

**NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE**



**Hearing Order RH-001-2012
Ordonnance d'audience RH-001-2012**

Trans Mountain Pipeline ULC Part IV Application

**Demande présentée par Trans Mountain Pipeline ULC aux termes
de la partie IV de la *Loi sur l'Office national de l'énergie***

VOLUME 3

**Hearing held at
L'audience tenue à**

**National Energy Board
444 - Seventh Avenue S.W.
Calgary, Alberta**

**February 14, 2013
Le 14 février 2013**

**International Reporting Inc.
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Imprimé au Canada

HEARING ORDER/ORDONNANCE D'AUDIENCE

RH-001-2012

IN THE MATTER OF Trans Mountain Pipeline ULC (Trans Mountain)
Application Pursuant to Part IV of the *National Energy Board Act* for
Approval of the Toll Methodology to be applied on an Expanded Trans Mountain
Pipeline System, if such an expansion is approved (Part IV Application)

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Calgary (Alberta), Thursday, February 14, 2013

Audience tenue à Calgary (Alberta), jeudi, le 14 février 2013

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

R. George Chairman/Président

D. Hamilton Member/Membre

A. Scott Member/Membre

APPEARANCES/COMPARUTIONS

APPLICANT/DEMANDEUR

Trans Mountain Pipeline ULC
- Mr. Gordon M. Nettleton
- Ms. Terri-Lee Oleniuk
- Mr. Jeremy Barretto

INTERVENORS/INTERVENANTS

Associations

Canadian Association of Petroleum Producers (CAPP)
- Mr. Nick Schultz

Companies / Compagnies

BP Canada Energy Trading Company
- Ms. L. Bernette Ho

Canadian Natural Resources Limited
- Mr. Don G. Davies

Canadian Oils Sands Partnership #1
- Ms. L. Bernette Ho

Cenovus Energy Inc.
- Mr. Don G. Davies

Chevron Canada Limited
- Mr. Keith Bergner

Devon Canada Corporation
- Mr. Don G. Davies

Husky Energy Marketing Inc.
- Mr. Don G. Davies

Imperial Oil Limited
- Mr. Don G. Davies

Nexen Marketing
- Ms. L. Bernette Ho

Statoil Canada Ltd.
- Ms. L. Bernette Ho

APPEARANCES/COMPARUTIONS
(Continued/Suite)

(ii)

INTERVENORS/INTERVENANTS

Companies / Compagnies

Suncor Energy Marketing Inc. / Suncor Energy Products Partnership (SEMI / SEPP)

- Mr. Bernard J. Roth
- Mr. Barry Zalmanowitz

Total E&P Canada Ltd.

- Mr. Scott Miller
- Ms. Deidre Derworiz
- Mr. Brian Wood

Governments / Gouvernements

Alberta Department of Energy

- Mr. Colin King

National Energy Board/Office national de l'énergie

- Ms. Christine Beauchemin
- Mr. Kiril Dumanovski

ERRATA

(i)

Wednesday, February 13, 2013 - Volume 2

Paragraph No.:

Should read:

1617:

“...493, that’s 41 cents on top of 493.”

“...\$4.93; that’s 41 cents on top of \$4.93.”

1619:

“**MR. RINNE:** Four-ninety-three (493) plus 34 and 548 plus 34.”

“**MR. RINNE:** Four-ninety-three (\$4.93) plus 34 and \$5.48 plus 34.”

1621:

“**MR. RINNE:** Five-twenty-seven (527) and 572 -- 582.”

“**MR. RINNE:** Five-twenty-seven (\$5.27) and \$5.72 -- \$5.82.”

1622:

“**MR. ROTH:** Five-eighty-two (582).”

“**MR. ROTH:** Five-eighty-two (\$5.82).”

1647:

“...you were at your 1.4 billion...”

“...you were at your \$1.4 billion...”

1660:

“...of a 4 to \$500 million...”

“...of a \$400 to \$500 million...”

1665:

“...in the range of 5 to \$6 on Gateway and a toll in the range of 5 to \$6 on TMPL.”

“...in the range of \$5 to \$6 on Gateway and a toll in the range of \$5 to \$6 on TMPL.”

1689:

“That’s why I was saying 5 or \$6. The order of magnitude on a difference on a 5 and \$6 toll on...”

“That’s why I was saying \$5 or \$6. The order of magnitude on a difference on a \$5 and \$6 toll on...”

1700:

“...is a chat task...”

“...is a hard task...”

1705:

“...of 18 hundred 50 million dollars.”

“...of \$850 million dollars.”

1751:

“...was considering reversing...”

“...was considering converting...”

ERRATA

(ii)

Wednesday, February 13, 2013 - Volume 2

Paragraph No.:

Should read:

1855:

“...that a geo mean is...”

“...that a Geometric mean...”

2039:

“...on 528 million of...”

“...on \$528 million of...”

2101:

“...they are approximately 1.3...”

“...they are approximately \$1.3...”

2112:

“...99.1 million...”

“...\$99.1 million...”

2165:

“**MR. ROTH:** Yeah. That’s the revised CAPP 1.3. It’s 99 -- or 90-some million out of 320 million of operating costs for power.”

“**MR. ROTH:** Yeah. That’s the revised CAPP 1.3. It’s \$99 -- or \$90-some million out of \$320 million of operating costs for power.”

2170:

“The power costs are 91,058,000 out of total operating expenses of 320,402,000.”

“The power costs are \$91,058,000 out of total operating expenses of \$320,402,000.”

2510:

“**VOICE:** ...”

“**MR. REED:** ...”

2517:

“**UNIDENTIFIED SPEAKER:** ...”

“**MR. REED:** ...”

2526:

“And the reference there is this is the...”

“And the reference is this is the...”

2529:

“... ‘the Board’s guidelines’...”

“... ‘the Board’s Guidelines’...”

2706:

“...one of the indicia...”

“...one of the indications...”

ERRATA

(iii)

Wednesday, February 13, 2013 - Volume 2

Paragraph No.:

Should read:

2739:

“They’re tailored individually to what that shipper...”

“They’re tailored individually to that shipper...”

2870:

“...the barrels greater than 75 price changed.”

“...the barrels greater than 75,000 price changed.”

2897:

“And the -- primarily...”

“And primarily...”

3141:

“...that is 7 cents per 100 million...”

“...that is 7 cents per \$100 million...”

3142:

“...the 7 cents per 100 million...”

“...the 7 cents per \$100 million...”

3146:

“...by 7 cents per 100 million.”

“...by 7 cents per \$100 million.”

TABLE OF CONTENTS/TABLE DES MATIÈRES

(i)

Description	Paragraph No./No. de paragraphe
Opening remarks by the Chairman	3185
Preliminary matters brought forward by Mr. Nettleton	3187
 <u>Trans Mountain Pipeline ULC Panel</u>	
Mr. Ian Anderson	
Mr. Scott Stoness	
Mr. Norman Rinne	
Mr. Gregory Hill	
Mr. Kevin MacFarlane	
Mr. John Reed	
Mr. Steven Kelly	
Dr. George Schink	
- Examination by Mr. Miller (continued)	3215
- Examination by Mr. Zalmanowitz	3605
- Examination by Mr. Dumanovski	4518
- Examination by the Chairman	4575
- Re-examination by Mr. Nettleton	4588
 <u>Total E&P Canada Ltd. Panel</u>	
Mr. Gary Houston	
Mr. Matthew McIntyre	
- Examination by Mr. Miller	4617
- Examination by Mr. Nettleton	4643

LIST OF EXHIBITS/LISTE DES PIÈCES

(i)

No.	Description	Paragraph No./No. de paragraphe
C16-8	Opening statement of Total E&P Canada Ltd.	3211
C15-14	Opening statement of Suncor Energy Marketing Inc. / Suncor Energy Products Partnership	3211
C16-9	Total E&P Canada Ltd. - Aid to cross-examination “Effective 7 cent per 100 million increase”	3602

UNDERTAKINGS/ENGAGEMENTS

No.	Description	Paragraph No./No. de paragraphe
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--- Upon commencing at 8:37 a.m./L'audience débute à 8h37

3185. **THE CHAIRMAN:** Looks like our technical difficulties have been resolved.

3186. **MR. NETTLETON:** Thank you, Mr. Chairman.

--- (Technical audio difficulties)

3187. **MR. NETTLETON:** The second matter concerns the timing and I believe there's unanimous agreement to this proposal that -- that Mr. Miller would continue with this cross-examination and finish doing so with -- with the Trans Mountain panel.

3188. Mr. Zalmanowitz would then continue and complete the Suncor cross-examination. There would be opportunity then obviously for the Board and Board staff to entertain any questions.

3189. Then the next step would be for the Total panel to appear and be cross-examined. I believe I'm the only party, other than the Board or Board staff, that that would unfold for the balance hopefully today and perhaps over to tomorrow, that Suncor's wishes are to have Dr. Waverman cross-examined following that.

3190. So we would see the Suncor panel next up. I would complete my cross-examination of Dr. Waverman and the balance of my cross-examination then would be for the remainder witnesses on the Suncor panel which would happen on the Tuesday of the following week -- of next week.

3191. And I believe, again, subject to any misunderstandings that I've made, again, that's what all counsel are amenable to. So I would like to propose that if possible, Mr. Chairman.

3192. **THE CHAIRMAN:** And if we finish early on Friday and still have time to continue cross with -- of the Suncor panel, does that agreement cover that?

3193. **MR. NETTLETON:** Well, no. That's the point, Mr. Chairman, that -- we have been sitting long days, the reality has been that these witnesses have been focused on the preparation of their -- of their testimony and not preparation of cross-examination and that once we finish with Dr. Waverman, we would stop, and whatever time that would be, whether it be tomorrow or -- and hopefully

Preliminary matters
Mr. Nettleton

tomorrow or early on Friday that the -- that we would pause there and then reconvene on Tuesday and that the cross-examination of the Suncor panel would continue at that time.

3194. **THE CHAIRMAN:** And counsel, this is unanimous with all counsel?

3195. **MR. NETTLETON:** That's my understanding and I would ask -- speak now or forever hold your peace.

--- (Laughter/Rires)

3196. **MR. ROTH:** Sir, I think everything has been accurately represented. The only thing -- the logical conclusion is Dr. Waverman would be released tomorrow, on Friday, after Mr. Nettleton was done.

3197. And what Mr. Nettleton hadn't indicated is the possibility that Board staff or the Board would also want to question. So what his proposal would entail is that Board counsel and the Board would have to have any questioning prepared for Dr. Waverman by tomorrow to make this all work.

3198. **MR. NETTLETON:** My good friend has filled in the blanks. Yes, that's right.

3199. **THE CHAIRMAN:** Okay. Just give us a moment please.

--- (A short pause/Courte pause)

3200. **THE CHAIRMAN:** We always appreciate it when counsel come together and get something that works for everybody. So we are inclined to accept the proposed schedule, of course, with the proviso that we do have a hard deadline next week. So it's basically going to be next week whatever it takes to do that.

3201. **MR. NETTLETON:** Thank you, Mr. Chairman. And yes, we're keenly aware of the deadline.

3202. I think -- I'm very grateful. It's been sitting long days this week and, quite frankly, the difficulty of ensuring that the line is very clear between preparing for cross and not disturbing testimony which has been my biggest concern here and why I'm seeking your indulgence. So I very much appreciate

- that. Thank you.
3203. **THE CHAIRMAN:** Thank you. And on your other motion, we do agree that we can excuse Dr. Lessard.
3204. **MR. NETTLETON:** Thank you, Mr. Chairman.
3205. **THE CHAIRMAN:** Thank you, Dr. Lessard.
3206. **DR. LESSARD:** Thank you, Mr. Chairman. Thank you.
3207. **THE CHAIRMAN:** Thank you, Dr. Lessard.
3208. Before we start with Mr. Miller, I was going to talk about the schedule for the week, but I think that's already been taken care of. Also, we have received the Opening statements from Total and Suncor. We have read them. There is no need to read them into the record. They will be entered on the record.
3209. Mr. Miller?
3210. Could we have exhibit numbers for those, Ms. Wong? I did notice you glancing at me. Thank you.
3211. **THE REGULATORY OFFICER:** The Opening statement for Total will be Exhibit C16-8 and the Opening statement for Suncor will be C15-14.
- EXHIBIT NO./PIECE No. C16-8:**
- Opening statement of Total E&P Canada Ltd.*
- EXHIBIT NO./PIECE No. C15-14:**
- Opening Statement of Suncor Energy Marketing Inc. / Suncor Energy Products Partnership*
3212. **THE CHAIRMAN:** Could you just repeat Suncor's? It was a bit too fast for me to take down.
3213. **THE REGULATORY OFFICER:** C15-14.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3214. **THE CHAIRMAN:** Thank you, Ms. Wong.

IAN ANDERSON: Resumed
SCOTT STONESS: Resumed
NORMAN RINNE: Resumed
GREGORY HILL: Resumed
KEVIN MacFARLANE: Resumed
JOHN REED: Resumed
GEORGE SCHINK: Resumed
STEVEN KELLY: Resumed

--- EXAMINATION BY/INTERROGATOIRE PAR MR. MILLER:
(Continued/Suite)

3215. **MR. MILLER:** Good morning, Mr. Chairman. Good morning,
Panel. Good morning, gentlemen.

3216. I'd like to start off to clarify something on the record yesterday. Mr.
Reed, at transcript reference 2892 yesterday, you were speaking about the
negotiations. And you spoke about at 20 -- at transcript reference 2894, you said:

*"There were 10 rounds of negotiations and changes between
the parties that began with the submission of the draft
documents on October 20th, 2011."*

3217. Do you recall that, sir?

3218. **MR. REED:** If you'll give me just a moment.

3219. **MR. MILLER:** Certainly.

3220. **MR. REED:** Yes, I see that.

3221. **MR. MILLER:** Thank you, sir.

3222. Now, a round of negotiations sounds quite formal to me. Were these
formal negotiations?

3223. **MR. REED:** I suppose that depends on one's definition of "formal".

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- Each one -- and the reason I described them as rounds, each one of them was marked by the circulation of a new set of documents to the participants with changes marked to the terms reflecting the discussions that had been had to that point. So they were rounds because they were marked by the issuance of successive sets of documents.
3224. **MR. MILLER:** So you distributed black-line versions of the documents. Is that correct?
3225. **MR. REED:** That's my understanding, yes.
3226. **MR. MILLER:** All right. Did you set out a schedule for these meetings? And you listed the dates as December 6th, December 22nd, February 3rd, February 10th, February 13th, March 27th, a second set on March 27th, April 16th, May 16th and January 10th.
3227. Now, for these -- each of these dates, did you set out a schedule for what you wanted to accomplish?
3228. **MR. REED:** I think that question should probably go to the company.
3229. **MR. RINNE:** I'll handle that question.
3230. That is -- there's no schedule for them. As feedback is occurring through the discussions of individual companies, we collect the feedback, we synthesize it as quickly as we can, we figure out what the impacts will be on the documents and we distribute and give notice to everybody when that happens.
3231. So sometimes -- I think one of them is a relatively small change. It's a typographical change, I believe, but nonetheless, it's one that needed to be corrected near the end of the -- one of the rounds.
3232. So there's no pre-defined schedule because the process is working towards the conclusion date and the meetings are ongoing with all the individual companies. So we do it as quickly and as comprehensively as we can.
3233. **MR. MILLER:** Well, sir, I'm trying to get a feel for what was involved. And did you -- in anticipation of these distribution of different documents, did you invite them to discuss with you the issues that they had? Did you send out a notice and say, "Let's talk about these issues"?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3234. **MR. RINNE:** Sir, the companies can approach us at any time about any of the issues, either ones that had been changed or ones that had not been changed, whether it was their request or somebody else's request.
3235. And the way that process evolves, and I believe it's typical in all these processes, is the companies that are genuinely interested in the project and have been negotiating and working through the processes, they look at the documents and they see what's been changed.
3236. Maybe the changes didn't reflect what they expected. They would then come back and talk to us about that or maybe they were fine with it and accepted it. And they then track those changes amongst themselves.
3237. So some companies -- there are some companies who are on that distribution list that had executed confidentiality agreements and were parties to the open season that we never heard or talked with. They got all the notices and they could access the documents. What they did with them was really up to them. And many of the parties were actively engaged.
3238. Every party had an opportunity to engage with us and go through those documents -- black lines, clean lines -- and have their concerns and issues addressed to the extent that we could.
3239. **MR. MILLER:** Okay, sir. So just so I'm clear, there was no formal process. You circulated documents and you collected the comments. Is that essentially it?
3240. **MR. RINNE:** Sir, the process was the open season process. That was the formal process. All of the parties knew the process of negotiations, of requesting changes, that we would assemble them as quickly as we could and they were sort of milestone driven while we were working through those changes.
3241. And every company, to be clear, the documents weren't distributed to them. The documents were -- there was an email sent to me giving them the -- an update that there were new documents posted on the website of which they had the user name and password to access.
3242. Again, whether they chose to access them, whether they chose to read them or not was really their responsibility to get back to us on whether they were

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- comfortable or wanted to have more discussions about any of the issues that were or were not changed. That was the process, sir.
3243. **MR. MILLER:** Okay. So essentially, on those 10 dates that are listed that Mr. Reed gave, you posted new black lines of the documents. That was the process.
3244. **MR. REED:** We would post black lines of the documents that had changed. If the document had not changed -- it was clear on the listing which documents changed. Some of them may not have changed in any one of those updates. But if they -- if there were changes made, the changes were all black-lined to the previous version.
3245. **MR. MILLER:** Okay. And it was limited to changes to the documents. Did you have any face-to-face meetings on those dates?
3246. **MR. RINNE:** Those dates are merely the dates that we sent the email out telling the shippers about when -- that the new documents were available. Prior to that period were the face-to-face meetings with the shippers, individual shippers. As you can imagine, there's a lot of shippers and there's a lot of changes, and so we managed that process.
3247. We would then -- the process would be we would put that notice out. Shippers would continue to have the feedback loop with us and then there would be another set of changes, as we worked towards the open season deadline.
3248. And I can add that in the middle of the first round of the open season, as we were working towards the pre-defined deadline, we were getting feedback from some shippers that they were very interested, the negotiations were going well but for timing considerations to get it through more changes and approvals in those kinds of things, that more time was needed. And we made that decision to extend the open season.
3249. So there's a feedback loop, sir, from companies that are sort of engaged and involved in the process. But I will say that there were companies that were not, and for all I know, never even went to the secure open website after they got the first draft of the versions or maybe they did.
3250. I can say that there's a broad spectrum of that -- of the feedback loop from the companies, from companies that participated and ultimately executed

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- agreements. Some were much more involved than others, did execute but were involved to a much lesser degree.
3251. **MR. MILLER:** So this culminated in posting 10 changed documents on the dates listed on the website. Did you also provide the background relating to those changes? Did you explain why those changes had been made?
3252. **MR. RINNE:** Well, sir, to do such a thing would be a pretty cumbersome and onerous process because changes were being made continuously for different reasons. It's very clear when a change is made and a company leaves a black line change, they can look at that and say -- and understand the effect of what that change has to the document. And if they have any questions or concerns or comments, that you come and talk to me.
3253. We're always available to have those conversations. We always were setting up meetings during that process, having exactly that feedback loop.
3254. **MR. MILLER:** Sir, you get a changed document, a black-lined document, would you not agree with me that to understand the context, the reason behind the change, it's important to determine whether or not it's acceptable or reasonable in the circumstances?
3255. **MR. RINNE:** I agree with that and that's why we're open for them to come and talk to us about what the context may or may not have been around the change and there's no instances where we didn't have any conversation about any of the changes that were made to the document, sir, not to the best of my recollection.
3256. **MR. MILLER:** But, sir, did you -- did you make any effort to explain -- remember, this is in the context of the shippers not being able to talk to any other shipper, that they can only talk to you.
3257. So having gone through the process and being the sole connecting point between the interests that have been raised, did you provide any context with respect to how these changes came about or did they simply get the document posted on the web page saying here's the changes that we've agreed to?
3258. **MR. RINNE:** I think I've answered the question several times, sir. I explained the process and the way it works.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3259. **MR. MILLER:** Well, when you post a black line on the website like that, yes, you can see the changes, but what you don't see is the changes that may have been requested that were not made. Those aren't there. They're absent. Isn't that correct?
3260. **MR. RINNE:** By the very definition, if something is not there, it's absent.
3261. And if, for example, a change had been requested by a company and it wasn't there in that issuance of that notice, in that version, I believe some of the companies who had made that request came back and talked to us. And I can't -- I can't go through all of the changes, but it wouldn't surprise me if a request had been made in one round that wasn't incorporated could have very well been incorporated in another round as a result of other gives and takes that were going on in the document, sir.
3262. **MR. MILLER:** But surely, sir, there were changes that you didn't agree to and didn't accept and there was no opportunity for any other party to understand that those had been even raised, yet alone understand the reasons why they may have been rejected.
3263. **MR. RINNE:** Well, if it was a change that they were interested in they would know, if it was a change they had made. If it was some company had requested a change for whatever the item was, it may or may not have been even a particular relevance to the other company and so they wouldn't know it.
3264. **MR. MILLER:** Well, you don't accept that a question asked and not answered might be of interest to the other parties who are negotiating this agreement as well?
3265. **MR. RINNE:** Sir, these companies are pretty experienced at this process and have as much or more experience than I do going through these documents and this kind of a process. And if they're interested in having changes made to those documents, my experience has been there's detailed and meaningful discussions around them.
3266. **MR. MILLER:** Well sir, I think maybe that's the problem. You say that they're very experienced in this process, but for the Firm 50 process, this is the only other time that this has been adopted; isn't that fair?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3267. **MR. RINNE:** Well, sir, it's certainly our experience that the process is very typical -- very similar to this -- happen with other pipeline providers. Also, essentially the same process occurred with the TMX 2 process some years earlier. And I don't think we had a secure website at the time. That technology sort of moved forward, but we distributed them by PDF documents. But -- so certainly, we and others have done the same process in the past.
3268. **MR. REED:** And I can confirm, based on our review that that practice, the definitions in the confidentiality agreement and the restrictions they provided in terms of talking among the open season participants is not at all uncommon in the industry.
3269. **MR. MILLER:** But it is not common with respect to Trans Mountain's previous guided -- negotiated settlements, as guided by the Board guidelines, is it? We went through that list yesterday.
3270. **MR. REED:** I think Trans Mountain just said, with regard to its last three open seasons, it's three for three with this type of language.
3271. And the open seasons I looked at, again, the language in the confidentiality agreements used by other pipelines is not materially different in many, many cases. I do accept that the discussions for toll settlements are different than what's typically done in open seasons, and I think they are different for very good reasons.
3272. **DR. SCHINK:** But I think -- excuse me, there's another point to be lost here. I mean these large integrated oil companies are engaged in bilateral negotiations in all their businesses -- in many of their business dealings. So the idea they're not used to this type of negotiation is just incorrect because they're engaged in these types of bilateral negotiations in all -- in many, many aspects of their business.
3273. **MR. MILLER:** Well, sir, are you suggesting that in other areas of their business, their negotiations are always filtered through one party and they don't have the benefit of understanding what other participants in the negotiation have to say? Is that what you're suggesting, sir?
3274. **DR. SCHINK:** It's not uncommon to have confidentiality agreements of this type because everybody involved in these kinds of negotiations is concerned about having information about their business shared with their

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- competitors.
3275. The shippers in this case don't want information about their businesses to the extent they share it with Trans Mountain or anybody in a bilateral negotiation given over to their competitors. Conversely, from Trans Mountain's side, they know the shippers are negotiating with the other providers, TransCanada and Enbridge, and they don't want information they may have shared with these shippers given over to their competitors either.
3276. So this is a very common practice to have a confidentiality agreement like this in many business-negotiating circumstances.
3277. **MR. MILLER:** So Mr. Schink, it's okay that the company determines what changes will be demonstrated and put into a black line and placed on a notice board, but it's not okay to have discussion about what questions were raised and answered and never were made as changes to the document. Is that what you're saying?
3278. **DR. SCHINK:** I think what I'm saying and I think what other people have said is these shippers are sophisticated, knowledgeable large entities that are perfectly capable to fend for themselves and don't need to lean on each other to negotiate a fair deal.
3279. **MR. MILLER:** Mr. Rinne, was all of the information focused through Trans Mountain?
3280. **MR. RINNE:** I'm sorry. Like the distribution of the --
3281. **MR. MILLER:** All of the information in the negotiations that was reflected in the black line changes, did all of that come through Trans Mountain?
3282. **MR. RINNE:** Yes, we were in control of that process.
3283. **MR. MILLER:** And at the end of the day, did you make a decision on what information would be changed and what information wouldn't be?
3284. **MR. RINNE:** At the end of the day, we -- we reflected the changes that were the result of the negotiations, the give and take, between ourselves and the shippers we were having -- having the one-on-one discussions with.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3285. So yes, we were in control of the documents. We made the changes. Again, there's a feedback loop and sometimes we would carry on and make more changes on that same item or it was acceptable and was moved on.
3286. **MR. MILLER:** And not all changes that had been requested by shippers were actually made to the documents. Is that correct?
3287. **MR. RINNE:** So yes, sir. Your -- sorry, can you repeat the question?
3288. **MR. MILLER:** Yes. Not all of the changes that had been requested in the negotiations by the shippers were, in fact, made to the documents.
3289. **MR. RINNE:** That's correct, sir. And the -- but the changes that were agreed to were reflected in those documents and available to -- to the benefit of all the parties.
3290. **MR. MILLER:** Thank you. Gentlemen, I'm just going to move to another area.
3291. Now, you've described the settlement as a -- as a package several times. That came up yesterday; correct?
3292. **MR. STONESS:** That is correct.
3293. **MR. MILLER:** And am I -- I'm correct that it's generally a package of outcomes?
3294. **MR. STONESS:** I'm not sure what your question is.
3295. **MR. MILLER:** Well, what you're presenting is this is what has been agreed between the parties as represented in these documents. Isn't that an outcome?
3296. **MR. STONESS:** Yes.
3297. **MR. MILLER:** Okay. It doesn't contain a description of the -- the discussions or the factors that led to those outcomes, did it?
3298. **MR. STONESS:** No, it does not. And I think that's consistent with a -- a negotiation.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3299. **MR. MILLER:** Okay.
3300. **MR. REED:** But I should chime in. Actually, we do have evidence quite a bit that goes through the process by which those negotiations occurred and through which those concessions and changes were made.
3301. So the documents don't have that but the evidence, including my evidence, has quite a bit on that.
3302. **MR. MILLER:** This morning at the filing manual for the National Energy Board --
3303. **THE CHAIRMAN:** Sir, when you're talking away from the mic it's difficult for the court reporter to follow.
3304. **MR. MILLER:** My apologies, sir.
3305. So if you turn, sirs, to page 3-11 in this document, which is entitled "A Filing Manual for the National Energy Board", I just want to --
3306. **THE CHAIRMAN:** Mr. Miller, the nature of this document is that of aid -- aid in cross? Is this what this document's about?
3307. **MR. MILLER:** Yes.
3308. **THE CHAIRMAN:** Thank you.
3309. **MR. MILLER:** Thank you, sir.
3310. I'm just interested in the -- this document is for a different purpose. This document says when you go through a toll process there's certain filing requirements and certain information that's required in relation to those -- those filing requirements. And at the top of the page ---
3311. **MR. STONESS:** Sorry. Can we just do a pause while ---
3312. **MR. MILLER:** Certainly.
3313. **MR. STONESS:** --- we look at this.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3314. There's pieces missing. I'm not sure what the section is, whether it's related to facilities or tolls or -- so I don't have the entire document.

3315. **THE CHAIRMAN:** Ms. Wong, do you have access to the entire document that you could put on the screen? Thank you.

--- (A short pause/Courte pause)

3316. **MR. STONESS:** Mr. Miller, I'm struggling because I think this is the -- the section that relates to facilities application as opposed to the toll application.

3317. **MR. MILLER:** I don't believe so, sir, but we can maybe help you. I'll give you this copy.

3318. So sir, just for the record, you have in front of you the full filing manual and it's turned up to the page relating to common filing requirements. Am I correct, sir?

3319. **MR. STONESS:** That is correct.

3320. **MR. NETTLETON:** And just for the record, that was provided to the witness two seconds ago.

3321. **MR. MILLER:** Gentlemen, my question's fairly simple. Perhaps it would be faster if I just asked it. If -- if you have problems then and want to take time, then that's fine, but we might speed this up if I simply ask you.

3322. **MR. STONESS:** Sorry. Okay.

3323. **MR. MILLER:** So on page 3-11 in the common filing requirements at the top of the page, it's talking about the notification that's required to be given.

3324. Basically, it says that there's a requirement to give commercial third parties to that application certain information. Is that fair, sir?

3325. **MR. STONESS:** Sorry. Whereabouts are you on page 3-11?

3326. **MR. MILLER:** Well, on the -- I'm going to be asking you about the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

details of the notification which appears on the top of page 3-11.

3327. **MR. STONESS:** Okay.

3328. **MR. MILLER:** I was asking you if you understood from your view that that relates to information that's going to be given to commercial third parties.

3329. **MR. NETTLETON:** Mr. Chairman, I'm only rising because the section actually starts on notification at 3-10. So if the witness is going to be asked specific parts, then perhaps we should start with the beginning and let the witness understand what it is exactly that he's being asked a question about so he can read the entirety of the section that he's being pointed to.

3330. **MR. MILLER:** Well, Mr. Nettleton knows perfectly well that 3-10 and 3-11 are both contained in the aid that has been used and it's also in the complete manual that Mr. Stoness has. We're not trying to ambush anybody here. We're simply trying to get an answer.

3331. **MR. NETTLETON:** My simple point, Mr. Chairman, was that my friend was pointing to and made reference to page 3-11 in his question and he was about to ask questions about notification. And I just interrupted him to make sure that the witness was aware that the actual discussion took place and starts on page 3-10.

3332. So if we're going to be asked questions or if the witness is going to be asked specific questions about this section and the witness has not been given this document in advance that he should be at least entitled to be referred to the section where the passage starts so that he has the opportunity to be informed of the full passage.

3333. **THE CHAIRMAN:** I think context in this case, since the documents have only been given, is probably important so we will give time for the witnesses to read the entire section if they require that for context.

--- (A short cause/Courte pause)

3334. **THE CHAIRMAN:** Ms. Wong, for the benefit of the Court, could you put on the screen the Table of Contents of that document?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

--- (A short pause/Courte pause)

3335. **MR. MILLER:** Mr. Chair, Gentlemen, mindful of time, I'm not sure that this is worth it. I can move on and, if we have time at the end, I'll come back to this.

3336. I mean, I think we should use our time as efficiently as we can.

3337. **THE CHAIRMAN:** We agree.

3338. **MR. MILLER:** Okay, then I'll move on.

3339. I was asking you, sir, about the package that's been provided. I was asking you if it was a package of outcomes that's exemplified by the documents that were concluded between the parties.

3340. And I simply want to know, sir, did it include a description of the factors that led to those outcomes?

3341. **MR. REED:** Sorry, I'm not sure whether you're referring to the Application or the FSA/TSA?

3342. **MR. MILLER:** You've had a negotiation. You have an outcome from that negotiation which is represented by the signed agreements.

3343. And I'm asking you where in the agreements do we see a discussion of the factors and elements that led to those outcomes?

3344. **MR. STONESS:** The description of the process was included in the Application.

3345. It's not customary to put descriptions of why you got to a specific clause within the clause.

3346. **MR. REED:** And, specifically, application -- this is listed and provided to you, in fact, of course in the Table in Concordance with the filing requirements and it says specifically that the sections you've referred to are met in the Application through section 2.3 in Tab B.

3347. And, in addition, as you'll recall that both the original FSA and TSA

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- and the final FSA and TSA were provided so that you can track all the changes that were made from one version, the original version, to the final version.
3348. **MR. MILLER:** Well, you can track the changes but there's no description of why you arrived at that particular provision.
3349. It doesn't explain, for example, that the fee to be charged is based upon a return on equity of a certain amount. It doesn't explain how you may have arrived at any escalation. It simply says this is what we've determined.
3350. Is that fair, sir?
3351. **MR. STONESS:** The outcome is a total package of negotiated outcomes and none of them exist on their own and it's a package deal.
3352. **MR. MILLER:** I understand that but it's a package deal that just lists what the result is, not how you came up with that result.
3353. What were the discussions, the considerations that went into achieving that result?
3354. **MR. STONESS:** Each different party would have had different reasons for why they came upon the final outcome.
3355. We don't know what the shippers had in mind when they were doing that so we're not able to describe their concerns.
3356. **MR. MILLER:** And, nonetheless, it's not there.
3357. **MR. STONESS:** I believe it is.
3358. What it says is that it is a package of outcomes as a result of a negotiation and that is what it is.
3359. **MR. MILLER:** That's fine but, you know, let's say we reached an outcome with respect to what the toll is, is there any explanation in the FSA and TSA on how that toll was arrived at, what the elements are, what would happen if there is change?
3360. Is there any discussion that gives an indication of how that ultimate

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- number was achieved?
3361. **MR. STONESS:** Yes, there is and the description is that it was a negotiated outcome that took into account various takes and puts of different parties.
3362. **MR. MILLER:** Fair enough.
3363. **THE CHAIRMAN:** Sorry, Mr. Miller, you've asked this question several times in different ways. The witness has provided the same answer in a variety of times.
3364. The Board is satisfied that the question has been satisfactorily answered so we suggest you please move on unless there's another area related to this that new information could be provided for the record.
3365. **MR. MILLER:** Perhaps one final question then, sir, just for my simple edification and that is -- the answer is: "We arrived at this number because this is the number we all agreed on."
3366. Isn't that really the explanation of how you got that number?
3367. **MR. REED:** Sorry, can you repeat the question?
3368. **MR. MILLER:** If I understand what you're saying, the indicia of how you reached that particular outcome is explained by the fact that you simply say: This is what the parties agreed to.
3369. **MR. STONESS:** That plus there were 13 parties agreeing to it and contracting with it and the process description that we put in our Application describing how we got to it.
3370. **MR. MILLER:** And that simply says it was by way of negotiation?
3371. **MR. STONESS:** No, that's not true.
3372. What it says is the process that we went through to arrive upon the conclusions.
3373. **MR. MILLER:** Well, now, you have confused me because you told

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- me it was as a result of the negotiation. That's what you agreed to.
3374. And now, you're saying that there's some other information?
3375. Because I couldn't find it, perhaps you could point me to it?
3376. **MR. STONESS:** What I'm saying is that you just had a long conversation with Mr. Rinne describing the process we went through. That is the process we went through.
3377. **MR. MILLER:** Okay, fair enough.
3378. That's the process. Fair enough.
- (A short pause/ Courte pause)
3379. **MR. MILLER:** ... move forward if you'll give us a second.
- (A short pause/Courte pause)
3380. **MR. MILLER:** Gentlemen, I'd like to move to an area that you discussed which was the -- the amount of commercial support.
3381. If we could focus on that for a moment?
3382. **MR. STONESS:** Do you have a specific reference or not?
3383. **MR. MILLER:** It would probably be best if we went to Trans Mountain's response to NEB IR No. 3, Exhibit B20-2, item 3.5.
3384. I think it's small 'd' but again ...
- (A short pause/Courte pause)
3385. **MR. MILLER:** It's page 13 of 17 -- yes, the next one -- right there.
3386. Gentlemen, it's on page 13 of 17. It is at the end of (d), it's at the top of the page.
3387. It's the second paragraph on the page and to add further confusion,

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

they have in the paragraph -- they have a small (c), which reads:

"The nature and level of commercial support for the achieved bargain;"

3388. Are we at the right place, gentlemen?

3389. **MR. REED:** Yes, go ahead.

3390. **MR. MILLER:** Okay.

3391. So you say that this is a packaged outcome. That's what you say at the beginning of the paragraph. This is a *"packaged outcome."*

3392. And then, you say that:

"Standard is met by a regulator examining the achieved outcome as a whole and determining on balance whether the resulting tolls are just and reasonable. The just and reasonable tolls standard is met through the consideration of whether [(a)] the negotiation process underlying the bargaining" scheme "achieved was fair; [(b)] the resulting tolls are not unduly discriminatory; [(c)] the nature and level of commercial support for the achieved bargain;"

3393. And I would like to talk about that if I could; okay?

3394. So, in your view, you believe that the tolls are supportable by the fact that there was a sufficient number of shippers who accepted the agreements; correct?

3395. **MR. REED:** Could I have the first part of that question read back?

3396. **MR. MILLER:** Well, as I take your evidence, you're suggesting that the Board should have regard to the fact that this is just and reasonable because a sufficient number of shippers have signed on for capacity.

3397. **MR. REED:** No, it's certainly not that simple.

3398. It goes to all of the points there in that paragraph. The nature and level

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- of commercial support is one aspect of that but it goes certainly beyond the number.
3399. **MR. MILLER:** Mr. Reed, don't dispute that that's what you've put in your document, I'm trying to talk about the point with respect to the level of commercial support.
3400. Can we focus on that?
3401. **MR. REED:** Yes, but your question was: Do I think the fact that 13 shippers have signed up for it means the tolls are just and reasonable?
3402. That's not correct.
3403. **MR. MILLER:** No, but -- and I didn't ask that, I was asking if, when we talk about the level of commercial support, you're saying that that's one of the indicia this Board should have regard to because there's been sufficient capacity signed up by shippers.
3404. **MR. REED:** That is correct.
3405. That is one of indicia that the Board should have regard to.
3406. **MR. MILLER:** Okay.
3407. And, really, what that means is that that indicia should be viewed favourably by the Board because shippers that control sufficient volumes agree to the outcome.
3408. Is that right?
3409. **MR. REED:** Again, thence when you have to go to the other provisions as well.
3410. Yes, they did agree to the outcome and that's an important fact. And the process by which they got to agreement was a robust, fair and competitive process.
3411. **MR. MILLER:** Well, let's -- I don't dispute that. The other points are valid, but let's focus on this efficiency of the volumes.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3412. So if that's one of the indicia that this Board should have regard to, what happens if there's other parties who don't agree but have still been required to sign on because they have no choice?
3413. **MR. REED:** Certainly, I would not accept that description as being accurate of these circumstances that shippers had no choice and that they had to sign on.
3414. One of the facts, I think, that perhaps is not on the record yet is that there were negotiations and discussions with several shippers that, in the end, elected not to proceed because they felt they had better alternatives.
3415. That's again an indication of a lack of market power when you reach agreement with 13 and there may be six, ten or thirteen others that say: "No, I have better alternatives; I'll go elsewhere. Thank you."
3416. So, no, I can't accept your characterization that people in this process signed on because they had no choice and, therefore, that somehow undercuts the strength of the commitments that have been made.
3417. Again, every shipper is free to speak their views in this proceeding, including your client, and we take all of that and put it in front of the Board for disposition of the issue as to whether it's just and reasonable.
3418. **MR. MILLER:** Sir, every shipper has the right to speak their views before this Board subject to the confidentiality provisions; correct?
3419. **MR. REED:** Yes, subject to the agreements they have freely entered into.
3420. **MR. MILLER:** Okay.
3421. **MR. REED:** If any party wants to seek a waiver of a confidentiality provision, it's also able to ask the company for that; and my understanding is no such requests have been made.
3422. **MR. MILLER:** Sir, you might want to check with Mr. Nettleton.
3423. In a letter to this Board, Total asked to be waived -- the confidentiality

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

provisions to be waived and Mr. Nettleton wrote back to the Board indicating that the company would not agree to that.

3424. **MR. REED:** I'm sorry, I have not seen that letter.

3425. **MR. MILLER:** That's why you need to check with your counsel, sir.

3426. Okay. So getting back to sufficiency. You have two parties who are here today who don't agree with all of the provisions contained or underlying this proposed toll; isn't that fair?

3427. **MR. REED:** I think we won't know that until Final Argument, but that's my assumption at this stage.

3428. **MR. MILLER:** Okay.

3429. And my question is that: If sufficiency is an appropriate measure then what happens to people like that who are dissenters?

3430. What happens in that case, are their views simply overlooked because the majority rules?

3431. **MR. REED:** No, and that's a very good question as to how a dissenting or a non-supportive party should be considered in these proceedings.

3432. Based on my experience in regulatory proceedings where those issues have come up, you look to some pretty fundamental questions about the situations of those parties vis-à-vis those that have agreed or supported the outcome. You ask are they (a) being treated any differently and you ask (b) are they situated any differently? So that what may be just and reasonable for the 11 is it also just and reasonable for the other two?

3433. So as I said, it goes to both: Are they factually differently situated and are they being treated differently?

3434. We know here that the same terms of service were offered to every shipper. All of the options were available to all of the shippers and all of the people that chose to not be shippers. So I certainly don't see any evidence supporting a view that these two were treated differently.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3435. As to whether they are situated differently such that the result that is just and reasonable for the 11 may be determined to be not just or reasonable for the two is a question the Board will need to answer.
3436. But again, I've seen no evidence in this proceeding to date that would suggest that the two are differently situated, either in terms of alternatives or in terms of markets or in terms of anything else that would suggest that they are deserving of different treatments such as the result of the negotiated tolls aren't just and reasonable for the two dissenters as well.
3437. But those are the two standards that I think the Board should have regard to: Are they being treated differently are they differently situated and, if so, would that justify any difference in treatment?
3438. **MR. MILLER:** Well, sir, under those two tests then how does sufficiency enter into that?
3439. If those are the two true tests, what value does sufficiency bring? It seems to me that those can certainly be answered without asking any question with respect to the amount of volume.
3440. **MR. REED:** I'm sorry, I couldn't hear the end. Without regard to?
3441. **MR. MILLER:** Any of the amounts of volumes.
3442. They become irrelevant if those are the two factors that the Board should have regard to.
3443. **MR. REED:** No.
3444. Well, first of all, this statement "*...the nature and level of commercial support*" is taken directly from Board orders. So maybe you should ask the Board as to why they feel that's important.
3445. But I think it's important with regard to the level of dissent. The number of dissenting parties relative to the number of supporting parties speaks to what may be, in fact, differences in the situations of the minority versus the majority.
3446. Obviously, the larger the minority, the more likely you will have a

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

situation where one of them is differently situated and maybe deserving of different treatment.

3447. We have not seen that here. In fact, what we have is, I think, more than 80 percent of the volumes are fully supportive of the result as being just and reasonable.

3448. But, again, I stand by what I said before. I think those are the two appropriate tests.

3449. **MR. MILLER:** So sure fair enough.

3450. So it's -- part of it is the level of dissenting parties. And we have dissenting parties in relation to this case; correct?

3451. **MR. REED:** Yes.

3452. **MR. MILLER:** Yes.

3453. **MR. REED:** Yes, we do.

3454. **MR. MILLER:** And their interests should be respected and weighed notwithstanding that they're dissenting parties.

3455. Isn't that fair?

3456. **MR. REED:** Yes, I think their views should be reviewed and heard out under the two-prong test that I've laid out.

3457. **MR. MILLER:** Okay.

3458. And this -- this isn't a situation then that you're suggesting that simply because there are a number of people who've provided sufficient level of service that the Board should simply go with the flow and approve it on that basis.

3459. That's not what you're suggesting; is it, Mr. Reed?

3460. **MR. REED:** No.

3461. In fact, even in unanimous settlements, I think the Board has a duty to

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- look at the terms to determine if they're just and reasonable. That's also the case where you have contesting parties.
3462. So, yes, I think those views can and should be heard and given the appropriate weight under the framework that I've outlined.
3463. **MR. MILLER:** Thank you.
3464. Now, in traditional negotiated settlement processes before the Board, would you agree with me, sir, that -- just as you've pointed out, that the Board makes reference to sufficiency of commercial service, it also makes reference to the fact of whether or not the proposed settlement is unanimous or not?
3465. **MR. REED:** It has different -- a different process for the consideration of contested settlements now since 2002 than for unanimous settlements, yes.
3466. **MR. MILLER:** Yes.
3467. And perhaps, Mr. Rinne, you've read the decisions of the Board relating to Trans Mountain's negotiated settlements, would you agree with me that they often start with a section called "Views of the Board" and, often times, they say that all parties with an interest in this proceeding have sufficient opportunity to inform themselves and no one party has expressed any opposition to any aspect of the agreements?
3468. Would you agree with me that that is a common element of the decisions?
3469. Mr. Stoness?
3470. **MR. STONESS:** I wouldn't agree with those exact words. I would agree with the concept that, usually, they refer to the level of support.
3471. **MR. MILLER:** Well, those exact words came out of Trans Mountain's first negotiated settlement in 1996.
3472. And I -- I fully accept that the words may change but the essence is there that one of the important considerations that the Board takes into account is whether or not the proposal has unanimous approval or not.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3473. Isn't that fair?

3474. **MR. STONESS:** I believe that's correct that they do take into account whether it's unanimous or not.

3475. It causes a different process if it's not unanimous.

3476. **MR. MILLER:** Okay. Thank you.

3477. Sir, I have a few questions about alternative -- alternative pipeline capacity. So if we could just shift into that area for a moment?

3478. Trans Mountain has suggested that the Gateway pipeline is one of the alternatives that shippers might look to to move their oil to the West Coast.

3479. Is that fair?

3480. **MR. STONESS:** Yes, Gateway is an alternative.

3481. **MR. MILLER:** Right.

3482. And would you agree with me that, compared to this expansion line, Gateway represents what would be called a "greenfield pipeline"?

3483. **MR. STONESS:** Gateway is greenfield, yes.

3484. **MR. MILLER:** Now, the Enbridge Mainline is another alternative; is that correct?

3485. **MR. STONESS:** Enbridge Mainline is another alternative, yes.

3486. **MR. MILLER:** And that pipeline recently went through a -- a looping and upgrade.

3487. Is that correct?

3488. **MR. STONESS:** I -- I don't know the details behind that.

3489. **MR. MILLER:** All right.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3490. **MR. RINNE:** I assume that was the Clipper expansion, sir.
3491. **MR. MILLER:** Yes.
3492. **MR. RINNE:** Or other extensions thereof.
3493. **MR. MILLER:** Now, sir, Gateway was a negotiated toll process,
wasn't it?
3494. **MR. STONESS:** I don't know. It depends on your definition of a
negotiated settlement.
3495. **MR. MILLER:** I'm sorry, sir. You've presented Gateway as an
alternative to your pipeline and you don't know whether or not it is effectively a
competitor to your line?
3496. **MR. STONESS:** Oh, certainly it is a competitor to our line, but I
think you asked whether it was a negotiated settlement.
3497. **MR. MILLER:** I did. I'm surprised that you didn't know the answer
to that.
3498. If it's going to be an alternative, don't you have some understanding
whether or not it's a viable alternative to your proposal?
3499. **MR. STONESS:** I didn't imply I didn't have any understanding. I
was not understanding your question.
3500. **MR. MILLER:** Sorry. And I perhaps misunderstood.
3501. Do you know what the return on equity for Gateway was?
3502. **MR. STONESS:** It's my understanding that they have two proposals
in front of them for return on equity.
3503. **MR. MILLER:** Okay. Do you know what those are?
3504. **MR. STONESS:** It's my understanding that the -- that one of them is
11 percent, and that is if all of the costs were flow-through, including capital,

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

- O&M, sustaining capital and all features. And the other is a range of possible ROE outcomes depending on the capital spending based on 12 percent.
3505. **MR. MILLER:** And that second one, would you agree with me that that really could be characterized as 12 percent plus a bonus for performance? Is that your understanding?
3506. **MR. RINNE:** I know a little bit more, maybe.
3507. Yeah, my understanding is it's 12 percent and then there's a risk-sharing formula above and below for cost savings or cost additions being shared between shippers and carrier. And then there's -- on top of that, there's additional revenues that may come from other shippers, spot shippers, I believe, that can then be shared in some other formula as well.
3508. **MR. MILLER:** But the two tolls are 11 percent and 12 percent with an escalator. That's essentially it, isn't it?
3509. **MR. RINNE:** I believe so, yeah.
3510. **MR. MILLER:** Thank you.
3511. Now, with respect to the Enbridge Mainline, would you agree that the return on equity for that expanded line is about 11 percent?
3512. **MR. STONESS:** Sorry. Are you referring to CTS? I'm not sure what you're referring to, Enbridge Mainline.
3513. **MR. MILLER:** Fair enough. I have a document from Enbridge filed publicly which is called "2011 ITS Revenue Requirement Schedules and Statements". Does that help?
3514. **MR. STONESS:** Sorry; repeat that?
3515. **MR. MILLER:** I have a document that's entitled "2011 ITS Schedule A, 2011 Revenue Requirement Schedules and Statements" from Enbridge. Would that be of assistance to you?
3516. **MR. STONESS:** It might be.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3517. **MR. MILLER:** Okay. It is part of the CTS agreement, if that helps.
3518. **MR. STONESS:** Well, it's helpful, but I can tell you that based on my previous review of CTS, it's hard to make out what the ROE was embedded within it.
3519. **MR. MILLER:** Well, perhaps just ask you this. Would you agree that it's around 11 percent? Is that something that is in your commercial knowledge?
3520. **MR. STONESS:** I wouldn't agree with that.
3521. **MR. MILLER:** Okay. Well, then, let's take a look at the document.
3522. **MR. NETTLETON:** Mr. Chairman, my friend is about to, I suppose, distribute yet another aid to cross. And I haven't seen the document that he's referring to.
3523. I know that he's put it to the witness to say would it be helpful, but the practice before this Board is that if there is going to be aids to cross that they would be distributed beforehand. Otherwise, your process is going to be made inefficient. I'm ambushed it. It just seems highly improper.
3524. **THE CHAIRMAN:** Mr. Miller?
3525. **MR. MILLER:** Thank you, Mr. Chairman.
3526. Quite frankly, I didn't think that we were going to have to go this way simply because if these other lines were true alternatives, it would be my belief that they would have some understanding of the commercial nature of those lines. If that's not true, if they don't know the commercial nature of these lines, then that's fine. I'll leave it at that that they do not understand what the rate of return on equity for the other lines is.
3527. That's fine with me for my purposes, sir.
3528. **MR. ANDERSON:** Mr. Miller, I don't think that either Mr. Stoness or Mr. Rinne is acknowledging or admitting that they have no commercial knowledge of the other lines.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3529. I think what we're saying is that you are throwing out numbers to us without perhaps the broader context of what that number implies and what the terms are around it and what the package is that's around it that may influence its outcome, which is why we're hesitating on agreeing to a number that you put out without looking at, if you like, the package around it that will influence what the outcome is.
3530. **MR. MILLER:** I'm content with the answer that we've received with respect to their knowledge of the competitive nature of the other lines. I'm fine with that.
3531. **THE CHAIRMAN:** Okay. I guess we can move on, then.
3532. **MR. MILLER:** Thank you.
3533. Gentlemen, I'd like to move to the timeline facing this project.
3534. Your expansion is being undertaken on an existing right-of-way. It's, for the most part, following an established route. You'll be dealing with people who are familiar with the pipeline. Is that a fair characteristic -- characterization of the general circumstances relating to this expansion?
3535. **MR. ANDERSON:** I think that's fair, Mr. Miller.
3536. **MR. MILLER:** And in fact, you see those as advantages with respect to being able to construct a pipeline faster than otherwise. Isn't that fair?
3537. **MR. ANDERSON:** No, Mr. Roth and I, I believe, discussed that a couple of days ago and I think that the circumstances around the, quote unquote, "brownfield" nature of the pipeline being that it is largely going to be an existing right-of-way through communities that we have knowledge provides us with insights into the challenges and the issues and concerns. It doesn't make constructability any easier. We go through some very difficult terrain and through some very difficult regions.
3538. **MR. MILLER:** Fair enough. But you're projecting that the project would receive regulatory approval and be in service by 2017. Is that correct?
3539. **MR. ANDERSON:** Our assumed timeline would have the pipe in service in late 2017, correct.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3540. **MR. MILLER:** Right. That's four years away.
3541. **MR. ANDERSON:** Four and a half.
3542. **MR. MILLER:** Okay. And sir, how long do you expect that it might take for Gateway to be in service? Do you have any idea?
3543. **MR. ANDERSON:** I have no idea, Mr. Miller.
3544. **MR. MILLER:** And I think that would be a fairly universal understanding, wouldn't it? No one really knows when that's going to get into service, do they?
3545. **MR. RINNE:** I thought I saw something from Enbridge 2018, but that was newspaper or some other article.
3546. **MR. ANDERSON:** And I think to the point, I think you'd have to ask the universe what they thought. What I think is it's uncertain.
3547. **MR. MILLER:** Thank you, sir.
3548. And if XL, if it gets approved, how long will it take before it's in service?
3549. **MR. ANDERSON:** I don't know specifically, Mr. Miller. I think you will read the same clippings and information reports that I would that would have it in service some time within a year or two after permit, if they finalize it.
3550. **MR. MILLER:** Now, sir, to obtain your approval, you're undertaking a significant amount of work right now to prepare your application for filing some time later this year. Is that fair?
3551. **MR. ANDERSON:** We are, yes.
3552. **MR. MILLER:** Okay. And that's going to take some time to get that work all completed, isn't it?
3553. **MR. ANDERSON:** It will take until the end of this year.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3554. **MR. MILLER:** Okay. So as part of that work, you're doing a number of things concurrently with other work that you're doing. For example, you're discussing -- having discussions with Aboriginal groups, communities. You're undertaking engineering work. You're undertaking an environmental assessment. All of that is happening in a concurrent basis leading up to the filing of your CPCN application; correct?
3555. **MR. ANDERSON:** All of that work is being undertaken to some degree, Mr. Miller. I'm not sure what the concurrent nature you're referring to.
3556. **MR. MILLER:** Well, no, I was just -- I'm just making the point that we've got a year until you're going to file and you've got a lot of things on the go that you're working on concurrently. That's the only point I'm trying to get concession on.
3557. **MR. ANDERSON:** That's accurate.
3558. **MR. MILLER:** Okay. So sir, during that period of time between now and the end of the year, there's an opportunity to have concurrent discussions to try and resolve the outstanding differences that exist with respect to the dissenting shippers. Wouldn't that be fair?
3559. **MR. ANDERSON:** No.
3560. **MR. MILLER:** Can you explain why we can't take advantage of the time that exists to continue discussions and try and get a unanimous agreement with respect to the toll?
3561. **MR. ANDERSON:** I believe we have the support and the agreement necessary to proceed and that we have justified our case before the Board and the Board will make that determination. And the work that we are undertaking towards a CPCN filing at the end of the year is predicated and assumes that we are successful in this proceeding in a timely fashion.
3562. **MR. MILLER:** Well, sir, wouldn't it be better when you bring your application before this Board to have unanimous support of all the shippers?
3563. **MR. ANDERSON:** That was our desire from the beginning, Mr. Miller. We weren't quite able to accomplish that ---

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3564. **MR. MILLER:** Okay.
3565. **MR. ANDERSON:** --- with a couple of parties. But having said that, we believe that the reasonability and completeness of the case and the support that we have justifies its acceptance by the Board and then we will carry on from there.
3566. **MR. MILLER:** And you mentioned that the work that is ongoing is predicated upon a successful determination from this Board, but your costs are covered, aren't they, sir? You're not going to be at any financial loss if you took some time during the remaining year to have continuing discussions to try and resolve the outstanding issues?
3567. **MR. ANDERSON:** That's true. They are assumed to be covered by Firm 50 dollars if we do stand down. However, (technical audio difficulties) by this Board.
3568. It's the process that we made very clear from the beginning that we believe the first important step in a \$5 billion expansion of the asset was demonstrated and approved commercial support. And that's the path that we're on and we have approval for the Board for the bifurcation of the proceeding in that way and that's what we're pursuing.
3569. **MR. MILLER:** Just a few more questions, panel, pick up a few extras.
3570. With respect to the period of the third round of the Trans Mountain season, if you can turn your mind to that period, that period's important because that's when the parties who consented to these provisions of Section 2.2 were able to become full participants in the open season. So if we turn our mind to that time, would you agree with me that, at that time, the Gateway pipeline was fully subscribed?
3571. **MR. RINNE:** I'm not -- I don't know the definition of "subscribed". My understanding is there's precedent agreements that are contingent upon shippers' option to proceed at some further time, I think when the permits are received or a cost estimate. I'm not sure if there's -- if they're more definitive than that. And I would imagine that they can look to make that pipeline bigger if more companies wanted to ship on it, just as we've been adjusting our scope.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3572. **MR. MILLER:** Well, for the purpose of my point, sir, can you say that during the third round of the open season that there was capacity available to parties who might want to acquire it on Gateway?
3573. **MR. RINNE:** Sir, I don't know the answer to that and if I could just add, I think, a point. The Round 3 discussion or the Round 3 open season was meant to reflect and adjust the issue of 2.2 and the "if/but for" 2.2 shippers would have signed up in the earlier rounds, and so I think the timeframe for the decisions for the shippers to have participated or not really would have been in Rounds 1 and 2 earlier in the year, no later in the year. And it's really just the "but for" 2.2 clause that would have then allowed them -- their decision-making process to go forward, which is what we tried to address by putting it in there.
3574. **MR. MILLER:** Sure. I'm fine with that. If we expand the time period to the full open season period, can you confirm whether or not, during that full open season period, capacity was available on Gateway?
3575. **MR. RINNE:** Sir, that's the same answer. I can't confirm that. I was just trying to define the timeframe more applicably to the Round 3 shippers.
3576. **MR. MILLER:** And sir, again, during that same time period -- we'll expand it to your time period, the full period of the open season. Can you confirm whether or not the -- there was any capacity available on the Keystone line?
3577. **MR. RINNE:** Again, I don't think I know the status of the contracting level or its expandability beyond the initial design that's been pursued. I believe there is a substantial expansion on Keystone that's possible.
3578. **MR. MILLER:** That's possible. But I was asking you, as an alternative for parties who were in your open season, was there any capacity on either Gateway or Keystone available during that period?
3579. **MR. NETTLETON:** Mr. Chairman, that's the third time that my friend has asked that question. He's got an answer, and so I'm objecting to the repetitiveness of the question.
3580. He's asked -- the witness has asked -- been asked and answered the question.
3581. **MR. MILLER:** Yeah, I'm fine, Mr. Chairman. I'm fine.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3582. **MR. STONESS:** Mr. Miller, I think your discussion -- whether or not there was some capacity available on either of those pipelines is a narrow question. The broader question is, is there a secondary market that was available and, to our knowledge, was there an option or was there a commitment on Gateway. And all of that created a window within us which said we were competing with those two options.

3583. We didn't know the particular details of them, but we felt like we were competing with those options.

3584. **MR. MILLER:** Thank you, sir, but you can understand that a remedy without recourse isn't very much assistance to -- of much assistance to a shipper like mine who had no option other than to try and get capacity on your pipeline.

3585. I'll move on.

3586. **MR. STONESS:** Sorry. I don't accept that you don't -- that your client does not have an option. And my point was, what was important from a measure of fair and just and reasonable is whether we thought we were competing, not whether there were competitive options. And we think there were.

3587. **MR. MILLER:** And ---

3588. **DR. SCHINK:** Yeah, I want to -- I mean, the idea that you're limiting to things where negotiations were going on as something would be available in the timeframe we're talking about, 2017-2018, there are certainly two pending projects that, because of their use of existing pipe, are likely to be available in that timeframe. And one is the conversion of the Trans Mountain gas pipeline to the east, certainly, because it's -- TransCanada. I'm sorry, TransCanada gas pipeline to the east. Is -- because of its use -- so much use of existing pipe can certainly be completed in that timeframe.

3589. And similarly, the Line 9 reversal project could be completed in that timeframe, so the notion you had no other alternatives is -- you know, doesn't make sense.

3590. And there's always the alternative of the shippers getting together and building your own pipeline.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Miller**

3591. **MR. MILLER:** Sir, you'd agree with me that plans for pending pipeline don't always reach fruition; correct?

3592. **DR. SCHINK:** That's correct. There's no guarantee that Trans Mountain's expansion will reach fruition.

3593. **MR. MILLER:** Mr. Chairman, those are all the questions of Total.

3594. **THE CHAIRMAN:** Thank you, sir.

3595. I'm noticing the ---

--- (A short pause/Courte pause)

3596. **THE CHAIRMAN:** We'll take a half-hour break right now and we'll come back around 10:30.

--- Upon recessing at 9:58 a.m./L'audience est suspendue à 9h58

--- Upon resuming at 10:30 a.m./L'audience est reprise à 10h30

3597. **THE CHAIRMAN:** Yes, sir, Mr. Miller.

3598. **MR. MILLER:** Yes, I have one housekeeping matter, sir. Checking my records, I note that we have not yet filed the aid to examination which was entitled "Effective 7 cent per 100 million increase" and I wonder if we might mark that as an exhibit, sir.

3599. **THE CHAIRMAN:** I don't see any objections by anybody -- whoops, Mr. Nettleton.

3600. **MR. NETTLETON:** I have no objection, sir.

3601. **THE CHAIRMAN:** Ms. Wong?

3602. **THE REGULATORY OFFICER:** That'll be C16-9.

--- **EXHIBIT NO./PIÈCE No. C16-9:**

Total E&P Canada Ltd. - Aid to cross-examination "Effective 7 cent per 100 million increase"

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3603. **MR. MILLER:** Thank you, sir.

3604. And panel, thank you for your patience and your thoughtful answers and I'm sorry if I surprised Mr. Nettleton with the filing binder from the Board.

--- EXAMINATION BY/INTERROGATOIRE PAR MR. ZALMANOWITZ:

3605. **MR. ZALMANOWITZ:** My name is Barry Zalmanowitz. I, along with Mr. Roth, represent Suncor.

3606. And as you know, Suncor supports the Trans Mountain expansion to provide diversification and much-needed access to tidewater markets in Asia, but Suncor's concerned about the proposed toll and tolling methodology and such. My examination is going to relate primarily to the evidence of Dr. Schink. I may have one or two questions for others that are related to that, but that gives you the context.

3607. Dr. Schink, just to put into context your evidence and how it helps the Board, I want to put to you a few propositions which I hope you'll agree with. I don't think they're contentious. They just provide context and, hopefully, they'll be helpful to the Board.

3608. Now, I understand that what your evidence goes to, it assists the Board in deciding the issue of whether the toll methodology and the tolls resulting from that methodology during the open season process were just and reasonable. That's in a very general sense what your evidence is about; correct?

3609. **DR. SCHINK:** I think more specifically whether the resulting tolls were competitive fair market value prices.

3610. **MR. ZALMANOWITZ:** Yes, I'm going to get down to that. I'm just going to give the paradigm so that we know how -- how all of those questions relate to the ultimate question, which is the -- the Board has discretion, very broad discretion, to determine whether a toll is just and reasonable.

3611. So an important consideration in determining whether the tolls are just and reasonable or whether a toll is just and reasonable is whether it approximates a toll that would result in a competitive market; correct? That's one consideration.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3612. **DR. SCHINK:** Yes, that the toll is consistent with what would -- or is a competitive market toll.

3613. **MR. ZALMANOWITZ:** Yeah, thank you.

3614. And to determine whether a toll is one that is consistent with one that would result in a competitive market, it's important to consider whether Trans Mountain had market power during the open season period; correct?

3615. **DR. SCHINK:** In the context of the negotiations, yes, if that's what you're saying.

3616. **MR. ZALMANOWITZ:** Yes, that's what I'm saying. That's exactly what I'm saying, actually.

3617. Now, market power has a specific meaning in economics and in competition and anti-trust analysis. Do you agree?

3618. **DR. SCHINK:** There are variants, but there is a fairly standard definition, yes.

3619. **MR. ZALMANOWITZ:** Yes. And one of the standard definitions of market power -- and sometimes it's called monopoly power, too, isn't it? Those are substitutable terms. It's either market power or monopoly power.

3620. **DR. SCHINK:** No, there are forms of market power that fall -- fall far short of market power -- or monopoly power. I apologize.

3621. **MR. ZALMANOWITZ:** Well, market power -- market power at the upper end is monopoly power.

3622. **DR. SCHINK:** At the -- at the highest extreme, yes.

3623. **MR. ZALMANOWITZ:** Yes. Well, I'll use the term market power to keep it consistent.

3624. So market power arises in the case of sellers if they have the ability -- it's the ability of a firm or a group of firms to profitably maintain prices above competitive levels; correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3625. **DR. SCHINK:** Correct.
3626. **MR. ZALMANOWITZ:** Now, competition law and anti-trust law enforcement agencies such as the Canadian Competition Bureau, in performing their duties, are called upon to consider whether a firm or a group of firms have market power. That's part of their job in analyzing cases that come before them; correct?
3627. **DR. SCHINK:** I'm sorry. I missed the first part of your question.
3628. **MR. ZALMANOWITZ:** The first part is that Competition Bureau, for example, in performing its duties, for example, analyzing a merger or analyzing whether there's an abuse of dominant position by a firm in a market, they have to consider whether that firm or group of firms have market power as part of their job from time to time; correct?
3629. **DR. SCHINK:** Well, in -- yes, but the analysis in the case of a merger is whether the merger would lessen competition substantially. And in the case of abuse, there has to be essentially proof of bad acts to do something, but yes.
3630. **MR. ZALMANOWITZ:** Yeah, but in abuse of dominant position, you agree that the first screen in Canadian law is whether the firm who's allegedly abusing a dominant position has market power. That's the starting point in the analytical framework in the abuse of dominance guidelines, is it not?
3631. **DR. SCHINK:** The guidelines have three criteria that have to be met. That's one of them.
3632. **MR. ZALMANOWITZ:** That's the first one. That's the threshold in the analytical ---
3633. **DR. SCHINK:** It's the first on the list. I think it is, if you -- if you don't -- well, yes, it's the first on the list. I don't know if it's the most important, ultimately.
3634. **MR. ZALMANOWITZ:** They don't go to the other two on the list if -- if they can't get past the first one.
3635. **DR. SCHINK:** But the first one is a screen, not a final determination.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

I mean, they -- the screens that they apply are -- if you, you know, shall we say, pass the screen test, they won't proceed. If you don't pass the screen test, they go on to do further examination. So it's not a pass-fail, it's ---

3636. **MR. ZALMANOWITZ:** No, I agree. But that's -- it's a necessary condition in that what they have to do is they have to analyze in a particular case whether a firm has market power and whether it's a merger case or an abuse of dominance case. That's what they're doing. They have analytical frameworks and they do that as part of their job. That's all I'm asking you.

3637. **DR. SCHINK:** Are we still talking just about the first step?

3638. **MR. ZALMANOWITZ:** Yes, we're not talking about everything they do. It's just one of the things that they have expertise in and they have analytical approaches which they publish -- is whether a firm or a group of firms have market power.

3639. **DR. SCHINK:** Yes, they do.

3640. I just want to make sure that it's clear that the screen tests are only a first step in whether -- in trying to determine whether or not a firm or merging firms might have market power to not dispositive.

3641. **MR. ZALMANOWITZ:** I agree with you.

3642. Now, a common starting point is to define a relevant market and then calculate market shares or some measure of concentration; correct?

3643. **DR. SCHINK:** Yes, that's part of the process.

3644. **MR. ZALMANOWITZ:** And, for example, the Canadian Competition Bureau, for a concentration measure, will use a four-firm concentration ratio as its screen and, in the United States, the Department of Justice or the Federal Trade Commission use something called the "Herfindahl-Hirschman Index" or commonly called the "HHI" and you've used that in your report; correct?

3645. **DR. SCHINK:** Yes, but the Competition Bureau also notes that they do employ or have employed the HHI also in their analyses.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3646. **MR. ZALMANOWITZ:** Right.
3647. They don't use the HHI as a screen though in merger cases, they might look at a delta that results from the merger, but they do not use the HHI as a screen.
3648. **DR. SCHINK:** Their primary screen is the -- their primary screening tool is the four-firm concentration ratio for ---
3649. **MR. ZALMANOWITZ:** Thank you.
3650. **DR. SCHINK:** --- concentration.
3651. **MR. ZALMANOWITZ:** Now, all of those, whether using a market share, four-firm concentration ratio or an HHI, all of those are really indirect proxies that assist the Competition Bureau or the Competition Tribunal or a board such as this as determining whether, in a particular case, the firm in question may possess market power.
3652. They're indirect proxies for market power; correct?
3653. **DR. SCHINK:** They certainly -- these investigations get very fact.
3654. If you fail to pass the screens they become very fact and test investigations, yes.
3655. **MR. ZALMANOWITZ:** Right.
3656. But if you're -- generally, if you fail to pass the screen, if you're doing a merger, the merging parties want to persuade the agency that they're below the -- a safe harbour threshold; correct?
3657. **DR. SCHINK:** Is that a question?
3658. **MR. ZALMANOWITZ:** Yes, that's what they're going to do?
3659. **DR. SCHINK:** I'm sorry. I'll try and answer the question.
3660. **MR. ZALMANOWITZ:** And if you're above that safe harbour threshold, then the agency -- whether it's Canadian Competition Bureau or the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

Department of Justice or Federal Trade Commission, they start looking at it more closely and they look at other factors; correct?

3661. **DR. SCHINK:** Yes, they can -- they begin conducting a more extensive examination.

3662. **MR. ZALMANOWITZ:** Now, I want to clarify two different concepts that are referred to in your evidence.

3663. One is fair market value and the other is competitive prices.

3664. **DR. SCHINK:** Yes.

3665. **MR. ZALMANOWITZ:** So in your evidence, you state that Trans Mountain asked you to provide an expert opinion on whether the tolls negotiated during the Open Season for transportation on its expanded pipeline system represented -- and I'm quoting:

"...fair market value competitive prices..."

3666. That's a quote from your evidence and I can -- if you have doubt about it, I can give you a specific reference, but that's ---

3667. **DR. SCHINK:** No, it sounds correct.

3668. **MR. ZALMANOWITZ:** You then say that, to do that, you broke your analysis down into two parts.

3669. The first part was that you analyzed the relevant -- the relative knowledge stature and bargaining strength of the parties to the Open Season and to the Open Season process itself -- that was one thing you did.

3670. Correct?

3671. **DR. SCHINK:** Yes.

3672. **MR. ZALMANOWITZ:** And then, secondly, you analyzed the extent and the intensity of competition faced by Trans Mountain in its origin and destination markets as well as the competitive -- competition, sorry -- faced by Trans Mountain from alternative pipelines and other non-pipeline's competition

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- to secure shipper commitments for future movements of crude oil from Western Canada.
3673. So that was your second part of it.
3674. **DR. SCHINK:** Yes.
3675. **MR. ZALMANOWITZ:** Now, those are really two distinct questions.
3676. And your -- the first part really goes to the question of the sophistication of the parties, the process during the Open Season, and that really relates to something called "fair market price" or "fair market value"; correct?
3677. **DR. SCHINK:** I don't know if you mentioned knowledge in that list, but you could have.
3678. **MR. ZALMANOWITZ:** I would say sophistication would include knowledge.
3679. **DR. SCHINK:** Oh, okay.
3680. **MR. ZALMANOWITZ:** Okay?
3681. **DR. SCHINK:** Now, I've lost the question.
3682. **MR. ZALMANOWITZ:** Okay.
3683. The question is that's -- the two distinct questions -- the first -- your first part of analysis goes to fair market value and the second part of your analysis really determines whether the market was competitive.
3684. **DR. SCHINK:** Well, the first, I think, goes to evaluating whether the Open Season process itself, you know, was competitive and the second goes to whether the -- these origin and destination markets are competitive. They're really two pieces.
3685. And I think, as I've said, -- and John Reed has said also -- that the Open Season process could be found to be -- produce a workably competitive result even if the markets were found not to be workably competitive.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3686. And I think that's an -- I think that -- on the other hand, I think if the markets are workably competitive, that gives the board, I think, further evidence of the overall competitiveness of the market place.
3687. So I think that's how I've characterized it.
3688. **MR. ZALMANOWITZ:** I just want you to confirm that, from the perspective of a competition agency's -- such as the Competition Bureau's analysis -- they don't really deal with whether something is a fair market price, they're looking at whether a market is competitive to determine whether there's a fair market price.
3689. “Fair market value” is not a term that appears in the Competition Bureau's merger enforcement guidelines.
3690. **DR. SCHINK:** No, it's a term that appears more, I think, in the regulatory arena or in a regulatory economics literature but I think it's pretty well known that competitive price and a fair market value price are essentially the same concepts.
3691. **MR. ZALMANOWITZ:** Now, I'm going to disagree with you.
3692. I would put to you the proposition that a fair market value price and a competitive price are not necessarily the same thing.
3693. **DR. SCHINK:** Let me correct my statement.
3694. A competitive price, I believe, is a fair market value price; can you accept that?
3695. **MR. ZALMANOWITZ:** Yes.
3696. **DR. SCHINK:** Okay.
3697. **MR. ZALMANOWITZ:** But a fair market value price is not necessarily a competitive price.
3698. **DR. SCHINK:** I think the regulators strive to achieve what is a competitive result but there's no guarantee they get there.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3699. But they do arrive at a fair market value price.

3700. **MR. ZALMANOWITZ:** Now, you also use the term “workably competitive” in your evidence.

3701. And so you say that, as part of your analysis, it was necessary to determine whether the origin and the destination markets were workably competitive and to result in a -- or to be able to conclude that the Open Season process produced fair market value competitive prices -- that that was part of your analysis.

3702. **DR. SCHINK:** Yes.

3703. **MR. ZALMANOWITZ:** Now, my understanding of “fair market value” in the literature would be a situation like this: If my wife and I were going to get divorced -- which is not the case -- and we agreed that she would get the house and we’re dividing up the property, we’re not actually selling the house but somebody’s got to come up with a fair market value of the house to determine how we’re going to settle the property.

3704. Those -- that’s an example of where courts use fair market value; correct?

3705. **DR. SCHINK:** Yes.

3706. **MR. ZALMANOWITZ:** They’d use it in tax cases where you have deed dispositions and you’ve got to assess taxes where really you’re trying to estimate in the absence of a sale, what would have happened in a sale between arm’s length parties -- that’s the kind of situation where that arises.

3707. **DR. SCHINK:** They’re trying to estimate what the value would have been in a competitive open market transaction, yes.

3708. **MR. ZALMANOWITZ:** Not necessarily competitive.

3709. I’ve read those cases. They don’t use the word “competitive”.

3710. **DR. SCHINK:** They may not use the word, but I think what they’re looking for, in my experience, is, in fact, a price that would be determined in the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

open marketplace and ---

3711. **MR. ZALMANOWITZ:** Now ---

3712. **DR. SCHINK:** --- generally competitive.

3713. **MR. ZALMANOWITZ:** Now, in my example of the divorce and the house, if I happen to have the only house in the city and so I had a monopoly on a house in the city, the fair market value, just pick that price, what would I get for that house; correct?

3714. **DR. SCHINK:** Correct. And what you're saying is if there isn't a market price, the Courts have to resort to some form of estimation methodology to reach a price, I will agree, but their first choice is a market price.

3715. **MR. ZALMANOWITZ:** Well, if there's market power, if somebody in those situations has an advantage, they want to make sure that we're fairly distributing our property. They're not concerned in a case fair market value whether that's the competitive price.

3716. **DR. SCHINK:** But if they ascertain as part of these proceedings that there is a market price, a fair market price, a market value, if you will, in the open market for that property, whatever it may be, house or anything else, that is the Court's first choice.

3717. **MR. ZALMANOWITZ:** Yeah, if they can go and see comparables.

3718. **DR. SCHINK:** Yes, essentially.

3719. **MR. ZALMANOWITZ:** Right. And if they saw -- if we could produce that there were a number of offers even though there wasn't a sale because everybody wanted that house -- it was the only house -- that would be a pretty good indicator of what a fair market value was or at least a floor for fair market value of those offers. It wouldn't have any regard to whether there was a lot of competition for that house.

3720. **DR. SCHINK:** I guess in your -- if -- there would be a concern that, you know, that for whatever reason the price was not unreasonable or that the resulting division in property in your divorce case was fair. That if -- one way or the other that the value assigned to the house wasn't in some sense too high

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- because of short-term or irregular market conditions or what have you.
3721. So it's not as simple, I think, as you infer. And basically, you're -- we have to bear in mind in your hypothetical you're proposing sort of a monopoly situation. You have the only house; therefore, you're the monopolist. I think that's a situation that really is not very relevant here.
3722. **MR. ZALMANOWITZ:** I'm just saying that fair market value generally in those cases and those contexts doesn't really tell you much about a competitive price, the different concepts. Certainly -- that's all I'm trying to say.
3723. **DR. SCHINK:** What I'm trying to say is you've come up with what I would call a contrived hypothetical. It really is the exception, not the rule to these sorts of cases.
3724. **MR. ZALMANOWITZ:** Well, it illustrates a point, I think. Anyway, I'm going to move on from that.
3725. You've already agreed with me that the merger enforcement guidelines published by the Competition Bureau and the Abuse of Dominance Enforcement Guidelines don't really deal at all with the concept of -- they don't use the term "fair market value".
3726. **DR. SCHINK:** I do not recall seeing it in the documents, no.
3727. **MR. ZALMANOWITZ:** Now, in your evidence you conducted analysis of Trans Mountain pipeline's origin and destination markets and the competition faced by Trans Mountain from alternative options to secure shipper commitments for the Trans Mountain expansion; correct?
3728. **DR. SCHINK:** Are you talking about the HHI analysis or are you talking about the other analysis?
3729. **MR. ZALMANOWITZ:** I'm talking about Part 4, yeah.
3730. **DR. SCHINK:** Let me just take a look.
3731. **MR. ZALMANOWITZ:** So that's Exhibit B15-6, your revised direct evidence, page 37, which I believe is Adobe page 41.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3732. **DR. SCHINK:** Yes, okay. These are the -- if we're on this division, my discussion of the open season process and why I believe it was a competitive and fair process is contained, I think, in sections -- let me look at the Table of Contents. I just want to make it clear that we've got two parts of this and which one we're talking about.
3733. I think the Section 3 of my revised direct evidence which goes from, I think, Adobe 12 to Adobe 39 is what deals with my assessment of why the open season process results in a competitive fair market value price.
3734. The section you're pointing now looks at whether or not the origin and destination markets served by Trans Mountain are competitive -- were competitive at the time of the open season negotiations 2011 and would be competitive at future time periods, I think most importantly, at the time when the Trans Mountain expansion is expected to be completed in 2017.
3735. **MR. ZALMANOWITZ:** Right. So that's all I was doing is focusing your attention to the part of your evidence that I want to ask some questions on. That's part of it.
3736. It's the analysis of the competitiveness of the origin and the destination markets, not the discussion of the open season process and sophistication of the parties.
3737. **DR. SCHINK:** I just wanted to make sure that not only you and I understood what we were talking about.
3738. **MR. ZALMANOWITZ:** Okay.
3739. **MR. NETTLETON:** Mr. Chairman, apparently there's an audio problem with Mr. Schink's mic -- or Dr. Schink's mic.
3740. And perhaps it would be solved if, Dr. Schink, you could speak closer to the microphone.
3741. **DR. SCHINK:** Okay, I will. Does this help? Is this better?
3742. **THE CHAIRMAN:** Yes.
3743. **MR. ZALMANOWITZ:** So at paragraph 71 of your direct evidence,

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

which is Adobe 42, you state that the general approach that you employed:

"...to assess the competitiveness of the markets served by an oil pipeline [is to] assess whether the oil pipeline has market power in these markets..."

3744. And that's the origin market and the destination market. And you said it's based on the

"...methodology [...] employed by the Canadian Competition Bureau, the U.S. Department of Justice, and the Federal Trade Commission."

3745. **DR. SCHINK:** The general approach, I think, is consistent with what is done -- or the approach is to analyzing market power by these anti-trust agencies. The specific -- and the specific methodology was developed by the Department of Justice in its Oil Pipeline Study.

3746. **MR. ZALMANOWITZ:** So what you're saying is that the approach that you adopted is similar to the approach that they would adopt for that purpose; correct?

3747. **DR. SCHINK:** Who is "they"?

3748. **MR. ZALMANOWITZ:** The Canadian Competition Bureau, the U.S. Department of Justice and the Federal Trade Commission. And then you also state that the Canadian Competition Bureau and the Department of Justice use a common process.

3749. **DR. SCHINK:** Their approach has a lot of similarities, from what I've been able to ascertain, and from my review of the documents as well as discussions with my colleagues who've had some experience in both venues.

3750. **MR. ZALMANOWITZ:** So if we take the Competition Bureau, they would start by defining the relevant market both in terms of the product or services being supplied. They would then identify a geographic market. They'd identify the suppliers of the firms, compete in those markets and then they would, in a general sense, try and go calculate a measure of market share or concentration; correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3751. That's their -- generally, that's what their starting point would be.
3752. **DR. SCHINK:** Yes, that's -- and that's also the approach used by the DOJ and FTC in their merger guidelines and in their actual practice.
3753. **MR. ZALMANOWITZ:** And then, after that, if there was some concern that they were over a -- a threshold or a measure that would go on and consider other factors and another important factor -- and you discuss it -- is barriers to entry.
3754. Correct?
3755. **DR. SCHINK:** Yes, that's one of the factors.
3756. **MR. ZALMANOWITZ:** Now, ---
3757. **DR. SCHINK:** Might I just add: I think another important factor is countervailing power.
3758. In other words, our -- the -- the market strength, if you will, or size or effectiveness, if you will, of the people on the other side of the transaction.
3759. **MR. ZALMANOWITZ:** Now, that -- that's something that can be one of the factors considered at a later stage. And that's in the merger enforcement guidelines. That's fine. We'll -- we can talk about that later.
3760. Now, for a crude oil pipeline like -- like the Trans Mountain expansion, you identified two products. One was crude oil and the other was refined products. And for geographic markets, you considered an origin market which is a receipt points -- or point -- and the destination market which would be the delivery points.
3761. Correct?
3762. **DR. SCHINK:** Yes.
3763. **MR. ZALMANOWITZ:** And then, you concluded that, if the origin and the destination market assessment determines that the oil pipeline faced sufficient competition so that it could not profitably exercise market power within an origin or a destination market then that market would be deemed

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

workably competitive.

3764. That's your -- that was your approach.

3765. **DR. SCHINK:** They -- it's -- that's correct but they do a separate evaluation of the origin and destination.

3766. **MR. ZALMANOWITZ:** I agree with you ---

3767. **DR. SCHINK:** Okay.

3768. **MR. ZALMANOWITZ:** --- that they do those separately.

3769. **DR. SCHINK:** Right. Okay. That's all I wanted to make sure.

3770. **MR. ZALMANOWITZ:** And so that -- that's -- your definition of workably competitive is the market, whether it's the origin market or the destination market, it's workably competitive if the pipeline could not profitably exercise market power.

3771. Correct?

3772. **DR. SCHINK:** In either of the origin or the destination.

3773. **MR. ZALMANOWITZ:** In either of the origin or the destination market.

3774. **DR. SCHINK:** Correct.

3775. **MR. ZALMANOWITZ:** You've got market power in one but not in the other.

3776. You would still have market power in one of those two markets.

3777. **DR. SCHINK:** And market power in-- you know, for any movement between them.

3778. **MR. ZALMANOWITZ:** Yeah.

3779. So if we take your definition of "workably competitive" and apply it to

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- this situation -- and I'm going to focus my questions on the origin market for crude oil.
3780. That's right.
3781. **DR. SCHINK:** The Western Canadian crude oil market?
3782. **MR. ZALMANOWITZ:** That's right.
3783. **DR. SCHINK:** Okay.
3784. **MR. ZALMANOWITZ:** And focussing on the origin market not the destination market.
3785. So the question would be, if we applied that to this case, would be: At the time of the Open Season, the origin market was workably competitive if Trans Mountain could not profitably exercise market power at that time period during the negotiation period?
3786. **DR. SCHINK:** Yes.
3787. **MR. ZALMANOWITZ:** And further refinement, what you mean by "profitably exercise market power" would be profitably obtain a toll that is above the competitive toll assuming we knew what the competitive toll was.
3788. **DR. SCHINK:** Well, I mean, the -- the -- you -- yeah. Yes.
3789. You don't have -- the idea is, if there's enough competition, you can be assured without knowing exactly what that number is that it won't be exceeded. That's one.
3790. And that's a common approach in these markets. You don't have to know the number you just have to know there's enough competition to ensure that no party would be able to charge a super competitive price.
3791. **MR. ZALMANOWITZ:** It was just the -- the purpose of that question was you used in your definition of "workably competitive" profitably exercise market power and if you look at the definition of "market power" in the merger enforcement guidelines, if market power means profitably sustain a price above a competitive level.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3792. **DR. SCHINK:** For a significant period of time.
3793. **MR. ZALMANOWITZ:** For a significant period of time.
3794. **DR. SCHINK:** Yes.
3795. **MR. ZALMANOWITZ:** Now, in the case of the negotiations where the shippers are negotiating tolls for 15 or 20 year time periods, once those are negotiated, those are fixed for 15 or 20 years.
3796. **DR. SCHINK:** Correct.
3797. **MR. ZALMANOWITZ:** And 15 or 20 years would be a significant period of time to be able to sustain a toll above a competitive price level assuming it was above the competitive price level.
3798. **DR. SCHINK:** That meets the significant period of time test, yes.
3799. **MR. ZALMANOWITZ:** Right.
3800. The Competition Bureau would use one maybe two years as a significant period of time.
3801. **DR. SCHINK:** As would the DOJ or FTC.
3802. **MR. ZALMANOWITZ:** Right.
3803. And for a substantial increase in price, they would, as a rule of thumb, consider a five percent increase to be a -- a significant or material increase in price.
3804. **DR. SCHINK:** Yes.
3805. And as do the DOJ and FTC.
3806. **MR. ZALMANOWITZ:** And the DOJ would consider that as well.
3807. Now -- so in your evidence, you calculated HHI's, Herfindahl-Hirshman Indexes which is a measure of concentration.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3808. Correct?

3809. **DR. SCHINK:** Correct.

3810. **MR. ZALMANOWITZ:** So to do that properly and if we take the example of the origin market -- you had to consider all of the alternatives -- the shippers in that origin market, Alberta -- would have to the Trans Mountain expansion at the time of those Open Season negotiations and you would include only those which are close substitutes for Trans Mountain's expansion.

3811. Correct?

3812. **DR. SCHINK:** Yes, but again, it's -- there's a problem with that phrase. It co-substitutes maybe in the eye of the beholder sort of thing.

3813. What -- what both -- what these agencies do is to decide -- and both the -- and the Competition Bureau from reading what they've said and from my own experience of DOJ and FTC is their -- they determine -- you know, in the case of evaluating whether a seller has market power, they go -- they look at who else that seller's customers are purchasing things from or purchasing a similar service from.

3814. And I think -- and they, you know, view that or view, you know, what the customers by their actions have deemed to be good alternatives to be; you know, sufficiently good substitutes to be included in the analysis.

3815. They don't engage at that level on any kind of specific price test or price difference. They -- they allow -- they trust the customer or the market participants' judgements and actions in terms of determining who's there.

3816. **MR. ZALMANOWITZ:** Well -- so there are a number of parts to your answer, one is it's from the perspective of the customer.

3817. Correct?

3818. **DR. SCHINK:** The customer --

3819. **MR. ZALMANOWITZ:** The substitutability of the alternatives is really from the perspective of the customers and, in that case, it would be shippers

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

or potential shippers on the Trans Mountain expansion.

3820. Correct?

3821. **DR. SCHINK:** They -- they interview the customers and they include in the list of competitors all the alternatives that all -- all the shippers have either in -- I guess, in this context, it would be any -- you know any other alternative that the -- that the shippers are actively using or have entered into contracts to use.

3822. I think, in the context here, there are contract -- you know -- or contracts with Keystone XL. There's contracts with Northern Gateway that are in place which would suggest that they're -- they're in competition. And there are -- they would also include, based on further analysis, anybody they thought could enter in the same timeframe as these. So ...

3823. **MR. ZALMANOWITZ:** Well, don't they include that entry at a later stage of their analysis?

3824. At least the Canadian Competition Bureau?

3825. **DR. SCHINK:** After they have identified those who are actually been -- are being used or have made -- or have been contracted with by the shippers that they then look to entry; you're right.

3826. **MR. ZALMANOWITZ:** So they -- they don't look at entry until a later stage.

3827. **DR. SCHINK:** A later stage of the ---

3828. **MR. ZALMANOWITZ:** That's right.

3829. They separate the -- the analytical framework goes in defined stages. They will look at entry later on.

3830. So ---

3831. **DR. SCHINK:** But -- but I think the point is the process doesn't finish until they've looked at entry in Tyler Veiling part of Western ---

3832. **MR. ZALMANOWITZ:** And I -- no, I agree with you.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3833. **DR. SCHINK:** Okay.
3834. **MR. ZALMANOWITZ:** We're just taking this one stage at a time.
3835. **DR. SCHINK:** That's fine, okay.
3836. **MR. ZALMANOWITZ:** Okay? But I don't agree with you on -- that they would simply accept, well, you know, who else are you using, what other things -- they would say, well, what are -- they would do a more rigorous analysis of what were reasonably close substitutes at that time.
3837. They use something called a "hypothetical monopolist test", do they?
3838. **DR. SCHINK:** They use it, but not for the reason -- not for the purposes you're suggesting.
3839. **MR. ZALMANOWITZ:** I'm going to disagree with you. I suggest to you and put to you that they use that exactly for the purpose I'm suggesting.
3840. **DR. SCHINK:** Well, let me -- my specific knowledge is and detailed knowledge is how the Department of Justice and the FTC go about it.
3841. They rely extremely heavily on the actions of the participants in the marketplace and don't try to second-guess it on the basis of price test. The way that the DOJ and FTC use it, they've identified the -- basically by talking to customers, and maybe competitors, but largely customers, identify who else is in the market, who else these people are buying from and then they assume that the merged companies, in the case of a merger, and all their competitors are a hypothetical monopolist.
3842. Then they say if that hypothetical monopolist consisting of the merged parties and everybody else they know in the market were to raise their prices by five percent, who else would enter the market. That is the so-called SSNIP test ---
3843. **MR. ZALMANOWITZ:** Right.
3844. **DR. SCHINK:** --- that is employed ---
3845. **MR. ZALMANOWITZ:** It's a conceptual test, the SSNIP test.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3846. **DR. SCHINK:** It's a conceptual test, but they -- my experience has been they don't use it to question alternatives the customers are using. They use it to find out if there are others in the margin who minded or -- given a say of five percent price increase.

3847. **MR. ZALMANOWITZ:** Well, so what you're telling me is you're not familiar with how the Canadian Competition Bureau would use it. Your experience is only with the Federal Trade Commission or the Department of Justice.

3848. **DR. SCHINK:** Well, you -- I grant you that. And the Canadian Bureau may use it differently, but from my reading of their documents and how they've described it, it sounds like they do the same thing that the FTC and DOJ does.

3849. But I admit I haven't -- I haven't participated in the process, so they may do something slightly differently.

3850. **MR. ZALMANOWITZ:** So if they -- I agree with you what they would do is very important for them. They would go and solicit the views of the shippers and they would say, "At this time, during this open season process, who did you perceive were as close substitutes for making a commitment to ship on the Trans Mountain expansion?"

3851. They would ask that question. They would go to the shippers and they would ask that question. Do you agree?

3852. **DR. SCHINK:** In -- well, we're not talking about a merger here but, I mean, I guess if -- you know, if they were somehow investigating the open season process -- I thought we were talking about origin destination market. Now we seem to have moved ---

3853. **MR. ZALMANOWITZ:** We're not talking about the process. I'm saying that if there were a case where they had to identify whether Trans Mountain had market power at the time of the open season process -- we're using their analytical framework because in abuse of dominance cases or merger cases, they have to do that.

3854. So we're examining the process that would be used by a competition

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- agency and you said that the Department of Justice and the Federal Trade Commission would place emphasis on the views of the customers, that they would ---
3855. **DR. SCHINK:** They would find out who else they were doing business with, who else they bought from, who else they had contracts with. And I think in this -- we have now totally mixed up the open season process with my origin destination market analysis, but ---
3856. **MR. ZALMANOWITZ:** No, we haven't, sir.
3857. **DR. SCHINK:** Well ---
3858. **MR. ZALMANOWITZ:** What we've done is I've asked you, in the origin market at the time of the open season -- because if the Competition Bureau's not involved in that process, they would say at that period of time, to analyze whether there was market power on the part of Trans Mountain, they would look at those shippers or anyone who might want to ship -- not necessarily those who signed on because there may be some who didn't sign on.
3859. **DR. SCHINK:** Okay. Look ---
3860. **MR. ZALMANOWITZ:** But they would get the views and they would say "What alternatives were close substitutes for you at that time? What alternatives did you have at that time?"
3861. **DR. SCHINK:** Okay.
3862. **MR. ZALMANOWITZ:** That's for the market definition purposes.
3863. **DR. SCHINK:** My problem with this is not the statement. I'm not sure what context we're talking.
3864. The origin destination analysis that was done for 2011 were who was active in the market in 2011, not who might be active in 2017 when ---
3865. **MR. ZALMANOWITZ:** Well, you didn't ---
3866. **DR. SCHINK:** Let me finish, please. Not in 2017 when the Trans Mountain might be projected.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3867. I also did a separate analysis of who would be present or might be present in 2017 to see how competitive that market would be, which is when Trans Mountain plans to operate.
3868. Now, if we want -- if, in the context of the open season, if for other reason that was being investigated, you know, by the Competition Bureau, they would want to find out from all the shippers, all the potential shippers, what other options were they using and considering, you know, at that time. And I submit that there are a large number of them.
3869. **MR. ZALMANOWITZ:** Okay.
3870. **DR. SCHINK:** There are -- and I've enumerated several ---
3871. **MR. ZALMANOWITZ:** I know you're -- you're starting answering questions that I haven't asked you yet.
3872. **DR. SCHINK:** Well, we seem to have gotten to a place that I'm confused about what you're asking about and I'm concerned that everybody would be confused what we're talking about.
3873. **MR. ZALMANOWITZ:** Well, let me try and clarify it for you. I'm not confused what I'm asking about, so that's a good start.
3874. But what we're trying to do is determine whether, in your HHI analysis, you included the appropriate alternatives, whether you included only alternatives that were good substitutes in the minds of shippers from Alberta during a relevant time period, being the open season time period.
3875. **DR. SCHINK:** Well, it's not just in their minds. The questions that get asked by the -- by at least -- I'll stick to DoJ and FTC and assume that more or less the Competition Bureau does similar things -- is not what do you think, but who are you using, who have you got contracts with.
3876. They don't, you know, they -- to transport your oil out of this market in the case of the Western Canadian origin market.
3877. And I think they -- all the ones that I included in my 2011 analysis, I think there's no dispute that all the pipelines and all the refineries I've included as

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- possible outlets for that crude oil are being used.
3878. When I get to 2017, which is when the Trans Mountain expansion would first begin, I mean, what I have included as possible alternatives -- or 2017-18, the alternatives I have included in my analysis include the Keystone XL and after -- somewhat after Trans Mountain is Northern Gateway.
3879. So I think those are the alternatives that I have included in my analysis.
3880. **MR. ZALMANOWITZ:** I appreciate that that's what you've included, but what I'm saying is the Competition Bureau would question whether it was appropriate to include a particular ---
3881. **MR. NETTLETON:** My friend is asking the witness about whether the Competition Bureau would make a conclusion. How is it possible for Dr. Schink to answer a question about what the Competition Bureau may or may not decide?
3882. **MR. ZALMANOWITZ:** He, in -- Dr. Schink, in his evidence, said that his analysis follows the same approach used by the Competition Bureau in the merger enforcement guidelines, so if that provides the context for it, that's really what I'm asking him is based on his understanding. And it's in his evidence.
3883. He says this is how -- this is the approach that they would follow. And I'm testing him on that, and I'm entitled to do that.
3884. **MR. NETTLETON:** Mr. Chairman, I'm not quarrelling with my friend testing this witness on his evidence. What I was quarrelling about was how my friend framed the question and, in particular, asking this witness to respond to how the Competition Bureau would decide a matter.
3885. And that's, in my respectful opinion, where we have to draw the line. It's not within this witness' purview to make statements about what the Competition Bureau may or may not do.
3886. **MR. ZALMANOWITZ:** I can rephrase my question.
3887. Was your perception of what they would do based on your experience

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

and your review of the merger enforcement guidelines? Is that ---

3888. **DR. SCHINK:** My -- my understanding of the process, I think I've described, I admit it was based on my understanding of the process as applied by the Department of Justice and the FTC, more specifically, and my reading of the documents which suggested to me that they followed a -- a very similar process and -- so I'm -- that's, I think my answer.
3889. **MR. ZALMANOWITZ:** Generally speaking though, you're understanding of a process would be if I ask you a general question, whether it's a Department of Justice or the Federal Trade Commission based on your understanding of what they would do, is it not the case what they would try and do is include in their analysis of market definition for the purposes of market share or market concentration calculations, to include only suppliers of a good substitute for the product from the perspective of the customers?
3890. **DR. SCHINK:** The agencies draw their own conclusions. They put a lot of weight on actions because of some -- some parties who they talk to are opposed to the merger and they -- that's why they rely very heavily on their actions as opposed to exactly what they say, and I think that's an intelligent way of doing it. I think your actions speak -- I think it's sort of a notion the -- your actions speak louder than your words. If you are using something or have made commitments to use something, that's evidence it must be a good alternative or you wouldn't use it.
3891. It's also the position, I think, that the DC Circuit took in its review of a -- of a regulatory commission decision that the -- that to the contrary, that the fact that the Canadian producers were using a lot of alternatives in the upper Midwest was proof that they ---
3892. **MR. ZALMANOWITZ:** Now you're just interpreting some U.S. case law.
3893. **DR. SCHINK:** No, I'm not interpreting ---
3894. **MR. ZALMANOWITZ:** Right ---
3895. **DR. SCHINK:** --- I'm reporting it -- they -- they found that economic argument compelling ---

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3896. **MR. ZALMANOWITZ:** You're not -- you're not answering the question. You're ---
3897. **DR. SCHINK:** I'm -- I apologize ---
3898. **MR. ZALMANOWITZ:** You're giving me a lecture.
3899. **DR. SCHINK:** I -- I apologize. Would you restate the question?
3900. **MR. ZALMANOWITZ:** So the question basically is this; that in the analysis of who to include in a market definition for the purposes of calculating market share, you've got to include only reasonably close substitutes. That's a general proposition; correct?
3901. **DR. SCHINK:** As -- yeah, as a general proposition, yes.
3902. **MR. ZALMANOWITZ:** And the reason that you include only reasonably close substitutes is because they will exercise price discipline on the effort by the pipeline company in question to exercise market power?
3903. **DR. SCHINK:** Yes.
3904. **MR. ZALMANOWITZ:** So if we look at your market share calculations which are at -- in your evidence there at Adobe pages 67 to 82. And that -- there you list all of the companies that you believe should be included for the purposes of calculating market shares at various points in time and you use various time periods; correct?
3905. **DR. SCHINK:** Yes, that's correct.
3906. **MR. ZALMANOWITZ:** And you've got to use different time periods because the open season was conducted at the end of 2011 and 2012, but really, what they were doing is contracting for capacity from probably 2017 for a period of 15 or 20 years after that; correct?
3907. **DR. SCHINK:** Correct.
3908. **MR. ZALMANOWITZ:** And so to analyze market power, you really had to consider perceptions or expectations of shippers in 2011 and 2012 and their -- well, their expectations for what would likely happen in the future?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3909. **DR. SCHINK:** Yes, assuming -- and I have assumed the expectations were well informed and they were aware of everything that the pipeline was aware of.
3910. **MR. ZALMANOWITZ:** Certain assumptions and if the assumptions are wrong, then you get different conclusions. If the assumptions are right, then your calculations are accurate; correct?
3911. **DR. SCHINK:** That's correct, but I think it's safe to assume that the shippers in this case were very well informed about the market conditions in western Canada and the expectations for them.
3912. **MR. ZALMANOWITZ:** Well, I agree with you that you have to assume that they were informed of them, but their -- their information may not have been the same as yours. Their assignment of expectations and probabilities may or may not be the same as yours. You'll agree with me?
3913. **DR. SCHINK:** Yes, but that's not a condition. The fact you will look at it and reach different conclusions doesn't mean that you didn't have all the same information and didn't approach the -- the information with the same level of sophistication. So it's -- the fact that you may reach different conclusions really doesn't -- doesn't alter the fact that you had all this information and knew how to use it.
3914. **MR. ZALMANOWITZ:** So if -- if you looked at Table 4.1 and you look at Panel 3 and you're looking at 2017, what you are including is the Trans Mountain expansion as well as all of the other export pipelines that are listed above Panel 3, and refineries and rail to Vancouver, correct, as alternatives?
3915. **DR. SCHINK:** In 2017 we're also adding or including additional rail capacity which -- a fact that's materializing more quickly than we expected.
3916. **MR. ZALMANOWITZ:** So if you referred to the merger enforcement guidelines and if they -- if you assume that that's what the Competition Bureau would follow, they would -- they would ask this question: They would say, conceptually, a relevant market is defined as the smallest group of products in which a sole profit maximizing seller -- also called the hypothetical monopolist -- would impose and sustain a small but significant non-transitory increase in price. That's what the merger enforcement guidelines state; correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3917. **DR. SCHINK:** And also what the DOJ and FTC say.
3918. **MR. ZALMANOWITZ:** And so if you were following those guidelines, you would look at every one of those alternatives included and you would test whether you would start from the smallest and you would go out and that's how you would define the market if you were doing it according to the merger enforcement guidelines; correct? That's conceptually how they would do it.
3919. **DR. SCHINK:** I again, we have this difference. The -- certainly the TransCanada PipeLine, its contracts, the -- Kinder Morgan is under -- has, you know -- has negotiations. There are commitments to the Enbridge Northern Gateway Pipeline that follows it. There are -- there is current evidence.
3920. When you're looking forward this far, I mean, the one difference I think between the analysis done here and would be done in a merger -- merger case as we're looking forward at the time this analysis was done -- five years, and so you, you know, you'd have to make the decision of who -- who was going to be in the market, who was going to be used.
3921. And I think you'd have to assume from my view that because, you know, because the other projects have gotten support, you know, that it is appropriate to include them as competitors. And again, the customers have spoken with their dollars and their actions.
3922. **MR. ZALMANOWITZ:** What they're looking for -- the shippers on the Trans Mountain expansion is going to come on-stream late 2017 we heard in evidence earlier today. That's when it's expected assuming it goes forward. What they are looking for is anticipated new production that they can ship to export markets, beginning in 2017 into the future; correct?
3923. **DR. SCHINK:** Correct.
3924. **MR. ZALMANOWITZ:** So that if those other pipelines are already full, those aren't really going to be good substitutes are they?
3925. **DR. SCHINK:** Well, we do compare in our analyses the capacity that's available to either transport or process the crude oil in western Canada -- by "process" I mean the refineries who can process the crude -- with the production

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- and the various tables, which I think are in my Appendix C, which is B15-9, are -- you know, present all of these analyses and they do show, in fact, that there is more capacity in either refineries and/or pipelines than is needed to absorb -- that is necessary or required to -- so I say absorb the crude oil produced in western Canada.
3926. **MR. ZALMANOWITZ:** Well, we'll get to that later. I wanted to ask you questions about that later, and that was your basis for doing adjusted capacities in your HHI calculation, but I'll come to that later.
3927. But your analysis assumes that all of those pipelines, rail transportation and, refineries would, in the minds of the shippers in 2011 and 2012, have been close substitutes for committing to shipping on the Trans Mountain expansion from that time in the future; correct?
3928. **DR. SCHINK:** They would be considered competitive alternatives. I think we have -- you are postulating that some price test is required to have them included, and I'm -- sir, I'm arguing, and I think based, if you will, on my experience in the U.S. at the DOJ and FTC, that if in fact commitments -- they're either known to being used or commitments had been made to use them, these agencies would consider them to be good alternatives or else they wouldn't be used.
3929. And I think -- and they wouldn't resort to a price test to try to prove that they were being -- the fact that they were being used indicated shipper rationality in some sense. And I -- they don't go there. At least, the U.S. doesn't and I don't ---
3930. **MR. ZALMANOWITZ:** Okay, you don't know what they do in Canada?
3931. **DR. SCHINK:** I don't know for certain, but I know from reading the documents, they don't suggest to me that they follow such an approach.
3932. **MR. ZALMANOWITZ:** Well, there's nothing in the Merger Enforcement Guidelines or any public document that I could find published by the Competition Bureau that will assume that if they were analyzing an oil pipeline case, that they would assume that all export pipelines, all refineries and all rail transportation out of an origin market should be assumed to be included in the same relevant market without testing that proposition.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3933. Do you agree with me on that?
3934. **DR. SCHINK:** The testing though is -- I think the best test, and you know, I can only speak for how the U.S. ---
3935. **MR. ZALMANOWITZ:** Just answer my question please. It's just there's nothing in the Merger Enforcement Guidelines or any document -- public document published by the Competition Bureau that would say that you just assume in an analysis of market power on a pipeline, that you just assume all of those are in the same relevant market; correct?
3936. **DR. SCHINK:** I don't think there's a statement in any document that they said they didn't either or that they -- you know that they wouldn't.
3937. **MR. ZALMANOWITZ:** Well, answer my question first. Because I suspect if there was something it would have been in your paper and it would have been lights flashing around it as well.
3938. **DR. SCHINK:** The -- I -- you know, I -- there's nothing written down that says, you know, that they, you know, are -- you know, they do -- that goes on in great detail what they do. It was clear to me, however, from the fact of the order of discussion, they discussed identifying market participants.
3939. And then after they discussed that they discussed applying the so-called SSNIP test, which says to me that they included all the -- all the used -- you know, all the alternatives were being used. And I do know that's how the FTC and DOJ do it.
3940. So I mean I -- you know, can I point to a smoking-gun sentence? No.
3941. **MR. ZALMANOWITZ:** But you didn't see anything in the guidelines that says they're not going to use the small but significant non-transitory increase in price, the SSNIP test. That's what they conceptually used, correct?
3942. **DR. SCHINK:** To see if there are alternatives not currently active who could be expected to begin supplying the market if a hypothetical monopolist, who effectively earned all the -- controlled all the existing participants were to raise their price by a SSNIP.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3943. That's how the SSNIP test is used, ---
3944. **MR. ZALMANOWITZ:** No, I don't ---
3945. **DR. SCHINK:** --- as I understand it.
3946. **MR. ZALMANOWITZ:** It says what it says, but you didn't accurately summarize what that approach is, but I'll leave that.
3947. One last thing; are you suggesting that, for example, the Competition Bureau was investigating whether there was market power in watches and the fact that I had both a \$10 Timex and a \$2,000 Rolex, that they would say that those are in the same market?
3948. **MR. NETTLETON:** Mr. Chairman, again, I'm failing to see the relevance of this line of questioning. My friend is using an analogy and again asking the witness to make opinions or statements about what the Competition Bureau would find about watch making.
3949. Perhaps he could refer it back to the evidence that this witness has sponsored and his testimony so that we could get back on track with the matters at hand.
3950. **MR. ZALMANOWITZ:** If you, Dr. Schink, were asked by competition authority like the Competition Bureau to determine whether a \$20 Timex watch was in the same relevant market as a \$2,000 Rolex market, would you conclude that they were simply because people use both of them and they both told time?
3951. Would that be good enough for you?
3952. **DR. SCHINK:** I think the -- you know, I don't think that that's a -- I think that's an extreme example. I think we're talking about not -- not desperately different products here. I mean ---
3953. **MR. ZALMANOWITZ:** I guess your answer to that question is no, you wouldn't -- you wouldn't advise them that they are in the same market. You'd say you have to do a little more work on that; correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3954. **DR. SCHINK:** In that case, yes, and I -- but I think the point I'm trying to make is we're not -- you know, the service offered by alternative pipelines is very similar. It's not -- we don't have the equivalent of a \$20 Rolex and -- or \$20, I'm sorry, Timex and a \$2,000 Rolex here. We talking about ---
3955. **MR. ZALMANOWITZ:** If one of ---
3956. **DR. SCHINK:** --- providing more or less the same service.
3957. **MR. ZALMANOWITZ:** Okay. For example, if one of the alternative pipelines is already full, then it's not going to be able to exercise competitive discipline on the Trans Mountain Pipeline; correct?
3958. **DR. SCHINK:** If there's -- if there's no -- if basically all the pipelines are full, all the other pipelines are full, there's no additional space available anywhere else, then there is -- then and in fact there wouldn't be an opportunity for the other pipelines to react.
3959. But again, that would be -- presumably, it might be a short term market condition, one that one wouldn't expect to persist in the long-run.
3960. So you really have to, if you're going to evaluate what's going on here, is not a short term, say, excess supply situation and try to draw long-run conclusions from it.
3961. But in reality, if all the other pipelines are full, then they couldn't do anything in response, but I think that's sort of an empty hypothetical.
3962. **MR. ZALMANOWITZ:** But if you're calculating market shares and one of them is already full and it's committed for long-term, then you've got to take that out of your calculation don't you?
3963. **DR. SCHINK:** You also have to take the product it's carrying out of the calculation too. So it's not -- it changes the whole calculation.
3964. **MR. ZALMANOWITZ:** Yes. But it's not going to be a competitive alternative for the product that's going to be produced by the shippers in 2017. That's not an alternative for them to move their product to an export market?
3965. **DR. SCHINK:** I disagree. I mean if we're talking about the fact -- if

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- you're trying to get to the fact that Northern Gateway was fully committed or that Keystone XL was fully committed, there is a secondary market. So there -- there are opportunities there.
3966. **MR. ZALMANOWITZ:** All right.
3967. **DR. SCHINK:** And there's nothing to -- you know, and my understanding is neither pipe is -- is at its maximum physical capacity.
3968. So I -- I, you know, I wouldn't disagree -- I can't -- I can't agree with you.
3969. **MR. ZALMANOWITZ:** Well, I asked you to assume if it was full and fully committed then it would not be a competitive alternative to shippers thinking about whether they should make commitments on Trans Mountain.
3970. And you've said two things. One, first of all, is: Well, there could be a secondary market. And I wanted to ask you a question about this.
3971. By the secondary market, you mean the shippers who already have committed, for example, on -- let's use Northern Gateway, even though we don't know when that's going to be completed -- but if someone was considering: "Well, I don't really need to make a commitment on the Trans Mountain expansion because I can use Northern Gateway as an alternative." and they find out, well, Northern Gateway is already fully committed -- assume it is -- then you say: Well, it still might be a competitive alternative and exercise discipline because it's a secondary market.
3972. So a secondary market is being -- means that somebody who's bought firm capacity on Northern Gateway rather than using that is going to sell it to somebody else.
3973. Correct? That's what you meant by the secondary market.
3974. **DR. SCHINK:** That's correct.
3975. And it really means that the -- you know, the fact that the pipeline has been contracted doesn't mean the pipeline is full.
3976. **MR. ZALMANOWITZ:** But the shippers are contracting for long

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

terms because they have product they've got to ship on it.

3977. Correct?

3978. **DR. SCHINK:** They have product that given current circumstances they expect to have to ship on it.

3979. But not all expectations are all realized.

3980. **MR. ZALMANOWITZ:** Well, they didn't buy -- are you suggesting that the shippers who made commitments on Northern Gateway bought that capacity so they could speculate on -- on selling that capacity on a secondary market?

--- (A short pause/Courte pause)

3981. **DR. SCHINK:** Well, the shippers include marketers who don't have production and they're -- you know, have -- have contracted for capacity that where they have no production, they're, you know, if they don't line up production to ship, they'll certainly move it.

3982. But the other part of it is that, you know, as there is uncertainty about future production among the producers. I mean, they're -- they don't know exactly how much they're going to need so they're -- they may have contracted and find out that production's lagging behind and will have capacity to sell.

3983. **MR. ZALMANOWITZ:** But are you suggesting that those who made firm commitments, firm long-term commitments, did it with the intention or the primary intention of not using that but selling it on a secondary market?

3984. Yes or no?

3985. **DR. SCHINK:** No.

3986. I mean, I -- they -- some of them may have. Some of them may --

3987. **MR. ZALMANOWITZ:** Or you don't know?

3988. **DR. SCHINK:** Some of them may have.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

3989. I mean, I --
3990. **MR. ZALMANOWITZ:** The answer is: You don't know?
3991. **DR. SCHINK:** I don't know for certain, no.
3992. **MR. ZALMANOWITZ:** Thank you.
3993. So you didn't analyze netbacks shippers for -- could get for their crude oil at various locations in making your decision as to what alternatives should be included in your HHI calculation; correct?
3994. You did not do a netback analysis?
3995. **DR. SCHINK:** I did not do a netback analysis.
3996. **MR. ZALMANOWITZ:** Now, in 2011 and 2012, and you're saying that the shippers were well-informed or reasonably well-informed about market circumstances in this negotiation process?
3997. **DR. SCHINK:** Yes.
3998. **MR. ZALMANOWITZ:** And so it would have been a known fact that, for most of the time since 2006 and perhaps even from 2004, that Canadian heavy crude has been heavily discounted compared to prices in other markets.
3999. Correct?
4000. **DR. SCHINK:** It hasn't been constant.
4001. There have been periods of discounting and periods when it wasn't heavily discounted -- during that 2005 to the current period.
4002. **MR. ZALMANOWITZ:** Well, I was just referring -- what I did was pretty much an exact quote out of the evidence of Mr. Kelly.
4003. And that statement was in 2011 and 2012:

*"It was a known fact that for most of the time since 2006,
Canadian heavy crude has been heavily discounted." (As*

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

read)

4004. So do you agree or disagree with that statement? Or do you want me
to ---

4005. **DR. SCHINK:** No, I agree with the statement.

4006. I'm -- it was -- but, however, there were periods when -- because I
have studied this market for other purposes -- when there was a respite from the
discount. I agree.

4007. **MR. ZALMANOWITZ:** But it says:

“...for most of the time.”

4008. **DR. SCHINK:** For most of the time, I will accept Mr. Kelly's
representation.

4009. **MR. ZALMANOWITZ:** Okay.

4010. Now, if you assume that a Western Canadian shipper, at the time of
the Open Season process, believed that it's netback would be significantly higher
on Trans Mountain expansion because it could get its product to Tidewater and
Asian markets compared to other alternatives, would it not have been advisable to
only include pipelines or alternatives that would result in a reasonably close
netback?

4011. **DR. SCHINK:** I think it would be ill-advised because I think
optionality and diversity of alternatives is very important here.

4012. I think, if you -- I mean, I think Mr. Kelly could explain it more
completely if you'd like.

4013. **MR. KELLY:** Would you like me to do so or?

4014. **MR. ZALMANOWITZ:** Not really.

--- (Laughter/Rires)

4015. **MR. KELLY:** Okay, maybe you'll get to me later.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4016. **MR. ZALMANOWITZ:** Not at this time.
4017. **MR. KELLY:** I'm here if you need me.
4018. **MR. ZALMANOWITZ:** So if you assume that Western Canadian shippers have significant doubts about whether the Keystone XL would be approved at the time of the Open Season -- just assume that ---
4019. **DR. SCHINK:** Okay.
4020. **MR. ZALMANOWITZ:** --- and you assume that they also -- given what they were reading in the paper at the time that the likelihood of Northern Gateway being constructed was also highly doubtful, wouldn't that have been relevant in your decision whether to include those alternatives in your market share, market concentration measures?
4021. **DR. SCHINK:** Well, in this, there are I think many risks and uncertainty associated with Trans Mountain.
4022. And if we're not going to include alternatives because of risk I wouldn't include -- because they faced a substantial amount of risk, I guess I wouldn't include Trans Mountain either which would give me no analysis.
4023. I -- I ---
4024. **MR. ZALMANOWITZ:** We wouldn't be here. We wouldn't be here.
4025. **DR. SCHINK:** We wouldn't be here.
4026. So I -- I think the -- the notion -- I mean, that argument really says that there's a huge difference in the risk faced by those two and Trans Mountain and I think all three face significant risks.
4027. So I don't think it's appropriate to start excluding one or the other on the basis that one is riskier.
4028. **MR. ZALMANOWITZ:** Well, I just asked you to assume that the -- at that time, the shippers believed that even though there's uncertainty that Trans

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- Mountain was their best shot, that that had the highest probability -- that was most likely -- and the others were unlikely, that's going to effect your analysis of market power; is it not?
4029. **DR. SCHINK:** No.
4030. I mean the fact that the shippers had an interest in shipping on Trans Mountain doesn't mean they have market power.
4031. I mean -- and that's all you're saying, they had a reason to be interested in -- in shipping ---
4032. **MR. ZALMANOWITZ:** No, you didn't -- you didn't answer my question.
4033. Assume -- assume that they -- as an economist, you -- you should be used to answering questions where people ask you to assume things. So ---
4034. **DR. SCHINK:** Yes, I am, but ...
4035. **MR. ZALMANOWITZ:** So you assume that those shippers think that Trans Mountain expansion is most likely and the other two are highly improbable then that -- if you accept that assumption, that's going to impact your analysis of market power; isn't it?
4036. **DR. SCHINK:** There -- there's two side -- not necessarily because there's two sides to this negotiation.
4037. If one, you know -- and I'll even give you, if every shipper believed that, it would have to be also that Trans Mountain would have to know it to take advantage of it and I don't think -- and I don't think -- and I know that Trans Mountain didn't believe that there weren't alternatives. So they wouldn't have -- have -- because, you know, I -- they've told me that and I believe it that -- that in fact ---
4038. **MR. ZALMANOWITZ:** Well I don't know if it would help you if I told you that Suncor believe otherwise but that's ---
4039. **DR. SCHINK:** Well ---

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4040. **MR. ZALMANOWITZ:** The evidence is the evidence, where I'm asking you to assume things.
4041. **DR. SCHINK:** Okay, well ---
4042. **MR. ZALMANOWITZ:** And if there's a factual foundation for assumptions then we're helping the Board. If there isn't then we're not helping the Board.
4043. **DR. SCHINK:** Well it would -- you know hypothetical, it would only matter if Trans Mountain was fully aware of it and acted on it.
4044. And I don't know that --, you know, they could if they -- if that was a known fact, and I don't think it was, and Trans Mountain was aware of it they might act on it. But I think if it's a fact that's not consistent with what's going on here.
4045. **MR. ZALMANOWITZ:** Now, just to -- I'm going to put you an extreme ---
4046. **MR. STONESS:** Sorry. I think I'd like to add here. So your question is are -- were we facing competition? And I think the ---
4047. **MR. ZALMANOWITZ:** No, my question was I asked Dr. Schink to assume something and then asked him what impact that has on his conclusions, if he accepts that assumption.
4048. **MR. STONESS:** I understand what you're saying but I'm saying that when we were negotiating these contracts we thought we had competition. The competition was with Keystone, the competition was with Gateway, the competition was with new pipelines that might come into place in four or five years.
4049. Four or five years is a long time. The contract was for 20 years following four or five years. There's lots of potential for other pipelines to be built in that period of time.
4050. We did not think that we had a lack of competition. In fact, we had an open season in 2006 that failed. We had competition when we tried to compete with Keystone XL in about 2008 where we failed. There was a lot of times that

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- we were competing and not succeeding and in this instance we had no comfort that we were not -- that we didn't have lots of competition.
4051. **MR. ZALMANOWITZ:** But Mr. Anderson answered in response to Mr. Miller's questions earlier today that he had no idea when Gateway might be in service and he also does not know when Keystone XL would be in service.
4052. **MR. ANDERSON:** Which is not to say I don't believe they're competition. I just have no knowledge of when they're going to be constructed.
4053. **MR. ZALMANOWITZ:** Is it fair then that the shippers didn't know that either?
4054. **MR. ANDERSON:** I might suggest the shippers even have more knowledge about when that might occur because they're in closer contact and discussion with those two pipelines about service on them.
4055. **MR. ZALMANOWITZ:** Well, I want to move on to get Mr. Schink to actually -- or Dr. Schink to answer one of my hypotheticals.
4056. And just to make a -- to illustrate a point, and it's an extreme point, that -- so if you were doing a competitive impact analysis and at the time of the open season, from the perspective of the shippers in western Canada who are desperate to get their crude product to tide water so they can breach Asian markets, that if their view or their expectation was there would likely not be any close substitutes to the Trans Mountain expansion available by 2017 or shortly thereafter, it could be conceivable that the only firm in a relevant market would be Trans Mountain expansion; is that not the case?
4057. So that's a hypothetical. That's an extreme hypothetical. That's one thing one could postulate.
4058. **MR. ANDERSON:** Well you can assume a lot of things but ---
4059. **MR. ZALMANOWITZ:** I wanted you to assume that.
4060. **MR. ANDERSON:** Well, if that was their view again it would only affect the negotiations if Trans Mountain were aware of it and acted on it.
4061. **MR. ZALMANOWITZ:** Well, no we're back to defining the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

competitive market at that time and including only close substitutes and that's the first stage in how you arrive at an HHI.

4062. And I'm putting to you that if that were the case one could argue that the HHI was 10,000, which is the highest possible measure of concentration and that would indicate, well, there's a serious concern with the competitiveness of this market ---

4063. **MR. ANDERSON:** But we've just ---

4064. **MR. ZALMANOWITZ:** --- in that extreme case; correct?

4065. **DR. SCHINK:** We've just gone beyond hypotheticals. I mean you've basically -- saying that, you know, essentially that, you know, that -- assuming that if the access to the Pacific tide water is in a distinct and separate market from everything else how does that affect my analysis.

4066. Well, it -- one, I'm -- and Mr. Kelly will gladly explain why it's a bad idea to do that or it's inappropriate to do that but it's certainly not an appropriate assumption.

4067. **MR. ZALMANOWITZ:** Well, that's in this evidence and I'll have some questions later on.

4068. **DR. SCHINK:** Okay.

4069. **MR. ZALMANOWITZ:** So you don't agree with me that applying a netback analysis to all of the alternatives available to the western Canadian producers at that time would have been helpful?

4070. **DR. SCHINK:** What price data or what market price data would you have in mind using to do such analyses?

4071. **MR. ZALMANOWITZ:** Well, I would understand that when firms -- when shippers are calculating whether they should make significant long-term commitments to ship on various pipelines that they're probably conducting that kind of analysis.

4072. **DR. SCHINK:** Yes but the issue here in terms of deciding whether to support this pipeline or some other pipeline are really the netbacks that would be

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

expected in the longer term and that this -- no sooner than 2017 and maybe 15 to 20 years beyond that.

4073. And the -- you know, conducting in that -- the market circumstances and the prices expected and the relative prices expecting in the different market places then are expected from -- based on Mr. Kelly's analysis, are expected to be quite different than they are today. And if I were to do a netback based on today's relative prices I would get a very misleading result, I think as also Mr. Kelly discusses.

4074. **MR. KELLY:** Seems like I should probably jump in just at that point. I think the connection you've -- you can tell me if you don't believe that you've made this connection. But the connection in your last couple of questions, hypothetical or not, is that the Canadian producing community, if I could use that term, is desperate to reach Asian markets by one means or another.

4075. And the question around netbacks is presumably behind that hypothetical, that in some way there is a ---

4076. **MR. ZALMANOWITZ:** I'm saying that that's a relevant factor isn't it? We heard evidence earlier, and I forget whether it was Mr. Anderson or Mr. Rinne, when we were talking about tolls on competing pipelines and the response was "no it's not tolls it's netbacks".

4077. **MR. KELLY:** Well fair point but I heard Mr. Rinne explain to Mr. Roth quite eloquently that the tolling regime is one aspect, the freight assumptions that are inherent in the netback calculation are quite another.

4078. And the area that I tend to have most expertise would be in the refining end of the analysis which is extremely relevant when you're looking at Asia because it's not as simple as saying "if I bring my crude to Asia I will get this price".

4079. **MR. ZALMANOWITZ:** No, I'm not saying it's simple. I'm saying that you're with -- your predecessor was Pervin & Gertz. You do netback analysis for your clients don't you?

4080. **MR. KELLY:** Yes, that's right and my answer to 18 in my reply.

4081. **MR. ZALMANOWITZ:** Yes, that's -- you do that. They want that

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

and you do netback analyses and ---

4082. **MR. KELLY:** Yes.

4083. **MR. ZALMANOWITZ:** The farther out in time you get the less reliable they might be. You have to understand the arrangements people make to do them properly, they're complicated, but you still do them.

4084. **MR. KELLY:** Yes, I agree. They are complicated and in the case of Asia I would say the assumptions or premises for that calculation are particularly tricky and we ---

4085. **MR. ZALMANOWITZ:** I was going to get back to you later on it.

4086. **MR. KELLY:** Okay.

4087. **MR. ZALMANOWITZ:** And it might be more efficient because we're ---

4088. **MR. KELLY:** Okay, as you wish.

4089. **MR. ZALMANOWITZ:** --- distracting.

4090. Now, in your evidence and in your appendix to the evidence where you calculate the HHIs, you use various scenarios, but in all of your tables under all of your scenarios if you used the Competition Bureau's four-firm concentration ratio the way I calculated them you'd be over 65 percent in all of those -- just about all of those scenarios.

4091. **DR. SCHINK:** I think you're right.

4092. **MR. ZALMANOWITZ:** Now, another thing that you did in calculating your HHIs was you adjusted capacity to take into account excess capacity.

4093. **DR. SCHINK:** Correct.

4094. **MR. ZALMANOWITZ:** And when you adjust the capacity, you say lower your HHI calculation; correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4095. **DR. SCHINK:** Yes, failing to account for excess capacity produces an upward bias in the HHI which the adjustment process removes.
4096. **MR. ZALMANOWITZ:** And in your evidence, you state it's appropriate to use the adjusted calculation when there is excess capacity.
4097. **DR. SCHINK:** Yes.
4098. **MR. ZALMANOWITZ:** And if you look at the written -- could I ask you to look at the written reply evidence of Mr. Kelly?
4099. It is pages 2 and 3, and it's response to question 4, Adobe pages 4 and 5.
4100. **DR. SCHINK:** I'm there.
4101. **MR. ZALMANOWITZ:** Now, Mr. Kelly states that -- and I'm beginning at the line 26:
- "IHS estimates that the current demand for crude oil transportation capacity to markets outside of Western Canada exceeds available takeaway capacity."*
4102. Correct?
4103. **DR. SCHINK:** Yes.
4104. **MR. ZALMANOWITZ:** So demand ---
4105. **DR. SCHINK:** Yes, it does.
4106. **MR. ZALMANOWITZ:** So that means there's no excess capacity currently?
4107. **DR. SCHINK:** That's what that statement suggests, yes.
4108. **MR. ZALMANOWITZ:** Yeah.
4109. So if there's no excess capacity, you shouldn't adjust?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4110. **DR. SCHINK:** Yes,
4111. But, at the times that I have done my calculations, there is excess.
4112. **MR. ZALMANOWITZ:** And so if you redid the calculation on Table 4.3, at page 65, at Panel 3, I believe that the HHI would be -- if you take out your adjustment, you don't adjust for capacity ---
4113. **DR. SCHINK:** Can you tell me where you're looking, please?
4114. **MR. ZALMANOWITZ:** Okay, it's page -- it's your revised direct evidence -- Table 4.3, page 65 paper, Panel 3.
4115. **DR. SCHINK:** I see that, yes.
4116. **MR. ZALMANOWITZ:** --- at 2017 so that that assumes Keystone and Trans Mountain expansion completed ---
4117. **DR. SCHINK:** Yes.
4118. **MR. ZALMANOWITZ:** --- and you have an HHI of 1,812.
4119. **DR. SCHINK:** That's correct.
4120. **MR. ZALMANOWITZ:** Now, I did the -- and this is subject to you checking -- that, for example, if you don't -- if you take out the adjustment, you're going to get an HHI of 2,694.
4121. **DR. SCHINK:** Well, I'll have -- I'd have to check it.
4122. **MR. ZALMANOWITZ:** You can check that.
4123. **DR. SCHINK:** Yes.
4124. **MR. ZALMANOWITZ:** But that was my calculation when I did it.
4125. And that would be over the 2500 safe harbour index if you did not adjust.
4126. **DR. SCHINK:** Can you just give me a second, please?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

--- (A short pause/Courte pause)

4127. **DR. SCHINK:** I'm trying to find the detailed table in the back so I can take a look.

4128. **MR. ZALMANOWITZ:** Probably in your appendix somewhere.

4129. **DR. SCHINK:** It is and I'm trying to find the right calculation.

4130. **MR. ZALMANOWITZ:** I think we could move on and we could come back to this after lunch.

4131. If you probably wanted to check, you could confirm after lunch whether I've calculated it correctly or not.

4132. **DR. SCHINK:** I just want to make one observation that the facility capacities have identified.

4133. If you turn to Exhibit B15-9, page 9 -- or, actually, page 8, I think -- let me just -- I want to make sure I'm looking at this -- page 8 or 9 -- and I'll tell you in a second exactly which one it should be.

4134. It's page 8 -- or Adobe page 8.

4135. **MR. ZALMANOWITZ:** What is the paper page, I just have ---

4136. **DR. SCHINK:** The paper age is -- it's saying -- the paper and Adobe are the same in this particular exhibit.

4137. The -- you'll see at the bottom the -- are you there yet?

4138. **MR. ZALMANOWITZ:** Yes.

4139. **DR. SCHINK:** That's the 1812 answer you -- or the number you've been pointing me to; is that correct?

4140. **MR. ZALMANOWITZ:** Yes.

4141. **DR. SCHINK:** Well, if you look over to the right hand column, the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

total capacity I have is 6,044.7 thousand barrels per day and the production that is identified in Western Canada is 4,294.7.

4142. That is excess capacity on the order of 1,700 barrels per day. So I would assert that that provides a circumstance where it's appropriate to adjust for excess capacity.

4143. **MR. ZALMANOWITZ:** Yeah, but you're not responding to the question that, if there was in fact no excess capacity, then you shouldn't be adjusting.

4144. **DR. SCHINK:** But the reality is there is excess capacity.

4145. **MR. ZALMANOWITZ:** There's evidence that there wasn't excess capacity that I referred you to.

4146. **DR. SCHINK:** That, I assume, was the current time period today, not 2017.

4147. **MR. KELLY:** It was current.

4148. **MR. ZALMANOWITZ:** Just reading from Mr. Kelly's evidence.

4149. **MR. KELLY:** Well, the sentence that you've opened with says the -- estimates that the "current demand" which is, I think, in difference to the table that Dr. Schink has prepared and that you've referred to which is 2017.

4150. **MR. ZALMANOWITZ:** Okay, I'm -- I'll get back to that, but I understood your evidence, you talked about the unique circumstances and other problems as well coming on because of the increased Bakken, the problems in pipelines relating to being operated at lower pressures because of integrity issues and so is a little more chronic than just a current time period that is expected to last for some period of time into the future.

4151. **MR. KELLY:** I agreed, yes, but I note in rereading my evidence that I also could add that we've made no provision that, in fact, many oil sands projects come on slower and later than expected, which is a negative -- which moves in the opposite direction.

4152. **MR. ZALMANOWITZ:** Many of those oil sands projects have

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

already had -- made large sum cost investments; have they not?

4153. **MR. KELLY:** Yes, I agree.

4154. And to the extent of the producers -- proponents of those projects hoping to get them online and at capacity as soon as possible to regain those investments, that's as they should.

4155. But many of them come on slower and later than expected.

4156. **MR. ZALMANOWITZ:** However, if this Board finds based on all of the evidence it's heard that there, in effect, isn't going to be excess capacity, then you shouldn't make the adjustment.

4157. Correct?

4158. **DR. SCHINK:** You're asking -- you're back to talking to me or ---

4159. **MR. ZALMANOWITZ:** Yes.

4160. **DR. SCHINK:** Oh! Okay.

4161. But I think the data says otherwise, so I mean I can't -- I mean --these numbers ---

4162. **MR. ZALMANOWITZ:** So if you ---

4163. **DR. SCHINK:** --- by the way, bear in mind that the forecast numbers that I'm showing on here for 2017 are not my forecast but CAPP's.

--- (A short pause/Courte pause)

4164. **MR. ZALMANOWITZ:** You'd agree with me, Dr. Schink, that market definition and market concentration calculation, it's not really and end in itself in competitive impact analysis because really the ultimate inquiry is one that is whether, in the circumstances, that someone had the ability to sustain a price increase. That's really the ultimate inquiry in a competitive impact analysis?

4165. **DR. SCHINK:** It is but I think what the criteria that's been kind of -- that's been accepted -- I mean the Competition Bureau says if you pass our

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

screening test, unless you can bring forward some very compelling information otherwise, we're going to assume the market is workably competitive.

4166. And the screen used by the Department of Justice in their oil pipeline study is used by the Federal Energy Commission in their work is essentially 2,500. If you have an HHI of 2,500 or less, there's -- you know, we're going to presume that it's workably competitive unless you can bring forth some evidence that convinces us otherwise.

4167. And I think -- I think -- so it's not irrelevant, it's an important factor.

4168. **MR. ZALMANOWITZ:** Certainly didn't say it's irrelevant, it's highly relevant. But the ultimate inquiry, it's not -- the ultimate inquiry isn't about market definition and the Merger Enforcement Guidelines state that. They say:

4169. "The ultimate inquiry is not about market definition, which is merely an analytical tool -- one that defies precision and can thus vary in its usefulness."

4170. That's a statement right out of the Merger Enforcement Guidelines. There's different ways of slicing and dicing the markets and you've got to be wary about using these numbers and drawing conclusions from them.

4171. **DR. SCHINK:** They are -- I mean I will grant you that always evaluations are market specific and you have to look into market conditions, and I think I've done so.

4172. But I think the -- however, the -- if in fact the market is found to be not highly concentrated based on the HHI, the view is that we are sceptical that market power could be exercised, i.e., that prices could be profitably charged if they were above competitive levels for a significant period of time; that that signals to us that's very unlikely.

4173. **MR. ZALMANOWITZ:** So if the four-firm concentration ratio is above 65 percent, which you said it is under all of your scenarios, then the analytical approach as set out in the Merger Enforcement Guidelines, you say, well, we've got to look at this more closely.

4174. **DR. SCHINK:** It says that and I -- you know, I think the -- I mean, my own view and it's -- my view is that the HHI provides more information, is more informative than the four-firm concentration ratio. I could give you an

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

example, if you wish, why ---

4175. **MR. ZALMANOWITZ:** No, I'm just asking what the Canadian Competition Bureau uses. They're not of that view; they don't use it as a screen.
4176. **DR. SCHINK:** They don't necessarily use it as an initial screen, but they did say they do use it in their analyses.
4177. **MR. ZALMANOWITZ:** They specifically use it -- there's one footnote where they say they will consider the delta in the HHI in considering a merger.
4178. **DR. SCHINK:** That's the primary consideration in a merger of -- at the FTC and DOJ, but we're not talking about a merger here. We're talking about whether a market is workably competitive.
4179. **MR. ZALMANOWITZ:** Right. And the Competition Bureau expressly states in that same footnote that they do not use the HHI as a screen; correct?
4180. **DR. SCHINK:** They do say that.
4181. **MR. ZALMANOWITZ:** Thank you.
4182. The other thing that the Merger Enforcement Guidelines say is -- well, typically what a competitive impact analysis is really aimed at is whether -- as a result of a merger, there's going to be a higher than competitive price. And it would be -- the job would be easy if one could simply put in a model and predict that, but that's a fairly complicated process isn't it?
4183. **DR. SCHINK:** Yes, it is.
4184. **MR. ZALMANOWITZ:** But the merger, they won't ignore evidence of that and they'll say -- for example, they'll say:
- "...when a completed merger has resulted in a material price increase, the Bureau may rely on evidence of that increase, taking into account [of course] other relevant factors."*
4185. So if you already have a price -- my question is, so that a situation

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- where you already have a price and a situation where there's an allegation of market power, that's something that someone reviewing the situation for the presence of market power can look at?
4186. **DR. SCHINK:** Are we talking about an abuse proceeding? Are we talking about a merger proceeding?
4187. **MR. ZALMANOWITZ:** Talk about a merger proceeding but then I'll convert it into this proceeding how it might be -- how it might be relevant.
4188. **DR. SCHINK:** If there had been allegations of improper or excessive price increases, they would evaluate that in a merger.
4189. **MR. ZALMANOWITZ:** And they would -- it's a situation where there was a merger and they're examining the merger after the fact, and prices went up, they would try and assess whether the price increase was the result of market power?
4190. **DR. SCHINK:** Now we're into abuse investigations.
4191. **MR. ZALMANOWITZ:** No, I'm going to get back. That's not abuse because that's not -- that's -- they can examine a merger after the fact. Mergers can be challenged after the fact. It's rare but it happens.
4192. **DR. SCHINK:** But it boils down to they -- somehow, they did abuse market power somehow or used market power somehow and ---
4193. **MR. ZALMANOWITZ:** They exploited market power.
4194. **DR. SCHINK:** Exploited market power, yes.
4195. **MR. ZALMANOWITZ:** Now, a case like this where you have the tolls that resulted from the open season, someone could analyze whether those tolls are higher than a competitive price? It's complicated but can be done.
4196. **DR. SCHINK:** You can set out to analyze it. It's not entirely clear you can come to a successful result in trying to analyze it.
4197. **MR. ZALMANOWITZ:** It could be one of the things you look at in conjunction with everything else that you look at in a market power analysis?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4198. **DR. SCHINK:** You could, yes, but I -- you know, you have to have comparables, if you will, and that's -- and I don't know that we have true comparables here because the circumstances of the various pipes is quite different.

4199. **MR. ZALMANOWITZ:** Now, in your evidence, in your direct evidence, you stated that:

"A new entrant enhances the competitiveness of a market and that the TM -- the Trans Mountain expansion has the effect of reducing market concentration similar to a new entrant." (As read)

4200. You make that statement. I can give you it's ---

4201. **DR. SCHINK:** I did make that statement. I'm aware of it.

4202. **MR. ZALMANOWITZ:** So -- and I'm not disputing the issue, the question. I think that's correct that when you add new capacity generally, I mean, there are some circumstances where it isn't but generally adding productive capacity is something that's pro competitive. I'm not disputing that.

4203. But that's not the issue here. Here, the issue is the Board has to decide whether Trans Mountain, at the time of the open season, had market power when it negotiated its tolls. I shouldn't say that's the only thing it has to decide; that's one of the factors.

4204. **MR. REED:** I wouldn't agree with that. I think it has to determine if the tolls are just and reasonable. And as we've said, we don't believe that an analysis of a finding of no market power is necessary to approve tolls as just and reasonable. The Board has ---

4205. **MR. ZALMANOWITZ:** Right, I ---

4206. **MR. REED:** If I could finish my answer. The Board has made many determinations that negotiated tolls are just and reasonable without any evidence coming into the record of market power or market concentration.

4207. **MR. ZALMANOWITZ:** Well, going back to the initial questions I

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- asked Dr. Schink, my point was a relevant factor was whether the tolls are competitive. And that's a relevant factor for determining whether the tolls are just and reasonable.
4208. **DR. SCHINK:** Competitive tolls are just and reasonable, yes.
4209. But I think I want to come back to this a little more while you're pausing. I mean there are two sets of analyses I've done and that the -- you know, the open season process in and of itself was competitive and had, I think, that -- and I think as John just said, you know, the process itself would be expected to produce a competitive fair market value price sort of almost -- literally independent of the overall competitive analysis of the markets. I think if the markets are competitive, that's further support for the view that the results coming out of the open season are competitive, but there's not a necessary -- it's not necessary to come out with that.
4210. **MR. ZALMANOWITZ:** I understand that and that -- I read your evidence that first appeared in your direct -- your revised direct evidence. You didn't make that argument. It showed up in your -- first showed up from you in your reply evidence and it basically is this: Even if I'm wrong and I can't show that the markets are competitive, it doesn't matter. If you look at the process and they're negotiated and you had sophisticated knowledgeable parties bargaining, that's good enough, and that's an argument the Board can accept or reject, but that's an argument.
4211. **DR. SCHINK:** Well, I had two distinct parts to my evidence, Section 3, as I mentioned earlier, deals with the -- the open season process independent of the markets and Section 4 then looks at -- at the origin and destination markets separately. So I didn't make the point. I think the point was made in response to one of the NEB IRs and I can't remember -- John, do you remember which one it was?
4212. **MR. REED:** I don't remember the IR number, but I -- I don't want to leave unchallenged your assertion that this wasn't made in the direct evidence. It's made quite specifically in my direct evidence at 15 ---
4213. **MR. ZALMANOWITZ:** I agree, Mr. Reed, but it wasn't in Dr. Schink's.
4214. **MR. NETTLETON:** Let -- let the witness speak and let him finish

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

his answer please.

4215. **MR. REED:** Just to complete that reference, it was Exhibit B15-13, at Adobe page 12.
4216. **MR. ZALMANOWITZ:** Thank you.
4217. Now, I have a question for Mr. Anderson. How long did it take from -- if you look at where you first started to plan Trans Mountain expansion to expected completion which you -- you said now is late 2017. The question I want is when did you first start this project?
4218. **MR. ANDERSON:** I'd have to ask you to be a little bit more specific around this project and this -- this plan. There have been, as Mr. Rinne articulated earlier, iterations of Trans Mountain expansion that have been in the planning discussion stages for over a decade.
4219. **MR. ZALMANOWITZ:** Okay. That's generally the answer that I was looking at, is that that beginning prior to -- you had stages 1, 2 and 3 of the open season, so if we take what started with stage 1 and prior to that, when would you consider this to have been a serious project where you're starting to spend resources looking at it?
4220. **MR. ANDERSON:** As I said, and as Mr. Rinne took either Mr. Miller or Mr. Roth through yesterday, there's been a history of contemplated Trans Mountain expansions for as long as I've been with the company, so going back to at least 2004-2005.
4221. This specific proposal, we would have started, I would say, conceptualizing and framing -- I mean let's put it this way, we -- we completed an open season that failed, as we talked earlier, on TMX 1 in 2006 -- TMX 2 in 2006, sorry. After that failed, I would say it was largely pens down post-2006 as really the markets started to pursue the Gulf Coast with much more rigour and the west coast wasn't as high a priority in -- in producers minds and we would have resurfaced, I think, doing some meaningful work on it in probably 2008-2009.
4222. **MR. ZALMANOWITZ:** Okay. So if you take 2008 to the end of 2017, so you're looking at roughly nine years, something like that?
4223. **MR. ANDERSON:** Sure.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4224. **MR. ZALMANOWITZ:** Okay. Now, another relevant factor in doing a competitive impact analysis is looking at whether there's barriers to entry into a particular industry. Is that correct, Dr. Schink?

4225. **DR. SCHINK:** That's -- excuse me. That's correct.

4226. **MR. ZALMANOWITZ:** And in the Merger Enforcement Guidelines, they say that entry is only effective in constraining the exercise of market power when it is likely, timely and sufficient in scale and scope.

4227. **DR. SCHINK:** They do say that, yes.

4228. **MR. ZALMANOWITZ:** And that would be similar to the Department of Justice and the Federal Trade Commission as well.

4229. **DR. SCHINK:** Yes.

4230. **THE CHAIRMAN:** Mr. Zalmanowitz, we're arriving close to our time, so if you ---

4231. **MR. ZALMANOWITZ:** This is a convenient ---

4232. **THE CHAIRMAN:** Find a logical place.

4233. **MR. ZALMANOWITZ:** Yes it is. I'm about to embark on a new topic.

4234. **THE CHAIRMAN:** Okay, perfect. So we will reconvene at 1:30.

4235. **MR. ZALMANOWITZ:** Thank you.

--- Upon recessing at 12:25 p.m./L'audience est suspendue à 12h25

--- Upon resuming at 1:30 p.m./L'audience est reprise à 13h30

4236. **THE CHAIRMAN:** Madame Beauchemin?

4237. **MS. BEAUCHEMIN:** Yes, thank you, Mr. Chair.

4238. I just have a request of counsel to please stay after today's cross-

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

examination. I would just like to have everyone who intends to present argument either orally or in writing to just stay so we can talk logistic and plan times for the filing of written argument and so forth. So I would appreciate your assistance.

4239. Thank you.

4240. **THE CHAIRMAN:** Mr. Zalmanowitz?

4241. Your microphone please.

IAN ANDERSON: Resumed
SCOTT STONESS: Resumed
NORMAN RINNE: Resumed
GREGORY HILL: Resumed
KEVIN MacFARLANE: Resumed
JOHN REED: Resumed
GEORGE SCHINK: Resumed
STEVEN KELLY: Resumed

**--- EXAMINATION BY/INTERROGATOIRE PAR MR. ZALMANOWITZ:
(Continued/Suite)**

4242. **MR. ZALMANOWITZ:** Dr. Schink, would you agree with me that from a competitive market analysis perspective that there are significant barriers to entry in either building a new crude oil pipeline from Alberta or doing an expansion similar to the Trans Mountain expansion?

4243. **DR. SCHINK:** I wouldn't want to describe them as barriers. It's -- I think, relative to Trans Mountain, I think there are many other pipeline companies who could in fact accomplish the same thing and more or less at the same timeframe. So I think it's not an issue of whether it takes a certain amount of time, it's whether there are -- are companies out there who are capable and potentially willing to do that.

4244. And so I don't see that -- I mean, I don't see that as a barrier of entry. It's a major undertaking, but it's a major undertaking for Trans Mountain and Northern Gateway and TransCanada and potentially others, like Inter-Pipeline Fund or Pembina -- or Pembina I think is how you say it, who are also players in this market. They all are capable of -- of doing this, have the financing and the knowledge.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4245. **MR. ZALMANOWITZ:** Using the analytical framework that's in the Merger Enforcement Guidelines or the FTC or DOJ Merger Enforcement Guidelines, they all have provisions where they discuss barriers to entry as the next stage of a -- of their analysis and you agreed with me earlier when I referred you to the statement in the Merger Enforcement Guidelines where they say:

“Entry is only effective in constraining the exercise of market power [...] [when it is] likely, timely and sufficient in scale and scope [to do so]...”

4246. **DR. SCHINK:** Yes.

4247. **MR. ZALMANOWITZ:** And they also indicate what types of barriers to entry there may be in an industry and one is are there regulatory barriers, do you need to get a regulatory approval and how long does that take. That's one consideration; correct?

4248. **DR. SCHINK:** That's one consideration, yes.

4249. **MR. ZALMANOWITZ:** Another consideration is whether there is significant sunk costs.

4250. **DR. SCHINK:** Yes.

4251. **MR. ZALMANOWITZ:** And generally when they're analyzing barriers to entry in the context of a competitive impact analysis, they want to know if new entry will have the effect of preventing someone from increasing a price approximately up to 5 percent, but no more, and will curtail that within one year. That is a standard in the Merger Enforcement Guidelines.

4252. **DR. SCHINK:** That's the standard, but I think we have to get our timeframes straight here. I think the -- what we're talking about in terms of entry with the Trans Mountain expansion is 2017-18, and the question is given regulatory constraints and large sunk capital investments and the other things required for competing pipelines, is it reasonable to expect that other projects that are proposed could be completed in that timeframe?

4253. And I think at least the two of them that are widely known right now, which are the TransCanada conversion of one of their gas pipelines to provide

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- eastern-bound service to the east coast and the other alternative, which is the reversal of Line 9 and of the Portland Pipeline to provide, essentially the same service, could be completed in the same timeframe because -- it's 2017, 2018 -- because a lot of existing pipe is involved and it's -- you know, and I think it's certainly doable within that timeframe.
4254. So I think that would meet their standards as a good alternative in the timeframe when Trans Mountain is expected to be completed.
4255. **MR. ZALMANOWITZ:** If someone were to start now and try and come up with a proposal, new proposal to compete with the Trans Mountain expansion, that could take as long as nine years, couldn't it, something brand new?
4256. **DR. SCHINK:** The reversal of Line 9 has been under consideration since -- Steve, help me here. I think it goes back to 2008, roughly.
4257. **MR. KELLY:** Approximately 2008 timeframe for that particular project.
4258. **DR. SCHINK:** And the -- and you know, there is a procedure underway now to reverse Line 9. So that's part of the regulatory procedure is underway.
4259. In terms of the TransCanada project, again Steve can probably confirm this, but I think that that has been under consideration -- and somehow, there has been a formal proposal since about the late 2011. Is that roughly correct?
4260. **MR. ZALMANOWITZ:** My question would be -- to be more precise, if somebody wanted to start from scratch and build a competing pipeline from Alberta to the west coast, starting now, that would take a long time and that would face a lot of hurdles. That wouldn't be done within one or two years would it?
4261. **DR. SCHINK:** No, but we're talking about within one or two years, 2017 or 2018, which is what's relevant.
4262. **MR. ZALMANOWITZ:** All right. Well, even if you started now, you would not get that done in 2017, if you started from scratch now.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4263. **DR. SCHINK:** I don't know that for certain. I think somebody else in the panel might have an opinion. I'm not -- I don't build pipelines.

4264. **MR. ZALMANOWITZ:** We heard Mr. Anderson tell us that it's been about nine years for the process involving this expansion. In any event ---

4265. **MR. ANDERSON:** I think to be clear, sir, since you're referring to what I said, it's been nine years since we started conceptualizing and designing the ideas around this expansion.

4266. If you ask me today to start from scratch to execute on a pipeline project to the west coast, I would envision a year of commercial work, 18 to 24 months of regulatory work, and another two years to construct, so probably not nine and probably five. Just to be clear.

4267. **MR. ZALMANOWITZ:** Certainly not one or two.

4268. **DR. SCHINK:** But again, it's one or two years within the time the Trans Mountain expansion is going to be completed, which is 2017 or 2018.

4269. **MR. ZALMANOWITZ:** And there's considerable uncertainty over getting the approvals.

4270. **DR. SCHINK:** As there is for Trans Mountain.

4271. **MR. ZALMANOWITZ:** And there's -- someone would have to go through an open season and get shipper commitment. That would be another hurdle that they would have to face if somebody wanted a competing project, yours now, correct?

4272. **DR. SCHINK:** Yes. And I think that Mr. Anderson took all that into account in his answer.

4273. **MR. ANDERSON:** I did.

4274. **MR. ZALMANOWITZ:** Now, there's some environmental -- from the time you get your -- prior to getting your Certificate of Public Convenience and Necessity, there's environmental studies that you have to accomplish in a time period. Is that about two years, doing a survey of the wildlife, things like that?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4275. **MR. ANDERSON:** That would all be done prior to the filing of the CPCN.
4276. **MR. ZALMANOWITZ:** And you'd face considerable political uncertainty as well over such a project. There's a lot of resistance politically in British Columbia to crude oil pipelines.
4277. **MR. ANDERSON:** I don't know that I would characterize it as political resistance. I think there are concerns and challenges that have to be overcome, certainly, and I would have factored that all into the timeframe I just gave you.
4278. **MR. ZALMANOWITZ:** So again, that was from scratch now, what did you say, four years?
4279. **MR. ANDERSON:** I said five.
4280. **MR. ZALMANOWITZ:** Five. Okay.
4281. Now, Dr. Schink, in your evidence, you spend time talking about expansion of rail as an alternative to bringing Alberta or western Canadian crude oil to export markets; correct?
4282. **DR. SCHINK:** Correct.
4283. **MR. ZALMANOWITZ:** And I think in your evidence, you claim that it's a close enough substitute to the Trans Mountain expansion, that it should properly be included in an HHI calculation; correct?
4284. **DR. SCHINK:** Correct.
4285. **MR. ZALMANOWITZ:** Now, that would only be correct if at the time of the open season, the shippers in Alberta perceived rail to be a close enough substitute to the Trans Mountain expansion. Wouldn't that be correct as well if you were analyzing competition?
4286. **DR. SCHINK:** At the time of the open season, yes, I think in my evidence I present -- you know, which is developed to -- I think, right at the end of the open season I did point out that there were a lot of projects underway and so forth. And it's -- the first people the railroads would talk to would be the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

shippers. So they were certainly aware of it and they had more information than I did because all I could get was what was in the papers, as opposed to the presentations and offers that Canadian National and Canadian Pacific would make to these companies.

4287. So I would argue they were aware of everything that I put in my evidence to support the argument that rail was a viable alternative.
4288. **MR. ZALMANOWITZ:** Yes. So practically the implication of your evidence is that the shippers would have gone through a thought process to say, well, we can bargain very hard with Trans Mountain because we can always ship this stuff by rail to the west coast; is that what your evidence is?
4289. **DR. SCHINK:** I mean that's certainly an option. I think that I've seen -- I think the article that you provided in the aid to cross -- I think it's Nexen who's investigating doing that, railing it to Port Rupert and then using Port Rupert as a send off place for it.
4290. **MR. ZALMANOWITZ:** Okay. That was one of the aids to cross that I provided you're referring to?
4291. **DR. SCHINK:** Yes, it was in there.
4292. **MR. ZALMANOWITZ:** Okay, let's look at that.
- (A short pause/Courte pause)
4293. **MR. ZALMANOWITZ:** That is the Globe and Mail Report on Business, January 30th, 2013.
4294. **DR. SCHINK:** I assume so.
4295. **MR. ZALMANOWITZ:** Yeah. The top, there's a date at the top so

4296. **DR. SCHINK:** Yes, I assume that I -- we heard ---
4297. **MR. ZALMANOWITZ:** And the title is "Seeking Its Pipeline to Asia and Nexen Looks to the Rails"?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4298. **DR. SCHINK:** Yes.

4299. **MR. ZALMANOWITZ:** Now, if you look at the first paragraph, if you flip over to the second page, there's only the headline on the first page. And the first -- the first paragraph in the middle column?

4300. **DR. SCHINK:** Yes, I have a copy.

4301. **MR. ZALMANOWITZ:** Yeah.

4302. And so it says:

"We're working with the port and looking at what kind of industrial development could be possible' ..."

4303. It's a quote:

"... Mr. Alvarez said but he added 'This is such an early stage that I would call it a concept and not much more.'" (As read)

4304. **DR. SCHINK:** I see that, yes.

4305. **MR. ZALMANOWITZ:** And then, Mr. Alvarez is a Vice President of -- of Nexen, Vice President of Corporate Relations, according to this article.

4306. **DR. SCHINK:** I -- I assume it says that here in some -- I know he's an executive at Nexen, yes.

4307. **MR. ZALMANOWITZ:** And then, if you look at the last column -- and I've highlighted it with a line on the right -- there's a quote from a Marcel Coutu, Chief Executive Officer of Canadian Oil Sands Ltd.

4308. He says:

"Railing is -- oil is not as safe and not as cheap as pipelining it so, in the long-term, that is probably not the best solution."
(As read)

4309. But he says, goes on to say:

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

“In the shorter term, however, pipeline problems will call industry -- cause industry to look at options such a rail’ he said.” (As read)

4310. Correct? Do you see that?

4311. **DR. SCHINK:** Yes.

4312. And subject to Mr. Anderson’s caution the other day that the -- the reporters don’t always get the words exactly right, that is what’s in the article.

4313. **MR. ZALMANOWITZ:** But you -- you included newspaper reports and clippings in your -- in your appendix.

4314. **DR. SCHINK:** Yes, we certainly did and -- but while we’re on this article, if there was some other interesting things here if I might point them out.

4315. On the first column -- on the first column on the left side, the fourth paragraph, it says:

“Rail has become an increasingly viable option for oil movement. The Scotia Bank on Tuesday estimating as much as 300,000 barrels per day of Canadian oil are now moving by train.”

4316. And that -- that is, you know, the amount that’s being estimated to go -- that we -- we came up with an estimate several months ago and thought it might be 200,000 and their estimate’s running as high as 300,000.

4317. So this suggests that the use of rail is exploding.

4318. **MR. ZALMANOWITZ:** Now, going on, you also note in your evidence:

“...that, ultimatel, producers must have a willingness to consider rail delivery in order to achieve wide-spread adoption but ,at this time, it’s unclear if the Athabasca crude oil producers are materially interested in rail delivery solutions.”
(As read)

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4319. Correct?
4320. **DR. SCHINK:** That's in my direct.
4321. **MR. ZALMANOWITZ:** Yeah. That's in your direct.
4322. **DR. SCHINK:** Well, I mean, since that, there -- Southern Pacific and MEG have actually signed contracts, moved substantial amounts of bitumen out of the Athabasca area.
4323. So it's -- I mean, the -- you know, it was on -- it wasn't entirely clear at that time but it's being -- there were talks above it but, now, it's become a reality.
4324. **MR. ZALMANOWITZ:** Now, it's also the price spreads, the current price spreads, have caused the increased interest in shipping oil by rail.
4325. Isn't that correct?
4326. **DR. SCHINK:** The price differentials are one reason to try to move forward as quickly as possible with all alternatives, including rail.
4327. **MR. ZALMANOWITZ:** In fact, in your evidence, you say that: it is the current price spread between or the price differential between Western Canada and the U.S. Gulf Coast is really a strong positive factor for the entry of rail for transporting crude.
4328. **DR. SCHINK:** Yes, it is, but it's also a strong factor for the entry of pipelines.
4329. **MR. ZALMANOWITZ:** Now, the -- to move large volumes of crude oil out of Western Canada by rail is going to require some significant investment.
4330. Correct?
4331. **DR. SCHINK:** There -- the one thing you have to bear in mind is that there is a -- railroads always -- already have an established far-reaching rail network. The rails are largely there.
4332. I think CN and maybe CP have -- are in the process of upgrading their

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- rails as we speak to -- to ensure that they can move more. But the capacity of rails are -- are there. The constraint right now seems to be cars to haul. But they're -- there have been -- substantial ramp ups in their production.
4333. So -- but I think the -- one of the studies that we've reviewed that looked into the cost that, essentially, the -- the incremental cost of implementing a rail move are roughly a tenth or estimated to be roughly a tenth of that of implementing a pipeline move. And it's such that, you know, recovery is generally possible in five years or less.
4334. And there's also the fact that these -- the lead times for implementing these projects are 12 to 18 months. So I think rail is a nimble alternative, a relatively low cost alternative, to enter. And, you know, it has certain number of advantages: The transit times to the -- from Alberta, the Gulf Coast or ---
4335. **MR. ZALMANOWITZ:** You -- you pointed that out in your -- I don't want to cut you off but you have pointed that out in your evidence. It's there. Your study is ---
4336. **DR. SCHINK:** No. I understand.
4337. I just wanted to sort of make it clear there that it had -- rail has advantages and I ---
4338. **MR. ZALMANOWITZ:** And there are -- but you need a considerable investment if someone wanted to move 500,000 barrels per day of Canadian crude to the West Coast that -- that's still going to be a considerable investment in facilities to load it by tank -- rail cars, transport it.
4339. You're also going to get lots of issues -- same kind of environmental issues and opposition moving that amount of crude through British Columbia; are you not?
4340. **DR. SCHINK:** Well, the rail -- the railroad -- the rail tracks are there.
4341. I think the opposition I read about in your article is really issues around the facilities -- are the port facilities not the actual transportation of the crude oil from Alberta to Prince Rupert, it's the facilities you'd have to build at Prince Rupert to get it onto a -- into a -- a tanker on the water.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4342. And I -- but I don't know anything of the details, only what's in that article so ...

4343. **MR. ZALMANOWITZ:** Now, part of this in -- in your direct evidence, in Appendix A, you also state that the -- this price different between U.S. Gulf Coast and Western Canada you believe it will likely moderate in five years or more.

4344. But the rapid growth of crude oil in these areas could prolong those spreads. So you're saying the price spreads could be longer than -- than five years.

4345. **DR. SCHINK:** Well, Mr. Kelly has addressed that at some length in his testimony and his testimony is essentially that the existing pipeline projects will eliminate the current extraordinary discount by 2016 and that he believes that the existing additional projects that are underway will ensure that this won't recur.

4346. And I think Mr. Kelly can elaborate on that if you'd like.

4347. **MR. ZALMANOWITZ:** I'll give Mr. Kelly an opportunity later on.

4348. You also state that:

“Asian demand for heavy crude is expected to remain strong well into the future.” (As read)

4349. That's a statement in your evidence.

4350. **DR. SCHINK:** Asian -- would you read it again? I'm sorry.

4351. **MR. ZALMANOWITZ:**

“Asian demand for heavy crude is expected to remain strong well into the future.”

4352. **DR. SCHINK:** There -- you know, there will be growth over there.

4353. But I think, as Mr. Kelly explained in his evidence, there's a lot of uncertainty also associated with that -- with that demand.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4354. And I think he can ---
4355. **MR. KELLY:** If I could ---
4356. Sounds like a ---
4357. **MR. ZALMANOWITZ:** If you bear with me, it would be more efficient if I ---
4358. **MR. NETTLETON:** Well, Mr. Chairman, the practice before this Board is that this is a panel and the panel is -- is providing evidence.
4359. Mr. Kelly has indicated he does wish to elaborate further on the question that has been posed so I -- I don't see why we would not allow Mr. Kelly to respond.
4360. **MR. ZALMANOWITZ:** I'm going to ask Mr. Kelly about that.
4361. And it was just in the -- for the sake of efficiency that I wanted to do it that way, but if Mr. Kelly wants to do that now, I'm in your hands.
4362. **MR. KELLY:** Well, I'll give you the short précis of it.
4363. I mean we do see Asia as a viable market, both now and into the future. Heavy crude demand per se in Asia is somewhat dependant on the country we're looking at. There's very, very diverse set of refining industries across Asia so we have to be a bit careful with blanket statements of that type. But I think obviously that is where we do see future growth so we can maybe pick that up again later.
4364. **MR. ZALMANOWITZ:** Thank you.
4365. So in your study, Dr. Schink, about the viability of rail transportation for crude oil out of western Canada that you also included, in at least some of that calculation, that it would be made even more economic if the shippers could purchase diluent in the destination market -- buy the diluent in the destination market, ship it back on those empty railcars and sell it at the higher price in the origin market. That's part of your analysis?
4366. **DR. SCHINK:** It was in one of the alternatives. However, I think if

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

- you look at the analysis that the rail moves in the longer-term are competitive even without the reverse diluent move.
4367. **MR. ZALMANOWITZ:** Now, you also talked about it being even more competitive if undiluted bitumen is transported by train because it doesn't take up as much space so you can ship more undiluted bitumen; correct?
4368. **DR. SCHINK:** Yes, but the analysis was done assuming some dilution. I think I saw a presentation by Southern Pacific -- a gentleman from Southern Pacific on a television -- local television program the other night, and he indicated that they were blending 5 percent diluent with the bitumen.
4369. We realize that that was -- some blending would occur. Our calculations are actually made assuming a 9 percent diluent blend rather than a 30 percent blend which is what you need to move it in a pipeline.
4370. So we've taken into account that the practice, at least initially, has been to include some diluent. In fact, our numbers are conservative relative to what Southern Pacific said they were doing but we did -- we -- to the best of our ability, we took into reality how people are actually doing it.
4371. **MR. ZALMANOWITZ:** Now, if you're going to move undiluted bitumen, you have to have heated tank cars don't you?
4372. **DR. SCHINK:** Either heated or heat them when you get there. I think that's why there's been a certain amount of blending and we -- as I said, our analyses that we present that show that, you know -- what we called on -- you know, we've labelled as transporting bitumen is really a 9 percent diluent blend with bitumen.
4373. So -- and we did that to take into account what we have seen had been practiced -- there was a certain amount of it -- we'd -- I think we've seen 5 to 9 percent was being blended to make it easier to handle and we took the upper end of the range to be conservative.
4374. **MR. ZALMANOWITZ:** Now, I just wanted to show you another aid to cross-examination, it's the Daily Oil Bulletin February 7, 2013.

--- (A short pause/Courte pause)

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4375. **MR. ZALMANOWITZ:** So this is from the Daily Oil Bulletin ---
4376. **DR. SCHINK:** Excuse me, could I have a copy just so I -- you know, I'm -- my eyesight isn't what it used to be; I hate reading screens.
4377. **UNIDENTIFIED SPEAKER:** I can empathise with you.
4378. **MR. ZALMANOWITZ:** The title of this article is "CN VP sees Rail Transportation as an Increasing Option for Shipping Alberta Crude", and it's dated February 7th, 2013.
4379. **DR. SCHINK:** Yes, I can see that.
4380. **MR. ZALMANOWITZ:** And then at the beginning of the second paragraph, there's some context tied to the title and it says:
- "Rail does not compete with pipeline. It's not an on/off switch decision where you say I believe in rail and I support rail or I support pipe and pipe is a solution -- both is required and they're complementary."* (As read)
4381. **DR. SCHINK:** I see that. I don't disagree with that. I don't -- I'm not arguing and I don't believe it's reasonable to say that rail is going to displace pipeline, I think rail is an -- is going to become and has become and is going to becoming an even greater alternative to pipeline. It's -- and it -- it's much more nimble and flexible and quick and I think that that will make it an important part of moving crude oil out of western Canada for the foreseeable future.
4382. **MR. ZALMANOWITZ:** If you look at the paragraph that's fourth from the bottom, again, another statement attributed to Mr. Cairns where he says however -- Cairns admitted:
- "Rail is not for everyone in the oil and gas industry. For large producers, shipping light oil that already have pipeline access to a particular market, he said, rail cannot compete. For small producers who are not in a position to make huge investments in pipeline though, he said, railway especially offers an affordable and immediate option."* (As read)
4383. **DR. SCHINK:** I see that but I also see light oil and not bitumen.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4384. **MR. ZALMANOWITZ:** Yes. But you don't disagree with those statements do you?
4385. **DR. SCHINK:** The advantage is -- I mean, rail has much greater advantages in the transportation of bitumen than it has of conventional light or heavy oil.
4386. **MR. ZALMANOWITZ:** Now, Mr. Kelly, you're a Vice-President of IHS Inc.; correct?
4387. **MR. KELLY:** That's correct.
4388. **MR. ZALMANOWITZ:** And in November of 2011, IHS Inc. acquired Purvin & Gertz; correct?
4389. **MR. KELLY:** Yes, that's correct.
4390. **MR. ZALMANOWITZ:** Now, it doesn't still go by the name Purvin & Gertz, does it -- the business -- have you...
4391. **MR. KELLY:** Well that's fairly recently the case that we've ---
4392. **MR. ZALMANOWITZ:** Okay. So if I mistakenly refer to Purvin & Gertz, you'll know I'm referring to IHS but it could be Purvin & Gertz if it happened prior to the acquisition?
4393. **MR. KELLY:** Well, that's actually the -- if I could say the convention I took in writing my reply.
4394. **MR. ZALMANOWITZ:** And you were also a Vice-President at Purvin & Gertz ---
4395. **Mr. KELLY:** I was.
4396. **MR. ZALMANOWITZ:** --- for many years?
4397. **MR. KELLY:** And I may actually slip and using Purvin & Gertz when I mean IHS so you'll excuse me for that.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4398. **MR. ZALMANOWITZ:** And Purvin & Gertz is a well-respected global energy consulting firm that provides technical, commercial, and strategic advice to international clients in the energy industry is it not?
4399. **MR. KELLY:** Yes, it did or does.
4400. **MR. ZALMANOWITZ:** It does and including -- and you would include in those kinds of clients crude oil producers?
4401. **MR. KELLY:** Indeed, yes.
4402. **MR. ZALMANOWITZ:** Now, in your reply evidence you say that it is your expectation that existing pipeline projects will essentially eliminate the current extraordinary discounts on Canadian heavy crude by 2016, and subsequent completion of additional pipeline projects will keep pace with western Canadian oil production growth which should ensure that extraordinary discounts will not recur after 2016.
4403. I can give you -- it's page 2, line 6-10, Adobe page 4.
4404. **MR. KELLY:** I see the reference.
4405. **MR. ZALMANOWITZ:** And you have at page 5, Adobe 7, a figure and it shows a discounting of Canadian heavy crude has been observed for much of the time period.
4406. If I look at that, it looks like it's been discounted from much of the time period beginning in 2004 but the text in your evidence says 2006. But if I look at the figure, although the discount isn't as great, it goes back to 2004.
4407. **MR. KELLY:** Yes, and one has to allow for the, I would say, the limitations of the analysis as well.
4408. But I think we're looking at the same chart.
4409. **MR. ZALMANOWITZ:** So that's 2004 so, now, that's about 9 years.
4410. Correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4411. **MR. KELLY:** That's correct.
4412. **MR. ZALMANOWITZ:** Now, you said that the extraordinary discounts will be eliminated but there will still be discounts well into the future; will there not?
4413. They might not be extraordinary but there will still be discounts?
4414. **MR. KELLY:** We can certainly imagine a future scenario where there are discounts, given the supply/demand balance at any point in time, yes.
4415. **MR. ZALMANOWITZ:** Now, are you aware that consulting firms like yours prepare for their clients forecasts of netback values at Edmonton for various other markets including the U.S. Gulf Coast, various locations in Asia and for various grades of crude?
4416. That that occurs; doesn't it?
4417. **MR. KELLY:** Yes, it does.
4418. **MR. ZALMANOWITZ:** Now, are you aware whether any of those reports forecast netback values at Edmonton from Asia, Asian markets, to be materially higher than the U.S. Gulf Coast going out to 2030 or 2040?
4419. **MR. KELLY:** How do you define ---
- (A short pause/Courte pause)
4420. **MR. ZALMANOWITZ:** Oh, okay.
4421. There is one aid to cross-examination that I think was provided to you that you should not put up and that -- I'm not there yet but I'm not going to ask you to put that up so ...
4422. **MR. KELLY:** Sorry, what am I to make of what you just said?
4423. **MR. ZALMANOWITZ:** Are you aware whether there are forecasts out there showing netback values at Edmonton from Asian markets to be materially higher from 2016 going all the way out to 2030?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4424. **MR. NETTLETON:** Mr. Chairman, just so that the drama can be reduced here, my friend did distribute an aid to cross that was part of a proprietary and confidential document.

4425. So when my friend is asking the witness about those types of reports, it would properly be put that they are proprietary and confidential and that is why the aid to cross cannot be publicly disseminated.

4426. I'm not going to object to the question I just think it's important you understand the context of why the exchange just happened the way it did.

4427. **MR. ZALMANOWITZ:** I was going to bring a resolution to the drama in a minute or two but I was going to keep the suspense going for a while but ...

--- (Laughter/Rires)

4428. **MR. KELLY:** I'm not sure it makes for ---

4429. **MR. ZALMANOWITZ:** So now I have to ask the question a third time. Or do you remember the question?

4430. **MR. KELLY:** I do remember the question.

4431. I actually am aware of the report that you may be referring to.

4432. Purvin & Gertz, as I've said in my reply and it may be worth having that in front of me, IHS and I could probably say IHS and previously Purvin & Gertz regularly prepares or prepared netback analyses for Western Canadian crude oils.

4433. I'm fully aware of the methodologies that we use, in fact, we would still call those Purvin & Gertz methodologies.

4434. I'm aware of the possibility that netbacks calculated from different markets can vary. I'm going to challenge -- or at least get you to clarify -- what you mean by material so we can complete our discussion.

4435. **MR. ZALMANOWITZ:** Netback could be a material netback. It could be anything from a dollar or more.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4436. **MR. KELLY:** Okay, if that's your metric a dollar or more being material.
4437. I think the broader context is worth describing and that is that we use various methodologies for determining netbacks whether it be from China, California, Wood River, Illinois or the Gulf Coast and I think those might actually be some of the points of geography that you're interested in.
4438. The key point about all of this is that the methodology is extremely sensitive to the assumptions made and there has been throughout your client's evidence an implication that -- and I think you actually used a word this morning which illustrates that same tendency -- that you used the term "desperate" to get to Asia.
4439. And the point of all of our work -- and I did get a small chance to talk to you about it this morning, but I did want to elaborate -- this is far from simple and, if we're going to take China as a good example, I think it has to be recognized that there's not a pot of gold at the end of this rainbow.
4440. And the client, my clients -- many of my clients who come to me for that kind of work -- many of the same companies are shippers, potential shippers on the Trans Mountain Pipeline -- recognize that development of markets in Asia will be a many-year process.
4441. This is not going to occur the minute the pipeline is connected to a terminal. It's going to take many years of hard work and the netbacks that I calculate today and put in a forecast may be completely hypothetical.
4442. And I could actually quote from the same report that you're referring to and give you some of that proviso if you like.
4443. **MR. ZALMANOWITZ:** I don't have the full report but I thought that we could not use the report.
4444. We asked for permission. I understand that Suncor's legal counsel asked IHS for permission to use that report in these proceedings and that permission was not given.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4445. **MR. KELLY:** Okay, but the methodology can still be discussed and

4446. **MR. ZALMANOWITZ:** Certainly, if you ---

4447. **MR. KELLY:** Okay.

4448. I don't need to read to you from the report. I know the methodology
well enough to say that, in the case of a ---

4449. **MR. ZALMANOWITZ:** I don't want to cut you off ---

4450. **MR. KELLY:** Okay.

4451. **MR. ZALMANOWITZ:** --- but the methodology, just so that we're
clear, relates to the methodology that resulted in a report that shows netbacks into
the future, well into the future?

4452. **MR. KELLY:** Correct, yes.

4453. **MR. ZALMANOWITZ:** So that's -- that's what we're talking about.

4454. Now, you're saying: Well, here's the methodology that we used to
generate those forecasts; correct?

4455. That's what you're telling -- that's what you're telling me now?

4456. **MR. KELLY:** Well, I'd like to give a sense of it.

4457. I don't intend to take the Panel through it. I think it would be
unnecessary in this forum but ---

4458. **MR. ZALMANOWITZ:** Can you just confirm that we still don't
have permission to put in the table of that forecast?

4459. **MR. KELLY:** That's my understanding from my legal advisors
internally.

4460. **MR. ZALMANOWITZ:** That's not -- I'm not saying that's your
decision but it's ---

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4461. **MR. KELLY:** No, I -- it is not.

4462. **MR. ZALMANOWITZ:** --- it's your employer's decision.

4463. **MR. KELLY:** It is not and -- but my point is that I'm more than willing to walk through the conceptual approach and I might say the limitations of the analysis.

4464. And I think that's really the point I want to make that ---

4465. **MR. ZALMANOWITZ:** If you can do that briefly.

4466. **MR. KELLY:** All right, I will. I'm not trying to make a speech but I'm...

4467. Let me say that -- and I think I did hint at it before -- the refining capacity that is currently available to process Canadian bitumen -- and I think that's in the main what we're talking about -- in China, which is arguably where most of the growth is, is actually at the moment relatively modest.

4468. In future, there can be many commercial arrangements that result in additional capacity to process Canadian heavy crude, but I would argue that those arrangements would not be backstopped by spot barrels coming off of the west coast in a -- in a tanker.

4469. It would be backstopped more likely by a term arrangement between possibly an integrated party, refiner -- and by that, I mean a refiner and producer within the same corporate family, or a long-term supply arrangement by which both parties achieve their objectives.

4470. **MR. ZALMANOWITZ:** Okay. Now, the -- based on your knowledge of the industry, when there are these long-term supply arrangements, they're usually tied to some index, isn't it?

4471. Somebody is not going to agree, for example, that is, a producer in Western Canada, to supply 100,000 barrels of oil a day for 20 years at a fixed price. It's going to be always tied in the future to some -- it'll be some amount above or below some index that the parties agree on. Is that not correct?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4472. **MR. KELLY:** I would see your proposition as reasonable that there would be an indexing arrangement rather than a fixed price arrangement.
4473. **MR. ZALMANOWITZ:** And -- but what we're concerned with in this hearing as well is the state of mind or the expectations of shippers in Alberta at the time of the open season. And if they perceive that the opportunities long term in Asia are higher and that netbacks are likely higher there compared to other alternatives, then that has an impact on those negotiations and how much you're prepared to pay for capacity on a pipeline. So if you understand that -- that question.
4474. So it is reasonable from -- I was just setting up a question and ---
4475. **MR. KELLY:** Okay.
4476. **MR. ZALMANOWITZ:** The question, then, is based on your experience in this industry, I put to you that there was a perception at that time that there was a significant long-term advantage to being able to ship crude oil to the west coast compared to other destinations. Would you agree with me?
4477. **MR. KELLY:** I would not. And I'd -- I'd like to actually back up to the beginning of your question because you included a proposition that, again, implied that the producers in question would be in some sense motivated completely by the netback available at that moment in time. And -- and I phrased it in my reply as ---
4478. **MR. ZALMANOWITZ:** I'm sorry. You mis ---
4479. **MR. KELLY:** Okay, well ---
4480. **MR. ZALMANOWITZ:** I said the expectation was that at that time the long-term prospects were greater.
4481. **MR. KELLY:** Can I get you to replay the whole question, then, because I think we need a common understanding?
4482. **MR. ZALMANOWITZ:** Based on your experience, would the producers in Western Canada expect that, long term, they could expect higher netbacks from crude oil that they could get to the west coast compared to other destinations such as Eastern Canada, the Midwest or the U.S. Gulf Coast?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4483. **MR. KELLY:** Well, I -- I can't tell you exactly what producers would be thinking. They might use our forecast materials as a guide. They may well use other forecasts or they may -- and I believe they do prepare their own forecasts because we quite often have healthy debates with our clients about these type of matters.
4484. So I can't read their minds in terms of what they might expect, but I can tell you that it would be -- it would come as a surprise to me that our -- that a producing company or perhaps a client of ours would look at one market as a -- if you like, as a -- as the sole objective in terms of maximizing netback, particularly with the considerations I mentioned regarding Asia.
4485. I mean, I think where I'm going with this is that it's more likely a portfolio approach, a diversification that's on the minds of our producing companies, not a whole -- a single-minded view on one market.
4486. **MR. ZALMANOWITZ:** No, and I wasn't suggesting that they would ignore other markets. My question was, at the time would they expect long term for there to be better netbacks from Asia than from other locations. Would that be a general perception?
4487. **MR. KELLY:** It's -- it -- well, it's difficult to agree with that because in a scenario -- well, and I guess where -- I should be completer (sic) in my answer. It depends on the company involved.
4488. If a company has, for example, term capacity on Keystone XL or some other pipeline, their economics in terms of their future expectations or the direction they might go in the future -- I don't know how far you're looking out there, but -- would be quite different than a company who, for example, like MEG which was mentioned by Dr. Schink or Southern Pacific, who is a much smaller producer.
4489. **MR. ZALMANOWITZ:** Context would be shippers in western Canada who are signing 15 or 20-year contracts beginning in 2017 to commit volumes to the west coast.
4490. **MR. KELLY:** Okay. That helps. But even there, we could say, well, are those particular companies also shippers on other pipelines? Have they reserved capacity on other pipelines?

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4491. I'd -- again, each company would have a unique set of considerations.

4492. **MR. ZALMANOWITZ:** You did confirm for me that you do produce netback calculations for your clients; correct?

4493. **MR. KELLY:** We do, yes.

4494. **MR. ZALMANOWITZ:** They want netback calculations.

4495. **MR. KELLY:** They -- yes, they do, obviously.

4496. **MR. ZALMANOWITZ:** Those are relevant to them.

4497. **MR. KELLY:** They are.

4498. **MR. ZALMANOWITZ:** Right. And you don't, at the bottom of your calculations, say "We've produced these, but they're not helpful".

4499. **MR. KELLY:** No, but we probably have some other fine print that they should read as well, though, about -- about the challenges of forecasting.

4500. **MR. ZALMANOWITZ:** Right. Now, in -- just giving me the answer that you just gave me, did you have in mind -- you were here throughout these proceedings when Mr. Anderson was being cross-examined by Mr. Roth and there was the transcription of a presentation and Mr. Anderson says:

*"Where's the market, where's the market, where's the market?
It's in Asia."* (As read)

4501. So were you aware -- did you have that in your mind when you just answered the question I asked you?

4502. **MR. KELLY:** Well, Mr. Anderson can say what he will say to his investors. I did not say it.

4503. **MR. ZALMANOWITZ:** So you would have told him not to say that?

4504. **MR. KELLY:** No, I would not have done that.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Zalmanowitz**

4505. **MR. ZALMANOWITZ:** If I could have a moment, I think I'm finished, but I would just like to check with my -- with Mr. Roth and the others so they can -- so if I just may have a ---

--- (A short pause/Courte pause)

4506. **MR. ZALMANOWITZ:** I'm sorry, Mr. Kelly, in the last question I asked and you said you would not have said that to Mr. Anderson.

4507. Just to clarify what you mean, you would not have told Mr. Anderson not to say:

*"Where's the market, where's the market, where's the market?
It's in Asia."* (As read)

4508. **MR. KELLY:** Well, let's be clear. My clients look to me for an opinion. They form their own opinions.

4509. Mr. Anderson and I are independent. We each form our own views and he's welcome to say, you know, what represents his company's views -- and I think you did say his -- in some cases his personal views.

4510. We can talk about Asia in more detail if you like and I will give you my views. I think they, with all due respect to Mr. Anderson, would be a little more nuanced in terms of the company -- sorry, the countries we were talking about, the future outlook for refinery demand, for crude demand by type in each of the countries of Asia if you'd like to go there. But I would not be prone to using the same phrase that Mr. Anderson used, that's -- that's his phrase.

4511. **MR. ZALMANOWITZ:** But you're not prepared to tell him not to say that if he wants to?

4512. **MR. KELLY:** I think you have my answer. I've ---

4513. **MR. ZALMANOWITZ:** Thank you.

4514. **MR. KELLY:** --- I provide advice to clients.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Dumanovski**

4515. **MR. ZALMANOWITZ:** Thank you. Thank you very much for indulging me. Those are all of my questions.

4516. **THE CHAIRMAN:** Thank you, sir.

4517. Mr. Dumanovski?

--- EXAMINATION BY/INTERROGATOIRE PAR MR. DUMANOVSKI:

4518. **MR. DUMANOVSKI:** Thank you, Mr. Chairman.

4519. Good afternoon, ladies and gentlemen. My name is Kiril Dumanovski; I'm a counsel for the Board and I have a couple of questions for you.

4520. I would like to start with some questions about integrity and pipeline safety costs. I would like to pull up Exhibit B16-2, Adobe page 4, which is Trans Mountain's response to NEB IR 1.2. The response to IR 1.2(b), Adobe page 4, states that anticipated costs that relate to integrity, insurance, pipeline safety, spill response and spill clean-up will "be funded by the revenues [...] realize[d] from the Fixed Toll Component..."

4521. In the response to IR 1.2(a), Trans Mountain states that:

"Anticipated and unanticipated costs [...] in Category 1 are included in the Fixed Toll Component. [and] [...] to the extent these costs increase, the financial return that Trans Mountain achieves will diminish."

4522. Is it fair to say that the integrity and pipeline safety costs are Category 1 costs?

4523. **MR. STONESS:** Yes. However, if they were -- are a -- as a result of a change in legislation or a change in Board order, then it would fall into Category 2.

4524. **MR. DUMANOVSKI:** But there is a possibility that they could be Category 1 as well; is that correct?

4525. **MR. STONESS:** Yes.

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Dumanovski**

4526. **MR. DUMANOVSKI:** Thank you.

4527. So to the extent that any incremental integrity and safety costs arise after commencement of operation and for the duration of the contracts, those costs will be at risk -- the Trans Mountain will be at risk for those costs; is that correct?

4528. **MR. STONESS:** That is true. And let me correct the first part, is that normally those kind of costs will fall into Category 1, but your question is -- the answer to your question is yes.

4529. **MR. DUMANOVSKI:** Thank you.

4530. So practically speaking, every dollar spent on integrity or safety is a dollar that Trans Mountain cannot recover as return on capital; is that correct?

4531. **MR. STONESS:** If it falls in that category, that's correct.

4532. **MR. DUMANOVSKI:** Thank you.

4533. So I have a question, I suppose Mr. Anderson could answer that question. Could you please comment on whether the applied-for toll methodology could create incentives for the company that could have negative impact on any required integrity and safety work after the commencement of operation and for the duration of the contract terms?

4534. **MR. ANDERSON:** I don't believe at all, sir, that it provides an incentive for us to not spend the necessary money on integrity and safety because we recognize the fact we will remain under the close jurisdiction of the Board on those matters; that safety standards and expectations and reporting and integrity programs will all be reviewed by the Board under their mandate. And we would anticipate continuing to spend everything that's necessary to ensure that the asset remains in a very safe and operationally safe manner.

4535. And I'd go further than that which is -- as you're well aware -- pipeline safety and integrity are a top of mind these days with virtually everybody, both in industry and in the public and in political forums. And it's with that that ourselves and the industry are taking, we hope, a leading effort in ensuring that integrity spending is maintained throughout the life of the asset.

4536. I might also add, if I could, one more piece, and that is that currently --

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Dumanovski**

as is transparent on our website -- Kinder Morgan's performance is measured against expectations of financial reporting but also environmental safety and the sort, in that we track and report that publicly, and all of our compensation is based on performance in that area as well.

4537. **MR. DUMANOVSKI:** Thank you.

4538. I would like to talk about now about financial statements. I would like to pull up Exhibit B20-2, at Adobe page 4, which is Trans Mountain's response to NEB IR 3.2. In response to IR 3.2(b):

“Trans Mountain is proposing to provide annual audited financial statements of Trans Mountain Pipeline L.P., [which is a] [...] partnership that owns the assets of the Trans Mountain System [because those] [...] assets [...] comprise the vast majority of the asset base in the partnership.”

4539. And I would like to pin down the meaning of “vast majority”. So could you please provide me the percentage of the regulate assets of the Trans Mountain system that is reflected in the financial statements of the partnership.

--- (A short pause/Courte pause)

4540. **MR. ANDERSON:** Sir, could you point me once again -- I apologize -- to the specific part of the response just to make sure I have the right piece in front of me?

4541. **MR. DUMANOVSKI:** It's the response to IR 3.2(b), Exhibit B20-2, Adobe page 4.

4542. **MR. STONESS:** The vast majority of the assets are related to Trans Mountain L.P. The other assets are related to shared services. So in our Kinder Morgan Canada operation, we have the staff that work on the -- that provide services to Trans Mountain. So all of the assets are in that -- all of the pipeline assets are in that category.

4543. **MR. DUMANOVSKI:** Is it possible to put a percentage number on that?

4544. **MR. ANDERSON:** Mr. Stoness has helped me recall. The part of the

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Dumanovski**

assets that would not be in the L.P. but that would be in Kinder Morgan Canada would be things like IT systems that might be shared across multiple companies and allocated then to those companies on a cost basis. So it would be a very small amount of assets, virtually all of the pipeline, the stations, the terminals are all within the L.P.

4545. I would say that the percentage would be -- in excess of 95 percent would be the assets of Trans Mountain L.P. In other words, there'd be just a very small part of shared service type assets that might be allocated to multiple companies and they'd be primarily IT systems, but a very small amount.

4546. **MR. DUMANOVSKI:** Thank you.

4547. I would like to talk about depreciation rates now. I would like to pull up Exhibit B20-2, at Adobe page 16 which is Trans Mountain's response to NEB IR 3.6. In response to IR 3.6(a), Trans Mountain states that it will:

"...keep books according to regulatory standards and notify the Board of any proposed changes."

4548. And just to be clear, for the record and having in mind the relief requested in the application, is Trans Mountain seeking to be exempted from keeping books in accordance with the provisions of the Oil Pipeline Uniform Accounting Regulations as they apply to Group One companies?

4549. **MR. STONESS:** Sorry. What -- what we've applied for is to comply with category one accounting, and category one does have accounting books.

4550. **MR. DUMANOVSKI:** Well, it is my understanding that the application -- in the application it is to be exempted from section 5.1 as it applies to Group One companies and -- and comply with section 5.2 as it applies to Group Two companies. Isn't that correct?

4551. **MR. STONESS:** That is correct. But my understanding of Group Two accounting is that you will still keep accounting book of records.

4552. **MR. DUMANOVSKI:** Okay. Thank you.

4553. So and in response to IR -- to IR 3.2(e), Adobe page 5, Trans Mountain states that it is prepared to file rate based information for plant in

**Trans Mountain Pipeline ULC Panel
Examination by Mr. Dumanovski**

- service, depreciation, additions and retirements. And having in mind the response to IR 3.6(a) which refers to keeping book -- books according to regulatory standards, will you please explain the meaning of "regulatory standards" in the context of the information Trans Mountain is prepared to file?
4554. **MR. STONESS:** Our proposal was that we file -- provide annual information consistent with a category two company.
4555. But we are saying that if the Board wants us to we will also add gross plant total additions, total retirements, annual depreciation, net plant in service annually if the Board desires.
4556. **MR. DUMANOVSKI:** Thank you.
4557. I just wanted to clear up one more issue. In response to IR 3.6(a) and (b) at Adobe page 16, Trans Mountain talks about -- has mentioned about changing depreciation and the need of the Board's approval on -- of any such change.
4558. So my question would be does Trans Mountain intend to ask the Board for approval of depreciation rates for the duration of the -- of the contract terms?
4559. **MR. STONESS:** The answer that we gave here -- let me paraphrase, is that if we -- we intend to continue on with our current depreciation rates. If we get to the point where the current depreciation rates appear to be wrong, we would give the Board notice and apply to have them changed.
4560. **MR. DUMANOVSKI:** Is that during the -- the 20-year term or after?
4561. **MR. STONESS:** Yes, during the 20-year term as well as after.
4562. **MR. DUMANOVSKI:** And considering the -- the applied-for toll methodology which is a negotiated toll as opposed to traditional cost-of-service methodology, why would such a need arise to ask the Board for approval?
4563. **MR. STONESS:** The need arises at -- because at the end of the 20-year term there's a possibility that we might go back to cost-of-service regulation and then we would need the net book at that point in time.

**Trans Mountain Pipeline ULC Panel
Examination by the Chairman**

4564. Just to be clear, if we did change the depreciation rate we would not expect that the tolls are changed. We've applied for fixed tolls for the term of the project, not to have them change according to the depreciation rates.

--- (A short pause/Courte pause)

4565. **MR. DUMANOVSKI:** In considering that the investment and the size of the investment you're about to make, do you think that's going to change the current depreciation rate?

4566. **MR. STONESS:** We do not anticipate that that would change the depreciation rate that we indicated in CAPP 1.3.

4567. **MR. DUMANOVSKI:** So you don't -- you don't expect that the investment of \$5.5 billion will -- will influence the economic life and depreciation rates of the expanded system; is that correct?

4568. **MR. STONESS:** CAPP 1.3 had separate depreciation rates for existing rate base versus new rate base.

4569. **MR. DUMANOVSKI:** And would a depreciation study in case there's a need for change, be useful or necessary to be -- to -- to set the appropriate depreciation rates?

4570. **MR. STONESS:** As I said, we intend to stick to our existing depreciation rates for the term of the project. But if there were an accounting need to change them then we would come in, notify the Board, and bring an application before the Board. That would include a depreciation study.

4571. **MR. DUMANOVSKI:** Thank you very much.

4572. No further questions. Thank you very much to the panel.

4573. **THE CHAIRMAN:** We're coming to -- towards the end of a pretty long sitting for you guys. I only have one question, and that's for Mr. Anderson.

--- **EXAMINATION BY/INTERROGATOIRE PAR THE CHAIRMAN:**

4574. **THE CHAIRMAN:** Mr. Anderson, on the -- Board counsel explored with you integrity and safety costs. Can I interpret your answers as a commitment

**Trans Mountain Pipeline ULC Panel
Examination by the Chairman**

that Trans Mountain will continue to adequately maintain integrity and safety if the toll methodology is in effect?

4575. **MR. ANDERSON:** You most certainly can.

4576. **THE CHAIRMAN:** That's very clear. Thank you very much.

4577. And I'd like to thank you and the rest of the panel for your contribution here today and the past few days.

4578. You are released.

4579. **MR. ANDERSON:** Thank you, sir.

4580. **THE CHAIRMAN:** Actually before I release you there might be re-direct.

4581. **MR. NETTLETON:** No, I take my signals well. No re-direct.

4582. Thank you.

--- (Laughter/Rires)

4583. **THE CHAIRMAN:** Thank you very much, gentlemen.

4584. We'll take a short 10-minute break. We'll be back at five to three.

4585. **MR. NETTLETON:** Mr. George, I'm sorry; I believe there is one matter that Mr. Rinne would like to speak to regarding his testimony to Mr. Miller.

4586. And in terms of -- I've just been signalled that there is that -- there is an issue that Mr. -- Mr. Rinne would like to speak -- so -- speak to. And Mr. Rinne in -- so I would like to engage in one or two questions to Mr. Rinne regarding this issue.

4587. **THE CHAIRMAN:** I'm not sure if legally there's an un-release, but you're unreleased.

**Trans Mountain Pipeline ULC Panel
Re-examination by Mr. Nettleton**

--- (Laughter/Rires)

--- **RE-EXAMINATION BY/RÉ-INTERROGATOIRE PAR MR. NETTLETON:**

4588. **MR. NETTLETON:** Mr. Rinne, could I take you to transcript reference 3057 and 3058.

4589. And there, there is a passage, a question exchanged between -- or by Mr. Miller that asked you about a 10 cent decrease in the tolls, and your answer at that point, at 360, was "No, that's not true".

4590. And I believe later on in the exchange you continued to have a discussion with Mr. Miller regarding the notification that was provided to Mr. Miller's client regarding the 10 cent -- 10 cent reduction.

4591. And, Mr. Rinne, do you have any comments to make regarding that passage or any passage relating to the 10-cent reduction in the transcript?

4592. **MR. RINNE:** Yes, I do.

4593. If I may, I had hoped to get back there with Mr. Miller today, but the opportunity didn't come.

4594. After our conversation, I reviewed the -- my correspondence trail last night for the period -- that 30-day period between the close of the Open Season and the return of the signed FSAs from shippers and I cannot confirm that I had the conversation from my records with Total on that -- in that regard.

4595. Although I believe I did, I can't confirm that and so it may, in fact, not have been the case that I had informed them of the 10 percent -- 10-cent toll reduction at the time.

4596. I did go through all the series of events and other discussions on my communication trail and I have a higher degree of certainty that I did discuss the expanded pipeline concept with him but not necessarily the 10-cent.

4597. I wanted to clarify that for the record.

4598. **MR. NETTLETON:** And, sir, just to be clear what gives you that higher degree of confidence?

**Trans Mountain Pipeline ULC Panel
Re-examination by Mr. Nettleton**

4599. **MR. RINNE:** Prior to the close of the Open Season, I had sent a note to Mr. McIntyre giving him an advance warning of the January 10th toll filing and the updates.

4600. And although there's not an explicit reference to the conversation of expanded capacity, I had sent him an e-mail talking that said "as we had previously discussed" and then it discussed a bunch of other things and it said "including the expended pipe design."

4601. And so, from that, I conclude that we had a conversation about it, it wasn't new news to him about the expanded pipeline.

4602. But, again, nothing on the record as it relates to the 10 cents.

4603. **MR. NETTLETON:** And what was the date of the e-mail, sir?

4604. **MR. RINNE:** It was January 9th.

4605. **MR. NETTLETON:** Okay, those are my ---

4606. **THE CHAIRMAN:** Once again, Panel, thank you and this time you're really released.

4607. Sorry, we're going to return at 3:00 o'clock.

--- Upon recessing at 2:46 p.m./L'audience est suspendue à 14h46

--- Upon resuming at 3:01 p.m./L'audience est reprise à 15h01

4608. **MR. MILLER:** Good afternoon, Panel.

4609. The Total Panel is available. They're ready to be sworn and then I'll introduce the Panel.

GARY HOUSTON: Sworn

MATTHEW McINTYRE: Sworn

4610. **MR. MILLER:** Thank you.

**Total E&P Canada Ltd. Panel
Examination by Mr. Miller**

4611. Ladies and gentlemen, I am pleased to introduce to you the members of the Panel who will speak to the evidence of Total E&P Canada Limited. This Panel is comprised of Mr. Gary Houston and Mr. Matthew McIntyre, both of whom have very extensive experience in the pipeline industry in Canada and overseas.
4612. Closest to the Panel is Mr. Houston. Mr. Houston has a very long career in oil and gas and specialized in pipelines in particular. He started his career working for Alberta Gas Trunkline which became, subsequently, NOVA Gas Transmission. He started that career in 1979.
4613. He has worked with Total SA since 2001 where he held the position of Chief Operating Officer and Director of Gas Transportation for the company's division in Argentina until 2003. He was subsequently Vice President Technology for Total's Gas and Power Division in Paris from 2003 to 2007. In 2008, he joined Total E&P Canada Limited and he is currently a director of the company and he is Vice President Midstream and Marketing for Total E&P Canada Limited.
4614. This is Mr. Houston's first appearance before this Board, however, he has been qualified and he has appeared on numerous occasions as a witness before the Alberta Energy Conservation Board.
4615. Seated beside Mr. Houston is Mr. Matthew McIntyre. Mr. McIntyre is Midstream and Marketing Manager for Total E&P Canada. He also started his career in pipelines also with NOVA Gas Transmission but a little later in 1987. He subsequently joined Total in 2001 and he has worked on pipeline matters in Canada and Argentina.
4616. He holds a BSc in Engineering and a Master's in Engineering from the University of Alberta and he has been working in the oil and gas industry for over 28 years. This is Mr. McIntyre's first appearance before this Board.

--- EXAMINATION BY/INTERROGATOIRE PAR MR. MILLER:

4617. **MR. MILLER:** A few questions: Mr. Houston, Total has filed the following exhibits associated with this proceeding. They are: the Written Evidence of Total, Exhibit No. C16-3-2, the Direct Evidence of Total's witnesses, Exhibit C16-6-2, the Response to Information Request from the Alberta Department of Energy, Exhibit C16-5-3, the Response to Information Request

**Total E&P Canada Ltd. Panel
Examination by Mr. Miller**

from Trans Mountain, Exhibit C16-5-4, a Response to Information Request No.1 from the National Energy Board, Exhibit C16-5-2, a Response to Information Request No. 2 from the National Energy Board, Exhibit B16-7-2, and Total's Opening Statement which is Exhibit No. C16-8.

4618. Sir, can you confirm that those exhibits were prepared by you or under your direction and control?

4619. **MR. HOUSTON:** Yes, they were.

4620. **MR. MILLER:** And, sir, do you adopt these exhibits as Total's evidence and the evidence of -- Total's evidence with respect to this proceeding?

4621. **MR. HOUSTON:** Yes, I do.

4622. **MR. MILLER:** Thank you.

4623. Mr. Houston, you will recall, yesterday, that there was a discussion on the record between myself and Mr. Rinne concerning when Total was informed of the decision by Trans Mountain to change the size of the expansion pipeline from 30 to 36 inches.

4624. Do you recall that?

4625. **MR. HOUSTON:** Yes, I do.

4626. **MR. MILLER:** And, sir, when was Total informed of that change by Trans Mountain?

4627. **MR. HOUSTON:** We're not sure of the exact date, but it was sometime in mid-December.

4628. We were informed by telephone that they were considering that change and we subsequently had that confirmed in early January.

4629. **MR. MILLER:** And mid-December of what year, sir?

4630. **MR. HOUSTON:** I'm sorry, 2012.

4631. **MR. MILLER:** Right.

4632. And ---

4633. **THE CHAIRMAN:** Excuse me, sir.

4634. Are the witnesses ready for cross-examination?

4635. **MR. MILLER:** Yes, sir, I -- because we had placed in contention the issue of a difference of opinion between the parties on whether -- when and how the information was provided, I simply indicated earlier today that we would clarify the position of Total on the record.

4636. That's the end of my questions. I just wanted to make sure that that was clear on the record, sir.

4637. **THE CHAIRMAN:** Okay.

4638. If you were going to continue, I would have asked Mr. Nettleton if he was in agreement.

4639. **MR. MILLER:** No, sir, we just -- we had discussed this earlier.

4640. I'd indicated that we were going to clarify that on the record.

4641. **THE CHAIRMAN:** Thank you.

4642. **MR. MILLER:** This Panel is now available for cross-examination, sir.

--- EXAMINATION BY/INTERROGATOIRE PAR MR. NETTLETON:

4643. **MR. NETTLETON:** Good afternoon, Panel. My name is Gordon Nettleton. I appear on behalf of Trans Mountain and, Ms. Beauchemin, I assume I'm the lucky and only one to cross-examine. There's no party coming before me.

4644. **MS. BEAUCHEMIN:** Yes, Mr. Nettleton. I apologize. I should have called you. You're indeed the only one.

4645. **MR. NETTLETON:** Gentlemen, I'd like to start, if I could,

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

exploring with you one of the areas that I understand given the cross-examination that happened with my clients and that is the understanding that you have regarding the applicability of the guidelines for negotiated settlements.

4646. And so if I could have you turn up Exhibit C16-5-2 which I believe was an exhibit or an appendix to your information responses to Trans Mountain. And, in particular, it's Adobe page 13 of 16.
4647. Do you have that -- sir, can you see that okay?
4648. **MR. HOUSTON:** Yes.
4649. **MR. NETTLETON:** Now, it's my understanding, Mr. Houston, from your evidence that you believe that negotiated settlements -- the guidelines for negotiated settlements are applicable to this proceeding; is that fair?
4650. **MR. HOUSTON:** We -- we certainly consider that it's a tried and true process and it's been before the NEB in many occasions prior to this -- this case. And that it is a good guideline for this kind of a procedure.
4651. **MR. NETTLETON:** I see.
4652. Mr. Houston, can I direct you to the first sentence of the negotiated settlement guidelines which reads:
- “Negotiated settlements are regarded by the Board as an opportunity for interested parties to resolve issues without resorting to a hearing process.”* (As read)
4653. Do you see that?
4654. **MR. HOUSTON:** It's not on -- oh, yes. Okay. Yes I do.
4655. **MR. NETTLETON:** And sir, we are in a hearing process are we not?
4656. **MR. HOUSTON:** Yes.
4657. **MR. NETTLETON:** And so is it your understanding, sir, that there are in fact two tracks that an application can come before this Board as it relates to toll matters; one is a track that follows a path where there is no hearing,

- potentially, and another track where there would be a hearing.
4658. **MR. HOUSTON:** It's my understanding that there may in fact be three tracks if that's what you want to call them.
4659. One is a negotiated settlement that is fully unanimous and meets the criteria of the guidelines and is accepted by the Board with full support from the shippers. Another would be the old way, if I can call it that, which is full rate hearing. And the third way would be a -- a contested negotiated settlement where the Board is asked to rule on -- on the issues that are not agreeable amongst the parties.
4660. **MR. NETTLETON:** Is it your understanding, sir, that the application that is before the Board in this proceeding has been made -- has been applied for in accordance with the negotiated toll settlement as a -- as an application that should not proceed by way of hearing?
4661. **MR. HOUSTON:** I -- I understand that these -- this has been presented to the Board as an agreement that's been negotiated amongst the parties.
4662. There are parties, including ourselves, who do not support the -- the agreement as it has been set down and so it's being presented to the Board in that context.
4663. **MR. NETTLETON:** But you understand do you, Mr. Houston, that my client is not seeking Board approval of a process that would comport with the negotiated settlements where there would be no hearing or a contested settlement where there would be no hearing. In fact, what they've done is they've sought approval pursuant to section 60 of the Act for approval of the -- of the application that's been made for just and reasonable tolls.
4664. **MR. MILLER:** Sir, I rise because it's really a legal question with respect to whether or not it falls under section 60 or not.
4665. I don't think it's fair to put to this witness a legal question.
4666. **MR. NETTLETON:** Sorry. Let me rephrase.
4667. Have you read the application, Mr. Houston?

4668. **MR. HOUSTON:** Yes I have.
4669. **MR. NETTLETON:** Do you know whether the application speaks to the application being filed in accordance or pursuant to the relief that is contemplated under the guidelines where there would be no hearing?
4670. **MR. HOUSTON:** I'm certainly aware that the Applicant, Trans Mountain, has put forward a -- a proposal for tolls and tariffs that they claimed was a result of a negotiation and which was claimed to be supported by the shippers that signed the -- the documents.
4671. **MR. NETTLETON:** Okay. Why don't we turn to Exhibit B1, Mr. Houston, which is the original filed application. And it's B1-2, which is the application document and it's at page 17, which is the prayer for relief or the relief requested.
4672. And all I'm asking you, sir, is to confirm that nowhere in that relief that's been set out is there reference to the negotiated settlement guideline; correct?
4673. **MR. HOUSTON:** Mr. Nettleton, if -- if I look at 4.0(a), it talks about the toll methodology and all terms and conditions found in the FSA and the TSA.
4674. **MR. NETTLETON:** Yeah, that wasn't my question, sir. My question was do you see anywhere in this relief requested where there is any reference to the guidelines for negotiated toll settlements?
4675. **MR. HOUSTON:** No, I don't believe the guidelines were the basis for the -- for the negotiation.
4676. **MR. NETTLETON:** And sir, if I could then flip you to page 14 of the application under heading 2.6.
4677. You'll see there, Mr. Houston, there's a discussion at paragraph 32 referring Guide P of the Board's filing manual. And you'll see that in that paragraph there's a discussion of the fact that the application is seeking approval of a toll methodology that is not cost-of-service based. Do you see that?
4678. **MR. HOUSTON:** Yes I do.

4679. **MR. NETTLETON:** And the position that's been advanced in this case, in this application, is that the application provides the evidence necessary for the Board to assess whether the toll methodology is just and reasonable and not unduly discriminatory. Do you see that?

4680. **MR. HOUSTON:** Yes.

4681. **MR. NETTLETON:** And that the position that Trans Mountain has made in this case, in this paragraph, is that the nature and the level of the evidence included in the application comports with the overall objective of Guide P. Do you see that?

4682. **MR. HOUSTON:** I see the words. Yes.

4683. **MR. NETTLETON:** Right. And again, there's no reference there is there to a negotiated toll settlement filing that's made in accordance with the guideline?

4684. **MR. HOUSTON:** I agree with you that the guideline is not directly referenced although the -- the toll methodology, the TSA the FSA were all agreements which Trans Mountain claimed to have negotiated with the -- with the shippers.

4685. And I believe it's the shipper support that Trans Mountain is putting forward as evidence that the toll methodology applied for is -- is fair.

4686. **MR. NETTLETON:** Okay. So just so that we're on the same page, is it -- the concern that you've raised is that the process by which the FSA and TSA were negotiated and resulted -- the results from that process known as the open season, that's the process you're complaining of about not being fair. Is that correct?

4687. **MR. HOUSTON:** I -- I'm not sure I understood your question correctly.

4688. What we're concerned about is that the negotiation process that led to a set of tolls and tariffs that subsequently was presented through three Open Seasons, in various forms, did not lead to an optimum solution that could be supported by all of the shippers.

4689. In particular, Total has serious concerns about a number of aspects of the tolls and tariffs. Tolls and tariffs, you understand, being the entirety of the TSA document.

4690. **MR. NETTLETON:** We'll get there.

4691. **MR. HOUSTON:** M'hm.

4692. **MR. NETTLETON:** Trust me.

4693. But, right now, I just want to concentrate on this -- on the issue that you've raised in your evidence and in cross-examination with my client as to the applicability of the negotiated toll settlement. And I just have a couple of other questions on that, Mr. Houston.

4694. Is it your view that it is the Applicant who has the choice in terms of how an application is made to this regulator?

4695. **MR. HOUSTON:** Well, I actually think the Board would have something to say about how the process is managed from a regulatory point of view.

4696. **MR. NETTLETON:** I'm not asking about the process, sir, I'm asking about when a party wants to make application to the Board, that party has choices: They can either go through and make a negotiated toll settlement filing and hope that it doesn't result in a hearing or they can make application in a different way that they know full well will result in a hearing.

4697. **MR. HOUSTON:** I think we have before us a guideline that has been used for -- successfully for many negotiated settlements and I think, as Trans Mountain pointed out through their testimony under cross-examination, that that guideline has been used by Trans Mountain in many cases successfully.

4698. I think it's a guideline that is a useful starting point if we're going to talk about a negotiated settlement.

4699. If we're going to talk about a set of tolls and tariffs that is unilaterally set down by Trans Mountain for acceptance by the Board, I don't know what that process is but it's certainly not a negotiated process.

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4700. **MR. NETTLETON:** So let me ask you this then Mr. Houston: Is it your view that whenever a pipeline company decides to convene an Open Season by default they have to pursue an application by way of negotiated toll settlement?
4701. **MR. HOUSTON:** I think the requirement is that they get the tolls and tariffs approved by the Board.
4702. **MR. NETTLETON:** Right.
4703. In other words, sir, ---
- (A short pause/Courte pause)
4704. **MR. HOUSTON:** Did I miss a question?
4705. **MR. NETTLETON:** I was waiting for you to get your discussions over.
4706. **MR. HOUSTON:** I'm sorry, please keep going.
4707. **MR. NETTLETON:** Do you have anything further to add to my -- there seemed to be an exchange with Mr. McIntyre; I was waiting for that.
4708. **MR. HOUSTON:** No, no.
4709. **MR. NETTLETON:** Okay.
4710. Can we agree, Mr. Houston, that however the Application for tolls comes before this Board, it's the same standard that applies, namely, that the tolls have to be demonstrated to be just and reasonable?
4711. **MR. HOUSTON:** I think we can agree on that.
4712. **MR. NETTLETON:** Okay.
4713. So, Mr. Houston, let's turn to the Open Season because it seems like the Open Season is where you have a very different view than my client, and what's happened there.

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4714. Now, if I could -- let me just see if I follow the evidence that you've put before this Board in this proceeding.

4715. Total is saying that the Open Season process that was carried out by Trans Mountain was neither fair nor transparent.

4716. Is that fair? Is that an accurate depiction?

4717. **MR. HOUSTON:** No, I don't believe it is.

4718. There ---

4719. **MR. NETTLETON:** All right, let's -- let's just turn to Exhibit C16-3, page 6, and it's paragraph 14. That's your direct evidence.

--- (A short pause/Courte pause)

4720. **MR. NETTLETON:** I thought I was reading the beginning of the paragraph -- and it's paragraph 14 -- to say that it's your position that Trans Mountain's Open Season process was neither fair nor transparent.

4721. Is that not right?

4722. **MR. HOUSTON:** I guess to extend my previous answer, our concern with this process is not only the Open Season.

4723. The Open Season was -- and I think we all have to admit, looking back, it was held over three separate occasions. There were negotiations going on during the Open Season and so it wasn't the nice clean event that it could have been.

4724. But I think our concern is broader than that and it's around the negotiations that were going on in a rather disjointed way and the result, I would say, of those negotiations that does not seem optimal to us.

4725. **MR. NETTLETON:** All right.

4726. I just wanted to confirm whether or not, sir, that's still your evidence, that Trans Mountain's Open Season process was neither fair nor transparent.

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4727. **MR. HOUSTON:** It was a difficult Open Season to follow.
4728. **MR. NETTLETON:** So the evidence really should read: Trans Mountain's Open Season was a difficult process to follow.
4729. **MR. HOUSTON:** We'll stand with the words that are written in the evidence.
4730. **MR. NETTLETON:** Okay.
4731. It's the case, is it not Mr. Houston, that Total was provided notice of the Open Season Round 1 at the same time as other prospective shippers?
4732. **MR. HOUSTON:** Yes, that's true.
4733. **MR. NETTLETON:** Right.
4734. And that's true with rounds -- with the Round 2 notice; correct?
4735. **MR. HOUSTON:** I believe so, yes.
4736. **MR. NETTLETON:** And with Round 3?
4737. **MR. HOUSTON:** Yes.
4738. **MR. NETTLETON:** Thank you.
4739. And Total had communications with Trans Mountain as part of the Open Season negotiation process; is that correct?
4740. **MR. HOUSTON:** I'm sorry, could you repeat that one?
4741. **MR. NETTLETON:** Total had communications with Trans Mountain as part of the Open Season negotiation process?
4742. **MR. HOUSTON:** Yes, we did.
4743. **MR. NETTLETON:** Thank you.

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4744. And Total entered into commercial discussions with Trans Mountain;
correct?
4745. **MR. HOUSTON:** Yes.
4746. **MR. NETTLETON:** And Total executed a Confidentiality
Agreement as part of the Open Season process; correct?
4747. **MR. HOUSTON:** Yes, it was our understanding and I believe it's
correct that it was not possible to do -- enter into the commercial discussion nor to
have any of the documentation if we had not first executed the Confidentiality
Agreement.
4748. **MR. NETTLETON:** Is there a reason why you're highlighting that,
Mr. Houston?
4749. **MR. HOUSTON:** No, no reason. I was just trying to be clear.
4750. **MR. NETTLETON:** Is that a common practice when Open Seasons
are held?
4751. **MR. HOUSTON:** We have confidentiality agreements for a lot of --
prior to entering into commercial discussions.
4752. **MR. NETTLETON:** You indicated in your response to an
information request that you'd participated in the Keystone Open Season process;
correct?
4753. **MR. HOUSTON:** Yes, we did.
4754. **MR. NETTLETON:** And did you sign a confidentiality agreement in
that process?
4755. **MR. HOUSTON:** Yes, we did.
4756. **MR. NETTLETON:** Okay.
4757. And once you signed the confidentiality agreement in this process, Mr.
Houston, Total was provided electronic access to the forms of transportation
services agreement, the facilities support agreement, the TSA and FSA as they've

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

been referred to and as well as the pro-forma terms and conditions of -- or the rules and regulations and the tariff.

4758. Correct?

4759. **MR. HOUSTON:** Yes, we were.

4760. **MR. NETTLETON:** And do you have any reason to doubt other shippers who also signed confidentiality agreements were afforded the same opportunity?

4761. **MR. HOUSTON:** I have no reason to doubt it.

4762. **MR. NETTLETON:** Thank you.

4763. Now, sir, you're aware -- as I recall, you chose not to participate in Rounds 1 and 2 but did participate in rounds three; correct? In Round 3.

4764. **MR. HOUSTON:** Well, when you talk about participating, we were in -- as you say, in discussions with Trans Mountain throughout Round 1 and Round 2.

4765. And we were talking to them about what we would have liked to have seen in the TSA and the FSA and our concerns with the project as it was being structured. So to that extent, we were involved in Rounds 1 and 2 and ---

4766. **MR. NETTLETON:** And, sir, you're aware, are you, that other parties, other shippers have filed evidence in this proceeding, such as yourselves, stating their views and perspectives regarding the open season?

4767. **MR. HOUSTON:** Yes.

4768. **MR. NETTLETON:** And have you read the direct evidence of BP Canada?

4769. **MR. HOUSTON:** It's some time ago, but yes, I read it. I believe it was fairly short.

4770. **MR. NETTLETON:** What about Canadian Oil Sands Partnership?

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4771. **MR. HOUSTON:** Yes, I remember reading that.
4772. **MR. NETTLETON:** And Statoil?
4773. **MR. HOUSTON:** Yes.
4774. **MR. NETTLETON:** And Nexen?
4775. **MR. HOUSTON:** Yes.
4776. **MR. NETTLETON:** And I can refer you to all of those, that direct evidence but I'd just like you to confirm, if you can, that all of those shippers have filed evidence in this proceeding that have indicated that they'd participated in the open season and certainly they have not expressed any concerns with the open season process. Is that your understanding?
4777. **MR. HOUSTON:** I'd rather not paraphrase their evidence since it's already on the record, but I do know that they filed evidence more or less in that direction.
4778. **MR. NETTLETON:** Mr. Houston, Total Energy -- Total E&P Canada has entered into a strategic alliance with Suncor Energy; is that correct?
4779. **MR. HOUSTON:** We are partners on three different projects and we consider that to be an alliance but really it's a partnership on three different projects.
4780. **MR. NETTLETON:** I think I read ---
4781. **MR. HOUSTON:** Joint venture perhaps.
4782. **MR. NETTLETON:** This is the danger again of press releases or newspaper stories when you hear headlines line "Strategic Alliance". But if it's a partnership of sorts, that's -- thank you for that clarification.
4783. And can you just explain to me, Mr. Houston, what facilities form part of that partnership or what the nature of that partnership is?
4784. **MR. HOUSTON:** Sure. There are two mining projects; the Fort Hills Mine where we're partners with Suncor and Teck. And then there's the Joslyn

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

North Mine where we're partners with Suncor, Impex and Occidental Petroleum. And finally, we're partners on an upgrader called the Voyageur Upgrader where it's only Suncor and Total in that partnership.

4785. **MR. NETTLETON:** So there's an alignment of interests with respect to the development of oil sands resources; is that fair?

4786. **MR. HOUSTON:** That's fair.

4787. My friend here is reminding me that when I use "partnership" sometimes they're JVs. I hope I don't get criticized for that.

4788. **MR. NETTLETON:** And Suncor is a participant in this proceeding or at least affiliates of Suncor are participants in this proceeding?

4789. **MR. HOUSTON:** They are.

4790. **MR. NETTLETON:** And I'm wondering, Madam Clerk, if we could turn up Exhibit C15-7-3, which is Suncor's response to Trans Mountain Information Request 1.6(a).

4791. And just to put context to this answer, the question that was asked of Suncor was:

"Is it Suncor's view that in times of constrained pipeline capacity [...] the WCSB, Open Season results ought not be used or trusted by regulators as demonstrating support for negotiated outcomes, including tolling methodologies, that are intended to backstop the development of new incremental transportation capacity?"

4792. That was the question. And then you'll see the response, gentlemen, is that Suncor says:

"No, Suncor is not taking issue with the open season, it is taking issue with the toll."

4793. Do you see that?

4794. **MR. HOUSTON:** Yes, I see it.

4795. **MR. NETTLETON:** So Suncor goes on in its response to say:
- "...all parties were provided with fair access to capacity unencumbered by Trans Mountain's assertion of market power through section..."*
4796. Through the removal of "section 2.2 of the FSA".
4797. Is that your view now? Mr. Houston, is that a view that you share with your strategic partner?
4798. **MR. HOUSTON:** Which part of it?
4799. **MR. NETTLETON:** Well, how about the whole response that Suncor has provided where they say, no, we are not taking issue with the open season. What they're taking issue with is the toll.
4800. So Suncor has effectively clarified that it's not the open season process that we're upset with. It's the toll.
4801. **MR. HOUSTON:** Let me clarify. We have partnerships and business relationships with Suncor, but we are two different companies and so I can't, you know, I can't speak for Suncor. You're asking me do I agree with the words they've written on the page? We have points of agreement and we have areas where we do not agree.
4802. **MR. NETTLETON:** Okay. So one point of disagreement, is it fair to say that you continue to disagree that the open season -- put it this way; Suncor is not taking issue with the open season process. Do you understand that?
4803. **MR. HOUSTON:** I see that that's what they've written in their evidence.
4804. **MR. NETTLETON:** And is that a position that you now support or is it a position that you don't support with your strategic partner?
4805. **MR. HOUSTON:** Don't let what I say make you think that I don't support my strategic partner because we work well together on the projects where we are partners. But I do think we have subtly different positions in this respect.

4806. When we talk about the open season, we are concerned about the process that I guess has led us to this hearing and that includes the negotiations that happened before the open season and the negotiations that were happening during the open season.
4807. I think the evidence is that we have 10 black lined drafts of contracts, which were coming at us during the process and, at the same time, we were talking with Trans Mountain. It was a very confusing negotiation. We think that the result is not optimal and that's how we've arrived here today.
4808. So I think we do have a subtly different position than Suncor seems to be expressing here, but I need to let them speak to their own evidence.
4809. **MR. NETTLETON:** I was just wondering, sir, whether or not Suncor's view that it is not taking issue with the open season is one that you now agree with?
4810. **MR. HOUSTON:** I think our evidence says different.
4811. **MR. NETTLETON:** Yeah, this was produced after evidence was due. What I'm asking you, sir, is whether that position has now changed your position with respect to your evidence?
4812. **MR. HOUSTON:** No, this is Suncor's evidence and we have our own evidence, and they are different on this point.
4813. **MR. NETTLETON:** Now, if I could have you turn to C16-3, paragraph 17 of your direct evidence. I just want to understand one of the elements -- one of the other elements that you were taking issue with in respect of the open season, Mr. Houston.
4814. You mention at paragraph 17 that there was insufficient routing information and that Total was not able to:

"...accurately assess the Project's timing and appropriateness."

4815. Do you see that?

4816. **MR. HOUSTON:** Yes, I do.
4817. **MR. NETTLETON:** Is that your evidence today?
4818. **MR. HOUSTON:** I think even Trans Mountain would admit that we are a long ways from having a final route for this project. They've -- I heard them talk about routing challenges during their direct evidence and under cross-examination, and I think there's a long ways to go in this project.
4819. **MR. NETTLETON:** No, but be clear. You say that because there was insufficient routing information, Total was not able to accurately assess the project's timing and appropriateness.
4820. My question is does that continue to be your position today; that there was insufficient information?
4821. **MR. HOUSTON:** I think the routing's at a preliminary stage.
4822. **MR. NETTLETON:** Well, when would the route, sir, be at a stage where it would give you perfect certainty?
4823. **MR. HOUSTON:** Well, I think we hope to work with Trans Mountain through the entire project. We -- let me be clear; we're supportive of this project. We think that access to the Pacific Coast through the Trans Mountain expansion is a very good thing for the industry and something that we're keen to support and get fully behind. And so we look forward to working with Trans Mountain as a shipper on the pipeline moving forward through the process.
4824. And that would include expressing to them -- if we had concerns about the routing or about the project, expressing those to them as the process goes forward.
4825. **MR. NETTLETON:** I know on Valentine's Day it's always nice to be to your friends, kind to your friends, and I'm sure my client appreciates those nice comments, Mr. Houston, but I want to get back to the open season.
4826. In paragraph 17, my understanding is -- and correct me if I'm wrong -- that one of the concerns that you had was insufficient routing information that caused Total to not be able to accurately assess the project's timing and

appropriateness; is that correct?

--- (A short pause/Courte pause)

4827. **MR. HOUSTON:** So if I could clarify our concern with respect to the routing and the advancement of the project. When we signed the TSA and the FSA, we were, in effect, taking a -- well, making an obligation, making a commitment towards Trans Mountain for five years to follow this project through. We have elsewhere in our evidence talked about when you make that kind of commitment, you take yourself out of the game, as it were, with respect to other projects that may be coming along or may eventually come along.

4828. And so it's particularly important to us that the technical aspects of the project to confirm its scope and nature advance at the same time as the commercial discussions.

4829. **MR. NETTLETON:** You mentioned to me, Mr. Houston, that you participated in the Keystone XL open season; correct?

4830. **MR. HOUSTON:** Yes, we did.

4831. **MR. NETTLETON:** And you're a shipper on Keystone XL?

4832. **MR. HOUSTON:** There's no pipeline yet, so we can't be a shipper. But when it's up and running we will be a shipper.

4833. **MR. NETTLETON:** Was the route for the Keystone XL determined in advance?

4834. **MR. HOUSTON:** Yes, it was.

4835. **MR. NETTLETON:** Did that route change following shipper commitments?

4836. **MR. HOUSTON:** Yes, I believe that was fully in the press. It's changed significantly through Nebraska.

4837. **MR. NETTLETON:** But that, nonetheless, allowed you to make commitments on Keystone.

**Total E&P Canada Ltd. Panel
Examination by Mr. Nettleton**

4838. **MR. HOUSTON:** And I think all these projects mature as they go along. What we're talking about is acquiring a level of advancement so that you can see the light at the end of the tunnel. I think Keystone XL had done that, in our judgment, anyway, by the time we made a significant commitment.

4839. **MR. NETTLETON:** Mr. Chairman, I'm mindful of the time. I'm at a logical place to stop. I'm in your hands if you'd like me to continue on.

4840. **THE CHAIRMAN:** Oh, thank you, sir. I think we'll reconvene tomorrow morning at 8:30. We'll adjourn now.

4841. Thank you.

--- Upon adjourning at 3:43 p.m./L'audience est ajournée à 15h43