Tsawwassen Fishing Area and Tsawwassen Intertidal Bivalve Area – Appendix J-1, A3W8G2, Adobe page 3; Exhibit C356-2-4, Tsawwassen First Nation Final Agreement Appendices, A3W8G1, Adobe page 281; Exhibit C356-2-5, Tsawwassen Allocation for Fish and Aquatic Plants – Appendix J-2; Tsawwassen First Nation Final Agreement Appendices, A3W8G2, Adobe page 283; Exhibit C356-8-9, Tsawwassen First Nation Harvest Agreement (2006), A4Q1V7; Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

726 **4.1 Trans Mountain’s Engagement has been Inadequate**

727 **4.1.1 Overview of Engagement**

728 According to the Proponent, they began to engage Aboriginal communities regarding the Project
729 in April 2012. To carry out this engagement with Aboriginal peoples, the Proponent established
730 the “Aboriginal Engagement Program”, and its purpose was said to be:

731 ...to provide an **open, transparent and inclusive process**, which seeks to **exchange**
732 **information** in a **respectful manner** to **address concerns** shared by those who might
733 have an interest in the Project or have Aboriginal interests potentially affected by the
734 Project, to incorporate feedback from in Project planning and execution; and to provide
735 opportunities to maximize Project benefits to Aboriginal communities and Aboriginal
736 Groups.⁸³

737 In Application Vol. 3B – Aboriginal Engagement, filed with the NEB in December, 2013, with
738 respect to TFN, the Proponent indicated the following:

739 1.5.2.4.27 Tsawwassen First Nation

740
741 Tsawwassen First Nation is an inlet community that was identified by Trans Mountain as
742 a community that might have an interest in the Project or have Aboriginal interests
743 potentially affected by the Project.
744

745 Trans Mountain provided the Project notification letter to Tsawwassen First Nation on
746 May 29, 2012. Trans Mountain met with Tsawwassen First Nation on November 26,
747 2012 to share Project-related information, to determine the communities interest in
748 engagement, and to develop a process for involvement in Project activities. A
749 confidential LOU was executed on May 30, 2013. Interest in participating in TLU/TMRU
750 studies to be confirmed by Tsawwassen First Nation. The results of these engagement
751 activities as well as Trans Mountain’s response to any issues raised through these
752 activities are detailed in Appendix A of this volume.
753

754 Trans Mountain has continued to share Project information with Tsawwassen First
755 Nation and will continue to do so as the Project evolves.

⁸³ Exhibit B1-39, Application, Vol. 3B 1.0 to 3.0 Aboriginal Engagement, 1.1, A3S0U5, Adobe page 24 [emphasis added]

756 The Proponent made much about its ‘engagement’ with Aboriginal groups or First Nations
757 intervenors.⁸⁴ Sadly, in the case of TFN, the Proponent started off its engagement by
758 mischaracterizing that engagement. That, coupled with the ongoing, repeated failure of the
759 Proponent to actually inform itself about TFN’s section 35 rights⁸⁵, and the potential adverse
760 impacts of the Project, leaves TFN with no option but to conclude that the process has been a
761 failure.

762 At this end point of the NEB hearing process, there is nothing on the record to show that the
763 Proponent has addressed any of TFN concerns: they could not address concerns that they aren’t
764 informed about. As part of its Aboriginal engagement program, the Proponent offered three
765 modes of engagement for participants. If an Aboriginal group intervenor whose circumstances
766 did not fit within one of the three engagement modes, like TFN, they were effectively shut
767 out.

768 TFN is the only First Nation intervenor that has participated fully in these proceedings that have
769 modern-day Treaty rights. Given this, the obligation is on the Proponent to properly and fully
770 inform itself about the content of the TFNFA, and understand the potential impacts of the Project
771 on those Treaty rights. The Proponent failed in meeting that obligation, which failure was
772 sanctioned by the NEB; even in the face of TFN’s requests of the NEB to require the Proponent
773 to undertake that assessment and analysis. The result is the potential impacts of the Project on
774 TFN’s Treaty rights are virtually unknown.

775 From the outset of its engagement with the Proponent, TFN made it clear that it expected to be
776 consulted about the Project.⁸⁶ TFN also made it clear, that given the Treaty and the established
777 rights contained therein, a Traditional Land Use study was not required.⁸⁷ While it is true that the
778 Proponent commenced its engagement with TFN in May 2012⁸⁸, a close review of the record of

⁸⁴ Exhibit B-444-2, Trans Mountain Revised Final Argument, lines 414 to 421, A4W6L8, Adobe page 29 [emphasis added]

⁸⁵ Exhibit C356-2-3, Tsawwassen First Nation Final Agreement, A3W8G0, Exhibit C356-2-4, Appendices A-I, A3W8G1; Exhibit C356-2-5, Appendices J-R plus Errata, A3W8G2, which were filed on May 12, 2014, Exhibit C356-13-3, Affidavit of A. Bak, A4X3Q3

⁸⁶ Exhibit 356-7-3, Tsawwassen Written Argument, at 5.1.1., A4L7T2, Adobe page 3, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁸⁷ Exhibit B1-40, Vol. 3B – Aboriginal Engagement - Logs, Appendix A-5-12, A3S0US, Adobe pages 582–587

⁸⁸ Exhibit 417-2, Trans Mountain Reply Evidence, at p. 7–13 to 7–14, A4S7E9, Adobe pages 95–96

779 engagement shows that the Proponent has not come close to the high level of engagement that
780 would be expected in the circumstances. TFN will show that the Proponent, as permitted by the
781 JRP, consistently failed to properly and adequately inform itself about the TFNFA. What little
782 analysis of the Treaty that was done by them, falls short of what is required.

783 **4.2 TFN Information Requests**

784 Starting from the first round of information requests⁸⁹, TFN raised with the Proponent that at that
785 point – May 12, 2014 – there had not been any specific evidence in the Application volumes, the
786 engagement logs, or any other filing by the Proponent to indicate that there was a review of the
787 TFNFA by them, let alone an understanding of it. In that regard, TFN attempted to uncover the
788 reason behind that omission, in its information request No. 6 (re-numbered to No. 1.06 in Trans
789 Mountain’s response), which reads:

790 There does not appear to be consideration of TFN as being a Treaty First Nation
791 Government with special characteristics that arise as a result of having governmental
792 powers of those of local/provincial/federal governments. TFN requests the Proponent to
793 explain why it has not appeared to have taken TFN’s unique legal and governmental
794 status into consideration, particularly when that information was provided to Trans
795 Mountain in the meetings that occurred leading up to the submission of the application to
796 the NEB.⁹⁰

797 In response to this IR, on June 18, 2014, the Proponent claimed, in essence, that they were
798 “aware” of the TFNFA, and that their “understanding of the TWN (sic) Final Agreement is based
799 on both reviewing the Agreement and through discussions with TWN (sic), and that in their
800 engagement with TFN, they “took the TFN Final Agreement into consideration.”⁹¹

801 On July 4, 2014, TFN filed a motion to compel a full and adequate response to this, and other,
802 information requests (“Motion 1”) on the basis that nowhere in the filings to date, including the

⁸⁹ Exhibit C356-2-2, Tsawwassen First Nation Information Request Round 1 to Trans Mountain, filed May 12, 2014, A3W8F9, Adobe pages 2–3, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁹⁰ Exhibit C356-2-2, Tsawwassen First Nation Information Request Round 1, A3W8F9, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

⁹¹ Exhibit B166-1, Trans Mountain Response to Tsawwassen IR 1No. 1.06, A3Y3U7, Adobe page 6 [emphasis added]

803 Application volumes, was there any demonstrable or appreciable understanding of the TFNFA,
804 let alone a reference by Trans Mountain to the TFNFA.⁹²

805 Intervenors were required to explain the basis for claiming the IR response was inadequate; TFN
806 did so:

807 First of all, the acronym for Tsawwassen First Nation should be TFN. Secondly,
808 notwithstanding Trans Mountain's position that it is "aware" of the Final Agreement
809 (TFNFA), they do not demonstrate any real or tangible appreciation or understanding of
810 the TFNFA. Given this apparent cursory or arms-length review of the TFNFA, there is no
811 evidence – direct or indirect – that Trans Mountain made a bona fide effort to properly
812 and effectively inform itself about the TFNFA in relation to the Tsawwassen First Nation.

813 In their reply, filed July 11, 2014, Trans Mountain did not refute the complete absence of any
814 reference to the TFNFA; their response to TFN's IR 1.06, was plain:

815 The requested information has been provided and Trans Mountain's response is full and
816 adequate. The response provides the Board with all necessary information pertaining to
817 this matter. There is no further response required and supplementing the original response
818 will not serve any purpose. Trans Mountain notes that if the Intervenor disagrees with the
819 information contained in the response, it may contest the information through evidence or
820 final argument.⁹³

821 On July 21, 2014, Trans Mountain filed the "Supplemental Traditional Marine Resource Use –
822 Marine Transportation Technical Report for the Trans Mountain Pipeline ULC Trans Mountain
823 Expansion Project ("Supplemental Report"), prepared by Tera.⁹⁴ For the first time, there was a
824 reference to the TFNFA by Trans Mountain, but just to the Appendices.⁹⁵

825 Section 4.0, "Supplemental Results of Literature/Desktop Review" opens with the following
826 commentary:

⁹² Exhibit 356-3-1, Tsawwassen First Nation Motion to Compel (Motion 1), A3Y8F, Adobe page 2

⁹³ Exhibit B231-2, Attachment – Table - Trans Mountain response to TFN IR1, A3Z2E1, Adobe page 1

⁹⁴ Exhibit B241-2, Supplemental Traditional Marine Resource Use – Marine Transportation Technical Report for the Trans Mountain Pipeline ULC Trans Mountain Expansion Project, A3Z4Z1

⁹⁵ Exhibit B241-2, Supplemental Traditional Marine Resource Use – Marine Transportation Technical Report, See "References", at p.8-1, A3Z4Z1, Adobe page 71

827 This section provides **supplemental** publicly available regional and local TMRU
828 **information for Tsawwassen First Nation based on their Final Agreement that was**
829 **not included in the Application filed with the NEB in December 2013.** Potential
830 resource use issues within the Marine RSA and identification of historic and current use
831 of areas within the Marine RSA by Tsawwassen First Nation to maintain a traditional
832 lifestyle are described in Table 4.1-1.⁹⁶

833 Supplemental means something further or additional to a thing to make it complete. In the case
834 of the Treaty, there was nothing in the Proponent's record in relation to it prior to July 21, 2014.
835 Again, for the first time, references the Appendices to the Treaty – were included in the
836 Proponent's filed materials. Although, they claim in their response to IR No. 1.06, that they were
837 "aware" of the Treaty, that they had reviewed it, and had taken into consideration, with no
838 reference made, it does not appear that the Treaty was reviewed by the Proponent before July,
839 2014. Rather, up to that time, the Proponent framed TFN Treaty rights as, and included them as
840 part of the Aboriginal groups with *asserted Aboriginal rights and title*, and it has kept them there
841 since.⁹⁷

842 **Table 4.1-1**, is titled "Supplemental Results of Tsawwassen First Nation Desktop Study and
843 Literature Review – Traditional Marine Resource Use Within or in Proximity to the Marine
844 Regional Study Area". It lists in bullet form, with no written analysis, what activities TFN "may
845 undertake within or in proximity" to the marine regional study area. The absence of any written
846 commentary suggests a near lack of analysis by the Proponent of the contents of the TFNFA.
847 Without that knowledge, there can be, and there is no, meaningful understanding of the potential
848 impact of the project on TFN's Treaty rights by the Proponent.

849 On September 26, 2014, the NEB issued Ruling 33 – Motions to Compel Full and Adequate
850 Responses to the First Round of Intervenor Information Requests.⁹⁸

851 The Board's test in considering motions to compel full and adequate responses to IRs is that:

⁹⁶ Exhibit B241-2, Supplemental Report, at p. 4-1, A3Z4Z, Adobe page 16 [emphasis added]

⁹⁷ Exhibit B417-2, Trans Mountain Written Reply evidence, at p. 7-13–7-14, "7.22 Tsawwassen First Nation: Starting May 29, 2012, Trans Mountain has been engaging TFN on the Project to provide comprehensive information to them, to seek feedback from them, to identify anticipated impacts of the Project on the asserted Aboriginal rights and title governing traditional and cultural use of the environment", A4S7E9, Adobe page 95–96

⁹⁸ Exhibit A81-1, NEB Ruling 33, A4C4H5; Appendix 1, A4C4H7

852 “[i]t looks at the relevance of the information sought, its significance, and the
853 reasonableness of the request. The Board balances these factors so as to satisfy the
854 purpose of the IR process, while preventing an intervenor from engaging in a “fishing
855 expedition” that could unfairly burden the applicant.”⁹⁹

856 In response to TFN’s motion regarding IR 1.06, the NEB ruled as follows:

857 Deny – Motion sought new or different information than was asked for in the original IR.
858 Consider asking a question in the next IR round to receive this information. (“Ground
859 One Denial”)

860
861 Deny – Between Trans Mountain’s IR response and its reply to the motion, it has
862 sufficiently answered the IR.¹⁰⁰ (“Ground Two Denial”)

863 In Ruling 33, the Board laid out the basis for denying a motion, which can include requests for
864 new or different information:

865 Some IRs, as asked, requested general information, which Trans Mountain provided in its
866 responses. In certain motions to compel, intervenors sought more specific information or
867 more details, which essentially were requests for new information. To obtain these new
868 details, a follow-up IR during the next round of IRs can be sent to Trans Mountain.¹⁰¹

869 In other cases, a motion can be denied by the Board on the basis that the responses were
870 sufficient.

871 In some cases, Trans Mountain may not have answered all parts of an intervenor’s IR.
872 However, the Board was of the view that the response provided sufficient information
873 and detail for the Board in its consideration of the application and no further response is
874 required.¹⁰²

875 Not surprisingly, TFN was disappointed with the NEB’s ruling regarding IR 1.06. It is plain on
876 its face that the Proponent made no effort to inform itself about the content of the Treaty, let
877 alone attempt any analysis or assessment of potential impacts of the Project on TFN’s Treaty
878 rights up to the filing of Motion 1 (July 4, 2014). The Proponent filed its response to Motion 1
879 after the release of the Supplemental Report, but before the NEB issued Ruling 33. Because the

⁹⁹ Exhibit A81-1, NEB Ruling 33, A4C4H5

¹⁰⁰ Exhibit A81-1, NEB Ruling 33, A4C4H5; Appendix 1, A4C4H7, Adobe page 126

¹⁰¹ Exhibit A81-1, A(ii) Requests for new or different information, NEB Ruling 33, A4C4H5

¹⁰² Exhibit A81-1, B(ii) Responses that were sufficient, NEB Ruling 33, A4C4H5

880 NEB did not refer to the Supplemental Report, it is difficult to understand the basis of the denials
881 to the motion. This is all the more puzzling given the Proponent's admission that the information
882 contained in the Supplemental Report regarding the Treaty had not been included in the
883 Application filed with the NEB in December 2013.

884 Further to the direction given by the NEB in the Ground One denial, on January 16, 2015, TFN
885 filed its Round Two Information Requests to the Proponent.¹⁰³ TFN made another request of the
886 Proponent in respect of the TFNFA by way of IR 2, which reads:

887 TFN requests that Trans Mountain undertake a comprehensive assessment of the
888 potential impacts of the project and associated accidents and malfunctions on TFN rights
889 and interests as set out in the TNFA and identify mitigation measures to reduce or
890 eliminate those potential impacts. TFN expects this assessment will be guided by the
891 TFNFA, together with supporting treaty documentation and numerous fisheries reports
892 and others that TFN has or will provide to Trans Mountain.¹⁰⁴

893 On February 18, 2015, the Proponent filed its response to TFN's second round IR 2, by way of
894 their IR 2.2:

895 Trans Mountain does not presume to define the rights of Aboriginal groups. Rather,
896 though the Aboriginal Engagement Program, Trans Mountain engages with Aboriginal
897 groups to provide comprehensive information to them and seek feedback from them on
898 the Trans Mountain Expansion Project ("the Project") and to identify potential impacts of
899 the Project on treaty and Aboriginal rights, title and interest and their traditional and
900 cultural use of the land and marine environment.

901 Through its engagement with TFN, Trans Mountain and TFN executed an agreement on
902 May 30, 2013 whereby TFN would "provide Kinder Morgan Canada (KMC) with an
903 initial list of Aboriginal and Treaty interests related to the Project and its potential
904 impacts by July 31, 2013.

905 KMC did not receive the list from TFN.¹⁰⁵

906 Again, in keeping with the process, on February 26, 2015, TFN filed its Motion to Compel Full
907 and Adequate Responses to the Second Round of Intervenor Information Requests

¹⁰³ Exhibit C356-5-1, Tsawwassen First Nation IR 2 to Trans Mountain, A4G5S8

¹⁰⁴ Exhibit C356-5-1, Tsawwassen First Nation IR 2 to Trans Mountain, A4G5S8, Adobe page 3

¹⁰⁵ Exhibit B318-21, Trans Mountain Response to Tsawwassen First Nation IR No. 2, A4H9H9, Adobe page 4

908 (“Motion 2”).¹⁰⁶ With respect to the Proponent’s response in IR 2.2, TFN’s explained the basis
909 for its inadequacy:

910 In its dealing with Trans Mountain and Kinder Morgan Canada, TFN has always made it
911 clear that all of its rights and interests are set out in detail in the Tsawwassen First Nation
912 Final Agreement (Filing ID A3W8G0). Again, Trans Mountain’s refusal to inform
913 “itself” after repeated attempts by TFN to request them to do so is astounding. We again
914 reiterate our request in this motion for the NEB to compel Trans Mountain to undertake
915 the analysis that is required to inform itself about the potential impacts on TFN Treaty
916 and Aboriginal rights.

917 TFN requests that the NEB compel Trans Mountain to respond more adequately.¹⁰⁷

918 On March 12, 2015, the Proponent filed, along its IR 2.2 response, a cover letter suggesting that
919 TFN was on a “fishing expedition”, adding that:

920 In response to the Intervenor’s Motion, Trans Mountain refers to the attached
921 organization char which provides Trans Mountain’s response to the Intervenor’s
922 comments. Trans Mountain’s responses are consistent with and guided by the Board’s
923 reasons in Ruling No. 33. In the organization chart, Trans Mountain has (1) indicated that
924 the original response is adequate and no further response is required to the specific IR or
925 (2) provided additional information or clarification in response to the specific IR.¹⁰⁸

926 The Proponent’s response to IR 2.2 was:

927 Trans Mountain has reviewed the Tsawwassen First Nation Final Agreement and
928 acknowledges TFN’s view that all of its rights and interests are set out in the TFNFA.

929 The National Energy Board included Potential impacts of the Project on Aboriginal
930 interests in its List of Issues for Project. Accordingly, Tran Mountain has facilitated
931 Traditional Land Use (TLU) studies, Traditional Ecological (TEK) studies and
932 Traditional Marine Resource Use (TRMU) studies with Aboriginal communities to assist
933 in assessing the potential impacts of the Project on Aboriginal interests and generally
934 inform the Environmental and Socio-Economic Assessment. The methodology used to
935 assess potential adverse effects of the Project on valued components supporting the
936 exercise of Aboriginal rights and interests can be found in Section 7.0 of Volumes 5A
937 (Filing ID A3S1Q9), 5B (Filing ID A3S1S7), and Section 4.0 of Volume 8A (Filing ID

¹⁰⁶ Exhibit C356-6-1, TFN Motion to Compel (Motion No. 2), A4I4S1, Adobe page 1

¹⁰⁷ Exhibit C356-6-1, TFN Motion to Compel (Motion No. 2), A4I4S1, Adobe page 1

¹⁰⁸ Exhibit B351-1, Trans Mountain’s cover letter, A4J5J0, Adobe page 3

938 A3S4X4). This assessment considers: the potential environmental and socio-economic
939 effects of the Project; ways in which these effects can be minimized or avoided altogether
940 and key mitigation strategies in place that will further reduce the effects.¹⁰⁹

941 As noted, TFN advised the Proponent on numerous occasions over the course of their
942 engagement, that studies were not required because the Treaty set out their rights.

943 Regarding, the Proponent's response, while there are numerous references in Section 7.0 of
944 Volumes 5A (Filing ID A3S1Q9), to "Aboriginal communities", most if not all, of those
945 references are generic references to Aboriginal communities providing Traditional Ecological
946 studies. There is no mention or reference to the Treaty.¹¹⁰

947 With respect to volume 5B, Socio-Economic Effects Assessment, the references to "Aboriginal
948 communities" are again generic and not attributable to any specific First Nation. There is only
949 one reference to TFN (in bullet form along with others), as being one of "62 communities [that]
950 have been identified as having an interest in the Project or having interests potentially affected
951 by the Project"¹¹¹, this, in the context of the "assertion of Aboriginal rights and title governing
952 traditional and cultural use of the land along the proposed pipeline corridor to maintain a
953 traditional lifestyle."¹¹²

954 Also, in their response to TFN's IR, the Proponent points to Section 4.0 of Volume 8A, Marine
955 Transportation,¹¹³ for the methodology used to assess potential adverse effects of the Project on
956 valued components supporting the exercise of Aboriginal rights and interests. However, Section
957 4.0 of Volume 8A is all of 1.2 pages, titled "Environmental and Socio-Economic Assessment:
958 Overview of Marine Transportation and Shipping Activities" with no reference to "Aboriginal"
959 or "Aboriginal communities", let alone to TFN.

¹⁰⁹ Exhibit B351-2, Trans Mountain Response to Motion 2, filed March 12, 2014, A4J5J1

¹¹⁰ Exhibit B5-20, Vol 5A – Biophysical, A3S1Q9, Adobe page 1

¹¹¹ Exhibit B5-38, Vol 5B: ESA – Socio-Economic, s. 7.2.2.3 Traditional Land and Resources Use Context, p. 7–15, A3S1S7, Adobe page 16

¹¹² Exhibit B5-38, Vol 5B: ESA – Socio-Economic, s. 7.2.2.3 Traditional Land and Resources Use Context, p. 7–15, A3S1S7, Adobe page 15

¹¹³ Exhibit B351-2, Trans Mountain Response to Motion 2, A4J5J1, Adobe page 1

960 On April 27, 2015, in Ruling No. 63¹¹⁴, the NEB denied TFN’s request regarding IR 2.2 in
961 Motion 2:

962 Between Trans Mountains IR response and its reply to the motion, it has sufficiently
963 answered the IR.¹¹⁵

964 To say that the information request process was discouraging and disappointing for TFN is an
965 understatement. In their attempt to have the Proponent inform itself about the Treaty, and the
966 adverse impacts the Project could have on their rights got them literally nowhere. It seemed that
967 no matter TFN efforts, the standard response – what little we did was enough – cookie-cutter
968 approach by the Proponent was the accepted. Ultimately, notwithstanding their claim of
969 providing intervenors with the ability to participate however they chose to¹¹⁶, the reality was if
970 an intervenor did not fit into their pre-established mold, the rights of that intervenor were set-
971 aside without proper and adequate review and rigour. That, we say, was not good enough.

972 In the end, what the information request process shows in the case of TFN, is that there is an
973 embedded and entrenched structural issue – the framework does not accord with Treaty
974 commitments that the Crown is required to honour.

975 Regarding TFN’s IRs of Federal Government Intervenors¹¹⁷, TFN sought support from
976 Environment Canada (“EC”) on the requirement that Trans Mountain implement a beached bird
977 monitoring program (“BBMP”) in the Salish Sea as a means of monitoring the impacts of
978 chronic oil spill from marine vessels. Although EC stated that the department “[r]ecognizes the
979 value of Beached Bird Surveys and is fully supportive of this approach for establishing baseline
980 information regarding chronic, operational discharges of oil” in their written evidence,¹¹⁸ EC did
981 not require that Trans Mountain implement a beached bird monitoring program.¹¹⁹ Instead, EC
982 presented three recommendations that detailed another approach to monitoring the impacts of

¹¹⁴ Exhibit A155-1, NEB Ruling 63, Motions to Compel Full and Adequate Responses to the Second Round of Intervenor Information Requests, A4K8G2

¹¹⁵ Exhibit A155-3, Appendix 1, A4K8GA, Adobe page 61

¹¹⁶ Exhibit B-444-2, Trans Mountain Revised Final Argument, lines 416 to 418, A4W6L8, Adobe page 29

¹¹⁷ Exhibit C356-10-2, TFN IRs to Government Participants, A4Q8S6

¹¹⁸ Exhibit C249-13-15-14, NRCAN on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 4

¹¹⁹ Exhibit C121-3-1, Environment Canada Written Evidence, A4L8Y6

983 marine pollution on marine birds. TFN accepts that if Trans Mountain is required to adopt all
984 three recommendations, then the TFN interests in this matter will be effectively addressed.

985 TFN is very concerned about the impacts of an oil spill on the habitat values of the brackish
986 marshes of the Fraser Estuary for migratory birds and aquatic species. EC is the federal
987 government's lead authority for the conservation and protection of migratory birds and their
988 habitat. Unfortunately, EC was unable to provide detailed comment on the risks that bitumen
989 might pose to the brackish marsh habitat: "The requested information regarding the threat of oil
990 spills to the structural integrity of sediment platforms is outside of EC's area of expertise."¹²⁰

991 A key part of the expertise required to protect migratory birds is an understanding of the real and
992 potential threats to the habitats of those birds. Given the international importance of the Fraser
993 Delta to migratory birds and given that vessel traffic including tankers laden with bitumen sail
994 past the Delta on a regular basis, TFN is surprised by this admission as it is TFN's understanding
995 that EC's role in overseeing the *Migratory Birds Convention Act* includes habitat protection.
996 Effective habitat protection includes understanding those factors that threaten (or not) habitat.

997 It would seem that the position articulated in EC's response to TFN's IR 2(b)¹²¹ runs counter to
998 the response provided to IR 2(c)¹²² which implies that oil poses a threat to the brackish marsh,
999 though no mechanism for that threat is provided in the response. It is TFN's position that EC, as
1000 the Department responsible for the conservation and protection of migratory birds and their
1001 habitat, be knowledgeable about the nature and mechanisms of threats to critical migratory bird
1002 habitats such as those comprising the brackish marshes of the Fraser Delta. Absent this
1003 understanding, EC's statement that "[d]epending on the volume, location, time of year, and other
1004 factors, an oil spill could have serious, long-lasting effects on important habitats such as
1005 marshes, eelgrass, and mudflats which, in turn, could negatively impact the estuarine food web

¹²⁰ Exhibit C249-13-15-14, NRCAN on Behalf of Government of Canada – Response to Tsawwassen First Nation IRs, A4R4A7, at Adobe page 6

¹²¹ Exhibit C249-13-15-14, NRCAN on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 6

¹²² Exhibit C249-13-15-14, NRCAN on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 7

1006 used by migratory birds”¹²³ lacks the required understanding of this threat – an understanding
1007 that, in TFN’s view, is essential for effectively mitigating the impacts that a spill of diluted
1008 bitumen could have on these sensitive and critical habitats of the Salish Sea.

1009 Also, as further discussed below, of all the assessed impacts the proposed project would have on
1010 the environment, Trans Mountain identified only one significant adverse effect: noise impacts on
1011 Southern Resident Killer Whale (“Southern Resident Killer Whale”). In TFN’s IR No. 3(a) to
1012 Fisheries and Oceans Canada (“DFO”) we asked “[w]hether underwater anthropogenic noise in
1013 the Salish Sea currently constitutes, or is reasonably capable of constituting, a significant adverse
1014 effect on Southern Resident Killer Whale”¹²⁴ DFO responded that it could not make a definitive
1015 conclusion at this time as more information was first needed.¹²⁵ DFO’s response was
1016 unsatisfactory.

1017 To be clear, TFN was not looking for a definitive response regarding whether or not a significant
1018 effect is currently happening; rather we were seeking DFO's position on whether or not
1019 underwater noise is reasonably capable of constituting a significant effect on Southern Resident
1020 Killer Whale. Moreover, TFN disagrees that more research is needed before a determination of
1021 whether or not current noise levels are reasonably capable of causing a significant adverse effect
1022 on Southern Resident Killer Whale.

1023 First, DFO has stated that a conclusion of significance is "plausible"; second, DFO has cited lack
1024 of scientific knowledge of the effects of underwater noise on the population dynamics of
1025 Southern Resident Killer Whale as an information gap. It is TFN's contention that because the
1026 population dynamics of the Southern Resident Killer Whale population integrate numerous
1027 factors and potential interactions between those factors, given (i) the logistical difficulties in
1028 doing research on this marine mammal, (ii) its small population size, and (iii) the species' low
1029 reproductive potential (λ) among others, it is not reasonable that we expect that we will
1030 ever have definitive data on the impacts of underwater noise on the population dynamics of

¹²³ Exhibit C249-13-15-14, NRCan on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 7

¹²⁴ Exhibit C356-10-2, TFN IRs to Government Participants, A4Q8S6, Adobe page 5

¹²⁵ Exhibit C249-13-15-14, NRCan on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 10

1031 Southern Resident Killer Whale. As long as the species is endangered, calling for more data
1032 before alleviating what are believed to be credible threats to recovery is simply irresponsible, in
1033 TFN's view.

1034 In IR No. 3(c), TFN asked for DFO's position as to whether or not "...approval of any project
1035 for which the residual adverse effects are deemed significant, is entirely consistent with the
1036 *Federal Sustainable Development Act* and the associated Federal Sustainable Development
1037 Strategy".¹²⁶ TFN was surprised and disappointed to see that DFO side-stepped the request by
1038 stating that it was outside the scope of its written evidence. TFN looks to DFO as the authority
1039 on how a significant impact to Southern Resident Killer Whale is viewed in light of the Federal
1040 Act and strategy that pertain to sustainable development. After all, if the DFO and its marine
1041 scientists cannot provide this guidance, how can TFN be assured that the JRP is being given the
1042 appropriate information to adequately address this crucial matter?

1043 In IR No. 3(d), TFN asked for DFO's opinion on whether "...it would be prudent and/or
1044 precautionary, from a strictly ecological perspective, to cap (i.e., limit the upper extent of)
1045 underwater anthropogenic noise levels in the Salish Sea at present levels until such time as there
1046 is a more complete scientific understanding of the implications of underwater noise for the
1047 recovery of Southern Resident Killer Whale." DFO did not answer the question, stating that they
1048 could not answer definitively. Again, TFN was not looking for a definitive answer, but rather for
1049 an opinion as to whether it would be prudent/precautionary to cap noise levels until the research
1050 that DFO says is needed can be obtained. Surely, DFO does not hold the view that humans can
1051 continue to add noise to the underwater environment so long as we lack definitive data on
1052 population-level effects of underwater noise on Southern Resident Killer Whale.

1053 In IR No. 8(b), TFN asked DFO to describe "...any and all authorizations under the *Species At*
1054 *Risk Act* that pertain to Southern Resident Killer Whale that DFO intends to issue or grant in
1055 conjunction with the Trans Mountain Expansion Project." DFO's response was not at all
1056 informative: "If approved, the proposed Trans Mountain Expansion Project would be subject to
1057 these provisions of SARA and the Marine Mammal Regulations. Permit applications received by

¹²⁶ Exhibit C356-10-2, TFN IRs to Government Participants, A4Q8S6, Adobe page 5

1058 DFO would be reviewed on a case by case basis.”¹²⁷ Given that the project description is well
1059 developed and is essentially an expansion of existing operations, TFN finds it difficult to believe
1060 that DFO is not in a position to comment on the authorizations that it would require of a
1061 proponent for a project of this nature.

1062 In IR No. 9(a), to Transport Canada (“TC”), TFN asked for information on “[t]he adequacy of
1063 the current capabilities of the Rescue Tug fleet in regards to its capacity to respond effectively to
1064 marine emergencies involving oil (bitumen) tankers in the Salish Sea.”¹²⁸ TC failed to answer
1065 the question as its response did not address rescue tugs, only escort tugs. TFN continues to seek
1066 clarification and information on the role of rescue tugs in the prevention of bitumen and fuel
1067 spills in the Salish Sea.

1068 In IR No. 10(b) to TC, TFN asked for information about TC’s view on operational spills: “
1069 [r]ecognizing that a zero-discharge target may be ideal though unrealistic based on empirical
1070 evidence of spills, and therefore some level of discharge must be expected regardless of the
1071 regulatory and enforcement regime, indicate whether the current situation regarding the rates
1072 and/or amounts of accidental discharge of oil and other hydrocarbons into the Salish Sea is, from
1073 a regulatory perspective, at or below a level whereby TC deems the regime to be effectively
1074 meeting its goals and objectives.”¹³² In a separate request, TFN asked “[i]f the current rates
1075 and/or amounts of oil discharged into the Salish Sea are not deemed acceptable from a regulatory
1076 perspective, please indicate how additional vessel traffic might be expected to affect those rates
1077 and what might or will be done to mitigate discharges down to an acceptable level”.¹²⁹ TC’s
1078 responses to the two separate IRs were the same. Both mentioned a reduction target (i.e., 5%
1079 annual reduction in releases of harmful substances) and relied on a single statistic to demonstrate
1080 the adequacy of the results: “[t]he last fiscal year saw an overall reduction in pollutant volumes
1081 by 29%”.¹³⁰ Neither response was informative, nor did TC’s responses satisfy the requests.
1082 Presenting a single year of data as a measure of the performance of a multi-year strategy is

¹²⁷ Exhibit C249-13-15-14, NRCan on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe page 18

¹²⁸ Exhibit C356-10-2, TFN IRs to Government Participants, A4Q8S6, Adobe page 8

¹²⁹ Exhibit C356-10-2, TFN IRs to Government Participants, A4Q8S6, Adobe pages 8–9

¹³⁰ Exhibit C249-13-15-14, NRCan on Behalf of Government of Canada-Response to Tsawwassen First Nation IRs, A4R4A7, Adobe pages 20–21

1083 misleading. For such a response, TFN would expect to see time-series (trend) data for previous
1084 years and for the current year (during which two notable spills have occurred in local waters). It
1085 would also have been helpful if corroborating information from the Auditor General was
1086 provided.

1087 **4.3 Trans Mountain Mischaracterized its Engagement**

1088 In its written evidence, TFN included a table setting out examples of the mischaracterization by
1089 the Proponent concerning its engagement with them regarding the Project, including their
1090 omission of meetings or communications where Tsawwassen raised concerns.¹³¹ It is clear that
1091 the Proponent misconstrued its engagement with TFN. It also mischaracterized or did not report
1092 on some aspects of their engagement with TFN, which in some cases, was not helpful to them. If
1093 TFN had not made a point of bringing that evidence to the attention of the NEB, their record
1094 would have stood. The Proponent is obligated to ensure that it accurately frames its engagement
1095 with intervenors.

1096 TFN is small community¹³², with a small administrative staff. The Proponent, as is evident from
1097 its detailed record of engagement contained in their Aboriginal Engagement Logs¹³³ has the
1098 human resources that easily overpower those of a small First Nation government. Even so, with
1099 the very limited staff capacity of TFN, and the very limited funding to support its participation
1100 concerning the Project, was still able to point out egregious examples of the Proponents' ongoing
1101 and repeated mischaracterization and omissions, which the Proponent "fully admits and
1102 accepts."¹³⁴

1103 TFN have raised their concerns throughout this process that the Proponent has consistently
1104 refused to inform itself about the contents of the Treaty, and the adverse impacts the Project

¹³¹ Exhibit C356-7-3, Tsawwassen Written Evidence, s. 4.1, A4L7T2, Adobe page 2-3; Exhibit C356-7-5, Appendix 3a and 3b, A4L7T4; Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

¹³² Exhibit C356-7-3, Tsawwassen Written Evidence, 2.1.1, A4L7T4, Adobe page 2, Exhibit C356-12-1, Affidavit of C. Ward, A4S5V4

¹³³ Exhibit B1-40, Vol. 3B – Aboriginal Engagement - Logs, Appendix A-5-12, A3S0U6

¹³⁴ Exhibit B417-2, Trans Mountain Reply Evidence, p. 7-13-7-14, A4S7E9, Adobe pages 95-96. See also, Exhibit B444-2, Trans Mountain Revised Final Argument, making reference to their 24000 points of engagement, at line 104, A4W6L8, Adobe page 11

1105 could have on those rights. This half-hearted approach is again evident in their Reply Evidence.
1106 For example, in their opening paragraph respecting their engagement with TFN, they state:

1107 Starting May 29, 2012, Trans Mountain has been engaging TFN on the Project to provide
1108 comprehensive information to them, to seek feedback from them, and to identify
1109 anticipated impacts of the Project on *the assertion of Aboriginal rights and title*
1110 *governing traditional and cultural use of the environment.*¹³⁵

1111 TFN has established Treaty rights and have not in this process asserted Aboriginal rights and
1112 title. This opening statement by the Proponent clearly shows that they simply have not taken
1113 seriously their obligation to fully understand TFN position as a Treaty nation, the content of their
1114 rights and how those rights intersect, or are potentially impacted by the Project.

1115 The Proponent's propensity for inattention is further evidenced in their reply evidence regarding
1116 its engagement with TFN, where they state:

1117 Trans Mountain acknowledges the errors and omissions and accepts the updated
1118 information filed by TFN. Trans Mountain is committed to continued engagement with
1119 *TWN* (sic) to discuss the Project...".¹³⁶

1120 This NEB is responsible to weigh the evidence of the parties, and on that evidence, make a
1121 determination in respect of the Project. TFN submits that the Proponent has failed in its
1122 engagement with them. TFN submits it is misleading for the Proponent to suggest that it has
1123 properly and fully engaged with TFN. Given the potential for adverse impacts of the Project,
1124 they ought to be held to a higher level of account given TFN's Treaty rights are at stake.

1125 **4.4 Continued Failures by Trans Mountain to Inform Itself**

1126 By letter dated January 9, 2015¹³⁷, the NEB issued its information request No. 3 to the
1127 Proponent. Contained therein was IR 3.10, requesting that the Proponent undertake – in relation
1128 to certain intervenors who gave oral Aboriginal evidence – an analysis regarding potential
1129 impacts of the Project on the:

¹³⁵ Exhibit B417-2, Trans Mountain Reply Evidence, p. 7-13-7-14, A4S7E9, Adobe page 95-96 [emphasis added]

¹³⁶ Exhibit B417-2, Trans Mountain Reply Evidence, p. 7-13-7-14, A4S7E9, Adobe page 95-96

¹³⁷ Exhibit A127-1, NEB Information Request No. 3 to Trans Mountain, January 9, 2015, A4G4L5

1130 “...potential or **established Aboriginal and Treaty rights**¹³⁸ throughout the lifecycle of
1131 the Project and in the event of a spill. This includes information regarding potential
1132 impacts to traditional harvesting activities (such as fishing, hunting, gathering,
1133 processing, and other activities) and cultural or spiritual practices.”¹³⁹

1134 Because it was clear to TFN that it was being held at a disadvantage insofar as the Proponent had
1135 not taken any concrete steps to inform itself about the Treaty – nor had the JRP required them to
1136 do so – TFN requested, in IR 2.3, that the Proponent provide the same information requested in
1137 the NEB’s IR 3.10 in respect of Tsawwassen in the second round of information requests on
1138 January 16, 2015.¹⁴⁰

1139 TFN requests that Trans Mountain provide, in table format, the same information as is
1140 requested by the NEB in IR 3.10 in its IR document (A4G4L5), in relation to TFN.

1141 The Proponent’s response to IR 2.3, filed on February 18, 2015, was:

1142 To date, TFN has not provided oral traditional evidence to Trans Mountain or the NEB
1143 and therefore is unable to provide responses to this request.¹⁴¹

1144 In support of Motion 2, filed on February 26, 2015, TFN set out the following basis for
1145 requesting the NEB to compel the Proponent to respond adequately:

1146 TFN should not be held to a disadvantage in being treated fairly just because it did not
1147 bring oral traditional evidence. We have previously explained that TFN did not file that
1148 evidence because our Aboriginal Treaty rights are set out in the TFNFA (Filing ID
1149 A3W8G0), which to date, Trans Mountain has refused to properly and fully inform itself
1150 about.

1151 TFN requests that the NEB compel Trans Mountain to respond, and specifically that they
1152 be required to do the detailed analysis as was requested by the NEB in relation to other
1153 Aboriginal intervenors, notwithstanding TFN did not file oral traditional evidence.¹⁴²

1154 The Proponent’s response to the rationale for IR 2.3 in Motion 2, filed on March 12, 2015, was:

¹³⁸ At this point, January 9, 2015, TFN was the only First Nation intervenor with established modern-day Treaty Rights. See Exhibit C411-0-1, The First Nations of the Maa-Nulth Treaty Society – Application to Participate, A4K8U4

¹³⁹ Exhibit A127-1, NEB Information Request No. 3 to Trans Mountain, A4G4L5, Adobe page 13 [emphasis added]

¹⁴⁰ Exhibit C356-5-1, Tsawwassen Round Two Information Requests to Trans Mountain, IR#3, A4G5S8, Adobe pages 3–4

¹⁴¹ Exhibit B318-21, Trans Mountain Response to TFN Round Two Information Requests, A4H9H9, Adobe page 6

¹⁴² Exhibit C356-6-1, TFN Motion to Compel Round Two, A4I4S1, Adobe page 1

1155 In accordance with Board Ruling No. 33 (Filing ID A63066), Trans Mountain’s response
1156 provided sufficient information and detail for the Board in its consideration of the
1157 application and no further response is required.¹⁴³

1158 The Board issued Ruling No. 63, including on Motion 2, on April 27, 2015. With respect to IR
1159 2.3, it made the following ruling:

1160 Deny – Motion sought information that may touch upon the List of Issues, but would not
1161 contribute to the record in any substantive way, and therefore, would not be material to
1162 the Board’s assessment. In some instances, the request was unreasonable or overly
1163 broad.¹⁴⁴

1164 At this point, at the end of the information requests and motions to compel process, there was
1165 still no tangible evidence on the record that the Proponent informed itself about the Treaty,
1166 notwithstanding TFN’s repeated attempts to have them do so. As an intervenor who participated
1167 in this process in good faith, it is troublesome to see that even where there is virtually nothing on
1168 the record about its Treaty rights informing the process, the NEB would permit the Proponent to
1169 continue to avoid it. This concern is further exacerbated with the NEB taking the view that
1170 having that knowledge and analysis would “not contribute in any substantive way, and therefore
1171 it would not be material” to their “assessment” of the Project – is simply astounding, though in
1172 keeping with the flawed process.

1173 **5. IMPACTS ON TFN RIGHTS AND INTERESTS**

1174 TFN has Treaty rights as they pertain to fish¹⁴⁵, aquatic plants, and migratory birds. They also
1175 have an interest in Southern Resident Killer Whale. These rights and interests are potentially
1176 impacted by matters connected to the Project, including shipping, spills and noise.

1177 **5.1 Treaty Fishing Right and Harvest Agreement**

1178 In its written evidence, TFN explained the importance of their harvest of Fish and Aquatic Plants
1179 for both domestic and commercial purposes.¹⁴⁶ TFN Members harvest these resources within

¹⁴³ Exhibit B351-2, Trans Mountain Response to TFN Round Two Notice of Motion, A4J5J1, Adobe page 1

¹⁴⁴ Exhibit A155-1, NEB Ruling 63, Motions to Compel Full and Adequate Responses to the Second Round of Intervenor Information Requests, A4K8G2; Exhibit A155-3, Appendix 1, A4K8G4, Adobe page 61

¹⁴⁵ See the Definition of Fish as defined in the TFNFA in Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 3

1180 defined areas,¹⁴⁷ and exercised them under the authority of TFN Law.¹⁴⁸ These harvesting rights
1181 of TFN are subject only to matters concerning conservation, public health and safety.¹⁴⁹

1182 TFN further explained that there are specific allocations for salmon and crab and other species of
1183 Fish and Aquatic Plants that are unallocated. For unallocated species, such as groundfish, TFN
1184 may harvest to meet the food, social and ceremonial (“FSC”) needs of the Nation.¹⁵⁰ The Treaty
1185 right also includes the right to barter and trade, which are ancient Aboriginal practices of TFN,
1186 and the TFN citizens continue to actively exercise those right.¹⁵¹

1187 **Figure 6.1** of TFN’s written evidence is a map showing how the Tsawwassen Fishing Area and
1188 the Tsawwassen Intertidal Bivalve Harvest Area are bisected by the proposed pipeline and
1189 shipping routes over those important TFN harvesting areas.

1190 The Tsawwassen Harvest Agreement (“THA”) is the instrument under which DFO provides
1191 commercial fishing capacity to TFN under the TFNFA. The THA provides that if DFO reduces
1192 the number of TFN commercial fishing licenses, or terminates it, TFN is entitled to be paid fair
1193 recompense.¹⁵²

1194 The formula used to determine TFN’s Treaty allocation of salmon each year means that the
1195 allocation varies with the size of the total allowable catch set out for Sockeye, Chum and Pink
1196 salmon.¹⁵³ The THA also provides for the commercial harvesting by TFN of salmon and

¹⁴⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1, A4L7T2, Adobe page 3, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁴⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1, A4L7T2, Adobe page 3, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁴⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1, A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁴⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.1., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵² Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.2., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵³ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.3-6.1.5., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1197 Dungeness crab.¹⁵⁴ TFN's written evidence explains, and illustrates in **Figure 6.2**, that annual
1198 salmon harvests occur from June through October, and Dungeness crab harvests occur primarily
1199 from April – November.¹⁵⁵

1200 Tsawwassen Domestic Allocations for Fish and Aquatic Plants are calculated using formulas.¹⁵⁶
1201 The Tsawwassen Treaty allocation for Sockeye salmon is calculated as 1% of the Canadian Total
1202 Allowable Catch (CTAC) as established by the Minister of Fisheries and Oceans:

1203
$$\text{TFN FSC Sockeye salmon allocation} = 1\% \times \text{CTAC for CTAC} < 500,000^{157}$$

1204 Allocations to TFN are precarious in nature and are determined by data collected throughout the
1205 fishing season, which may cause changes to the CTAC; thereby modifying the TFN allocation
1206 for Sockeye salmon. Modifications to Treaty allocations may occur pre-season, in-season, and
1207 post-season for an individual species.¹⁵⁸

1208 **Table 6.1** of TFN's written evidence shows the Tsawwassen domestic harvests of salmon and
1209 crab from 2009–2014 under the TFN Treaty Fishing Right. Fraser Sockeye salmon is the
1210 dominant salmon species captured and relied on by TFN in this fishery. Dungeness crab, also an
1211 important food item for TFN, is also caught in large quantities. While Eulachon is also important
1212 to TFN, the harvest of Eulachon is greatly reduced from historic levels due to conservation
1213 concerns.¹⁵⁹

1214 Based on this data, it is clear that TFN members rely heavily on various Salmon species,
1215 Dungeness crab and Eulachon. Not only do these resources provide sustenance as food to this

¹⁵⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.3, 6.1.4, 6.1.5., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵⁵ The Eulachon harvest typically occurs from mid-April to mid-May. Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 6

¹⁵⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.5., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.5., A4L7T2, Adobe page 4, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.7., A4L7T2, Adobe page 6, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁵⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.8., A4L7T2, Adobe page 7, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1216 community, but there is also a deep cultural importance as well as an economic component to
1217 them.¹⁶⁰

1218 The Tsawwassen Treaty Right to Fish and Aquatic Plants is not limited to just those species
1219 listed in **Table 6.1**. Rather, the Treaty Right extends to all Fish and Aquatic Plants for which
1220 there are harvest opportunities within the Tsawwassen Fishing Area and the Intertidal Bivalve
1221 Fishing Area.¹⁶¹ In particular, this includes resources such as Intertidal Bivalves, shrimp and
1222 prawns, and groundfish species, all of which are of real significance to TFN.¹⁶² **Table 6.1** of
1223 TFN's written evidence explains the Tsawwassen harvests of salmon and crab from 2009–2014
1224 for the THA salmon fisheries.¹⁶³ **Table 6.3** explains the landed value of salmon and Dungeness
1225 crab harvested in Tsawwassen fisheries.¹⁶⁴

1226 In its written evidence, TFN describes the type, quantity and importance of commercial fishing
1227 licences provided to it under the TFNFA. The Project has the potential to affect these current and
1228 future commercial opportunities of TFN for the same reasons that would affect TFN Treaty
1229 fisheries.

1230 **5.2 Adverse Effects of the Project on TFN Treaty Right to Fish and Aquatic Plants**

1231 Should the Project be approved, it will interact with the Tsawwassen Right to harvest Fish and
1232 Aquatic Plants primarily through two of the Project's activities: 1) the crossing of the Fraser
1233 River near the Port Mann Bridge and 2) the transit of ships adjacent and through the Tsawwassen
1234 Fishing Area and the Tsawwassen Intertidal Bivalve Harvest Area.¹⁶⁵

¹⁶⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.9., A4L7T2, Adobe page 7, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.10., A4L7T2, Adobe page 7, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶² Exhibit C356-7-3, Tsawwassen Written Evidence, 6.1.10., A4L7T2, Adobe page 7, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶³ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 7–8, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 8–9, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.1., A4L7T2, Adobe page 9, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1235 **5.2.1 Spills into the Salish Sea and Fraser River Crossing**

1236 The primary concern is the potential for oil spills and subsequent effects on the TFN Treaty
1237 Right to Fish and Aquatic Plants and TFN commercial fishing opportunities either through the
1238 THA or the general commercial fishery.¹⁶⁶

1239 The shipping lanes that the tankers carrying oil will travel along cross through the southwest
1240 corner of the Tsawwassen Fishing Area. Given this is an active fishing area for TFN, the concern
1241 is for both safety and potential interference with Tsawwassen fishing.¹⁶⁷

1242 An oil spill has the real potential to infringe on the TFN Treaty right to Fish and Aquatic Plants
1243 by impacting the fish and aquatic plants themselves (e.g., damage to organisms and habitat) as
1244 well as by impacting the harvesting of those fish and aquatic plants by Tsawwassen through
1245 closures to fisheries for conservation, health or public safety reasons (e.g., closure of fisheries
1246 because of tainting of seafood or gear fouling). Spill response and clean-up activities could also
1247 interfere with Tsawwassen fisheries.¹⁶⁸

1248 **Table 7.1** of TFN's written evidence illustrates that the probability that an oil spill of 8250 m³ or
1249 more will occur in the marine environment within the 50 year operating life of the Project is
1250 8.8% with the proposed mitigations. The probability of at least one spill in 50 years increases to
1251 17.6% for NewCase 1c when spills of any size are considered.¹⁶⁹

1252 We know from TFN's evidence that the distribution and abundance of salmon stocks throughout
1253 the Tsawwassen Harvest Area is extensive in both space and time.¹⁷⁰ Salmon are present
1254 throughout the Tsawwassen Harvest Area as adults and as juveniles in near-shore habitat.¹⁷¹ The
1255 concern is that these resources may be exposed to oil or condensate in the event of a spill at any

¹⁶⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.2–7.1.3., A4L7T2, Adobe page 9, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.2, A4L7T2, Adobe page 9, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.3., A4L7T2, Adobe page 9, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁶⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.4., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.5., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.5., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1256 time of the year.¹⁷² Adult salmon are in highest abundance in the Tsawwassen Harvest Area
1257 during May to October and juveniles are in highest abundance from March through August.¹⁷³
1258 Thus, there is a high probability that an oil spill would impact one or several salmon stocks if it
1259 occurred between March and October.¹⁷⁴

1260 TFN also examined recovery time for marine resources affected by an oil spill in its written
1261 evidence.¹⁷⁵ It determined that while recovery time can vary, generally it takes decades for the
1262 impacts of the spill itself, but residual effects to dissipate, if ever.¹⁷⁶ As a First Nation whose
1263 lands front the Salish Sea, and whose fishing grounds are on those waters and the rivers
1264 implicated by the Project, and on and around marshes connected to them, their fear is real and
1265 significant.

1266 **5.2.2 Effects of an Overland Spill at the Fraser River Crossing**

1267 The Proponent modeled spills during spring, summer, fall and winter conditions, all of which
1268 excepting winter, are three periods that overlap most with the Tsawwassen fishing periods and
1269 hence are the credible worse cases.¹⁷⁷

1270 In its written evidence, TFN illustrates the probability of oiling (**Figure 8.1**)¹⁷⁸, extent of
1271 shoreline oiling (**Figure 8.2**)¹⁷⁹, and time to first contact for the spill scenarios performed by the
1272 Proponent at Site FR (**Figure 8.3**)¹⁸⁰, as overlaid with the Tsawwassen harvest areas. These
1273 results show that a pipeline spill at the Fraser River crossing would result in rapid and significant

¹⁷² Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.5., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷³ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.5., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.5., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.6., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 7.1.6., A4L7T2, Adobe page 10, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.1., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁷⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.1-8.1.5., A4L7T2, Adobe page 12, Affidavit of R. Bocking, A4S5V7

¹⁷⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 13, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 14, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1274 oiling of shoreline areas and fish habitat along the South Arm of the Fraser and onto Roberts
1275 Bank.

1276 These areas provide critical habitat for salmon and Eulachon as well as Dungeness crab at
1277 Roberts Bank.¹⁸¹ A spill during spring freshet would carry oil out into the Salish Sea and into
1278 the Tsawwassen bivalve harvesting area.¹⁸² TFN's evidence is that a spill at Site FR during the
1279 Tsawwassen fisheries would most certainly result in closures of Tsawwassen salmon and
1280 Eulachon fisheries by DFO.¹⁸³ Tsawwassen would most likely suffer irreparable cultural and
1281 economic losses from such a spill.¹⁸⁴

1282 TFN uses of areas near the mouth of the Fraser River for cultural activities are directly and
1283 inextricably linked to the harvest of salmon.¹⁸⁵ Most notably among these activities is the 'First
1284 Salmon' ceremony. In addition to the treatment and use of the fish itself, prayers, songs and
1285 thanks are offered to ensure that the sockeye may then return to its home and family.¹⁸⁶ This
1286 practice reaches back to time immemorial, and is a fundamental aspect of the unique identity of
1287 the Coast Salish, including TFN.¹⁸⁷

1288 Simply put, there are no other places within its territory where Tsawwassen can engage in these
1289 important and community sustaining activities. A spill in TFN's environment will impact the
1290 physical health of salmon, the broader physical habitat, and it is quite possible it will result in a

¹⁸¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.1., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸² Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.1., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸³ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.2., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.2., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.3., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.3., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.4., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1291 direct and negative impact on the exercise of Coast Salish culture and spirituality; it could
1292 indelibly stain the landscape and their way of life.¹⁸⁸

1293 TFN also included in its evidence illustrations in **Figure 8.1**¹⁸⁹, **Figure 8.2**¹⁹⁰ and **Figure 8.3**¹⁹¹
1294 of the economic effect of a spill if it occurred during the large cycle return of Fraser sockeye as
1295 seen in the 2010 and 2014 (see **Table 6.1** and **6.2**) catch years. Again, TFN undertook this
1296 analysis in an effort to bring to the JRP a better appreciation of the likelihood of a spill having
1297 disastrous outcomes for TFN.

1298 **5.2.3 Effects of a Marine Spill at Site D (Salish Sea)**

1299 As also discussed in TFN's written evidence, the Proponent modeled spills for each of the four
1300 seasons (or periods), for two spill volumes at Site D in the Salish Sea.¹⁹² TFN indicated for all
1301 but the winter period, these periods overlap the most with the Tsawwassen fishing periods. TFN
1302 pointed out that the 16,500 m³ spill volume were the credible worse cases.¹⁹³

1303 TFN illustrates the probability of oiling (**Figure 9.1**), extent of shoreline oiling (**Figure 9.2**), and
1304 time to first contact for the spill scenarios performed by the Proponent at Site D (**Figure 9.3**),
1305 overlaid with the Tsawwassen Harvest Areas.

1306 Stochastic modeling results presented in the Application show that accidental spills in the Salish
1307 Sea at Site D have a high or very high probability (>50%) of oil being present in the Tsawwassen
1308 Harvest Areas and would affect an area as large as 3,311 km² (including areas outside the
1309 Tsawwassen Harvest Areas) for a 16,500 m³ spill in summer (**Table 6.1**, Volume 8b)

¹⁸⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 8.1.5., A4L7T2, Adobe page 11, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁸⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 12, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 13, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹¹ Exhibit C356-7-3, Tsawwassen Written Evidence, A4L7T2, Adobe page 14, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹² Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.1., A4L7T2, Adobe page 14–15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹³ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.1., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1310 (Figure 9.1).¹⁹⁴ Shoreline areas between Point Roberts and the Roberts Bank Terminal along
1311 with shoreline areas of the southern Gulf islands would be most affected (Figure 9.2).¹⁹⁵ The
1312 time to first contact with these shoreline areas is short (Figure 9.3).¹⁹⁶

1313 According to the Application, of a total of 1,196 km² of shallow water habitat (<10 m depth) in
1314 the Regional Study Area, 264 km² has a high probability (>50%) of being oiled from a
1315 16,500 m³ spill in summer. At Roberts Bank, this is important Dungeness crab habitat and where
1316 the Tsawwassen fisheries on that resource take place.¹⁹⁷

1317 A spill at Site D during the Tsawwassen fisheries targeting salmon or Dungeness crab could
1318 result in closures of the fishery by DFO; fisheries which are currently limited in the number and
1319 duration of allowable harvest days.¹⁹⁸ Therefore, Tsawwassen would likely suffer cultural and
1320 economic losses from such a spill.¹⁹⁹ The economic effects would be greatest if a spill occurred
1321 during the large cycle return year of Fraser Sockeye as was seen in 2010 and 2014.²⁰⁰

1322 **5.2.4 Effects of a Marine Spill at Site E (Salish Sea, Arachne Reef)**

1323 The Proponent modeled spills for each of the four seasons, for two spill volumes Site E in Salish
1324 Sea.²⁰¹ All periods, excepting the winter period, overlap the most with the Tsawwassen fishing
1325 periods.²⁰² The 16,500 m³ spill volume are the credible worse cases.²⁰³ TFN filed evidence

¹⁹⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.2., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.2., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.2., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.3., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.4., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

¹⁹⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.4., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 9.1.4., A4L7T2, Adobe page 15, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰² Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰³ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

1326 regarding the Tsawwassen Harvest Areas and the probability of oiling (**Figure 10.1**)²⁰⁴, the
1327 extent of shoreline oiling (**Figure 10.2**)²⁰⁵, and time to first contact for the spill scenarios
1328 performed by the Proponent at Site E (**Figure 10.3**).²⁰⁶

1329 Stochastic modeling results presented in the Application show that accidental spills in the Salish
1330 Sea at Site E have a lower probability (>10%) of oil being present in the Tsawwassen harvest
1331 areas but could still affect shoreline areas in the Tsawwassen Harvest Areas between Point
1332 Roberts and the Roberts Bank Terminal along with shoreline areas of the southern Gulf islands
1333 (**Figure 10.2**).²⁰⁷ The time to first contact with these shoreline areas is longer than for a spill at
1334 Site D (**Figure 10.3**).²⁰⁸

1335 Oiling of harvest areas from a spill at Site E during the Tsawwassen fisheries targeting salmon or
1336 Dungeness crab could result in closures of the fishery by DFO; fisheries which are currently
1337 limited in the number and duration of allowable harvest days. That means, Tsawwassen would
1338 likely suffer cultural and economic losses from such a spill.²⁰⁹

1339 **5.3 Effects of the Project on Treaty Right to Migratory Birds**

1340 As noted above, TFN has the right to harvest Migratory Birds for domestic purposes in the
1341 Tsawwassen Migratory Bird Harvest Area (see **Figure 6.1**) throughout the year in accordance
1342 with the TFNFA.²¹⁰

1343 TFN's written evidence discussed the importance of the Fraser River, which sustains the largest
1344 Delta on Canada's Pacific coast. The Fraser River delta is a critical link in a series of migratory

²⁰⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Fig. 10.1, Adobe page 22, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Fig. 10.2., Adobe page 24, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.2., A4L7T2, Adobe page 21, Fig. 10.3, Adobe page 26, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.3., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.3., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²⁰⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 10.1.4., A4L7T2, Adobe page 21, Exhibit C356-12-4, Affidavit of R. Bocking, A4S5V7

²¹⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.1.2., A4L7T2, Adobe page 27, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1345 bird habitats. The Delta also supports some of the highest densities of wintering waterfowl,
1346 shorebirds, and raptors in Canada.²¹¹

1347 TFN explained that brackish marshes occupy ~3% of the Delta and are some of the Delta's last
1348 vestiges of ecological communities that exist in a similar state to those that existed prior to
1349 European contact. By serving as food for herbivores and detritivores and as structural habitat
1350 (cover) for fish and invertebrates, healthy brackish marshes in the Fraser River Delta are integral
1351 to an ecosystem that supports high profile species of fish and migratory birds.²¹²

1352 It is difficult to overstate the value of migratory birds to Tsawwassen. Historically, Tsawwassen
1353 hunted and traded waterfowl with their territorial neighbours, bringing canoes full of them to
1354 upriver communities. The presence of migratory birds throughout Tsawwassen's Traditional
1355 Territory is even acknowledged in the naming of places – the western foreshore of Boundary
1356 Bay is known to Tsawwassen as *Tunuxun*, a Hunqum'i'num word which means 'ducks'.²¹³

1357 Although the Migratory Bird Harvest Area encompasses a large area of land and water, the
1358 opportunity for members to exercise the Treaty right is confined to a very small fraction of that
1359 area. The issue is two-fold: first, only a small portion of that area is suitable habitat for the
1360 species harvested by the TFN community. Secondly, of that suitable habitat, a considerable
1361 portion is closed to hunting. The result then, for TFN Members, is that some of the best
1362 remaining waterfowl hunting opportunities along the foreshore of the Fraser Delta adjacent to
1363 Tsawwassen Lands – an area vastly smaller than what was once available to Tsawwassen
1364 harvesters – *is increasingly becoming a more inaccessible harvesting ground.*²¹⁴

1365 **5.3.1 Effects of a Spill of Diluted Bitumen on Migratory Birds**

1366 TFN has two main concerns about the Project and its implications for the Treaty Right respecting
1367 migratory birds, both of which are linked to the adverse effects of a spill of diluted bitumen that

²¹¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.2.2., A4L7T2, Adobe page 27, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹² Exhibit C356-7-3, Tsawwassen Written Evidence, 11.2.2., A4L7T2, Adobe page 27, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹³ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.2.3., A4L7T2, Adobe page 27, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.2.4., A4L7T2, Adobe page 28, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1368 reaches the shore of the Fraser Delta. First, a spill that reaches the shoreline of the Fraser Delta is
1369 expected to result in animal and plant mortality due to toxicity and smothering effects whereby
1370 the death and decay of vegetation leads to habitat degradation. Second, degraded environmental
1371 conditions are believed to have the potential to unreasonably limit or preclude the exercise of the
1372 right to harvest migratory birds for an unknown period of time.²¹⁵

1373 Marine spill scenarios prepared by the Proponent and depicted in **Figures 9.1–9.3** through
1374 **10.1–10.3** of TFN’s written evidence, confirm that contamination by diluted bitumen – of that
1375 part of the shoreline of the Fraser Delta within the Migratory Bird Harvest Area – is a realistic
1376 outcome of a marine spill. The actual amount of hydrocarbons contacting the shore depends on a
1377 number of factors, including spill volume, spill trajectory, spill response, and spill recovery.²¹⁶

1378 TFN also describes in its written evidence, the influence of the elevation of the intertidal
1379 platform on the vegetation community of a brackish marsh in the Fraser Delta. Brackish marsh
1380 habitat of the Fraser Delta can exist only where tidal inundation is frequent enough to prevent the
1381 establishment of ‘upland’ species and where the intertidal sediment platform is exposed often
1382 enough such that subtidal marine species such as eelgrasses and macrophytic algae cannot
1383 become established. The narrow band of brackish marshes of the Fraser Delta have been
1384 confined on the landward side by an elaborate network of dykes, ditches and pumping stations
1385 that confine the nearshore influence of the marine environment.²¹⁷

1386 Given that, and considering that the upland limit of the brackish marsh is now defined and
1387 demarcated by the dykes, the net area of the marsh is solely dependent on the degree to which
1388 the marsh extends seaward. As with the threat that sea-level rise due to climate change poses to
1389 brackish marshes, any perturbations that decrease the elevation of the marsh platform will only
1390 serve to reduce its area. The deposition of diluted bitumen onto the brackish marshes of the
1391 Fraser Delta is believed to constitute such a perturbation. Just as roadside cutbanks of exposed
1392 soil are routinely hydro-seeded to provide soil stability that resists erosion, the deep root and

²¹⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.2., A4L7T2, Adobe page 28, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.3., A4L7T2, Adobe page 28, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.4., A4L7T2, Adobe page 28, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1393 rhizome networks of brackish marsh plants serve to bind the sediments and resist the erosional
1394 forces of waves and currents.²¹⁸

1395 Intertidal marsh plants are key to reducing coastal erosion.²¹⁹ TFN explained in its written
1396 evidence that for intertidal marsh habitats affected by the recent Deepwater Horizon oil spill in
1397 the Gulf of Mexico, plant death led to sediment erosion and habitat degradation:

1398 *“Our results suggest that oil-generated death of this stabilizing root matrix at the*
1399 *edges of these marshes triggered a geomorphic response that led to accelerated*
1400 *erosion of the marsh edge, hastening the degradation of the elevated platform on*
1401 *which marsh vegetation depends.”²²⁰*

1402 As summarized in **Figure 11.1**, the death of marsh vegetation and the subsequent decomposition
1403 of the root and rhizome network trigger a cascade of events that could lead to sediment erosion,
1404 which includes:

- 1405 • loss of a substrate for new plant growth;
- 1406 • loss of habitat for marsh-dependent species;
- 1407 • loss of animal abundance; and
- 1408 • loss of opportunities for humans to benefit from marsh resources.²²¹

1409 In the current context of adverse impacts of the Project, these losses translate into real and
1410 substantial risks to the TFN, particularly on the ability of its Members to exercise their right to
1411 harvest migratory birds.²²²

1412 In the Proponent’s follow up response to TFN information request No.1, they consistently
1413 downplayed the risks of environmental damage of the brackish marsh ecosystem as a result of a
1414 catastrophic spill of diluted bitumen. For example, the Proponent stated that it:

²¹⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.4., A4L7T2, Adobe pages 28–29, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²¹⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.5., A4L7T2, Adobe page 29, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.5., A4L7T2, Adobe page 29, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.6., A4L7T2, Adobe page 29, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²² Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.6, A4L7T2, Adobe page 29, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1415 “...is confident that plant mortality caused by exposure to crude oil or oil spill
1416 response activities in the unlikely event of a spill affecting Boundary Bay, Roberts
1417 or Sturgeon Banks would be minor and reversible, and that wide-spread erosion
1418 or other physical change to salt marsh and shoreline habitat is not a likely
1419 outcome of such an accident.”²²³

1420 As set out in its written evidence, TFN did not uncover any empirical evidence capable of
1421 substantiating the high degree of confidence the Proponent places in this assessment.²²⁴ The
1422 evidence suggests that oil spills can and do degrade coastal marshes.²²⁵ The practical result, in
1423 terms of the TFN right to harvest migratory birds, is that there still exists an as-yet-unknown
1424 level of risk from current shipping levels, and an expansion of tanker traffic can only exacerbate
1425 this risk.²²⁶

1426 As it is with salmon, there will be adverse impacts to TFN’s culture with reductions in harvests
1427 of migratory birds. In upholding the long-standing practice of trading in waterfowl with
1428 neighbouring nations, the TFNFA reflects this long standing practice.²²⁷ When changes in the
1429 environment that reduce opportunities to harvest migratory birds have occurred or may occur,
1430 those incidents adversely impact the ability of the TFN people to continue their ancient
1431 practices.²²⁸

1432 **5.4 Effects of the Project on TFN Interests in Killer Whale**

1433 **5.4.1 Endangered Southern Killer Whales**

1434 Southern Resident Killer Whale is endangered and on Schedule 1 of the *Species at Risk Act*.²²⁹
1435 TFN indicates in its written evidence that most of the Salish Sea has been delineated as critical

²²³ Exhibit B280-3, Trans Mountain Follow up Response to TFN IR No.1, A4D3G2, Adobe page 304, Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.7, A4L7T2, Adobe page 30, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.8., A4L7T2, Adobe page 30, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.8., A4L7T2, Adobe page 30, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.8., A4L7T2, Adobe page 30, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.9., A4L7T2, Adobe pages 30–31, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 11.3.9., A4L7T2, Adobe pages 30–31, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²²⁹ *Species at Risk Act*, S.C., 2002, c. 29.

1436 habitat in the recovery strategy (**Figure 12.0**) including the waters off the shore of Tsawwassen
1437 Lands.²³⁰ There has been a net decline in the whale population since 1998.²³¹ Unless there are
1438 drastic changes, *inter alia*, to the population recovery strategy, it appears unlikely those factors
1439 which continue to compromise the population's demographics will see any marked
1440 improvement.²³²

1441 **5.4.2 Cultural Importance of Killer Whale**

1442 While TFN does not have a history as a whaling nation, nor does it have any Treaty rights to
1443 whales in the Salish Sea, TFN still has strong cultural ties to Southern Resident Killer Whale and
1444 a vested interest in its wellbeing.²³³

1445 The Tsawwassen community faces out onto the Salish Sea, and its members must cross it to
1446 access the southern Gulf Islands, among other things, to harvest shellfish.²³⁴ As an
1447 acknowledgement of the population of *kwulhmulucun* (Killer Whales) who occupy the salt water,
1448 the Tsawwassen have adorned their ocean-going canoe with an image of the Killer Whale. The
1449 species also figures prominently in the stories of the Tsawwassen people.²³⁵

1450 **5.4.3 Current Impacts on Killer Whale**

1451 In modern times there has been recognition that the perilous state of the Southern Resident race
1452 of Killer Whale is a result of human activities in and around the Salish Sea.²³⁶ From capture for
1453 the commercial aquarium industry, to chemical pollution, to depletion of key prey (Chinook
1454 salmon), to the ever-increasing levels of underwater noise, humans are pushing this race to the
1455 brink of extinction. TFN takes very seriously any assaults to these magnificent creatures whose

²³⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.1.2., A4L7T2, Adobe page 31, Fig. 12.0, Adobe page 32, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.1.2., A4L7T2, Adobe page 31, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³² Exhibit C356-7-3, Tsawwassen Written Evidence, 12.1.2., A4L7T2, Adobe page 31, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³³ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.2.2, A4L7T2, Adobe page 32, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.2.3., A4L7T2, Adobe page 32, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.2.3., A4L7T2, Adobe page 32, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.2., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1456 very existence as a top predator in the Salish Sea is the ultimate indicator of the health of this
1457 ecosystem – the very ecosystem that sustains the lives and livelihoods of TFN citizens. A Sea
1458 that is fit for Killer Whale is one that is fit for TFN.²³⁷

1459 TFN pointed out in its written evidence, that of the many interactions between the Project and
1460 valued components along the pipeline from Alberta to the West Coast, and the extensive of
1461 shipping lanes from the terminal out to the J- Buoy, the only non-accident effect the Proponent
1462 deemed “significant” was the sensory disturbance Killer Whale caused by underwater shipping
1463 noise in the Salish Sea.²³⁸ TFN submits that considering the great lengths to which proponents
1464 typically go to mitigate “significant” adverse effects to the point of non-significance, this
1465 conclusion is both telling and troubling.²³⁹

1466 As TFN shows in its written evidence, unlike the terrestrial portions of the project, the Proponent
1467 has limited influence over the operations of marine vessels calling to and from Westridge
1468 Terminal.²⁴⁰ There are presently a number of statutes that seek to protect the environment from
1469 harmful effects of spilled hydrocarbons and other chemical releases.²⁴¹ Similarly, regulations
1470 governing ballast water provide a measure of protection from the harmful effects of invasive
1471 species.²⁴²

1472 However, when it comes to the emission of underwater noise, there are neither Canadian nor
1473 international regulations in place. As the world’s oceans have become increasingly polluted by
1474 noise, underwater noise in the marine environment has been identified as an issue of growing

²³⁷ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.2., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³⁸ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.3., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²³⁹ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.3., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴⁰ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.4., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴¹ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.4., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴² Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.4., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1475 public concern for over two decades. Even so, governments have yet to mitigate this pollution by
1476 regulating or capping it.²⁴³

1477 Now, according to the Proponent:

1478 *“With or without the Project, the southern resident killer whale population*
1479 *continues to be adversely affected by sensory disturbance caused by all types of*
1480 *marine vessel traffic. Even though the Project contribution to overall sensory*
1481 *disturbance effects would be small, the potential effect of the increase in Project-*
1482 *related marine vessel traffic was determined to be high magnitude, high*
1483 *probability and significant for southern resident killer whales.”²⁴⁴*

1484 TFN notes in its written evidence, that if one accepts the theory that underwater noise in the
1485 Salish Sea currently poses a credible risk to Southern Resident Killer Whale and population
1486 recovery thereof, in recognition of the fact that: (i) the Project will exacerbate the problem of
1487 underwater noise in the Salish Sea, and (ii) our understanding of what constitutes an acceptable
1488 level of underwater ambient shipping noise is rudimentary at best, adding more shipping noise to
1489 the underwater soundscape of the Salish Sea may be unjustifiably risk-prone.²⁴⁵

1490 TFN is not saying that the Project will amount to some tipping point, but rather that the tipping
1491 point may have already been breached. TFN submits what is urgently needed is serious
1492 regulatory action to reduce underwater noise levels in the Salish Sea. In TFN’s view, authorizing
1493 more noise is simply irrational and irresponsible if we are to have any real chance of recovering
1494 this valued species which stands as an important cultural symbol of the Coast Salish Peoples.²⁴⁶

1495 **5.4.4 Trans Mountain’s Submissions on Significant Adverse Effects on Killer Whale**

1496 The Proponent’s Revised Final Argument openly confronts the matter of significant adverse
1497 effects (direct and cumulative) of underwater noise on Southern Resident Killer Whale – an
1498 endangered species. However, there are instances where the wording in their Revised Final

²⁴³ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.4., A4L7T2, Adobe page 33, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴⁴ Exhibit B1-1, Vol.1, Summary, s. 2.6, A3S0Q7, Adobe page 70, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴⁵ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.5., A4L7T2, Adobe page 34, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

²⁴⁶ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.3.6., A4L7T2, Adobe page 34, Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6

1499 Argument would appear to lose sight of this and indicate that no significant adverse effects are
1500 expected. For example:

1501 *“Trans Mountain further submits that, in light of the test under the CEAA 2012*
1502 *that is discussed below, the evidence demonstrates that the Project will not cause*
1503 *significant adverse environmental effects.”*²⁴⁷

1504 and

1505 *“No significant residual effects were predicted based on the outcome of the*
1506 *individual species at risk effects assessment.”*²⁴⁸

1507 and

1508 *“The Board can be confident that the construction and operation of the Project,*
1509 *subject to the Board’s conditions, and the extensive regulatory regime that is*
1510 *currently in place, can be carried out in a manner that will have no unacceptable*
1511 *environmental or socio-economic impacts.”*²⁴⁹

1512 Considering the importance of ‘significant adverse effects’ for the JRP’s deliberations on the
1513 acceptability of the Project, TFN expects consistency among claims about the Project and any
1514 significant adverse effects it might have, in this case, Southern Resident Killer Whale.

1515 **5.4.5 Trans Mountain’s Argument Inaccurate Regarding Killer Whale Recovery**

1516 The Proponent’s Revised Final Argument contains a number of statements on Southern Resident
1517 Killer Whale that are inaccurate or are misleading insofar as they attempt to suggest that the
1518 situation with this endangered species is not as dire as it actually is. Trans Mountain states:

1519 *“The first recovery strategy identified in DFO’s southern resident killer whale*
1520 *Action Plan is to ensure that resident killer whales have an adequate and*
1521 *accessible food supply to allow recovery of the species. To assist in achieving this*
1522 *goal, Trans Mountain will work with stakeholders, Aboriginal communities, and*
1523 *regulatory authorities such as DFO and the NEB to protect, preserve and, where*
1524 *possible, enhance the freshwater habitat of Fraser River salmon stocks. The*
1525 *primary way Trans Mountain will contribute is by implementing the various*

²⁴⁷ Exhibit B444-2, Trans Mountain Revised Final Argument, at line 904, A4W6L8, Adobe page 53

²⁴⁸ Exhibit B444-2, Trans Mountain Revised Final Argument, at line 4009, A4W6L8, Adobe page 224

²⁴⁹ Exhibit B444-2, Trans Mountain Revised Final Argument, at line 6435, A4W6L8, Adobe page 358

1526 *comprehensive measures proposed in the Application to mitigate environmental*
1527 *effects during construction of the Project, including for the 116 salmon-bearing*
1528 *crossings within the B.C. portion of the proposed pipeline corridor.*²⁵⁰

1529 TFN takes exception to the Proponent's position that mitigating environmental effects during
1530 construction constitutes a primary way of contributing toward the goal of achieving an adequate
1531 food supply for Southern Resident Killer Whale. Typically, mitigating the impacts of pipeline
1532 stream-crossings can at-best be expected to return the crossing to a pre-construction state
1533 (i.e., status quo). As such, this can in no way be viewed as a contribution toward Southern
1534 Resident Killer Whale conservation unless the present condition of the crossing locations are
1535 degraded to the point where the Proponent will actually *improve* them post-construction. If this is
1536 the case, then the potential benefits of this restoration and enhancement work should be clearly
1537 stated. If not, credit for mitigation during construction must not be claimed.

1538 Currently, both the Proponent and DFO agree that there are no technically feasible mitigation
1539 measures to address underwater acoustic impacts from shipping on Southern Resident Killer
1540 Whale. DFO notes that:

1541 *"...the Proponent has not proposed mitigation measures that they intend to*
1542 *implement to reduce the potential effects of underwater noise and ship strikes*
1543 *from increased Project-related vessel traffic on marine mammals, and DFO is not*
1544 *aware of any technically feasible mitigation measures that can be implemented*
1545 *directly by the Proponent in this regard.*²⁵¹

1546 In their Revised Final Argument, the Proponent describes a number of steps it will undertake
1547 with a view to gaining information on the impacts of underwater noise on Southern Resident
1548 Killer Whale. They then go on to assure the NEB that:

1549 *"The Board can be confident that Trans Mountain's southern resident killer*
1550 *whale recovery strategies will ensure impacts to the whale population are being*
1551 *studied so that any Project related effects can be mitigated.*²⁵²

²⁵⁰ Exhibit B444-2, Trans Mountain Revised Final Argument, line 5592, A4W6L8, Adobe page 311

²⁵¹ Exhibit 97-2-2, Written Evidence of Fisheries and Oceans Canada and the Canadian Coast Guard, line 2, A4L7D4, Adobe page 35

²⁵² Exhibit B444-2, Trans Mountain Revised Final Argument, line 5642, A4W6L8, Adobe page 314

1552 Firstly, TFN submits that it is incorrect to refer to “...*Trans Mountain’s southern resident killer*
1553 *whale recovery strategies...*”. The Proponent is committed to engaging in conservation efforts
1554 that may support DFO’s recovery strategy and action plan for the species, but the Proponent does
1555 not have any ‘recovery strategies’ as such. Secondly, the fault with this assurance is that there is
1556 no certainty that the outcome of the scientific studies will in any way inform the Proponent’s
1557 Marine Mammal Protection Plan to an extent whereby the significant adverse effects currently
1558 predicted for the project will be mitigated in the future. To claim that this is the case is to risk
1559 setting false expectations, in essence, by promising favourable results. Scientific information
1560 may, in fact, inform the marine shipping industry and Transport Canada in ways that serve the
1561 interests of Southern Resident Killer Whale recovery, but there can be no certainty of this at the
1562 present time.

1563 The Proponent’s Revised Final Argument states:

1564 *Trans Mountain will implement any additional technically and economically*
1565 *feasible mitigation measures that are identified in the future for southern resident*
1566 *killer whales. Trans Mountain is going well beyond any requirements of the*
1567 *CEAA 2012, NEB or DFO to ensure the southern resident killer whale population*
1568 *continues to recover and thrive through the implementation of proper mitigation*
1569 *measures in the Salish Sea.*²⁵³

1570 The foregoing statement infers that the Southern Resident Killer Whale population is currently
1571 recovering and that through its ‘above and beyond’ actions, Trans Mountain will ensure this
1572 recovery continues. In fact, Southern Resident Killer Whale is endangered and is on Schedule 1
1573 of the *Species at Risk Act* and there is presently no evidence of recovery. The whale population
1574 numbered 89 in 1998 and as of 31 March 2015, the total was 81.²⁵⁴ At this point, population
1575 recovery seems unlikely unless those factors currently compromising the population’s
1576 demographics undergo some drastic changes.

²⁵³ Exhibit B444-2, Trans Mountain Revised Final Argument, lines 5670, A4W6L8, Adobe page 315

²⁵⁴ Exhibit C356-7-3, Tsawwassen Written Evidence, 12.1.2., A4L7T2, Adobe page 31; Exhibit C356-12-3, Affidavit of M. Demarchi, A4S5V6.

1577 **6. INADEQUATE CROWN CONSULTATION**

1578 **6.1 Overview**

1579 On August 12, 2013, the NEB filed certain attachments²⁵⁵ directed at Aboriginal groups,
1580 including a letter setting out its role as the federal regulator in respect of the Project. Included in
1581 the NEB August 12, 2013 filing was a letter from Natural Resources Canada to “Chiefs, Council,
1582 or Aboriginal representatives” informing them that:²⁵⁶

1583 The Crown will rely on the National Energy Board’s (NEB) public hearing process, to
1584 the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the
1585 proposed Project. Through the NEB process, the NEB will consider issues and concerns
1586 raised by Aboriginal groups. The Crown will utilise the NEB process to identify, consider
1587 and address the potential adverse impacts of the proposed Project on established of
1588 potential Aboriginal and treaty rights through the following steps:

- 1589
- 1590 1. As part of its enhanced Aboriginal engagement process initiated after
1591 receiving the Project Description, the NEB contacts potentially affected
1592 Aboriginal groups by letter as well as by telephone, to introduce the federal
1593 review process for the proposed Project. In addition, the NEB offers to meet
1594 Aboriginal groups to provide further information on the process and how to
1595 participate.

 - 1596 2. Aboriginal groups that have project-related concerns are encouraged to
1597 discuss them with Trans Mountain Pipeline ULC. Unresolved concerns should
1598 be conveyed to the NEB, either orally or in writing, through the NEB public
1599 hearing process. To learn more about the proposed Project, Trans Mountain
1600 Pipeline ULC’s Project Description may be accessed by going to the NEB
1601 website (www.neb-one.gc.ca) and clicking on Regulatory Documents “View”
1602 on the right-hand side. On the next screen, enter A51996 in the yellow box
1603 situated at the bottom on the left-hand side.

 - 1604 3. Following receipt of the Application from the proponent, and subject to its
1605 determination that the Application is complete, the NEB will schedule a
1606 hearing for the project review. The NEB will provide information about the
1607 public hearing process, including options for those wishing to participate. To
1608 facilitate participation in the NEB process, all regulatory documents

²⁵⁵ Exhibit A3-1, Attachments 1–4 Letter to Aboriginal Groups with Description of Trans Mountain Expansion
Project A3K217, Adobe page 5–6

²⁵⁶ Exhibit A3-21, Letter from NEB to Tsawwassen First Nation, August 12, 2013, A3K2K7

1609 pertaining to the proposed Project will be publicly available on the NEB
1610 website.

1611 4. Other federal departments that determine that they have a regulatory
1612 responsibility for the proposed Project will also participate in the NEB process
1613 to further understand the concerns Aboriginal groups may have regarding the
1614 possible effects of their federal regulatory decisions on potential or established
1615 Aboriginal or treaty rights.

1616 5. Federal authorizations for the proposed project will only be issued once the
1617 Crown determines that its consultation obligations with respect to each of
1618 these authorizations have been discharged.

1619 On February 6, 2015²⁵⁷, NRCan wrote to explain again the consultation steps they planned to
1620 take. In that letter, they also explained the criteria it used for a strength of claim for Aboriginal
1621 groups “close to the proposed pipeline right of way” (February 2015 Consultation Plan):

1622 The MPMO is currently conducting a strength of claim assessment for all Aboriginal
1623 groups close to the proposed pipeline right of way. The Crown will consider certain
1624 criteria, as evidence is brought forward, to develop the adequacy of consultation
1625 assessment. Key criteria may include 1) Extent: whether an adverse impact on a right
1626 may be localized or experienced to a broader extent, and how the geographic extent of the
1627 adverse impact on the right related to the geographic extent of the right practised;
1628 2) Certainty: the likelihood that an adverse impact on a right will occur; 3) Magnitude:
1629 the nature and degree of the impact on a right; 4) Duration and Frequency: how often the
1630 impact on a right occurs and whether these occurrences are short-term or long-term; and
1631 5) Reversibility: whether the adverse impact on a right is reversible, and what the
1632 recovery period would be.

1633 At this early stage in the review process, Aboriginal groups have not yet submitted all
1634 their evidence on potential impacts. Consequently, only a very preliminary assessment of
1635 which groups could potentially be impacted by the Project and the extent of these impacts
1636 has been carried out. The assessment of the impacts of the Project on potential or
1637 established Aboriginal or treaty rights of these groups will evolve as the NEB review
1638 process unfolds and Aboriginal groups submit their evidence to the NEB.

1639 The February 2015 Consultation Plan is the most detailed explanation of the Crown’s approach
1640 to assessing potential impacts of the Project to *rights*. Yet, it comes in the midst of the second

²⁵⁷ Exhibit C269-19-5, Letter from Natural Resources Canada to First Nations, February 6, 2015, A4L5K5, Adobe page 74

1641 round of information requests, having been sent directly to Aboriginal group intervenors with
1642 respect to the Project. As has been noted, that it is not appropriate in the circumstances of the
1643 Project – for the Crown on one hand, to be bound to the legal obligation to consult, but on the
1644 other, they are adverse TFN – for it to ‘slide’ information to Aboriginal intervenors about
1645 something as critical in-depth consultation.

1646 **6.2 Crown has Not Discharged its Duty to Consult**

1647 We know now, years after the commencement of the process that the Crown had determined that
1648 the duty of consultation owed by them to TFN was “high” on the spectrum. Unfortunately, the
1649 Crown has not discharged its duty to consult TFN at any stage of this process.

1650 In the Treaty context, the Crown’s duty to consult is triggered when actual knowledge arises on
1651 the part of the Crown when treaty rights may be impacted.²⁵⁸ TFN accepts that there is a
1652 reciprocal duty on Aboriginal groups to consult with the Crown; however, the starting point for
1653 consultation, according to *Mikisew*, where there is a treaty, is for the Crown to inform itself
1654 about the impacts their Project will have on the rights of that Indigenous group. From there, the
1655 Crown is obligated to consult in good faith, with the intention of substantially addressing the
1656 Aboriginal groups concerns. The Court determined this level of consultation was owed to the
1657 Mikisew even though the duty to consult was on the low end of the *Haida* spectrum.

1658 Because the Crown has determined that consultation owed to TFN in this process is at the high
1659 end of the consultation spectrum,²⁵⁹ deep consultation is required, aimed at finding a satisfactory
1660 solution to the concerns of TFN, requiring written reasons to show that TFN’s concerns were
1661 considered, and how those concerns influenced the decision.²⁶⁰

1662 As set out above, the first contact from the Crown to Aboriginal groups, including TFN in
1663 relation to the Project was a letter dated August 12, 2013 from Natural Resources Canada, which
1664 was an attachment to a NEB letter of the same date. In NRCan’s letter, again, they stated:

²⁵⁸ *Haida*, at para 35, *Rio Tinto*, at para 40, *Mikisew*, at para 34

²⁵⁹ Exhibit C249-9-1, Natural Resources Canada Written Evidence, A4Q0V2, Exhibit C249-2, Annex E: Crown Listing Identifying all Aboriginal groups for which the Crown recognizes a duty to consult (A4Q0V3), Adobe page 120

²⁶⁰ *Haida*, at paras 43–41

1665 The Crown will rely on the National Energy Board's (NEB) public hearing process, to
1666 the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the
1667 proposed Project. Through the NEB process, the NEB will consider issues and concerns
1668 raised by Aboriginal groups. The Crown will utilise the NEB process to identify, consider
1669 and address the potential adverse impacts of the proposed Project on established of
1670 potential Aboriginal and treaty rights...

1671 In its role as intervenor, TFN has found that the Federal Departments seem more interested in
1672 supporting positive outcomes of the Project than discharging their constitutional obligation of
1673 ensuring the protection of TFN's Treaty rights.

1674 In their written evidence submissions to the NEB, NRCan, in justifying the role of the
1675 overarching role of the NEB stated:

1676 The NEB, which has broad powers to set conditions for the Project, has full access to
1677 relevant information on how the Project might adversely impact Aboriginal interests,
1678 including impacts on potential or established Aboriginal or treaty rights.²⁶¹

1679 NRCan goes on to explain the four phases of the Crown consultation in connection to the
1680 Project:

1681 Phase I: Initial engagement, from submission of the project description to the start of the
1682 NEB review process;

1683 Phase II: NEB hearings, from the start of the NEB review process to the close of the
1684 hearing record;

1685 Phase III: Post-NEB hearings, from the close of the hearing record to a Governor in
1686 Council (GIC) decision on the project; and

1687 Phase IV: Regulatory permitting, from the GIC decision on the project to issuance of
1688 departmental regulatory approvals (if required).

1689 Sometime prior to NRCan's August 12, 2013 letter to Aboriginal groups, including TFN, various
1690 federal departments determined a list of:

1691 Aboriginal groups whose rights and interests be adversely impacted by the Project, the
1692 MPMO, Aboriginal Affairs and Northern Development Canada (AANDC), Transport

²⁶¹ Exhibit C249-9-1, NRCan Written Evidence, at para. 28, A4Q0V2, Adobe page 9-10

1693 Canada (TC), Fisheries and Oceans Canada (DFO), Parks Canada and the NEB
1694 coordinated research and analysis on the proximity of Aboriginal groups' traditional
1695 territories to elements of the Project described by the Proponent, including the proposed
1696 pipeline Right of Way (RoW), marine terminal expansion, and designated shipping
1697 lanes.²⁶²

1698 NRCan also confirmed that:

1699 To inform the preliminary depth of consultation owed to each group, the Crown
1700 undertook additional analysis with respect to preliminary strength of claim and potential
1701 for adverse impacts arising from the Project to potential or established Aboriginal and
1702 treaty rights.²⁶³

1703 Moreover, they confirm that the preliminary depth of consultation assessment is refined
1704 throughout the NEB review and consultation process, based on:

- 1705 I. information contained in the Proponent's Application;
- 1706 II. information provided by Aboriginal groups regarding their views of how their
1707 claimed Aboriginal rights and other interests might be adversely impacted by the
1708 Project;
- 1709 III. input from Aboriginal groups on assessing potential adverse impacts of the Project on
1710 claimed Aboriginal rights and interests;
- 1711 IV. draft conditions issued by the NEB with respect to the Project;
- 1712 V. conclusions and recommendations of the NEB in respect of any residual effects of the
1713 Project; and
- 1714 VI. consultation with Aboriginal groups during the post hearing stage.²⁶⁴

1715 NRCan indicates that "throughout the Project review", the Crown relies on an Issues Tracking
1716 Tables, to "ensure that it has an accurate understanding of key Aboriginal interests and
1717 concerns". The first Issues Tracking Table that came to TFN's attention was in connection to an
1718 information request from NRCan-MPMO, filed on June 22, 2015.²⁶⁵

²⁶² Exhibit C249-9-1, NRCan Written Evidence, at para. 31, A4Q0V2, Adobe page 10

²⁶³ Exhibit C249-9-1, NRCan Written Evidence, at para. 32, A4Q0V2, Adobe page 10 [emphasis added]

²⁶⁴ Exhibit C249-9-1, NRCan Written Evidence, at para. 31., A4Q0V2, Adobe page 10

²⁶⁵ Exhibit C249-12-2, NRCan (MPMO) Information Request to Tsawwassen First Nation, filed June 22, 2014, A4Q8Q4. See also: Exhibit C249-13-15, NRCan-MPMO response to TFN Information Round Two Requests No. 16(b), at p. 29, A4R4A7, Adobe page 29

1719 As noted above, attached the NRCan's Written Evidence Submissions was Annex A-K, and
1720 included within it is "Annex E: Crown List Identifying all Aboriginal groups for which the
1721 Crown recognizes a duty to consult", which contains a table listing Aboriginal groups, with a
1722 corresponding column "Preliminary Depth of Consultation Owed".²⁶⁶

1723 With respect to TFN, the Crown determined that the duty of consultation it owed to them was on
1724 the "high" end of the consultation spectrum, as evidenced in Annex E.²⁶⁷

1725 Annex E was prepared sometime before the Crown's letter of August 12, 2013 to Aboriginal
1726 groups, including TFN. It appears that this analysis was done after the Proponent submitted its
1727 projection description on May 23, 2013, as the Crown could not have undertaken its *analysis*
1728 *with respect to preliminary strength of claim and potential for adverse impacts arising from the*
1729 *Project* unless it had the project description from which to undertake that analysis.

1730 Trans Mountain filed their Application with the NEB in December, 2013, again, with no
1731 reference to the Treaty. TFN filed its application to participate with NEB as an intervenor on
1732 January 31, 2014.²⁶⁸

1733 NRCan wasn't the only federal government participate as an intervenor in the Project. Aboriginal
1734 Affairs and Northern Development ("AANDC"), is also an intervenor and in that capacity, filed
1735 written evidence submissions with the NEB on May 26, 2015.²⁶⁹ What information there is
1736 about TFN in AANDC's written evidence is scant at best. There are two references to TFN;
1737 namely, on page 8 below the heading of "Treaties and Aboriginal Government", it is noted that:

1738 Treaties with Tsawwassen First Nation and the Maa-nulth First Nations are being
1739 implemented.²⁷⁰

1740 and

²⁶⁶ Exhibit C249-9-1, NRCan Written Evidence, A4Q0V2, Exhibit C249-9-2, Annex E: Crown List Identifying all Aboriginal groups for which the Crown recognizes a duty to consult" A4Q0V3, Adobe page 117

²⁶⁷ Exhibit C249-9-1, NRCan Written Evidence, A4Q0V2, Exhibit C249-9-2, Annex E, Adobe page 120

²⁶⁸ Exhibit C356-0-1, Tsawwassen First Nation Application to Participate to NEB, A3T5J3, Exhibit C356-12-1, Affidavit of C. Ward

²⁶⁹ Exhibit C2-1-1, AANDC Written Evidence, A4L5G9

²⁷⁰ Exhibit C2-1-1, AANDC Written Evidence. at line 15, A4L5G9, Adobe page 9

1741 Tsawwassen First Nation and Maa-nulth First Nations have marine harvesting treaty
 1742 areas by designated shipping lanes.²⁷¹

1743 At page 18 of AANDC’s written evidence is a table of those First Nation participating in the
 1744 British Columbia Treaty Commission process, and in respect of Tsawwassen First Nation, the
 1745 following is noted²⁷²:

Treaty Negotiation Table	Affiliated First Nations (Indian Act band names)	Asserted Traditional Territory	Stage of B.C. Treaty Process	Status of Negotiations	Statement of Intent Map
...
Tsawwassen First Nation	Tsawwassen First Nation	The Trans Mountain Expansion Project pipeline corridor and designated shipping lanes cross the Tsawwassen’s treaty Territory.	Stage 6: Implementing the Treaty	The Tsawwassen First Nation Final Agreement is completed and in effect as of April 2 (sic), 2009.	Annex P

1746
 1747 Annex P – a map – is titled ‘Trans Mountain Expansion Project Tsawwassen First Nation
 1748 Territory and Lands’, and in area the ‘Data sources and notes’, it is noted that: ‘Tsawwassen
 1749 Territory is defined in Appendix A of the Tsawwassen Final Agreement’, and ‘Trans Mountain
 1750 Expansion Project route transcribed from 1:15,000 maps obtained from Trans Mountain website
 1751 (Aug 2014).’ Annex P was produced by the Community Infrastructure Directorate, AANDC, on
 1752 April 21, 2015.

1753 Well before the Proponent submitted the Application to the NEB in December 2013, the Crown
 1754 was aware of its obligation to inform itself about the Treaty and undertake an analysis of the
 1755 potential for adverse arising from the Project on established Aboriginal and Treaty rights.

²⁷¹ Exhibit C2-1-1, ANNDC Written Evidence, at line 25, A4L5G9, Adobe page 9

²⁷² Exhibit C2-1-1, AANDC Written Evidence, A4L5G9, Adobe page 19

1756 The Crown confirmed in its August 12, 2013 letter that they had prepared a list of Aboriginal
1757 groups whose rights may be adversely impacted by the Project, and undertook, with the NEB,
1758 “coordinated research and analysis on the proximity of Aboriginal groups’ traditional territories
1759 to elements of the Project described by the Proponent, including the proposed pipeline Right of
1760 Way (RoW), marine terminal expansion, and designated shipping lanes.”²⁷³

1761 In contrast, in their February 6, 2015 letter, the Crown appears to have narrowed the scope of
1762 their strength of claim analysis “for all Aboriginal groups close to the proposed pipeline right of
1763 way”, and yet at the same time, broadened the depth of their assessment on impacts on “rights”,
1764 without reference to “Aboriginal and treaty”. It appears then that the Crown, by February 2015
1765 had moved to conducting specific in-depth assessments, previously absent, and excluded in that
1766 assessment, the Treaty and any in-depth analysis of it. [emphasis added]

1767 Regarding the strength of claim and impacts analysis by the Crown, TFN’s knowledge of it,
1768 came by way of the information request process, or written evidence filed, later in the process.

1769 **6.3 Crown’s Information Requests**

1770 In the above section, it is clear that the Proponent filed the Application with a complete absence
1771 of any analysis of potential adverse impacts on TFN’s Treaty rights. It is also clear, that it was
1772 only through the first round of information requests and the subsequent filing of Motion 1 by
1773 TFN, did the Proponent undertake an assessment of the Treaty, and even then, reference was
1774 only made to the Appendices to it.

1775 While it was troubling as an intervenor to be confronted by an acrimonious tone and side-
1776 stepping approach by the Proponent during the information request process, it is more troubling
1777 to see that the Crown, in its’ capacity as an intervenor, share in that tone and approach.

1778 In accordance with Procedural Direction No. 12²⁷⁴, on June 22, 2015, intervenors filed
1779 information requests to other intervenors. TFN filed information requests to various federal
1780 government intervenors²⁷⁵, which fell broadly into the following categories:

²⁷³ Exhibit C249-9-1, NRCan Written Evidence, at para. 31, A4Q0V2, Adobe page 10 [emphasis added]

²⁷⁴ Exhibit A177, Procedural Direction No. 12, A70520

- 1781 i. science-based to Environment Canada and the Department of Fisheries and Oceans;
1782 ii. emergency preparedness to Transport Canada;
1783 iii. the Treaty and rights associated with in relation to the NEB process to AANDC;
1784 iv. consultation within and outside of the NEB process to NRCan; and
1785 v. compliance and monitoring enforcement to the Coast Guard.

1786 Matters dealt with in (i), (ii) and (v) are dealt with below.

1787 With respect to the almost complete absence of any analysis of the contents of the Treaty and
1788 any in AANDC's written evidence, TFN made a series of information in relation to that gap. In
1789 short, TFN was met with generic response typically something to the effect that:

1790 At page 8, line 15 of AANDC's evidence, AANDC acknowledges that the Tsawwassen
1791 First Nation has a treaty that is being implemented. Further, the Tsawwassen Final
1792 Agreement (which acknowledges that it is a treaty and sets out the Tsawwassen rights
1793 protected by s. 35 of the Constitution Act, 1982 including the geographic extent of those
1794 rights such as those rights that may be impacted by the designated shipping lanes) is a
1795 public document and has legal force and effect through Federal and Provincial
1796 legislation. The National Energy Board (NEB) takes judicial notice of public documents
1797 and federal law and their content. AANDC did not think it necessary to comment on the
1798 provisions of the Tsawwassen Final Agreement within the context of its evidence before
1799 the NEB Panel but AANDC did draw the NEB's attention to the Tsawwassen Final
1800 Agreement.²⁷⁶

1801 As stated above, in Tsawwassen's view, one or two lines in reference to the Treaty demonstrates
1802 a clear lack of analysis by the Crown into the potential adverse impacts of the Project on their
1803 Treaty rights.

²⁷⁵ Exhibit C356-10-2, TFN Information Request to Government Participants, A4Q8S6

²⁷⁶ See responses 12(a), 13(a) and 14(a) in Exhibit C249-13-15, Government of Canada Responses to Tsawwassen First Nation Requests to Environment Canada, the Department of Fisheries and Oceans Canada, Transport Canada, Natural Resources Canada, Aboriginal Affairs and Northern Development Canada and the Canadian Coast Guard, A4R4A8

1804 **7. COMMENTS ON DRAFT CONDITIONS**

1805 Intervenor were invited to make comment on the Draft Conditions released by the NEB on
1806 August 12, 2015,²⁷⁷ with additional Draft Conditions released by the NEB on December 11,
1807 2015.²⁷⁸

1808 In general, the conditions provide that NEB approval of the submissions is required, and in
1809 others, it only requires that Trans Mountain to file its materials with NEB. In all cases, TFN
1810 submits that it needs to be explicitly stated that the NEB must review and approve the materials
1811 submitted in response to each condition, and that the review and approval process for key and
1812 applicable conditions will involve consultation with potentially affected Aboriginal groups,
1813 including TFN. Short of NEB approval, there is no means of adjudicating the sufficiency of a
1814 given submission, and hence, reaching a determination as to the adequacy of the response and a
1815 determination as to whether or not the intentions of the condition have been satisfied.

1816 TFN's specific comments to the Draft Conditions are found in Appendix "A" to this argument in
1817 chief. In Appendix "A", and on page 12 of this Written Argument is the following:

1818 Disclaimer on provision of comments on Draft Conditions: As outlined in the evidence,
1819 many intervenors remain deeply concerned about the adequacy and integrity of scientific
1820 information provided by the Proponent regarding safety issues, including from a spill,
1821 accident or malfunction in connection with the Project. TFN remains of the view that the
1822 draft conditions, even if modified based on comments from intervenors, will still be
1823 inadequate as against the significant adverse effects the proposed Project is likely to have
1824 on the interests and legal rights of TFN and its Members, which effects are not justifiable
1825 in all the circumstances.

1826 **8. THE JRP SHOULD RECOMMEND AGAINST APPROVAL**

1827 TFN submits that the JRP should recommend against approval of the Project because it cannot
1828 be determined, given the information provided in this process, that the proposed Project is not
1829 likely to cause significant adverse effects, or that any significant adverse effects can be justified
1830 in the circumstances. Approving the Project is not in the public interest.

²⁷⁷ Exhibit A199-1, A199-3, Procedural Direction No. 17, A4S1G0, A4S1G2

²⁷⁸ Exhibit A237-1, Letter from NEB to Intervenors, December 11, 2015, A4W4K3; Exhibit A237-3, Appendix A, A4W4K5

1831 **8.1 The Socio-Economic Argument and Public Interest**

1832 In these proceedings, “public interest” means, the interest being “inclusive of all Canadians and
1833 refers to a balance of economic, environmental, and social interests that changes as society's
1834 values and preferences evolve over time.” In reaching that determination, the NEB “estimates
1835 the overall public good a project may create and its potential negative aspects, weighs its various
1836 impacts, and makes a decision” based on those factors.²⁷⁹

1837 Intervenor Living Oceans Society completed a report, *Public Interest Evaluation of the Trans*
1838 *Mountain Expansion Project*, dated December, 2015,²⁸⁰ which is in part, a benefit cost analysis.
1839 Living Oceans Society, in conducting its analysis, did so according to Federal Treasury Board
1840 guidelines and identified a number of costs that the Proponent did not.²⁸¹ Benefit cost analysis
1841 requires that all costs are accounted for and all benefits attributable to the project, then if the
1842 costs outweigh the benefits, it cannot be said that the project is in the public interest. TFN
1843 supports and adopts the evidence of Living Oceans contained in the *Public Interest Evaluation of*
1844 *the Trans Mountain Expansion Project* report.

1845 Living Oceans Society argues that the Proponent inflated the benefits.²⁸² Beyond that however,
1846 the authors conclude that the Proponent omitted consideration of many of the potential
1847 economic, environmental and social impacts in its analysis, despite being required to do so by
1848 the NEB.²⁸³ One of the more significant costs not taken into account is the failure to account for
1849 the cost of infringing on Aboriginal Rights. The authors acknowledge that you can't value that
1850 cost easily, but that you need to acknowledge it and failure to do so impairs your ability to assess
1851 whether the project is in the public interest. The authors point to decision of the Lax Kw'alaams

²⁷⁹ *Pipeline Regulation in Canada: A Guide for Landowners and the Public*, Ch. 1, Introduction to the NEB (modified September 9, 2015)

²⁸⁰ Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4

²⁸¹ See for instance, section 4.0 and 6.0, Exhibit C214-30-2, A4W0R4.

²⁸² Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 79

²⁸³ Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 87

1852 to reject an offer of \$1.1 billion to approve LNG plant as evidence of the potential magnitude of
1853 the value.²⁸⁴

1854 The Proponent has not provided credible evidence of the economic benefit of the project because
1855 of a failure to undertake an analysis of benefits under the current oil price scenario, instead
1856 arguing that it would be too onerous to do so. It is critical to have an accurate understanding of
1857 the economic benefits of the project, as those benefits being used as justification for the Project's
1858 approval. It should not be considered "too onerous" to do the work necessary to accurately
1859 calculate the benefits of the project. Living Oceans Society have assessed the economic benefits
1860 of the project under current prices and informed by current price forecasts, both of which have
1861 changed since the Proponent's initial submission.²⁸⁵

1862 Further, the Proponent has not undertaken a benefit cost analysis of the Project, and as such, they
1863 have omitted a number of costs attributable to the project, including the cost of adverse impacts
1864 to Aboriginal rights.²⁸⁶ Should a spill occur, it is clear from the TFN's evidence that there will
1865 be impacts on TFN's ability to exercise our Treaty rights; this will impose a significant cost on
1866 TFN and its Members, not to mention to the federal government and Proponent who will have
1867 responsibility to clean and remediate the spill. It is critical that all costs be identified and to the
1868 extent possible valued in the course of this assessment.

1869 The Proponent has not undertaken a comprehensive benefit cost analysis and has not assessed the
1870 impacts of the project in a manner consistent with Treasury Board Guidelines for reviewing the
1871 impacts of projects.²⁸⁷ The Proponent has also failed to accurately value both the benefits and
1872 the costs of the project, which impairs the NEB's ability to accurately determine whether the
1873 project is indeed in the public interest. In the absence of complete and accurate information
1874 regarding benefits and costs from the proponent and we argue that the JRP should rely on the
1875 work of the Living Ocean's Society, who have prepared a comprehensive benefit cost analysis

²⁸⁴ Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 86.

²⁸⁵ See for instance, section 5, Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 86.

²⁸⁶ See for instance, ss.6.9.1. and Appendix "A" of Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 86.

²⁸⁷ See for instance, ss. 4.6 and 6.1, Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 86.

1876 according to federal government guidelines showing a net cost to Canada ranging between \$4.1
1877 billion and \$22.1 billion.²⁸⁸

1878 In terms of the Aboriginal consultation, in the case of TFN, we have shown above that the
1879 Proponent failed to accurately reflect our discussions, which is clear evidence of the inadequacy
1880 of their consultation. In its written argument, Tran Mountains states that it is confident that it has
1881 put forward the best available evidence on the record to address concerns received from
1882 Aboriginal groups and stakeholders to support the Board in making a favourable public interest
1883 recommendation.²⁸⁹ It further states:

1884 Trans Mountain has made every reasonable effort to ensure that all Aboriginal groups,
1885 including communities, associations and councils, who express an interest in Project
1886 engagement have been provided an opportunity to engage in a meaningful dialogue in the
1887 **manner they choose, and in a way that meets their objectives and values.** Trans
1888 Mountain submits that the process and outcomes of Trans Mountain’s Aboriginal
1889 engagement efforts support a recommendation that the Project is in the public interest.²⁹⁰
1890 [emphasis added]

1891 For this statement, the Proponent relies on Vol. 3B Aboriginal Engagement of the Application
1892 submitted to the NEB in December 2013. As noted throughout this Written Argument, there was
1893 virtually no information pertaining to the TFN or the Treaty in Vol. 3B, or in any other volume
1894 filed with the NEB.

1895 Contrary to the Proponent’s claim that their engagement process outcomes with Aboriginal
1896 communities, including with TFN, was conducted in a robust manner so as lead to a
1897 “recommendation that the Project is in the public interest” is false and should not be accepted.
1898 The complete lack of inclusion of any aspect of the TFNFA in the Application, or in any of the
1899 Proponent’s filed materials – until July 21, 2015, and then only a desktop literature review in

²⁸⁸ Exhibit C214-30-2, Replacement for Attachment to Written Evidence of Living Oceans – Public Interest Evaluation, December, 2015, A4W0R4, at Adobe page 19.

²⁸⁹ Exhibit B444-2, Trans Mountain Revised Final Argument, line 501, A4W6L8, Adobe page 34

²⁹⁰ Exhibit B444-2, Trans Mountain Revised Final Argument, line 1446, A4W6L8, Adobe page 82

1900 respect of the Appendices to the TFNFA²⁹¹ – after TFN’s first round of information requests –
1901 reaches nowhere near the level of adequate consultation that is owed to TFN.

1902 In terms of the adequacy of the process, we have set above the structural problems inherent with
1903 the requirements of Chapter 15 of the Treaty regarding Canada’s obligations, that TFN submits
1904 have not been fulfilled, and the process here. There are two disjointed processes running parallel
1905 in the case of TFN, the result is that TFN, as an Aboriginal people, lose again.

1906 On the whole, TFN submits that the insufficient information, including scientific information,
1907 regarding potential adverse effects, protracted timelines, the chronic underfunding, coincident
1908 with the adversarial, interest-based nature of the process has severely limited the effectiveness
1909 and reliability of the process and the Project.

1910 **8.2 Closing Comments and Recommendation**

1911 Regarding TFN Treaty rights, the approach of Trans Mountain throughout this process in
1912 refusing to properly take into account the TFNFA, but as importantly, to identify impacts to the
1913 rights of TFN set out in it, is clearly unacceptable. Even more worrisome is the lack of oversight
1914 by the Crown in ensuring that the Proponent developed a proper and rigorous process that permit
1915 the concerns and issues raised by TFN to be adequately addressed. The Crown owes a high duty
1916 of consultation to TFN, primarily on the basis that the rights of TFN and people are potentially at
1917 stake. Section 35 of the *Constitution Act, 1982*, underpins every facet of the Treaty. The common
1918 law also demands that the Crown, in the context of a modern treaty, is not to interpret it in an
1919 ungenerous manner. For in the end, treaties are the modern instruments, not to be treated as an
1920 everyday contract. They are new departures from historical treaties but they too are also one step
1921 in the long journey of reconciliation in this country. As such, TFN expected that the Crown
1922 would discharge its legal obligation to honourably adequately consult them, however to date, it
1923 has not met that obligation.

1924 For all the reasons above, TFN urges the JRP to recommend that the Project is not in the public
1925 interest and should not be approved.

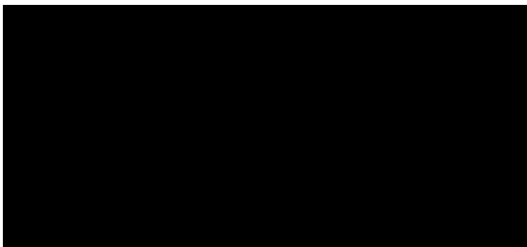
²⁹¹ Exhibit B241-2, Supplemental Technical Report, A3Z4Z1, Adobe page 10

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12TH DAY OF JANUARY, 2016



Tina L. Dion
Representative for Tsawwassen First Nation
Barrister & Solicitor

SIGNED
FOR



LIST OF AUTHORITIES

Cases

1. *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at paras 10, 12, 38, 42, 45, 52, 55, 56
2. *Calder v. The Attorney General of British Columbia*, [1973] SCR 313, at page 318
3. *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, [2000] BCJ No 1524, at paras 180-181
4. *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, aff'd 2008 FCA 20, at para 82
5. *Guerin v. R.*, [1984] 2 SCR 335, 13 DLR (4th) 21, at page 382
6. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, at paras 20, 26, 27, 35, 39, 42-45, 73, 76
7. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623. at paras 69-70, 75, 77-79
8. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at paras 3, 34, 49, 53, 54, 55, 57, 63-64, 66, 67
9. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] SCJ No. 108, at paras 160, 168
10. *R. v. Badger* [1996] 1 SCR 771, [1996] SCJ No 39, at paras 41, 78
11. *R. v. Pamejawn* [1996] 2 SCR 821, 138 DLR (4th) 204, at para 27
12. *R. v. Sparrow* [1990], 1 SCR. 1075, 70 DLR (4th) 385, at paras 1106, 1109
13. *R. v. Van Der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289, at para 30, 45, 49
14. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, at paras 36, 39, 40, 44
15. *Slaight Communications Inc v. Davidson*, [1989] 2 SCR 1038, [1989] SCJ No 45, at para 87
16. *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App Cas 36, [1888] JCI No 1 (PC), at pages 661, 664
17. *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 SCR 657, at para 9
18. *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras 144-151
19. *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (CanLII), 2008 BCSC 1139 at para 178

Statutes

1. *Canadian Environmental Assessment Act*, S.C., 2012, c. 19, ("CEAA") s. 4, 19, 29(1), 31(1)(a), 52
2. *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 52(1), (2)
3. *Species at Risk Act*, S.C., 2002, c. 29.
4. *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39 and S.C. 2008, c. 32