

**JOINT REVIEW PANEL FOR THE ENBRIDGE
NORTHERN GATEWAY PROJECT
COMMISSION D'EXAMEN CONJOINT DU PROJET
ENBRIDGE NORTHERN GATEWAY**



**Hearing Order OH-4-2011
Ordonnance d'audience OH-4-2011**

**Northern Gateway Pipelines Inc.
Enbridge Northern Gateway Project
Application of 27 May 2010**

**Demande de Northern Gateway Pipelines Inc.
du 27 mai 2010 relative au projet
Enbridge Northern Gateway**

VOLUME 177

**Hearing held at
Audience tenue à**

**Best Western Plus Terrace Inn
4553 Greig Avenue
Terrace, British Columbia**

**June 18, 2013
Le 18 juin 2013**

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as represented by the Minister of the Environment
and the National Energy Board

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HEARING /AUDIENCE

OH-4-2011

IN THE MATTER OF an application filed by the Northern Gateway Pipelines Limited Partnership for a Certificate of Public Convenience and Necessity pursuant to section 52 of the *National Energy Board Act*, for authorization to construct and operate the Enbridge Northern Gateway Project.

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Terrace (British Columbia), Tuesday, June 18, 2013
Audience tenue à Terrace (Colombie-Britannique), mardi, le 18 juin 2013

JOINT REVIEW PANEL/LA COMMISSION D'EXAMEN CONJOINT

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- Mr. Michael Ross

Sherwood Park Fish & Game Association
- Mr. Andrew Boyd

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National Energy Board/Office national de l'énergie
- Mr. Andrew Hudson

ERRATA

(i)

Monday, June 17, 2013 - Volume 176

Paragraph No.:

75:

“... March 2010 at 44 – 44J”

85:

“...[16 Exhibits B83-2...”

94:

“...planning tool. It is now generally recognized...”

140:

“...tugs as a mitigation measures.”

232:

“...[Exhibit B174-7 at 7, Paragraph 82J”

Should read:

“... March 2010 at 44 – 45J”

“...[Exhibits B83-2...”

“...planning tool that is now generally regarded...”

“...tugs as a mitigation measure.”

“...[Exhibit D72-92-2 at 254, paragraph 933ff]”

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**Opening remarks
Chairperson**

--- Upon commencing at 8:30 a.m./L'audience débute à 8h30

1100. **THE CHAIRPERSON:** If we could get everyone to take their seats, we'll be ready to get underway, please.

1101. Thank you very much, everyone. Good morning.

1102. I just want to inform everybody that due to unforeseen circumstances, we will be making a change in the hearing hours for this Friday. So this Friday, instead of sitting from 8:30 to 4:30, we will be sitting from 8:30 until 1:00 and we will not be sitting on Saturday. It remains our intention to complete the hearing on or before the 28th of June, and all of our estimates indicated -- indicate that that shouldn't be problem.

1103. If we do have to add additional hearing hours as we go along, we will add them to the days that we are sitting. And we don't anticipate any further changes to the schedule other than what we've announced here of sitting from 8:30 to 1:00 on Saturday -- sorry, on Friday, and not sitting on Saturday.

1104. Before we get underway this morning, are there any preliminary matters that parties wish to raise?

--- (No response/Aucune réponse)

1105. **THE CHAIRPERSON:** Very different from the questioning phase, isn't it? We used to have a line-up at the podium on a regular basis. Thank you very much.

1106. So we'll come back to the Province of B.C., and Mr. Jones, we thank you very much for your submission. And after having the chance to think about things and have further discussions, the Panel has no questions of the Province of B.C. So thank you very much.

1107. **MR. JONES:** Thank you. Let me know if you change your mind.

--- (Laughter/Rires)

1108. **THE CHAIRPERSON:** We will.

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1109. **MR. JONES:** It's been a pleasure.
1110. **THE CHAIRPERSON:** Thank you.
1111. We'll call next C.J. Peter Associates Engineering.
1112. Good morning, gentlemen.
1113. Mr. Peter?
1114. **MR. PETER:** Good morning, Madam Chair. Thank you very much for letting us appear before you and the Members of the Panel once again.
1115. I'd just like to reiterate what others have already said, which is that in -- if we happen to take exception to any of the written and oral arguments of others in this submission, C.J. Peter Associates in no way wishes this to be construed as a criticism of their arguments or their counsel.
1116. So that having been said, may I now present Mr. Brian Gunn and Dr. Hugh Kerr to give our oral response to those arguments? Thank you very much.
1117. **THE CHAIRPERSON:** Thank you.
1118. Good morning, Mr. Gunn.
1119. **MR. GUNN:** Good morning, Madam Leggett. How are you?
1120. **THE CHAIRPERSON:** I'm fine, thanks. And it's so much better, I think, all parties will find with that door open a little bit to get some fresh air in this room once in a while. As he closes it, but I think that's because a truck was going by.
- (Laughter/Rires)
1121. **THE CHAIRPERSON:** We can be assured Mr. Campbell's on it.
1122. Mr. Gunn, please proceed.
- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. GUNN AND DR. KERR:**

1123. **MR. GUNN:** Thank you.
1124. So I'd like to start by talking about the risk situation. And we've been through the Northern Gateway final written arguments.
1125. And by Northern Gateway's own calculations, as per their QRA Table, *[QRA, Marine Shipping Quantitative Risk Analysis, DNV Technical Data Report, 2010, Table 8-8]* and already accounting for the effects of escort tugs, the return period of spills, oil or condensate, of any size, is 250 years and that of substantial oil spills greater than 5,000 cubic metres is 550 years.
1126. We agree with BC Nature/Nature Canada *[Exhibit D12-31-2, paragraphs 233-235]* that Northern Gateway's use of return periods is potentially misleading and provides an optimistic statistic. As stated by BC Nature and Nature Canada, Northern Gateway should have reported on the probability of spills occurring during the operating life of the Project, which we understand to be 50 years.
1127. The 250-year return period translates into a probability of 18 percent of at least one spill of any size occurring during the 50-year operating life. The 550-year return period corresponding to spills of greater than 5,000 cubic metres, the associated probability that one such spill in the 50-year operating life is 9 percent.
1128. We believe these probabilities of spills occurring are too high and unacceptable. It is important to highlight that these numbers already include the 80 percent reduction due to the use of tugs and approximate one-third conditional probability of a spill, if a tanker incident has occurred. *[Paragraphs 954-956]*
1129. Northern Gateway argues that things will be much better than estimated and that the QRA is conservative. *[Paragraphs 966, 977, 978]*
1130. Better, they say, because of world-class tug policies, tanker design, double-hulls that will drastically reduce the conditional probability of a spill, and navigational aids that will be installed along the route. These are all conjectures that are not quantitatively incorporated into the QRA.
1131. Will the promised tug policy exceed the effects already taken into account in the QRA through the 80 percent reduction for tugs? It would appear that a further reduction needs to be quantified to justify Northern Gateway's

conjecture.

1132. It seems plausible that double-hulls are better than single hulls, but by how much? Were equivalent navigational aids already in existence and accounted for in the incident rate database from Lloyd's Register? *[Paragraph 974]*
1133. We have not had access to this database because of its cost. We believe it should have been made freely available by Northern Gateway as part of the evaluation process of their submissions. We remain unclear as to how the issue of underreporting of incidents has been dealt with in the analysis of the database. *[Paragraphs 963-967]*
1134. In any case, additional reductions due to "world-class" tug policies, double-hulls and navigational aids would need to be quite substantial to overcome the high risks evident from the QRA and which form the basis of Northern Gateway's submission.
1135. When society demands an annual risk of the order of at least 1×10 to the minus 4 for projects with high consequences -- that's one incident in 10,000 years -- in the case of non-performance like very important bridges, dams, offshore oil exploration structures, et cetera, why would society be satisfied with Northern Gateway's estimates, a much higher annual risk, particularly given the high consequences of spills in a highly environmentally sensitive environment?
1136. It is not an acceptable argument to say that the stated risks should be accepted because they are comparable to those already acceptable elsewhere.
1137. Northern Gateway's results cannot hide the inherent risks. Therefore, they rely on the process of conservatism, but these are not quantitatively studied. It is hard to hide the obvious additional risks brought on by the increased traffic due to LNG developments. Yet, Northern Gateway dismisses this fact without factually studying the situation.
1138. They quote sensitivity studies that are no more than hand-waving. They just studied the variation and the estimated spill return period when they introduced an artificial change of 20 to 50 percent in one of the QRA scaling factors. That is the one affecting traffic density and collisions.
1139. Does this artificial increase suffice to represent the 432 additional LNG tankers expected at Kitimat? We do not know since the topic is brushed

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away without explicit consideration. In fact, Northern Gateway just summarizes the risk [Paragraph 1036] by stating that:

“The risk of a tanker incident is very low and the risk of an oil spill from a tanker even lower. Northern Gateway has, through its commitments, reduced those risks to as close to zero as reasonably [practical].”

1140. We disagree strongly with this statement and the written argument of Northern Gateway since it is obviously not supported by their own estimates -- incident return periods or probabilities of at least one incident within the operating life of the Project. The contribution of the LNG traffic cannot be ignored.

1141. In our letter of comment, we detailed our own estimation of this contribution as shown in the tables filed on the record. [A2X6G9 at 8 and A2C8Y8 at 3]

1142. Thus, for an annual traffic of 652 tankers, 220 oil and 432 liquefied natural gas, the return period of collisions was estimated at 73 years with 81 years for groundings only. Thus the return period for either a grounding or a collision was calculated as 38 years, corresponding to a 73 percent probability of at least one such incident during the 50-year life.

1143. These estimates do not include the help of escort tugs, but they are too low to benefit from the use of such help. The tables that we showed are highly dependent on the assumed conditional probability of a spill given that an incident has occurred.

1144. Excuse me.

1145. Well, we can't put the table up, but basically we're saying that if the conditional probability of a spill -- of a spill given an incident is .327, then the return period with no tug spills of all sizes due to either groundings or collisions, is 1 in 118 years or 35 percent, and if the conditional probability of a spill is 1, then that number goes to 1 in 38 years or 73 percent.

1146. So are we to be satisfied that the safety of the Project is enhanced because the results are backed by full bridge simulations, as Northern Gateway says -- I'm sorry, are we to be satisfied that the safety of the Project is enhanced because the results are backed by full bridge simulations as Northern Gateway

says?

1147. Hardly, because these simulations, while highly effective for training of pilots and captains, were not used extensively to permit estimates of probabilities that tankers will probably -- that tankers will complete their journey successfully, under different navigational situations and weather conditions.
1148. Testimony by Northern Gateway during the Prince Rupert hearings confirmed that these simulations were never intended to obtain “statistics”, as we discuss in our written submission.
1149. There are deficiencies in the final written argument of Transport Canada, so I want to bring Transport Canada into this, Natural Resources Canada and Environment -- Environment Canada.
1150. We are very critical of Transport Canada for providing TERMPOL -- for approving -- sorry -- TERMPOL for this Project despite the fact that the risks, as stated by Northern Gateway, are considerable, and in our opinion are significantly understated by Northern Gateway.
1151. Furthermore, the marine voluntary commitments they require to be mandatory of Northern Gateway are in fact needed for the safe operation by other projects, namely the LNG undertakings which have been approved and could be in operation, as we understand it, as early as 2014.
1152. The voluntary commitments [*Exhibit E9-78 at 4-7*] referred to in their comment on the JRP Draft Condition Number 5 should be in the process of implementation by the Government of Canada now, before LNG tankers start plying these waters. Transport Canada, in our opinion, is transferring their responsibility for providing navigation aids and systems in these waters to Northern Gateway.
1153. It is also our opinion that the following missing items should be added to Northern Gateway marine voluntary commitments: First, the radar coverage and navigational aids should be provided along the entire tanker transit routes, not just Caamano Sound and Lewis Passage as per DNV QRA.
1154. Second, the Canadian Hydrographic Service charts should be reviewed and brought up to date, as they have been -- as they have been converted from old datums and were not prepared for the large vessels proposed for the routes; the

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- VTS, control facility and tracking and monitoring system needs to be implemented in Prince Rupert.
1155. The operation will be unsafe without these upgrades, particularly when LNG tankers start navigating the coast as early as 2014.
1156. We dispute the claim by Northern Gateway that weather in the CCAA -- I always have trouble with these abbreviations, but it's the confined areas -- is mostly "benign" [*Paragraphs 1030, 1031*].
1157. In fact, we have presented evidence that wind speeds and wave heights have been underestimated. While it is true that weather perception may depend on the vessel size, we think that this should not be an argument to minimize weather issues just because one is dealing with tankers.
1158. We are not satisfied that a dilbit spill will be easily cleaned up, as we feel that there is not a consensus on the conditions under which dilbit will remain on the surface or will sink. We feel that there needs to be further controlled experimentation on this subject. This conclusion is backed by the experience of Michigan's Kalamazoo River.
1159. In reference to Draft Condition Number 165, it is our opinion that dilbit is not safe to ship, and Northern Gateway should be required to fulfill this draft condition before getting approval, not after, because we fail to see that if -- if they have a sinking problem that they're going to be able to clean it up and that they have the experience to do so.
1160. Beyond these technical questions, we are concerned that the legal responsibilities of handling a disastrous spill and provisions for contingency funds are not well defined nor assigned.
1161. For example, the installation of navigational aids and other mitigation measures would be Northern Gateway's responsibility, [*Paragraph 981*] rather than stating that they will be, so it says "would" instead of "will". This issue has been raised by others too, and we agree completely with their concerns.
1162. And to sort of finally put a few thoughts down as engineers because we have -- we have concerns about the ability to get our products overseas and what is a safe way to do it, and when we look at the whole situation, we ask ourselves what we could do as was brought up by Northern Gateway yesterday to

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- improve the situation. What improvements could you make?
1163. And certainly they've gone a long ways in -- in coming up with things like escort tugs and so on, but you know, I can't give them total credit for that because they're used elsewhere in the world and the whole inspection program of ships and so on.
1164. But in the end, we are talking about a long channel to get the -- the tankers in and out of Kitimat, 160 nautical miles, compared to other alternatives in the North which would be Rupert and Port Simpson.
1165. So we're talking about 16-hour transits compared to 8-hour transits in -- I'm sorry, 2-hour transits in Rupert and 1-hour transit in Port Simpson. So we believe the risk goes up proportional to the length of the route.
1166. And we're concerned -- we're concerned that this kind of pristine area -- well, it's not "kind of", it is a pristine area in the North, is very much affected by what we do industrially and this an area that is -- despite the fact that it's had ships and so on for a long time, we're talking about a huge, huge impact in terms of tankers and their -- in our view, high probability of some spills and the difficulty of cleaning it up. And so we think this is just the wrong place for an oil -- dilbit export terminal.
1167. And -- so that's just our concluding remarks and we think there are better areas, better places, to ship the product. We're not opposed to the oil situation or shipping product. We'd all like to see green energy but the reality of life is we all live on this planet and we all use petroleum.
1168. So I guess that would conclude my remarks. Given these misgivings, we strongly oppose the approval of this Project and urge the Joint Panel -- Joint Review Panel to do so in their final recommendation.
1169. So thank you very much for your time.
1170. **THE CHAIRPERSON:** Thank you Mr. Gunn.
1171. Dr. Kerr?
1172. **DR. KERR:** Thank you. How much time do I have?

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1173. **THE CHAIRPERSON:** Forty-three (43) minutes remaining.
1174. **DR. KERR:** Can you hear me on this mic?
1175. I want, first, to thank the Panel for allowing me to appear today as part of the group working with Mr. C.J. Peter.
1176. You also have been gracious in permitting me to raise questions in Prince George with both the United Fisherman Allied Workers Union, represented by Mrs. Joy Thorkelson and Dr. Josette Wier, to whom I also extend my thanks. I greatly appreciate the opportunity to submit a written argument and also to make this final oral argument.
1177. Northern Gateway has filed written arguments of about 380 pages and an attachment of 100 pages. My arguments today focus on their arguments.
1178. Prime Minister Harper has said that the decision about whether to approve this pipeline will be “based on science”. Much of the hearings, in fact, have been about the engineering design of the pipeline. Engineering is based on science. Many of the engineering topics inherent in the pipeline are still evolving, such as corrosion under deposits, and stress analysis around various types of cracks.
1179. In order to make a design, one uses the knowledge available to date but one has to make various assumptions. In my experience of over 50 years in engineering, I know that it is important to have the relevant numbers in order to test a theory or analyse a design.
1180. It is very difficult, if not impossible, to judge Northern Gateway’s “science” without knowing numerical details of their proposal. As we will see, they have refused to release what we think are some critical numerical details. And some of the numerical details that they do present are of considerable concern.
1181. For example, in their final arguments [*Exhibit B226-2 at 149*] Page 149, they state:

“There has not been a major rupture on an NEB regulated oil pipeline in Canada for the past 25 years.”

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1182. In this statement, it is important to distinguish between a rupture and a leak. The spill in Line 21, near Norman Wells in 2011, was between 700 and 1500 barrels. Legally, it was not a “rupture”, but it was certainly a serious leak, and it started at a cracked weld. This spill we discussed in our written final arguments [*Exhibit D25-28-2 at 18*].
1183. In Northern Gateway’s written final arguments, section XVII A(5) [*Exhibit B226-2 at 368*], there is a discussion of Enbridge’s track record. They quote the hearing transcript [*Transcript Volume 150, line 24016*], which stated that 120 spills occurred which were not contained on site. They discount 83 of these on the basis that they were less than 100 barrels. Now, to me, 100 barrels is a lot but nevertheless.
1184. They then say that leaves only 21 spills “of any appreciable size”. I do not know where the number “21” comes from. My math gives $120-83=37$ such spills. Which they say were over 24,000 kilometres of pipeline, in 11 years.
1185. If it’s 37 spills over 11 years, that translates to about 3.5 so-called “appreciable” spills per year, in 24,000 kilometres of pipeline.
1186. The proposed pipeline is about 1,000 kilometres long. Hence, if we divide by 24,000 and multiply it by 1,000 to find an estimate from their data, we get $3.5/24=0.145$ spills per year on a pipeline about 1,000 kilometres long.
1187. This implies that for Northern Gateway an “appreciable” spill would occur every 7 years. If one uses their number of 21, wherever that comes from, the same mathematics or “science” would give an “appreciable” spill every 12 years.
1188. I’m well aware that Northern Gateway will say that this calculation is not valid. However, my points here are two fold. First, there can be errors in Northern Gateway’s so-called “science”. Second, the figures they use to substantiate their “track record” are far from reassuring.
1189. I want, now, to turn our attention to coatings. Conditions 7-8 [*Exhibit A346-5 at 6*] would require that Northern Gateway use a three-layer composite coating or a High Performance Composite Coating coat for the entire pipeline.
1190. In Northern Gateway’s final arguments [*Exhibit B226-2 at 380*], and

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in Attachment 1 [*Exhibit B226-3 at 6-7*], they argue that it should not be required to use a three-layer composite coating, because it would result in an uneconomic design with no benefits in most instances.

1191. Instead they ask that they should be allowed to:

“...work with the coating producers and applicators...”

1192. to:

“...address requirements based on Z662-11.”

1193. Enbridge actually filed an Exhibit [*CSA Z662-11*] which supposedly gives the ENB specifications for plant- applied coatings. In fact, their filing only included the cover page and the list of contents. This “filing of specifications” is similar to other areas, such as pipe specifications, where Northern Gateway has chosen not to reveal any numerical details of their specifications to the public.

1194. Both CSA Z245.1 and CSA-Z662.11 have sections on coatings in their Section 9s.

1195. For example, CSA Z662.11 states in section 9.2.5[*CSA Z662-11*]:

“The coating test parameters shall meet the following requirements unless analysis demonstrates that alternative parameters are appropriate.”

1196. Then, in section 9.2.6:

“Results of the testing specified in clause 9.2.5 for the coating system being considered shall be evaluated on the basis of acceptance criteria established by the company or operating company, whichever is applicable.”

1197. As I understand these sections, they mean that, according to Z662, Northern Gateway would decide what the criteria should be. Their proposed amendment would also require that Northern Gateway:

“file with the NEB evaluation reports which demonstrate the suitability of the selected coatings.”

1198. It is not clear if by “file” that Northern Gateway expects the NEB to examine the Northern Gateway decision, or whether the act of “filing” would be sufficient to satisfy this condition.
1199. There are no specific numerical requirements laid down by Z662 itself. Therefore, the request in the final argument that Northern Gateway not be required to use a three-layer composite coating but, instead, use another cheaper coating can be interpreted as: Trust us.
1200. Clearly, conditions 7-8 are suggested by the Panel because three-layer composite coatings have some superior properties. Northern Gateway, in fact, filed some research papers [*Exhibits B109-25, B109-26*] which compare the properties of multi-component coatings.
1201. They show clearly that fusion-bonded epoxy is inferior in several ways. One paper also looked at cost and states [*Exhibit B109-25 at 9*] about a multi-component coating:
- “The superior mechanical and corrosion resistance properties make it a cost effective solution for pipeline operators.”*
1202. In addition, there remains the question of how to coat the girth welds in the field.
1203. Conditions 124-5 would require that Northern Gateway supply some specifications for the field coatings to the NEB. Field coatings would be used to cover the girth welds and adjacent areas, as well as any other surface area which may have been damaged during construction or service. Northern Gateway did eventually file their specifications for field coatings. [*Exhibit B87-4*]
1204. They refer to various other standards and also discuss the temperature range, surface cleanliness required, et cetera. It is not clear what coating would actually be used for the girth welds.
1205. Section 9 of their field coating specification talks about quality control, and who is responsible for it. Specifically it states [*Exhibit B87-4 at 25*]:

“Section 9.1.1: The Applicator is responsible for the quality of the work performed.”

1206. Many people have asked about what liability Northern Gateway assumes in building the pipeline. This clause indicates that for the field weld coatings, the Applicator is being made responsible.
1207. Then, in Section 9.1.3, the Northern Gateway specification states:
- “To monitor the Applicator’s performance relative to QC, the Company may designate an inspector.”*
1208. Now, the *National Energy Board Act* has the *Onshore Pipeline Regulations, 1999*, commonly referred to as OPR. They include the following regulation on construction inspection. [*Onshore Pipeline Regulations, 1999, SOR 99/294 at 25*]
1209. Section 54(1):
- “When a company constructs a pipeline, the company or an agent independent of any construction contractor retained by the company shall inspect the construction ...”*
1210. That is the company or an agent independent of the contractor.
1211. This suggests that Northern Gateway, in their specifications, would be in violation of this OPR regulation if they rely on the Applicator to inspect the work, as suggested in their specifications.
1212. In contrast to Northern Gateway specifying that the Applicator is responsible for the work quality, the NEB regulation suggests that, since Northern Gateway must inspect the work, it or the independent third party becomes responsible for the quality.
1213. We suggest an additional potential condition that an onsite inspection by third parties be required for these coatings consistent with the OPR.
1214. During the hearings there was some discussion about inspection of these coatings after the pipe is buried. [*Transcript Volume 99, lines 23639-23651*]
1215. Mr. Kresic stated that the voltage gradient techniques used to inspect

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- these coatings, after the pipe is buried, can detect defects “smaller than a dime”. Leaks and corrosion through such defects were not discussed in the Northern Gateway written final arguments. Field coatings and Conditions 124-5 are discussed in more detail in our written final arguments. [*Exhibit D25-28-2 at 24-5*]
1216. It is noted there that the timing of the specifications to be supplied to the NEB will be too late for public comments.
1217. The scheduling of voltage gradient testing of the coatings also is discussed in our written final arguments.
1218. I want to turn now to “Pipe Specification and Category and Notch Toughness” as discussed in Northern Gateway’s final arguments, plus their suggested changes to Conditions 31-2.
1219. First, in their written final arguments Northern Gateway states [*Exhibit B226-2 at 113*] that they “placed its pipe specification into Evidence.” As far as the public is concerned, this is not true.
1220. A highly redacted specification was filed under a confidentiality order [*Exhibit B64-9*] after a strenuous six-month campaign by Northern Gateway to avoid disclosure. The redacted version contains only headings and no actual numerical requirements. This statement by Northern Gateway that the specifications were put into evidence is an insult to those who tried to get the full specifications released.
1221. This is another example where the failure to release numerical specifications makes it difficult to assess the “science” of the Application.
1222. There are two parts to Conditions 31-2: Part (a) is about welds in the manufactured pipe, and part (b) is about girth welds made in the field. I will talk first about part (a).
1223. Northern Gateway has argued in its written final argument [*Exhibit B226-2 at 113, line 345*] on page 113 that Category II pipe (with proven notch toughness) would be selected “when it is required or in situations where fracture initiation is a concern” and that the decision about where it would be used would be made during detailed engineering.

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1224. In Conditions 31-2(a), the Panel has suggested [*Exhibit A346-5 at 10*] that acceptable Charpy -- that's C-H-A-R-P-Y, not S-H-A-R-P-I-E -- Charpy -- V Notch (CVN) and CTOD values be determined for weld metal and heat-affected zones of the longitudinal pipe welds -- that is the welds made during manufacture of the pipe -- for the lowest installation temperature and the most severe deformation during construction or operation.
1225. Northern Gateway is objecting to this condition and instead suggests [*Exhibit B226-2 at 381, line 1417*] on page 381 that such testing would only be required when "strain-based" design will be used; that is, when either their design or considerations such as geohazards lead them to conclude that the pipeline might actually be plastically deformed, in which case Category II pipe would be used.
1226. In other areas of the pipeline -- in fact, for most of the pipeline -- they ask that no toughness testing of the pipe material or its longitudinal welds be required.
1227. As discussed both during the hearings and in our written final arguments, since Northern Gateway has not released any numerical details about their own compositional or property requirements for pipe, it is not known to the public whether their "Category I" pipe under their specifications actually includes some toughness requirements such as CVN tests or CTOD tests. Release of such information might have avoided much of the discussion on toughness, if indeed their specs include some toughness requirements for "Category I" pipe.
1228. In CSA Z245.1, however, Section 8.4.3, Category I pipe has no toughness requirements. Scientifically no requirements, like no apples, means zero. "No" means "no".
1229. Northern Gateway states they will use tougher pipe, Category II, in some areas. However, toughness remains a concern for the pipeline in general. The pipes are bent during construction in order to follow the terrain, which introduces permanent strain. Third-party accidents, such as a backhoe sharply impacting the pipe, are a well-known cause of denting, gouging or even penetration in the pipe wall. Improper pipe handling also can happen during construction.
1230. For example, impact by equipment can leave dents. Improper preparation of ditches may leave rocks which can dent the pipe if it is dropped

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due to an equipment glitch or a careless operator. Such dents cause stress concentrations, especially on the inside of the pipe. If the toughness is low, they might cause a small crack. Such a crack could allow a fatigue crack to grow as the pipe pressure cycles, which can lead to a leak or a rupture.

1231. The strain at which any existing crack will lead to failure depends on the material's so-called "fracture toughness". Charpy-V and CTOD testing are two different tests used to get measures of fracture toughness.

1232. In discussing toughness requirements, a quote from one of the Northern Gateway submissions [*Exhibit B32-2 at 3-4*] is that:

"...preliminary calculations also indicate that a through-wall defect with a length of approximately 50 millimetres can be sustained with Charpy V-notch absorbed energy values of less than 10 Joules..."

1233. And that was repeated by Mr. Mihell during the hearings in Volume 87, line 7046.

1234. This assertion depends on several mathematical steps, including a correlation of CVN results with the so-called "fracture toughness". There are several correlations in the literature between CVN and fracture toughness. Discussion continues about which is best. We don't know which one Northern Gateway used.

1235. For a low value of CVN, such as 10 Joules, these different correlations can give fracture toughnesses which differ by a factor of two, which in turn implies differences in the critical crack length of a factor of four.

1236. Fracture toughness also decreases with temperature as discussed in the same hearing. [*Transcript Volume 87, lines 7095-7202*] Therefore, it's important that fracture toughness-CVN correlations are based on actual experimental results at such low toughnesses and at the desired temperature, rather than assuming a fracture toughness using an extrapolation of results from higher toughness results. We do not know how they did their calculation.

1237. The point of all this is that fracture mechanics is an evolving and inexact science. For example, in the NTSB report on the Marshall spill [*Exhibit B92-3*], it documents several failings of Enbridge in calculating how fast a fatigue

- crack would grow.
1238. During the discussion over the effects of temperature on toughness [Transcript Volumes 89, lines 9603-9704], Northern Gateway agreed that, as the temperature decreases, there can be a ductile to brittle transition, and that this temperature range depends on the steel and it's affected by welding. Charpy-V testing gives a measure of the toughness range -- the temperature range over which this transition occurs.
1239. **THE CHAIRPERSON:** Dr. Kerr, we have read your written argument and I'm just seeking to understand which argument you're replying to in presenting this information.
1240. **DR. KERR:** Discussion Conditions 31 and 32.
1241. **THE CHAIRPERSON:** Thank you.
1242. And so if you could give us the key aspects of that beyond -- other than what's already in your written argument that would be helpful to us.
1243. **DR. KERR:** Okay.
1244. Well, again, they say [Exhibit B226-2 at 381, line 1416] it's not currently anticipated that Charpy-V or CTOD testing would be required for most of the pipeline and it states [Exhibit B226-2 at 381, line 1417] that Potential Conditions 31 and 32 are unnecessarily onerous.
1245. My concern and the -- presumably the concern behind the proposed Conditions 31-2 is that if there's no toughness requirement for the pipe at all, then Northern Gateway could end up with some very poor pipe simply because some purchasing agent acting for Northern Gateway thought they were getting a good deal. Its welds might be even more brittle. Such pipe can, in fact, exist as discussed in some detail in document D25-9-5. [Exhibit D25-9-5]
1246. There are many pipelines being built or planned, both in North America and elsewhere. It's very possible, as has happened on other occasions, that there's a shortage of pipe. Then, Northern Gateway would be forced to go offshore to purchase pipe in order to keep on schedule.
1247. In Northern Gateway's final written arguments, it's stated [Exhibit

B226-2 at 113, line 348] that:

“The evidence of Northern Gateway as to the appropriateness and applicability of Category I and II pipe is [...] uncontroverted.”

1248. In fact, as discussed in our written final arguments, [*Exhibit D25-28-2 at 8-9*] PHMSA in the U.S. has recommended to the State Department that the American equivalent of Category II be required for all of the Keystone XL Pipeline.
1249. There was also an Information Request [*Exhibit D217-1, IR#3 to NG from Dr. Josette Wier*] filed during the hearings on the differences between pipelines built in the U.S. versus Canada. In the Northern Gateway response [*Exhibit B43-7 at 2*], it said that U.S. pipelines must conform to ASME standard B31-4. In B31-4, there’s a toughness requirement for all pipelines.
1250. Hence, in fact, not only the U.S. Section of the Keystone Pipeline, but all American pipelines have toughness requirements for the pipe material. If the Northern Gateway pipeline were to extend into the U.S., if it, for example, wasn’t allowed to go through British Columbia, it would be required to meet toughness requirements in the American section. Hence, a condition which Northern Gateway calls “onerous” is one they automatically have to comply to in the U.S., as do all other companies.
1251. We suggest that Northern Gateway should be required to have some toughness requirements for the pipe and its longitudinal welds down to the lowest installation temperature. Ideally, the NEB would be at least as conservative as is required by ASME and PHMSA, considering the winter weather and possible third-party or installation damages.
1252. Contrary to Northern Gateway’s assertions, we would contend that the applicability of Category I versus Category II pipe is, and remains, controvertible.
1253. I turn to girth welds. Part B of Conditions 31-2 [*Exhibit A346-5 at 10*] requires that Northern Gateway must:

“...determine the minimum acceptable values for CVN and CTOD for field circumferential welds [again] for the lowest installation temperature and the most severe deformation

during construction or operation.”

1254. It also would require that such tests be carried out for all possible steels and combinations of them.

1255. Northern Gateway objects to this requirement and suggests in Appendix 1 [*Exhibit B226-3 at 17*], page 17, that these requirements only be required:

“...when [some] [...] zone defect acceptance criteria will be established in accordance with CSA Z662 Annex K...”

1256. or:

“...when strain-based design will be used in accordance with CSA Z662 Annex C.”

1257. On line 347 [*Exhibit B226-2 at 113, line 347*] of the written arguments, Northern Gateway confirmed that it would employ CTOD testing for mechanised welds and CVN testing on manual welds in accordance with its finalized weld procedure specifications.

1258. The impression conveyed during the hearings was that, at least for weld procedure tests, CVN and CTOD testing would be carried out in the various zones of girth welds for all pipe; that is, all different heats of pipe.

1259. For example [*Transcript Volume 87, line 9633*], Mr. Mihell talked about doing Charpy tests as part of the welding qualification tests, even for Category I pipe.

1260. However, from the discussion [*Exhibit B226-2 at 381*] on page 381, it appears that Northern Gateway does not want to do any CVN or CTOD tests for sections where they are proposing to use Category I pipe, not even for weld procedure testing. This, of course, is consistent with their argument that no toughness testing should be required for Category I pipe.

1261. So the argument I made earlier in favour of Category II pipe, obviously, applies here. And again, I note that the American standard [*ASME B31.4-2009, 434.8.3 (2)(e)*] also suggests that toughness testing of girth welds be considered in contrast to Northern Gateway’s final arguments.

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1262. The question is whether the weld or heat-affected zone of the girth welds may have worse toughness than the pipe itself. The only way to answer that question is to do a toughness testing.
1263. I turn now to corrosion.
1264. In their written final arguments, Northern Gateway argues [*Exhibit B226-2 at 368-369*] that dilbit is no more corrosive than conventional crude oil. This topic remains controversial. In our opinion, further research is needed as is being carried out by the U.S. National Academy of Sciences. But, unfortunately, their report to Congress is not due until July of this year.
1265. Northern Gateway quotes, among others, a report by Alberta Innovates [*Exhibit B50-2 at 17-21*]. I note again, as noted in the transcripts, [*Transcript Volume 99, lines 23824-23830*] and, in fact, the authors of this report themselves commented that the Alberta Innovates report was unable to separate data for lines carrying the two different types of product; that is, regular crude versus dilbit.
1266. Also, they admitted that internal corrosion has occurred on some lines carrying dilbit [*Transcript Volume 99, line 23851*]. I also note that Enbridge was unwilling to release their research data on internal corrosion in their pipelines.
1267. The final written arguments of the Haisla Nation [*Exhibit D80-104, p. 163-8*] focus on an under-deposit corrosion. We agree with their concern. The Haisla note that Northern Gateway has admitted that this is the most important type of internal corrosion in oil pipelines. But Northern Gateway completely ignores this important form of corrosion in their written final argument, despite the fact that Enbridge employees are doing research on it and publishing papers, some in conjunction with NRCan.
1268. Further discussion of internal corrosion, including under deposit corrosion can be found in our written final arguments. We reiterate that under-deposit corrosion remains a major concern.
1269. Inspection.
1270. In the Northern Gateway written final arguments, there's a brief discussion [*Exhibit B226-2 at 165-166*] of pipeline integrity management, including some comments on smart pigs and crack detection and other inline

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- inspection equipment. It boasts about being one of the world's largest users of inline inspection tools.
1271. However, we know from the NTSB report on the Marshall spill and the Norman Wells spill, that even in the last three years leaks or ruptures have occurred despite sophisticated inline inspections not long before the spills.
1272. In their written final arguments, Northern Gateway presents few details about their inspections and do not address some of our other concerns. It is important to determine whether internal corrosion is occurring even within the first year of operation.
1273. Conditions 193-4 specify some types of inspection tools which must be used and the timing of such inspections. We suggest another. It's possible to use a so-called "smart pig", which both cleans the inside of the pipe and collects some of the deposits which then can be analyzed for corrosion products. Inspection employing such deposit sampling devices should be used.
1274. In addition, there need to be specified accuracies of the various inspection tools, which should be updated as the technology improves.
1275. Finally, to conclude, we remain opposed to this Project. Northern Gateway has failed to release important aspects about their proposals. In some other aspects, their proposed specifications or design leave serious concerns. There still appears to be the attitude of "trust us" despite these failures or concerns, and despite recent large spills which their inspections failed to find.
1276. Is that time up?
1277. **THE CHAIRPERSON:** Fifteen (15) minutes.
1278. **DR. KERR:** Oh. The JRP has proposed many conditions but Northern Gateway objects to several which we would support. Even were those conditions imposed, possible problems due to material selection, welding or construction problems, and limitations of inspection tools and/or predictions of failure make the risks too high. The science divulged to the public is insufficient to approve of the pipeline.
1279. Thank you, Madam Chair and Members of the Panel.

1280. **THE CHAIRPERSON:** Thank you, Dr. Kerr.
1281. Thank you very much to C.J. Peter Engineering Associates. We have no questions.
1282. Thank you.
1283. **MR. PETER:** Thank you, Madam Chair.
1284. **THE CHAIRPERSON:** We'll call next the Canadian Association of Petroleum Producers.
1285. Good morning, Mr. Bergner.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. BERGNER:

1286. **MR. BERGNER:** Good morning, Madam Chair, Panel Members.
1287. My name is Keith Bergner and it's my privilege today to present the reply oral submissions of CAPP, the Canadian Association of Petroleum Producers. It's also my distinct pleasure to have with me today Ms. Nancy Bernard-Brown.
1288. Just to set out CAPP's position again before I commence with the reply, CAPP supports this application and it does so based on the clear and demonstrated need for the Project. And I'm cognisant that oral reply submissions is not the time to repeat or restate arguments and so I will not but just to outline the topics on which I'll be giving reply.
1289. The topics identified in CAPP's argument cover supply, markets, the need to connect supply and markets, and the adverse effects that arise once supply is unable to reach markets. So those are the themes I'll be covering.
1290. And in commenting on the written and oral arguments of others with whom we disagree, I would like to echo the comments that have been made by others and endorse the comments that have been made by others that where we disagree, we take issue with the positions, not the participants, not the people.
1291. Mr. Neufeld got the ball rolling on this one and I think this is at least

one point we can identify where everyone is in unanimous agreement, that we too don't take any issue with the participants, the organizations involved or the people involved. We -- where we take issue is with the positions or the arguments advanced and that's it.

1292. In addition, I'll be noting some submissions where we agree with others and I like to think being an agreeable guy by nature, perhaps I'll start with some of those and turning to the need for the Project. Northern Gateway has outlined in its arguments the evidence and its arguments concerning the supply and markets for crude oil and condensate. [NGP submission, page 42-3] And they've submitted that, quote:

"The evidence unequivocally demonstrated more than sufficient market potential for Canadian crude oil." [NGP submission, page 44, para 132]

1293. CAPP agrees and I note that in reviewing the written arguments of others, no party has seriously questioned the availability of supply or the existence of markets. Now, there has been some residual questioning in the submissions of intervenors regarding connecting supply and markets. In other words, the sufficiency of available pipeline capacity to connect a growing supply with markets.

1294. And in particular, some intervenors have repeated the evidence that -- originally it came from the witnesses presented by ForestEthics suggesting that additional pipeline capacity would not be required until approximately 2025, and this had been put forward by ForestEthics. [Exhibit D39-1-3-1, CEP Submission, page 5, para. 15; See also Coastal First Nations submission, section 2.2, page 86]

1295. And in their written submissions, a number of intervenors have picked up and repeated this and I've included some citations in the material and so I won't read them into the record now.

1296. But as CAPP detailed in its written submissions, the witnesses put forward by ForestEthics, on this point in particular, were found to lack qualifications as experts and acknowledged that the analysis they had done regarding the capacity needs was based on earlier information, earlier supply forecasts which had been overtaken by subsequent supply forecasts. [CAPP Written Submission para. 29 to 33]

1297. And with respect, CAPP submits that the evidence of ForestEthics on this particular point was found wanting, and having it repeated by other intervenors in their written arguments has not strengthened that evidence. And in fact, the evidence shows quite the opposite. Current pipeline capacity is not sufficient.

1298. MEG or M-E-G or MEG as they've affectionately called, states this in their argument, quote:

"The level of apportionment experienced on Canadian crude oil pipelines, combined with the discounting of Canadian crude oil prices for crude oil shipped to U.S. markets, makes additional pipeline capacity, as well as market diversification, imperative to the Canadian oil industry." [MEG Submission, page 4]

1299. CAPP strongly agrees with this statement.

1300. As MEG further indicated, quote:

"Canadian crude oil export pipelines are frequently in apportionment, which results in Canadian producers not being able to get available supply to markets, and consequently detrimentally impacts the prices received for Canadian crude..." [MEG Submission, page 11]

1301. End quote.

1302. Again, CAPP strongly agrees with this.

1303. Now, turning to some of the submissions with which we don't agree and I'd like to turn, in particular, to the arguments filed by the Alberta Federation of Labour, AFL, or the Communication, Energy and Paperworkers Union, or CEP. And again, before commencing on this, I'd like to repeat and commend all parties who took the time to file written argument and took the time and the effort to participate in these hearings.

1304. Yesterday -- I've just been handed the transcript, but yesterday, Ms. Chahley, in Transcript Volume 176, at line 809, quoted from the Board's -- the National Energy Board's Keystone XL decision which that the conclusion of the

quote was in referring to AFL and CEP, it said, quote:

“The Board accepts these perspectives as valid public interest considerations.”

1305. Let me be clear that CAPP also accepts these perspectives as valid public interest considerations. We don't take any issue with their participation or the participants in the proceeding. We do take issue with the positions but not -- again, not with their participation.
1306. And the position that CAPP takes issue with is the voice of protectionism and market restriction that has been repeated in this hearing and as has become clear, this is not a new debate. This is a debate that has been staked out in the Keystone, the Alberta Clipper, the Southern Lights, and the Keystone XL proceedings previously.
1307. And the debate centres on this, on refining and upgrading in Canada, in AFL's submissions (and this theme is picked up by others) significant effort is spent that greater economic benefit for Canadians would arise if crude oil were -- instead of being exported, was upgraded and refined in Alberta or in Canada instead of being sent to Northern Gateway or other pipelines for export.
1308. And Ms. Chahley repeated the point yesterday, and I wasn't able to find the transcript reference this morning, having just received it. But in talking about crude oil, she said words to the effect that “if we don't export it, we could upgrade and refine it here”. And my notes have that at about 2:00 p.m., but I can find the transcript reference if given an opportunity.
1309. With respect, CAPP submits that this submission misses a key point, and the point is this. This application before you is not about a choice between upgrading and refining on one hand and exports on the other hand. This application is about a pipeline, and a pipeline designed to reach new markets.
1310. And once a pipeline is in place to reach that new market, pipelines can be used to ship a wide variety of petroleum products, be they crude oil, be it bitumen, conventional crude oil or refined products. That has been the experience all across Canada with other crude oil pipelines and there's no reasons to treat this pipeline any differently.
1311. Now, in her submissions, Ms. Chahley tried to find various factors to

- distinguish this case from other cases that have come before the National Energy Board. And again, referencing Transcript 176 from yesterday, at lines 815 to 819, there's various factors identified that seek to distinguish this pipeline or this application from others.
1312. Now, with greatest respect, this is an economic argument we're discussing, and the economic principles don't change based on geography of the pipeline or based on public concern about the pipeline. The economic principles are not impacted by geography or public concern. The economic principles remain consistent.
1313. And at approximately line 825 and following of the -- of yesterday's transcript, I was pleased to see Ms. Chahley make, what I interpreted as a number of comments favourable to free markets. She was expressing concern about where the free market was in this application.
1314. And free markets are very important to CAPP. And when it comes to refineries and upgraders, it's CAPP's position that refineries and upgraders will be built in Canada where it makes economic sense to do so. That is a decision for the market to make. It's not -- again, it's not the subject of this application.
1315. In our view, AFL's submissions present a false choice. There is no evidence in this proceeding to suggest that a denial of this application would lead to more refineries and upgraders being built in Canada. Again, that's a decision for the market. It's not the subject of this application.
1316. Turning to the economic impacts of the pipeline application before you, AFL spends considerable energy and time in its written submissions disputing the impact that -- of Northern Gateway on the Canadian economy. And AFL goes so far as to suggest that, quote, "it will damage the Canadian economy and increase inflation". [AFL Submissions, page 3, lines 89-90] Close quote.
1317. In CAPP's respectful submission, these issues were explored in great detail during the evidentiary hearing and CAPP respectfully suggests that Dr. Mansell and others dealt with these arguments in great detail and in convincing and conclusive fashion.
1318. Now, AFL goes on to suggest that, quote:

"The impact of the export pipeline, in terms of creating

benefits to the Canadian economy, will cease once the pipeline is full.” [AFL Submissions, page 14, lines 434-36]

1319. Close quote.

1320. Now, this we find an unsupportable statement, with greatest respect. By this logic, any of the existing pipelines in Canada that are currently full have no economic benefit to Canada. Clearly not the case.

1321. When a pipeline is full, it may cease to be the price setting mechanism for the market, but it clearly does not cease to have benefit for the Canadian economy. With respect, the AFL submission conflates these two concepts, being a price setting mechanism on one hand and having an economic benefit to Canada on the other hand. And by conflating these two concepts, the logic, reasoning, and analysis of the argument is, with greatest respect, flawed.

1322. If a pipeline is full, its impact in terms of creating economic benefits to the Canadian economy does not cease. If a pipeline is full, it's because it is needed. It's needed because supply, growing supply in Canada, requires the means to reach a market. That's what pipelines do. They connect production and markets.

1323. This pipeline is needed. This pipeline will be used and CAPP supports the approval of this application.

1324. I'd like to turn now to some comments in reply to the Communication, Energy and Paperworkers Union, or CEP.

1325. CEP similarly suggests that approval of the Northern Gateway pipeline will be adverse to, quote:

“...the substantial economic development and job creation that comes from upgrading and refining.” [CEP Submissions, paragraph 3 (ii)]

1326. Close quote.

1327. And again, I've dealt with some of these issues already, and so I won't repeat them. But I will note again, that these concerns have been raised in previous proceedings; Keystone, Southern Lights, Alberta Clipper and Keystone

XL. [CEP Submissions, page 3, paragraph 9]

1328. And given that these concerns have been raised before, the Board has addressed these concerns before in earlier decisions. And I'll note the Board rejected these arguments in the past. Having been presented with these same arguments based on the same economic principles, CAPP would urge the Panel to follow the same path and to again dismiss these arguments.
1329. And when I call them the same arguments, I'd like to make this note. CAPP's submissions make reference to the Informetrica Report [*CEP Submissions, paragraph 14*] and Ms. Chahley made reference to it again yesterday in her submissions on behalf of AFL.
1330. And the CEP argument indicates that Michael McCracken was retained by CEP to address the potential impacts of the Northern Gateway Pipeline Project. Now, what the CEP argument does not say, but is evident from the face of the report, is that Mr. McCracken's report, the primary report, was prepared in 2007 in relation to the Keystone Pipeline, not in relation to Northern Gateway.
1331. And the Informetrica Report, in our respectful submission, has been recycled for this proceeding and presented again along with a cover letter from Mr. McCracken indicating that the same reasoning still applies.
1332. It's the same argument. It's the same economic argument based on the same economic principles that has been presented and rejected by the Board in the past.
1333. Now, again, let me emphasize this doesn't disentitle their participation. This doesn't mean we say they shouldn't be here. But we do say the same result should follow as in these earlier proceedings.
1334. With respect, we submit there's no evidentiary value in recycling reports from earlier proceedings that have been considered, that have been rejected.
1335. And in the Keystone proceeding, just to provide the outcome, the Board expressly addressed and rejected the Informetrica Report, and it said, quote:

“The Board notes that the evidence does not, however, support the proposition that an expansion of the Canadian refining industry would necessarily result from a denial of the application. This is a decision normally made by the market.”
[See NEB Decision OH-1-2007, page 56; and see CAPP Written Argument, paras. 56-60]

1336. End quote.

1337. We respectfully submit that the Panel in this proceeding should draw a similar conclusion based on very similar evidence and based on the same economic principles.

1338. I'd like to turn now to the issue of government policy, and there's been some discussion of government policy. For example, in its argument, AFL suggests that it provided evidence of the, quote, “stated policy positions” of the Alberta government. [AFL Submission, page 3, line 93; and page 30, lines 920 and following]

1339. And they go on to suggest that these policies or, perhaps more accurately, their understanding of these government policies, have implications for this application before you.

1340. And with greatest respect, we say that the Alberta government is quite capable of speaking for itself in respect of its policies, and in fact, has done so in this proceeding. The Alberta government's submission notes that in previous hearings, these positions were put forward and it says, quote:

“Alberta disagree with the position of AFL...” [Alberta Submission para. 48]

1341. And the Alberta submission goes -- the Alberta government submission goes on to say, quote:

“Alberta believes that additional pipelines are an essential component to ensure the proper function of petroleum markets and the development of future value added opportunities.”
[Alberta Submission, para. 48]

1342. Close quote.

1343. With this, CAPP strongly agrees.
1344. Now, yesterday we heard a slight -- what I took to be a slightly different spin on this approach. And as I understood it, AFL -- Ms. Chahley on behalf of AFL stated that the market signal of lower prices would not stop producers from producing, would not cause producers to stop producing. If it was still profitable, they would still produce, albeit it at lower prices. And therefore, as I understood the argument put forward, there would be “no harm” except to a limited group of producers.
1345. Now, even if you ignore -- even if you completely put to one side the adverse impact that lower prices would have on producers -- and I hasten to add, speaking on behalf of the Canadian Association of Petroleum Producers, we do not urge you to do that. But even if you did, if you ignore the adverse impact on producers, there is a significant and material adverse impact on Canada, on all Canadians.
1346. Lower prices for produced crude oil mean lower royalties, mean lower taxes. This is not a producer issue, this is a Canadian issue. And the effect of lower prices will cause Canada to lose out on significant benefits.
1347. It's selling a non-renewable resource at a lower price. It's a loss to producers, yes, but it's a loss to Canada. Lower prices mean lower royalties, lower taxes. Producers lose, yes, but Canada loses. And how is that in the public interest?
1348. Now, the Funding Participants, Cenovus et al, who will -- I understand will follow, have submitted written argument regarding why the positions advanced by AFL should be dismissed. [*Funding Participants' Submissions, page 4-8*] And CAPP agrees with these submissions.
1349. And the Funding Participants have also submitted argument indicating that, quote:
- "...the JRP should find there is a clear need for the Northern Gateway [Pipeline] Project to be developed in a timely manner." [Funding Participants' Submissions, page 12]*
1350. Close quote.

1351. And CAPP agrees with those submissions.
1352. I'd like now to turn to the issue of Aboriginal consultation, and I'll be brief on this issue. There have been significant submissions -- significant number and volume of submissions before you regarding Crown consultation, the adequacy of Crown consultation, the adequacy of consultation by the Applicant and the Panel's role in all of this.
1353. Now, clearly this is a point on which there is much debate, but this much is clear. This application, this hearing process, has provided Aboriginal groups with an opportunity to make known their concerns, and many intervenors have taken the opportunity to do exactly that. And they're appearing before you yesterday, today and in the days that follow to do exactly that.
1354. And the Panel's process is and has been very well designed to accommodate the raising of such concerns and to allow them to be discussed, explored and adjudicated. And the Federal Court, in looking at a similar National Energy Board process, stated, quote:
- "The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific." [Brokenhead Ojibway First Nation v. Canada (Attorney General), 2009 FC 484, paragraph 26]*
1355. Close quote.
1356. Your process is similarly well designed and similarly well suited to do exactly that.
1357. Now, Northern Gateway's written argument have provided extensive submissions, which obviously I won't repeat, regarding public consultation and Aboriginal engagement. *[NGP Submissions, section XV, pages 295 to 337]*
1358. CAPP does respectfully submit that the evidence reviewed in that submission demonstrates that Northern Gateway has designed a sound consultation program adequate for the purpose of identifying and understanding the potential impacts of the Project on Aboriginal people.
1359. Now, clearly, there have been challenges. However, Northern

- Gateway, in our respectful view, has sought to meaningfully engage Aboriginal groups, those Aboriginal groups potentially impacted by the Project and to provide a reasonable opportunity for those groups to discuss and bring forward their concerns.
1360. This Panel -- this Panel is tasked with reviewing these concerns, considering the potential effect of the Project on Aboriginal rights and interests. However, there are limits to the role of this Panel. And those limits arise from the recommendation and the decision-making process as it's now established in the *National Energy Board Act*.
1361. And pursuant to section 54 of the *National Energy Board Act*, after this Panel has submitted its report, it's the Governor in Council that will have a decision to make. And when contemplating its future decision, the Crown will have to make its own assessment about the need for further consultation in considering the recommendations contained in the report put forward by this Panel.
1362. And any determination made by the Governor in Council and the constitutionality or the legitimacy of any decision to be made in the future by the Governor in Council is not within the mandate of this Panel to determine. A consultation process can't be judged before it's complete. The validity of a future decision not yet made is not part of the mandate of this Panel to determine.
1363. I raise this point because a number of intervenors have suggested that the Crown consultation process, as it's been set up, is inadequate. [See for example the *Submissions of the Gitxaala Nation*, page 277, paras. 1031ff] And some intervenors have suggested that:
- "Canada's proposal to engage in consultation following the release of the JRP's report is insufficient..." [Submissions of the Gitxaala Nation, page 284, para. 1045]*
1364. Again, this is a future process, a future decision, and the means and the adequacy of the process used by the Crown in the future to support that future decision-making is not part of what's before you in this Application.
1365. I'd like to briefly address the potential impacts of the proposed Project.
1366. Northern Gateway's submission reviews a huge amount of evidence

which, in CAPP's submission, shows that the potential impacts of this Project are capable of mitigation. In CAPP's submission, the evidence shows that Northern Gateway took these -- took the concerns raised very seriously, including the issues and concerns around the environment, lands, land use, the rights and interests of Aboriginal groups and the other concerns that have been raised. There has been substantial voluminous evidence provided, substantive evidence provided that the impacts are manageable and are capable of mitigation.

1367. In conclusion, CAPP submits that there is a great need for this Project. The Project can proceed in an environmentally-responsible manner with due regard for the interests of Aboriginal groups and other public interest concerns.

1368. The economic consequences of shut-in are simply unacceptable. The Board has noted -- the National Energy Board has noted in the past the adverse impacts that can arise when supply is unable to reach market. Conversely, if supply can reach markets, the economic benefits can be significant. Doing nothing in this current situation is simply not an option. Similarly, contrary to what others have suggested, waiting for some other option to arise -- some other pipeline to proceed, some other means to connect supply and markets is similarly not an option.

1369. More pipeline capacity is clearly needed and CAPP emphasizes that its -- it has watched with increasing and growing concern as other projects that have received regulatory approval face ongoing delays that have prevented, thus far, supply connecting to markets. Pipeline capacity that was supposed to be in place has been delayed and the time -- the time lost and the failure to proceed with this Application would create huge economic costs to Canada; not to producers alone, not to producers in isolation to Canada.

1370. As a result, CAPP strongly supports the Application. The Application is in the public interest and CAPP urges this Panel to recommend its approval.

1371. Now, just before I relinquish the microphone, I do want to say this. I've -- I've been perhaps -- I've identified some areas where we've disagreed with AFL. I did want to make a point in particular of very firmly and very enthusiastically agreeing wholeheartedly with one point made by Ms. Chahley yesterday. Ms. Chahley complimented the NEB and the CEAA staff for their exceptionally friendly and helpful service throughout this proceeding and with this comment I wholeheartedly endorse and agree.

1372. I do want to add my thanks to the staff for their ongoing and consistent helpfulness. They appear to make a habit of going above and beyond the call of duty.

1373. I would also like to echo the comments that have been made regarding the participants in this proceeding, the -- both the parties, the organizations they represent and -- and the other counsel. It's been a pleasure. It's always a pleasure to debate these issues -- important issues where the debate is conducted with civility and respect on all sides and I found that even -- even parties not represented by counsel, including those parties that are, for all parties, the discussion and the debate has been conducted with true professionalism.

1374. And finally, I would like to thank the Panel members for their time and their patience. The -- the proceeding and the road has been long. Our road will soon end. Yours will continue, and I wish you well in your deliberations.

1375. Subject to any questions, those are my submissions.

1376. **THE CHAIRPERSON:** Thank you very much for your submissions, Mr. Bergner. The Panel has no questions.

1377. **MR. KEITH BERGNER:** Thank you.

1378. **THE CHAIRPERSON:** We'll take our morning break now and be back for 10 after 10 please. Thank you.

--- Upon recessing at 9:53 a.m./L'audience est suspendue à 9h53

--- Upon resuming at 10:10 a.m./L'audience est reprise à 10h10

1379. **THE CHAIRPERSON:** If we can get everyone to take your seats again, please, we'll get underway.

1380. Thank you very much.

1381. I understand that next party will be joining us remotely and that's Cenovus Energy Inc., INPEX Canada Limited, Nexen Inc., Suncor Energy Marketing Inc. and Total E&P Canada Ltd., and I understand that this party is represented by Ms. Ho.

1382. Ms. Ho, are you on the line?

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MS. HO:

1383. **MS. BERNETTE HO:** I am, thank you, Madam Chair and good morning to you and the Panel members.

1384. My name is Bernette Ho and many thanks for the Panel's leave to deliver Reply remarks on behalf of Cenovus, INPEX Canada, Nexen Inc., Suncor Energy Marketing Inc. and Total E&P Canada Ltd.

1385. Throughout my remarks, any time I refer to the entirety of this group, I will call them the "Funding Participants".

1386. And I have provided a copy of my remarks to the Regulatory Officer and I would ask that the court reporter include evidentiary references in the transcript.

1387. I have made some minor amendments to the version that I sent to Ms. Niro; so I hope that the changes do not cause the court reporters or the translators too much inconvenience, but they're -- they're fairly minor.

1388. Through my comments today, I propose to address six topics in response to arguments submitted to the Joint Review Panel on May 31st and in oral remarks made yesterday. Those topics broadly are: Number 1, the adequacy of commercial support for the Northern Gateway Project. Number 2, supply and demand in relation to the oil pipeline. Number 3, the need for the condensate pipeline. Number 4, the Asia Premium or price lift expected as a result of Northern Gateway. Number 5, the suggestion made by the Alberta Federation of Labour yesterday that the Northern Gateway Pipeline will be akin to a quote "private pipeline". And finally, Number 6, the AFL's suggestion that the JRP should heed Federal and Alberta policy and, therefore, refuse to recommend approval of the Northern Gateway Project.

1389. Of course, as has already been made clear by others, the comments I'm about to make are in response to positions advanced by parties and are not in any way directed towards the parties or their counsel themselves. I should also say that our silence on the final arguments of the Communications Energy and Paperworkers Union Canada should not be taken as agreement. Rather, CEP has largely adopted the argument of the Alberta Federation of Labour and CEP's

- submissions are also otherwise addressed in the Funding Participants' final argument.
1390. So the first topic I would like to address, Madam Chair, if I could just plough on I guess, relates to the suggestion that there is insufficient evidence of commercial support for the Northern Gateway Project because only Precedent Agreements have been executed as opposed to Transportation Service Agreements.
1391. And this argument is found in the Final Argument of the Environmental Coalition consisting of ForestEthics Advocacy, the Living Oceans Society and the Raincoast Conservation Foundation [*Exhibit D66-31-2, paragraphs 54 to 72*]; the Final Argument of the Haisla Nation [*Exhibit D80-104-2, paragraphs 361-370*]; and the Final Argument of the Coastal First Nations [*Exhibit D35-51-2, paragraph 370*].
1392. Notably, these intervenors, who now challenge the adequacy of the commercial support behind the Project, did not question the Funding Participants during the hearing. Had they availed themselves of this opportunity, perhaps they would have a better understanding of the position of the Funding Participants and all of their evidence before the Panel on this matter.
1393. Mr. Dembicki on behalf of Cenovus indicated during questioning that he was aware of other situations where precedent agreements are required prior to executing binding transportation services agreements and so the approach followed in this case is not unorthodox. [*80T29838-29839*]
1394. And although TSAs have not been executed, precedent agreements and funding support agreements have been. Pro forma TSAs are attached to the executed precedent agreements and so the negotiation process with regards to the TSAs has largely been concluded. [*81T30301-30303*]
1395. In order to arrive at these agreements, considerable time and effort was invested by both Northern Gateway and the Funding Participants. And of course, the funding support agreements call upon the Funding Participants to share in the costs associated with developing the Project, entirely at their own risk.
1396. If regulatory approvals are not granted or the Project does not proceed for some other reason, the Funding Participants are not able to recover the monies they have already paid pursuant to the funding support agreements. As of the

- start of the hearings, the Funding Participants had contributed a total of \$140 million towards project development costs [69T14645] and you can bet that number is higher today.
1397. Notwithstanding the Environmental Coalition's submission that 140 million only represents approximately 5 percent of the total project's costs [Exhibit D66-31-2, paragraph 70], I submit to you that 140 million is not "chump change". It represents a significant financial commitment which the JRP should consider as evidence of the Funding Participants' significant commitment to the Project.
1398. That commitment will of course have to be confirmed, which is why it is entirely appropriate to include a condition along the lines of proposed Condition 9(a) requiring that evidence be provided to the regulator confirming that binding TSAs for sufficient volumes have been executed prior to the commencement of construction.
1399. I submit that the JRP should also consider that there is clearly precedent for regulatory approvals to be granted for export pipelines, even in the absence of executed TSAs. In GH-6-96, the National Energy Board approved the facility application respecting the Sable Offshore Energy Project and the Maritime & Northeast Pipeline Project.
1400. There the Board made reference to the Joint Public Review Panel Report issued in October 1997. It was explained that Maritime & Northeast had entered into precedent agreements with potential shippers, which were subject to certain conditions precedent, including receipt of all necessary regulatory approvals for the construction and operation of the pipeline, and shippers being satisfied with rate treatment and rate levels. Once the condition precedents were satisfied, it was expected that shippers would execute firm transportation service agreements.
1401. Again in GH-3-97, being the NEB's decision respecting the Alliance Pipeline, Alliance filed pro forma copies of both the precedent agreements and transportation service agreements and the Board approved Alliance's facility application with a condition requiring Alliance, prior to the commencement of construction, to submit an affidavit confirming that transportation service agreements had been executed for the subscribed capacity. [GH-3-97 at page 29]
1402. Now, in the present case, there is a logical reason why binding TSAs

- have not yet been executed. Information still has to be gathered by Northern Gateway in the form of a Class III Estimate and the Funding Participants still need to examine that information to fully understand the costs and economics associated with the Project.
1403. But it is worth noting what the Funding Participants told you, through responses to Panel counsel's questions, regarding the likelihood of execution of TSAs. What you heard from the Funding Participants was that if everything goes as planned, the Funding Participants expect to execute the TSAs.
1404. Ms. Zumwalt indicated that Nexen had committed a lot of funds already to the Project, so that would seem to signal that, assuming it was economic, it would be Nexen's clear intention to execute. *[81T30267]*
1405. Mr. Houston told you that his team has had to go significantly high in Total to get the funds approved to date to support the Gateway project and each time, the Project has been justified as a good option going forward so it is something that Total will probably want to do if everything follows the plan. *[81T30268]*
1406. Mr. Dembicki made it clear that Northern Gateway is a very important project to Cenovus, and so they are moving forward with the expectation of executing the transportation services agreement. *[81T30271]*
1407. And Mr. John Van Heyst indicated that there's a good chance that Suncor would execute the TSAs if the Project proceeds as currently conceived. *[81T30273]*
1408. So it is clear that the Funding Participants are not taking their commitment to the Project lightly. The Funding Participants consider both their time and financial commitment to date to be significant evidence of their commercial support for the Northern Gateway project, all of which is at risk if regulatory approval of the Project is not granted or the Project is not built.
1409. Given all of this, the Funding Participants submit that the Panel should find that there is sufficient evidence of commercial support for the Northern Gateway project.
1410. Before I move on to my next topic for reply, I wanted to indicate that it is somewhat troublesome that some intervenors who have advanced arguments

suggesting that there is insufficient commercial support for the Project have done so without reference to the evidence in the proceeding, or even worse, by misrepresenting the evidence of the Funding Participants.

1411. The most egregious example of misconstruing the evidence of the Funding Participants is found at paragraphs 363 and 364 of the Haisla Nation argument in the section addressing the need for the condensate line. [*Exhibit D80-104-2*]
1412. And there, the Haisla Nation purports to cite testimony provided by Mr. Houston as indicating that shippers entered into precedent agreements without, in their words, “a solid understanding of whether the proposed pipeline was consistent with their future plans” and that, quote, “Total E&P Canada Ltd. described the proposed project as a ‘long shot’.” End quote.
1413. Now, while it is true that Mr. Houston used the phrase, “long shot”, the entirety of Mr. Houston’s testimony is essential to understanding Total’s perspective on the Northern Gateway project as a whole, and not just in relation to the condensate line.
1414. At Transcript Volume 80, paragraphs 29804 and 29805, Mr. Houston stated the following:
- “I think -- I can only speak for our perception of the project at the time, that was a very long -- long range project. We signed on in early 2008 and now we're talking about 2018. That's a long planning window for a lot of folks. We also saw it as a long shot, but we saw it even in 2008 as a critical piece of infrastructure, another piece of the puzzle, if you will, for the industry in Canada. And so we stepped up, but based on a strategic outlook of the market as opposed to a real solid understanding of where -- you know, how it was going to fit into our plans. And we continue to see it as a very strategic piece of the transportation network.”*
1415. So what Mr. Houston was telling the JRP was that even back in 2008, five years ago now, Total considered the Project a long shot but critical. More importantly though, today, Total still considers the NGP to be a “very strategic piece of the transportation network”, and that testimony was provided in reference to both the oil and condensate pipelines.

1416. Turning then to the next topic I would like to address it's the suggestion by the Coastal First Nation that the Project application has not been adequately supported by a supply/demand study and that if NGP is built, there will be surplus transportation capacity until at least 2024. *[Exhibit D35-51-2, paragraphs 371 - 375]*
1417. The Coastal First Nation also argues that Northern Gateway's own evidence supports the position that the Northern Gateway project is not needed because alternative forms of transportation will be available to ship oil produced in the Western Canadian Sedimentary Basin. *[Exhibit D35-51-2, paragraph 376 and 379]*
1418. Now, it is a little difficult to provide a detailed response to the arguments because the Coastal First Nation did not provide pinpoint evidentiary references in support of their position in some instances.
1419. For example, in support of the proposition that Northern Gateway's own evidence confirms that the Project is not needed, the Coastal First Nation refers to the entirety of Muse Stancil's report submitted as reply evidence *[Exhibit B83-3-Attachment 1]*, so that is not particularly helpful.
1420. Regardless, with respect to the matter of supply, let me briefly refer you to the evidence of the Funding Participants because that evidence makes it clear that NGP is needed and is needed in a timely manner, as oil production is expected to increase.
1421. Cenovus, Suncor and Total outlined the expected increases in their oil production in their direct evidence *[Cenovus, Exhibit D29-2-2, A1; Suncor, Exhibit D29-2-4, A1; Total, Exhibit D29-2-5, A1]* and that was summarized in our written argument. *[Exhibit D29-9-2 at page 1]*
1422. The Funding Participants also provided evidence that, even with alternative forms of transportation being available, the Funding Participants are of the view that Northern Gateway will still get used. *[Suncor, Exhibit D29-4-4, A5; Total, Exhibit D29-4-5, A5; Ms. Zumwalt at 80T29736]*
1423. So the Funding Participants have told you that Northern Gateway is needed as a transportation alternative.

1424. And the views of the Funding Participants should not come as a surprise to the JRP, as their evidence is consistent with the supply forecasts published by third parties, such as CAPP and the NEB, which speak to the sizeable bitumen reserves in the WCSB. [*Exhibit B100-3 at 20, Figure 3, Exhibit B1-4 at page 1-3*]
1425. And so it is submitted that the JRP has all of the evidence it needs to conclude that there is adequate supply to support the development of the oil pipeline.
1426. With regards to demand and markets, the evidence of the Funding Participants is again clear. The Northern Gateway Project and its position in providing tidewater access is absolutely crucial for Canadian producers to be able to access to new oil markets and achieve market diversification.
1427. This was emphasized in the Funding Participants' direct evidence [*Cenovus, Exhibit D29-2-2, A3; Nexen, Exhibit D29-2-3, A3; Suncor, Exhibit D29-2-4, A4; Total, Exhibit D29-2-5, A3*] and again during questioning. [*Mr. Dembicki at 80T29676; Ms. Zumwalt at 80T29710; Mr. Houston at 80T29713*]
1428. And indeed, in response to questions regarding tidewater access, you heard various members of the Funding Participants' panel use words like "key", "crucial", "critical" and "very important". This was also outlined in our Final Argument [*D29-9-2*] at pages 2 and 3; so I will simply refer you back to that.
1429. But let there be no mistake, the Funding Participants told you, in no uncertain terms, that there is clear demand for the Northern Gateway Project and so you don't need a separate supply demand study to tell you what you already know from the record before you.
1430. Turning then to the third topic I'd like to address, and this is the suggestion that the need for the condensate line has not been established.
1431. According to some, the condensate line should not be recommended for approval because there is a lack of evidence on the record. [*AFL Written Argument, Exhibit D4-21-2, page 32, line 985 to page 36, line 1099; Haisla Nation Argument, Exhibit D80-104-2, paragraph 336-384.*]
1432. So again, let me just spend a bit of time reviewing the evidence before the Panel regarding the condensate line and, in particular, the need for the

condensate line.

1433. In addition to the evidence filed by Northern Gateway, being evidence of condensate supply as analyzed by Poten & Partners [*Exhibit B1-4 at page 1-10; Exhibit B49-2*], the Funding Participants provided evidence on this matter.

1434. Much of the evidence the Funding Participants provided was in response to questions asked by the Alberta Federation of Labour during the hearing. So it was somewhat surprising to me that the AFL did not reference this testimony when it wrote, at page 32 of its argument that:

“Evidence on the record regarding condensate essentially boils down to ...”

1435. four references, none of which includes the testimony or evidence of the Funding Participants.

1436. With regards to supply, Ms. Chahley had a discussion with Mr. Houston of Total at Transcript Volume 81 paragraphs 29929 - 29933:

“Ms. Chahley: Do any of you have -- have any of you identified what the market source for condensate would be that you would be using your share of Northern Gateway to ship? And if anyone has, put up their hand.

Mr. Houston: I would just note that, from Kitimat, you have access to a world market. There are many, many sources that one could access and there's no need [to line up for it this -- sorry --] to line it up this far in advance, that there is ample supply and many providers.

Ms. Chahley: Does anyone have anything they wanted to add to that, or is it that the same for everyone? So it's fair to say you haven't yet lined up your sources, but you're confident there will be plenty of options. Is that a good summary?

Mr. Houston: Yes.”

1437. So the Funding Participants were in agreement: There are plenty of sources of condensate in the world market and ample supply.

1438. It should also be noted that Mr. Moe, on behalf of MEG Energy, spent a fair amount of time explaining the international diluent markets in response to questions from Ms. Chahley and that is found at Transcript Volume 81, paragraphs 29948-29956.
1439. With regards to evidence of market demand supporting development of the condensate pipeline, again, there is evidence on the record which has not been referred to by the AFL. Cenovus and Total have indicated that they expect the condensate line to address their need for diluent to support heavy crude oil and bitumen production. [*Cenovus, Exhibit D29-4-2, A4; Total, Exhibit D29-4-5, A4*]
1440. Mr. Moe confirmed that, in his view, MEG will be:
- “...a solid user of the Gateway condensate pipeline.”*
[81T29952]
1441. Mr. Dembicki further indicated that, with the development of the condensate line, Cenovus will stop using rail to ship diluent in support of its oil sands operation. Transportation by pipeline is the preferred alternative.
[81T29957]
1442. And this evidence I just reviewed is consistent with third-party forecasts which can be found on the Panel’s registry; namely, the NEB’s forecast set out in the NEB 2009 Canada Energy Demand and Supply to 2020 Report outlining condensate import requirements [*Exhibit B1-4 at 22*] and the NEB’s market assessment issued in November, 2011 which shows forecast condensate import requirements into Canada of 670,000 barrels per day by year 2035.
[*Exhibit B114-2 at 38*]
1443. So it is not accurate to say, as suggested by the AFL, that there is a lack of evidence regarding the need for the condensate pipeline on the record. Rather, the AFL and other intervenors who make this assertion have simply chosen to ignore the evidence that is before the JRP.
1444. And that evidence demonstrates that potential shippers who have made substantial financial commitments towards the development of the condensate pipeline are confident that they will be able to access sources of diluent to ship on the condensate line and then they -- and that they, in fact, plan to do so.

1445. The next topic I'd like to briefly touch upon is the suggestion found in the AFL and Coastal First Nation argument that the Asia premium on netbacks or price lift expected as a result of Northern Gateway Project is overstated. [*Final Argument of AFL, Exhibit D4-21-2; Coastal First Nation Written Argument, Exhibit D35-51-2, paragraphs 391-415*]

1446. And here, I note that the AFL has not provided pinpoint evidentiary references in support of its assertions.

1447. For example, under the heading "The Asia Premium", at page 11, line 324, the AFL writes:

"Furthermore, the evidence from the shippers witness panel confirms that "Asia premium" is not something that they expect to capture or base their support for the Northern Gateway Project."

1448. And in support of this proposition, AFL refers to the entirety of Volumes 80 and 81 of the hearing transcript so it is impossible to know what specific testimony the AFL is referring to but, during the course of the proceeding, Cenovus clearly indicated that it expects there to be a price lift as a result of the Northern Gateway Project [*Cenovus, Exhibit D29-2-2*] and this view was confirmed during questioning by testimony provided by other Funding Participants. [*Ms. Zumwalt, 80T29989-29990; Mr. Dembicki, 80T30124*]

1449. Now, in its section of argument dealing with the predicted price lift, AFL further asks the JRP to conclude that:

"The oil producers in Alberta do not require the price benefits predicted from the Northern Gateway export pipeline to maintain their profitability and they will not reduce their supply if the price of bitumen does not rise as predicted."
[*Exhibit D4-21-2, page 18, lines 536-538*]

1450. Now, Ms. Chahley also spent a fair amount of time addressing this point yesterday in her oral remarks, stating that shippers will not alter their production regardless of whether Northern Gateway proceeds, inferring that the producers will continue to produce bitumen because their economics will not be affected. And I'm sorry that I'm not able to provide a transcript reference, as I don't think yesterday's transcript has appeared online quite yet.

1451. But I think that it's important to highlight that this AFL proposition was not put directly to the Funding Participants during questioning. Instead, the AFL purports to rely on Dr. York's evidence and testimony in support of its theory. This is the same testimony that the AFL remarkably suggests leads you to conclude that the Northern Gateway Project will, at best, contribute to a one-year benefit to the Canadian economy.
1452. The Funding Participants clearly disagree with this assertion, and quite apart from how misguided the AFL's interpretation of Dr. York's evidence is, I think you should ask yourself: Why didn't the AFL ask the Funding Participants why they require the price benefits predicted from the Northern Gateway Project?
1453. Why not ask the Funding Participants what the economics are around current netbacks?
1454. I submit that if this question had been put to the Funding Participants, the AFL would not have liked the answer. And you can gain insight into what the Funding Participants would have told you about the AFL's proposition, that the Funding Participants do not require the economic benefits associated with the Northern Gateway Project by looking at the addendum to the Wood Mackenzie Report filed by the Government of Alberta. [*Exhibit E8-6-4 at pages 15 and 16*]
1455. In any event, what is on the record is the evidence of Cenovus and Nexen that I referenced previously, evidence and testimony confirming that the Funding Participants do, in fact, expect price benefits to be realized as a result of the Northern Gateway Project. This will, in turn, mean that economic benefits will be realized.
1456. The next topic on my list takes me to addressing something else raised by Ms. Chahley yesterday when she commented on the Funding Participants' request that Proposed Condition 10(e) calling for a 10 percent reserve on the oil pipeline's nominal capacity for spot shippers be amended to 5 percent as contemplated by Northern Gateway and the Funding Participants.
1457. Recall that the AFL's comments were made following the AFL's suggestion that decisions regarding Northern Gateway are not being made based on free market principles and that the Funding Participants' request for a 5 percent reserve would make the oil pipeline akin to a private pipeline, perhaps, for "secret shippers".

1458. Now, when you look at the record before this Panel, I submit that you must reject the AFL's comments outright. First, recall that the Funding Participants are in the position they are in as a result of an extensive open season process conducted by Northern Gateway. This was described in detail in MEG Energy's final argument starting at page 13, so I won't review it now. [*Exhibit D133-7-1*]
1459. And the Funding Participants are in the position they are in as a result of having freely entered into negotiations with Northern Gateway and arriving at mutually acceptable forms of precedent agreements, funding support agreements and pro forma TSAs.
1460. But more importantly, recall that during questioning by Panel counsel, the Funding Participants each described why they would be opposed to a condition setting aside a larger percentage for uncommitted capacity on the oil pipeline. [*81T30282 - 30297*]
1461. Mr. Dembicki for Cenovus stated that such a condition would not be looked at favourably because a whole package of terms has been negotiated. Expansion of the spot capacity would take away from the package of rights reached via negotiation and make it less attractive. [*81T30285*]
1462. Other Funding Participants expressed similar views, emphasizing that it is about economics and guaranteeing the capital of the Project. Those sound very much like explanations consistent with free market principles to me, and not comments made in defence of a private pipeline for "secret shippers".
1463. The final argument I wish to briefly address in reply is the AFL's suggestion that the JRP should not approve the Northern Gateway Project because both Alberta and Federal policy favour domestic refiners and upgraders and Project approval would somehow detract from achieving this policy objective. [*Exhibit D4-21-2 at page 29, line 903 to page 30, line 931*]
1464. And I know that Mr. Bergner touched on this already, so I will be brief.
1465. Insofar as the Funding Participants are concerned, it was made clear during questioning that there is no direct relationship between construction and operation of Northern Gateway and the construction and operation of domestic

- refineries and upgraders. [80T29208-29238; 80T29264-29268; 80T29369-29372; 80T29566-29580]
1466. This point was addressed in our written argument at page 5, so I will not repeat that now. [Exhibit D29-9-2, page 5]
1467. But what I will say is that when I reviewed the written arguments submitted by the Government of Canada and the Government of Alberta [Exhibit E9-78-2; Exhibit E8-25-2], I did not see anything along the lines of the proposition being put forward by the AFL.
1468. I would have thought that Alberta and Canada would have seen written argument as an opportunity to outline their respective position in no uncertain terms, and indeed, they have done so. In that respect, I refer you to paragraph 48 of Alberta's final argument, which confirms Alberta's position regarding support for value added upgrading in the Province, but further states that the value added concept is consistent with additional pipeline expansion and is an essential component to ensuring the proper functioning of petroleum markets.
1469. This is, of course, a view that is shared by the Funding Participants, that being the goal of having properly functioning petroleum markets and, importantly, having access to them.
1470. Subject to any questions that the Panel may have, those are the reply comments of the Funding Participants. Thank you for your time and consideration.
1471. **THE CHAIRPERSON:** Thank you, Ms. Ho.
1472. The Panel has no questions for you, and we thank you for participating remotely.
1473. **MS. HO:** Thank you very much.
1474. **THE CHAIRPERSON:** Goodbye
1475. **MS. HO:** Bye.
1476. **THE CHAIRPERSON:** We'll call next the Council of the Haida

Nation.

--- (A short pause/Courte pause)

1477. **THE CHAIRPERSON:** Absolutely. Go ahead and get yourself settled.

--- (A short pause/Courte pause)

1478. **THE CHAIRPERSON:** Good morning, Ms. Williams-Davidson and good morning to others of the Haida Nation who are here as well.

--- ORAL ARGUMENT/PLAIDOIRIE PAR MS. WILLIAMS-DAVIDSON AND MR. LANTIN:

1479. **MS. WILLIAMS-DAVIDSON:** Thank you.

1480. Good morning, Madam Chair and Members of the Panel. I am Gid7ahl-gudsllaay lalaxaaygans, Terri-Lynn Williams-Davidson, from White Raven Law Corporation representing the Council of the Haida Nation.

1481. I'd like to take a moment to introduce the Haida leadership in attendance today. Seated next to me is Kil Tlaatsgaa, Peter Lantin, the President of the Haida Nation. There are two Hereditary Chiefs in attendance. First, next to Kil Tlaatsgaa, is sGaan 7yuu7yaans, Allan Wilson, and then Gaahlaay, Lonnie Young, and Guujaaw, a member of the Council of Haida Nation as well.

1482. I will begin the submissions for the Haida Nation and Kil Tlaatsgaa, Peter Lantin, will provide our concluding reply submissions.

1483. To ensure we proceed efficiently, we have provided copies of our speaking notes which contain the references that we'll refer to.

1484. The Council of the Haida Nation submits that Northern Gateway's Application is fundamentally flawed. Northern Gateway has concluded that the risk of an oil spill from a tanker accident or malfunction in the territorial waters of Haida Gwaii is minimal. As a result, Northern Gateway did not do a proper environmental assessment for Haida Gwaii.

1485. Our oral argument will reply -- respond to Northern Gateway's

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- attempts to justify this flawed approach in its written argument. I will also respond to Northern Gateway's arguments related to Aboriginal engagement and consultation.
1486. Now, beginning with the risk assessment related to tanker accident and malfunctions, Northern Gateway incorrectly asserts that it is "simply not the case" that an accident involving a tanker transiting to or from the proposed Kitimat terminal is likely, if not inevitable. *[Northern Gateway Pipelines Inc. Written Argument, May 31, 2013 ("NG Argument"), paras. 1021- 1023]*
1487. Its assurances are not convincing, nor should they be relied upon by the Joint Review Panel.
1488. Northern Gateway has mistakenly dismissed and underestimated the possibility of an oil spill from a tanker accident or a malfunction in the Open Water Area. *[Exhibit D35-51-2, paras. 207-250]*
1489. Northern Gateway's analysis fails to consider worst-case scenarios *[Exhibit D35-51-2, paras 315-327]*. The inclusion of worst-case scenarios is common in environmental assessment methods but it was not used for the TERMPOL report or for the quantitative risk analysis.
1490. Northern Gateway claims that the return period is about 12,000 years for a major oil spill in the Open Water Area, and that's ludicrous. Northern Gateway has mistakenly extrapolated from a very short record of 16 years from 1990 to 2006 *[NG Argument, para. 963]* to make a prediction of 12,000 years.
1491. Predictions can vary widely based on assumptions. Uncontested evidence submitted by the Coastal First Nations based on the United States Government Oil Spill Risk Analysis Model shows that the likelihood of a tanker oil spill for the Project is very high, ranging from 81.75 percent and 99.9 percent. *[Exhibit D35-51-2, para. 251]* Northern Gateway's prediction is simply unbelievable.
1492. Northern Gateway has also failed to provide an adequate sensitivity analysis, as it did not account for increases in vessel traffic to the proposed Kitimat Terminal or combined factors assessed for sensitivity. *[Exhibit D35-51-2 paras. 219-228]*
1493. As part of its sensitivity analysis, Northern Gateway considered the

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- return period of an oil spill for the areas between the 12 nautical miles -- 12 nautical mile territorial boundary of segments 5, which is Dixon Entrance, and 8 (Queen Charlotte Sound) and the 200 nautical mile limit of the economic exclusive zone. *[NG Argument, para. 970, footnote 1365]*
1494. Northern Gateway discounted the risk factor associated with the tanker traffic along these areas even though, by its own estimate, the spill return periods were significantly lower for these areas than that for segments 5 and 8. *[Exhibit B23-34, Adobe pages 114-116]*
1495. According to the Government of Canada, the 75 nautical mile tanker exclusive zone off the west coast of Haida Gwaii would not apply to the Project's tankers. *[Transcript Volume 169, line 20435]*
1496. This is particularly troubling since spills along these open water areas could find their way to the shoreline of Haida Gwaii.
1497. Northern Gateway's lack of a vigorous analysis for the Open Water Area and the waters to the west of Haida Gwaii, calls into question the reliability and relevance of the QRA with respect to the tanker routes in Haida territorial waters. Northern Gateway failed to independently analyze the specific risk to Haida Gwaii associated with the Project's tanker traffic in Haida territorial waters.
1498. The Council of the Haida Nation submits that it is more likely than not that there will be a tanker accident in the tanker route surrounding Haida Gwaii for a number of reasons, as set out in our written argument. We add that the QRA dismissed spills such as the Exxon Valdez oil spill as outliers in the calculation of frequency of oil spills. The underlying cause of the accident was a master who was drunk and left the bridge of his ship. *[Exhibit D35-14-1, Adobe page 23]*
1499. Future mistakes such as this are not beyond the realm of possibility; one only has to look at the number of car accidents that occur due to driving under the influence of alcohol.
1500. Northern Gateway refers to what it calls "facts" related to the dangerous nature of the proposed tanker routes, which supposedly render groundless any concerns relating to the safety of the routes. *[NG Argument, para. 1025]*
1501. Even if these facts were true, they relate to the CCAA and do not

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- address concerns relating to the safety of tanker routes in Haida territorial waters, including collisions, grounding or accidents due to equipment malfunction, human error or other factors. Safety issues relating to the Open Water Area has not been adequately considered.
1502. Northern Gateway incredulously argues that it has reduced the spill -- the risk of an oil spill from a tanker accident to as close to zero as practicable through its commitments relating to prevention and mitigation. *[NG Argument, para. 1036]*
1503. Mitigation measures do not ensure that a spill will not occur due to human error, equipment failure or weather and sea conditions. As well, many of the measures proposed such as double-hulled tankers and escort tugs are already industry practice in many parts of the world.
1504. They should not be considered to be mitigative measures whether or not they are required by Transport Canada. Mitigation is the reduction of adverse impacts, not the elimination or complete avoidance of adverse impacts. *[Transcript Volume 164, line 11726 (Ms Elise DeCola)]*
1505. Both the deployment and effectiveness of oil spill response measures is dependent upon the prevailing weather and sea conditions at the time of the spill and a 24-hour timeframe therefore which is “critical for spill response”. *[Transcript Volume 169, line 19916]*
1506. Clean-up is next to impossible if equipment cannot be deployed. Weather conditions in the Open Water Area, especially in the winter and especially around Haida Gwaii would make it impossible to employ equipment. Northern Gateway’s expert Dr. Owens admitted that for most open water spills, no oil from a spill is recovered. His evidence is supported by Haisla’s expert Ms. DeCola. *[Transcript Volume 134, line 2578 (Dr. Edward Owens)]*
1507. Northern Gateway also boasts about taking an innovative approach to marine assessment. We say that the extent of innovation is to involve First Nations in the clean-up of an oil spill. *[NG argument, paras. 1252-1253]* Although Northern Gateway has had little if any discussions with First Nations about involvement with oil spill clean-up.
1508. Northern Gateway has not substantially addressed Haida Gwaii’s vulnerability to significant adverse impacts should there be an oil spill in the

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- tanker routes in Haida territorial waters. Northern Gateway's risk assessment gives little comfort to the Haida Nation. Most fatal to its application is the fact that Northern Gateway has not met its obligations to demonstrate to the Joint Review Panel that there will be no significant adverse impacts resulting from the operations with respect to Haida Gwaii and the Haida Nation.
1509. Instead, Northern Gateway proposes to conduct a survey of select locations on the east coast of Haida Gwaii after project approval to establish baseline data in the event of an oil spill, and to assess the effectiveness of proposed mitigation and environmental protection measures. *[NG Argument, paras. 710 to 715]*
1510. In response to this plan, we say that a proper environmental assessment, including baseline surveys, should have been done in the Open Water Area as part of the Joint Review Panel process. Baseline surveys have been developing in Kitimat for six years but none in the Open Water Area. This is a wasted opportunity; if an oil spill occurs in the first five years of operation there will be zero baseline data against which to assess damages.
1511. Further, we say conducting baseline surveys after project approval cannot adequately compensate for the lack of a proper environmental assessment. The environmental assessment should have considered both the potential effects of an oil spill on the coastal and marine ecosystems of Haida Gwaii and the potential effect of aquatic invasive species resulting from tanker traffic.
1512. Northern Gateway's approach does not permit the Council of the Haida Nation or the Crown to properly assess the impacts upon Haida Aboriginal rights and title as required by law. It is not acceptable to defer this important inquiry to the post-approval phase of the Project that deals with oil spill response planning.
1513. An assessment of the nature and scope of the potential consequences of an oil spill from a tanker accident or malfunction is crucial to the JRP's deliberations regarding whether the Project will result in significant adverse impacts for Haida Gwaii and the Haida Nation. Without this important information base, the Joint Review Panel cannot make a reasoned decision and fulfill its mandate to review the Project in a careful and precautionary manner.
1514. Northern Gateway has committed to incorporating Haida oral traditional evidence but only after the Project is approved for purposes of follow-

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- up monitoring and oil spill response planning. *[NG Argument, paras. 1295 – 1297; 1300]*
1515. This turns Northern Gateway's obligation on its head, and in turn, frustrates the Crown's obligations to the Haida Nation. Northern Gateway must incorporate the information now, as we maintain that it was not incorporated. This must be done before the application is approved and it must fully integrate the body -- the incredible body of knowledge that the Haida have provided in a fulsome environmental assessment for Haida Gwaii. This is necessary to assess the potential impacts on Haida Aboriginal rights and title.
1516. Northern Gateway admits in its argument that it did not conduct spill modelling for the Open Water Area near Haida Gwaii. *[NG Argument, paras. 1248 – 1249]* This omission is troubling in view of the navigational hazard posed by Learmonth Bank near Langara Island -- near East Gwaii. An oil spill in that location would have a devastating impact on the fragile ecosystems of Langara Island and Lepas Bay.
1517. In further response, we direct the Panel to our argument regarding the failure of Northern Gateway to commission any study relating to the unique vulnerabilities on Haida Gwaii, including the susceptibility of North Beach and McIntyre Bay to oiling. As well, we say that Northern Gateway did not commission any study relating to depressed herring stocks in Gwaii Haanas and unique herring stocks in Skidegate Inlet that might be impacted from an oil spill on the southern route.
1518. Northern Gateway in its argument acknowledges that marine invasive species from ballast water and hull fouling is a global marine industry issue. *[NG Argument, paras. 686-687]*
1519. Introductions in other parts of the world have caused irreversible changes to marine ecosystems. Despite this, Northern Gateway failed to assess the consequences of the introduction of aquatic invasive species to Haida Gwaii and upon the Haida people.
1520. Northern Gateway's submission that activities related to the exercise of asserted Aboriginal rights would not be affected by routine project-related shipping is based on a fundamental misunderstanding of the nature of Aboriginal title. *[NG Argument, para. 1246]*

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1521. Aboriginal title includes the right to make decisions, including those that impact the economic component of Aboriginal title, about the use of marine and -- about the use of waters and marine resources subject to Aboriginal title, including restricting uses that risk long-term impacts and that are incompatible with Haida values and the intrinsic importance of the waters, resources and abutting lands to the Haida Nation.
1522. Northern Gateway submits that there is no credible nexus between the Project and the effects on the Haida Nation's rights. *[NG Argument, para. 1273, footnote 1741]*
1523. This statement is highly objectionable, both for its inaccuracy and its utter lack of understanding of Haida Aboriginal Rights and Title. Northern Gateway has inaccurately assessed the impacts upon the Haida Nation.
1524. Northern Gateway optimistically submits that, even if an oil spill were to occur, the impacts to the biophysical and human environment would not be permanent *[NG Argument, paras. 1250-1253]* and that recovery times are measured in months, rather than years. *[NG Argument, para. 804]*
1525. This is not so straightforward, as is evident from the Exxon Valdez oil spill example.
1526. The lesson to be learned from EVOS is that there is considerable uncertainty regarding the nature, scope and speed of recovery from an oil spill. Some marine species are believed to have recovered within two to four years, while other species, such as killer whales, sea otters, harlequin ducks and herring, have yet to recover. There is disagreement among EVOS experts about the extent of recovery from an oil spill event.
1527. Part of the problem with EVOS studies was that there was totally inadequate baseline inventories. The lack of baseline information on the fate and behaviour of diluted bitumen casts further doubt on Northern Gateway's assertion that there will be no permanent impacts from an oil spill.
1528. Without this information, it is not possible to determine whether diluted bitumen will sink or float if spilled into the marine environment and whether adverse effects can be mitigated. According to the Haisla Nation's expert, Ms. DeCola, there is no standard cleanup procedures for dealing with sunken or submerged oil. *[Transcript Volume 164, line 12095]*

1529. This information gap is a fatal defect in the Project's environmental assessment. Without the necessary information, the Joint Review Panel cannot assess the full impacts of spilled diluted bitumen on the coastal and marine areas of Haida Gwaii in the event of a tanker incident in Dixon Entrance, Hecate Strait, Queen Charlotte Sound or in the waters to the west of Haida Gwaii.
1530. It logically follows that, since Haida Gwaii is surrounded by the Project's tanker routes in Haida territorial waters, including Dixon Entrance, which has the acknowledged navigational hazard of Learmonth Bank, situated near the centre of the channel, that the entire coastline and marine ecosystems of Haida Gwaii is vulnerable to an oil spill in the Open Water Area and in the waters to the west of Haida Gwaii.
1531. Northern Gateway describes its engagement program as involving "consultation with Aboriginal groups" [*NG Argument, para. 1198*] and states that the Joint Review Panel process has involved multiple stages of "consultation" with Aboriginal groups. [*NG Argument, paras. 1162 – 1163*]
1532. Beginning with the first statement about Northern Gateway's engagement program, Northern Gateway mistakenly confuses "engagement" with "consultation". Northern Gateway's engagement activities with the Haida involved little more than providing information about the Project and attempting to solicit information that Northern Gateway could use to propose measures to mitigate the admittedly adverse impacts on the Haida Nation's rights and interests in the event of an oil spill in Haida territorial waters.
1533. The Joint Review Panel's consultation activities can best be described as registering oral and written evidence about Haida Aboriginal Rights and Title and Haida concerns about potential impacts on those rights from the Project.
1534. While we agree that the federal Crown needs this information to assist with fulfilling its obligations to consult and accommodate the Haida Nation with respect to potential infringements, we say that consultation requires much more than engagement for the purpose of collecting information on behalf of the Crown.
1535. Neither Northern Gateway nor the Joint Review Panel has the authority to discharge the federal Crown's consultation obligations to the Haida Nation. Yet, Northern Gateway's submissions attempts to leapfrog over those

obligations directly to justification and compensation.

1536. In the *Haida* case, the Supreme Court of Canada directed that consultation requires putting forward for Haida consideration a proposal that is not yet finalized, seeks Haida opinion on the proposal, does not promote but listens with an open mind to what the Haida have to say and, finally, consultation requires being prepared to alter the original proposal to accommodate Haida concerns. [*Haida Nation v. Canada (Minister of Forests)*, 2004 SCC 73 at para. 46, [2004] 3 SCR 511]

1537. In the companion case to our case, the *Taku* case, [*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 (“*Taku*”)] the Chief Justice stated:

“As discussed in Haida, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior [to making --] to taking decisions. [R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1119; R. v. Nikal, [1996] 1 S.C.R. 1013; R. v. Gladstone, [1996] 2 S.C.R. 723; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 168] The obligation to consult does not arise only upon proof of an Aboriginal [right], in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.”

1538. Accordingly, the Haida Nation is entitled to receive, and expects to receive, a deep level of consultation before any decision is made by the Crown about whether to approve this Project. The Haida Nation is entitled to receive, and expects to receive, a sufficient level of responsiveness, including a

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willingness to alter or reject the proposal to accommodate Haida concerns.

1539. Post-approval consultation will be too late to satisfy the Crown's consultation and accommodation obligations to the Haida Nation. In *Taku*, [*Taku, supra, para. 18*] the post-approval permitting stage required the proponent in that case to develop a more detailed baseline information and analysis which could result in adjustments to the road route at issue.

1540. There is no similar post-approval permitting process for Northern Gateway's Project that could result in adjustments to the proposed tanker route through territorial waters -- Haida Territorial waters. Northern Gateway has determined that the only feasible open water routes to and from the proposed Kitimat terminal are in Haida territorial waters.

1541. Northern Gateway has tried to distinguish the *Taku* case, saying that this environmental assessment process discharges the Crown's duty to consult. Northern Gateway relies upon the court's statement that Aboriginal concerns:

"...could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning." [NG Argument, para. 1161]

1542. In response, we remind the Panel that the Haida and the Crown are very far along in reconciliation negotiations. In fact, we're at the cutting edge of reconciliation in Canada. We agree that the best stage to engage in consultation and accommodation is at the strategic level. The outcomes from strategic marine use planning must properly constrain future projects and developments, such as Northern Gateway's proposed project.

1543. The Haida litigation history, the Crown's knowledge of Haida Title and Rights and the progress with reconciliation means that deep consultation is required with the Haida Nation, and accommodation of Haida concerns. That must precede any decision by the Crown regarding whether to approve the Project.

1544. Kil Tlaatsgaa, Peter Lantin will provide our concluding reply submissions.

1545. Thank you.

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1546. **MR. LANTIN:** Good morning, Madam Chair, fellow Panel members.

1547. My name is kil tlaats'gaa, Peter Lantin, and I am the President of the Haida Nation. As President, I am the official spokesperson for the Haida Nation. I want to begin our concluding remarks opposing the Enbridge Northern Gateway Project by bringing us back to the people of Haida Gwaii, to humanize this process, in direct response to the overall approach Northern Gateway has taken in their written argument. *[NG Argument, paras. 1322-1368]*

1548. My submission will address four areas: One, the failure of Northern Gateway to understand the responsibilities of the Haida Nation; two, our assessment of risk; three, cost benefit-analysis; and finally, four, lack of support for the Project.

1549. So I'll begin with the responsibilities of the Haida Nation. Northern Gateway purports to have heard and responded to some of the concerns expressed by Aboriginal nations. *[NG Argument, paras. 1315]*

1550. Yet, Northern Gateway does not appear to understand the responsibilities that flow from being inextricably linked with the natural environment. *[NB Argument, para. 1310]*

1551. Let me briefly explain what I mean. The Haida Nation has an ancient culture borne from one of the richest land and marine areas on the planet. Because of this origin and because of our longstanding relationship with Haida Gwaii, we inherit responsibilities to take care of the land, the surrounding waters, and the people who call it home.

1552. The Panel heard eloquent submissions from Haida Elders, Margaret Edgars and Diane Brown, and others, about the inseparable connections between our culture and Haida Gwaii and our stewardship responsibilities. This is a lesson that my Nonnie, my grandmother Ethel Jones, demonstrated when she inspired people from all over the world during the stand at Lyell Island, to take care of and protect Haida Gwaii for future generations of all peoples.

1553. This connection is not unique to just the Haida, it's recognized by our neighbours in Haida Gwaii. This is represented by two of the mayors of the municipalities on Haida Gwaii. And to quote Mayor Merilees of the Village of Massett:

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“14242. There is a very clear linkage between our natural environment, our ecosystem and the Haida Nation, [...] particularly the oceans.” [Transcript Volume 23]

1554. And to quote Mayor Kulesha:

“21340. The Village of Queen Charlotte respects their hereditary responsibilities and the relationships of the Haida people to Haida Gwaii and we recognize the co-existence of Crown and Aboriginal title.” [Transcript Volume 31]

1555. Yet, Northern Gateway’s response to Haida oral submissions does not incorporate the same appreciation of Haida hereditary responsibility into the assessment of whether the Project proceeds or not. But instead, responds and proposes to address these concerns with oil spill response plans *[NG Argument, paras. 1314-1318]* and offering economic benefits. *[NG Argument, paras. 1319-1320]*

1556. Our Elders have been clear that our responsibilities are greater because we have not ceded or surrendered our Aboriginal rights and title, and because our rights and title are at continued risk of infringements. We have taken every step and have not shied away from conflict to fulfil this responsibility. We have also been to Canada’s highest court to confirm that we have a strong case of Aboriginal title.

1557. We have also shown that we are more than willing to work hand in hand with the Crown to begin reconciling our interests and to tackle the larger strategic level decisions to avoid conflict at the operational level. As reconciliation proceeds, our strong case cannot be ignored.

1558. Northern Gateway has advised the Panel to view, with some degree of caution, assertions of an Aboriginal right to make land or marine use decisions. *[NG Argument, para. 1235]*

1559. Further, Northern Gateway has argued that lands, and by implication marine waters, subject to Aboriginal title can be used for development and that Aboriginal nations do not have an unfettered right to decide land use. *[NG Argument, para. 1235]*

1560. In response, we say that we have approached the right to choose how

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- Aboriginal title lands and waters are used to reconciliation by building alliances and negotiating shared decision making with the Crown. It is in the mutual interest of the Crown and the Haida Nation to pursue reconciliation rather than conflict.
1561. We lay the groundwork of reconciliation by fostering relationships with the local communities of Haida Gwaii, through the formation and, for an example, of the Gwaii Trust [*Exhibit D42-6-2, Adobe page 52, 55, 58 and 62*] and later formalizing our cooperative relationships through protocol agreements with the local municipalities.
1562. And to give you another quote from Mayor Kulesha of the Village of Queen Charlotte: [*Transcript Volume 31*]
- “21340. ...The protocol agreement sets out the basis for all of us to work together in a spirit of respectful cooperation, to design a future that supports a healthy environment and [...] sustainable islands’ economy.”*
1563. We further say that Northern Gateway fails to realize the importance of and implementation of strategic level consultation and accommodation through co-management agreements before proof of Aboriginal title.
1564. We have successfully challenged the inadequacy of consultation at the operational level. We established that consultation requires involvement in decision making at the strategic level to ensure that development does not unjustifiably infringe Aboriginal title nor jeopardize the inherent limit of Aboriginal title. Northern Gateway’s model of consultation and engagement is consultation at the operational level. Too little, too late to protect the Aboriginal title and interests from adverse impacts.
1565. To conclude this opening point, we have made great progress in implementing reconciliation. We have established co-management arrangements with both the Province of British Columbia and Canada. We have jointly negotiated processes for management and stewardship of the lands and marine areas and developed strategies to move towards and develop a more sustainable island economy. The proposed project throws a wrench into these initiatives and jeopardizes not only the people of Haida Gwaii but reconciliation in this country as a whole.

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1566. On to my second point, the assessment of risk -- our assessment of risk. As Ms. Williams-Davidson spoke to you earlier, Northern Gateway made a decision at the outset that it could essentially ignore Haida concerns because the Haida Gwaii is in the Open Water Area. Yesterday, in his oral argument, Mr. Neufeld called the Haida a more distant community again, indicating a dismissive approach to the concerns our people have raised about the proposed project.
1567. Northern Gateway's interaction with our people was superficial and nominal with an inability to hear and appreciate that our values, land, waters, culture and future sustainability are at stake. If a spill occurs in the open water surrounding Haida Gwaii, any oil response plan, even an innovative one, will be ineffective at cleaning up or preventing oil from reaching the coastline. The impacts could be permanent and long-lasting beyond our lifetimes.
1568. Contrary to what Northern Gateway would have this Panel believe, our people are neither naïve [*NG Argument, para. 1023*] nor ill-informed [*NG Argument, para. 243, quoting from Transcript Vol. 77, para. 25556*].
1569. We have fully assessed Northern Gateway's application, working with our Elders, our traditional knowledge holders, our political and hereditary leaders, our technical staff and our legal advisers to assess the environmental, cultural, social and economic impact of the proposed project.
1570. After expending significant time and resources to review and test the application, compile and submit our evidence and make oral history submissions and legal argument, we have concluded that the application is grossly inadequate and incomplete. Northern Gateway has manifestly failed on all counts.
1571. Our conclusion is contrary to Northern Gateway's cost benefit analysis, which I will turn to next.
1572. Northern Gateway submits that the purpose of the cost benefit analysis for the proposed project is to give an idea of the overall cost and benefits of the Project, instead of reflecting the cost and benefit attributable to any particular group, including the Haida Nation. [*NG Argument, para. 211*]
1573. Northern Gateway's approach is wrong. Northern Gateway is required to assess the potential impact of the Project on the Haida Nation, which requires at minimum, a cost benefit analysis with respect to the Haida Nation.

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1574. If such an analysis were done, it would show that the Haida Nation would be burdened with catastrophic costs, including long-lasting and potentially irreversible impacts on Haida sustenance, cultural, political and spiritual rights in the event of both an oil spill and the introduction of aquatic invasive species from ship hulls or ballast water.
1575. Northern Gateway acknowledges that impacts on cultural and spiritual values associated with harvesting cannot be monetized, but nevertheless argues that there is an onus on the Haida Nation to provide the values at risk. *[NG Argument, para. 212]* We say that the burden is actually on Northern Gateway. And second, we say we have provided this evidence.
1576. Our conclusion is correct as evidence from the lack of support for the proposed project, which I will conclude on.
1577. Northern Gateway boasts that 60 percent of Aboriginal communities support the Project as they have signed up for equity participation in the Project. *[NG Argument, para. 243]* Let's examine this assertion.
1578. Northern Gateway admits that of the 18 equity packages offered in Alberta, 15 were allegedly signed in Alberta. And of the 22 packages offered in the interior of British Columbia, 11 were allegedly signed. *[NG Argument, para. 1083]*
1579. Northern Gateway also admits that five Aboriginal groups on the coast of British Columbia received an initial equity offer but no offer has been finalized. *[NG Argument, para. 1084]*
1580. This means zero percent support from coastal Aboriginal Nations.
1581. This also means that of the 27 packages offered in British Columbia, only 11 were allegedly signed. If you do the math, 60 percent of the Aboriginal groups in British Columbia do not support the Project. This does not include those who do not appear on the list, who have not yet been offered an equity package, and who do not support the Project.
1582. The Haida Nation is not in favour of the Project because the potential costs outweigh the potential benefits touted by Northern Gateway. We are not alone in this conviction. This view is held by the majority of people living in Haida Gwaii. And once again, I'll give a few quotes from our neighbours, from

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the Mayor of the Village of Massett, Mayor Merilees:

"14248. There are really no [real] mitigation efforts that would be acceptable to slow or [...] stop any sort of damage from the introduction of oil to our environment. [He] really fear[s] that this project cannot just affect our local communities, our local food. It affects our local economy and it affects our nation. We should be showing the world what we really value in [this] country." [Transcript Volume 23]

1583. And from Mayor Kulesha:

"21341. The issues with the pipeline and tanker traffic brought to you by the representatives of the council of the Haida Nation and the hearings in Old Massett and here in Skidegate again yesterday, are issues that they share. We are very much united in front of you in our opposition to the proposal to build a pipeline that requires bringing large tankers into the waters of Hecate Strait, Dixon Entrance, and Queen Charlotte Sound." [Transcript Volume 31]

1584. The risks to Northern Gateway, the oil companies and shippers are low. They are manageable and acceptable business risks. However, for all the people who rely upon the oceans, the proposed project would put at risk our life source, our communities, our families and our future. This view is shared by the majority of the people living in Haida Gwaii.

1585. And for the final time, I will give a quote from Mayor Merilees, who owns and operates a tourism business on Haida Gwaii. He quotes:

"14245. Allowing tanker traffic on our coast will result in an oil spill at some point. It may not be in my lifetime, but it will occur, and that's really a risk that we, as an islands community, cannot afford to take. I fear the damage that would be done to the culture of the Haida and, in turn, the culture of the west coast of Canada, my business, my livelihood."

1586. The assessment process for the Open Water Area should not be reduced to fine-tuning with a risk analysis; rather, it requires a complete

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- environmental assessment. We cannot permit this process to masquerade as consultation. It is engagement about oil spill clean-up.
1587. For instance, Mr. Carruthers envisioned aligning with First Nations through training and job opportunities. With respect, you do not build Aboriginal self-respect [*NG Argument, para. 243, quoting from Transcript Vol. 77, para. 25554*] by training and job opportunities in oil spill clean-up in the very waters that will sustain our culture millennia into the future long after oil is depleted from this planet.
1588. This process must focus on the consequences, the consequences to the sea, the Haida people, the people of Haida Gwaii, and our collective future. We, the Haida Nation on behalf of Haida Gwaii, strongly recommend that the Panel advise the federal government not to approve this Project.
1589. I stand before you to remind that the Haida Nation's responsibility to focus the Joint Review Panel and the Crown on the consequences is the proper and only path forward, much like it was when my Nonnie, Ethel Jones, and other Elders stood at the line at Lyell Island.
1590. Thank you.
1591. **THE CHAIRPERSON:** Thank you very much, Mr. Lantin, Ms. Williams-Davidson, for your presentations and also thank you for Chief Wilson, Chief Young and Guujaaw for being here as well.
1592. We have no questions. Thank you.
1593. The next party who was listed was Mr. Beckett. However, I've been informed that he's not going to be appearing now, so we'll call next Dr. Wier.
1594. Good morning, Dr. Wier. Please go ahead.
- ORAL ARGUMENT BY/PLAIDOIRIE PAR DR. WIER:**
1595. **DR. WIER:** Good morning, Panel, and member of the public. It's really a hard act to follow, this presentation from Haida Gwaii. I had the privilege to live there for nine years in the seventies, and I truly, truly know what is at stake, and that fuels me for this presentation today.

1596. My argument is based on the four themes that Northern Gateway's final argument rest. One is, trust us. The other one is, the Project will benefit all Canadians, and mitigation will negate the admitted risk of significant and adverse effect on the environment and human health. It's like although there will be, you know, effect, it's not going to happen. So I'm challenging all those -- all those themes.
1597. So on the "trust us" case, one -- trust us because we spent a lot of money on the Project. The Proponent claims that the Project sponsor spent approximately -- actually, that's not what we heard this morning from the funding participant counsel, but it says in the final arguments about \$500 million in pre-development cost.
1598. So should we assume that that was money well spent because it's just a lot of money? How much of this money was spent in advertising, and we know \$5 million since 2012 alone.
1599. How much was spent on the extensive visits lobbying the federal and now the provincial government? Very, very substantial. How much of that money will be claimed as an expense against the profits?
1600. So because it's a lot of money, which it seems -- the Proponent seems to revere, it doesn't mean anything as far as us intervenors, non-funded, who spent countless hours, who are here on our own money. We paid for our gas, we paid -- we flew. We paid for -- for our lodging and accommodations. It's -- we spent \$500 million. That's what it's worth to us, our private time, and more effective.
1601. So the Proponent's -- I contend that the Panel should not give any weight to that claim.
1602. Second theme is "trust us because we will exceed codes and standards".
1603. You know, certain codes and standards, but very important codes and standards they don't plan on exceeding.
1604. It's unfortunate, as we heard this morning from C.J. Peters' presentation for -- from Dr. Kerr, the steel standards, which are very mysterious and have successfully been redacted away from the public, from investigation, we

don't know what they are.

1605. And just catching a bit of conversation this morning by Mr. Doering to the press, we -- he introduced the idea of Category III pipes, which have never, ever been presented in the evidence. So is it I, is it II, is it III, we don't know.

1606. The other thing that "trust us because we will exceed codes and standards" is not supported by their refuse to adopt the Alaska standards for spill clean-up of 36,000 cubic metre within 72 hours. That is really, really showing that this is where you should shine.

1607. So for not doing so, the Panel should not give much credibility to the Proponent's much-touted claim of commitment to safety.

1608. Okay. Another trust us; "Trust us because we responded to public concerns by enhancing our design". This one really gets me.

1609. In paragraph 329 after -- through public consultation and Aboriginal engagement, Northern Gateway has heard concerns expressed about the risk of a spill. And it's made -- Northern Gateway has endeavoured to make it clear that it intends to take all reasonably practicable measures as part of that effort in July 2012, two years after the -- one year and a half after the application -- Northern Gateway announced its decision to enhance the design.

1610. So I'm struggling with cognitive dissonance in many aspects of the final argument. And one -- this is one of them. The Proponent claims they have been working on the Project for 11 years. It's astounding that during those 11 years they never heard public and Aboriginal concerns about spills. This was clearly shown on the -- at the open houses, the one I attended in Smithers. They had no information whatsoever on spills in their records.

1611. So to present measures two years after the initial application sheds doubts as to the claim of safety to the initial application.

1612. Another trust us one which I want to debunk is "trust us because our pump stations will have numerous safety features". Well, in paragraph 356 of the final argument, it says pump stations for the Project will be designed with numerous operational, safety and containment features.

1613. Well, if we look at the Proponent's records -- and another reason for

- not trusting the company -- is the recent March 2013 NEB finding regarding the lack of Emergency Shut Down Systems (ESD) and accompanying alternate source of power at 117 of its 125 pump stations. [http://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/sfty/brdrdr/nbrdg_rft2013_001-eng.html]
1614. Trust us. We're doing to do better. We can't trust them they're going to do better because the -- I don't know how to pronounce it. The Bakken pipeline [http://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/sfty/brdrdr/nbrdg_rft2013_001-eng.html] -- and I can't -- I couldn't find if it's being built presently with its recently finished being built.
1615. The National Energy Board found the same thing, no shutdown system and alternate source of power.
1616. Should we assume that they're going to comply this time around?
1617. Another "Trust us": We will have a rigorous spill prevention and emergency preparedness.
1618. Well, as demonstrated, in my opinion, unequivocally by the Province of B.C. and many others, the "rigorous spill prevention and emergency preparedness" is mostly on the drawing board, and not only do we not have any indication that they are rigorous as claimed, there was no evidence to test if they are going to be effective.
1619. Another "Trust us": Trust us because of our excellent spill records.
1620. Well, it depends which lengths you take to look at them. In paragraph 1356, Northern Gateway quotes testimony [*Volume 150- Line 24015*] -- and I think that was in answer to my question in Prince George -- mentioning 755 spills from 2002 to 2012. And as Dr. Kerr showed this morning, they made an error in calculation saying that they found only 21 spills during that time over 11 years over 24,000 kilometres and there is an arithmetic error which she's copied in the final argument, which I think they could have done a little calculation themselves. In reality, it adds up to 37 for 11 years.
1621. And to make this worse, they didn't look at their own undertaking, Undertaking U-46, in which their report had 45 spills greater than 100 barrels, which, by the way, are reportable spills, between 2005 to 2012. So they don't even know their own track records. They can't report it properly.

1622. Can we trust those spill statistics?
1623. How can they maintain under cross-examination that, on the NEB regulated pipelines, zero significant spills or ruptures -- which is spills about 10 barrels -- on any liquids pipelines was observed, constructed -- on any pipeline constructed over past 35 years? [Volume 150 Line 23996]
1624. And that was presented to the CAB, the Community Advisory Board, and it's very misleading. This is -- I just cannot believe they would say something like this. What's misleading, as Dr. Kerr showed this morning, is there are lots of leaks and nobody from the public and CAB members would know the difference between a leak and a rupture.
1625. So I really hold Northern Gateway highly responsible for misconstruing reality. It's unacceptable.
1626. I contend that the Proponent manipulates spill statistics and reports either partial -- so you never know if it's in Canada NEB, or is it Canada and U.S., or is it just U.S. -- or incorrect data, as I showed. This significantly underplays -- and I think it's psychologically not registering. From hearing all I've heard today, I believe that it's not registered that their spill performance is not good at all. I submit that the Panel should give great weight to the Proponent unsatisfactory spill records.
1627. Trust us because we learned from the Kalamazoo spill.
1628. So I have also great difficulty with what is stated in the final argument about the Kalamazoo. So in paragraph 557, Northern Gateway writes:
- “Once the release was detected and confirmed Enbridge initiated its emergency response plan and had initial containment at the site and on the water within one hour.”*
1629. Well, it took 17 hours to put the equipment in the water. So it's very misleading. Everybody knows that.
1630. The Proponent -- it's deplorable to not say -- if not worse, to read that the Proponent boast about their initial containment deployed within an hour when it took them -- when the NTSB wrote:

“Enbridge’s emergency response actions during the initial hours following the release were not sufficiently focused on source control and demonstrated a lack of awareness and training in the use of effective containment methods.” [B92-3 p.122]

1631. Why do they boast in their final argument about this one-hour response?

1632. Further, in the final argument, in paragraph 556, they say:

“The response of Enbridge to the Marshall incident was swift and extensive.”

1633. However, this is not concurred with the NTSB which didn’t view the initial response as swift and responsive. Enbridge -- and they say, this, is a quote from the report:

“Enbridge did not have the resources on site to contain or control the flow of oil into Talmadge Creek and the Kalamazoo River.”

1634. In paragraph 557, Enbridge further writes:

“At the height of the response in 2010, Enbridge had deployed up to 2,500 employees and contractors in the clean-up and remediation effort.”

1635. By omission, it hides the important fact that, at the very crucial initial stage, Enbridge only had a crew of four individuals serve as the entire team in Enbridge's first response effort. [B92-3 p.120]

1636. These statements presented in the Proponent’s final argument mislead and misrepresent. It is impossible to trust the Proponent when it misconstrues its serious mishandling of the accident and there is no reason to believe it will do otherwise with the proposed project, keeping an unrealistic image of competency and excellence even when they fail.

1637. The purported return to normal activities in the Kalamazoo is not

documented. In paragraph 557, one reads:

“Enbridge is still conducting certain remediation activities at the Marshall site and along the Kalamazoo River, although all activities along the river have returned to normal conditions.”
[Transcript Volume 93, Paragraph 15952; Transcript Volume 96, Paragraph 19920; Transcript Volume 100, Paragraphs 24441 – 24444.]

1638. Well, I look at the reference that they give, which is -- I gave it to Ms. Niro -- and the reference -- there is nothing in the references quoted that mention that all activities have returned to normal conditions. References only mention ongoing cleanup and remediation.

1639. It is troubling that the Proponent would assert a return to normalcy without any documentation. It feeds, in my opinion, into the dystopic view of what took place and what continues to take place.

1640. The changes made after the Kalamazoo.

1641. They learned so much about the Kalamazoo. In paragraph 564, on page 169, the enumeration of changes post-Kalamazoo includes changes to emergency response programs, and it says:

“Enbridge is preparing an emergency response preparedness assessment and has invested an additional \$50 million to enhance equipment and capabilities.” [Written evidence p. 169]

1642. Is preparing in 2013? This is three years after the accident and this is an assessment? Why is it taking them three years to make an assessment -- three -- after the accident?

1643. Although the Proponent claims they have learned from their lessons from the Kalamazoo and made substantial changes afterwards, the May 2013 NEB inspection report of their control centre -- and the reference is given to Ms. Niro as well -- in Edmonton centre notes:

“Many of Enbridge’s reported improvements are multi-year initiatives that had not been fully implemented at the time of

the verification.”

1644. I think that’s very, very important.

1645. Misleading statements on the Kalamazoo are abound in the final argument. In -- this is not public relation effort, this is presented as evidence.

1646. In paragraph 566, one reads:

“Enbridge took immediate responsibility for the incident.”
[B45-8 p.90]

1647. And I looked at the reference, B45-8, page 90, and it says in the -- in that reference:

“Enbridge accepted full responsibility for all the costs related to the emergency response and for any property damage resulting from the spill.”

1648. How is that for taking full, immediate responsibility for the incident? So while the Proponent assumes responsibility for cost and property damage, in such a statement, there is no indication that it took responsibility for what led to the accident and no mention of other costs like health and social effects.

1649. So responsibility is not clearly conveyed when one reads in paragraph 570, Mr. Kresic acknowledged that, *“there was a deficiency in Enbridge's pipeline [integrity management -- integrity program], something had to change as a result.”*

1650. Particularly when the Proponent adds in paragraph 570, quoting Volume 94:

“So once again, despite Enbridge having a very sophisticated program -- probably the most sophisticated program in the world when it comes to crack management, it still identified that there was some reliability issues with the technology that did require us to make significant changes [where learning for all of industry --] where learnings for all of industry now will come from.”

1651. Well why does that tell us? I'm taking that the most sophisticated program in the world fails. That's acknowledging that and to be the best is no insurance that accident will no -- will not occur. The learning curve is endless.

1652. The Panel must give considerable weight to the inevitable technological limitations and failures which take away the claim that "additional technologies" will solve any problem. This is where the weight of what is at stake should take precedence over the inevitability of failures like in the Kalamazoo.

1653. I'm looking at promises after the Marshall incident -- accident. I'm just using the silly word that the industry use -- incident. It's an accident. It's a tragedy. It's not an incident. In paragraph 569, Enbridge -- it says:

"Enbridge operations personnel are determined to never repeat an incident like the Marshall Incident. In questioning, Mr. Baumgartner gave a personal commitment [to ensuring the performance of Enbridge's control centre --] to ensuring the performance of Enbridge control centre operations."

1654. This is the type -- this is in the final argument. This is the type I call empty promise. There's no -- it's great, Mr. Baumgartner, he wants to do good. Maybe he'll be retired by the time this is needed but we don't know -- no parameters are offered, no goal post, no timeline, no consequences are presented for not achieving.

1655. I concur with the Province of B.C. that in spite of glowing statements on changes to corporate culture, similar statements were made in the past and there are concerns about their hollowness. To me, to finish on the Kalamazoo, such hollowness is encapsulated in the statement in paragraph 457 which says:

"To top that off, shortly after the Application was filed, Enbridge suffered the worst pipeline rupture event in its history."

1656. Suffered, as if it had fallen from the sky. Where is the responsibility?

1657. The Proponent clearly shows that not only it has not taken full responsibility for the Kalamazoo accident and there is no comfort in the hollow promises for improvements and lessons learnt because the attitude remains exactly the same.

1658. So another theme in the final argument is the Project will -- it's in the national interest, it will benefit all. And not to pick on Northern Gateway but this was fed by the presentation by CAPP and the Funding Participants. In paragraph 248, it says:

"The project will provide billions of dollars in benefits for the Canadian oil and gas industry, the federal government, provincial governments and Aboriginal groups, benefiting all Canadians through a large and robust social rate of return."

1659. The order could not be presented in a better way because, number one on the list is multinational tar sand oil producers, and we heard this morning that -- okay. So I have to -- I'm not a lawyer so I have to tie up what I heard this morning, with a statement.

1660. So -- oh yeah, we heard this morning from the counsel for CAPP. Like it's so self-centered, it's so Alberta-centered. I can't -- with respect, I can't see it otherwise. He says when producers lose, Canada loses. Well as if we -- that's all we have in Canada and the big hole of the tar sands. So we also heard -- oh yeah, I want to comment of the -- return to for the robust social returns.

1661. We have no indication that the money will go for social return -- rate of return, as purported in the final argument. Is that going to more F35 programs? Is that going to help Senators, you know, meet their travel allowances? We don't know.

--- (Laughter/Rires)

1662. **DR. WIER:** In paragraph 237, British Columbia -- it says:

"British Columbia [-- yeah at the end --] would also benefit from the expenditure of hundreds of millions of dollars on improvements to the safety of navigation and shipping and enhancements to spill response capability off the north coast of British Columbia."

1663. As mentioned many times and as I mention myself in my final argument, we don't know who's going to pay for those improvement and we already know that taxpayers will have to shoulder a lot of it. So I'm not going to

repeat them. I content -- I contend, this would be equivalent to subsidies paid by tax dollars.

1664. Further, who takes the risks? Those benefits come with highly significant risks which defeat the sense of “benefit”, which seems to escape Northern Gateway’s all benefits. They don’t understand risk because it’s somebody else who takes them.

1665. In paragraph 1346, one reads:

“It is clear both from the oral statements and the letters of comment that British Columbians seek to protect their beautiful surroundings. What is not nearly so clear is how construction and routine operation of the Project would impact their ability to enjoy ‘Supernatural British Columbia’.”

1666. Well, this is really clearly admitting the failure of the 11 years of purported, “public consultation”. It seems the Proponent never encountered the concern and never sought to address it. As I mentioned before, they just -- they’ve never heard people talking about spills.

1667. In paragraph 1347, it says:

“A few speakers raised concerns that tanker traffic would impact tourism or fishing but there was no evidence about how that would be so.”

1668. I mean just imagine your sailboat and a big VLCC coming around the corner. Really, do we have to demonstrate -- do we have to hire a consultant to demonstrate that? It’s astounding.

1669. In paragraph 1351, we -- you know the long-term job benefits, I think they should be -- I take it with a big grain of sand.

“The number of long term jobs has increased --- “

1670. Hallelujah.

“--- from 228 to 268.”

1671. You know, they don't say 300 or something but you know, 268. Those numbers are extremely low. I mean it's nice -- it's very nice but it's -- you know, what -- it's very low and it represent a very small benefit, even with a projected increase of 40 more jobs. And you know, how would you trust numbers that are so precise? You know, 268 and there's no confidence interval. I don't -- I don't trust them.

1672. In paragraph 1354:

“The [legendary] oil price uplift [would result] that would result from the Project would generate 18 billion in reinvestment in oil and gas exploration and development in British Columbia at a time when a tremendous amount of capital would be needed to develop British Columbia's emerging LNG industry.”

1673. Well, this is pure speculation and, likely, the biggest reason why Al Monaco wants to meet with Christy Clark. There is no commitment and no guarantee that those profits would not be invested in the Proponent's own infrastructure or even in off-shore tax heavens.

1674. Who is to say?

1675. In paragraph 1352:

“Northern Gateway has worked with contractors to develop plans for hiring local people ...”

1676. Wow, “working with contractors”, how committing is that? It's meaningless. It says nothing about the commitment towards hiring local people and how to define local employment.

1677. In paragraph 617:

“Notwithstanding that Northern Gateway conservatively estimated that a terrestrial spill from the pipelines would cost, at a maximum, approximately 200 million, it confirmed that it intends to obtain its own standalone operational insurance policy with a limit of no less than 250 million.”

1678. How do we feel in British Columbia when we know that they just spent over 800 million in the -- in the cleaning up or whatever this word means in the Kalamazoo, in a place that's very easy to access, in a river that's very small and it's highly populated?
1679. How do we feel when we hear that? We feel we don't trust those guys. They want to unload on us.
1680. The Panel should put great weight on this insufficient insurance liability which will unload costs to Canadians. It certainly deters from the claim that the Project is in the national interest.
1681. So another theme of the final argument is: Mitigation will negate environmental and human health effects.
1682. So the Proponent acknowledged that, yes, the Project has the potential to incur adverse and significant environmental and human health effects. However, they say: It's not going to happen because of our mitigation measures.
1683. So in paragraph 324:
- "Northern Gateway is committed to mitigating environmental risk, and in particular, risk to fish and fish habitat through a safe, reliable and responsible design and construction program."*
1684. However, those promises ring hollow given the following:
1685. They never ever talk about the Lakehead pipeline where they had 500 violations during construction for wetland and waterway protection permits. Five hundred (500)! And this is a recently-built pipeline. I can't remember exactly when -- within the last five years, I believe, and the Department of Justice settlement on those issues mentioned that:
- "...the incidents of violation[s] were numerous and widespread, and resulted in impacts to the streams and wetlands throughout the various watersheds..."*
1686. from construction by Enbridge Energy pipeline -- here we go, in 2007-2008 [D217-9-4 p.1].

1687. The Proponent's response when I questioned them about it was:

“Northern Gateway will comply with all regulatory requirements [...]. Northern Gateway has no intention of risking its reputation with regulators and the public by knowingly violating permit conditions for project construction or operations.” [B43-8 p.6]

1688. It rings hollow. They may not knowingly do it, but it will happen.

1689. The National Energy Board findings of the lack of emergency switch shut down system and alternate source of power to them is also a source of concern because it's happening with the recently-built or being built Bakken pipeline.

1690. So the “safe, reliable and responsible”, do we trust that?

1691. The Proponent makes it sound that, because it is highly regulated, regulatory compliance will ensure safe operations like in paragraph 272:

“Safe operation of the Kitimat Terminal will be assured through regulatory compliance and compliance with Northern Gateway's terminal requirements”.

1692. This rings hollow as well if -- in light of the federal cutbacks and changes of legislation which many say, were actively lobbied for and successfully obtained by companies by Enbridge -- like Enbridge.

1693. Another example in paragraph 1023:

“With respect, it would be naïve at best to suggest that the relevant regulatory requirements are insufficient to prevent tanker accidents from being likely -- let alone inevitable.”

1694. I'm sorry. It's been quoted this morning and it's an important one.

1695. I contend that in spite -- this is a dream -- a dream that there are regulators and regulation and that it will reduce the risk to zero. That's completely unrealistic.

1696. The recent Kulluk accident in Alaska, in late December, which I quote in my final argument, shows a succession of impossible technological failure. The tow rope broke -- two tow ropes broke and multiple engine failures in the tugs. So it's ridiculous to think regulations and regulators and technology will prevent accidents.

1697. When it comes to spill response and clean-up, the Province of B.C. demonstrated clearly why the spill response presented in the Application is inadequate.

1698. I quote the Province of B.C. presentation. They -- they can't -- we:

"... cannot assert that it will be able to effectively respond to spills"

1699. And:

"its plans for responding to a spill are only conceptual"

1700. While adding:

"Enbridge has not demonstrated its ability to learn from its mistakes..."

1701. I think I've demonstrated that with the Kalamazoo:

"...in order to avoid spills."

1702. As well, I concur with the Province that the claims to a marine world class response capability and "manpower and equipment for planned response that will exceed international practice" are not supported when they don't want to match what's happening in Alaska.

1703. So float or sink?

1704. I mean, we cannot avoid bringing it up. Will the diluted bitumen float or sink?

1705. Well, in paragraph 543, it's downplayed there again. They talk about

- a small fraction will -- will sink. It downplays what's happening in the -- in the Kalamazoo.
1706. In paragraph 544, it says it's a temporary -- sinking, it's a temporary condition.
1707. However, in the reference they give in paragraph 544, it says:
- "...approximately 15 [to] 20% - of the volume of product that reached Talmadge Creek and the Kalamazoo River did submerge".*
1708. So it's not a small fraction. Not only is not insignificant, and it's not a temporary condition as we've seen with the US-EPA ordering that it be cleaned 2 ½ now 3 years after the rupture.
1709. The Panel should reject the Proponent's assertion that only a small fraction of dilbit will submerge given the Proponent's own evidence which doesn't support that statement.
1710. Well, the success of recovery after oil spill is overstated and many many knowledgeable people, BC Nature, everybody has brought up the controversy that what is very scary about Enbridge is science is rarely assertive to the -- at the level that they are. Like, EVOS, they say -- I think I have it here:
- "Many believed that EVOS shows that the effects of a spill cannot be remediated and that an oil spill can never be cleaned-up. Once again, the great weight of the evidence in this proceeding proves otherwise."*
1711. It doesn't. There is enormous controversy and nobody knows and we're looking at just species like large species, but the effect on the bacterial and plankton are probably as significant but we have no handle on what happened after EVOS on those -- on those very important part of the ecosystem.
1712. So we don't know and what is difficult for corporations is, when we don't know, they have to fill up the void. So either we need more research or we need more data and/or it doesn't exist. So we don't know. We don't know. It's important. We don't know.

1713. Mitigation of tanker accident. In paragraph 1036:

“The risk of a tanker incident ---”

1714. This word “incident”.

“--- is very low and the risk of an oil spill from a tanker, even lower. Northern Gateway has, through its commitments, reduced those risks to as close to zero as reasonably practicable.”

1715. Everybody has used that quote. Reasonably practicable is not acceptable. It’s meaningless.

1716. As Coastal First Nations in particular, and several others have clearly shown in their final arguments, Northern Gateway estimates of likelihood of spills are unreliable and there is a high likelihood of tanker spills, as we heard today, even this morning. They also show -- and it’s poorly presented to the public, it’s presented in the form every 13,000 years of whatever -- that is ungraspable but because the reality is otherwise.

1717. They also show that pilots and escort tugs do not eliminate risk, operational limits are speculative and Northern Gateway did not commit to using newer tankers that meet IMP standards. *[D35-14-1 – Coastal First Nation – Great Bear Initiative – CFN Evidence – A2K0J7, page 20]*

1718. They also -- okay, so this point has been made. I will not repeat it.

1719. I contend that one of the most important mitigation measure is the ability to regulate and monitor. And with the cutbacks of the federal government, we’ve lost this ability. The Project is to take place in a vacuum of government regulations and monitoring.

1720. That doesn’t prevent Northern Gateway in paragraph 324 to 327 to say the Proponent will work with DFO in the form of an ongoing and continuous consultation and coordination while DFO doesn’t conduct any work for us arising HADD *[Volume 107 Line 3514]* relying solely on the Proponent’s claim of construction constraints. *[Volume 107 Line 3558]*

1721. And this is their own testimony and it’s in the reference provided.

1722. It's misleading for the Proponent to state they will consult and work with DFO and DFO is not there. When their habitat management program has been discontinued -- habitat management program discontinued, species at risk program discontinued; contaminants and marine toxicology program discontinued -- all relevant program to the Project.

1723. Also of great concern is the discontinuation of -- and the EER mentioned by Environment Canada on -- it's the environmental emergency response program of Environment Canada, discontinued. This is what's going to oversee pipeline and tanker spills or provide -- I think it was to provide advice and the transportation of dangerous goods under Environment Canada, which was to oversee pipeline and tankers -- no, it's of Transport Canada -- so transportation of dangerous good was by Transport Canada has been discontinued.

1724. So this is very important for the Panel to realize, that the Project is in the hands of the Proponent. There is no regulation regulator and it's extremely, extremely distressing for the public to -- in which it's supposed to be in the national interest. It's in our interest but there's nobody to monitor and there's no regulations.

1725. Northern Gateway, in paragraph 823, looks forward to working with Environment Canada, the Canadian Wildlife Service in the finalization of the marine -- and I think it's EEMP, environmental effect monitoring program, including the marine bird monitoring program discussed -- so on. Well, bird survey has been cancelled this year by Canadian Wildlife Service.

1726. As for Coast Guard, let's see what Coast Guard is at. Two separate audits, one in 2010 and one by DFO, questioned its capacity to respond to a significant marine pollution event. We have no indication that this capacity has been acquired in 2013.

1727. So what we are relying on is the company's promise and their own studies. The Panel should give great weight to this slashing of government regulations and programs and capacity for monitoring and enforce.

1728. I carry on -- how much time do I have?

1729. **THE CHAIRPERSON:** Eighteen (18) minutes and 30 seconds.

1730. **DR. WIER:** Okay. Okay, I'll carry on with public consultation which is so much overemphasized and -- this topic.

1731. In Paragraph 1091, the primary goal -- it says:

"The primary goal of the public consultation program is for Northern Gateway to provide transparent information, listen..."

1732. Something they've never done.

"...and address concerns to the best of its ability."

1733. This is the kind of public relation talk that is not based on reality. I showed earlier on how spill statistic for transparent communication, it's manipulated. It's not transparent, it's not clear, it's confusing. Not even mentioned at the open houses -- are so manipulated and so confusing.

1734. In Paragraph 1576, Northern Gateway, it says:

"Northern Gateway has worked very hard to make its public consultation relevant. Ms. Perret explained that "we're not interested [in just, say, --] in just, say, going into a community and talking [...] we want to have an exchange of information..."

1735. It's a complete failure in all of this from my personal experience. I recall two meetings that Ms. Perret -- when she came to Smithers. One was a presentation to the Town of Smithers where it was not advertised, we just hear it from word of mouth and we were not allowed to ask questions. This is supposedly where they listen, right?

1736. And the other meeting was at their beloved Chambers of Commerce. I had to pay \$20 to attend to the breakfast meeting and it was not conducting pre-work people, sympathetic audience was not conducting to listening and asking questions.

1737. In Paragraph 1108:

"Accordingly, CAB meetings exemplify broad stakeholder

consultation and engagement practices and provide an excellent forum for the sharing of diverse viewpoints and experience.” [B2-1 p. 53]

1738. That is so misrepresented. Nobody knows who the people on the CAB are. There are their names. We don't know who they are. I live in Smithers. There is people in my community who are hiding, I don't know why, who are CAB members and to say that they are community based and they represent communities, I really, really resent that. They don't. Because if they would, they would give their names so the community would know who they are and then they would ask people. So it's completely misrepresentation.
1739. It took one year to get the website operative for the CAB. So as a member of the public, I went to one CAB meeting in Smithers just to realize that it's not open and transparent. The control of the microphone was phenomenal so you can't -- you can only speak when you're allowed to speak. It was very, very control. And the people who were there were, in general, the profile was very sympathetic. I can say that from my experience.
1740. So some presentations that are made to the CAB are on the web but, unfortunately, Patrick Moore's presentation was not. But he made a presentation to the CAB meeting where he said to -- in Smithers to the public, and he said -- amazing thing, he said, "Tar sands is good. It's cleaning it. They're becoming white, they're clean".
1741. And you know, it's very scary to hear that and to hear that Patrick Moore presentation was extremely well received by the CAB members. You wonder where the critical mind is.
1742. Very misleading is the introduction of public forum.
1743. I asked this question to Ms. Perret, and they say: We had four public forum. And two of them were in Smithers, which really surprised me because I'm -- I live in Smithers and I follow the issue, as you know. What's -- two public meetings, what were they?
1744. So she said one was the North Central Local Government Association in May 2010. And I -- she calls it a "public forum" and I checked, and it's not -- it's not a public forum. It's for paid members only.

1745. The second public forum which she calls "public forum" is the presentation at -- or maybe a discussion. I wasn't there. I don't know. She calls it "public forum", an event at the Smithers High School, where members of the public are not allowed to be there.
1746. So distortion there, dystopia, in full blown.
1747. So I -- my views on the CABs are -- I hope to have conveyed my views on the CAB, that they are shameful.
1748. In paragraph 1212, the Joint Review Panel -- it says:
- "The JRP should conclude, based on the extensive record before it, that Northern Gateway's public consultation and Aboriginal engagement programs have been broad, inclusive, meaningful and effective."*
1749. This is not the case. Northern Gateway has its own way of controlling the microphone. Northern Gateway has not shown any ability to listen by selecting sympathetic audiences, mostly Chambers of Commerce and social clubs.
1750. CABs are misnomers and Northern Gateway is only accessible through phone lines with answering machine, which is -- I tried to contact Ms. Perret and after she made a presentation, I was not allowed to ask questions to. And she -- her -- she couldn't be reached. I had to leave my name, my phone number, and I would be replied within two or three days. And her personal contact is kept confidential for safety.
1751. What about my safety? Is Enbridge going to go after me when I have to give my name, my phone number, but she doesn't? I really resent that.
1752. The Joint Review Panel should give very little credibility to the public consultation process, which was mostly a propaganda exercise aimed at educating -- and I really resent the word "educating" because it's educating -- most of the time, I'm more educated than the people who are trying to educate me and that's really demeaning.
1753. It was mostly a propaganda effort. And what they call "education" is like a Communist re-education camp. It's education taken in that sense.

1754. So public opposition to the Project is very high, as you know. And it's really surprising to read in the final argument that there were -- in paragraph 1328, it says:

"Northern Gateway heard a number of oral presenters comment that they had not heard one person give an oral statement in support of the Project."

1755. Yeah, there was not one. There were three, two in B.C., one in Smithers, and one in Alberta. So two -- so that's three out of over 1,000, so you can say "some". You know, there were some in support because it's more than one. But three is a very small.

1756. In paragraph 1329:

"The simple fact is that members of the public who have no concerns with a project are not likely to take the time to say so. Community hearings are generally organized to hear concerns, not praise."

1757. Well, this is an opinion, it's not a fact. And it has no basis.

1758. To me, if the benefits were so hyperbolic as described, people would testify: I want this. It's going to be good for me, I support it.

1759. In paragraph 1331, many -- it says:

"Many oral statement presenters relied on public opinion polling information to suggest that most British Columbians oppose the Project. However, Northern Gateway's polling results indicate that as long as Northern Gateway provides world-class..."

1760. Whatever that means:

"...marine safety measures,..."

1761. Which it does:

"...British Columbians are very supportive of the Project."

[Volume 152 Line 26587 to 26589]

1762. Well, I looked. I was very interested in Northern Gateway polling because I didn't see anything in the evidence. So I looked at the reference, Volume 152. It's incorrectly referred to. It's -- I think it was 102 unless the line -- it just doesn't match.

1763. So if it's 102 with the correct line, the reference says: "We do listen" -- it's -- it doesn't say people support the Project -- are very supportive of the Project. It doesn't -- it says:

"We do listen to input from aboriginal groups in their traditional land use studies and in our consultation -- or engagement activities. We listen to the public when they speak to us through engagement activities. We listen to regulators".

1764. This is a far stretch from -- and irrelevant to saying that British Columbians are very supportive of the Project. I don't know. So that will have to be straightened out.

1765. So Northern Gateway did not present credible evidence that British Columbians are "very supportive", as they claim, of the Project. The Panel should reject the statement and give very great weight to the opposition of the Project in British Columbia, which is quite -- we have two worlds apart here, Alberta and B.C.

1766. In paragraph 1332, it says:

"Northern Gateway is confident that the more the oral statement presenters would have reviewed the evidence in this proceeding, the more they would have been satisfied that their concerns had been heard and addressed."

1767. What a demeaning statement. People of high level of education who are extremely well informed, who took -- who researched what they said and the evidence is just full of gaps. And when you present it that, you know, many, many of the things you are going to say are going to be post-approval, but in the meanwhile, there's nothing in the evidence that tells that we can trust you or those mitigation measures are going to work. What -- they're out of touch with what the oral presentations convey.

1768. And I'm very concerned with misleading, inaccurate statements in the final argument. I think this is really troubling, to go to that late stage and do that.

1769. In paragraph 279, I read:

"A review of the route selection evidence on the record – which generally stands unchallenged..." [Volume 152 Line 26587 to 26589]

1770. Well, the route revision was a no-win game. If you would challenge it, they would tell you, "Ah, this is Route Revision R. It's going to be S or T or U or V and it's going to be changed". So we couldn't challenge.

1771. They were moving -- I think Richard Overstall from the Northwest Institute said:

"Well, how can we test it if you keep moving the goal post?"

1772. So it's not that the route was unchallenged, it's like it was moving on us, so what's the point?

1773. I'm having great difficulties with the number of fish-bearing crossings -- the crossings of fish-bearing creeks.

1774. In paragraph 316, it says:

"The pipelines would cross approximately 764 identified watercourses of which approximately 633 are fish-bearing."

1775. Well, those numbers differ from the ones I gave from the transcript where it -- I found -- from the transcript, there were 777 and 671, so we've lost -- those numbers are different from the transcript. I want to point that out. The final argument is different than what was given in the transcripts.

1776. And the quotes -- the quote refers -- the paragraph 316 -- to multiple evidence. *[Exhibits B182-1 to B182-40, B183-1 to B183-40 and B194-2 to B194-8].*

1777. Many, many -- there is one, two, three, four, five, six -- six evidence

- that are referred and one of them is just a cover letter, so I don't know why it's there. The other one is a bunch of maps. There's several maps. None of them has a legend that says number of fish-bearings.
1778. So, you know, at this late stage, with \$500 million later, you can't even come up -- the company cannot even come up with a proper number of fish-bearing crossings, which they contradict themselves with the transcripts.
1779. **THE CHAIRPERSON:** Dr. Wier, I just want to make sure that you're aware that you have four minutes left.
1780. **DR. WIER:** Okay. Well, I'm going on and on. Okay, so maybe I'll go to -- well it's unfortunate that ---
1781. **THE CHAIRPERSON:** I would encourage you to finish up with your key points that you want to leave with the Panel.
1782. **DR. WIER:** Okay. I wanted to say that the environmental human health risk assessment had -- should be discarded. There was no human health effects. An assessment, as has been repeated time after time is a measure of risk and effect and it was an assessment of risk. It was not an assessment of effect and the expert -- supposedly expert who had no proper qualification, in my opinion, Dr. -- Mr. Yee, who also misled the Panel on his CV so -- which is very disturbing.
1783. **THE CHAIRPERSON:** Dr. Wier, we've read your written argument. If you can focus your comments ---
1784. **DR. WIER:** So I ---
1785. **THE CHAIRPERSON:** --- on reply to other arguments that have been presented please.
1786. **DR. WIER:** So I would say that it's very important to not take into consider -- there hasn't been a human health risk assessment because there hasn't been a description of the effects. All they say is respiratory whatever so respiratory could be you have a cold or you have lung cancer. It means nothing. It's -- there's no description of effects. So it should be discarded.
1787. Well -- okay, I want to emphasize that the lack of certainty does not

- mean absence of effects. To not know if there are effects doesn't mean there are no effects. I've struggled with that in my pesticide world forever. To not know doesn't mean that there is no effect and I think the Applicant is repeatedly making that mistake.
1788. In their recovery assessment, they say the recovery will be complete but the science is not there. We don't have the science to know if the recovery is complete. Actually, it's more likely incomplete than complete.
1789. And the peer review literature, as you have heard and I want to repeat on the -- is not -- the peer review literature doesn't support the assertion that effects from spills are reversible and recovery is measured in months, not years.
1790. Okay, so I will stop there. Thank you for your attention.
1791. **THE CHAIRPERSON:** Thank you very much, Dr. Wier.
1792. The Panel has no questions. Thank you very much for presenting your oral reply to us.
1793. We'll take lunch now and come back for 1:20, please.
1794. Thank you.
- Upon recessing at 12:17 p.m./L'audience est suspendue à 12h17
--- Upon resuming at 1:23 p.m./L'audience est reprise à 13h23
1795. **THE CHAIRPERSON:** Thank you very much everyone. My apologies for being just a little bit late getting underway.
1796. The next party is -- first of all, if we could take our seats and come to order. Thank you very much.
1797. All right, the next party we're calling is Daiya-Mattess Keyoh. Mr. Sam and Mr. Munroe, are you both on the line?
1798. **MR. SAM:** Yes we are.
1799. **THE CHAIRPERSON:** Terrific. Thank you very much.

1800. Please go ahead with your oral reply.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. SAM:

1801. **MR. SAM:** Okay. The Daiya-Mattess has filed an enormous amount of evidence. We aren't here to repeat what we have already submitted.

1802. Neither Enbridge nor the Crown have engaged us to mitigate impacts. And the Crown, to our knowledge, has not done enough to uphold our constitutionally protected Aboriginal interest in our Daiya-Mattess Keyoh, which has 66 members and growing.

1803. Whitsa (ph). That's all.

1804. **THE CHAIRPERSON:** Thank you very much. Thank you for participating and so we'll say goodbye to you, and we'll call the next party, Douglas Channel Watch please.

--- (A short pause/Courte pause)

1805. **THE CHAIRPERSON:** Good afternoon.

1806. **MR. MINCHIN:** Good afternoon.

1807. **THE CHAIRPERSON:** Who's going to be going first?

1808. **MR. MINCHIN:** I'll be going first.

1809. **THE CHAIRPERSON:** Okay.

1810. Thanks, Mr. Minchin. Please go ahead when you're ready.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. MINCHIN, MS. BROWN AND MR. SHANNON:

1811. **MR. MINCHIN:** Thank you, Madam Chair.

1812. Thank you, Madam Chair and other Panel Members.

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1813. Douglas Channel Watch thinks it important to mention that we are on Tsimshian lands, lands never given or negotiated away. This is an important thing to recognize and to honour.
1814. We wish to thank the Panel members, as well as the NEB and CEAA staff who helped with our new group -- a group formed because of this proposal -- in its role as first time intervenor in these hearings.
1815. I am Murray Minchin, and seated with me are Cheryl Brown and Dave Shannon. Each of us will be speaking for approximately 20 minutes.
1816. The format of this oral final argument hearing does not allow enough time to touch on all the points Douglas Channel Watch has issue with in the Proponent's written final argument. Rather than trying to give an account of those points short enough to fit within the allotted time constraints, I'll be using my 20 minutes to take quotes from the Proponent's final written argument which illustrate why I have serious misgivings about the level to which this Proponent can be trusted. So I'll be dovetailing with what Josette Wier was saying earlier this morning.
1817. Has the Proponent been honest in describing the risks? Have they been honest in describing the difficulties existing in British Columbia's uninhabited wilderness?
1818. Has the Proponent attempted to sway the Panel, and ultimately Prime Minister Harper, by intentionally avoiding complications and using linguistic subterfuge to shine only the rosier of lights on Enbridge's Northern Gateway dual pipeline and supertanker port proposal?
1819. Because words are slippery things and a careful use of them can hide uncomfortable truths or deflect one's attention from historical fact towards unrealistically rosy predictions of the future.
1820. Take for example paragraph 275 where the Proponent claims:
- "The choice of Kitimat was announced in October 14th, 2005 and was welcomed by elected representatives of the District of Kitimat."*

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1821. This was a previous mayor and council and the public wasn't aware of the massive scale of the proposal at that time. The current Kitimat mayor and council have maintained a position of neutrality, as you are well aware, by their absolute minimum participation in these hearings even though listed as a government participant. There is no evidence on the record that the District of Kitimat supports this proposal.

1822. At this point, Douglas Channel Watch would like to thank the Haisla Nation. They were the ones who stepped forward and have done the most to defend the rights and interests of all species -- human or otherwise -- that live in, migrate to or migrate through the Kitimat Valley Watershed and Douglas Channel areas.

1823. Another example of how the Proponent, in paragraph 250, tries to compare the existing Trans Mountain pipeline to the proposed Northern Gateway pipelines by saying:

“The pipeline traverses the same or similar terrain and environmental settings and many of the same physiographic regions as would the project. It runs through mountainous terrain with geohazards, was constructed and operates under the same or similar climatic conditions.”

1824. Interesting, isn't it, how the words “same” or “similar” were dropped in regards to geohazards.

1825. The Proponent knows full well that the Hault Creek and Upper Kitimat River Valleys are much more extreme and contain much more severe and numerous geohazards per kilometre than the Trans Mountain pipeline, as do the valleys immediately east of the proposed tunnels. Making the comparison even more suspect is the fact that the Pacific Trail pipeline has already established an easiest safest route through the Hault Creek and Upper Kitimat River Valleys thereby forcing the Proponent to have second dibs on steeper terrain.

1826. In paragraph 278, the Proponent tries to comfort us by saying:

“While a proposed route parallels the Kitimat River to some extent, it is not immediately adjacent to the river.”

1827. How would the Proponent define “immediately adjacent to the river”?

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Would the pipelines have to be inches from the riverbank, a metre or two?

1828. The currently proposed reality is that the dual pipelines will be 500 metres or less from Hoult Creek and the Upper Kitimat River for over 25 kilometres on steep slopes that drain straight into the water.

1829. The Proponent's definitions of proximity are again a concern at paragraph 276 where the Proponent states that the proposed storage tanks will be:

"...away from designated Reserve lands, spawning rivers, marine spawning areas, shore bird concentrations and sensitive shorelines."

1830. Where is the dividing line between "away from" and "uncomfortably close"?

1831. The Proponent wishes us to believe the proposed storage tanks are away from sensitive areas when, in fact, the 1.3 billion litres of liquid petroleum products proposed to be in those storage tanks will be only eight kilometres from the Kitimat River estuary and six kilometres from the Haisla community of Kitimat Village. With a two-knot incoming tide and a brisk south wind, they wouldn't be very far away at all.

1832. While the Proponent may not be flat out lying in their written final argument, they could be accused of completely ignoring evidence that is damaging to their purposes. Take, for example, paragraph 431 wherein they claim:

"In British Columbia, 97.9 percent of Route U is within two kilometres of existing road access."

1833. In this statement, the Proponent is intentionally trying to mislead us by ignoring Undertaking U-43 where they had to make the following admission:

"Northern Gateway calculates that, currently, 28 percent of the centre line will be within two kilometres of regularly plowed roads."

1834. So the truth is, 72 percent of the proposed pipelines length across British Columbia may be inaccessible to trucks attempting to rapidly respond to

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emergency situations for up to seven months of the year. The Proponent is quite aware of this because they couldn't access many points along the Kitimat River in the main Kitimat River Valley because of snow in May of 2010.

1835. This is a good example of where local knowledge trumps so-called "expert knowledge".

1836. More diversionary language can be found in paragraph 494 where the Proponent states:

"Zero pipeline failures is the operational target. There is no value in having any form of pipeline failure. Northern Gateway's success will be measured by its operational history and safety record."

1837. It's a warm and fuzzy statement for sure, if you leave out the definition of "value" aside, but the problem is Northern Gateway has no operational history or safety record to judge. So if Northern Gateway can't be judged why not take a look at Enbridge's history.

1838. Well, the Proponent knew this question would be coming and couldn't hide from the Kalamazoo spill, so what they did do in their final written argument was they asked the Panel, in paragraph 556, to disregard all intervenor arguments related to the Kalamazoo spill by saying:

"However, to the extent that intervenors attempt an argument to focus the JRP in any way on an inquiry into the root causes, environmental or other impacts, or any other aspects of the Marshall incident such arguments should be disregarded."

1839. Nothing could be more relevant than intervenors putting Enbridge's Kalamazoo learnings into a British Columbian context with its uninhabited wilds, mountains and cold fast free-running salmon-bearing rivers.

1840. Now, cue the violins for paragraph 1457 where the Proponent seeks our sympathy by saying:

"The prosecution of this Application has not been easy. The project sponsors have expended approximately \$500 million in pre-development costs."

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1841. Well, boohoo. I would argue that \$500 million divided between 10 oil companies is chump change in opposition to what was stated earlier this morning.

1842. The Proponent's written final argument gets on shaky ground regarding design and construction of the storage tanks on a ridge beside Douglas Channel in paragraph 249 where they say:

"It also involves the safe construction and operation of the Kitimat terminal in Kitimat Arm in an area subject to seismic activity which encompasses both terrestrial and marine components."

1843. Now, that's interesting because isn't that the first time -- the first admission by the Proponent in a little over 10,000 pages of documents that the area they intend to build their project is in a seismically-active area?

1844. Haven't they been telling us all along to this point that the only seismic concerns would be from the distant Queen Charlotte fault off of Haida Gwaii?

1845. Now, this completely contradicts Mr. Neufeld's statement yesterday where he described the Project area as not "seismically unstable". So what is it?

1846. This is their final argument and they're contradicting themselves.

1847. Consider then this statement in paragraph 296:

"Seismic conditions in the project area have also been addressed."

1848. Well, really? Is that a truthful statement, considering Natural Resources Canada has only submitted a preliminary report concerning a 50-kilometre fault line and massive submarine landslides they accidentally discovered last year in Douglas Channel while doing a modern survey of the Channel for navigation hazards.

1849. How can the Proponent claim to have adequately addressed seismic forces in their design of this Project when they don't know what those forces are or for what duration they may be subjected to those forces.

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1850. Has there ever been a paleoseismological study in the Project area to establish past earthquake or tsunami history?
1851. Wouldn't it be in the best interest of the Proponent, the Panel and Canadians to know the risks before 1.3 billion litres of liquid petroleum products are allowed to be stored on a low ridge right beside Douglas Channel?
1852. Another example of seismic truth avoidance -- sorry, just checking the clock. Don't want to impede on my partners here. Thanks.
1853. Another example of seismic truth avoidance by calculated word choice is found in paragraph 389 where the Proponent said, quote:
- "It is also important to recognize that seismic shaking has little effect on a buried welded steel pipeline."*
1854. End quote.
1855. Well, this may be true if the soil in which the pipeline lays is mere horizontal and remains essentially undisturbed but what of earthflows initiating in glacialment burying clay layers which can travel over a kilometre or debris slides and rockfalls falling over 5,000 feet down steep mountain sides?
1856. What sort of an effect do you suppose these would have on pipelines buried a mere metre below grade and which lay perpendicular to the path of the earthflow debris slide or rockfall?
1857. In defending the choice of Kitimat, as the end point for this proposal, in paragraph 270 the Proponent claims, quote:
- "There are few information requests and very little substantive questioning on alternatives to the project."*
1858. End quote.
1859. Well, I would suggest that no alternative routing suggestions were made because there is overwhelming opposition to any liquid petroleum pipelines onto British Columbia's north coast as evidenced by 96 percent of the letters of comment submitted to this Panel being against the Project.

1860. I would further suggest that any and all liquid petroleum pipeline proposals to any port on Northern British Columbia's coast will be met by the same level of opposition.
1861. And with that I will pass it on to Cheryl Brown.
1862. **MS. BROWN:** So good afternoon. While I have the opportunity, I'd like to thank the Panel for their patience and their help in these proceedings.
1863. And as a person of the public taking intervenor status, the task has been, at times, daunting. As you have read our arguments, you know that we are in disagreement of the Project. As reasonable citizens, we find that the risks are unacceptable.
1864. There are several fundamental problems in the Northern Gateway application and the argument and that I will present. To begin with, the initial development of the marine environment assessment's requirements began in a less than firm manner.
1865. There are no NEB guidelines for the marine environmental assessment. As a result, Northern Gateway developed an equivalent list to the terrestrial guidelines. Supplementing this, CEA provided a scope of factors guidance document which was used as guidance only.

[82. Given the NEB's typical focus on terrestrial pipelines, the information requirements listed in the Filing Manual are largely focused on the terrestrial environment. Recognizing this, Northern Gateway developed an equivalent list of information requirements pertinent to the marine environment, including the Confined Channel Assessment Area ("CCAA"). This list of marine topics was included in the PIP.

83. The CEA Agency also provided the Scope of Factors guidance document for the Project.⁷⁴ "The primary purpose of this document is to provide additional guidance to the proponent on the assessment of environmental effects associated with the marine project components." ⁷⁵ As explained by Mr. Green during questioning in Prince Rupert, the document provides guidance only. ⁷⁶]

1866. As a consequence Enbridge defined the scope of factors for the Project for the marine component as no formal guidelines were in place. The Canadian public finds that the government has limited guidelines for this process in this area and has given control over the marine assessment to the company that intends to operate there. Is this not a conflict of interest.

1867. It is within this context that the purpose of the Project is described by Enbridge. It is about moving oil for more money to meet the business model of investors. It is not about public interest.

[98. The purpose of the Project is to connect Canada's rapidly growing crude oil supplies to rapidly growing markets in the Pacific Basin. The need for the Project is compelling. It is based on these undeniable facts:

The world needs oil and this need will continue for decades. The global population is measured in the billions and so too are the barrels of oil they require on an annual basis to sustain and improve the standard of living in both developed and developing economies.⁹³

29675. MR. RICHARD DEMBICKI: What we explain to investors and to our shareholders is that we have a business model in place to deliver reliable and steady growth in our oil sands production. And what we outline for them is that it's paramount that we also have market access.]

1868. As well the funding partners through this process have felt that they had to reassure success by adding more money to the application.

[109. The testing of the evidence of need provided through the FSAs during the course of the final hearings strengthened the case for the Project. The financial commitment of the FPs has grown considerably since Northern Gateway filed the Application. Not only have all units offered been fully subscribed, the value of those units has increased substantially from the initial \$100 million commitment. Further, FPs have participated in the further commitments that Northern Gateway has made during the regulatory process. The evidence of need

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*coming from Northern Gateway's Project partners and
potential shippers could not be stronger.]*

1869. The fact that Enbridge is not doing a cost analysis of the expensive tug operation for this Project fits with the apparent financial commitments of the funding partners. Oil funding partners want their oil out of the tar sands. They want to enhance the returns for the investors of this Project.
1870. Enbridge has had the convenience of defining the scope of the assessment of the marine portion and then stating in the end they have no legal responsibility in the marine portion, with the Government of Canada being responsible through current legislation and standards.
1871. **THE CHAIRPERSON:** Ms. Brown, can you help us understand which argument you're replying to?
1872. **MS. BROWN:** It's regarding the -- I've placed it in the document. Let me go back up here.
1873. **THE CHAIRPERSON:** And so -- no I don't want to take away from your time but we're here to hear your reply to the arguments that have been filed by other parties either in writing or orally.
1874. **MS. BROWN:** Right.
1875. **THE CHAIRPERSON:** As opposed to hearing your argument that you've already made in your submission.
1876. **MS. BROWN:** And I haven't made this argument. This is in response to items that have been in the Enbridge argument per se.
1877. **THE CHAIRPERSON:** Okay.
1878. **MS. BROWN:** Okay.
1879. **THE CHAIRPERSON:** And if you can just help us orient where you are in the Enbridge argument so that we can follow you.
1880. **MS. BROWN:** Okay. Let me go back here. So the first part about the NEB and the CEA's guidelines had come from paragraph 82 and 83.

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1881. Okay, good. All right. Thank you, Louise.
1882. And the investors piece was in 98 and 29675. And then the funding process was in -- from the -- then the financial backers was in 109. Okay?
1883. So the -- Enbridge has had the convenience of defining the scope of the assessment of the marine portion and then stating in the end they have no legal responsibility in the marine portion, with the Government of Canada being responsible.
1884. My concern is that Enbridge, with unlimited resources to set forth the application, are not subjected to the rigour of independent guidelines on the portion of the Project they are not responsible for. This is in the public interest -- this is not in the public interest.
1885. Regarding the marine spill of the Kalamazoo. And this was in 16758 and 16757.

[81 Additionally, Northern Gateway acknowledges the need for the development of additional tactics for recovering submerged and sunken oil, and intends to address this through its process for the development of its OSRP and by participating in industry research relating to the fate and behavior of products that are to be shipped, including diluted bitumen.772

16758. So once again, despite Enbridge having a very sophisticated program -- probably the most sophisticated program in the world when it comes to crack management, it still identified that there was some reliability issues with the technology that did require us to make significant changes where learnings for all of industry now will come from.]

1886. As a result of the Kalamazoo, Enbridge acknowledges the need to develop additional tactics to recover oil, as well as additional science. They also recognize the failure of their safety system. These have been lessons of the Kalamazoo.
1887. However, Enbridge is still in the same position and is vulnerable to a spill. Their gained sense of confidence in being able to manage is again flawed.

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- Confidence blinds you to the facts and not asking the right questions and working from a set of assumptions that are not true or valid.
1888. The past culture of safety of Enbridge and the ethics that resulted in the Kalamazoo will be hard to leave behind. As much as Enbridge tries to leave their past it'll haunt them. It's engrained in the management and the corporate psyche and will be very difficult to change.
1889. Self-regulation inherently wants you to see you are okay and right. As much as you want to do well you will never see the blind spots that protect your sense of integrity.
1890. I speak of this in terms of the -- of an individual because the corporation responds like an individual to a stressor and change situation. It makes Enbridge vulnerable to the Black Swan. Third-party scrutiny is essential to limit this. The lack of third-party scrutiny throughout this application demonstrates a lack of scientific rigour and limits the ability to self-identify blind spots.
1891. Within all of this Northern Gateway's intent to self-monitor during the construction and operation is a concern within this corporate culture. Along with this is the reduction of provincial and federal monitoring of projects. The safety of this Project is vulnerable to self-regulation.
1892. The common thread throughout the application, evidence and cross-examination, is the limited ability of Northern Gateway or any industry, to clean up the spill and lack of the scientific data and research on behaviour of the product and methods to begin to clean it up.
1893. In 1251 there is a claim that Northern Gateway -- by Gateway, that the spill will not have any permanent damage and that communities will heal and that the spill -- that this makes the spill okay. It shows that they will -- they indicate that environment and communities will recover.
1894. However, in the recovery document during cross-examination the weakness of the studies and the literature was demonstrated. Current research in a biodiversity approach has been lagging and limited in marine research. I would argue that the research presented is fundamentally flawed without the incorporation of biodiversity.

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[1251. However, Northern Gateway's evidence was also clear that, even if a spill were to occur (which is not expected), impacts to the biophysical environment and the human environment would not be permanent. History shows that both recover.

However in the recovery document during the cross examination the weakness of the studies and literature was demonstrated. Current research in a biodiversity approach has been lagging and limited in marine research.]

1895. On to Public Participation. Enbridge states that the opponents tend to question the utility of oil sands development generally from a philosophical foundation and view the risk associated with the Project as unacceptable. This is from 1461.

1896. This is a huge generalization by Enbridge that nowhere near captures the diversity and concerns stated by the public in their voice that states the risks are unacceptable.

[11461. Although there is alignment on certain issues, differences remain between those who support the Project, and those who oppose it. Fundamentally, supporters see a Project that will provide to all Canadians assured economic benefits that will greatly outweigh the risks involved in pipeline and marine transportation. Opponents tend to question the utility of oil sands development generally, and from that philosophical foundation, view the risks associated with the Project as unacceptable.]

1897. The process under the NEB and CEA is to provide a process to consider and decide between diverging positions. But then Northern Gateway begins the argument that their part in the process has more validity. Northern Gateway wants all other evidence and comments that are not provided by valid expert witnesses to have less value.

1898. I ask: Why does the Panel ask for the statements and comments from the public and why then are intervenors allowed to submit evidence without an expert witness?

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1899. It has taken the Panel a lot of time and money to hear the large numbers of the public and is it to be disregarded? It is part of the mandate of the NEB to hear and consider all evidence and comments. They are to seek out the public input. However, it is expected by citizens of this country that their statements, letters and evidence will be heard and considered with a level that respects their input.
1900. With the continued minimization and disregard of public input, evidence and cross-examination, there is an environment of lack of trust and respect. The process sets out this argumentative dialogue where the intent is to downgrade the other party or minimize, but it sets the stage for continued multitudes of 'No' to this Project.
1901. Northern Gateway states that the opinions of opposing people are not relevant to this decision as the evidence is not provided by expert witness. The JRP is mandated to seek the public comments but the process of how they view and evaluate the input is unknown.
1902. The discreditation of evidence by others who are not deemed as experts is insulting to those who have expertise and took the time to examine the Application of Gateway. Resources were not unlimited or even available to most who submitted evidence and comments. Gateway hides behind a judicial façade response as another way to minimize any questioning or alternative view of the Project.
1903. As a person of public who ventured out on their own research, I question: Who says it does not have validity and who determines how much validity?
1904. Northern Gateway in their argument of reducing the validity of public comment spoke to the decisions of the 1994 Clear Cutting in Ontario -- this is in 1462. It is interesting that the judgement ruled against the input of public, yet 20 years later, research has shown them to be correct and not the expert witnesses.

[1462. The fundamental purpose of the NEB Act, with the support of environmental assessment under the CEA Act, is to provide a process to consider and decide between such diverging positions - a process that allows for disclosure of information, the testing of evidence and an organized analysis of the evidentiary record for the purpose of formulating a

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recommendation to the Governor in Council. Part II -Factors to be Considered During the Joint Review

The joint review will include a consideration of the following factors:

The environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

The significance of the effects referred to above;
Comments from the public and Aboriginal peoples that are received during the review;

Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project;]

1905. Another question is: How valid is the expert witness when the evidence is not substantiated?
1906. Evidence of the intervenors has been asked not to be admissible to the process as it's not prepared by expert witnesses yet Gateway has asked for the endorsement of studies of the effectiveness of their escort tugs that could not be scrutinized during the cross-examinations.
1907. Only speculative cross-examination could occur as the sole document for their claim of effectiveness of the escort tugs could not be examined. Northern Gateway, in response to cross-examination, tried to formulate evidence to support their claims through anecdotal evidence and referred to further studies that were not part of the evidence submitted.
1908. I would argue that the evidence is not valid for a significant claim of marine safety by Northern Gateway.
1909. In following along with the QRA, I would like to make further comments.

[(3) QRA Methodology

954. The QRA followed relevant aspects of the international best practice from the IMO definition of a Formal Safety

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Assessment.1337 More specifically, the QRA included the six analytical steps that are typical of marine risk assessments – if not most risk assessments: system definition; hazard identification; frequency assessment; consequence assessment; risk evaluation; and, risk mitigation.1338 Each step is discussed below.]

1910. As it was determined in the cross-examination, the DNV QRA followed what they determined to be “relevant aspects” of the IMO Formal Safety Assessment for best practices. And this was noted in -- where am I? Sorry, I haven’t got the -- it was in the argument for Enbridge.
1911. It was not determined -- it was determined that a number of best practices were not incorporated in the DNV QRA. Introduction of the human aspects of the QRAs was not done by the DNV through -- though the assessment is now part of best practices and the tools available through the IMO. This has limited the understanding of the human factors that impact the analysis of the QRA. Instead, these factors remain hidden in the under-reported Fairplay database.
1912. This limits the understanding of the issues for the establishment of safe marine practices. The QRA should include this process.
1913. Enbridge also maintains that the DNV analysis was not to debate the acceptability of risk yet best practices of the IMO of the Formal Safety Assessment for QRAs asked for the assessment of determination of risk both individually and socially. The Northern Gateway QRA did not undertake this Northern -- did not undertake this. Northern Gateway stated that this was not part of their relevant aspects.
1914. Determination of risk is not done in this process, as stated by Enbridge, and instead will be determined by the Federal Government.

[897. After raising, but not answering, the question of whether such effects are likely, the Spill Impacts report proceeds to offer a series of tests for assessing whether the risk of spill is acceptable and to criticize the risk assessment methodology applied by DNV. These tests include whether alternatives are available and whether the risk is shared equitably by those standing to benefit from the Project.

898. Many of the criticisms leveled against DNV ring hollow when it is remembered that the Coastal First Nations and most of its members declined to participate in the QRA Working Group. For example, contrary to statements made in the Spill Impact report, the DNV report examined the probability of all spill sizes and a variety of sensitivity analyses were completed. Moreover, under the direction of the QRA Working Group, DNV undertook its analysis with a fundamental objective of identifying operational and design measures that would prevent any spill from happening – whether small or large – and to test the efficacy of available risk reduction. Its purpose was not to debate risk acceptability from a social perspective.1248]

1915. In 897 and 898 of the argument, Northern Gateway criticized Coastal First Nations in their cross-examination and argument for suggesting that there were alternative ways for assessing risk and as acceptability and they needed to be applied to this Project.

1916. Northern Gateway suggested that Coastal First Nations cannot discuss these options as they chose not to participate in the QRA working group, suggesting that they'd had their chance. The fact is Northern Gateway did not follow best practices in the QRA development and chose not to do was discussed in the cross-examination. Instead, it was stated and confirmed that the acceptability of risk would not be discussed and defaulted to the Federal Government.

1917. So who does determine the acceptability of risk?

1918. Here's how it's laid out as I understand it.

1919. Northern Gateway states repeatedly that the Application is not to debate risk acceptability. The Joint Review Panel is to consider the significance -- and that's the key word -- of environmental effects of the Project, including environmental effects of malfunction of accidents that may occur and accumulate -- and accumulative environmental impacts.

1920. As stated by Northern Gateway, the government will determine the acceptability of risk.

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1921. Then, under the process of the NEB in this CEA, it is to provide a process to consider and decide between diverging positions. And the diverging position is the opposing group who feel the risks are too great or unacceptable.

[1462. The fundamental purpose of the NEB Act, with the support of environmental assessment under the CEA Act, is to provide a process to consider and decide between such diverging positions - a process that allows for disclosure of information, the testing of evidence and an organized analysis of the evidentiary record for the purpose of formulating a recommendation to the Governor in Council. Part II -]

1922. Yet, there's nowhere in the Project and the process where there is a determination of the acceptability of risk. The public responses indicated that risk is not acceptable. There is a divergent position that has been put forth strongly, yet has been minimized and discounted and considered overreacted and not valid. There is no government process -- there is no process to address it; instead it's been forwarded to the federal government.

[T866. When questioned regarding the issue of risk perceptions as impacts per se, Mr. Green and Mr. Anderson explained that, from an environmental assessment perspective, the concept espoused by Drs. Gibson and Candler is not an accepted or a required element under the CEA Act or policy guidelines.1216 There is good reason for this. Risk perceptions are by definition subjective and, as such, are highly variable as between individuals and over time.]

1923. As members of the public, we participate in a process and we say that the risks are too high.

1924. As you deliberate this proposal, you need to consider the degree of public participation and that the theme is unacceptable and also determine where that this risk is talked about and determined.

1925. With the best of our ability, we've participated in this process. We are at ground zero. Kitimat Valley and Douglas Channel are our home. The risks are too great and the -- than the gains for this Project. Thank you.

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1926. **THE CHAIRPERSON:** Thank you, Ms. Brown.
1927. Good afternoon, Mr. Shannon.
1928. **MR. SHANNON:** Good afternoon. I'll try not to shout like I did before.
1929. I've gone into my first subject to some extent in my written argument; so I won't repeat that here.
1930. The following written evidence from Northern Gateway briefly touches on the Project Gateway Environmental Stations.
1931. Paragraph 1,001, in the -- I'll quote:
- "Northern Gateway has committed to the continued operation of the Project meteorological stations and data obtained from them would be available to inform navigational decisions."*
1932. In questioning, I tried on several occasions throughout the hearings for clarification of the accuracy of these Gateway Environmental Stations and was met with some very conflicting responses.
1933. In Transcript 115, starting at lines 14661, in questions on Environment Canada weather buoys, I received agreement from Mr. Fissel that the buoy at Nanakwa Shoal in Douglas Channel has been prone to underreporting wind conditions in the CCAA. Mr. Fissel pointed out that the six additional GEM stations in the CCAA were used to augment the data from this weather buoy.
1934. Concerned that these six land based GEM stations were also not sufficiently clear of obstructions to accurately reflect the wind speeds over the adjacent water. I asked in transcript 137, line 6888, whether there was a rule of thumb for clearance from obstructions for wind measuring stations.
1935. The reply I received to this question on line 6889 was that:
- "...There's no regulation or recommendation..."*
1936. However, in transcript 160, lines -- starting at lines 5426, using an aid to questioning, I referenced information from the World Meteorological

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- Organization which showed appropriate guidelines for wind measuring devices. Indeed, for accurate reporting of wind speed, an anemometer would best be placed at least 10 times the height of the obstruction away from that obstruction.
1937. There was no disagreement from Mr. Fissel, except to suggest that “some compromises” were necessary. I was also concerned, in transcript 137, that there may be considerable discrepancy between the land-based GEM stations, when I asked whether there had been any validation of the wind speed measurements with measurements taken in the channel adjacent to the weather stations.
1938. On line 6905 of transcript, I received the reply:
- “...you would have to do a great deal of those measurements...”*
1939. However, in transcript 170, at line 5467, I asked a similar question:
- “...has any attempt been made to validate the overall output of the six GEM stations with respect to a [nearby] point in the water... clear of obstructions.”*
1940. On line 56 -- sorry, 5468, Mr. Fissel answered, “Yes”.
1941. So for two nearly identical questions in two different sessions, I received conflicting replies to my questions. So I’m wondering how truthful some of the other answers have been in the proceedings.
1942. Finally, on the subject of the quality of data from the GEM stations in transcript 170, the reply I received from Mr. Doyle of the Meteorological Service of Environment Canada -- between lines 21120 and the next line -- was, and I quote:
- “...and nearly all the Proponents stations landed [about] a ‘three (out of five)’, “where a scale of one would be perfect and five produces relatively worthless data...”*
1943. In other words, as I expected, the winds in the CCAA measured by the GEM stations actually do underestimate the wind speeds, as is also the case with the only EC weather buoy at Nanakwa Shoal. So it is my firm contention that

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because the recorded wind speeds under-report the true wind speeds, you have to doubt the oil spill trajectory model that includes these results as inputs.

1944. Furthermore, I contend that to continue to use these project meteorological stations to also “inform navigation decisions” as stated in Northern Gateway’s written evidence is also subject to doubt. Northern Gateway said in its written argument on paragraph 747 that:

“... Intervenors such as BC Nature and the Gitga’at First Nation have implied that the environmental assessment for marine shipping is inadequate, with respect to the baseline information used, the effects considered, the thresholds used for determining the significance of environmental effects, the effectiveness of the mitigation and protection measures committed to by Northern Gateway, or the environmental monitoring proposed by Northern Gateway. These criticisms are simply not valid; ...”

1945. End quote.

1946. So for all the reasons I’ve identified in my foregoing argument, I disagree with Northern Gateway when it states, *“these criticisms are not valid.”* The winds they report are clearly an underestimate and by extension, the environmental assessment for marine shipping is also inadequate.

1947. So my following -- the following statement is described in paragraph 297 of Northern Gateway’s final written argument. And line 297 reads:

“The impact of climate change on geohazards has also been considered. Trends have indicated that there is a tendency for heavier precipitation. This could result, for example, in more frequent or larger debris flows, deeper scour events or more extensive lateral erosion or a deeper avulsion.”

1948. And I highlighted this:

“It should also be noted that more frequent, high intensity rainfall events may act to reduce the amount of material available for entrainment in successive debris flows, representing reduced hazard.”

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1949. End of quote.

1950. Now, yesterday brought -- Northern Gateway brought up the topic of the Black Swan. That is, as we are well aware, that's unexpected catastrophes, and they mentioned that in their argument yesterday. This was with respect to financial black swans but the following is evidence of one such black swan of another type noted in transcript record 121 starting on line 21668.

1951. And this goes:

“Heavy snow melts caused a tragic debris slide 10 metres deep at Legate Creek [that’s on Highway 16, just east of us here in Terrace] on May 28th, 2007, killing two people and closing the highway east of Terrace. Due to the instability of the slide, it was 24 hours before the crews were allowed to clear the highway.”

1952. The next line reads:

“How would Enbridge deal with a pipeline rupture from a debris slide when it is so unstable that you can’t access it safely for at least 24 hours? The time factor would also be increased if the rupture occurs in a remote location where there is no road access and no heavy equipment available.”

1953. End of quote.

1954. Now, Highway 16 has existed for at least 60 years, with many extreme rainfall events in that time but this tragic event took the region by complete surprise. This is one of those black swans. To suggest that more frequent rainfall will likely reduce the probability of future debris flows, as described in the previous passage, is a very vacuous argument, in my mind.

1955. Also in its written argument, Northern Gateway points out that pipelines have been constructed and operated in similar climatic conditions as would the Project. They further point out on paragraph 251, start quote:

“Additional examples include: the PNG Pipeline that travels through the Coast Mountains...”

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1956. End of quote.

1957. It is interesting to note, however, that this pipeline has been torn out by debris slides on at least two occasions, once on the Copper River and once on the mountains near Prince Rupert. A dilbit pipeline breach in the coastal mountains would have far more serious consequences than that.

1958. On line 544 of its written argument, Northern Gateway discusses the fate of oil spilled into the river and references Dr. Horn's testimony in Prince Rupert. In bracket -- start of quote here:

"In the case of the Kalamazoo spill, there was a high flow of water moving through the region. It was a flood event in which there was a large amount of suspended solids. If you [looked] at that water, it was not pristine and clear. In fact, it was very muddy and brown. It was turbid with suspended solids. So the diluted bitumen that mixed in the water [column] bound with those particles, became more dense and then sank to the bottom."

1959. End of quote.

1960. I'd like to point out that any oil that spills into Burnie/Clore River system, one that feeds the Copper River, will eventually run into a river, that is the Copper that is very seldom anything but turbid with suspended particles.

1961. The aptly named Copper River feeds the Skeena River system, which is itself very often loaded with suspended particles. We can therefore fully expect that an oil spill reaches -- an oil spill that reaches the Copper River will sink in the Copper or Skeena River systems, both of which are extremely important salmon habitats.

1962. In its written argument starting on paragraph 476, Northern Gateway is critical of particular intervening environmental organizations, several of which are foreign funded. They specifically mention BC Nature/Nature Canada, ForestEthics, Raincoast Conservation Coalition, Living Oceans.

1963. And Northern Gateway claims that because these organizations do not offer any suggestions or recommendations that would improve the level of

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protection provided by the Project, that the criticisms put forward by these organizations amount to nothing more than criticisms for criticism sake. Those were their claims.

1964. I would like to point out that these groups do give voice to the many thousands of Canadians who oppose this Project but not -- do not have the very deep pockets and extensive spare time on their hands to personally intervene in the hearings. Individually, the Canadian public cannot personally defend against the many highly funded, non-Canadian foreign companies and countries which are obviously backing the Proponent.

1965. In fairness, some of the Proponent's financial backers do not have a vested interest in the welfare of the Canadians that this Project threatens.

1966. I say thank you to the environmental groups I've mentioned, who are defending the rights and freedoms of individual Canadians in this country and the healthy future of this planet.

1967. In its final written argument on page -- on paragraph 986, Northern Gateway comments on tanker acceptance criteria. These specifically include: "Fully-coated ballast tanks".

1968. That's one of many. However, excluded from the list is any mention of cargo tank protection. For example, Mr. Keith Michel stated in transcript 158 at line 1619:

"And in 2013, requirements go into effect for coating of cargo tanks, the top and bottom of these tanks."

1969. End of quote.

1970. The top and bottom of cargo tanks are critically important regions. These are the regions most prone to corrosion. Cargo tanks coatings must be added to the list of conditions for the tanker acceptance -- tanker acceptance criteria.

1971. Now to wrap up, I do not consider the Northern Gateway proposal to be in the best interest of Canadians and I urge the Panel to reject the proposal. This has been my seventh opportunity to address the Panel. I've learned a lot and would like to thank the Panel for being most gracious throughout the hearings.

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1972. I have the utmost respect for the skills and assistance from NEB staff. I've had some very nervous moments when my Word and Adobe programs let me down prior to one or two important deadlines. For the assistance she gave me in those hours of panic, Ms. Niro went above and beyond the call of duty when I wanted to throw my computer through the window.
1973. I've met many wonderful intervenors and excellent lawyers and professionals throughout the exercise, have felt a camaraderie I've never quite experienced before. I cannot say enough praise about the many speakers of the heart from the First Nations participants that I've met. I have the utmost admiration and respect for them.
1974. Ursula Franklin, one of Canada's national treasures, elaborates on the difference between hearing and listening. My hope is the Panel has been listening.
1975. Thank you.
1976. **THE CHAIRPERSON:** Thank you, Mr. Shannon. Thank you to each of you.
1977. The Panel has no questions on your submission. Thank you very much.
1978. We'll call next the Driftpile Cree Nation. Good afternoon.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. LALJI, DR. DERSCH AND CHIEF LABOUCAN:

1979. **MR. LALJI:** Is it -- okay, it's working now. I am Aryn Lalji, legal counsel for the Driftpile Cree Nation. I'd like to thank Madam Chair and the other Members of the Panel for hearing our submissions today.
1980. Just to bring to your attention, a copy of the submission -- an outline of the submission was provided to the Panel which is cited with references, so we won't be specifically referring to -- to the final written arguments of the different parties to which we are referring.

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1981. I would like to commence by thanking the people of Tsimshian for welcoming us to their traditional territory where we are today and I'd like to acknowledge the presence of Chief Rose Laboucan of the Driftpile Cree Nation and a very good number of the -- of the councillors from the Driftpile Cree Nation who have travelled here today to be present at the -- the hearing, as well as Dr. Ave Dersch who will be making some presentations and submissions on behalf of Driftpile as well.
1982. So with that, I'll -- I'll commence my remarks. Each of us will speak for a period of time between 10 and 15 minutes, I believe.
1983. So Driftpile Cree Nation is pleased to have the opportunity to make these oral final arguments with respect to the application of Northern Gateway Limited Partnership for a Certificate of Public Convenience and Necessity pursuant to section 52 of the *National Energy Board Act [RSC 1985, c N-7]* with respect to the Project which is identified in the Hearing Order.
1984. For the reasons stated by Driftpile in its final argument, Driftpile seeks that the Joint Review Panel not recommend the Project be approved. It is respectfully submitted that the final written argument of Northern Gateway does not establish that the Project is in the public interest. In fact, it is Driftpile's position that the evidentiary record makes it clear that the Project would be adverse to the public interest.
1985. First, the duty of consultation and accommodation owed to First Nations has not been discharged. Second, the Project will have significant adverse environmental impacts which cannot be appropriately mitigated. These direct and adverse impacts of the Project will cause an unjustified infringement of Driftpile's Aboriginal and Treaty rights.
1986. If the Panel does recommend approval, Driftpile asks that the Panel place strict conditions on the approval in order to ensure Driftpile's rights and interests are protected and that the adverse impacts are mitigated. Such conditions are discussed in Driftpile's written argument.
1987. So with respect to the issue of the duty of consultation and accommodation, in the *Carrier-Sekani* case, the Supreme Court stated that:

"The constitutional dimension of the duty to consult gives rise to a special public interest..." [Alcan v Carrier Sekani Tribal

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Council, 2010 SCC 43 at para 70]

1988. Contrary to the Proponent's assertions in their final argument, the special public interest has not been satisfied by Northern Gateway or the Crown. When the duty of consultation and accommodation arises, the Crown must, in good faith, attempt to substantially address the concerns raised by First Nations through a process of meaningful consultation. [*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42] That has not occurred to date.
1989. As noted in the submissions of Driftpile [*D55-11-2 Driftpile First Nation – 9763935_1_Written Evidence of DCN – A3IIL7 at paras 23-24 [Driftpile, Written Argument]*], the Coastal First Nations [*D35-51-2 – CFN – Great Bear Initiative – CFN Written Final Argument – A3IOH3 at paras 40-46 [CFN, Written Argument]*], the Council of the Haida Nation [*D42-45-2 Council of the Haida Nation – Final Written Argument – A3IIW7 at paras 214-219 [Haida, Written Argument]*] and the Haisla Nation [*D80-104-2 Haisla Nation Final Written Argument – 31 May 2013 – A3IOV0 at paras 218-251*], there has been inadequate Crown consultation. To date, Driftpile has had no direct discussions regarding consultation and accommodation with the Crown.
1990. Northern Gateway cites the *Taku River [Taku River Tlingit First Nation v BC, 2004 SCC 74]* case for the principle that a -- that a regulatory process such as this one can discharge the duty to consult. [*B226-2 NGP Limited Partnership – Written Argument – A3III9 at paras 1153-1163 [NGP, Written Argument]*]
1991. Northern Gateway states:
- “The environmental assessment and regulatory review process utilized for the Northern Gateway Project provides for a far more in depth and sophisticated exchange of project information and Aboriginal concerns than [...] was used in Taku.” [Ibid at para 1162]*
1992. Such a comparison is really not appropriate. The potential adverse impacts of the Project at issue in Taku River were relatively minor compared to the potential long-term impacts of pipelines, oil tankers, construction, boring of tunnels et cetera that the Project entails. The enormous magnitude and impact on First Nations rights and interests in this case, requires that the honour of the Crown be discharged through direct and meaningful consultation and

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accommodation.

1993. While lengthy, the joint review process cannot stand in lieu of the Crown's duty to meaningfully consult with the many First Nations whose Aboriginal and Treaty rights will be impacted by the Project.
1994. Further, the Crown has delegated far more than procedural aspects of the duty to consult and accommodation to Northern Gateway. Thus, any approval of the Project based on the Joint Review Panel process alone will lead to a decision which is incorrect and reviewable at law.
1995. Additionally, the consultation responsibilities that have been delegated to Northern Gateway have not been met. Northern Gateway has not meaningfully engaged in consultation with Driftpile. Northern Gateway states that it has engaged with Aboriginal groups to the fullest extent possible and that consultation logs represent an injustice to its efforts.
1996. In support of this, Northern Gateway records the numbers of encounters with Aboriginal groups and stakeholders. In Driftpile's view, Northern Gateway has been satisfied with merely going through the motions of consultation. The mere existence of a consultation log does not mean that consultation has been adequate or meaningful.
1997. Further, the consultation logs do not tell the whole story. Driftpile's dealings with Northern Gateway demonstrate that Northern Gateway did not have an intention of substantially addressing Driftpile's concerns. Northern Gateway's mitigation measures were not appropriate because they did not take into account Driftpile concerns.
1998. The discussion surrounding an accommodation and benefits framework, other than the equity offer that Northern Gateway spoke of in their final written argument, was not well received by Northern Gateway Pipeline. Northern Gateway's process for consultation did not allow for meaningful or unique mitigation and accommodation for individual First Nations.
1999. This was problematic for Driftpile, as it was Driftpile's position that it was not in a position to accept a pre-determined equity offer proposed by Northern Gateway. [*Driftpile, Written Argument, supra note 4 at 20-22; D55-5-2 – Driftpile First Nation – DFN Submission June 21 2012 – A2U2V2 at paras 16-21 [Driftpile, Response].*]

2000. Northern Gateway's written argument complains that First Nations did not meaningfully respond to its mitigation tables. Northern Gateway states about half the Aboriginal groups did not respond; of those who did respond, some groups provided perfunctory responses and some groups merely used the information request as an opportunity to present argument. *[NGP, Written Argument, supra note 9 at para 1052]*
2001. Northern Gateway cites Driftpile as an example of a First Nation that gave perfunctory argumentative responses. Driftpile finds such a statement self-serving of the Applicant and not reflective of the very real efforts that Driftpile made over several years to meaningfully respond to the issues of mitigation.
2002. A significant part of this process and dialogue was initiated and funded by Driftpile directly. While there were capacity limitations, Driftpile did the best that it could to engage in the process. As such, the suggestion that Driftpile's contributions to the consultation process were perfunctory and argumentative is untenable.
2003. Driftpile's response to the JRP Information Request Number 1 *[Driftpile, Response, supra note 11]* discusses the relevant law because Northern Gateway's proposed mitigation measures can only be understood through the context of Driftpile's constitutionally protected Aboriginal and Treaty rights. Meaningful dialogue did not take place despite Driftpile's availability to engage in such discussion.
2004. Driftpile would like to ask Northern Gateway the following: How can mitigation measures be assessed for adequacy without fully understanding the rights and interests which need to be protected?
2005. Further, Driftpile believes that the federal government's interference with the Project has been inconsistent with the honour of the Crown and not in keeping with the honour of the Crown. Driftpile also agrees with the statements made by the Council of the Haida Nation in its oral final argument earlier today with respect to the requirement of having a full environmental assessment of the impacts of the Project to Haida Gwaii prior to the approval of the Project.
2006. With respect to the issues in environmental concerns, the threat of the project poses to the environment also demonstrates that there is not -- that it is also not in the public interest. Driftpile agrees with the submissions of the

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Province of British Columbia about how it will respond in the event of a spill and it is currently not clear whether Northern Gateway will ever be able to effectively respond to a spill.

2007. The Province is correct when it states that Northern Gateway should not be granted approval on the mere promise to do more work once the certificate is granted. [*D167-24-2 Province of British Columbia –Final Written Argument – A310Z4 at paras. 4-5 [BC, Written Argument].*]
2008. The British Columbia position is justified considering that Enbridge has had 11 releases of greater than 1,000 barrels between the years of 2002 and 2012. [*Ibid at para 13*] And we’ve heard evidence -- oral reply evidence suggesting that those numbers might be higher.
2009. Driftpile also shares the Province’s concerns in relation to Northern Gateway’s conflicting statements and confusion regarding whether diluted bitumen will sink or float. [*Ibid at paras 42-58*]
2010. Driftpile cannot trust Northern Gateway’s claim that it will mitigate environmental impacts if the Proponent itself does not even know whether the substance which is going through the pipeline will sink to the bottom of rivers and lakes in Driftpile’s traditional territory.
2011. If a spill and submergence of diluted bitumen occurs it will permanently and adversely impact Driftpile’s traditional territory as evidenced by what recently occurred in Michigan [*Ibid at para 54*], and we’ve heard many other intervenors speak on that today.
2012. Northern Gateway states:
- “The key finding of the work undertaken by Northern Gateway and its scientific advisors is that the project is not likely to cause significant adverse effects on the environment.” [NGP Written Argument, supra note 9 at para 491]*
2013. Such a claim cannot be accepted in light of the foregoing and the overwhelming amount of evidence given by other intervenors such as the Coastal First Nations evidence that there is a high likelihood, ranging between 81.7 percent and 99.9 percent, of a tanker spill large enough to cause significant adverse environmental effects. [*CFN, Written Argument, supra note 5 at para*

494(vii)]

2014. Driftpile agrees with the submissions of other intervenors who cite concerns that approval of the Project will be contrary to protections afforded to Indigenous rights under the United Nations Declaration of the Rights of Indigenous Peoples. In particular, Driftpile agrees with the submissions of the Council of the Haida Nation.
2015. So to conclude with my remarks, Driftpile submits that the Panel should not recommend approval of the project because it is not in the public interest. The Project is not in the public interest because the duty of consultation and accommodation has not been discharged and because of the adverse environmental impacts. These direct and adverse impacts of the Project will cause unjustified infringement of Driftpile's Aboriginal and Treaty rights.
2016. If the Panel does recommend approval, Driftpile asks that the Panel place strict conditions on the approval in order to ensure Driftpile's rights and interests are protected and that the adverse impacts are mitigated.
2017. Further to Driftpile's written final arguments, and the arguments of other intervenors, the proposed conditions are inadequate and need to be strengthened. The "Approve now -Consult later" approach of the proposed conditions is not acceptable to Driftpile.
2018. I thank the Panel for its time. I would now like to ask Dr. Ave Dersch to present some submissions on behalf of Driftpile.
2019. **DR. AVE DERSCH:** I am Dr. Ave Dersch. I'm an archeologist ethnobotanist and traditional land use study facilitator and principle of Moccasin and Flower Consulting. I'm regularly engaged by Driftpile with respect to the assessments of projects proposed in Driftpile's traditional territory.
2020. I have a couple different topics to talk about. The first one is inaccurate assessments of impacts and meaningless mitigation.
2021. Northern Gateway states that:

"The Project is not likely to cause significant adverse effects on the environment." [NGP, Written Argument, supra note 9 at para. 491]

2022. That statement is based on a flawed environmental assessment methodology where impacts are matched with mitigation measures designed to eliminate the impact. Mitigation measures suggested to mitigate impacts to Aboriginal and Treaty rights are rarely successful or appropriate.
2023. NGP’s environmental impact assessment does not use an appropriate definition of significance. Driftpile considers the loss of traditional resources and opportunities to practice traditional activities along the 25-metre right-of-way to be significant. *[D197-13-1 Swan River Final Argument, dated May 30, 2013 – A310X2, Written Argument at para 27 [Swan River, Written Argument].]*
2024. In their written argument, Northern Gateway discusses how they provided detailed responses to the ATK studies completed by Aboriginal groups in the form of mitigation tables. *[NGP, Written Argument, supra note 9 at para. 1050]*
2025. They state that these mitigation tables received little attention from intervenors during the JRP process. *[Ibid at para 1052]*
2026. They state that some of the groups provided perfunctory responses. In looking it up “perfunctory” means superficial, cursory, shallow or sketchy. This is a better term used to describe Northern Gateway’s efforts in preparing these mitigation tables. Driftpile found these tables to contain vague and meaningless mitigation measures that showed a lack of understanding of the real impacts at hand.
2027. So, as example, Driftpile’s concerned about both the effects of weedy species used in reclamation and herbicide use on traditionally used plants. In the mitigation table, Northern Gateway does not commit to not using weedy species in reclamation and instead states:

“Native species will be used where suitable seed stock is available.”

2028. Instead of committing to not using herbicides Northern Gateway states:

“Any herbicides used will be licensed and appropriate to the situation.” [B74-5 – Attachment 1 JRP IR 10 9 – A2T9E7 at 6]

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2029. Northern Gateway is confusing what they refer to as “robust consultation records” with “meaningful consultation”. These are very different.
2030. The second point, Northern Gateway also states that:
- “Aboriginal engagement programs have been broad, inclusive, meaningful and effective.” [NGP, Written Argument, supra note 9 at para 1212]*
2031. This hasn’t been Driftpile’s experience. Consultation has occurred at such a high and general project level that there’s a severe disconnect with the specific impacts to traditional land use identified in ATK studies in Northern Gateway’s proposed mitigation strategies.
2032. Because of this disconnect, general mitigation measures which have been proposed have been neither meaningful nor effective when addressing impacts to Aboriginal and Treaty rights.
2033. We are left to hope that, quote, “[a]dditional engagement...with Aboriginal groups during detailed routing and engineering” [B74-5 Attachment 1 JRP IR 10 9 – A2T9E7 at 5] will offer a solution to dealing with specific ATK issues and concerns but it is vague what this “additional engagement” will look like and is thus unclear whether it will adequately address ATK issues and concerns.
2034. Likewise, when Northern Gateway commits to continue to engage Driftpile during all phases of the Project, it’s uncertain what level of engagement they will be seeking and if it will be adequate. Northern Gateway’s assessment of impacts on First Nations traditional uses and constitutionally protected rights does not have meaningful content.
2035. Northern Gateway is proposing to do the bulk of the work to understand impacts to First Nations and to incorporate information from ATK’s after approval of the project as part of designing mitigation and response measures. [D72-92-2 Gitxaala Nation – Final Submissions – A3IJ7 at para 18]
2036. This isn’t adequate. Driftpile is worried that Northern Gateway is merely promising to deal with First Nations concerns later but those promises will never be fulfilled once the Project receives approval. [Ibid at para 19]

2037. Okay, point three; lack of information available to assess impacts to rights. Northern Gateway states that:

“...given the mitigation measures proposed, adverse effects of routine construction and routine operations on the exercise of Aboriginal rights, including treaty rights [...] will be minor and short-term in nature”. [NGP, Written Argument, supra note 9 at para 1303]

2038. This comment cannot be substantiated by the evidence. First, there is significant evidence of potential for adverse impact to the environment and Aboriginal rights if the Project were to be approved. However, until affected First Nations are provided with the time and capacity to complete detailed rights sustaining land use plans and cumulative effects assessments in their traditional territories, no one is in the position to be able to make conclusions regarding the level of impact the Project will have on the First Nations Aboriginal and Treaty rights.

2039. In its final argument, Northern Gateway states that: “100% of the RoW is now covered by ATK studies”. *[Ibid at para 1286]*

2040. This is misleading and would have led the Panel to believe that the broad views and concerns of affected First Nations have been considered and accommodated. We know from the record that ATK studies have not been completed by all impacted First Nations. As such, the concerns and findings of one ATK participant should not be attributed or inferred to other nations.

2041. Any attempts by Northern Gateway to make such attributions is inappropriate and misleading. The fact that numerous ATK studies are still underway at this time suggests that significant evidence regarding impacts and mitigation will not be considered by the Panel. This is concerning and may put the Panel in a position of having to make its decision without considering all relevant impacts.

2042. Okay, my next point; Aboriginal involvement in biophysical studies. In discussing employment and business opportunities in their final argument, Northern Gateway describes the involvement of Aboriginal communities and fieldwork done to date. *[Ibid at para 1076]*

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2043. A policy is described whereby they always utilize an Aboriginal technician. We more commonly refer to this through their processes local assistant as part of the field teams.
2044. Northern Gateway overstates the value of this policy on the ground this translate to a very short duration of work for a very limited number of individuals. The technicians are treated like assistants in that they receive little to no training in capacity building and work in a context with no expectation for long-term, meaningful employment.
2045. These technicians likely never see the final reports that they were involved in collecting the field data for. Further to this, there are no protocols in place for the collection of incidental, indigenous knowledge by biophysical leads from Aboriginal technicians while out in the field. To put their -- this puts their indigenous knowledge at risk.
2046. This ad hoc and short term involvement of individuals in Northern Gateway fieldwork is not a positive policy and shows Northern Gateway's lack of commitment to meaningful involvement of First Nations in the assessment process.
2047. Okay, my last point; cumulative effects in Driftpile's territory. Contrary to what Northern Gateway states in its written argument, the Project would cause significant adverse effects on the environment. *[NGP, Written Argument, supra note 9 at para 491]*
2048. With regards to habitat disturbance and fragmentation, cumulative effects in Driftpile's core territory are severe and already have a negative impact.
2049. Driftpile's core territory was 65 percent disturbed by 2009. Projections suggest that only 25 percent of their core territory will be more than 250 metres away from disturbances in the year 2035. Further development in Driftpile's core territory, such as the Project, will push the ecosystem into a substantial and long-term reorganization. *[Swan River, Written Argument, supra note 27 at para 28]*
2050. At the current rate of disturbance in Driftpile's traditional territory, the population of moose could cease to be viable in less than 20 years. The Project would have a real impact upon moose and would accelerate the negative effects of cumulative effects already affecting moose. *[Ibid at para 44]*

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2051. Woodland caribou; in its written arguments, Northern Gateway discusses the importance of protecting species at risk, such as woodland caribou. Northern Gateway states that it will utilize best industry practices and avoidance, if possible, to mitigate effects on habitat for species of concern. *[NGP, Written Argument, supra note 9 at para 443]*
2052. It thus seems contradictory that Northern Gateway is choosing a pipeline route going directly through the Little Smoky Caribou Range.
2053. The Little Smoky caribou herd is in trouble. In 2010, the herd consisted of 78 caribou. Environment Canada estimates that 95 percent of Little Smoky caribou herd's required habitat is already disturbed. Environment Canada has concluded that the Little Smoky caribou herd can recover but is currently not self-sustaining. Environment Canada also concludes that the herd cannot become self-sustaining without habitat restoration. *[Ibid at para 34]*
2054. The approval of the Project is inconsistent with attempts to protect the Little Smoky caribou herd.
2055. It's alarming the Project route has been proposed to go through the northern end of the Little Smoky caribou range. *[Ibid at para 32-33]*
2056. Treaty 8 protects Driftpile's right to hunt caribou. Approval of the Project would infringe on that right.
2057. Those are my submissions. Chief Rose Laboucan will now conclude for Driftpile.
2058. **CHIEF LABOUCAN:** Good afternoon and thank you for allowing me to appear before you once again. I didn't come bearing any gifts this time but we'll just go forward.
2059. **THE CHAIRPERSON:** Your presence is a gift in itself. Thank you.
2060. **CHIEF LABOUCAN:** Thank you. My name is Rose Laboucan. I am teacher by trade. I am the Chief of the Driftpile Cree Nation, serving my sixth consecutive term so I must be doing something right.
2061. Our band's traditional territory is located in Northern Alberta. Like

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- our ancestors have done since time immemorial, we too have hunted, fished, and trapped and gathered in that territory but I am not sure our grandchildren will.
2062. Those rights are supposed to be protected by Treaty Number 8. Driftpile is a signatory to Treaty Number 8 and were signed by Chief Kinodayoo in 1899. As a matter of fact, June 21st, Friday, will be 114 years since that was signed. On behalf of Driftpile, I urge the Panel not to recommend that the Project be approved.
2063. This Project is not in the public interest. And by the way, and I'm from Alberta. This Project is not in the interest, also, of Mother Earth. Approval of the Project will have a significant adverse impact on Aboriginal and Treaty rights, specifically Treaty Number 8. Provided that we would be free to hunt, trap and fish after signing of the Treaty as we were before [*Treaty No. 8 Made June 21, 1899 and Adhesions, Reports Etc, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca>], we have compromised so much already.*
2064. This Project, as you've heard in Ave's presentation -- sorry, Dr. Dersch -- we know her as Ave -- and our legal counsel previously, so you know the impacts -- the environmental impacts and they're not going to be very good. But before I return to why the Project is not in the public interest, I want to make it very clear that Driftpile has been very reasonable with Enbridge, with Northern Gateway, with our negotiations.
2065. We've been free and open to discussions and we've tried to be flexible in the way that it was done. It is, in my opinion, Northern Gateway that has been -- that has obstructed meaningful consultation and refuses to be flexible. [*Driftpile, Written Argument, supra note 4 at paras 20-22; Driftpile, Response, supra note 11 at paras 16-21*]
2066. Despite what Northern Gateway's written state -- written argument states, Northern Gateway has not attempted to address Driftpile's concerns to the fullest extent possible [*NGP, Written Argument, supra note 9 at paras 1037-1038*] and you can find those in 1037 to 1038 of the -- of their written argument.
2067. For ethical reasons, Driftpile strongly opposes taking an equity interest in the Project and Northern Gateway refuses to take that into account. Driftpile spent a significant amount of time and resources developing a potential agreement that would meet Driftpile's goals; respect to environmental mitigation and

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- benefits, as well as Northern Gateway's goals, without forcing Driftpile to take an equity interest in the Project.
2068. Northern Gateway refused to consider the agreement. [*Driftpile, Written Argument, supra note 4 at paras 20-21; Driftpile, Response, supra note 11 at para 21*]
2069. This is an example of Northern Gateway's refusing to engage in meaningful consultation. The duty to consult and accommodate involves back and forth. Both sides must be willing. They must be willing to give and take. Northern Gateway, however, simply wants to dictate terms.
2070. I remember being in that room and having that binder: Here is the agreement. Take it or leave it. And many Nations agreed, but we didn't.
2071. The duty to consult requires more than simply listening. Consultation requires both listening and meaningful responding. However, neither Northern Gateway nor the Crown have responded meaningfully to the concerns of First Nations regarding the Project.
2072. Northern Gateway has been content to simply go through the motions to merely engage in something that looks on the surface like consultation. Based on Northern Gateway's written argument, it appears Northern Gateway believes consultation is merely a numbers game.
2073. Northern Gateway records the number of meetings, presentation, phone calls and such. [*NGP, Written Argument, supra note 9 at para 1039*] However, it has been Driftpile's experience that Northern Gateway's not willing to be flexible in the -- or accommodate the concerns of our voices. [*Driftpile, Written Argument, supra note 4 at paras 20-22; Driftpile, Response, supra note 11 at paras 16-21*]
2074. Northern Gateway's written argument makes it sound like it's -- as if it's a benefits package. Their benefit package is flexible. [*NGP, Written Argument, supra note 9 at para 1058-1070*] That is a misrepresentation. As stated, Northern Gateway has treated its benefits package in a one-size-fits-all, a cookie cutter manner, and that's not what we're looking for.
2075. Northern Gateway has not taken account of such things as Driftpile's refusal based on ethical grounds to be an equity participant in the Project.

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[Driftpile, Response, supra note 11 at para 59]

2076. How can we agree to be owners of disaster? Not if, but when. It's a matter of principle.

“Northern Gateway's evidence on the benefits this Project would bring to local communities and Aboriginal groups should be accepted by the Panel.” [NGP, Written Argument, supra note 9 at para 1056]

2077. Such a claim is clearly refuted by the fierce opposition to the Project amongst so many First Nations.

2078. What Northern Gateway was offering to Driftpile was a net negative, not a net benefit. Northern Gateway wanted Driftpile to align a large portion of our traditional territory with no adequate plan for prevention and mitigation was in place, and only minimal economic benefits were offered.

2079. Sorry; I have -- I have diabetes, so I get a really dry mouth. I'll stop for a second here.

2080. Furthermore, the benefits are merely estimates and targets. *[Ibid at paras 1058, 1073]* Northern Gateway's Aboriginal employment targets are especially concerning. *[Ibid at para 1073]*

2081. Northern Gateway professes that its targets are reasonably attainable. However, it is already preparing to blame First Nations for its failure to meet those targets.

2082. Northern Gateway's written argument provides the following quote:

"I think there is only one qualifier: Aboriginal groups have to be willing. This is our aspiration, as we put it, but -- and we're doing everything in our power to encourage Aboriginal groups to engage with us so that that is easily met. But if the Aboriginal groups choose not to engage, then it may be a difficult target." [Ibid at para 1081]

2083. Such a quote shows to me paternalistic attitude towards First Nations. It treats First Nations as misguided children in trying to help them. I am so sick

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and tired of the racist, bigoted, paternalistic treatment of First Nations in this country. And this, once again, proves to me that it's not stopping.

2084. Northern Gateway's written argument attempts to make it appear that the Project has broad support. [*Ibid at paras 1072, 1083*] That is not a reasonable assertion. The Province of British Columbia opposed the Project, stating that Northern Gateway's "Trust me" approach is not good enough. [*BC, Written Argument, supra note 15 at para 5*]
2085. Also, numerous First Nations and environmental group opposed the Project.
2086. Northern Gateway's written argument also attempts to justify the Crown's inadequate consultation efforts. [*NGP, Written Argument, supra note 9 at paras 1153-1163*] The Crown never directly consulted Driftpile and has not discharged its duty.
2087. Our experience with Northern Gateway is that it had no desire to truly understand the rights and interests that are being adversely impacted and to what degree they need to be protected. Northern Gateway just wants to go through the motion of doing a traditional study and that it does not take account of.
2088. It attends meetings where it does not meaningfully respond. It proposes a one-size-fits-all cookie cutter accommodation strategy that do not address the actual rights and interests that are impacted.
2089. Contrary to what Northern Gateway states in its written arguments, the Project would cause adverse -- would cause significant adverse effects on the environment. [*NGP, Written Argument, supra note 9 at para 491*]
2090. Driftpile is particularly concerned about Northern Gateway's failure to meaningfully discuss mitigation measures related to the environment, especially cumulative environmental impacts of development on the Driftpile traditional territory.
2091. Cumulative environmental impacts are having a severe adverse effect on Driftpile's exercise of its Aboriginal and Treaty rights. Impacts from agriculture, forestry, oil and gas like the Swan Hills Waste Plant Treatment Centre and transmission and transporting corridors have had significant impacts on Driftpile's traditional territory.

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2092. Thresholds are being crossed whereby areas of Driftpile's traditional territory can no longer support the wildlife and plants required to allow Driftpile to exercise its Aboriginal and Treaty rights, particularly in Treaty No. 8: the right to hunt, trap and fish. *[Driftpile, Response, supra note 11 at para 31]*
2093. Northern Gateway's discussion of mitigation measures with Driftpile has been limited because Northern Gateway has chosen to focus on a topic of financial participation.
2094. Contrary to what Northern Gateway states, Northern Gateway has barely consulted Driftpile regarding Driftpile's environmental concerns. To date, Northern Gateway has not accommodated any of Driftpile's environmental concerns; instead, has relied on the general environmental provisions outlined in Northern Gateway's Application. *[Ibid at para 60]*
2095. However, the duty to -- of consultation and accommodation requires that Driftpile's specific concerns be listened to and addressed either by the Crown or one of its delegates.
2096. Finally, I believe this Project is inconsistent with the UN Declaration. And you may say: Well, that's not part of this. But, for Driftpile, we use it in our IBAs. If we have an IBA with industry, we quote the United Nations Declaration.
2097. So I just want to read one portion of the Declaration on Article 26:
- "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."*
2098. And this is what addresses our use of the traditional lands.
2099. I also want to say that I agree with Dr. Wier -- I think her name was -- that these spills are accidents and not incidents. And is this what we want from the West Coast to Asia?
2100. Therefore, in conclusion, as long as the sun shines, the grass grows and the rivers flow, we will oppose the Project. In the spirit of Mother Earth, I ask that you do not recommend approval of this Project, not for me, not for you, not for anybody else in this room, but for those yet unborn.

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2101. Thank you.

2102. **THE CHAIRPERSON:** Thank you, Chief Laboucan.

2103. Thank you very much to the three of you for the submissions of Driftpile Cree Nation. The Panel has no questions.

2104. Let's take our afternoon break now and come back at 3:00. Thank you.

--- Upon recessing at 2:44 p.m./L'audience est suspendue à 14h44

--- Upon resuming at 3:01 p.m./L'audience est reprise à 15h01

2105. **THE CHAIRPERSON:** Thank you very much, everyone, for being back promptly.

2106. We've just been informed that there's been a switch in the order and so ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation will be next and then Ermineskin Cree Nation ---

2107. I'm sorry. I jumped ahead.

--- (Laughter/Rires)

2108. **THE CHAIRPERSON:** Thank you very much. So backtrack. Shouldn't have tried to start early. I next call Edmonton Chamber of Commerce, please.

2109. And I will tell you that depending on the order of how things go it could be that there will be a switch between the two parties I just discussed earlier. Thank you.

2110. So the Edmonton Chamber of Commerce?

--- (A short pause/Courte pause)

--- **ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. MORRISON:**

2111. **MR. MORRISON:** Okay.

2112. **THE CHAIRPERSON:** Good afternoon.
2113. **MR. MORRISON:** Good afternoon. My name is Ian Morrison and I'm representing the Edmonton Chamber of Commerce. Today I'd like to thank you for hearing our final arguments.
2114. The Edmonton Chamber of Commerce is a member-driven organization and we consider ourselves to be the voice of business in Edmonton. The Edmonton Chamber of Commerce works in conjunction with the Alberta Chambers and the Canadian Chambers of Commerce that affect -- on issues that affect business.
2115. The Edmonton Chamber is the largest municipal chamber in Canada with 2,661 members. Eighty (80) percent of which are small to medium enterprises and that means they have less than 100 full-time staff. This equates to 108,432 full-time staff and 9,964 part-time staff.
2116. So I'm just reciting those figures to give you an idea of the size of the membership of this organization and the total constituency there. And as you can imagine with 108,000 full-time staff the number of families that that also represents.
2117. So today I'd like to address five topics and I'll just be doing this at a fairly high level. And really, the topics that I'm going to address have been talked about in previous testimony or in the final argument. So I've been following these and will hope to address these at a somewhat higher level to talk about the broad arguments there.
2118. And the topics that I'd like to talk about are firstly, social license. So it's been brought up in previous testimony that certain Proponents of certain groups feel that this Project and this process will not afford this Project a social license and I would like to talk about the Edmonton Chamber's thoughts on that.
2119. The next point will be the -- a certainty of benefits. And, so several groups have talked about the fact that the benefits will not accrue to a large number of people and I would like to talk about the certainty of these benefits and what that means in the overall approval process.
2120. The next point will be what we believe are the remote probabilities of

- negative consequences and why standards and the standards in place will suggest that that will be an occurrence.
2121. The next point will be the impact of the Project -- the impact if the Project does not proceed. And the Edmonton Chamber believes that there's a tangible impact of not proceeding with this Project.
2122. And the third one is that the Chamber realizes -- and this ties in with the social license idea that we'll put forward. But the Chamber realizes that not all sectors of society, not all peoples, will benefit equally from the Project and there may be negative consequences that will accrue to some parties. And that we believe that these negative consequences must be dealt with in a fair and timely manner in some form of equitable compensation.
2123. So the first element I'd like to talk to is about the social license. And the Edmonton Chamber of Commerce views that the social license is defined by the notion that the majority of the members of the affected population, on balance, feel that their interests are being considered and that the Project will benefit them or at least not negatively influence them.
2124. So it's an important distinction when we look at social license in terms of the broad population and individual interest groups. So we don't feel that social license means that every interest group has to agree with the Project. That there may be interest groups that don't agree with the Project but that does not mean that a particular project may not have a broad social license. So the issues here are one of equilibrium and a broad acceptance.
2125. We also feel that the JRP provides an extraordinary forum for the examination of the costs and benefits of a project and as well the distribution of those costs and benefits. So clearly, in Edmonton, we see a tremendous number of pipeline projects, we see a tremendous number of terminal projects, and we see a tremendous number of process plants.
2126. Our jurisdiction has the highest concentration of pipeline segments in Canada, we have the highest number of terminals in Canada, and we have the highest concentration of petrochemical industry in Canada.
2127. And so we understand what those effects can be. We understand what the negative consequences can be and we clearly understand what the benefits are. And I think we have a very good experience on actually seeing what those are and

- living with those -- what living with those consequences are.
2128. I think what we've seen in a lot of the testimony here is that groups are talking that have little or no experience with actual pipeline projects. They have little or no experience with actual terminal projects and have little or no experience in dealing with large hydrocarbon transportation companies.
2129. We feel that in Edmonton we do have that actual experience and we've lived with Enbridge, we've lived with Trans Mountain for decades and we've had a successful and a prosperous relationship with those organizations.
2130. So, the EEC feels strongly that this Project will benefit the vast majority of Canadians. We understand that those benefits may not be distributed equally, and again, as we said, if there are negative consequences we believe that it's a requirement, however this requirement has been met with the controls that are put in place. We believe that there's a requirement that a timely and fair compensation be put in place should those negative effects accrue.
2131. So I'd like to talk about the certainty of benefits. One of the things that we have seen with pipeline projects and the hydrocarbon industry in general, is that there has been great benefit to the economy of Canada and the well-being of the general population in Canada by the hydrocarbon industry and by the transportation of those hydrocarbons to market.
2132. I don't think anybody can argue that the -- that there has not been on net a tremendous benefit by this industry. It's an argument of gross disproportion. The benefits have far outweighed the negative consequences for the hydrocarbon industry and for the hydrocarbon transportation industry. And I think that that's a clear concept that most people can agree with.
2133. Again, the outcome that we would like to see is really that all the citizens of Canada benefit. And we see this as -- from the view of the Chamber of Commerce, we see this as jobs. As I stated, the majority of our members are small to medium enterprises and to them it's all about jobs.
2134. This allows them to hire more people, it allows them to pay higher salaries. They're -- they pay more taxes. So this Project is really about economic prosperity, it's all about jobs, family, better healthcare, better schools, better roads.

2135. We can see in some of the jurisdictions that have a higher concentration of pipeline transportation, hydrocarbon industry that they have done very well. They're some of the most successful communities in Canada.
2136. And we believe that the hydrocarbon industry, for the most part, operates in a very responsible and sustainable fashion and that these benefits have accrued to the vast majority of Canadians. And we believe again that that's an argument of gross disproportion. The benefits far outweigh the costs that have actually been realized.
2137. So again it's all about, in this Project, the prime theme of this Project is really improving the standard of living of Canadians and that's the key element of this Project.
2138. Now again, the greater Edmonton area has the largest concentration of petrochemical activity and transportation activity in Canada. We clearly understand what these benefits are and what the negative consequences are and the likelihood of those benefits and those consequences.
2139. We understand how standards governing this industry have been developed. We understand that they're risk based and that they're based on an acceptable level of risk in society.
2140. So where we may see in some cases that, yes, this may be a question of a certain application of the standard or, yes, maybe the tower for the -- to measure the wind velocity is incorrect, but that's not the Project as a whole.
2141. The Project as a whole is governed by standards that have been very responsibly developed, developed by a large number of scientists over a long period of time and the pipeline transportation industry in Canada is recognized as being one of the safest, one of the best in the world and this has been developed through the application of those standards. And the Edmonton Chamber of Commerce trusts that Enbridge will develop this project in a responsible fashion using industry best practices.
2142. So it's been stated a number of times that we should not trust Enbridge to do what they say. In Edmonton, we've lived with Enbridge for -- for over 50 years and we trust them as a good corporate partner. We found that they have, for the majority, always lived up to their cases. They contribute to the community, and they contribute to the area around them.

2143. Now, again we've talked about negative impacts and these negative impacts have been stated as being certain and what we have understood and -- and for the pipelines we have lived around, we have found that these impacts are far from certain.
2144. In fact, we've found that these negative impacts are actually quite remote and what we've found is that the idea about the standards of development are based on the -- the absolute probability of occurrence and the impact of occurrence and the -- the standards have -- have worked, for the most part, and the consequences are quite remote.
2145. So when we look at this argument, one of the points we're trying to say is that on the whole -- okay, and so on the whole, the argument that we're trying to put forward is -- is that the benefits are quite certain and the negative consequences are quite unlikely.
2146. And so again, this has to be measured and what we say is that we feel that it's quite clear that on the gross argument that the benefits far outweigh the costs. Now, this is not to say, again, that those costs, that those negative consequences may not occur, but we feel that the protocols are in place, the administrative and financial controls are in place for timely and adequate compensation.
2147. The fourth point I'd like to talk about is the fact that we feel if the Project does not proceed that harm will be done to existing populations. We believe that the bitumen bubble will be exasperated, that the revenues -- expected revenues will not be achieved and that jobs will be lost, families will be destroyed.
2148. And I think that many of us can remember what happened during the last downturn in the hydrocarbon industry in Alberta and the effect of that on a large number of Canadian families living in Edmonton in the mid-eighties. It was quite disastrous, and again, that's the last thing that the Edmonton Chamber of Commerce wants to see happen and we do believe that if this Project and other like projects do not proceed, that it will have a significant effect on the oil sands industry and this will lead to a tangible downturn in the economy.
2149. The last point I'd like to talk about before I conclude is the idea that adequate compensation would be paid and that those mechanisms are in place to

- to pay a fair amount of compensation in a timely manner should those negative consequences occur.
2150. And I'd just like to say is that although there are some unique aspects to this Project, it is by no means unique to the hydrocarbon transportation industry. There are literally hundreds of pipeline projects that take place in North America every year. There's probably thousands on a global basis that take place every year.
2151. This is -- there is little that is new or cutting edge technology about pipeline terminal projects and marine transportation. It's a mature industry. Hundreds and hundreds of ships enter Canadian waters and -- and deliver their cargo every day. This -- this science is well known and although some of the Proponents may believe that the sky is falling if this Project goes ahead, we do not believe that that's the case.
2152. We believe that the industry has shown that they contribute very highly to the standard of living of Canadians and they do so, for the most part, with little actual negative consequences accruing. And so, we do believe though that should a negative consequence occur, that those administrative and financial tools be in place so a timely and fair compensation does arrive.
2153. So in conclusion, I'd like to say that the Edmonton Chamber of Commerce, the 108,000 people that it represents and all their families, we believe strongly that the majority of these people strongly support this Project. The business community of Edmonton, all the polls we've -- we've done and all the people we've talked to, we find very little opposition to this Project. This -- this may be expected by -- by a community that has -- that's so well grounded in the hydrocarbon industry I would suspect.
2154. And so we believe that the -- and we strongly encourage the JRP to recommend -- to recommend approval of this Project and that by doing so, you will allow these valuable benefits to accrue to the citizens of Canada and you will improve the standard of living of the vast majority of people.
2155. Thank you very much.
2156. **THE CHAIRPERSON:** Thank you, Mr. Morrison.

2157. And now we come to the two parties that I believe have agreed to switch. So we will call next ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation.

2158. Good afternoon, Mr. Robinson.

2159. **MR. BARRY ROBINSON:** Good afternoon.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MR. ROBINSON:

2160. **MR. BARRY ROBINSON:** Madam Chair and Panel Members, as you know, but others may not, my name is Barry Robinson and I'm counsel for three groups, ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation, and we welcome this opportunity to make final oral argument on behalf of those groups in front of you.

2161. In this oral argument, I intend to respond first to a few points raised in oral argument by Northern Gateway. And then I'll present the Coalition's rebuttal to Northern Gateway's written argument, and the Coalition's rebuttal to Northern Gateway's written argument really falls into two categories: One is, Northern Gateway's position that the environmental assessment is complete; and secondly, whether promises made in Northern Gateway's written argument are supported by their past performance.

2162. I will also address Northern Gateway's position as articulated with respect to the proposed conditions that were put forward.

2163. I've provided a written copy of this oral argument to the Panel staff which includes all the exhibit and transcript references, so I will not be referring to lines and paragraphs unless you wish me to at any point.

2164. I want to start with a recurring question around transportation service agreements and whether TSAs are required to demonstrate binding commercial support for the Project and when TSAs should be required.

2165. In their written argument, Northern Gateway stated that the regulatory approvals stage involves, in their words, "a huge financial risk" and that therefore Northern Gateway had to involve its shippers in sharing the risk in the form of funding support agreements and precedent agreements. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 100*]

2166. Northern Gateway concedes that, at the time the application was submitted, it did not have long-term firm TSAs negotiated with its shippers. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 110]*
2167. And Northern Gateway then goes on at some length in their written argument as to how precedent agreements and they also refer to testimony of shippers demonstrate financial commitment to the Project. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 105-114]*
2168. In his oral argument, Mr. Neufeld acknowledged, but did not agree with, the Coalition's position that Northern Gateway ought to have included and filed binding TSAs. *[Hearing Transcript, Vol. 176 (17 June 2013) at Line 68]* Mr. Neufeld went on to state and I quote:
- “For prospective shippers, capital cost [...] is managed through the use of Precedent Agreements [or capital cost risk rather is managed through the use of Precedent Agreements] and the preparation of a Class III Cost Estimate prior to entering into binding TSAs. This is completely reasonable given that prospective shippers are entitled to understand the full cost of the Project commitments before signing long-term contracts.”*
2169. End of quote.
2170. This approach is also reflected in the written evidence of potential shippers. The shippers' group of Cenovus et al. indicate in their written argument that they should not be required to enter into TSAs before the Certificate of Public Convenience and Necessity is issued and the Class III Capital Cost Estimate is completed. *[Written Argument of Cenovus Energy Inc., Inpex Canada Ltd., Nexen Inc., Suncor Energy Marketing Inc. and Total E&P Canada Ltd. (31 May 2013) Exhibit D29-9-2 at 9]*
2171. And Ms. Ho confirmed that position in her oral argument today.
2172. Similarly, MEG Energy, in their written submission, indicates that the shippers will not execute long-term firm TSAs until they are satisfied that the

Project has been approved and will be subject to acceptable terms and conditions.
[Final Argument, MEG Energy Corp. (31 May 2013) Exhibit D133-7-1 at 15]

2173. So therefore, there remains some uncertainty amongst the shippers as to the economic feasibility of the Project. If the final proposed costs of the project are too great, the Funding Participants are under no obligation to execute and enter into TSAs.

2174. The Coalition understands this uncertainty. However, what the Coalition doesn't understand is the contrast between this Project and the TransMountain expansion program, Kinder Morgan's TransMountain expansion program. The TransMountain expansion, offering a very similar service to that offered by the Northern Gateway Project, received binding 20-year TSAs in a short open season despite not having yet filed an application with the NEB, not knowing the terms and conditions and not knowing the final costs that may apply to the project. *[Hearing Transcript, Vol. 73 (8 September 2012) at Lines 19751-19753]*

2175. It is interesting that Northern Gateway, in their written argument, stated that:

"...it was ... not possible for a Trans Mountain expansion to meet the transportation needs of crude oil shippers."
[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 179]

2176. Yet, TransMountain managed to do in a short open season what Northern Gateway has not been able to achieve in seven years which is to obtain binding transportation service agreements. And Northern Gateway has not adequately explained in either their written or oral argument what obstacle they faced that TransMountain expansion did not.

2177. I'd like now to turn to some arguments that have been made with respect to the economic benefits of this Project. I want to first turn to some statements made by Mr. Bergner on behalf of CAPP. Mr. Bergner said that the economic benefits of this pipeline will continue even if it is not the price setting mechanism and even if the pipeline is full.

2178. The Coalition would submit that a full pipeline has net benefits to Canada only if the volume is not simply shifted from another existing pipeline. If

Northern Gateway is just taking a volume that was or is going down another pipeline, then there is no net economic benefit to the Project even when the pipeline is full.

2179. Therefore, the benefit that Mr. Bergner is referring to must be based on the Project inducing or supporting increased western Canadian oil production or preventing shut-in.

2180. The fact is that Northern Gateway, in the Wright Mansell report, claims that the Project will result in \$109.6 billion in Canadian -- increase in Canadian Gross Domestic Product over the period 2019 to 2048 as a result of increased oil and gas production induced by the Project. [*Public Interest Benefit Evaluation of the Enbridge Northern Gateway Pipeline Project: Update and Reply Evidence (20 July 2012), Exhibit B83-04, Table 3.7 at 62*]

2181. And this represents 35 percent of the net gross domestic product impacts of the Project.

2182. In the Panel session results and decision issued on January 19, 2011, you ruled that the Panel:

“...does not consider that there is a sufficiently direct connection between the Project and any particular existing or proposed oil sands development, or other oil production activities, to warrant consideration of the environmental effects of such activities.” [Panel Session Results and Decision (19 January 2011), Exhibit A22-3 at 13]

2183. Environmental effects as defined in the *Canadian Environmental Assessment Act* includes socio-economic impacts. [*Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52 at s 5(2)(b)(i)*]

2184. Therefore, you have already ruled that induced upstream impacts, including the economic impacts, are outside the scope of these proceedings. Therefore, you must not consider the induced benefits from increased upstream oil and gas production as presented in the Wright Mansell report or the impact of potential shut-in; to do so would be contrary to your own ruling and would be an error in law.

2185. I want to turn now to specific elements of Northern Gateway's written

- argument.
2186. Mr. Tollefson discussed, in his oral argument on behalf of BC Nature/Nature Canada, the difference between sufficiency and completeness with reference to section 52(1) of the *National Energy Board Act*. [*Hearing Transcript, Vol. 176 (17 June 2013) at Lines 990-1003*]
2187. Mr. Jones on behalf of the Province of British Columbia touched on the concept of sufficiency as well. [*Hearing Transcript, Vol. 176 (17 June 2013) at Lines 1025-1030*] And the Coalition agrees with both those submissions with respect to completeness.
2188. At several points in their written argument, Northern Gateway expresses the opinion that the environmental assessment is sufficient and complete. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 311, 661, 908*]
2189. And Mr. Neufeld made a vigorous defence of the sufficiency of the environmental assessment in his oral argument. [*Hearing Transcript, Vol. 176(17 June 2013) at Lines 59-60, 67-69, 93-96, 105, 134, 150-159*]
2190. In their written argument, Northern Gateway refers on numerous occasions to the environmental assessment process as an iterative process. [*See for example Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 258-259, 306, 354, 732, 1040*]
2191. In fact, in their written argument, Northern Gateway uses the term “iterative” 16 times, refers to “continuous improvement or refinement” 14 times, uses the term “ongoing” 37 times with respect to matters to be completed at later stages and refers to “follow-up studies” or “follow-up programs” 19 times.
2192. The Coalition submits that while environmental assessment is intended to be ongoing, iterative and dynamic during the environmental assessment process [*Pembina Institute for Appropriate Development v. Canada (Attorney General) 2008 FC 302 at para 24*], by the end of the environmental assessment process, the identification of environmental effects and the identification of technologically and economically feasible mitigation measures must be complete.
2193. Mr. Neufeld stated in his oral argument that ForestEthics is never going to tell you that enough information has been provided. [*Hearing*

Transcript, Vol. 176 (17 June 2013) at Line 99]

2194. But, frankly, it really doesn't matter if ForestEthics is satisfied or not. What matters is the *Canadian Environmental Assessment Act* and what it requires.
2195. The *Canadian Environmental Assessment Act* is clear that the Panel, in assessing the project must consider the environmental effects of the project, including the effects of malfunctions or accidents and cumulative effects; the significance of those effects; and mitigation measures that are technically and economically feasible. [*CEA, 2012 at s 19(1)(a), (b) and (d)*]
2196. Professor Nathalie Chalifour of the University of Ottawa, in a paper referring to a case known as *Pembina Institute versus Canada*, also known as the *Kearl* case to many people, has argued that these three elements must be analyzed in sequence in order for the assessment to be meaningful. [*Nathalie Chalifour, "Case Comment: A (Pre) Cautionary Tale about the Kearl Oil Sands Decision – The Significance of Pembina Institute for Appropriate Development et al v Canada (Attorney General) for the Future of Environmental Assessment" (2009) 5 McGill Int'l J Sust Dev L & Pol'y 251 at 267*]
2197. That is, you cannot identify mitigation measures that are effective and technically and feasible if you have not first identified the environmental effects and their significance.
2198. The Coalition submits that there are significant gaps in the identification of environmental effects of this Project. Since Northern Gateway has not completed the identification of the environmental effects nor determined the significance of those effects in some cases, the effectiveness of the mitigation measures being proposed are theoretical at best.
2199. The *Canadian Environmental Assessment Act* does not require that the Panel to eliminate all uncertainty surrounding project effects. [*Pembina Institute for Appropriate Development v. Canada (Attorney General) 2008 FC 302 at para 23*]
2200. However, the Act does require that the Panel establish that the proposed mitigation measures are technically and economically feasible and that they would actually mitigate any significant environmental effects of the Project. [*Pembina Institute for Appropriate Development v. Canada (Attorney General) 2008 FC 302 at para 24-26*] If this test is not met, the Panel cannot consider the

- mitigation measures in assessing the significance of the impacts.
2201. In his oral argument, Mr. Neufeld stated that the *Canadian Environmental Assessment Act* -- under the *Canadian Environmental Assessment Act*, Northern Gateway can rely on follow-up programs. [*Hearing Transcript, Vol. 176 (17 June 2013) at Line 65*]
2202. The *Canadian Environmental Assessment Act* clearly states that the purpose of follow-up programs is:
- “...to verify the accuracy of the environmental assessment ...”*
2203. and to:
- “...determine the effectiveness of any mitigation measures.”*
[CEA Act, 2012 at s 2(1)]
2204. Follow-up programs are not intended to identify environmental effects and mitigation measures that were deferred during the environmental assessment process. They are to verify the environmental effects that were identified and determine the effectiveness of measures that were identified during the environmental assessment process. So follow-up programs cannot save an incomplete environmental assessment.
2205. Madam Justice Tremblay-Lamer in the *Pembina Institute* case stated:
- “...in the context of a panel assessment, possibilities of future research and development do not constitute mitigation measures.”* [*Pembina Institute for Appropriate Development v. Canada (Attorney General) 2008 FC 302 at para 25*]
2206. It may be useful to illustrate the failure on the part of Northern Gateway to identify all the environmental effects and technically and economically feasible mitigation measures with reference to specific parts of their written argument.
2207. I’d like to turn first to the assessment of geohazards along the pipeline route.
2208. Mr. Neufeld addressed the issue of geohazards in his oral argument

with assurances that there was nothing particularly unique about this Project and that Northern Gateway has no lack of confidence in their ability to manage the geohazard risk. [*Hearing Transcript, Vol. 176 (17 June 2013) at Lines 85-92*]

2209. In response to questions about the apparent omission of certain geohazards from the Overall Geotechnical Report and the Quantitative Geohazard Assessment, Northern Gateway explains, in their written argument, that those reports included only those geohazards that had the potential to cause a loss of containment event on the pipeline. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 292-294, 311*]

2210. This approach ignores the impact that geohazards may have on other infrastructure such as power lines, road access or other road access that may be required during an emergency event.

2211. In commenting on the Panel's Potential Condition Numbers 75 to 77, Natural Resources Canada recommended, quote:

"Northern Gateway must assess the terrain from height of land on both sides of the pipeline route (e.g., surficial and bedrock including topography) in the Coast and Rocky Mountains, and describe any additional potential faults or lineaments identified through LiDAR." [Written Argument of Transport Canada, Natural Resources Canada and Environment Canada (31 May 2013), E9-78-2 at 22]

2212. End of quote.

2213. Natural Resources Canada then went on to say, quote:

"...without reference to the underlying material and topography, there is no ability to assess whether the [geohazard] identification and assessment is complete." [Written Argument of Transport Canada, Natural Resources Canada and Environment Canada (31 May 2013), E9-78-2 at 25]

2214. End of quote.

2215. Therefore, at this point in time, Northern Gateway's assessment of the

geohazard risks is incomplete and the Panel's evaluation must find that the assessment is incomplete.

2216. Further, in their written argument, Northern Gateway stated that the quantitative geohazard assessment was intended, quote:

"...to provide an early indication of appropriate mitigation measures." [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 311]

2217. End of quote.

2218. Further, Northern Gateway stated, with regard to geohazards, quote:

"...the detail of mitigation measures is sufficient at this stage. It is not necessary, nor expected, that detailed design of mitigation measures be completed now." [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 380]

2219. End of quote.

2220. Clearly, the *Canadian Environmental Assessment Act* requires the identification of mitigation measures that are technically and economically feasible, and not just an indication of potential mitigation measures. Further, it's not clear how Northern Gateway can identify technically and economically feasible mitigation measures, when, as stated by Natural Resources Canada, Northern Gateway's identification and assessment of the geohazards is not yet complete.

2221. In their argument -- written argument, Northern Gateway states, quote:

"Geotechnical risk assessment, like risk-based design, is an iterative process. The work to identify geohazards and [to] mitigate them is ongoing." [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 305]

2222. This is a clear admission that the requirement to identify environmental effects and technically and economically feasible mitigation measures during the environmental assessment process is not complete.

2223. Therefore, Northern Gateway has not completed the assessment of the geohazard risks at this time and you, the Panel, cannot meet your obligation under section 19 of the *Canadian Environmental Assessment Act* to assess those risks and the feasibility of any mitigation measures.

2224. Similarly, I'll turn now to the question of the fate and behaviour of diluted bitumen. I don't want to spend too much time because it's been covered by others, touched on by Mr. Jones [*Hearing Transcript, Vol. 176 (17 June 2013) at Lines 1037-1041*] and Dr. Wier and Driftpile First Nation as well. But I would like just to delve little more deeply than Mr. Jones did in his oral argument.

2225. In their written argument, Northern Gateway concedes that there is, quote:

“...little experience with how oil sands products behave when spilled into aquatic environments”. [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 836]

2226. End of quote.

2227. Northern Gateway also concedes that the question of diluted bitumen sinking in the marine environment remains uncertain. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 837-838*]

2228. I'd like to respond to a statement made by Mr. Neufeld in his oral argument. Mr. Neufeld stated that the laboratory research conducted by SL Ross confirmed that dilbit, quote:

“...will not sink when spilled, and it will not sink due to weathering”. [Hearing Transcript, Vol. 176 (17 June 2013) at Line 181]

2229. End of quote.

2230. To be clear, what the SL Ross studies actually showed was that weathered dilbit will not sink in a tank at 15 degrees Celsius with no sediment present. That is all that the SL Ross studies showed.

2231. Northern Gateway concedes in its written argument that diluted bitumen may sink when it becomes attached to suspended sediments and that the total volume of oil that sinks depends on the amount of suspended sediment. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 543, 828, 838, 848]*
2232. Having made that concession though, Northern Gateway then fails to provide any information on the level of sediment concentration in combination with other factors such as temperature that will cause diluted bitumen to sink and at what rate, fails to present any information on the suspended sediment levels found at the mouths of rivers entering into Kitimat Arm or Douglas Channel, and it fails to provide any information on how these sediment levels vary seasonally or geographically across the channel.
2233. The uncertainty with respect to the fate and behaviour of diluted bitumen was also discussed extensively by witnesses from Environment Canada, in particular Dr. Bruce Hollebhone, and that evidence has been canvassed in our written argument and I won't repeat it here. *[Final Written Argument of ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation (30 May 2013) Exhibit B66-31-2 at para 155-167]*
2234. So therefore, we're left with a most fundamental question unanswered with respect to the risk posed by diluted bitumen. Will diluted bitumen sink in the marine environment, and under what conditions?
2235. That unanswered question is reflected in the Panel's Potential Condition No. 165 requiring Northern Gateway to conduct additional research on the fate and behaviour of heavy oils in the freshwater and marine environments *[Collection of Potential Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013), Exhibit A346-5 at 38]* and in Northern Gateway's statement that it will participate in a Scientific Advisory Committee directing further research into the fate and behaviour of diluted bitumen. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 849]*
2236. However, this commitment to further research does not satisfy the requirement under *Canadian Environmental Assessment Act*, that environmental effects and technically and economically feasible mitigation measures be identified as part of the environmental assessment process, not after. Therefore,

again, you cannot meet your obligation under section 19 of the *Canadian Environmental Assessment Act* to assess those risks and the feasibility of mitigation measures.

2237. I just have one further comment with respect to the sinking bitumen question, and that is that section 4(1)(b) of the *Canadian Environmental Assessment Act* states that one of the purposes of the Act is to ensure that projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects. [CEA, 2012 at s 4(1)(b)]
2238. And section 4(2) of the Act states that the Government of Canada, the Minister, the Agency, federal authorities and responsible authorities must exercise their power in a manner that applies to precautionary principle. [CEA, 2012 at s 4(2)]
2239. And the precautionary principle states simply that:
- "Where there are threats of serious or irreversible damage, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." [Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development, 3-14 June 1992, UN Doc. A/CONF. 151/26/ (vol. I)
<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>]*
2240. So what would be the precautionary approach with respect to the uncertainty regarding the fate and behaviour of diluted bitumen in the marine environment look like?
2241. The Coalition submits the precautionary approach would be to plan for sinking bitumen and to develop mitigation and response measures on the assumption that dilbit will sink in the marine environment. Instead, what we get from Northern Gateway are denials of that proposition based on limited tank tests and one incident in Burnaby.
2242. Similarly, we lack -- we see a lack of baseline data for several important biological components of the environment.

2243. In their written argument in response to intervenors who argued that Northern Gateway had not collected adequate baseline information to complete the environmental assessment, Northern Gateway stated, quote:

“...the amount of information available did not affect the ability to do a rigorous environmental assessment.” [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 661]

2244. However, one paragraph later, and as noted by Ms. Williams-Davidson for the Haida Nation, Northern Gateway concedes that they had, quote:

“...not conducted surveys for any biological group in the open water area”. [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 662]

2245. Unquote.

2246. Further, in oral testimony, witnesses for Northern Gateway conceded that they did not conduct any fish surveys in the marine project effects assessment area [*Hearing Transcript, Vol. 112 (11 December 2012) at Lines 9509-9512*], they did not conduct any field work to identify salmon streams that drain into Kitimat Arm or Douglas Channel [*Hearing Transcript, Vol. 112 (11 December 2012) at Lines 9530-9531*], they did not make any attempt to identify intertidal spawning habitat for salmon [*Hearing Transcript, Vol. 112 (11 December 2012) at Lines 9513-9515*] and they did not collect any baseline data on water quality, sediment quality or contamination of fish on salmon-bearing streams [*Hearing Transcript, Vol. 112 (11 December 2012) at Lines 30119-30125*].

2247. Northern Gateway indicated that surveys of fish abundance, diversity, habitat and information on specific fish habitat would not be conducted until after Project approval. [*Hearing Transcript, Vol. 113 (12 December 2012) at Lines 12511-12518*]

2248. With respect to fisheries impacts, Northern Gateway stated that it was committed to mitigating, quote:

“...risk to fish and fish habitat through a safe, reliable and responsible design and construction program”. [Northern Gateway Pipelines Inc., Written Argument (31 May 2013),

Exhibit B226-2 at para 324] End quote.

2249. Northern Gateway cannot accurately assess at this point in time the potential impacts on fish and fish habitat when basic baseline information have not been collected.
2250. Further, under the *Canadian Environmental Assessment Act*, Northern Gateway must demonstrate that mitigation measures are technically and economically feasible now as part of the environmental assessment process and not as part of the final design and construction program.
2251. We see a similar issue with respect to marine mammals. In their written argument, Northern Gateway concedes that marine mammal density surveys will not be conducted until the post-approval stage. And in their written argument, Northern Gateway states that it does not dispute the importance of this work, but incorrectly, in our opinion, states that it is not required for the purposes of an environmental assessment. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 908*]
2252. Northern Gateway also concedes that a confident determination of the significance of the impact of residual underwater noise was not possible at this point in time. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 684*]
2253. Northern Gateway states in their written argument that noise impacts and the risk of vessel strikes would be mitigated through reduced vessel speeds, whale monitoring, remote detection and low noise designs for tugs. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 694*]
2254. Northern Gateway then goes on to conclude that, quote:
- “...the residual environmental effects of Project-related marine transportation may lead to changes in the distribution and abundance of some marine mammals within the CCAA, but that effects are not expected to affect the long-term viability of marine mammals at a population level. [Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 696]*

2255. End of quote.

2256. Contrast that conclusion with the testimony of Dr. John Ford of Fisheries and Oceans Canada who stated, I do not -- quote:

“...I do not think we have enough information on the spatial distribution in the context of risk of ship strike, for example, which in order to better appreciate and assess the potential risk in that area, we need very high resolution information at a scale of a few kilometres or less even, in terms of -- in the confined channel area, where the animals are with respect to the shipping corridor.

So this is one of the main reasons we have not been able to -- be able to accurately predict what ship strike risk may exist for humpback whales, fin whales and so on because of a lack of high resolution spatial information for that area.” [Hearing Transcript, Vol. 167 (22 April 2013) at Lines 16461-16462]

2257. End of quote.

2258. How then does Northern Gateway determine, with any confidence, that the effects are not expected to have a long-term impact of the viability of the marine mammal populations, when Fisheries and Oceans Canada says there is not sufficient information to predict that risk?

2259. Similarly with respect to marine birds, in response to a question as to whether there was adequate information to estimate the risk of the Project to marine birds, Dr. Sean Boyd of Environment Canada responded, quote:

“As far as determining the impact of the project, I would say no, we don't have enough information, that's for sure. And that's why we are going to need some more information, some more detailed baseline surveys. [Hearing Transcript, Vol. 167 (22 April 2013) at Lines 16483]

2260. End of quote.

2261. The evidence of Fisheries and Oceans Canada and Environment Canada with respect to the inadequacy of the information to assess the risks of the

Project clearly conflicts with Northern Gateway's assertion that "the amount of information available did not affect the ability to do a rigorous environmental assessment". Fisheries and Oceans Canada and Environment Canada are saying you don't even have the basic baseline information.

2262. In summary on this point, the *Canadian Environmental Assessment Act* requires that all significant environmental effects be identified as part of the environmental assessment process, that mitigation measures be established to be technically and economically feasible. Promises of future studies or the collection of additional baseline information post-approval do not fulfill this requirement.
2263. The test is not met when Northern Gateway defers basic information on significant issues as geohazard risks, the fate and behaviour of diluted bitumen, and the spatial distribution of marine mammals and marine birds to a post-approval phase.
2264. The other reason that the Coalition objects to the deferral of so many important studies and the deferral of proven mitigation measures to the post-approval phase is captured in the Government of British Columbia's position that "Trust me" is not good enough in this case. [*Argument of the Province of British Columbia (31 May 2013), Exhibit No. D167-24-2 at para 5*]
2265. The Coalition submits that Northern Gateway's past performance speaks louder than its current promises. A few examples are in order. In their written argument, Northern Gateway states with respect to leak detection and control, that they are committed to "applying industry best practices", "employing industry-leading technologies" and using the "best available leak detection technologies". [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 336-337*]
2266. In written and oral argument, Northern Gateway claims to have had a program of continuous improvement with respect to integrity management in place for at least 10 years. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 551; Hearing Transcript, Vol. 94 (19 October 2012) at Line 16408*]
2267. Yet despite that program, Northern Gateway had pipeline integrity deficiencies identified on at least eight occasions between 1999 and 2010, culminating in the significant spill at Marshall, Michigan in July 2010. [*Written*

Evidence of Living Oceans Society, Raincoast Conservation Foundation and ForestEthics, Attachment J (21 December 2011), Exhibit D66-3-12]

2268. In their written argument, Northern Gateway claims that pump stations will have numerous operational, safety and containment features and will meet or exceed industry codes and standards. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 356]*
2269. And as discussed by Dr. Wier, while Northern Gateway was appearing before you and making those promises, Northern Gateway was, at the same time, being cited by the National Energy Board for failing to have emergency shutdown buttons and backup power on a number of a number of stations. *[Letter, S Young (National Energy Board) to A Monaco (Enbridge Pipeline Inc.), (15 March 2013); National Energy Board, Order SO-E101-001-2013, Enbridge Pipeline Inc. (14 March 2013); Argument of the Province of British Columbia (31 May 2013), Exhibit No. D167-24-2 at para 97]*
2270. So while promising to meet or exceed industry codes and standards on the Northern Gateway pipeline, Enbridge was actually breaching basic industry standards on their existing pipelines.
2271. And I should point out that those inspections, with respect to the emergency shutdown buttons, were done in 2000 -- the fall of 2011, the fall of 2012. So well after Northern Gateway had claimed to have made improvements following the Michigan -- in their environmental performance following the Michigan event.
2272. Mr. Jones and Mr. Minchin referred to a statement by Northern Gateway with respect to the Marshall, Michigan incident but I think it bears repeating. And that is that Northern Gateway argued, quote:
- “[T]o the extent that Intervenors attempt in argument to focus the JRP in any way on an inquiry into the root causes, environmental or other impacts or any other aspects of the Marshall Incident, such arguments should be disregarded.
[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 556]*
2273. End of quote.

2274. The Coalition would argue exactly the opposite. You, as a Panel, must carefully consider the root causes of the Marshall incident as indicative of Northern Gateway's past performance and as instructive -- instructive to current and potential organizational deficiencies.
2275. With respect to the Marshall incident, Northern Gateway, in its written argument, argues that there was -- or states that there was a deficiency in its integrity management program, that changes were made as a result and that the target is zero pipeline ruptures. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 570*]
2276. Northern Gateway also confirmed that its success will be measured by its operational history and safety record. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 494*]
2277. Yet, when asked to commit to a measurable performance standard equal to Enbridge's 2011 performance, Northern Gateway refused to do so. [*Hearing Transcript, Vol. 94 (19 October 2012) at Lines 17010-17026*]
2278. With respect to the Coalition's recommended condition that Northern Gateway be held to a standard equivalent to Enbridge's 2011 spill performance [*Final Written Argument of ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation (30 May 2013), Exhibit D66-31-2 at para 282-283*], Mr. Neufeld, in oral argument, stated that the recommended condition was not reasonable and was "counterproductive" and that the goal should be zero spills. [*Hearing Transcript, Vol. 176 (17 June 2013) at Line 338*]
2279. If Northern Gateway was willing to commit to zero spills, I think the Coalition could support that.
2280. Northern Gateway's reluctance to commit to a measurable performance standard is difficult to understand. The Coalition submits that, as a basic management principle, if something is important to the operation of a business, there should be a measurable performance standard, the performance should be monitored and if the standard is not met, there should be consequences.
2281. Enbridge's 2011 record for leaks per 1,000 kilometres of pipeline and quantity of oil leaked per 1,000 kilometres of pipeline would be based on all of Enbridge's pipelines regardless of age and design.

2282. Despite the fact that the Northern Gateway pipeline will be the most modern pipeline and despite assurances from Northern Gateway the Project will use the most modern integrity management and control technology, Northern Gateway refuses to be held to even the average performance level of their pipelines in 2011. [*Hearing Transcript, Vol. 94 (19 October 2012) at Lines 17010-17026*]
2283. Northern Gateway estimates the spill return period for a greater-than-pinhole leak on Northern Gateway pipeline to be one in 76.7 years. [*Northern Gateway Response to Undertaking U-49 (8 February 2013), Exhibit B195-1 at 3; Argument of the Province of British Columbia (31 May 2013), Exhibit No. D167-24-2 at para 25*]
2284. Yet they won't commit to a spill performance standard of one leak per 1,000 kilometres per year, a standard that is at least 75 times less stringent than their own prediction of leak frequency.
2285. We fail to see how such a standard would be unreasonable or counterproductive but seem that an upper limit on Northern Gateway's performance that would have consequences makes sense. That is why "Trust me" is not good enough in this Project.
2286. I'd like to turn now to the Panel's list of potential conditions and Northern Gateway's response in their written argument to those potential conditions. In their written argument, Northern Gateway concedes that the inclusion of conditions in the Certificate of Public Convenience and Necessity would ensure that plans and programs that remain to be developed are in place prior to applicable Project milestones and are of superior quality.
2287. Further, Northern Gateway acknowledges that the potential conditions, as articulated by the Panel, would facilitate additional refinement and improvement of the Project. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1379-1380*]
2288. The Coalition, while clearly opposed to this Project proceeding, believes that clear, robust and enforceable conditions are essential if this Project were to proceed. As discussed, Enbridge's past performance and refusal to commit to a performance standard does not instil confidence that the deficiencies that led to the Marshall incident have been corrected.

2289. Promises to conduct further research, to conduct further studies and to find future solutions are not sufficient. These commitments must be captured as clear, robust and enforceable conditions. The Coalition supports the Panel's list of Potential Conditions subject only to suggested amendments that we discussed in our written argument. [*Collection of Potential Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013) Exhibit A346-5*]
2290. Further, the Coalition supports the recommendations of Transport Canada, Natural Resources Canada, Environment Canada, with respect to potential conditions as presented in their written argument. [*Written Argument of Transport Canada, Natural Resources Canada and Environment Canada (31 May 2013), E9-78-2*]
2291. As presented in the Coalition's written argument, the Coalition proposes that 267 additional commitments made by Northern Gateway during these proceedings be set as conditions pursuant to potential Conditions 2, 3 and 48-51.
2292. In oral argument, Mr. Neufeld referred to the Coalition's table of 267 additional conditions, which were based on Northern Gateway's oral and written commitments. Mr. Neufeld stated that Northern Gateway cannot accept the characterization of those commitments by the Coalition. [*Hearing Transcript, Vol. 176 (17 June 2013) at Line 332*]
2293. With respect, we have provided hearing transcript and document references for each of the 267 commitments in the table. Most of the commitments were clear and unambiguous. Where there was ambiguity in the commitment, the Coalition either omitted the commitment or presented what we thought was a fair and conservative interpretation of the commitment.
2294. While Northern Gateway may dispute the Coalition's articulation of some of those 267 commitments, the Panel is quite capable of interpreting the intent of those commitments from the reference materials.
2295. The Coalition notes that many of these 267 commitments, as well as many of the commitments made in Volume 7a of Northern Gateway's Application, do not appear to have been captured in Northern Gateway's list of commitments. This would indicate that Northern Gateway's compilation and its list of commitments has not been thorough and is not complete.

2296. The Coalition submits that it is significant, that Northern Gateway, despite committing to a world class project is already trying to weaken potential conditions that were intended to provide for enhanced pipeline and marine safety and environmental protection.
2297. There are a number of potential conditions where the Coalition clearly disagrees with Northern Gateway's position as presented in their written argument.
2298. Potential Condition Number 7-8 call for the use of a three-layer composite coating or High Performance Composite Coating for the entire pipeline. *[Collection of Potential Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013) Exhibit A346-5 at 6]*
2299. I think this matter was ably discussed by Dr. Kerr and the Coalition would submit -- would support Dr. Kerr's position on this.
2300. This Potential Condition appears to be based on the testimony of Dr. Bill Santos of Natural Resources Canada, who clearly said that these coatings would increase pipeline integrity and safety. *[Hearing Transcript, Vol. 110 (28 November 2012) at Lines 7561-7580]*
2301. Despite Dr. Santos' evidence on this point, Northern Gateway suggests in their written argument that these coatings for the entirety of the pipeline would result in an uneconomic design and would add no value in most instances. *[Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1411]*
2302. Despite assurances of a world class standard in using industry best practices, Northern Gateway is retreating, even before receiving approval of the project, to economic arguments of why they can't meet these standards.
2303. The Coalition submits that Potential Condition Numbers 7-8 are important conditions designed to enhance the integrity, safety and environmental performance of the pipeline and that the Panel should ensure that these conditions are maintained as final conditions.
2304. Dr. Kerr also ably reviewed the importance of Potential Condition Numbers 31-32 with respect to fracture toughness. *[Collection of Potential*

Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013) Exhibit A346-5 at 10-11]

2305. And I will say again no more other than that Coalition supports Dr. Kerr's argument on this point.
2306. The Coalition is also concerned about Northern Gateway's response to Potential Condition 168 with respect to emergency response exercises.
2307. Potential Condition Number 168 proposed that Northern Gateway carry out full field-scale exercises for 5 scenarios prior to commencing operations and unannounced full-scale field exercises for the same 5 scenarios in the first 2 years following the commencement of operations. *[Collection of Potential Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013) Exhibit A346-5 at 39-41]*
2308. In their written argument, Northern Gateway responds that they would only carry out two full-scale field exercises prior to commencing operations and that they are opposed to unannounced full-scale exercises on the basis that they are not practical.
2309. The Coalition finds this unusual, given the testimony of Northern Gateway's own witnesses and, in particular, Dr. Elliott Taylor, as to the importance of full-scale field exercises and the importance of unannounced exercises.
2310. To quote Dr. Taylor:
- "...You want to make sure your teams have some experience in the field under different conditions that you might be looking at.*
- And so if we just go with a seasonal aspect, you're probably looking at deployment exercises maybe four seasons: spring, summer, fall and winter. And ideally, you'd have, at a minimum, one year of those under your belt, preferably two years under your belt before you became operational."*
- [Hearing Transcript, Vol. 148 (1 March 2013) at Lines 22358-22359]*

2311. And I'll just reiterate a quote that was referenced by Mr. Jones yesterday where Dr. Taylor states:

*"The other one that I find very successful and I really like to see in world-class operations are your unannounced exercises, and that is the surprise. It gives people a challenge."
[Hearing Transcript, Vol. 148 (1 March 2013) at Line 22365]*

2312. If Northern Gateway is to have deployment exercises for four seasons prior to the commencement of operations as recommended by their own witness, Dr. Taylor, that is at least four pre-commencement exercises. Possibly eight if, as Dr. Taylor suggested, two years might be better and not simply two as suggested by Northern Gateway.

2313. Further, Northern Gateway has promised world class operations yet they are opposing a condition that would require them to do an unannounced full-scale exercise.

2314. Finally, the Coalition wishes to address Northern Gateway's response to Potential Condition Number 147 pertaining to financial assurances for the cost of clean-up, remediation and other damages resulting from Project operations. *[Collection of Potential Conditions, Northern Gateway Pipelines Inc., Enbridge Northern Gateway Project (12 April 2013) Exhibit A346-5 at 33-35]*

2315. You, as a Panel, heard extensive and wide-ranging evidence on the potential costs of clean-up and remediation, the potential damages to important natural resources and the financial resources both within Northern Gateway and Enbridge and outside of those entities to deal with those costs. The Coalition submits that the Panel was exactly right in both the amounts and form of financial security required for the Project.

2316. However, Northern Gateway wants to add a proviso to that financial condition that if regulatory changes are made that standardize the financial assurances required for pipelines, that this condition would be modified or dispensed with. *[Northern Gateway Pipelines Inc., Written Argument, Attachment 1 – Conditions Table (31 May 2013), Exhibit B226-2 at 67-72]*

2317. The Coalition submits that the Panel has determined the appropriate amount and form of financial security for this Project in this environment. Industry-wide regulations that establish a lower amount of security would

- undermine the assurances given to this Panel by Northern Gateway that they would be responsible for all clean-up and remediation costs and damages attributable to the Project. [*Northern Gateway Response to Joint Review Panel Information Request No. 9.3(f), (25 January 2012) Exhibit B58-2 at 11-12; Northern Gateway Response to Joint Review Panel Information Request No. 11.14(c.2 and c.3), (3 September 2012) Exhibit B101-2 at 77; Northern Gateway Response to Fort St. James Sustainability Information Request No. 2.3.2, (24 November 2011) Exhibit B47-6 at 3,5]*
2318. The Coalition also notes that Northern Gateway committed that it would be responsible for all damages to the marine environment that are attributable to the Project and would compensate individuals, businesses and Aboriginal groups for losses resulting from damage to the marine environment. [*Northern Gateway Project Application, Volume 6C: Risk Assessment and Management of Spills, (14 August 2012) Exhibit B3-41, at 9-26; Hearing Transcript, Vol. 98 (1 November 2012), Line 22405]*
2319. These commitments would be outside of any pipeline regulatory framework. Therefore, the amount specified in Potential Condition Number 147 should be maintained regardless of any change to a pipeline regulatory regime.
2320. It is perhaps in Northern Gateway's conclusions in their written arguments where we most clearly see the divide between Northern Gateway's position and that of the Coalition, and I would suggest many other Canadians.
2321. Northern Gateway, in its concluding submissions, talks of the personal and corporate commitment to the review process. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1457]*
2322. Northern Gateway talks of its perseverance throughout the review process. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1459-1460]*
2323. And then, Northern Gateway makes this remarkable statement that has been referred to by Dr. Wier and Mr. Minchin and others that:

“To top that off, shortly after the Application was filed, Enbridge suffered the worst pipeline rupture in its history.”
[*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1457]*

2324. With respect, Enbridge did not “suffer” the worst pipeline rupture in its history, Enbridge caused the worst pipeline rupture in its history. Enbridge was not the victim of the Marshall accident, it was the perpetrator.
2325. Let’s unpack that a bit.
2326. The U.S. National Transportation Safety Board was clear. The NTSB found pervasive organizational failures at Enbridge, including: a “culture of deviance” from approved procedures in the Enbridge control room; inadequate training of control center personnel; deficient pipeline integrity management systems; a failure to identify and ensure the availability of well-trained emergency responders; and failure to prepare for worst case discharges. [*National Transportation Safety Board, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010 (2012), Pipeline Accident Report NTSB/PAR-12/01 (Exhibit B92-3) at 101, 118-121*]
2327. Enbridge did not “suffer” the Marshall incident; Enbridge caused the Marshall incident through their pervasive organizational failures.
2328. The people and environment of Marshall, Michigan suffered the worst pipeline incident in their history, not Enbridge.
2329. Finally, the Coalition would like to address Northern Gateway’s perception of the public interest.
2330. In their written argument, Northern Gateway states that the Project is urgently needed and meets all the requirements for approval under the *National Energy Board Act* and, therefore, it is in the Canadian public interest. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1451*]
2331. Northern Gateway states that it persevered in this Project on behalf of all Canadians based on its belief in the value of pipeline infrastructure to the Canadian economy and the value of connecting Canadian resources to new markets. [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1459*]
2332. These concepts were also echoed by CAPP and by the funding participants in their arguments.

2333. With respect, the test of public interest is broader than financial impacts and meeting the formal requirements of the *National Energy Board Act*. The National Energy Board has noted in previous decisions that the public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society's values and preferences evolve over time. [*National Energy Board, Emera Brunswick Pipeline Company Ltd. (31 May 2007), NEB Decision GH-1-2006 at 84*]

2334. Section 19 of the *Canadian Environmental Assessment Act* says that you must consider comments from the public that are received in accordance with the Act.

2335. In his opening statement to this Panel, Mr. John Carruthers stated that Northern Gateway had taken note of the nature and extent of public concerns that had been expressed, particularly in British Columbia, and especially in coastal regions. [*Northern Gateway Pipelines Limited Partnership Opening Statement (30 August 2012) Exhibit B95-2 at 2*]

2336. Mr. Carruthers said that Northern Gateway would embrace consultation and conversation as an enduring component of the Project's construction and operation. [*Northern Gateway Pipelines Limited Partnership Opening Statement (30 August 2012) Exhibit B95-2 at 3*]

2337. In contrast, Northern Gateway, in their closing argument, dismissed the public's comments on this Project as variously, having, quote:

“...inflated perceptions of risk...” [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 867*]

2338. Unquote -- being based on, quote:

“...misconceptions, misunderstandings, myths and disinformation...” [*Northern Gateway Pipelines Inc., Written Argument (31 May 2013), Exhibit B226-2 at para 1368*]

2339. Unquote -- and as discussed by Ms. Brown that “statements of a scientific or technical nature” in oral statements and letters of comment “should be given no weight”. [*Northern Gateway Pipelines Inc., Written Argument (31*

May 2013), Exhibit B226-2 at para 1369]

2340. This demonstrates the true nature of Northern Gateway's commitment to public engagement. If you present a contrary view, you will be discredited as uninformed or misled.
2341. The Coalition suggests that those doctors, engineers, fishermen and women, biologists and geologists who made oral statements before you and wrote letters of concern would be surprised that Northern Gateway's position is that their scientific and technical information should be given no weight.
2342. As stated previously, the public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society's values and preferences evolve over time. *[National Energy Board, Emera Brunswick Pipeline Company Ltd. (31 May 2007), NEB Decision GH-1-2006 at 84]*
2343. Society's values involve more than the financial benefits to Northern Gateway or to oil producers or even to government revenues. Society's values today include the protection of wild salmon and the communities that depend on salmon for economic, social and cultural sustenance.
2344. Society's values today include the protection of species at risk, such as caribou, orca and humpback whale. Society's values today include clean, uncontaminated water for drinking and recreation. Society's values today include reducing greenhouse gases and not blindly committing to ever increasing use of fossil fuels.
2345. And you have heard and will hear in articulate and passionate statements the values of First Nations today. These are the values that you must also weigh in reaching your recommendations on this Project.
2346. Finally, I will just echo the comments of those who preceded me. I would like to thank the Panel staff for their efficient and friendly support, supporting us throughout this process. I would like to thank you, the Members of the Panel, for your patient, good humoured and thoughtful approach to those who have appeared before you. It's been a long road and the Coalition wishes you well in your deliberations.
2347. Those are the Coalition's submissions, subject to any questions you

may have.

2348. **THE CHAIRPERSON:** Thank you very much, Mr. Robinson.
2349. Thank you for your kind remarks at the end. We literally couldn't have done it without the staff, we keep saying that, and I hope the staff are feeling the kudos that are being passed onto them whether they're sitting here listening or listening remotely.
2350. The Panel has no questions.
2351. **MR. ROBINSON:** Thank you.
2352. **THE CHAIRPERSON:** Thank you, Mr. Robinson.
2353. The next couple of presenters will be joining us remotely. And so in order to provide certainty of timing and that sort of thing, we'll finish for this afternoon and we'll sit again tomorrow morning at 8:30. The first party we'll hear from is Ermineskin Cree Nation and Samson Cree Nation.
2354. Thank you very much, everyone. Good evening.
- Upon adjourning at 4:06 p.m./L'audience est ajournée à 16h06