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 176

Hearing held at
Audience tenue à

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

June 17, 2013
Le 17 juin 2013

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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), Monday, June 17, 2013
Audience tenue à Terrace (Colombie-Britannique), lundi, le 17 juin 2013

JOINT REVIEW PANEL/LA COMMISSION D'EXAMEN CONJOINT

S. Leggett	Chairperson/Présidente
K. Bateman	Member/Membre
H. Matthews	Member/Membre

APPEARANCES/COMPARUTIONS

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- Mr. Richard A. Neufeld, Q.C.
- Mr. Ken MacDonald
- Mr. Bernie Roth
- Ms. Laura Estep
- Ms. Kathleen Shannon
- Mr. Dennis Langen
- Mr. Douglas Crowther

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- Chief Herb Arcand

Alberta Federation of Labour
- Ms. Leanne Chahley

BC Nature and Nature Canada
- Mr. Chris Tollefson
- Mr. Anthony Ho
- Ms. Natasha Gooch
- Ms. Rosemary Fox

Doug Beckett

Province of British Columbia
- Ms. Elizabeth Graff
- Mr. Christopher R. Jones

C.J. Peter Associates Engineering
- Dr. Hugh Kerr
- Dr. Ricardo Foschi
- Mr. Brian Gunn

Canadian Association of Petroleum Producers (CAPP)
- Mr. Keith Bergner

Cenovus Energy Inc., INPEX Canada Ltd., Nexen Inc.,
Suncor Energy Marketing Inc. and Total E&P Canada Ltd.
- Mr. Don Davies

Coastal First Nations - Great Bear Initiative
- Mr. Art Sterritt

Council of the Haida Nation
- Ms. Terri-Lynn Williams-Davidson
- Peter Lantin

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Daiya-Mattess Keyoh
- Mr. Ken Sam
- Mr. Jim Munroe

Douglas Channel Watch
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- Mr. Dave Shannon

Driftpile Cree Nation
- Chief Rose Laboucan
- Dr. Ave Dersch
- Mr. Stephen J. Rukavina

Edmonton Chamber of Commerce
- Mr. Ian Morrison
- Mr. James Cumming

Ermineskin Cree Nation and Samson Cree Nation
- Mr. Rangi Jeerakathil

ForestEthics Advocacy, Living Oceans Society
and Raincoast Conservation Foundation - "The Coalition"
- Mr. Barry Robinson

District of Fort St. James
- Ms. Brenda Gouglas
- Mayor Rob MacDougall
- Mr. Dave Birdi
- Ms. Joan Burdeniuk
- Mr. Riley Willick
- Mr. Russ Gingrich

Fort St. James Sustainability Group
- Ms. Kandace Kerr
- Ms. Louise Evans-Salt
- Ms. Brenda Gouglas

Gitga'at First Nation
- Mr. Michael Reid

INTERVENORS/INTERVENANTS

Gitxaala Nation
- Ms. Rosanne M. Kyle
- Mr. Robert Janes

Government of Alberta
- Mr. Ron Kruhlak, Q.C.

Government of Canada (Transport Canada,
Natural Resources Canada and Environment Canada)
- Ms. Dayna Anderson

Haisla Nation
- Ms. Jennifer Griffith

Heiltsuk Economic Development Corporation
- Ms. Carrie Humchitt
- Ms. Lisa Fong

Heiltsuk Hereditary Chief
- Ms. Carrie Humchitt
- Ms. Lisa Fong

Heiltsuk Tribal Council
- Ms. Carrie Humchitt
- Ms. Lisa Fong

Heiltsuk Youth Voice
- Ms. Carrie Humchitt
- Ms. Lisa Fong

Kitimat Valley Naturalists
- Mr. Walter Thorne
- Mr. Dennis Horwood

MEG Energy Corp.
- Mr. Loyola G. Keough

North Coast Cetacean Society
- Mr. Hermann Meuter
- Ms. Janie Wray

INTERVENORS/INTERVENANTS

Northwest Institute of Bioregional Research
and Friends of Morice-Bulkley
- Mr. Richard Overstall

Office of the Wet'suwet'en
- Mr. Jeff Huberman
- Mr. Michael Ross

Sherwood Park Fish & Game Association
- Mr. Andrew Boyd

United Fishermen and Allied Workers' Union
- Ms. Joy Thorkelson

Dr. Josette Wier

World Trade Center Edmonton
- Mr. Martin Salloum
- Mr. Robin Bobocel

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

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--- Upon commencing at 8:29 a.m./L'audience débute à 8h29

THE CHAIRPERSON: Good morning, everyone. Bonjour à tous. If we could get everyone to take their seats, please, we'll get ready to get under way.

Thank you very much.

Welcome to the Oral Argument phase of this hearing. I think many of us in the room are familiar with each other but, just in case you haven't met the Panel before, on my right is Mr. Kenneth Bateman.

MEMBER BATEMAN: Good morning.

THE CHAIRPERSON: And on my left is Mr. Hans Matthews.

MEMBER MATTHEWS: Good morning.

THE CHAIRPERSON: And my name is Sheila Leggett.

We want to welcome everyone who is here in the hearing room and also listening to us through the webcast.

Before we get started, we'll just go through the security aspects of things. The emergency exits are the doors that you came through. There's two sets of double doors in the middle of the room. And the exit to the outside is to the right; and outside those doors and to the left is where the washrooms are.

In addition to the Panel, we have staff in the room to assist and answer any process-related questions you may have. You'll be able to recognize them by their brass name tags and also probably on a familiar basis if you've been involved in the hearing as we've gone along.

I'd like to just introduce them by name. I'm not sure if they're all in the room or not. But we have Ruth Mills, our Hearing Manager. Ms. Mills, who's right there. Ms. Niro, our Regulatory Officer. Ms. Higgins, our Communications Specialist. Mr. Hudson, our legal counsel. Mr. Hildebrand, IT support. Mr. Williams and Mr. Campbell, security. And there are also contractors who are supporting the hearing, including a court reporter, sound technician, interpreters and commissionaires.

12. With respect to our schedule for hearing oral argument, we will sit Monday to Friday from 8:30 to 4:30 p.m. We will plan to take a lunch break from noon to 1:00 as well as 15-minute breaks in the morning and the afternoon. Additional hearing time may be scheduled in the evenings and on Saturdays if required.

13. Before we get under way, I would remind parties of the Panel's guidance in Procedural Directions No. 12 and 15 with regards to final argument, copies of which are available at the back of the room.

14. The purpose of final argument is to provide an orderly process to registered parties to tell the Panel their views about the Project, including whether they believe it is in the public interest and whether the Panel should recommend approval or denial of the Project.

15. Parties may also make their case about the relevance and weight of any evidence on the public registry and discuss the merits of conditions the Panel might place on any certificate that may be issued for the Project or suggest additional conditions. This will help us, the Panel, make the decisions and recommendations that we're charged with making.

16. No new evidence can be given through written argument or oral argument, as the Panel cannot use new evidence in its deliberations. The evidentiary record was closed at the end of our last session in Prince Rupert.

17. All parties giving oral argument have filed written argument. There's no need to repeat or summarize your written argument. We have read the written arguments.

18. Similarly, you cannot add new matters to your written argument. The reason that no limits were placed on the length of written argument was to allow you to cover everything that you wanted to cover.

19. The purpose of oral argument is for you to address the written and oral arguments of other parties with which you disagree and indicate your agreement with arguments you favour. In oral argument, you should not repeat or reframe arguments that have already been presented to the Panel by other parties as this is not helpful to the Panel. Parties may indicate that they agree with and adopt prior arguments.

20. As indicated in Procedural Direction No. 12, we will not be displaying any documents in the hearing room. When giving oral argument, parties do not have to read out their references to exhibit numbers, transcripts or case law provided that they have given an advanced written copy of their oral argument or references to the Regulatory Officer. The court reporter will include all of these references in the transcripts.

21. That's a good reminder to all of us if we could all just take a moment and switch our phones into silent mode, our Blackberries from beeping and our text messages from not sounding. That would be helpful to all of us.

--- (Laughter/Rires)

22. **THE CHAIRPERSON:** Going back to where I was about giving the advanced copy of your comments to the Regulatory Officer, this just helps us from an efficiency approach.

23. In terms of process, we will hear from parties starting at the top of the revised Order or Appearances and proceeding to the bottom. Copies of the revised Order of Appearances was sent to parties on the 14th of June and they're also available at the back of the room.

24. During this top down portion, parties should provide all of their comments on the written arguments and on the oral arguments that had been made before that. Parties may reply to all other oral arguments in reverse order or the bottom up portion.

25. We remind parties that their oral argument in the top down portion must not exceed one hour for intervenors and government participants and two hours for Northern Gateway. And to help us all with that we have a clock system here and at 15 minutes before the end of your time, there will be a green noise, an audible sound, and then at five minutes before your time is up, there'll be another green, and on the hour there'll be a red.

26. Thank you.

27. If parties have no comments to make in response to any new matters raised in the arguments of those who presented after them, they should not

provide bottom up oral argument. It is anticipated that the bottom up will be relatively brief. The reverse order of bottom up argument is to provide procedural fairness, so switching order during this portion will not be possible.

28. As parties have registered in advance for final oral argument, we will dispense with reading the Order of Appearances.

29. So I believe we're getting close to getting underway. Are there any preliminary matters that parties wish to raise before we begin?

--- (No response/Aucune réponse)

30. **THE CHAIRPERSON:** Seeing none, we'll call Enbridge Northern Gateway.

31. Mr. Neufeld.

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

32. **MR. NEUFELD:** Thank you, Madam Chair and Panel Members.

33. It's my pleasure to appear before you today to present Northern Gateway's reply to the written arguments filed by opposing parties. My remarks this morning will be divided into four broad areas.

34. First, I'm going to touch briefly on some procedural issues of concern that Northern Gateway had in reviewing some of the submissions that have been filed by intervenors.

35. Second, I will respond to a number of the common arguments advanced by intervenors. Obviously, time doesn't permit a broad sweep of those arguments but we will -- but we will, Madam Chair, deal with some of the common themes that appear.

36. Third, I'm going to respond briefly to a couple of the legal arguments that have been advanced by intervenors. You've saw many of those, but two warrant reply today.

37. Last, I will address suggestions that have been made for conditions or revisions to conditions that were proposed by the Panel.

38. Let me first say that while Northern Gateway doesn't agree with many of the arguments that have been placed before you by intervenors in this proceeding, we commend those who took the time and the effort to file such an extensive body of submissions.

39. This is an important proceeding. It's important -- it's an important project for Canada. It's an important project for communities along the right-of-way and for communities along marine transportation routes.

40. The evidentiary record -- as I'm sure all three of you are aware -- is, in a word, massive. The written submissions that have been filed by all parties, I suggest to you, do justice to that record, and we're sure that you will find all of them to be of assistance.

41. Now, this morning I'll be making some comments about the submissions that have been made by others. And I want to just make it clear at the beginning that when we comment critically on submissions that have been filed, we're talking about the submissions, not the submitters, not their counsel.

42. This proceeding has been marked, I think, by a remarkable measure of respect and cooperation and I dare say some new friendships. So when we criticize submissions that have been made by others, let's bear in mind that that's the context of our comments.

43. I'll turn then to the procedural issues, and there are a couple that I want to bring to your attention. As you mentioned in your Procedural Directions *[Exhibits A303-1 and A357-1]*, the Panel made it clear that argument was not to be used as an opportunity to submit new evidence. You also went so far as to instruct the parties as to the type of authorities that could be relied on -- case law and legislation, past NEB decisions and orders.

44. Unfortunately, a number of the arguments that were filed ignored those Procedural Directions and that unfortunately also included submissions that had been filed by counsel.

45. I'll provide some specific examples later in my remarks, but the point is that when new evidence finds its way into arguments, what it really does is make those arguments of lesser value to the Panel because you have really no choice but to ignore the new evidence that's contained in the arguments and that

often makes the arguments make little sense.

46. Our second procedural concern stems from missing citations to the record where there ought to have been citations, or conversely, citations, including transcripts references, that do not in fact support the propositions put forward in the submissions.

47. And again, we found a number of examples of that in checking footnotes. We weren't able to do a complete check of every footnote in every argument -- there's thousands of pages -- but the ones that we did check, when things seemed a bit off in terms of the statements that were made as fact in argument, we would check the footnotes and often what we found was that the citation didn't in fact -- did not in fact support the proposition stated.

48. So when you're going through the written submissions, our suggestion is simply this. Each of you paid close attention during the hearing. If it seems that statements that are made don't make a lot of sense or don't resonate with what you can -- what you heard the evidence to be, you're going to need the check against the -- against the record for that.

49. And I include Northern Gateway's submission on that. If there's something in the Northern Gateway written submission that seems not to resonate, we encourage you to check the record and check the citations. We did, once or twice or three times, but you can never tell with up to 2,000 footnotes whether each and every one of them are accurate. *[Exhibit B226-2]*

50. Time doesn't permit you to take -- permit you to take all of those -- or refer you to all of those references this morning, but we simply urge you to be careful and cautious when you're reviewing the written submissions.

51. Our third procedural concern is that some intervenors in particular have made the mistake of characterizing evidence that supported their position as being -- and I quote -- "uncontested" when in fact that was not the case. That term appears most of all as we saw in the submissions of the Coastal First Nations, but there were others who made the same mistake.

52. In a proceeding such as this where you've adopted special procedures to reduce barriers to participation, the fact that parties may choose not to cross-examine one or another witness is, to my way of thinking, of little importance.

53. The fact that the Coastal Nations chose not to cross-examine Northern Gateway's Shipping and Navigation Panel, for example, cannot be construed as accepting that portion of the application.

54. In the same vein, the fact that Northern Gateway chose not to request that people such as the director of that organization be produced for cross-examination, does not mean that it accepts any or all of the evidence or arguments that they've made.

55. In the same way, it should be clear that my remarks this morning will focus only on areas where Northern Gateway considers reply to be necessary. That shouldn't be taken to mean that we agree with or accept all of the other arguments that are made by opposing parties.

56. So those are the procedural observations that we have to make this morning.

57. Let me turn to the themes of argument that you've seen in submissions by opposing parties. It seemed to us that the overarching argument that was made by opponents was that you don't have enough information. There are at least eight variations on that theme and I'm going to go through those this morning. But essentially, they come to the same place.

58. Now, given the volume of information that comprises the hearing record, it's an argument that, I have to say, rings quite hollow to us but nonetheless it appears to be one that's been latched on to.

59. With respect, what the insufficiency argument generally lacks is an understanding, or acknowledgement, of the way in which your Board, the National Energy Board, considers and regulates pipeline projects under your jurisdiction. *[National Energy Board Act, RSC 1985, c N-7]*

60. Now, I addressed this about three years ago, if you recall, in Prince George *[Transcript Volume 7, Paragraphs 3622 – 3745]* at the sufficiency proceedings. At that point, you had already heard from parties that argued that the application materials were insufficient.

61. In response, I reviewed for the Panel, at that time, the many checks and balances that are included within the *National Energy Board's Act* and Onshore Pipeline Regulations and filing manuals and so forth to ensure that

sufficient information is available to facilitate decision-making at the appropriate time, at various stages of project development. *[Transcript Volume 7, Paragraphs 3661 – 3679]*

62. Those include, of course, the hearing process that we've just been through, includes the filing of an initial application and supporting environmental assessment materials. It includes the filing of supplemental information prior to an application being set down for hearing. I spoke about that in Prince George.

63. It includes the filing of evidence, the filing of reply. It includes information requests and responses of which we saw thousands. It includes the seating of witnesses *[National Energy Board Act, RSC 1985, c N-7, s. 54]* and questioning of those witnesses but it doesn't stop there.

64. It also includes post-certificate processes, such as the filing of applications for detailed route approval, and even detailed route hearings if required. It also includes the filing of applications for leave to construct and leave to operate a pipeline, through which information that's required in satisfaction of preconstruction or preoperational conditions is evaluated. Included will be filing of detailed operational response plans, which in this particular case, will also have been subject to a third-party planning readiness review before it even comes to the Board.

65. And it doesn't stop there. The NEB, as you know, has continuing supervisory and enforcement functions. It has inspection powers that are exercised during construction and during operation. It can and does audit pipeline companies to ensure compliance with commitments, with conditions and with regulatory standards. And again, this includes emergency preparedness. And under the *Canadian Environmental Assessment Act*, it can also include any follow-up programs that have been committed to or otherwise required by the company as part of the CEAA assessment.

66. So as an overarching principle and as an overarching proposition, we say that when parties want you to evaluate this project based solely on the information contained in an application that was filed in May of 2010, or to ignore that future processes will be undertaken, or when they argue that providing information at a later stage somehow undermines the environmental assessment process, they're either misguided or they're wilfully blind to the processes that are used by your Board to regulate pipelines in Canada.

67. I will now turn then to the specific areas where opponents have suggested that there is insufficient information.

68. The first area is project need. A few intervenors, not all, but a few have argued that the evidence of project need is insufficient. The ForestEthics submission, for example, argued at some length that there is an insufficient showing of commercial support, that the Project ought to have included and filed binding Transportation Service Agreements. *[Exhibit D66-31-2 at 23 – 27, Paragraphs 54 – 72]*

69. They never did explain to us why that's important to them as an organization, how ForestEthics, whether the San Francisco office or the Vancouver office stands to be affected by the strength, or otherwise, of the commercial arrangements that underpin this project. Instead, it seems to be a case of an intervenor spotting what it considers to be a weakness in an application, and trying to exploit it.

70. On a broader level, a number of intervenors disputed the economic benefits that are put forward by Northern Gateway, challenging, for example, the estimate of price uplift associated with accessing Pacific Basin markets.

71. On one hand, the Coastal First Nations stayed with their evidence, although they expanded on it, and argued that Northern Gateway's benefits were overstated because there was an excess of pipeline capacity and not enough supply to fill it *[Exhibit D35-51-2 at 86, Paragraphs 374 – 379 and 391 – 412]*, as if the Bakken discovery had never been made.

72. Others ran in an opposite direction, arguing that Northern Gateway would only bring benefits for one year because the capacity would be filled after the first year of operations and once the pipeline was filled the price uplift would end. *[Exhibit D80-104-2 at Paragraphs 401 and 407 and D4-21-2 at 16 – 19]*

73. The arguments, we suggest, ran off in different directions with -- but with one common goal, to create uncertainty regarding the formidable economic benefits that Northern Gateway had quantified.

74. In support of that -- of the argument that Northern Gateway benefits were uncertain, the Coastal Nations selectively quoted from the National Energy Board's decision in Keystone XL. They quoted the Board as saying, and I quote:

> *"New pipelines connecting producing regions with consuming regions change market dynamics in ways that cannot easily be predicted. It is difficult to determine with certainty the impact that a major project such as the Keystone XL […] may have on netback prices once it is placed in […] service." [Exhibit D35-51-2 at 87 – 88, Paragraph 384 citing National Energy Board, Reasons for Decision OH-1-2009, TransCanada Keystone Pipeline GP Ltd, March 2010 at 44]*

75. What they omitted from the Board's decision was the following statement that appeared immediately thereafter:

> *"The Board is of the view that in the short term it is reasonable to expect a period of adjustment, which could potentially include a period of lower netbacks to producers. Over the longer term, however, the Board is satisfied that the Project will help ensure that adequate capacity exists to connect growing WCSB supply to attractive markets, and in this way help ensure that all producers realize netbacks that reflect the full market value [of] their production. Canadian crude oil netbacks provide revenues to governments and industry to make social and economic investments. In the Board's view, these investments benefit all Canadians." [National Energy Board, Reasons for Decision OH-1-2009, TransCanada Keystone Pipeline GP Ltd., March 2010 at 44 – 44]*

76. Northern Gateway, Madam Chair, does exactly the same thing. Like Keystone XL, or for that matter, like LNG projects that are being proposed in British Columbia, it ensures that Canadian producers get "full market value for their production" and that will benefit "all Canadians".

77. Now, some intervenors suggested that -- in evidence, that to show that the Project is needed by Canada, cost benefit analyses ought to have been undertaken. They even took a stab at doing so based on limited information and criticized Northern Gateway for not having done what they considered to be a proper cost benefit analysis.

78. Now, that position, we suggest, clearly fell into the category of, "Be careful what you ask for" because the cost benefit work done by Dr. Ruitenbeek, Dr. Mansell and Mr. Anielski clearly shows that when properly performed, cost

benefit analysis demonstrates large, positive and robust net benefits for Canada. This is discussed in our written submission. *[Exhibit B226-2 at 65 - 77]*

79. I won't comment further on that.

80. The Coastal Nations took the opportunity of written argument to introduce revised cost benefit calculations *[Exhibit D35-51-2 at 99 – Table and footnote 256 (which is left blank)]* and to characterize Dr. Gunton's earlier evidence on matters such as the passive use value of the PNCIMA area as "uncontested". *[Exhibit D35-51-2 at Paragraphs 297, 301 and 435]*

81. Now, of course, nothing could be further from the truth. Dr. Ruitenbeek clearly reviewed and rejected that aspect of the work done by Dr. Gunton in 2011. Even Dr. Gregory is on record, in the past, as having questioned the utility of passive use values. *[Exhibits B83-4 at 125 – 129 and B226-2 at 72, Paragraph 219]*

82. In Dr. Gunton's updated evidence, submitted in argument, simply carried forward the same methodological errors as his original version. It continues to assume that pipelines leaving the Western Canadian Sedimentary Basin are underutilized. As I said, as if the Bakken discovery had not been made.

83. It continues -- excuse me -- to put forward what I consider to be a remarkable proposition, that new employment in British Columbia isn't needed because there's full employment, there's no economic benefits associated with the employment opportunities that would be associated with this project.

84. And that comes from someone who is providing advice to Coastal Nations. Some of whom have told us that their communities suffer from crushing levels of unemployment, 85 to 90 percent, and yet we're told there's full employment in British Columbia so there's no employment benefits associated with this project. It simply doesn't square.

85. Another common argument that was made in the submissions was that Northern Gateway had not adequately assessed and characterized geohazards. Typically, those arguments relied on a paper authored by a fellow by the name of James Schwab. Northern Gateway responded in detail to the Schwab paper in its reply evidence and addressed that issue again in written submissions. *[16 Exhibits B83-2 at 58 – 68 and B226-2 at Paragraphs 368 – 376]*

86. I'm not going to go into the detail of that to and fro. In written argument, filed on behalf of the Haisla, they went on at some length to criticize the work done by Northern Gateway's geotechnical experts, sometimes in rather colourful language.

87. For example, they start off the critique of the geotechnical work by saying -- stating as follows:

> *"The proposed project represents unique circumstances, including the transportation of highly toxic hydrocarbons through geologically and seismically unstable and remote terrain..." [Exhibit D80-104-2 at 6, Paragraph 20]*

88. In fact, the evidence shows there's nothing particularly unique about this project, except the level of mitigations that have been applied. In the Kitimat River Valley, for example, the pipelines will be alongside or parallel the Pacific Trails Pipeline that's under construction. *[Exhibit B32-2 at 35 – 37; Transcript Volume 154, Paragraphs 29627 – 29628]*

89. Crude oil hardly qualifies as being "highly toxic", at least in the ordinary sense of the word. Nor does condensate, which is otherwise known as natural gasoline. When's the last time that you told yourself, before leaving town, that you have to stop and fill up the car with "highly toxic hydrocarbons"? It doesn't square.

90. And the pipeline is not seismic -- the route is not seismically unstable. The seismic risk along the pipeline right-of-way is low, with only a few locations of moderate risk encountered, none of which are within the Haisla territory. *[Transcript Volume 110, Paragraphs 7259 – 7261 and 7286 – 7288 and Transcript Volume 88, Paragraphs 8227 – 8228]*

91. The submission filed on behalf of that group also portrays Northern Gateway's commitment to acquiring additional LiDAR information as somehow constituting a lack of confidence in its program for geotechnical risk assessment. *[Exhibit D80-104-2 at Paragraph 643]*

92. There is in fact no lack of confidence on the part of the Project. There's nothing wrong and everything right about committing to a rigorous program for managing geotechnical risk, including acquisition of additional data as you proceed. That doesn't say that you are not confident in your ability to

manage risk, it simply indicates one reason why you are confident in your ability to manage risk.

93. Opponents also argued that there is insufficient environmental information to support approval of the Project.

94. The Supreme Court of Canada has stated the following, oft quoted, principle:

> *"Environmental impact assessment is, in its simplest form, a planning tool. It is now generally recognized as an integral component of sound decision-making." [Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3 at 71. Also see Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage), [2001] 2 FC 461 at para 17]*

95. As you carry out the environmental assessment that will form part of your report, you should consider arguments of insufficiency in that context. There is nothing wrong with incorporating additional environmental information into project planning as it becomes available. A sound planning exercise should embrace and take advantage of all opportunities to do so.

96. The application was supported by a comprehensive environmental and socio-economic assessment, as well as a series of detailed technical data reports which, as you will recall, we agreed to file at the time of the Prince George sufficiency proceedings because it had previously been available only on the website due to its volume.

97. You know, in total at the time there was about 18,000 pages of material. Over the course of the hearing process that was supplemented by additional studies. For example, by my count 17 studies that were required under the TERMPOL process, thousands of information -- response -- request responses; written evidence and so forth.

98. And yet there are those who will argue that there was not enough environmental information available to you to make recommendations. Not that it's a bad project, but the Proponent just didn't give you enough information to approve it. It's almost as if some of these organizations would have you believe that if only Northern Gateway had supplied a bit more environmental information

they could have supported this pipeline.

99. We know that that's not the case, Madam Chair. No amount of additional environmental information is going to persuade ForestEthics, the Natural Resource Defence Council or any other member of the so-called tar sands campaign to support the -- a pipeline such as this. They're never going to tell you that enough information has been provided.

100. Now, I would probably say the same thing about BC Nature, but all we know about them is that they commissioned some evidence and retained the University of Victoria's Environmental Law Centre to oppose the Project. They presented no policy evidence or policy witnesses, so we really don't know much about who they are.

101. But we do know that they found witnesses prepared to criticize Northern Gateway's environmental and socio-economic assessment methodology, at least as far as it related to wildlife. And boy, did they criticize. *[Exhibit D12-31-2 at Paragraphs 24, 27, 70 and 92 (for example)]*

102. What they didn't do in their written submissions was offer anything other than criticisms. Was to offer -- they didn't offer anything constructive to your Panel. For example, rather than simply criticizing the environmental assessment methodology they could have offered some suggestions as to how, in their view, the methodological uncertainty affects predictions, and what mitigation or follow-up program should be undertaken to address that uncertainty and reduce potential adverse effects on wildlife. But they chose not to do that; nor for that matter did ForestEthics.

103. To his credit, you'll remember that Dr. Paquet of the Raincoast Foundation did confirm his organization's willingness to work with Northern Gateway and participate in future wildlife management as well as marine mammal programs. *[Transcript Volume 107, Paragraphs 1657 – 1661; Transcript Volume 166, Paragraphs 15090 – 15095; Transcript Volume 166, Paragraphs 15012 – 15021, 15090 – 15093, 15112 – 15115]*

104. And we welcome that. That was clearly a constructive approach to take and we'll take Dr. Paquet up on that offer.

105. In any event, as explained on numerous occasions by Mr. Green and Mr. Anderson, the environmental assessment practices used here were consistent

with standard, and well known, and well accepted practices throughout industry, and it's more than sufficient for current planning purposes. *[Transcript Volume 101 at Paragraph 26393; Transcript Volume 104, Paragraph 29263; Transcript Volume 113, Paragraphs 12565 – 12566]*

106. It started way back in 2005 with online public workshops -- online and public workshops to discuss scoping and valued ecosystem components. *[Exhibit B2-1 at 29ff]*

107. It resumed when project development ramped -- activities ramped up a couple of years later. It included consultation with resource managers in both Alberta and British Columbia, and at each and every sub-assessment explicitly took into account Aboriginal traditional knowledge information that was available to that point in time.

108. The conclusion reached by all of this was that the pipeline project is not likely to cause significant adverse effects on the environment. That's not very remarkable. That same conclusion has been reached every time a pipeline project in this country has undergone the comprehensive and rigorous environmental assessment process that was dictated under the CEAA when it was enacted in 1995. I mean, even before, when the National Energy Board was requiring such reviews as part of its public interest mandate.

109. The projects, in respect of which such conclusions have been found, have been diverse, both in terms of the products carried and their geographic region. They include liquids lines in the Canadian Arctic, liquids lines in British Columbia, liquids lines in Alberta and the other Prairie provinces. They include sour gas pipelines -- talk about a toxic substance that's one. They include sour gas pipelines in Northeastern British Columbia and Northwestern Alberta.

110. They include high pressure natural gas pipelines in the Maritimes, one of which went through an urban park in Saint John. And they include gas and liquids pipelines in Ontario and Quebec. *[See, for example, Mackenzie Gas Project, NEB Decision GH-1-2004; Emera Brunswick, NEB Decision, GH-1-2006; Grizzly Valley Pipeline, NEB Decision GH-2-2002.]*

111. And the consistent conclusion after thorough reviews has always been that pipelines in this country can be constructed and operated without significant adverse effects on the environment.

112. So while you can always use more environmental information, you don't need more to do your job in this case. There's more than enough evidence on the record to find that these pipelines are no different than those that went on before.

113. In fact, the evidence shows that Northern Gateway has gone over and above standard practices, for example, in addressing affects to caribou and grizzly bear.

114. The same goes for the marine transportation component of this Project.

115. Madam Chair, marine transportation to the edge of Canadian waters was added to the environmental scope of this Project for one reason: Aboriginal and public concern over potential spills.

116. We suggest that it had nothing to do with the potential for gulls or other marine birds to move away as a tanker inches toward them. It had nothing to do with fish swimming in a different direction as a vessel passes by. It didn't even have anything to do with conflicts between vessels or effects of underwater noise. If it did, all of the other terminal projects that have been brought forward in the Kitimat and Prince Rupert region would have included marine transportation in their environmental assessments, whether done federally or provincially. But not one did.

117. The major challenge that was faced by Northern Gateway's environmental assessment team in respect to routine marine operations was, in fact, in identifying credible pathways of effects to be evaluated.

118. As explained in our written submission, they found a few such as wakes, underwater noise, marine mammal strikes and conflicts with fishers, all of which are common with existing traffic in the area. All of the other effects that were postulated were fleeting, elusive or speculative.

119. It's not to say that these routine effects or effects of routine operations were ignored. Given concerns for effects of underwater noise and vessel strikes on marine mammals, especially whales, Northern Gateway committed to reduce vessel speeds and other measures. While other large vessels present similar risks to marine mammals, as you heard many times, this is the only project to commit to specialized measures for those effects.

120. As an aside, I can't help but point out here that the Gitxaala argument erroneously states that Ms. Ahrens agreed that vessel strikes are inevitable. If you check the transcript passages cited there -- this is one of the examples I gave you -- you'll see that she didn't say that.

121. Now to its credit, Northern Gateway also undertook additional studies and identified measures to deal with other marine transportation issues, even minor ones. They did a second wake study that showed that -- excuse me -- that the vessels won't adversely affect intertidal resources and harvesting. *[Exhibit B83-23]*

122. And with its commitment to reduce vessel speeds in the Confined Channel Assessment Area, wakes will be even smaller than predicted by these studies. It will require measures to reduce the effects of lighting on marine birds. *[Exhibit B3-15 at 8]*

123. It's proposed a comprehensive marine environmental effects monitoring program that can inform future mitigation, as well as providing baseline information against which to evaluate a spill, should one ever occur. *[Exhibit B46-38 at 9; Transcript Volume 114, Paragraphs 13143 – 13146]*

124. And it's proposed a fisheries liaison committee to reduce conflicts, even though project-related vessels would only be a small fraction of large vessel traffic in the region. *[Exhibit B206-2]*

125. Northern Gateway also responded in a constructive way to concerns expressed by Environment Canada researchers regarding the need for additional marine bird information and more information on effects of oil spills on marine birds.

126. To address those concerns, the Project committed to a marine mammals -- sorry, excuse me -- to a marine environmental effects monitoring program that will document environmental conditions for three years prior to operations and at least three years after operations, with a focus on marine environmental quality, marine birds and marine shoreline communities.

127. Now, to its credit, Environment Canada's researchers fairly reviewed that supplemental information and confirmed that their concerns had been addressed in a reasonable manner. *[Exhibit B188-7 at 4 – 5]*

128. Environment Canada also obtained from Northern Gateway a commitment to a long-term marine bird monitoring program that will include both the Confined Channel Assessment Area and portions of the Open Water Area. *[Transcript Volume 111, Paragraphs 8776]*

129. This, again, is something that no other terminal operator has ever been required to do and the results, we suggest, will inform many aspects of marine bird management on the North Central Coast of British Columbia for years to come.

130. Now, in argument, British Columbia Nature essentially dismissed that additional information suggesting that it ought to have been provided with the original Application. *[Exhibit D12-31-2 at Paragraph 73]*

131. Gitxaala went on at length to make similar arguments regarding inclusion of their Traditional Use Study information in Northern Gateway's assessment materials.

132. Both display, I suggest, a misunderstanding of the environmental assessment process under the *Canadian Environmental Assessment Act*. Both presume that it is Northern Gateway that prepares the operative environmental assessment in this case and that that assessment was done in May of 2010, when in fact and in law, it's your Panel's report that comprises the environmental assessment in respect of this Project and it's based on the entirety of the record.

133. We turn to the issue of spill prevention and response.

134. Intervenor criticism of the sufficiency of information also extended, of course, to the description of potential oil spills, in terms of the frequency of spills, the consequences and the measures taken to respond. This probably consumed the bulk of the questioning phase of the hearing.

135. The Project's position from the outset, Madam Chair, has been that emergency preparedness begins with accident prevention. That's the case in respect of the pipeline, in respect of the terminal and in respect of marine transportation. That's why Northern Gateway is committed to excellence in pipeline design, construction and operation and it's also why it developed and has committed to the extended responsibility program for marine transportation.

136. Other than the Haisla and I guess C.J. Peters, both in evidence and in

argument, intervenors provided very little evidence regarding the adequacy of engineering and operational measures to be taken to prevent spills. Instead what, again, you saw were criticisms. A focal point of the criticism was the DNV Quantitative Risk Assessment in terms of its evaluation of the effectiveness of prevention measures such as escort tugs.

137. Northern Gateway anticipated that such criticisms would be repeated in argument and we've already responded to them in argument-in-chief. *[Exhibit B226-2 at Paragraphs 602 – 605, 950 – 978 and 625 – 626]*

138. So I'm not going to go into detail with responses to those suggestions.

139. I do want to note, however, that a number of intervenors seem to play a bit fast and loose in characterizing or ignoring evidence provided by Northern Gateway in respect of marine spill prevention, as well as in characterizing the evidence of Northern Gateway regarding the Enbridge spill prevention record.

140. For example, B.C. Nature's submission argued that the QRA double-counted the effects of escort tugs. It says, and I quote:

> *"Given the fact that the use of tug escorts has been implemented, either legally or on a voluntary basis, in terminals and tanker traffic areas around the world during the period examined by the QRA, it follows that the effect of […] escort[s] [tugs] would already be reflected in the incident frequency data used by DNV from the IHS Fairplay. Therefore, DNV failed to demonstrate that the QRA does not double-count the use of tugs as a mitigation measures." [Exhibit D12-31-2 at Paragraph 216]*

141. Now, B.C. Nature tendered no evidence of its own on the issue and, in fact, the evidence presented by Mr. Brandsaeter along with Mr. Scalzo, you'll recall, contradicts the assertion that's made in the B.C. Nature argument.

142. Mr. Scalzo said very clearly, and I'm quoting from Transcript Volume 156 here:

> "…*we talked about the application of escort tugs in some voluntary and some regulatory applications but they are, again, the overall exception to world-wide tanker terminals.*

> *There are thousands and thousands of tanker terminals throughout the world and there are only a few […] that use, in mitigation, escort tugs." [Transcript Volume 156, Paragraph 32263]*

143. That was Mr. Scalzo's evidence.

144. For his part, Mr. Brandsaeter made it clear that it doesn't really matter because if in fact the IHS Fairplay incident statistics include incidents that occurred notwithstanding the use of escort tugs, then the DNV risk calculations would be more conservative *[Transcript Volume 156, at Paragraphs 32228 – 32244]*, not less.

145. The Coastal Nations argued that the QRA did not include consideration of non-accidental structural failure. *[Exhibit D35-51-2 at Paragraphs 241 – 250]*

146. Now, they chose not to question the Shipping and Navigation Panel for good reason I'm sure, but BC Nature did, and they received a clear answer to that very allegation.

147. The full exchange appears in Transcript Volume 156, and I'll quote Mr. Brandsaeter starting at paragraph 31703:

> *"Well, Mr. Tollefson, as I indicated earlier, the founderings are typically including all NASF.*
>
> *Those include the disastrous and most serious events related to structural failures and, as we have heard Mr. Michel explain here, those are the ones that primarily would occur to single-hulled tankers but we have included them still because we wouldn't like to disregard the possibility.*
>
> *So I don't agree with your statement that we haven't included NASF just because we haven't called them by that name but they are included in the founderings, certainly."*

148. To which Mr. Tollefson replies, *"Very good."*

149. That's the evidence.

150. Perhaps the most strident criticisms, if you go through the intervenor submissions, relating to emergency response related to the sufficiency of the response planning documents that had been presented by Northern Gateway, and those related to both terrestrial and marine response.

151. It's been argued by the province that Northern Gateway's emergency preparedness plans remain too preliminary. It apparently needs to see more detail and operational response plans in place before supporting the application. *[Exhibit D167-24-2 at Paragraph 6]*

152. Others suggested that the evidence presented by Northern Gateway was too general to be relied on, that what we need to see are detailed operational plans, I guess, that will demonstrate, once and for all, that Northern Gateway or its contracted response organization will be able to respond to a spill within a prescribed period of time and in all conceivable circumstances.

153. Now, we suggest that preparation of detailed operational plans at this stage of project development would be both unnecessary and, more importantly, counterproductive.

154. The application here was filed in May of 2010. If approved and placed into service in a timely manner, operation of this pipeline project will commence some time in 2018. It's an eight-year difference.

155. There was and there remains ample time to develop detailed operational response plans that will be second to none. This is not a case of putting off until tomorrow what you can do today. It's a case of developing operational plans in an orderly, organized manner, conducting training and drills, as you discussed, Madam Chair, with the Northern Gateway witnesses and others, and revising those operational plans to incorporate lessons learned and continuing to undertake reviews and training and improvement during operations.

156. This is an ongoing process. And it's also a case of regular supervision and oversight of such planning by agencies, such as the National Energy Board, Transport Canada and others as they are developed and placed into service -- put into place prior to operation, and thereafter.

157. So while the profile of this project is higher than most, the concept of filing operational emergency response plans prior to operation rather than at the

ESA stage is not new and it's not unusual. It makes sense. It makes sense for all pipelines and, in fact, I would suggest, Madam Chair and Members, that it makes sense for others who would be involved in the review and operationalization of such plans in the future.

158. This sensible approach is common practice. The Mackenzie Gas Pipeline project included a liquids component, a liquids pipeline that will run from Inuvik to Norman Wells. And talk about a remote area. It was required by the National Energy Board as a pre-operation condition, not at the environmental assessment stage, to file emergency procedures manuals. *[GH-1-2004, Volume 2 at 158]*

159. The Emera Brunswick project which, Madam Chair, you and Member Bateman are quite familiar with, involved a high pressure natural gas line through the City of Saint John or a park in the environs there. The Board again required as a pre-operation condition, not at the environmental assessment stage, that an emergency procedures manual be into place. *[NEB Decision, GH-1-2006 at 124]*

160. The same was the case for a sour gas pipeline project known as the Grizzly Valley Pipeline project, which was approved by your Board for Northern B.C. and -- Northeast British Columbia and Northwest Alberta. *[NEB Decision GH-2-2002 at 38]*

161. And I'd add that the same approach is taken by both the Province of Alberta and the Province of British Columbia in their legislation governing intra-provincial pipelines. Both provinces require emergency response plans to be in place for oil and gas pipelines, but neither require that such plans be in place at the time an application is made to construct. *[Pipeline Act, RSA 2000, c P-15; Pipeline Regulation, Alta Reg 91/2005; ERCB Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry; Oil and Gas Activities Act, SBC, Chapter 36; Pipeline and Liquefied Natural Gas Facility Regulation, BC Reg 281/2010; Environmental Protection and Management Regulation, BC Reg 200/2010]*

162. Nor, for that matter, at the time an application is made to construct an LNG liquefaction and transportation project. *[Oil and Gas Activities Act, SBC, Chapter 36; Pipeline and Liquefied Natural Gas Facility Regulation, BC Reg 281/2010; Environmental Protection and Management Regulation, BC Reg 200/2010]*

163. While undoubtedly safe, those sorts of projects and facilities carry their own set of risks, including risk of heavy oil spills. And provincial law is clear, that operational emergency response plans are only required prior to commencement of operation of such facilities, not prior to construction and certainly not at the environmental assessment stage. *[Oil and Gas Activities Act, SBC, Chapter 36, Pipeline and Liquefied Natural Gas Facility Regulation, BC Reg 281/2010, Environmental Protection and Management Regulation, BC Reg 200/2010]*

164. Madam Chair, the emergency preparedness process described in the application and elaborated on at length during this proceeding is one in which Northern Gateway takes great pride.

165. It's easy to take such a process and criticize it for lacking detail and prescriptiveness. It's easy to contrive scenarios where such details or written prescriptions might not work exactly as planned or think of a new so-called "worst case" but that doesn't mean that a program is deficient, it simply means that emergency preparedness planning is fundamentally a process, not a piece of paper, and not a binder.

166. In undertaking that process, Northern Gateway is committed to working with both the federal and provincial governments, especially the government in the Province of British Columbia.

167. The Project understands and shares British Columbia's objective of having world-class emergency response capability in place for both terrestrial and marine environments. Let's be clear about that. There's complete alignment on that, with the only disagreement being the timing of completion of operational planning.

168. Let's talk about diluted bitumen.

169. Another aspect of emergency response planning and, for that matter, the description of potential spill effects that received great attention relates to the fate and behaviour of diluted bitumen.

170. It's been argued that we just don't know enough about this stuff, this diluted bitumen, to authorize a pipeline that carries it. *[See examples Exhibits D72-92-2 at Paragraphs 331 – 402; D80-104-2 at Paragraphs 1283 – 1297]*

171. Well, that's apparently so even though Canada has produced billions of barrels of oil sands products over the decades and has safely transported them by pipeline across major river systems in this country and even through -- and even by tanker through the Port of Vancouver. *[Transcript Volume 172, paragraphs 24874 to 24879]*

172. Now, intervenor arguments seem to centre on whether a dilbit, as it's called, would float, or not float, in an aquatic environment, and we heard a lot about that; a lot of discussion.

173. Northern Gateway witnesses spoke to this issue from both a theoretical and practical perspective and the evidence, and that of Intervenors is addressed in our argument-in-chief. *[Exhibit B226-2 at Paragraphs 541 – 546 and 825 – 849]*

174. I'm not going to go through that in detail, but I will recap.

175. The evidence shows that Northern Gateway will only accept diluted bitumen with a specific gravity of less than 0.94 or thereabouts.

176. As noted by Dr. Maki, given that freshwater has a specific gravity of 1 and saltwater is higher than that, it is an immutable fact that diluted bitumen, like other crude oils, will float. *[Transcript Volume 134, Paragraph 3016]*

177. The evidence also is that if you combine it with sediment, conventional crude oil can indeed achieve specific gravity of higher than 1 and sink in a freshwater environment; so too can diluted bitumen although, according to the evidence of Environment Canada, it is less susceptible than conventional crude to the sediment interaction process. *[Transcript Volume 169, Paragraph 19820-19832]*

178. Thus, at Marshall, a fraction of the portion of dilbit that had become entrained in the water column of a river that was under flood and with high sediment loading did in fact sink. It has since been recovered but for a small amount that remains. *[Exhibit B226-2 at 164, Paragraphs 545]*

179. The evidence also showed that we have little experience in Canada with diluted bitumen being spilled into aquatic environments. That's a very good thing. Canada's only dilbit spill into a marine environment was due to a rupture of a pipeline caused by third-party interference at Burnaby. It floated. Ninety-five percent (95%) was recovered and none is left as far as anyone is aware.

[Transcript Volume 172, Paragraphs 24862 – 24864 and 24929 – 24930.]

180. Now, against that evidence, you also heard witnesses from Environment Canada testify to the need for more research. *[Transcript Volume 169, Paragraphs 19879 – 19882]*

181. We accept that but, as noted in argument-in-chief, the laboratory research undertaken by S.L. Ross has already confirmed that which was previously stated: that dilbit, with a specific gravity close to the maximum amount permitted under Enbridge tariff specs, will not sink when spilled, and it will not sink due to weathering.

182. So while the Scientific Advisory Committee can certainly undertake more research -- and that's supported by the Project -- on the weight of the evidence, there is no need for concern, we suggest, for either existing transportation activities out of Vancouver or future operations out of Kitimat.

183. It also bears repeating that, although Environment Canada is interested in further research, the evidence of Dr. Owens as well as Transport Canada was clear that oil spill response organizations are presently equipped to deal with heavy oils, including dilbit.

184. Transport Canada was firm on that, as was Dr. Owens, who's been personally involved in oil spill response, including heavy oil, on many occasions during his very long career. *[Exhibit B226-2 at 241 – 243, Paragraphs 833 – 834; Transcript Volume 173, Paragraphs 25533 – 25542; Transcript Volume 141, Paragraphs 12817 – 12818]*

185. What about what happens after a spill?

186. A number of intervenors challenged the Recovery Study conducted under the leadership of Dr. Pearson. *[Exhibit B83-17]* It was described at times in somewhat derogatory terms. For example, it was called "self-serving" and "misleading". *[Exhibits D12-31-2 at 160 and D80-104-2 at 1496 and 1514]*

187. In fact, what the Recovery Study was, was an earnest and good faith effort to fairly assess a large body of literature regarding the effects of oil spills. It replied directly to assertions made by lay witnesses and experts alike to that point in the proceeding regarding the permanence of oil spill effects.

188. Now, having observed Dr. Pearson in person -- that's hard to say -- having observed Dr. Pearson in person over many days of cross-examination, Madam Chair, we're confident that you and the Panel Members will conclude that he is, above all else, an honest and sincere scientist. He would not conspire to mislead anyone for any reason.

189. What his report showed is that the natural environment can and does recover from perturbances such as oil spills especially if intervention occurs to enhance recovery. It takes time, especially for species with longer life cycles, but it does occur. In fact, according to the literature, recovery takes place more quickly than is the case for many other human perturbances such as over-fishing, logging and mining.

190. That's what the literature tells us, and that's what Dr. Pearson and his team reported to you.

191. None of which is to say, of course, that marine spills are acceptable nor that we're predicting that they will take place. They are not.

192. Let's move then to the issue of risk assessment.

193. This was another common theme in intervenor arguments and the theme was that Northern Gateway had inadequately assessed the risks of the Project. You saw that in the submissions of the Gitxaala *[Exhibit D72-92-2 at 53ff],* the Gitga'at *[Exhibit D71-35-2 at 43 and 100]*, and the Haisla *[Exhibit D80-104-2 at 111],* among others. *[See, for example, Exhibits D66-31-2 at 67 and D167-24-2 at 14 – 15 and 17 – 20]*

194. In fact, the evidence shows that risk assessment and risk management is the foundational element to this Project. It also happens to be a central tool used by the National Energy Board in oversight of interprovincial pipelines in Canada, *[Exhibit B75-2 at 2; National Energy Board Onshore Pipeline Regulations, SOR/99-294, s 6.5]*.

195. And it's also part and parcel of the development of engineering standards and Codes *[See, for example, CSA Z662-11]* which, in turn, are an integral component of the Onshore Pipeline Regulations.

196. The Application itself contains a variety of reports and indeed Application volumes that deal with risk management. *[See, for example, Exhibits*

B3-20, B3-21, B9-2 to B9-4 and B16-33 to B16-34]

197. The DNV Report *[Exhibit B23-34]* was done to satisfy the TERMPOL review process as well as for submission to your Panel. Public safety risk assessments were done by Dr. Bercha. *[Exhibit B69-3, B69-4 and B69-5]*

198. At the request of your Panel, a Semi-Quantitative Risk Assessment *[Exhibit B75-2]* was done before the Application was even set down for hearing. And at the request of a member of the public, you'll recall -- I think it's Mr. Marsh -- another updated Semi-Quantitative Risk Assessment *[Exhibit B196-2]* was done during the hearing. *[Transcript Volume 93, Paragraph 15159; Exhibit B196-1]*

199. That update happened to demonstrate a substantial reduction in failure frequency potential as a result of the project design enhancements and advancements in geo-hazard identification and mitigation.

200. Watercourse crossings were evaluated using a risk management framework that was discussed and reviewed as between DFO and the Project. Of course, Drs. Horn and Stephenson, along with Mr. Yee, authored what we suggest was a groundbreaking document in the form of the Ecological and Human Health Risk Assessment to provide additional insights into potential risks associated with pipeline operations. *[Exhibits B80-2 to B80-12]*

201. All that, of course, was in addition to the risk assessments contained in the initial Application Volumes 7B, 7C and 8C.

202. So when people say that the Project hasn't evaluated risk, what they really mean, I suggest, is that "you haven't looked at risk the way I want you to." Which may well be true, because risk assessments are done for many reasons and in many contexts, but it doesn't mean that the Application and supporting evidence is deficient.

203. Now, it's been argued by some that Northern Gateway was overly focused on probabilistic risk assessment.

204. I enjoyed the opportunity to have to read the "Black Swan" text because of that argument. The argument was that the Project should properly have focused on planning for these so-called "Black Swan" events. As I understand it, the evidence is that those events are ones with catastrophic effects,

but which can't be predicted. Hence, they're "black swans" because you've never seen one in the past, you don't expect to see one in the future.

205. The argument is that you can't simply look to history to probabilistically determine whether a catastrophic event is likely, and then determine the value of risk mitigation associated with that event.

206. Instead, you should plan for the possibility of such events and look to alternative means to accomplish an objective that doesn't give rise to a catastrophic risk. I think that Dr. Beegle-Krause referred to that as minimum regret or something like that.

207. We say, of course, that the Project has done exactly that. It has examined ways and means and alternatives to drive the risk of spills to as close to zero as practicable.

208. On the marine side, it adopted extended responsibility as a core planning -- project planning principle, and voluntarily committed to tremendously costly spill prevention measures, such as a fleet of purpose-built super tugs.

209. On the terrestrial side, as I mentioned, the Project used a Semi-Quantitative Risk Assessment approach to examine risk and risk mitigation. But over and above that, it committed to a very extensive and costly series of design enhancements involving thicker walled pipe, increased valve spacing and so forth.

210. Now, that dual set of commitments, both on the terrestrial and marine side, alone increased the capital cost of this Project since the time of filing of the Application by close to a billion dollars. *[Transcript Volume 91, Paragraphs 12504 – 12507.]*

211. Neither of those spill prevention enhancement programs incorporated or relied on an "expected value" approach to risk management where you try to match your investment to the expected value of risk reduction expressed in monetary terms. In other words, if we spend this much money over here, we can save this much money in terms of cleaning up spills or whatever based on historical data.

212. If they had used that sort of approach, you wouldn’t have seen the commitments that you saw. You would not have seen commitments to escort tugs, you wouldn’t have seen commitments to a world-class response capability or

thicker-walled pipe or 50 percent more valves because, from a strict financial monetary perspective, those measures would not have been justifiable.

213. But in order to provide you and the Canadian public and people along the right-of-way and along marine transportation routes with additional assurances, the Project committed to those enhanced measures.

214. So when parties say that the Project has been a slave to historical statistics and expected value and has ignored the so-called "Black Swan", we say they're flat out wrong. It's made an enormous investment in avoiding catastrophic events, both terrestrial and marine.

215. Now, before I leave this, I have to say that risk management does not just apply to engineering and operations issues. It also applies to the financial risks that are faced by the Project, and the economic risks that are faced by our country.

216. From the Project's perspective, a variety of steps are being taken to manage financial risks faced by Northern Gateway and its owners, including its Aboriginal partners. The Project will not proceed without long-term Transportation Service Agreements. This ensures that there will be revenue available to return the capital of investors, to retire debt, and to provide a fair return on equity.

217. For prospective shippers, capital cost risk 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.

218. Now, the TSAs manage the financial risk to the pipelines, in part, through a force majeure provision that require shippers to pay tolls for up to a year of an -- of an unexpected interruption of service. And similarly, as a prudent operator, Northern Gateway is and would be required to maintain adequate insurance to cover events such as ruptures or spills. Its owners, its shippers, its lenders and the community would expect no less.

219. From a broader Canadian perspective, Madam Chair, Northern Gateway provides enormous protection against the economic risks of having one of our country's primary and major economic drivers -- which is to say oil

production and export -- dependent on a single market.

220. Do you want to see an economic Black Swan for Canada?

221. How about a decision by the U.S. that it no longer needs or will no longer accept or import any Canadian oil?

222. One of the key building blocks of our economy or the types of investments that the Panel -- or the Board talked about in the Keystone XL Decision, the social and economic investments by government would be stopped in its tracks.

223. The $30 billion in export price discounting, that Mr. Carruthers spoke to you about in Prince Rupert that occurred last year, would be a drop in the bucket. *[Transcript Volume 152, Paragraphs 26753 – 26754.]* Canadians would be facing, we suggest, an economic catastrophe of unprecedented proportions.

224. Providing meaningful access to Pacific Basin markets is a reasonable, and we suggest, urgently required step in managing Canada's economic future and risk, and ensuring that Canada's economy continues to grow for the benefit of all of us.

225. At the end of the day, risk assessment and management, like sustainability, is a concept that's intrinsically embedded in the determination of the public interest. In an ideal world, every person, every community, every region would be satisfied that the benefits of a particular proposal outweigh its burdens to them. That they, individually or regionally or locally or provincially, are better off without a project -- or with a project than without it.

226. But we don't live in an ideal world. Tradeoffs are a fact of life. That does not mean that any person, any community or region should be marginalized, which is why this Project has conducted such an extensive public and Aboriginal consultation program, why your Panel has conducted such a wide-ranging and long proceeding, and why the Project has developed such extensive programs for local and Aboriginal economic opportunities. It's also why the Project has committed to such a comprehensive suite of mitigation measures for environmental protection.

227. All it means is that in determining public interest, we need to seek a balance; a balance that respect local interests, plans and that will deliver benefits

to local communities, and environmental sustainability, while still ensuring that projects that are needed for this country can proceed. We suggest that this Project respects that balance.

228. Let me turn to the issue of Aboriginal Rights.

229. Another predominant theme in the written submissions was that the Project will adversely affect Aboriginal rights. Some say that the Project has ignored or underplayed such effects in its evidence. Groups such as the Haisla and the Gitxaala point to their evidence as showing that they have Aboriginal title -- or at very least a very strong claim to title -- over large areas of land and water. Some have described that evidence as uncontested. *[Exhibit D80-104-2 at 41, Paragraph 169]*

230. Now, the fact that there was no conflicting evidence provided by Northern Gateway, or more appropriately the Crown, does not mean that no such evidence exists, or that contrary arguments couldn't be made in an appropriate forum based on the evidence that's been provided. But as we made clear, it's not the role of the Proponent, nor the role of the Crown for that matter in a proceeding such as this, to join issue with and engage in a debate over the question of rights and title. *[See, for example, Transcript Volume 149, Paragraphs 22859 – 22860]*

231. So, of course, the evidence that's been presented to date is uncontested, but doesn't make it definitive. It doesn't mean also that it should be ignored. The amended Joint Review Panel Agreement instructs your Panel to reference the information provided by Aboriginal peoples *[Exhibit B174-7 at 7, Paragraph 82]* -- incidentally not by the Proponent or the Crown -- to reference information provided by Aboriginal peoples on their rights and to include measures to mitigate effects on asserted rights which is, of course, where Northern Gateway has focused its efforts.

232. In written argument, the Gitxaala suggested that Northern Gateway had not listened to it or considered its concerns and its evidence regarding traditional use, culture and governance. *[Exhibit B174-7 at 7, Paragraph 82]* I suggest to you that nothing could be further from the truth.

233. Northern Gateway listened carefully and listened respectfully. It may not agree with the arguments advanced, but it listened to the Gitxaala leadership and its members. It heard, loud and clear, that the Gitxaala leadership had no desire to discuss economic benefits associated with the Project at this time. That

message was forcefully delivered *[Exhibit B83-40 at 96]* and it was heard.

234. Northern Gateway funded the Gitxaala Use Study. *[Exhibit D72-49-2 at 14]* It reviewed it in the context of the work done in support of the application that had been filed about a year before that study was completed and have confirmed that the study verified that which had been assumed by the ESA authors: *[Transcript Volume 155, Paragraphs 30700 – 30705]* that the Gitxaala extensively utilize marine coastal areas such as Principe Channel for traditional and cultural purposes.

235. When you look at that study, one thing leaps out at you and leapt out for the reviewing people at -- the people at Northern Gateway who were reviewing it. The fundamental conclusion to be drawn from the study, and other evidence for that matter, was that the overwhelming concern regarding this project relates to the effects of an oil spill, which most of those who were interviewed seemed to consider to be inevitable.

236. Those concerns -- as I said, the concerns about oil spill effects were not unexpected, and they were not new. In fact, it was because of such concerns (by coastal nations and others), that Northern Gateway way back to 2005, had suggested that this project be referred to a review panel as opposed to being subjected to a lower level of environmental assessment than the *Canadian Environmental Assessment Act*.

237. It was because of that concern and in response to that concern that many measures were taken. That's why the Project voluntarily entered into the TERMPOL review process and agreed to do that process in advance of or contemporaneously with your review process so that -- so that the Panel would have that information available.

238. It's why the Project took the unusual step of establishing or trying to establish a collaborative forum for the examination of risk through the DNV quantitative risk assessment. DNV was hired by the Quantitative Risk Assessment Working Group. Its Terms of Reference were directed by that working group. Communities from around the coastal areas were invited and indeed it was urgent -- arduously hoped that they would participate. Only a few did.

239. It was why the Project, going way back in time, agreed to include marine transportation within the National Energy Board application. That wasn't

always done. In fact, it was never done before then.

240. It was why the Project agreed to develop and implement the extended responsibility program, again, unprecedented, and it acted on the recommendations of experts like Mr. Michel and Mr. Brandsaeter, and others, regarding the need for state-of-the-art tanker acceptance programs and so forth.

241. It's why the Project reached out to communities to invite participation in environmental monitoring programs, Fisheries Liaison Committees, development of geographic response plans. That's why the Project developed the community response plan program on the advice of Mr. Wooley, during your proceeding.

242. So when counsel for opposing First Nation intervenors say that the Project hasn't listened to their concerns about project effects and the effects of oil spills on their rights and interests, they're just wrong. Northern Gateway has listened and they've responded with unprecedented accommodation measures.

243. Now, the Haisla also suggested, in argument, that their rights and interests and concerns had not been listened to or adequately taken into account. And again we suggest the evidence simply doesn't support those claims. In fact, Northern Gateway has listened. It's heard that the Haisla, like the Gitxaala, is not prepared to discuss economic opportunities and benefits at this time.

244. Northern Gateway respects that. As long -- and I want to make this very clear, as long as it's not at the same time argued that the burdens and benefits of the Project are unfairly distributed, parties are completely free not to engage or to engage with the Proponent of a project leading up to a proceeding like -- like this. And they chose not to engage in discussions around economic opportunities. That's fine.

245. Northern Gateway also heard that they favour development of the proposed terminal site, but for an LNG terminal rather than an oil terminal. *[Exhibits D80-104-2 at 4 and D80-51-2 at 15 – 16]*

246. Again, we respect that position, and we acknowledge that if the Project proceeds there will need to be further discussions with both the Province of British Columbia, to the owner of that site, and the Haisla which claims Aboriginal rights and title to it regarding the terms and conditions for land tenure for that site.

247. We also heard -- Northern Gateway also heard that the -- from the Haisla that if the Project proceeds following approval and Crown consultation, it wants to be involved in post-certificate monitoring and response programs. *[Exhibit D80-51-2 at 25 – 29]* The Project welcomes that.

248. We heard, as did you three, in Kitimaat Village -- and when was it -- January 9, a year and a half ago, something like that, that community members view the Project as being a double-barrelled threat. That -- that term resonated with me, both marine and -- and terrestrial.

249. So in response, the Kitimat River Valley studies were commissioned, as was the recovery study. The plans identified in the Kitimat River Valley studies are ones that are designed to respond to and accommodate the concerns expressed that day by the Haisla regarding the protection of that area and potential effects on their rights. As planning proceeds, the Project more than welcomes the Haisla to participate in those and other follow-up programs that will come out of those studies.

250. The Project also listened carefully to the evidence presented by the Gitga'at community, and reviewed the written materials that were authored on their behalf. Those have been addressed in our written submissions and I'm not going to go into detail in responding here other than to note really how unfortunate it was that the agreement that had been reached between the Project and the Gitga'at was rescinded when it was because a number of the steps that are included by the Gitga'at in their submission as plans that ought to be in place in the future could, in our submission, have been well underway by now.

251. Arguments have also been made regarding the potential for infringement of Aboriginal rights and title by others, more distant communities or groups, such as the Haida and Heiltsuk. Again, we've addressed those in our argument in-chief.

252. I do want to respond very briefly, however, to a recurring suggestion that approval of this pipeline project would in some fashion interfere with marine planning activities. *[Exhibits D85-27-6 at Paragraph 23 and D45-42-2 at Paragraphs 94 – 100]*

253. There's no logical foundation for arguments such as that.

254. The vessels calling on the Kitimat Terminal will constitute only a very small fraction of marine shipping on the north central coast. With -- the evidence also showed that the hazards associated with operation of modern tankers, in open water areas such as that are quite small. There is no reason to believe that the Project will have any effect on ocean management initiatives whether undertaken by the federal government or otherwise.

255. So in summary, we suggest that none of the substantial themes that fall within the overarching argument of incompleteness of the application should cause you as Panel Members to question whether this project is in the public interest, and whether it's ready for approval. It clearly is.

256. Let me turn then to legal arguments, and I'll deal with these quite briefly because I want to get on to the issue of conditions before -- before leaving the microphone.

257. The -- the arguments filed by other parties include a number of legal arguments. I'm only going to respond very quickly to two.

258. One concern is a continued allegation of procedural unfairness that we see being advanced by BC Nature. That allegation was already considered and dismissed by the Panel and it was somewhat surprising to see it reprised, at some length, in their -- in their written submissions. *[Exhibit D12-31-2 at 71 – 92]*

259. The allegation of procedural unfairness had no merit when it was initially made to you, and it has even less now, if that is possible.

260. We responded in writing to the original motion, and I only have one additional comment.

261. You'll note that much of the 20 pages or so of argument on this point centres on the allegation that Mr. Michel gave opinion evidence on risk assessment matters, although he was not qualified as an expert in risk assessment.

262. In fact, Madam Chair, you may recall that Mr. Michel is not only a world leader in naval architecture, but he is also an expert in risk assessment. He was expressly presented to you as such and accepted by your Panel as such. It's in the transcript. *[Transcript Volume 155, Paragraphs 31080 – 31100. Mr. Michel's CV is contained in Exhibit B210-5]*

263. A second and more substantive legal argument that was made deals with the issue of sufficiency of Crown consultation with First Nations. Now, this argument is made in a number of the submissions that are made to you. The issue is one that would have been debated at length or at more length, I suggest, if the Gitxaala Notice of Constitutional Question had proceeded as scheduled.

264. The general question of Crown consultation was addressed in our written argument, but that submission did not specifically address the argument that your Panel is duty-bound to pronounce on the sufficiency of the Crown's consultation to date. *[Exhibit B226-2 at Paragraphs 1153 – 1163]*

265. As explained repeatedly by Mr. Stinson-O'Gorman, the consultation program being undertaken for this Project has been going on for a long time, and there is much more to be done. *[Transcript Volume 174, Paragraphs 27395 – 27399]*

266. It started years ago when First Nations and Métis were consulted regarding the Terms of Reference for this review and continued with the provision of information regarding the JRP process and funding to participate in the review.

267. The JRP process, as you are all very, very aware, included an extensive and exhaustive itinerary for you, as Panel Members, to visit Aboriginal communities and hear their oral evidence in an informal setting. You've asked Northern Gateway at various stages to summarize and present to you its own information regarding its own dealings with Aboriginal groups, to report to you on the concerns expressed, and to identify mitigation measures.

268. This was done in the mitigation tables filed in response to JRP 5.9 and 10.9, which, as you'll recall, comprises over 1,000 pages in length. *[Exhibits B40-4 and B74-5]*

269. It had various names within our office, but we'll just call them "mitigation tables" today because it took a long time and a lot of work. It was a monumental task for those tables to be put into place. But in the event -- in the result, it did provide for a matrix for discussion with Aboriginal communities that would allow for collaboration for the identification of issues and for the realistic discussion of mitigation measures. And for those communities that responded, it worked. *[Transcript Volume 149, Paragraphs 22866 – 22867; Transcript Volume 150, Paragraphs 23028 – 23031 and 23304 – 23305]*

270. Unfortunately, not all communities did respond in that way, either because of a strategy of disengagement or frankly, in some cases, probably a lack of interest. They weren't interested in following up on the mitigation tables and the different steps that could be taken. But for those that did, it was a very useful document and that information is on your record as well.

271. Now, the Gitxaala submission would have you ignore all that Northern Gateway did or, for that matter, did not do given a strategy of non-engagement that we saw in -- on occasion. It says that the Crown didn't delegate consultation to Northern Gateway. *[Exhibit D72-92-2 at 1007]*

272. That argument is wrong. The Crown consultation program makes it clear that, while the obligation to consult resides with the Crown, the mechanism for exchanging Project information, for exchanging views and opinions on the Project, including measures regarding mitigation and accommodation of Aboriginal concerns, includes all of the process that we've been undertaking.

273. Mr. Stinson O'Gorman could not possibly have been clearer on that point during his appearance before you. If he repeated it once, I dare say he repeated it 1,000 -- 100 times. And that may have been during Ms. Humchitt's cross-examination of him one afternoon in Prince Rupert alone.

274. If nothing else, his was a remarkable display of consistency in answering essentially the same question with an identical response -- you'll recall that afternoon -- no matter what angle was used by the cross-examiner.

275. So if you were to pronounce on the sufficiency of Crown consultation, the answer would be obvious, at least in the abstract. But you can't do that because no matter how brilliant any one of you three are in your individual capacities, you're not clairvoyant. You can't pronounce upon the sufficiency of a process that hasn't happened yet or hasn't finished yet. And there is no need for you to pronounce upon the sufficiency of past actions.

276. If certain groups believe that they haven't been adequately consulted, you can report that in your report. Alternatively, you can leave it to the Crown consultation coordinator to compile and transmit those concerns in preparing his report to the Governor-in-Council.

277. The *Jackpine* decision, together with the decision of Justice Barnes in the unsuccessful judicial review application brought by the Gitxaala in this very

case, dispose of this issue nicely. *[Métis Nation of Alberta Region 1 v Joint Review Panel, 2012 ABCA 352; Gitxaala Nation v Canada (Transport), 2012 FC 1336]*

278. Both deal with the same framework for consultation and, in both cases, the response of the Courts to challenges in the middle of the process was the same.

279. So while it's true that the Joint Review Panel Agreement in *Jackpine* specifically stated that the Panel would not determine sufficiency of consultation, we suggest that's a distinction without a difference. The basic reason why the Panel was directed not to do so in *Jackpine* and, in the case of this Project, why the Court declined to intervene in the consultation process following issuance of the TERMPOL Report, was that the contemplated consultation wasn't over yet.

280. "The consultation is insufficient. So stop the consultation", was the way that counsel for Shell put it in the *Jackpine* case and the basis upon which the Alberta Court of Appeal agreed that that was simply not a reasonable position. *[Métis Nation of Alberta Region 1 v Joint Review Panel, 2012 ABCA 352 at paras. 12 and 20]*

281. So we suggest that you don't need to assess the sufficiency of consultation and, if you were to do so, the answer would be that the process here clearly satisfies the Honour of the Crown. There has been ample consultation, and there's lots more to come.

282. So let me then, turn, to the question of conditions.

283. On April 12, your Panel issued for comment close to 200 conditions. *[Exhibit A346-5]* Embedded within those potential conditions were obligations to comply with all commitments made by Northern Gateway which, by our count, numbers in the hundreds. In addition, the potential conditions require compliance with other instruments such as applicable Codes and Regulations. So if nothing else, this will be a highly regulated project.

284. In reviewing the potential conditions, Northern Gateway endeavoured to evaluate them from the perspective of practicality and, in a couple of cases, cost. Most were accepted, subject to some minor wording changes. A few were identified as impractical or duplicative of work that had already been completed and, in those cases, Northern Gateway respectfully disagreed with their being

imposed.

285. In reviewing the written submissions of intervenors and the Government of Canada, Northern Gateway took a similar approach. In other words, we tried to identify suggested conditions that are considered unacceptable from the perspective of practicality and, occasionally, cost.

286. Let me start with the Province of British Columbia's suggestions. In -- its discussion of conditions started at page 49 of its argument. *[Exhibit D167-24-2]*

287. I can tell you that Northern Gateway generally agrees with the suggestions that have been made by British Columbia. For example, the Province has requested the addition of the Clore River to the spill response scenarios to be used for training. Northern Gateway accepts this request and looks forward to working with the Province of British Columbia and others on training exercises for that and other locations.

288. I can also tell you that the Project generally agrees with the revisions and additional conditions set out in Appendices A through C of the British Columbia argument.

289. There are a couple, however, that do cause some concern and we suggest not be adopted at this time.

290. The first is a suggestion for a prescriptive requirement for marine response capacity of 72 -- excuse me, of 36,000 cubic metres within 72 hours throughout the response area. This time standard originates in Alaska, and was discussed at some length during the hearing.

291. In Northern Gateway's respectful view, it does not make sense to prescribe a specific time period for response capability at this time, whether 72 hours or otherwise. What is important is that you have the right equipment in place to do the job, at the right locations, at the right time.

292. A prescriptive requirement, such as 36,000 cubic metres in 72 hours for the entire response area, we suggest would not be sensible, or an efficient planning approach and in fact, could be counter-productive by requiring or resulting in a misallocation of resources.

293. Now, the system of emergency response proposed by Northern Gateway, I have to -- I hasten to add is based on many of the same concepts used in Alaska and the Project is satisfied that it will provide an equivalent effectiveness and, simply, you don't need to have the same level of prescription set out in conditions at this stage.

294. We say that with the knowledge that these sorts of standards are under review by the federal and provincial governments and it makes sense, in Northern Gateway's submission, to let that process of review play out rather than to try to anticipate any standards that might flow out of it.

295. The same suggested condition might also be interpreted as requiring such spill response capacity in all oceanic conditions. If applied to marine transportation generally, such a requirement, if literally interpreted and applied, would paralyze shipping around the world, including off the coast of British Columbia.

296. Response gaps are an accepted and unavoidable part of all marine transportation and response anywhere in the world. *[Transcript Volume 138, Paragraph 8184]*

297. If the proposed condition was actually intended to prohibit those, Northern Gateway could not possibly accept it. No operator could.

298. But we're not quite sure, frankly, on the way that it's worded, whether that was the intent.

299. The Province also wants Northern Gateway to prepare geographic response plans for all sections of the B.C. Coast that could be affected, no matter how remote the risk. *[Exhibit D167-24-2 at 63]* So that would be in addition to the Confined Channel Assessment Area.

300. Let me say and let me make it clear that Northern Gateway is certainly prepared to support the preparation of such plans, and would be keen to enter into discussions with B.C. around that. However, it does seem, with respect, to be quite unreasonable to load all of that responsibility onto one project proponent.

301. Let's remember that the three spills affecting the B.C. Coast that were mentioned most during the hearing didn't relate to marine transportation of oil out of Vancouver or condensate into Kitimat.

302. One was a barge carrying heavy oil along the coast of Washington. That's in Nestucca. The second was an American warship that sank off the West Coast -- or the B.C. North Coast in World War II or shortly thereafter, the Zalensky. And the third was a ferry owned and operated by the -- a B.C. government Crown Corporation.

303. So while Northern Gateway is prepared to do more than its share in terms of geographic response plan preparation, we do suggest that at some point there is a need for other industry and government to step up as well. Again, we expect that that will be part of the broader conversations that will take place going forward.

304. The Province of B.C. has also suggested that it considers it critically important for there to be a comprehensive review of Northern Gateway's proposed Terminal Regulations.

305. The Project agrees.

306. That was made clear in Northern Gateway's argument and the evidence cited within it. *[NGP Argument, Paragraph 1003]* The process for developing the Terminal Regulations would include a review by Transport Canada, B.C. Coast Pilots, the Pacific Pilotage Authority, and possibly also a potential tug escort operator and the Chamber of Shipping. Northern Gateway certainly welcomes participation of the Province of British Columbia in that review process as well.

307. The Gitxaala.

308. We have a number of suggestions for conditions. *[Exhibit D72-92-4 at 166]*

309. One of the primary changes that they seek is that all filings should be for approval of the Board, rather than for information, and that processes for submissions on such filings be established -- excuse me -- including a right for the National Energy Board to order a hearing and for participant funding to be available. *[Ibid at Paragraph 21ff]*

310. Northern Gateway can accept that, in some circumstances, materials filed with the Board should also be provided to directly affected parties, and an

opportunity for comment should be provided. I dare say, though, that no one wants the condition compliance process to be the gift that keeps on giving for lawyers and consultants. Not even lawyers and consultants or at least not this one, Madam Chair.

311. So we suggest that the Panel should carefully consider which of the suggested conditions should be for approval and the processes for notification and solicitation of submissions if required. If in individual cases it's considered that processes for written comments be established, the condition could provide for that but we do urge you not to be overly prescriptive.

312. The Panel -- the Board can determine for itself, for example, who stands to be directly and adversely affected by a particular condition, and who is not, and by which conditions, and what process is to be used to solicit input. We simply question whether it's productive for your Panel to offer prescriptions around that, at this stage.

313. The Haisla Nation made many suggestions regarding potential conditions. These start at page 312 *[Exhibit D80-104-2]* of their argument. The discussion is quite lengthy and, with all respect, was a -- we found a bit disjointed. Time doesn't permit me to comment in detail but I'm -- but I will touch on some general concerns and a couple of instances where we're fine with the suggestions.

314. First, Northern Gateway has difficulty with any conditions that would require third-party approval of plans and programs. The NEB will be the final arbiter on such matters and we suggest shouldn't be delegating approval to others or giving parties a veto in the conditions process. We saw examples of that in the suggested conditions. For example, the revisions that are suggested Potential Condition 5(n). *[Exhibit D80-104-2 at 317]*

315. Second, we don't believe it is reasonable or appropriate for Class III Cost Estimates to be revised in the manner suggested by the Haisla. *[Exhibit D80-104-2 at 317 – 318]*

316. This is primarily a commercial issue and I suggest is one between the funding participants and the Project and ought not to be dealt with by way of prescriptive conditions.

317. Third, we noted -- excuse me -- that a number of the revisions suggested seem to constitute loading more stringent requirements onto the Project

for the sake of that. In other words, there was no particular reason advanced why more stringency was required but it was asked for on various occasions.

318. For example, we believe that it's unreasonable for there to be five years of pre-construction environmental monitoring [*Exhibit D80-104-2 at 313]* and there wasn't any good reason advanced for that.

319. Two or three years is, we think, more than sufficient and certainly more than other terminal operators in the area have done.

320. Other suggestions that would fall within that category would be, for example, to require identification and pre-approval of remote locations for disposal of potentially acid-generating rock; again, something that seems to be just simply superadded with no real rationale.

321. Similarly, the requirement for extension of the Linear Feature Management and Removal Plan, which will apply in the grizzly management area generally to the west of the Haisla territory and that's been requested to be extended to include all of the Haisla territory and we don't see a sound rationale for that.

322. It's been also suggested that valve spacing should be revised so that there's a maximum of 100 cubic metres release with no evidence on the record as to whether such a requirement would be practical, whether it would be economically feasible or indeed whether it would be any safer than the current spacing, bearing in mind that valves have flanges and flanges themselves can be the source of leaks and drips. So we don't see any of those changes as being reasonable or required.

323. The Haisla submission also provides additional comments pertaining to their participation and post-approval programs and filings. *[Exhibit D80-104-2 at 323 – 333]* As I say, the Project welcomes that participation, and by both the Haisla and other Aboriginal groups. We understand that there is a cost component associated with that participation and the Project is certainly prepared to negotiate a reasonable funding toward that end. This is something that was also suggested, I believe, in the Gitxaala submissions.

324. We do question whether the amount of the funding is something that the Board -- I was talking now about the National Energy Board, as a body needs to mandate or adjudicate, especially given the fact that some programs or portions

thereof, may best be undertaken in cooperation with other operators.

325. For example, the marine mammal protection program would be an example of that. And similarly, one would hope that First Nations would be prepared to cooperate amongst themselves by undertaking collaborative reviews where possible rather than each nation applying for and seeking separate funding for their individual reviews.

326. Finally, I can say that the Project does agree with the suggested condition put forward by the Haisla regarding rare plant reclamation. And we can also advise that vessel strike analysis to be prepared will include consideration of grey whales.

327. We turn to the Gitga'at. They *[Exhibit D71-35-2]* took a slightly different approach with respect to conditions. Among other things, as we read it, the Gitga'at seek to negotiate with the Crown and/or the Proponent regarding the development of a series of "protection plans". *[Exhibit D71-35-2 at 89 – 104]*

328. It isn't entirely clear to us whether they would want to see completion of such negotiations and plans made a condition of the certificate. We would have a concern if they did, because clearly the Project cannot guarantee a particular outcome with individual organizations such as this.

329. Having said that, as I said earlier, Northern Gateway can state that the types of investigations and measures identified by the Gitga'at within the protection plans that they've articulated are generally ones that fall within the ambit of the planning and negotiation processes that Northern Gateway and the Gitga'at had at one time agreed to undertake. *[Transcript Volume 163, Paragraphs 10451 – 10467]*

330. So negotiation and development of protection plans along the lines of those described is something that the Project would welcome. This could be done in conjunction with involvement of the Gitga'at in other initiatives, such as the community response plans, harvest studies and so forth. What's required is mutual goodwill and cooperation and, for its part, Northern Gateway is prepared to provide that.

331. ForestEthics suggested a number of conditions and restated a number of commitments that have been previously included in the Table of Commitments filed by Northern Gateway. *[Exhibit D66-31-2 at 89ff. See also Exhibit B165-3]*

332. Our response can be briefly stated. First, the Project considers that its record of commitments is accurate and cannot accept the characterizations of those commitments by ForestEthics.

333. Second, we don't believe that there is a need for each and every post-certificate filing to be approved by the Board. *[Exhibit D66-31-2 at 79ff]*

334. In many cases, these filings are for informational purposes. They're always subject to review if an issue arises, but they're for information. There's no specific approval process associated with them.

335. As an example, as I mentioned earlier, ForestEthics seems a bit concerned that the Project won't manage its financial risks properly, and in particular, will not have binding TSAs in effect prior to construction. *[Exhibit D66-31-2 at 24 – 26]*

336. While we appreciate that concern, the TSAs need not to be approved by the Board. They've already been filed as *pro forma* documents; so what you're looking for is proof that they've been executed. That's all.

337. ForestEthics also suggests that the Cabinet impose leak or spill metrics, such as a certain number of volume of spills permitted annually within the body of the certificate. *[Exhibit D66-31-2 at 83]*

338. We don't believe this to be reasonable at all. And actually, my observation would be that it's counterproductive. You know, the goal here should be for zero spills not a notional number that's derived from statistics on another pipeline. The era of regulation by prescription is long past, Madam Chair.

339. Let me turn to the Swan River First Nation. We haven't spoken of them so far. In its argument, the Swan River Nation has made many suggestions regarding potential conditions, including a requirement that they receive funding to participate in a range of post-approval monitoring and a requirement that the corridor be rerouted around the Little Smoky Caribou range altogether.

340. Northern Gateway welcomes involvement by the Swan River First Nation and post-certificate program and will certainly live up to all commitments that it's made to Aboriginal groups, including the Swan River First Nation. We do not agree with what we consider to be an overly prescriptive approach as

suggested by the Swan River Nation in its comments relating to issues such as access management planning, caribou habitat restoration planning and offset measures planning.

341. Similarly, while the Project is certainly prepared to engage in additional discussions, it's not at all clear to us on the evidence that any particular habitat restoration ratio should be applied in respect of specific traditional use areas generally. I think they're called "primary livelihood areas" in the Swan River submission, as opposed to critical caribou habitat, for example, as seems to be suggested by the Swan River First Nation. So that sort of a metric is not something that we would see as being a reasonable one to impose on the Project.

342. Let me turn to the Government of Canada. Transport Canada, Natural Resources Canada and Environment Canada have filed written argument commenting on the conditions proposed by the Panel. *[Exhibit E9-78-2]*

343. Northern Gateway has reviewed those submissions and can generally agree and generally accepts the recommendations made.

344. I see that the light just went on, Madam Chair. I'll easily be finished. My back-up plan was to call Mr. Roth forward to race through the bell but you won't need that.

345. First, we noted that the government departments have, at various locations, suggested that additional time be added for the purpose of the NEB's review of filings. In our view, it's really for the National Energy Board to determine how much time it believes would be reasonable for it to review the filings made by Northern Gateway, whether those filings are for informational purposes or for approval.

346. There are a number of examples of this but I'll point you to one. In the discussion of access management plans, commencing at page 66 of the Federal Government's submissions, it's been suggested that the requirement of filing at least six months prior to commencing construction be replaced by a clause that would require filing within 12 months after project approval or at least 12 months prior to commencing construction, whichever is sooner. *[Exhibit E9-78-2 at 69]*

347. To say, we believe that the Board can determine for itself how much time is reasonable for it to review and consider the access management plan.

Excuse me. Consultation with other government departments and others will already have occurred in advance of that filing so they shouldn't be affected by whatever cycle time the NEB decides to provide to itself in the reviewing and either approving or accepting for information that plan.

348. The concern here is quite simply this, and I think it is important, because there's a public engagement and in some cases Aboriginal engagement access aspect to this and other plans. We don't want to put ourselves in the position of sacrificing time that may be required at that point in the process in order to provide additional time for review following the filing -- the completion of that and filing for the NEB to review.

349. So we don't want to be unnecessarily compromising the consultation activities and the consultation timeline in order to provide additional review time for the NEB, if you don't need it. And so that's why we say that the NEB should decide what's a reasonable cycle time for its review.

350. Staying with the access management plan, we also noted that Environment Canada would like to see the plan be required to include goals and objectives regarding access management for the control of both humans and predator access.

351. In the Project's view, access -- the access management plan should be directed primarily to the control of human access as opposed to predator access. Predator access is, as we heard, a fundamental part of the caribou protection and compensation programs that are set forth in separate conditions. But that's where it should really be dealt with, as opposed to applying generally to access management that applies to larger areas along the pipeline right-of-way.

352. Northern Gateway also generally accepts the recommendations made by NRCan regarding geohazards. We do question the degree of prescriptiveness that is contained in a number of the certificates or -- excuse me -- a number of the proposed conditions.

353. For example, requiring pore pressure readings for a one year prior to construction is not a detail that one would ordinarily see a certificate condition. Particularly in the marine environment, other monitoring measures or methods besides pore pressure monitoring, may be much more effective for long-term assessment of submarine slide potential and so forth.

354. So in the event that there's external review required, it would be our suggestion that that could be facilitated through the Geohazards Working Group that's been discussed at some length in the proceeding, which will be comprised of a team of external geotechnical experts as opposed to trying to define and prescribe in the certificate this precise measures that would be taken. We just say that that goes way too far down into the weeds of detail for a certificate condition.

355. With those comments and as indicated, Northern Gateway can generally agree with and accept the suggested revisions in the Government of Canada's conditions.

356. Madam Chair, that brings to an end my comments regarding the written submissions of intervenors.

357. I'd like to just close off this morning by just reaffirming to the Panel that notwithstanding comments that some can construe as critical in nature, the Project really does believe that as put forward to your Panel a path forward that will allow a lot of the concerns that have been raised to be addressed in a collaborative and respectful process and a fair -- and fair processes and a meaningful engagement going forward.

358. It's going to allow our country to enjoy tremendous economic benefits that would be afforded by this project, while at the same time providing fair and reasonable protection for local and regional interest.

359. In the next week or so, you're going to hear from parties on both sides of that question, from opponents and supporters. I can tell you that as we've done to date, we will be here; we will listen carefully to the submissions of opposing intervenors. We'll also listen carefully and probably with more agreement with the submissions of those who support the Project.

360. We will do our best to avoid interrupting anyone's submissions, but we will be paying close attention and I say, may address you if we consider that oral arguments are clearly going over the line in terms of adherence to your Panel's Procedural Directions.

361. There is a need for oral arguments, for example, to not include new evidence, as you've indicated, there is a need for oral arguments at this stage to reply to submissions that have been filed in writing as opposed to providing a re-

argument of a case. And we are a little bit concerned, based on some of the correspondence, that some of the intervenors may not have gotten that message, particularly ones that are unrepresented, but in some cases, ones that are. So it's possible that we may seek to address you, but I hope we won't need to.

362. Thank you.

363. **THE CHAIRPERSON:** Thank you, Mr. Neufeld.

364. Let's take our morning break and come back at 10:45 with any questions from the Panel.

365. Thank you.

--- Upon recessing at 10:29 a.m./L'audience est suspendue à 10h29
--- Upon resuming at 10:46 a.m./L'audience est reprise à 10h46

366. **THE CHAIRPERSON:** If we could ask everyone to take their seats again, please.

367. We're ready to get underway again. Please, if you'll take your seats. Thank you very much.

368. Thank you, Mr. Neufeld, the Panel has no questions.

369. We'll call next Coastal First Nations - Great Bear Initiative.

370. Good morning, Mr. Sterritt, please proceed.

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

371. **MR. STERRITT:** Good morning and thank you, Madam Chair and Panel. I want to thank you for this final opportunity to address you in what has been for us and I'm sure you, a very long and challenging process.

372. I also, if I could, Madam Chair, thank the intervenors that allowed me to kind of jump the key a little bit, I do have something extremely important I have to move on to.

373. I intend to respond to Enbridge's argument and also explain my

Coastal First Nations recommend that you dismiss their application and recommend that the Project be rejected on the grounds that it is incomplete, contrary to the public interest and is likely to cause significant adverse environmental impacts.

374. To begin with, I want to remind you that First Nations are not just stakeholders in this process. The Coastal First Nations is an alliance of First Nations who have Aboriginal rights and title from one end to the other of B.C.'s north and central coast as well as Haida Gwaii.

375. What this project represents for us and our people is a threat to the marine resources we harvest, and that has sustained our communities and our culture for millennia. Our future is dependent on these waters. This is not our backyard; this is an integral part of who we are. These are our constitutionally protected rights and title that are being put at risk.

376. That being said, I do not want you to think that Coastal First Nations and its members are opposed to development. In fact, the very purpose of Coastal First Nations is to develop a sustainable economy and to breathe life into our rights while we do that.

377. We have been doing this successfully now for about 14 or 15 years. We've done this in collaboration with other parties, with industry and with governments, both Canada and British Columbia.

378. However, as far as Northern Gateway is concerned, after studying all of the evidence, reading all of the studies and listening to all of the testimony, the Coastal First Nations remain unconvinced that the risk of introducing oil tankers carrying diluted bitumen into our waters is one that we can accept.

379. I say this because -- first, the evidence shows that Enbridge tanker operations -- even after considering mitigation measures -- will adversely affect First Nations' rights and title and our culture. I am referring specifically to the fact that Enbridge's proposed Fisheries Liaison Committee will not be effective in preventing impacts to our fisheries and their proposal to use whale spotters won't be effective in the dark to stop ships from striking whales.

380. Second, Coastal First Nations filed uncontested evidence that Enbridge has not proposed all of the measures available to it to prevent tanker incidents and reduce the risk that their project places on First Nations.

381. When Mr. Carruthers states that he wants to reduce the risk to as close to zero as reasonably practicable, he is acknowledging that there are many more measures that Enbridge could take but chooses not to because of cost.

382. In other words, it seems that Enbridge places more value on profit than they do on First Nations.

383. Third, the evidence shows that the likelihood of an oil spill is high, much higher than Enbridge has tried to portray.

384. Fourth, the evidence shows that a diluted bitumen spill will have the significant adverse effects on the environment and potential catastrophic effects on our Aboriginal rights and title.

385. Fifth, the evidence shows that the Application and your assessment is incomplete. You lacked an effective cumulative effects assessment because you have not considered or predicted what the environmental effects of all tankers associated with the 12 LNG proposed projects and the additional tankers that would be used by Enbridge when operating at full capacity.

386. You also lack information ---

387. **THE CHAIRPERSON:** Mr. Sterritt, sorry, I didn't mean to interrupt you in mid-sentence, but as we said in our Opening Statement and as we've said in the Procedural Directions, the purpose of oral argument is for you to address the written and the oral arguments of other parties, rather than re-state your position that you've already provided to us in written argument.

388. **MR. STERRITT:** Right.

389. **THE CHAIRPERSON:** So if we could have you present your reply in terms of the other arguments that have been filed and also, of course, of Northern Gateway's oral argument who has gone before you.

390. **MR. STERRITT:** Yes, that's where I'm heading.

391. **THE CHAIRPERSON:** Oh, could you get right there?

392. **MR. STERRITT:** Sure, yes.

393. **THE CHAIRPERSON:** Thank you.

394. **MR. STERRITT:** Okay, you lack information crucial to your assessment that answers the question of whether or not bitumen will sink or float. Without this, you can't complete an adequate risk assessment nor predict the consequences of a spill.

395. And number six, we do not believe that approving Northern Gateway is in the public interest and its need is questionable.

396. I now want address Enbridge's written arguments.

397. Enbridge argues that you should somehow dismiss Coastal First Nations concerns because they claim we did not participate in their risk assessment working group or that we did not engage in economic benefit discussions.

398. I want to explain to you as I have in other documents on the record that CFN felt it needed an overarching consultation understanding with Enbridge in order to protect our rights entitled before engaging in any of their working groups. If Enbridge had any understanding of dealing with First Nations in B.C., they would have known that such protocol agreements are the norm and, in fact, all First Nations that I am familiar with would want to know what the risks are before engaging in any discussions of benefits.

399. In fact, the NEB's own filing manual suggests that proponents consider establishing a consultation protocol in collaboration with Aboriginal groups that takes into consideration their needs and cultural elements.

400. Based on Coastal First Nations and their Member Nations' experience with Northern Gateway both before and during the JRP process, Northern Gateway has not been responsive to the needs, input or concerns of potentially affected groups, nor designed a consultation protocol with First Nations that takes into account their needs and cultural elements.

401. Therefore, Northern Gateway Pipeline has not met the essence of the NEB's requirements for Aboriginal consultation and engagement as they have claimed in their Final Arguments. I should also point out that, of the 25 groups invited to participate in the risk assessment working group, almost all declined

because they had similar concerns as we did.

402. In retrospect, given all that Enbridge has done or more accurately not done in the past several years to promote meaningful consultation, I believe we are right to be worried about how much we could trust Enbridge.

403. And lastly, I don't even know where to begin in responding to Enbridge's argument that we cannot fairly complain about the cost of participating in the JRP process, while at the same time pursuing advertising campaigns outside of it.

404. Perhaps I should simply state that our participation costs were under $300,000 while Enbridge has flaunted a budget in excess of $300 million for this Project. The majority of our campaigns have been earned media. Our one little video with facts cost us $2500 and produced over 100,000 hits on social media, and we didn't even disappear any islands in doing this.

405. And secondly, I don't know how Enbridge can possibly expect that such statements are going to help them develop any long-term trusting relationship with us. It's too bad that they did not decide to restart discussion with us in 2011 and has instead decided to take this adversarial approach.

406. Enbridge argues that you should ignore some intervenors' evidence because they have chosen to criticize Northern Gateway Pipeline rather than suggest ways the Project could be improved. As far as I know, it is the responsibility of intervenors, governments and the JRP to identify issues and concerns and for Enbridge to respond to them.

407. This is, in fact, what happened with respect to the pipeline. Enbridge heard concerns and made changes to river crossings, routes and pipe thickness. Interestingly enough, they have made no changes whatsoever to the marine portion of the Project in the face of issues and concerns that we have all expressed.

408. My last comment on Enbridge's argument that Intervenors were not collaborative is this: If Enbridge wanted a truly collaborative process, they would not have developed their project in such an uncollaborative way.

409. I now want to address Enbridge's argument that routine tanker operations would have little adverse impact with respect to killer whales.

410. By the way, my wife, my children and most of my 16 grandchildren are killer whales. And as such, killer whales are regarded as our kin, our family, and an important part of our culture. Enbridge's solution makes absolutely no sense. We heard undisputed testimony that Enbridge's proposal to mitigate the noise effect of tankers on whales by reducing speed will actually increase those effects.

411. Secondly, we also heard undisputed testimony that the use of both whale spotters and technology will not be effective in preventing whale strikes at night.

412. Both of these potential adverse effects would result in significant cumulative effects of marine traffic for all proposed LNG projects and -- Northern Gateway operating at full capacity were to be considered.

413. Enbridge also argues that despite the fact that Northern Resident Killer Whales will be impacted by tanker noise and despite the fact that they cannot predict with any confidence that these impacts would not be significant, that it is okay to approve the Project without the necessary information to make a prediction.

414. As far as the Coastal First Nations is concerned, this is not an issue that can be left until after the Project is approved. Killer Whales are an inherent part of First Nations' culture and adverse effects on them will have corresponding adverse effects on First Nations' rights and title.

415. Enbridge's proposed post-approval monitoring study comes too late to offer any protection and does nothing to inform the decision on whether this Project should be approved.

416. With respect to our fisheries, the main measure proposed by Enbridge to mitigate tanker impacts is the Fisheries Liaison Committee. To begin with, I cannot help but point out the irony in Enbridge's argument about bringing all parties together to manage marine traffic when this was something that the original Pacific North Coast Integrated Management Area Process was to have dealt with before it was unilaterally changed by Canada to make sure that all potential obstacles to Northern Gateway were removed. This after much lobbying by the Canadian Association of Petroleum Producers and Enbridge.

417. Secondly, Enbridge argues that they could possibly find ways to accommodate our fisheries by having their tankers avoid fishers. If they were serious about this, they could simply commit to not allowing tankers to enter areas where such fishing was underway. They have made no such commitment.

418. As far as we are concerned, and as the evidence shows, Enbridge sees itself as having an effective veto over the Fisheries Liaison Committee, thus ensuring nothing contrary to its own self-interest would result from this proposed committee. We have argued that this committee, as proposed, will be ineffective because it would lack any regulatory authority to implement or enforce its decisions and recommendations.

419. And lastly, Enbridge argues that it will pay fishers for gear damage or loss. I can't help but wonder why they would not also agree to pay compensation for our lost fishing time which can be quite significant at a time limited fishery in which we could lose hours pulling up fishing gear, stepping aside for a tanker, then resetting the gear. Considered cumulatively this could be a significant adverse effect, far greater than any gear that we might lose.

420. Enbridge also argues that the joint review process should discount ours and other First Nations evidence with regard to potential adverse effects because as Enbridge states:

> *"None of the Coastal First Nations with interests in marine areas transited by vessels calling at Kitimat has engaged in meaningful discussions with Northern Gateway regarding project benefits."* (As read)

421. I have quoted this so as to remind myself, and you, how insulting this statement is. The suggestion that the joint review process must trade off our concerns against unspecified benefits reveals that Enbridge views First Nations' concerns as minor concerns that can be bought off. I would suggest to you that this attitude goes a long way in explaining why Enbridge's consultations have been so unproductive.

422. Let's talk a little bit about Kitimat air quality. I want to discuss Enbridge's argument that their 220 tankers will not result in significant air quality changes. Their own air quality impact study shows that Northern Gateway pipeline will result in air emissions that exceed federal, provincial, and international air quality standards and will have an adverse effect on human

health.

423. Secondly, if Enbridge had done a comprehensive cumulative effects assessment, taking into account the total number of tankers they require at full operating capacity, along with the number of tankers estimated to be associated with all of the LNG projects, their impact prediction would show even higher adverse air quality impacts. Therefore, there is no basis for Enbridge's claim that air quality impacts will not be significant.

424. Under invasive species, Enbridge argues that we should not be concerned about their tankers introducing invasive species into our waters, those species that would threaten our livelihoods, because they will follow international and Canadian law.

425. This provides us with little comfort, since these laws have proven to be ineffective. Similarly, we find no comfort in their statement that there are few measures currently available to minimize hull fouling.

426. Coastal First Nations is extremely concerned about the sizeable increase in marine vessels and the potential for their introducing invasive species which can adversely affect the marine environment upon which we are dependent.

427. We feel that the least Enbridge could have done in responding to this concern is to identify what measures may be available, or even what options exist to address this issue. Their proposal to monitor the situation after the fact would of course be too little too late.

428. Moving on to the fate and behaviour of diluted bitumen. I want to talk now, and discuss with you, one of the key issues in the review which has been the subject of so much discussion, whether diluted bitumen will sink.

429. I remain astounded that Enbridge can argue that the answer to this question be left until the Project is approved. We feel strongly that the answer to this question is needed now, before any kind of assessment, conclusions, and any decisions are made.

430. Given the testimony of Canada's scientists under cross-examination, there is a great deal of uncertainty about whether diluted bitumen will sink. And also where high sediment areas are located, that increase the risk of oil sinking are located.

431. Coastal First Nations fails to see how the JRP can assess the consequences of an oil spill if you don't even know where the oil is going to end up; on the bottom in our halibut, black cod and crab spawning areas or in the intertidal zone destroying the shellfish that have sustained us for millennia. We also note that this information is required for the risk assessment demanded by the CEAA regulatory requirements.

432. In addition, since Enbridge's spill scenarios did not include situations in which the diluted bitumen sunk, except at shore, they need to be redone before the assessment is completed and decisions made.

433. To conclude with this issue, we are flabbergasted by Enbridge's assertion that they have filed more than enough evidence on this issue. This assertion is outrageous and ignores the fact that the quality of their evidence has not stood up to review in this process.

434. And tankers, Enbridge argues that there have been many improvements to tanker safety as a result of International Maritime Organization's regulations and government action. However, I would like to point out that Enbridge has been deliberately misleading at this statement.

435. They try to give the impression that their tankers will meet IMO standards when in fact their own witnesses have testified that they have refused to commit to using newer tankers that meet IMO standards for cargo tank corrosion coating, something that would reduce the risk of marine incidents and oil spills. Perhaps this is what is meant by not practicable?

436. Under consultation, Enbridge ends their argument by claiming that the joint review process should conclude that their public consultation and Aboriginal engagement programs have been broad, inclusive, meaningful, and effective.

437. Coastal First Nation reminds the Joint Review Panel that this statement is totally contrary to the undisputed evidence we filed that showed that Enbridge CEO, Pat Daniels, admitted that Enbridge consultations were so inadequate that he wished that we could go back and restart the clock.

438. Enbridge has not consulted broadly. They have not consulted with First Nations on Vancouver Island for instance, who would be affected by a spill in the Queen Charlotte Sound area.

439. Similarly, given the fact Enbridge has failed to obtain support from First Nations on the coast of B.C., it is hard to understand how they can make a statement that their consultations were effective. In fact, Enbridge has refused to identify which, if any First Nations in B.C., support the Project. And whether that support includes any acceptance or acknowledgement of the risks associated with the Project.

440. Given Enbridge's consultation track record, Coastal First Nations wonders if Enbridge told those First Nations, who they claim have signed on to their equity agreement that, as Enbridge testified in Edmonton, their payouts would be affected by oil spill liabilities.

441. As for the meaningfulness of their consultations, our written argument has extensive discussion on that topic. And I don't want to repeat that here.

442. I also want to state that as far as we are concerned the consultation on this process by both Canada and Enbridge has been deficient, and any reliance by Canada on our participation in the JRP for filing -- for fulfilling its obligations would be misplaced.

443. Let me reiterate the legalities of this. Enbridge has not taken effective measures to effectively address and remedy the implications of tanker traffic and oil spills on the Aboriginal rights and title of First Nations.

444. On cross-examination Enbridge readily acknowledged and admitted the existence of Constitutional and Aboriginal rights of First Nations to fish for food, social and ceremonial purposes. Furthermore, Enbridge also acknowledged and admitted the crucial importance of protecting Aboriginal culture and spiritual values, as well as First Nations ability to fish for their livelihood.

445. Yet, to date, no resolution or understanding has been reached between Enbridge and First Nations regarding how First Nations concerns are to be substantially addressed nor has the federal Crown addressed First Nations' concerns as required by law.

446. Under justification, neither Enbridge nor the Crown have demonstrated how the detrimental effects of tanker traffic or oil spills on Aboriginal rights can be justified. For example, no compelling evidence justifying the infringement of the Heiltsuk commercial right or First Nations

rights to fish for food, social and ceremonial purposes has been tendered. Enbridge justification is one of denial.

447. Yet, justification must be established before any proper valid and legal recommendation can be made by this tribunal. In fact, the Supreme Court's reference in *Delgamuukw* to seeking the consent of First Nations in regard to decisions which impact fishing rights is particularly salient. In this case, First Nation concerns have not been substantially addressed.

448. Indeed, when Coastal First Nations in good faith requested that Northern Gateway suspend proceedings for a time in order to create a meaningful opportunity for such consultations, Enbridge declined to do so.

449. Furthermore, the Supreme Court in *Delgamuukw* expands our current understanding of how an infringement can be justified by providing that compensation will ordinarily be required by the Crown when infringement has occurred.

450. In this case, the evidence shows that there is no reliable or adequate measure for ensuring that the Crown or Enbridge will assume responsibility for paying First Nations compensation for the severe losses associated with potential oil spills, our losses caused by the disruption of fishing activities by tanker traffic.

451. The evidence does not establish that the available compensation schemes will be sufficient, yet the onus lies with the Crown and Enbridge to effectively address these concerns, and they have not. Nor has Northern Gateway or the Crown met their burden of proof in establishing that the infringement by the Project will -- on our rights will be minimized.

452. That priority has been given to the exercise of Aboriginal rights and that compensation will be entirely inadequate to address the irreparable harm caused by an oil spill or tanker interfering with our fishing.

453. Enbridge also argues that First Nations do not have jurisdictional or sovereign rights. With respect, Enbridge mischaracterizes the issue.

454. The issue centres on recognizing the right of First Nations to have a voice in how decisions are made that affect their lands and waters within their traditional territory. Further, the existence of inherent Aboriginal governance rights, which co-exist with federal and provincial authority, is supported by

Canadian jurisprudence.

455. The case law makes it very clear that Northern Gateway cannot summarily dismiss the customary laws or jurisdictional rights of First Nations as merely political in nature and therefore, unenforceable. As the Supreme Court of Canada reasoned in *Delgamuukw,* First Nations have the right to choose to what uses Aboriginal lands and resources can be put.

456. Enbridge also attempts to dismiss the legitimacy of Aboriginal title on the basis that it has not yet been proven, however the Haida case has made it abundantly clear that Aboriginal rights cannot be dismissed prior to their proof.

457. In sum, the legal obligation to consult and the accommodation of First Nations interests has not been met by Enbridge or the Crown and Coastal First Nations has been denied the opportunity for full participation because of inadequate funding.

458. I'd now like to briefly summarize what we've learned from this review: One, Coastal First Nations has identified at least 40 significant informational missions preventing adequate assessment required of the JRP and legislation and other regulatory documents.

459. Second, tanker operations could result in significant cumulative adverse effects after mitigation is applied and Northern Gateway should be rejected.

460. Third, as I have discussed, the fundamental question that the JRP is required to answer to fulfill its statutory obligations is what is the probability of an oil spill from the Northern Gateway Pipeline Project and how accurate is the probability estimate.

461. CFN argues that you do not have the required evidence you need to answer this question as specified in your scope of factors. Specifically, you do not know what the probability of an oil spill is for the entire Northern Gateway Pipeline Project over its operating life since Enbridge has only provided information on spill return periods for some components of the Project but not for the entire project.

462. **THE CHAIRPERSON:** Mr. Sterritt, as we mentioned, we have read your written argument.

463. **MR. STERRITT:** M'hm.

464. **THE CHAIRPERSON:** And so what we're here to listen to today is for you to address the written and oral arguments, whether you disagree with them or whether that you're supportive of them, but there's no need to repeat what you've already given to us in written argument.

465. **MR. STERRITT:** Okay.

466. **THE CHAIRPERSON:** Perhaps you want to just take a look at your notes and -- and take a moment to see because as I said, we've read it and we -- we don't need to hear your argument repeated. We're here to listen to your reply to other arguments that have been made.

467. **MR. STERRITT:** Okay, we're getting close to the end, Madam Chair. You also ---

468. **THE CHAIRPERSON:** It's just to make sure that ---

469. **MR. STERRITT:** Yeah ---

470. **THE CHAIRPERSON:** We're all here for the same purposes.

471. **MR. STERRITT:** Right, well I think we are.

472. **THE CHAIRPERSON:** We've all worked hard on this and I can assure you that ---

473. **MR. STERRITT:** Yeah.

474. **THE CHAIRPERSON:** --- we have read what you've written.

475. **MR. STERRITT:** Yeah.

476. **THE CHAIRPERSON:** So what we're interested now is in your reply to arguments that have been presented by others.

477. **MR. STERRITT:** M'hm, okay.

478. Okay, Enbridge has not provided confidence intervals testing the reliability of these estimates. They have not completed adequate sensitivity analysis. They have not identified sources of errors in or qualifications to their estimates and they have made no attempt to define an acceptable level of risk.

479. And you do not know how accurate Enbridge's oil spill risk assessment is because Enbridge relied on data that underestimates tanker incidents by up to 96 percent. Enbridge used an ad hoc subjective process for determining scaling factors to adjust the spill risk downward. Enbridge relied on vessel density forecasts that underestimate density and risk by excluding LNG projects proposed for Kitimat and Prince Rupert.

480. Enbridge adjusted the spill risk downward by as much as 90 percent to reflect the impact of tug escorts without providing any documentation to support this claim. In fact, Enbridge -- in fact, CFN evidence shows, if you use the highly-respected U.S. government oil spill risk model, the forecast return periods are between 6 and 10 years compared to Northern Gateway's 250 years.

481. **THE CHAIRPERSON:** And my recollection, Mr. Sterritt is that you dealt with that in your written argument?

482. **MR. STERRITT:** Yeah, and I just -- that's why I skipped half that page ---

483. **THE CHAIRPERSON:** I will say that we read 2,700 pages, so I'm not going to be able to zone right in, ---

484. **MR. STERRITT:** Right.

485. **THE CHAIRPERSON:** --- but it's just that the intent of you spending this time to reply to the arguments that others have presented as opposed to repeating the evidence -- the argument, sorry, that you've already presented to us.

486. **MR. STERRITT:** Okay.

487. Okay, Madam Chair, Enbridge has refused to accept any liability for damages from all marine spills and their own evidence clearly shows that the cost of a larger marine spill will exceed compensation from all sources and could result in a shortfall of compensation between 1 and $7 billion. That will be -- that

would have to be made up by taxpayers and those suffering damages.

488. Coastal First Nations argued that those most likely to suffer uncompensated and devastated damages will be First Nations, since the evidence shows that environmental degradation that impacts spiritual and cultural health are not eligible for compensation, and those damages that are eligible are subject to costly litigation processes that generate further social and psychological costs.

489. Madam Chair, I'd also like to talk about the public interest. I want to clearly state that as far as we're concerned Northern Gateway pipeline is not in the public interest and should be rejected on that basis. If you bear with me, I will briefly list the reasons why I say this.

490. How can it be in the public interest to approve a project that is opposed by all coastal First Nations? Not just ours, but all of those on the whole coast.

491. How can it be in the public interest to approve a project when First Nations constitutionally protected rights will be adversely affected and where the legal obligations to First Nations have not been fulfilled and when there has been no peaceful reconciliation?

492. How can it be in the public interest to approve the Project when the biologically diverse and healthy marine ecosystem that we rely on is already under significant risk by human activity and will be further threatened?

493. How can it be in the public interest to approve the Project when the First Nations are not prepared to accept the risk and precaution expected of it? How can it be in the public interest to approve the Project when the likely adverse environmental effects cannot be adequately mitigated or compensated?

494. How can it be in the public interest to approve a project that imposes a significant risk on third parties who receive none of the benefits? How can it be in the public interest to approve a project that is opposed by First Nations, the First Nations Summit, the Assembly of First Nations, the Union of B.C. Indian Chiefs and every -- all other First Nations?

495. How can it be in the public interest to approve a project that is approved by elected officials, such as the Union of B.C. Municipalities, the B.C. NDP, the B.C. Liberal Party and 143 federal MPs?

496. How can it be in the public interest when the social and economic benefits generated within the boundaries of Canada do not necessarily benefit Canadians, that which you are required to consider, but rather, benefits foreign companies and foreign shareholders to the tune of 47 percent?

497. We clearly illustrated in our cross of Enbridge on September 20, 2012, that they did not include this in their cost uplift analysis and, accordingly, overstated the benefits they have been touting.

498. How can it be in the public interest to approve the Project when there have been such enormous opposition voiced to the JRP by 4,000 letters, 200 intervenors, oral evidence of 380 witnesses, 1,200 oral statements and ---

499. **THE CHAIRPERSON:** Mr. Sterritt ---

500. **MR. STERRITT:** --- 1,174 oral presenters?

501. **THE CHAIRPERSON:** Mr. Sterritt, the Panel is being patient.

502. **MR. STERRITT:** I'm just going to close now.

503. **THE CHAIRPERSON:** The Panel is being patient, but we really are here -- we have had the benefit of reading your written argument.

504. **MR. STERRITT:** Yeah.

505. **THE CHAIRPERSON:** And we're really here to hear your reply to the written argument and the oral argument of those who've gone before you.

506. **MR. STERRITT:** Okay. I've got a couple of pages and then I'll be out of here.

507. **THE CHAIRPERSON:** Can you take a look at them and just ---

508. **MR. STERRITT:** Yeah.

509. **THE CHAIRPERSON:** --- make sure that they actually are responding to the arguments because that is what we're here for today.

510. **MR. STERRITT:** Okay.

511. **THE CHAIRPERSON:** So just take a couple minutes. You've still got 24 minutes, so you're not in a rush for time. But it is important that we hear what your reply is to the argument of others who have presented argument.

--- (A short pause/Courte pause)

512. **MR. STERRITT:** Okay, Madam Chair, along -- along the same lines, but ---

513. **THE CHAIRPERSON:** And so what we're listening ---

514. **MR. STERRITT:** --- I'm going to -- I'm ---

515. **THE CHAIRPERSON:** What we're interested in is ---

516. **MR. STERRITT:** --- going to talk about Enbridge's comments.

517. **THE CHAIRPERSON:** So what we're interested in is your reply to ---

518. **MR. STERRITT:** Right.

519. **THE CHAIRPERSON:** --- arguments that have been made by others.

520. **MR. STERRITT:** Right.

521. **THE CHAIRPERSON:** So if you could just focus on that.

522. **MR. STERRITT:** By Enbridge as well; right?

523. **THE CHAIRPERSON:** Yes.

524. **MR. STERRITT:** Yeah, exactly.

525. **THE CHAIRPERSON:** And other arguments that you might be aligned with. Whatever your comments are as far as ---

526. **MR. STERRITT:** Right.

527. **THE CHAIRPERSON:** --- the arguments that have already come forward so far.

528. **MR. STERRITT:** Right.

529. **THE CHAIRPERSON:** As opposed to presenting ---

530. **MR. STERRITT:** Okay.

531. **THE CHAIRPERSON:** --- your argument again to us.

532. **MR. STERRITT:** Okay.

533. **THE CHAIRPERSON:** Thank you.

534. **MR. STERRITT:** Okay. So we filed evidence that shows Northern Gateway isn't needed. That's a given. We have also shown that Enbridge's price lift argument is based on erroneous assumptions ---

535. **THE CHAIRPERSON:** Mr. Sterritt, this is in your written argument. Have you got reply to what Enbridge or, sorry, what Northern Gateway has presented in their arguments? Is there something more that you want to say that goes beyond what you've provided in your argument in reply to what either Northern Gateway or other parties have presented?

536. And we do this because it's fair for everybody. We don't want to apply different rules to different people, and we've tried to be very clear in our Procedural Directions what the purpose of the reply -- the oral reply argument is.

537. **MR. STERRITT:** Okay. Madam Chair, I'd like to talk a little bit about some of the JRP rulings, if that's okay with you.

538. **THE CHAIRPERSON:** If they've been raised in other arguments and are not part of your argument that you've already presented, that's the sort of thing that we want to hear about.

539. **MR. STERRITT:** Yeah, we haven't made the argument to this, although we want to make the point about that. So I've got like two pages left here and ---

540. **THE CHAIRPERSON:** Let's try it.

541. **MR. STERRITT:** Let’s try it on.

542. **THE CHAIRPERSON:** It's just it's very important that the rules apply to everybody.

543. **MR. STERRITT:** Yeah, we think it’s important. Yeah.

544. **THE CHAIRPERSON:** And so we need to be very consistent with the direction that we've provided and the way we implement it.

545. **MR. STERRITT:** Okay. So we have not made this point before, but before I conclude, I wanted to -- and it's unfortunate, I don't really want to go down this road, but we think it's necessary to mention that the Coastal First Nations feel that the joint review process has made several rulings that deprive us of our -- of the information we consider is needed to complete an adequate assessment.

546. Specifically, the JRP ruled against CFN's Motion No. 2 asking for adjournment to allow proper consultation to occur.

547. **THE CHAIRPERSON:** Mr. Sterritt, I don't recall reading this in your argument, and so it sounds to me like you're bringing up new argument ---

548. **MR. STERRITT:** You want me to ---

549. **THE CHAIRPERSON:** --- at this point. Is that correct?

550. **MR. STERRITT:** I'm -- it wasn't in our argument. You said you don't want my argument. If I've already presented it, I don't want to present it again; right?

551. **THE CHAIRPERSON:** That's right. And also, here's the next rule. You can't bring in new argument at this point. You can only reply to the argument that others have brought forward.

552. **MR. STERRITT:** Okay.

553. **THE CHAIRPERSON:** Thank you.

554. **MR. STERRITT:** Okay. So the fact that you've ruled against us in motions and that submitted information that we were trying to get out of Enbridge is -- because that's the linkage. We were trying to get information out of Enbridge and you made rulings that we think restricted us from getting that information. So that's why we were trying to bring it up in this context.

555. So -- but that's fine. If I could go to my concluding remarks.

556. **THE CHAIRPERSON:** Thank you, Mr. Sterritt.

557. **MR. STERRITT:** In closing, the fundamental question such as the likelihood of adverse environmental effects has not been answered and, consequently, we do not think that you can proceed to fulfil your statutory obligations in the face of insufficient evidence. If you contravene your own requirements and find the application complete, then you must decide whether the application, when taking into account mitigation measures, is likely to cause significant adverse effects.

558. On this question, the evidence is clear; Northern Gateway pipeline is likely to cause significant adverse environmental effects.

559. You must also decide if Northern Gateway pipeline is needed in the public interest. Again, the evidence is clear. Enbridge has failed to meet its burden of proof requirement to demonstrate that Northern Gateway pipeline is needed or in the public interest.

560. The evidence and the public preference expressed in the JRP clearly shows that it is not in the public interest because the risks and costs exceed the benefits.

561. Finally, let me say that approval of Northern Gateway in the face of overwhelming opposition is a recipe for conflict that is contrary to the national interest and the interests of all parties involved.

562. We have experienced similar conflicts in the past and we have learned the painful lessons that these have imposed upon us.

563. **THE CHAIRPERSON:** Mr. Sterritt, again, I believe you covered

that in your written argument, so if you could move to any wrap-up comments you have in response to arguments that others have filed.

564. **MR. STERRITT:** Okay, Madam Chair, as you deliberate your final recommendations for the federal Cabinet, we'd like you -- like to ask you to remember this. Despite the hundreds of millions of dollars and effort by the Proponent, British Columbia, First Nations, and all of the public in British Columbia have rejected this project.

565. In all my decades of experience, I have never, ever witnessed a project that has garnered such opposition. Never in the history of British Columbia.

566. I don't envy the position that you're in, but I think you should think -- if you think this is in the public interest, you may very well find that this creates nothing but conflict in British Columbia.

567. With that, I wish you well in your deliberations and I thank you for your patience, and I even understand some of your impatience with me.

--- (Laughter/Rires)

568. **MR. STERRITT:** So thank you very much.

569. **THE CHAIRPERSON:** One can hope for no more than that, Mr. Sterritt. Thank you very much, Mr. Sterritt.

570. **MR. STERRITT:** Thank you.

571. **THE CHAIRPERSON:** Mr. Sterritt, just before you leave, the Panel doesn't have any questions for you, so thank you very much.

572. **MR. STERRITT:** Please, please.

--- (Laughter/Rires)

573. **THE CHAIRPERSON:** Thank you.

--- (A short pause/Courte pause)

574. **THE CHAIRPERSON:** So before we call Alexander First Nation,

we're just going to take a five-minute break and we'll be back at let's say 11:40.

575. Thank you, everyone.

--- Upon recessing at 11:31 a.m./L'audience est suspendue à 11h31
--- Upon resuming at 11:41 a.m./L'audience est reprise à 11h41

576. **THE CHAIRPERSON:** If we could get everyone to take their seats, I believe we're ready to get underway shortly.

--- (A short pause/Courte pause)

577. **THE CHAIRPERSON:** Thank you very much everyone.

578. I believe we're also expecting Chief Arcand, Ms. O'Driscoll?

579. Is that right? Is he going to be there shortly?

580. **MS. O'DRISCOLL:** Yes, Madam Chair. He's actually just had his headdress smudged and should be joining us momentarily.

581. **THE CHAIRPERSON:** Thank you, Ms. O'Driscoll.

--- (A short pause/Courte pause)

582. **THE CHAIRPERSON:** Good morning, Chief Arcand, Ms. O'Driscoll.

583. Ms. O'Driscoll, before we get underway, I just want to confirm that you have reviewed with your client the purpose of what we're here for today, which is reply argument because we don't want to have any disrespect.

584. And so we want to just make sure that the purpose of today is fully understood and if you need to take a few minutes to review that with your client we'd be very happy to do that.

585. **MS. O'DRISCOLL:** Thank you, Madam Chair, and good morning to the entire Panel.

586. I nod my head as you pass that comment because that was actually part of my introductory address to you is to confirm that we are very aware and mindful of the rules.

587. And to provide some direction for the Panel to be able to follow the Chief's submissions momentarily here, he will be doing a general introduction.

588. There will be some familiar words and thoughts but it's just part of tradition to fully identify his capacity and that of his community. He will then be addressing very specifically the concept of equity participation which was raised in Northern Gateway's written submissions and that's the context of the argument you will see presented.

589. The secondary part will be honour of the Crown and how that hinges, of course, with that economic engagement aspect of the Project.

590. **THE CHAIRPERSON:** Thank you, Ms. O'Driscoll.

591. Can you help us understand the argument where Crown consultation was raised that Chief Arcand will be responding to?

592. **MS. O'DRISCOLL:** I'm a little confused on your question.

593. **THE CHAIRPERSON:** I may not have been clear.

594. And so I understand that Chief Arcand is going to speak to Crown consultation and I'm seeking to understand if you can help us understand the argument where the Crown consultation was raised that he's now responding to.

595. **MS. O'DRISCOLL:** Oh, forgive me.

596. Equity participation is the driving factor. It was not consultation. Obviously, there is an overlap because they cannot be isolated and so I flag it to your attention to realize the context in which his comments are being made.

597. The driving focus and the underpinning is the equity participation that Alexander has chosen to engage in with the Applicant. And it's those comments from the Applicant's submissions as well as his response to the submissions of the government participants in that regard.

598. **THE CHAIRPERSON:** Thank you, Ms. O'Driscoll.

599. **MS. O'DRISCOLL:** Just further housekeeping with respect to the submission.

600. We did make the request for one hour but, in light of the very narrow scope and the nature of the Chief's submissions, we anticipate probably half an hour at most. Okay.

601. **THE CHAIRPERSON:** Thank you.

602. Are those your preliminary comments and we turn now to Chief Arcand?

603. **MS. O'DRISCOLL:** If I may, Chair, just to properly, formally address the Panel.

604. **THE CHAIRPERSON:** Absolutely.

--- ORAL ARGUMENT BY/PLAIDOIRIE PAR MS. O'DRISCOLL AND CHIEF ARCAND:

605. **MS. O'DRISCOLL:** And a couple of comments in response to the oral submissions that have been presented earlier this morning.

606. First of all, for the record, my name is Caroline O'Driscoll of O'Driscoll and Company and I'm acting as legal counsel for the intervenor Alexander First Nation.

607. Shortly, I will be introducing Chief Herb Arcand who will be presenting the final oral argument of the Alexander First Nation. Prior to the Chief coming to the microphone here, there are a couple of key facts or arguments, I should note, that were raised in the applicant's submissions -- oral submissions earlier this morning.

608. The first was with respect specifically to the consultation process not being completed and, in fact, Alexander would agree with that. If we make reference back to Alexander's written submissions and particular focus and attention given to Alexander's recommendations, Alexander is suggesting that the Panel has the opportunity and the authority to actually set the Crown straight and

ensure that adequate and fulsome consultation is completed prior to that final endpoint when a certificate is to be contemplated to be issued.

609. The second aspect of this morning's submissions, again from the Applicant, that we wish to note for the record is the clear absence of specific comments with respect to Alexander's recommendations to this Panel. We would suggest that the lack of comment would endorse the principle that the Applicant does not have issue with the recommendations that Alexander has presented to you in their written submission.

610. With those preliminary comments, I now defer to Chief Arcand to present the argument -- oral argument of the Alexander First Nation. Thank you.

611. **THE CHAIRPERSON:** Thank you, Ms. O'Driscoll.

612. Good morning, Chief Arcand. Thank you for being with us this morning.

613. **CHIEF ARCAND:** … and good morning.

614. I would like to start by thanking the Creator for another day and for providing us with safe travels to make it here.

615. As is our tradition within Treaty 6 territory, I want to acknowledge the Tsimshian First Nations and, more specifically, the Gitxaalas and the Gitsumkalum people for allowing us to be in their traditional territory today.

616. I also want to recognize Mr. Curtis Arcand, a Band Council member from the Alexander First Nation from Treaty 6 territory who is here today with me in attendance and to thank him for helping me prepare for this day.

617. I also want to say hello and acknowledge all the Alexander First Nation members who are listening to these proceedings today.

618. Last but not least, I want to recognize you, the Joint Review Panel, once again. I am grateful for another opportunity to speak to you and present our final oral submission in this beautiful territory. The Tsimshian are truly blessed by Mother Earth to have such a rich and natural, breathtaking territory and I am very humbled to be here today.

619. I am here today on behalf of the Alexander First Nation. Our submission is based on our understanding that your decisions has many implications for Canada, as well as for the First Nations in Canada and so I can appreciate that it's not an easy or simple decision that you have to make.

620. We, in Alexander, continue to be astounded that, in this day and age, the general public in Canada is still largely naïve about the complexity of this Northern Gateway Application, about Indigenous people in general and, more specifically, the general lack of understanding about the rights that we, in Alexander, possess and that are guaranteed to us by virtue of us being a nation or tribe within the meaning of the World Proclamation of 1763, signatories in a tribe or band within the meaning of our sacred Treaty Number 6 of 1876 and organized society of collectivity in an Aboriginal people within the meaning of the *Constitution Act, 1982* and an Indian band as defined under *The Indian Act*.

621. Furthermore, as I have identified to this Panel before, the members of the Alexander First Nation are also Indians within the meaning of Section 9124 of the *Constitution Act of 1867*, the *Rupert's Land and North-Western Territory Order of 1870*, the *Constitution Act, 1930* and the *Constitution Act, 1982*.

622. We are also Treaty Indians under a sacred Treaty Number 6 and Aboriginal peoples within the meaning of the *Constitution Act of 1982* and, notably, Sections 25 and 35 thereof, as well as Indigenous people as the term is used in the *United Nations Declaration on the rights of indigenous peoples*.

623. It is our hope that our participation in this JRP process has shed light on the complex issues that arise when a development proposal overlaps with our constitutionally protected Treaty and Aboriginal rights, be it this Application or otherwise.

624. More importantly though, we hope that our participation has helped to clarify these issues in the context of this Application and fostered a deeper level of understanding for this Panel, so that you are able to recognize that our rights go well beyond the list of issues which effectively marginalized the Alexander First Nation in this JRP process.

625. In our written submissions, we provided several suggestions for conditions on the Project to ensure that the Crown is held accountable for the immediate and long-term implications of its conduct in connection with our Aboriginal and Treaty rights. If this Panel's increased understanding of the

complexity and implications of these issues has not already prompted you to adopt our suggested conditions, I now ask you on behalf of my community to avail of my participation here today and ask me any additional questions that you may have at the end of my oral submissions so that I can assist you in reaching that level of understanding.

626. Like the leaders of the other First Nations and the federal and provincial governments participating in this process, I worry about how my council and I will be able to provide quality services and programs, employment and sustainable development for our people. The daily and ongoing challenge of Alexander's leadership is finding the balance in achieving these goals while trying to maintain a way of life as guided by our own worldview.

627. In simpler terms, the Alexander First Nation has two fundamental priorities of equal importance when it engages in this JRP process. Number one: protection of our Treaty and Aboriginal rights. Number two: community sustainability.

628. These are not simply tenets of the political platform of our current Chief-in-Council; they are core mandates that permeate throughout our community reflecting the teachings of our Elders.

629. Of greatest significance is that our traditional teachings and beliefs emphasize that these two principles are not mutually exclusive. They are inherently intertwined to complement and reinforce one another.

630. Unfortunately, this process has made it abundantly clear to us that the federal Crown does not understand how these concepts coexist and evolve together.

631. For instance, when the federal Crown failed to request that our unique community and land interests be added to the list of issues and/or otherwise expressly be accounted for this process; when the federal Crown failed to engage in consultation with us to determine the accommodation and compensation that is required with respect to our unique interests and constitutionally protected rights; when the federal Crown chose to rely on the Applicant to engage with our community under the generic guidance of the federal Crown's consultation policy, but without advising the Applicant of the magnitude and significance of our various rights and the fact the nature of our rights requires accommodation and compensation; and when the federal Crown chose not to follow-up in a

meaningful way on any of our submissions and requests during this process.

632. So yes, when the federal Crown failed to act in all of these different ways, the Alexander First Nation was basically coerced into pitting its two core principles against one another.

633. Just consider for a moment the two contrasting options available to our leadership. Option number one, oppose this project on the grounds of the lack of proper scope in their Terms of Reference and the Crown's failure to consult and accommodate and to compensate the Alexander First Nation. Such staunch opposition to any form of development has immediate implications on our potential business opportunities.

634. Despite the fact that our opposition is directed at the Crown, in reality, it is industry that is the first impacted and affected by our opposition. How can the Alexander First Nation even contemplate meaningful engagement with industry for sustainable economic development when its opposition of a project potentially equates to obstacles and the perception that we are antidevelopment?

635. Alternatively, we could consider an option number two; support the Project based on the rationale that it will facilitate economic development opportunities. However, time and time again, and this process is no exception, the federal Crown treats our industry engagement as though it is meaningful and successful consultation, even though our rights are not even fully identified and/or understood for the creation of a business relationship.

636. Business negotiations are not consultation, and more importantly, they are not accommodation and compensation for our constitutionally protected Treaty and Aboriginal rights.

637. In reality, proximity of our community lands and traditional territory to a given project increases the polarity of our community mandates, since proximity promotes industry interest and business relations, exponentially inflating the downside of each option.

638. This project is no exception to this pattern. As a result, the Alexander First Nation cannot afford the luxury of taking a hard position with either option since it requires us to essentially pick one of our community mandates over another. Diminishing the protection of Treaty and Aboriginal rights in the interest of community sustainability or vice versa is not an option.

639. Adding insult to potential injury, if we even wanted to consider taking a strong position in support of opposition, the nature of our TLE lands to the north of our main reserve, that is lands destined to become reserve lands, further compounds the effects of a hard position, since our community stands to potentially inherit the pipelines regardless of rerouting options.

640. As I have just stated, compromising on either of our two core principles is simply not an option. Thus, the Alexander First Nation's approach to this proposed project has been two-fold. Firstly, we engaged in a JRP process to the maximum extent that our capacity and resources has allowed.

641. And secondly, we engaged with the Applicant directly in business negotiations to see if there was any way we could re-establish some nominal degree of control over the fate of our community and lands, since the Crown's failures to consult has completely compromised our rights and community goals.

642. I will speak to each of these in turn. Number one, our engagement in the JRP process.

643. As noted in the Applicant's final written argument at paragraph 74, Alexander's engagement in this process precedes the creation of this Panel. We actually provided written comment on the draft JRP agreement in 2009 noting our concerns with respect to our Treaty and Aboriginal rights and the Crown's related fiduciary and constitutional duties.

644. We then took the opportunity to provide comments to you, both orally and in writing, pursuant to Procedural Direction Number 1, as noted in paragraph 36 of the Applicant's final written submission.

645. Once again, we voiced our concern that the significance of our rights was not adequately identified in the scope of this process. Unfortunately, the revised list of issues failed to incorporate our concerns, which suggest that the federal and Alberta Crown participants chose not to demand such revisions on our behalf either.

646. As generally noted by the Applicant at paragraph 49 of its final written submission, we registered as intervenors on July 14th, 2011 to participate in this process. More importantly, we have exercised all of our rights as intervenors to bring attention to the Crown's silence and failure to fulfill its obligations to us

with respect to our community, our Reserve and our TLE and traditional lands as well; as well as our constitutionally-protected Treaty and Aboriginal rights.

647. I don't think I'll ever forget our participation in the questioning of the Government of Canada's witness panel in Prince George on November 23rd, 2012, when I personally sat across from a panel of 22 witnesses and one via telephone conference, as they confirmed to us that none of them had received or even requested information with respect to the Alexander First Nation and our community on our main Reserve.

648. Just imagine for a moment if you can -- just imagine the marginalized position that our community has to be subjected to with respect to this process.

649. Can you imagine my devastation as Chief knowing that my community was listening to those proceedings and hearing that the Federal Crown had experts and expert reports to speak to the impacts on vegetation and wildlife and, yet, no one, not one of them, could speak to our community which is located on the proposed project route?

650. The Federal Crown, our fiduciary, bound by the Constitution to protect our Treaty and Aboriginal rights; how would you feel?

651. What options would you pursue when you're tireless efforts to engage in this process and raise the concerns of your people falls on deaf ears?

652. The proposed project route will pass through two of our three Reserves. Our community is in the immediate vicinity of the Project's right-of-way and over 50 percent of the proposed route traverses through our traditional territory. Based on the proximity facts alone, the Federal Crown should have ensured that we were incorporated into the socioeconomic assessments for this Project as a community, rather than just being listed under the Aboriginal Engagement Program.

653. Automatically being put into this category, without careful consideration of the complexities of our concerns and interests has been demeaning for us and makes us feel that we were being treated as less than a whole. This is demoralizing because of how it has upset the normal functioning of our teachings from our Elders.

654. I realize that all my life I have been taught to respect our non-human

relatives on the land but, at the same time, I am human, not a species of fish, not a plant. And in being human, my rights are obviously not the same as my non-human relatives, and I expect and demand to be treated accordingly.

655. So, yes, despite our limited capacity and funding, we have participated in this process to the best of our ability by submitting written evidence, providing oral evidence, issuing information requests, including very specific ones, to the Federal Crown, participating in multiple cross-examinations of both the Applicant and the Crown's, and submitting final written argument to bring attention to the fact that the Federal Crown has not consulted with us at all to ensure that our treaty rights are adequately identified, respected, accommodated and compensated.

656. And once more, I am here before you today to make our concerns known once again.

657. Most recently, both the Federal and Alberta Crowns have confirmed again that they are choosing to not fulfill their obligations to us. As evidenced by their final written arguments, they are silent to our concerns. Even suggested revisions to your proposed conditions lack any reference to our community.

658. Throughout the course of this process, my community continuously asked: How can the Panel recommend approval of the Project if the Crown has failed to fulfill the fiduciary and constitutionally obligations that it owes to the Alexander First Nation?

659. This is a question that I now ask you on behalf of the Alexander First Nation.

660. We have done all we can. All we can do to raise these issues to you and, now, we look to this Panel to exercise its authority to impose strict conditions on the Federal and Alberta Crowns, to ensure that they fulfill their constitutional obligations to us and that our rights are properly protected and respected.

661. Number 2: Our engagement with the Applicant.

662. Although the Alexander First Nation is expert in its own right with respect to the scope and significance of our community, our Reserve, TLE and traditional lands and our Treaty and Aboriginal rights, the nature of our relationship with the Crowns and the Federal Crown's disengagement and failure

to even acknowledge our rights in this process has severely compromised the bargaining power that we should have otherwise been able to wield in business negotiations; especially due to the nature of our rights and our proximity to this proposed Project.

663. I sometimes imagine the potential we might have had if -- if we had the support of the Federal Crown's human resource and capacity; like the 23 expert witnesses that appeared before me in Prince George. I imagine, for example, the leverage this support could have bestowed on us in our business negotiations with the Applicant.

664. Despite the shortcomings created by our limited capacity, we discovered the Applicant's shared vision to create:

> *"...a foundation for genuine partnership and a sustainable (vs. shorter term) stream of economic benefit to Aboriginal communities."*

665. This is reiterated in his Final Written Submission at paragraph 115.

666. Furthermore, the Applicant confirmed that partnership was in no way to:

> *"...affect the need to mitigate and, if necessary, accommodate Aboriginal groups for impacts on the exercise of their rights."*

667. And this is noted at paragraph 118 of the Applicant's Final Written Submission.

668. Just as importantly for our community, the Applicant endorsed our unrestricted participation in the JRP process to provide input and express our concerns, with respect to: (1) land use for traditional purposes; (2) the socio-economic circumstances of our members; (3) the environment; (4) and our Aboriginal and Treaty rights or title or both, including our right to suggest measures to be taken to mitigate the potential effects of the Project.

669. Reference to this position is provided in the Applicant's Final Written Submission at paragraph 117.

670. Business is business and, yes, our negotiation power was compromised

by virtue of the Federal Crown's silence, in particular.

671. However, after shared determination and hard work to sort and resolve our differences on business matters, we are pleased to acknowledge our partnership with the Applicant, founded on our mutual goal of creating sustainable economic opportunities that will generate long-term benefits for both parties.

672. From my community perspective, we have ended up with an agreement that is ripe with potential outcomes that we look forward to seeing come to fruition.

673. It has enabled us to somehow continue to work towards both of our mandates, that is, protection of our rights and pursuit of our community sustainability, despite the noticeable absence of our fiduciary. We provided notice to this Panel of our relationship with the Applicant in our letter dated December 21st, 2012 that was subsequently filed in these proceedings.

674. We want to publicly acknowledge the respect shown to us by the Applicant as demonstrated by its rare and slowly evolving ability to distinguish the difference between sustainable business relationships and the implications of the complex fiduciary relationships that we share with the Crowns; and, most importantly, not allowing the latter to impede our new and developing partnership.

675. We have raised and presented our issues as well as recommendations on how to resolve our issues and concerns with the Crowns throughout this process and take great comfort in knowing that our new partner does not stand in the way of our ongoing fight to hold the Crown accountable for its actions with respect to our lands and our people.

676. In turn, we wish the reciprocate this support by publicly acknowledging our business relationship at this hearing and voicing our optimism that our partnership will be mutually beneficial as a matter of business to both the Alexander First Nation and the Applicant if this Project is approved.

677. As noted in the Applicant's Final Written Submission, at paragraphs 84-86:

"...the primary source of information with respect to the

> *Federal Crown's engagement and fulfillment of its constitutional obligations is provided in its consultation framework."*

678. Neither the federal, nor Alberta Crowns have decided to bother addressing this issue in their own final arguments. This is simply not good enough. It is unacceptable. As we noted in our written submission, quoting Haida, quote:

> *"At all stages [of consultation] good faith on both sides is required. The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised, through a meaningful process of consultation. Sharp dealing is not permitted."*

679. By not even addressing consultation with the Alexander First Nation in their final arguments, we're limited yet again on how we bring light to this issue. What the silence does -- what the silence does demonstrate though is that the Crowns are choosing to continue with the pattern of behaviour that we have experienced throughout this entire process, which is not only offensive and disrespectful but runs afoul the honour of the Crown.

680. The internal divisibility of the federal Crown which could arguably be one of the primary reasons why our community fell through the cracks and was marginalized in this process, the complete lack of diligence demonstrated to follow-up and respond to any of the Alexander First Nation's concerns in a meaningful way, the nominal effort to engage in discussions once this Panel has released its report, and this process is almost complete, all of these serve as examples of breaches of the Crown's honour.

681. Of greatest pressing concern is the unilateral legislative actions being taken by both the federal and Alberta Crowns. Actions that clearly demonstrate no regard for constitutionally protected Treaty and Aboriginal rights. I am truly frustrated by the fact that I have to keep worrying about federal and provincial governments' legislative actions.

682. When we look beyond the surface of these legislative changes that are supposedly intended to help First Nations in the regulatory processes, we see that these actions are really a façade. In actuality, these types of actions by government are outright attacks on the existence of our Aboriginal and Treaty

rights and on our interests in the resource development projects.

683. Government does not seem to bat an eyelash as it disregards rulings by its highest court and we have seen that -- we have seen this happen more recently at an alarming rate. This makes me worry about the future for the members of Alexander because the government tells the general public in Canada that their measures are supported to protect our constitutional rights.

684. At the same time, realities of limited resources and available industry relationships are prompting unhealthy rivalries and a breakdown of relationships amongst First Nations while we are trying to get at the truth. How can the Crown's actions be deemed to be in good faith and honourable if this is their actual effect? Has the Crown lost all respect for its own Constitution and the reconciliation that it owes and legally promised to us?

685. In closing, firstly, I confirm my community's support of our business partner's application for the approval of this project. In light of the existence and location of our community, our reserve, TLE, and traditional land interests and our constitutionally protected Treaty and Aboriginal rights, as well as the existence of our filed claim as against both the federal and Alberta Crowns, we request that the -- that our conditions be attached to a project approval to ensure that the Crown's fiduciary and Constitutional obligations are honoured and fulfilled.

686. Thank you. Ay-hay.

687. **THE CHAIRPERSON:** Thank you, Chief Arcand.

688. The Panel has no questions of Alexander First Nation.

689. We'll break now for lunch and come back at quarter to two, please.

690. Thank you.

--- Upon recessing at 12:38 p.m./L'audience est suspendue à 12h38
--- Upon resuming at 1:43 p.m./L'audience est reprise à 13h43

691. **THE CHAIRPERSON:** Good afternoon.

692. If we could get everyone to take their seats, we'll be ready to get underway.

693. Thank you very much.

694. The next party we are going to hear from in oral reply is Alberta Federation of Labour.

695. Ms. Chahley?

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

696. **MS. CHAHLEY:** Thank you, Madam Chair, Members of the Panel.

697. It's good to be back to the hearing to present in front of you at this stage. I have with me Shannon Phillips, and she is one of the Alberta Federation of Labour executive staff.

698. We are pleased to present our Final Oral Arguments on behalf of the 27 Union affiliates that the Alberta Federation of Labour represents, now representing about 160,000 workers in Alberta.

699. We've prepared and filed a detailed Written Argument for you and, as you have requested, it is not my intention to repeat that argument here today. I thank you for your careful consideration of the points that we presented there and for your consideration of the evidence filed on behalf of the AFL and of our questioning that we made during the hearing.

700. **THE CHAIRPERSON:** Ms. Chahley, we're just doing a little bit of sign language here.

701. First of all, could you pull your microphone a little bit closer?

702. And we may need to do a volume adjustment at the back of the room.

703. **MS. CHAHLEY:** Is that better for everyone? There we go. Thank you.

704. I think I have this problem every time I come to this microphone. All right.

705. So we do know that the Panel has been reviewing all the written arguments as well and the extensive evidence in the materials and we also know that you understand that, given the volume of written arguments, that we're not going to be in a position to respond in the time allotted to us to each and every thing that is said.

706. So we want to start with a clear statement that we have overall respectful disagreement with much of the argument made by the supporters of the pipeline that you will have already understood by reading our written argument as to where we stand on those positions. And so we will not -- I'm not going to have time to address all of those. I'm going to just address a few of the key points that we want to bring to your attention today.

707. I also wanted to just pause for a minute and echo Mr. Neufeld's comments that he made this morning. Where the Alberta Federation of Labour disagrees and makes comment about a position of the parties in this argument today or even in our written arguments, we in no way intend that to be directed to the people involved or their counsel; that we found that the participants in these proceedings have been respectful at all times and we hope that people would see us as the same.

708. So if I can, with those opening remarks, get to my first point. Our first point that we wanted to -- and we're going to frame our oral argument a bit like our written argument, with some questions that we want answered and some conclusions that we hope you'll draw.

709. And so the first question that we ask ourselves when reading the arguments was: Has Enbridge switched positions in terms of its economic arguments?

710. In their written argument, Enbridge referred twice, at paragraphs 98 and 246 *[Exhibit B226-2, Enbridge Written Argument at paras. 98 and 246]*, to testimony given by Mr. Carruthers in Prince Rupert on March 14th, 2013 in response to a question asked by Ms. Kerr on behalf of the Fort St. James Sustainability Group.

711. It was an unusual reference for us and we asked: "Why?" Why, after hundreds of pages of evidence on the commercial benefits for the Project, including reports by experts, days of evidence that spanned most of September of

2012, why was Enbridge referring twice in their written argument to this comment made on March 14th? And we think you should ask "Why?" too.

712. The question that was asked at that point by Ms. Kerr was: "Is a social licence also a precondition for constructing Northern Gateway?" *[Transcript No. 152 Line 26748]*

713. And, Madam Chair, I have handed my argument to the Clerk and the references to the transcript will appear in the final transcript so I'm not reading them all here for you.

714. That question was first responded to by Janet Holder and then Mr. Carruthers gave a lengthy answer that was quoted in full by Enbridge in their written argument *[Exhibit B226-2, Enbridge Written Argument]* at paragraph 246.

715. In the answer, Mr. Carruthers referred to recent media reports discussing the "bitumen bubble" and he went on to give his view, based on those ---

716. **THE CHAIRPERSON:** Ms. Chahley, sorry, there's some noise in the background here. I think we're going to have to ask you to pull that microphone just a little bit closer.

717. **MS. CHAHLEY:** Okay.

718. **THE CHAIRPERSON:** If we start getting feedback, obviously, we'll take those measures.

719. And just slow down just a little bit.

720. **MS. CHAHLEY:** Okay, you know, this is -- that light made me nervous.

721. **THE CHAIRPERSON:** I know.

--- (Laughter/Rires)

722. **THE CHAIRPERSON**: And that light means business and it's serious, but we also want to be able to understand what you're saying.

723. **MS. CHAHLEY:** Okay.

724. **THE CHAIRPERSON:** Thank you.

725. **MS. CHAHLEY:** So let me just start at the top of that paragraph then, and we'll go then.

726. So in the answer that Mr. Carruthers gave to the question, he referred to recent media reports discussing the "bitumen bubble". And he went on to give his view based on those media reports that, if Northern Gateway pipeline had been built in 2005, it would have created $30 billion worth of benefit.

727. Now, we thought -- I thought that Mr. Carruthers had made those statements, in passing, on that day, having just read the media and Enbridge has basically left them to lie; that would have been one thing. But Enbridge referenced them twice in their final argument. Obviously, Enbridge feels that they're important and is relying on them as evidence to support their Application.

728. And then again today. Today, we heard reference to that same point, to the alleged 30 billion in Northern Gateway's Oral Argument.

729. So the AFL submits that you ought to consider the following points in respect to those arguments.

730. First, Enbridge's reliance on media reports as evidence of economic benefits of their project ought to give you some significant pause. Particularly, when we know there have been subsequent media reports that took issue with those concepts and the purported benefits Mr. Carruthers was speaking about.

731. The media reports from March 2013 are not sworn evidence before you and Mr. Carruthers is not an economist or an expert in economics.

732. Further, we don’t have to remind you that it is -- at least in our view -- inappropriate that Enbridge brought this new economic evidence in March of 2013. It wasn't filed with their written evidence or reply evidence. It was not provided while the Enbridge Commercial Panel was available for cross-examination. It was not provided in a manner to give us an opportunity to cross-examine on it. It was not provided while economic experts were present. There was no motion brought to seek to bring the economic experts back to address it. It just, as I say, with a remark in passing that's now been elevated to a different

scale.

733. Within the quote, Mr. Carruthers, after referring to the media reports of the bitumen bubble, said, and I'm going to just read the little phrase for your benefit now and for everyone's. He said this:

> *"... and if we had built Northern Gateway like we had originally conceived back in 2005, we would have avoided the economic consequences that we're seeing today that some have estimated at 30 billion." [Transcript Volume 152, line 26753]*

734. And again, that's at line 26753 of Volume 152 of the Transcript, for those people who are trying to find it.

735. First, we say that you ought to remember that Enbridge didn't build the Project back then because they didn't have industry backing to do build the Project back then.

736. The underlying argument though that we feel Enbridge is trying to make with this evidence is that the Northern Gateway Pipelines Project would have, and will in the future, resolved the problem reported in the media at that time, which was of the inability of bitumen to reach any market due to transportation constraints, that is that the bitumen was becoming shut-in.

737. Now, we say one of the huge problems with this argument is that it flies, in our view, in the face of the clear assumptions made by the Enbridge experts *[Muse Stancil Updated Report, Exhibit B83-6-3, page 44, adobe page 47]* and the Government of Alberta expert, Dr. York, *[Wood Mackenzie updated report, Exhibit E8-6-4]*.

738. And that was, you'll recall, there would be no shut-in oil in Alberta throughout all of the forecast period. And you'll remember Dr. Mansell forecasted for 35 years.

739. Enbridge, we wonder, are they now appearing to reject the approach of their own economic experts that we spent so much time hearing from in September?

740. In our view, the analysis and arguments are diametrically opposed, depending on whether you assume there's going to be oil shut-in or not. When no

oil shut-in is presumed -- so the oil can all reach markets -- then without access to premium heavy crude markets -- remember that Dr. York talked about -- the bitumen will be sold in the less attractive markets and the price would then be discounted which would then overall affect the price of all bitumen sold in refineries in North America.

741. And that's how Dr. York explained it and when we go back and read Mr. Ernest's reports, it's clear that he also was providing us really with this same kind of analysis.

742. The underlying basis of the predicted price lift of the experts that we heard them testify in Edmonton, was that the fact of the Northern Gateway Project, its benefit would be to take 525,000 barrels a day of bitumen out of North America, out of that whole market so that the rest of the bitumen would not reach those less attractive refineries, the price would remain higher.

743. But in the event the bitumen assumed to be shut-in before the Northern Gateway pipeline has started, a whole different economic analysis follows from that, not an argument that, at least I understand, that the Proponents have been making before you.

744. And that is, first, to 525,000 barrels a day of bitumen is shut-in, the overall economic consequence to everyone except the producers -- and I'll come back to the producers in a moment, but the consequence to the rest of us, the consequence and the price of the bitumen while it's shut-in is very similar to shipping it off the continent.

745. The level of North American supply in the market, the part that does get to the market is reduced, the bitumen then goes to the market that has more attractive refineries buying, that does not lead it to the price being discounted. The price of bitumen that is sold is higher.

746. Now, of course, the real issue with the shut-in analysis is that it logically focuses on the lost opportunity cost to the producers because they are not able to sell their bitumen anywhere that's been shut-in to Alberta.

747. That lost opportunity cost analysis is different than what you've been hearing about the economic benefits in terms of Northern Gateway. And we say that's very similar to what we have been urging on you which is there's a lost opportunity cost to upgrade and refine in Alberta when the bitumen is shipped

away.

748. And we have said to you in our evidence, that lost opportunity cost is the high paid long-term career jobs, the spin-off economic benefits from those jobs and the spin-off value added to industry in Canada, as opposed to those activities happening in the countries that are purchasing our raw bitumen. But we remind you, Dr. Mansell wholly rejected those costs in that analysis in his evidence.

749. So therefore we say to you, we urge you to say, "Why is Northern Gateway, why is Enbridge switching positions at this late stage, what's that about".

750. We wondered if it was because maybe they agreed to with the conclusions that we urged on you in our final argument, that is that the analysis of their experts and those of the Alberta government's is unreliable and, taken as a whole, leads to the conclusion that economic benefits of the proposed Northern Gateway pipelines, if any benefits at all are reliably proven, have been proven by those experts who last, at the very most, for one to two years, not the 30 years predicted. And those benefits were a small fraction of the amounts promised in the application.

751. And then, Madam Chair, Members of the Panel, this morning we heard another reason why that evidence was a focus. We heard Northern Gateway refer to an economic black swan event potentially happening. And they were referring to that same $30 billion. It's the same quotation that I've just read to you from the transcript -- sorry, read to you from the argument which is part of the transcript.

752. They're not talking about though, it of being a shut-in oil problem. They posed the $30 billion cost as something far worse. They posed it as, what if the United States of America stops importing our bitumen altogether.

753. Now, Madam Chair, we feel that that is unfortunate fear mongering and it is regrettable, in our view, that it was suggested here today. In response we want to remind you, number one, all of the experts in support of the pipeline application before you in all of those hundreds and hundreds of pages of their evidence, both written and through questioning, gave their opinion on the operation of the North American oil industry.

754. All of them assumed -- first off, they assumed as a logical and reasonable assumption that all the oil from Western Canada would reach a market primarily in the United States in the 35-year forecast period with or -- sorry -- without Northern Gateway. That was their base case. No Northern Gateway, all the oil gets to market for 35 years. No one, neither the Applicant or any of the other parties, suggested that that assumption was wrong or that it was inappropriate or unreliable.

755. There is evidence before you, including the evidence from the AFL, the Lost Down the Pipeline Report which we put in as Exhibit D4-2-12, it includes a detailed discussion of the extensive long-term investment that's been made in the United States of America on refineries to upgrade their refineries to a point where they can process raw bitumen, where they have the facilities now to handle it so they become the complex refineries that Dr. York was talking about.

756. In that evidence, in that report, at least in other parts of the evidence, we talked about the revival of whole communities in the United States as they retooled old refineries. They have a long-term plan to refine bitumen and other heavy crudes from Western Canada. They also talk frankly about the economic benefits to those communities in planning to upgrade and refine in their communities.

757. So there is plenty of evidence before you beyond what the experts said and what they assumed for you to know that there's a long-term plan in the United States to use Canadian bitumen.

758. But there's more. We were here. The Alberta Federation of Labour has -- not in front of this Panel but before the National Energy Board, we have been in attendance at the three Keystone hearings, the Legacy, the Expansion and the XL. We were here at the Alberta Clipper hearings that were approved by the National Energy Board.

759. We read those decisions, we listened to the evidence. And those decisions were founded, in part, on an understanding that those pipelines would be useful to ship heavy crude from Western Canada to the United States for the life of those pipelines.

760. So this suggestion today that, oh, we need to build Northern Gateway because otherwise we might have, you know, the Americans cut off their interest in us, after all, they've got the Bakken, Madam Chair, there's just no foundation

for that. And there's no point in us spending time there and it's, as I said, we think it's unfortunate to be raising that spectre in this manner at this late stage.

761. But finally, I can't leave this point without reminding you that, in fact, the Alberta Federation of Labour's position is, if that were to happen, if we were not going to be exporting our bitumen raw and unrefined to the United States of America, that would be, in fact, what the AFL's been advocating to this Panel and to the National Energy Board for a long time.

762. That would mean that then Canadians could upgrade and refine it and then we could develop those value-added industries and have those very long-term career jobs for people. And then we could sell the products, we could sell the gasoline, the jet fuel, the diesel fuel to other people, including the United States.

763. So we submit that the focus on this point that Mr. Carruthers made when he was reading the newspaper in March of 2013 is not helpful. It's not helpful to your analysis. It's not helpful to the position of the parties here today. It's a distraction that's inappropriate and we ask that you just disregard those arguments entirely.

764. My next point I want to move on to is, what is Enbridge saying about the financial risk? And I'm going to make this point briefly, but in the written argument Enbridge stated at paragraph 242 *[Exhibit B226-2, Enbridge Written Argument, para. 242]* that being required to maintain the level of insurance of $1 billion or 950 million is -- and they use the words "economically inefficient".

765. They said there's no evidence to justify a requirement for Northern Gateway to place insurance or other financial instruments in the amount suggested by Ms. Allan, and they were referring to our witness Robyn Allan. Any such requirement would be unprecedented and economically inefficient. And in their written arguments the shippers also take issue with that suggestion because it, in our submission, is parallel to although not identical to your -- or the draft recommendation number 147.

766. Now, we did note that Enbridge in their Appendix to their written argument where they went through the conditions, Condition 147, they were less -- appeared to be less stridently opposed to it as they were in their written argument. And we note that Enbridge didn't refer to that today. And so, you know, it may be that what they're suggesting is what they said in the Appendix

now but they haven't changed their written argument, which said that they objected to doing this.

767. So I just briefly wanted to touch on that because we agree with that condition and we disagree with the position of Enbridge in their written argument.

768. We wanted to remind you that Ms. Allen's evidence was that the appropriate minimum level of insurance was $1 billion. She said that it was based on both her written evidence *[Exhibit D4-2-49, pages 33 – 40, Exhibit D4-5-2]* and her oral testimony *[Transcript Volume 80, Lines 28587 – 28720 and Lines 28906 - 28916 and Lines 28921 – 28943]*.

769. She explained the importance of having insurance in place at a level sufficient to cover the costs of a spill.

770. And she also talked about the high level of coverage being helpful to encourage Northern Gateway to maintain high safety standards because the higher their safety standards, the lower the risk. That would allow them then to negotiate as they were negotiating their insurance premiums to reduce those premiums and that that to and fro in the industry was, in fact, a good check and balance on the insurance issue.

771. And I just wanted to pause for a minute, because if you look at the Enbridge written argument on this point, they did also criticize Ms. Allan's evidence and suggested that she had made her statements based only on one incident in California, in San Bruno, that it was a gas line incident. And we would ask you to go back and read the transcript because you'll see that that's not the case.

772. They missed the fact that right around the same time that Ms. Allan also said in the same lines of the transcript that she was also referring to the Kalamazoo spill, that was an Enbridge spill, and the Gulf of Mexico, a British Petroleum spill.

773. So we think that Enbridge must have just missed that point, there's no other explanation.

774. Now, so as we said, in your Condition -- draft Condition 147, you suggested that there'd be financial assurances, including third-party mandatory insurance to be maintained overall at the level of $950 million, and we encourage

you to maintain that condition as you have written it.

775. So our next point that we wanted to cover is: What about the Alberta Government?

776. There was many things in the Alberta Government's written submissions that caused us concern and that we wanted to ask again "Why? "

777. I wanted to first start with their argument starting at approximately paragraph 31.

778. When Dr. York gave his evidence, we submit to you, that the conclusion of his evidence is, in our view, crystal clear. He was clear he did not predict that the impact of Northern Gateway export pipeline would last for more than one year, taking his evidence at its best. He also stated that his report did not ever suggest the Northern Gateway export pipeline would provide a longer solution to the $8 per barrel discount on the price of bitumen longer than the one year.

779. Remember when I asked him, he was clear that the report did not require any correction regarding the timeframe for his predicted benefit, because he said his report was not a prediction based on the Northern Gateway export pipeline specifically, he was talking about a West Coast solution of a greater size. And he said that that pipeline in and of itself was insufficient to solve the problem for more than the year.

780. Now, what I was going to say to you is: Well, no one in this room would be surprised that I read the report wrong. I'm no expert and I didn't really fully understand what Dr. York was saying about that until I got to the end of the questioning.

781. We submit to you that there is no reason for the Alberta Government, who retained him and had the benefit of spending time with him, to misunderstand or misrepresent his report on the evidence. Yet, at paragraph 31 of the written argument, the Government of Alberta stated that the conclusions in the Muse Stancil Reports broadly align with the conclusions in the Wood Mackenzie Reports. *[Exhibit E8-25-2.]*

782. Now, the Muse Stancil Reports, on their face, stated that the Northern Gateway export pipeline would provide benefits through to 2035. *[For example,*

see Exhibit B83-3, page 7, adobe page 10.] That's not just one year.

783. In fact, in our written submission, we talked about the reason why you could read those reports to see less of a benefit, but on their face they predict a much longer benefit.

784. We don't understand -- we have no explanation for why the government would say that those reports were broadly aligned, except that if what they're saying is they agree that the Muse Stancil Reports only predict a benefit for one or two years as well.

785. In paragraph 35 of its written argument, the Alberta Government also stated that it supports the conclusions of Dr. Mansell. And those are that the significant economic benefits associated with the Northern Gateway Pipeline would be projected for 30 years.

786. Again, why would they support those conclusions? And why would they make that statement to you when their own expert had testified it would only be for one year?

787. And then, we also say that you want to ask yourself why the Alberta Government said in paragraph 42 of their written submission -- and here's what they said:

> *"Tidewater projects such as Northern Gateway are urgently needed as Northern Gateway on its own does not solve the market access problem forever and additional transportation options will continue to be required going forward."*

788. They said: will not solve the market access problems forever.

789. Now, we were troubled by that because their evidence was not that this was going to create any kind of long-term impact, getting close to "forever". Dr. York said: "At the best, one year."

790. So when they wrote that submission to you, why did they imply much longer than one year?

791. Particularly, when they went on in the next three paragraphs of their written argument to suggest that the predicted $8 per barrel discount that would

be suffered by producers -- that this is a predicted loss that Dr. York had predicted was a loss "of a magnitude -- of a magnitude that cannot by any measure be in the Canadian public interest." *[Exhibit E8-25-2, para. 44.]*

792. And again, the implication is that that benefit is going to last -- or that discount is going to last for many years not, at best, one year.

793. And we also remind you that, remember, Dr. York said an upgrader or a refinery and the further value-added processing of the raw resource would provide the same or better benefit that he was predicting would occur by the Northern Gateway Pipeline. And again, I won't go into that, we've outlined that position in our argument.

794. We're also very disappointed to read in the final submission of the Alberta Government where they refer to our evidence -- and you'll recall with the AFL evidence, there's many statements of policy of the Alberta Government -- and they called it our "evidence" in air quotes, you know, in quotation marks *[Exhibit E8-25-2, para. 48.]*, apparently to imply it was not real evidence of their position -- or of the government's positions.

795. Public documents pledging specific government action on a topic of public interest, we say are templates for action. The purpose of these documents is not to tell a story to the public and then promptly enact a different set of policies behind closed doors.

796. The documents that AFL filed as evidence were called things like the "Alberta's Energy Strategy" and another document called "Responsible Actions, Responsible Oil". Those were an expression of the legislature, the public interest, and the will of the people.

797. It would be astonishing to us for the Alberta Government to imply these policies are merely public relations exercises or, worse, that they were not intended to convey to the public its real policies.

798. We ask the Panel to remember the Government of Alberta was here as a participant. They had every chance to refute our evidence, to bring evidence of what their -- if they felt our evidence wasn't a proper statement of their policies. They could have brought someone to tell you that. These are public statements of their policies. They weren't secret or hidden; they were made to the public. They did not bring any evidence about that.

799. So finally, the last thing we would like to say to you about the Alberta government is we would ask you to read -- to also again ask yourself: "Why?" Why did the government not explain how its policies would be met by the approval of the pipeline?

800. Why did they not address the question of how their policies would be met by a pipeline that would likely be owned and used almost exclusively by a handful of shippers with very long-term contracts, particularly when there is significant Chinese and Asian ownership in those shippers?

801. Why is the Government of Alberta not explaining how it can be content to let its public policy fall to the wayside and allow the government of a foreign country to have so much influence on the policy decisions in Alberta and Canada?

802. Why is the Alberta government letting so much good value-added jobs, as we would say, be shipped down the pipeline with the bitumen to Asia or to China? Why is that in the public interest?

803. Why has the Government of Alberta not addressed these questions as, clearly, there is marginal economic benefit from this pipeline project on the evidence of their expert?

804. So we would ask you to draw the conclusion that the Alberta government's position is unreliable and confusing. It's not logical or supported by its own evidence.

805. In response to the argument -- written argument of CAPP, we'd like you to -- we'd like to tell you why we believe that the AFL and groups like us bring a valid perspective to these proceedings, the perspective of Canadian workers who are important parts of the Canadian public interest and real Canadians. And they're also, as Canadians, part of the public interest.

806. In their written argument, CAPP spent a considerable time challenging the positions of the AFL and also of the CEP who you heard from, Mr. Coles, and they, frankly, in our opinion, appeared to be suggesting that our participation was of no assistance to the Panel. CAPP was critical of the AFL taking the same position in this hearing that it had taken in others and they said that we shouldn't get to do that because our position didn't prevail in those other hearings.

807. I do want to spend a few minutes on this point because I think it will also inform some of the rest of your decision making here. I want to start by reminding you -- because CAPP referenced a number of the decisions.

808. They brought forward the early Keystone decisions and the written argument for you to look at but I want to remind you what the Board said in 2009, in the Keystone XL decision. *[OH-1-2009, Reasons for Decision (filed in the electronic registry as document A1S1E7) at page 34, adobe page 46]*

809. And I'm just going to read you a very short excerpt. They said:

> *"The Board has benefited from the perspectives of the AFL expressed throughout the proceedings and the CEP as submitted through final argument. As expressed in the OH-1-2007 and OH-1-2008 Reasons for Decision, the Board is informed by the positions of industry parties as well as government expression of current economic and energy policy. The Board's public interest determination must balance the many competing political, economic and social interests.*
>
> *In final argument, the CEP and the AFL expressed concern that shipping raw bitumen by pipeline to the U. S. had an impact on domestic investment in upgraders and refineries in Alberta and Canada. The Board accepts these perspectives as valid public interest considerations…"*

810. Now I'm stopping there. In that decision, the Board went on to accept a position of the Applicant's over the one expressed by us and the CEP but in no way did the Board suggest our participation was unwelcome or unhelpful, simply because we didn't win -- because our position didn't prevail.

811. As the Province of B.C. and several other intervenors have pointed out in their written arguments in, *Re Emera British -- Brunswick Pipeline Company [Emera Brunswick Pipeline Company Ltd. (31 May 2007) NEB Decision GH-1-2006, para. 84 and following]* decision, it also provided useful guidance on the scope of the public interest.

812. We remind the Panel that Emera said that the public interest was dynamic concept that varies from case to case and the relevant criteria change

with the circumstances of each case. The AFL's evidence and arguments, we submit, are relevant in this case, regardless of whether or not they were persuasive in other circumstances.

813. Further, Emera directed us all to all consider the public interest may change depending on the nature of the factors at the time of the decision, including, quote:

> *"...the application, the location, the commodity involved, the various segments of the public affected by the decision, societal values at the time and the purpose of the applicable section of the NEB Act." [Emera Brunswick Pipeline Company Ltd. (31 May 2007) NEB Decision GH-1-2006, para. 84 and following]*

814. End of quote.

815. Northern Gateway is the first major export pipeline to Canada's west coast in decades and the first designed to export raw bitumen out of Canada to the west coast. The market that this pipeline is designed to reach is new as well. It's not the United States, with whom we enjoy a closely integrated free market economy and with whom we are parties to NAFTA, a free trade agreement.

816. Instead, the market is Asia and primarily China, and we heard that from the experts whose oil industry is controlled by their government. China is not a nation with whom we have a free trade agreement. The shippers, at least those who have revealed themselves in this hearing, include many with significant Chinese ownership.

817. Furthermore, this pipeline is unique in that it will cross northern British Columbia which is a difficult and complex terrain and it will infringe upon the territories of several Aboriginal groups who have concerns.

818. The AFL has been at the hearings of all phases of Keystone and Alberta Clipper, as I told you. The public opposition to Northern Gateway pipeline that we see here is every order of magnitude greater than the opposition that was present in those pipelines. The length of the hearing is just stunningly longer, the volume of material you have is such a difference.

819. We say the value of our society regarding the export of raw bitumen has matured and the ordinary Canadian appears to be concerned. These are all

considerable and important factors that set this application apart from the earlier ones.

820. So to the extent that you might accept or be concerned about the argument CAPP made in their written submission about the validity or helpfulness of the arguments in the evidence we brought to you, we submit that first of all, the Board said in Keystone that we -- Keystone XL, that AFL brought useful positions and furthermore, when looking at Emera, this is a new matter, a different matter and we believe that we have been helpful to you.

821. We're confident that you'll find our evidence, our arguments, our questioning of the witnesses to have been useful to you and we're confident that you are interested in the views expressed by the Federation of Labour on behalf of Canadian workers.

822. I then want to go on -- and I'm doing pretty good in terms of the time. I hope I've slowed down sufficiently for you as well but I'm waiting for that green light. I'm going to talk -- I have about three more points to make so we'll ---

823. **THE CHAIRPERSON:** And you have about 10 minutes until the green light comes on.

824. **MS. CHAHLEY:** So I'm doing very good.

825. I want to talk a little bit about where in all of the arguments is the free market. As advocated in the submissions of many of the parties, and certainly you'll see it in the Alberta government and in the shipper's arguments and in CAPP, that you will want to be looking at the decisions rendered by the National Energy Board in those other export pipeline cases and you're going to be looking for -- in those cases, they looked at the case of whether the public interest should be -- is affected by the free market.

826. And what they said, to a large degree, was the free market is sending signals that we need this pipeline. That's a good reason. That's one of the factors we're going to consider. And you've heard -- in the written evidence, there's variations on that theme before you too by the Proponents, the people supporting the pipeline.

827. And in fact, I would say that Enbridge's argument about the black

swan is even a further argument today made that you need to give this pipeline approval because it may then -- if you don't, that might cost us the entire U.S. market. So -- but we're still left, when we read all those materials and we look at all the evidence, we are still asking where is the free market in this case? And I want to explain to you why we say that in response to these arguments about the free market.

828. What you hear the Proponent saying is they need this pipeline. It's essential to the success of the producers and the western Canada -- Canadian oil industry and we submit that that's not really what you ought to conclude in the end and we're going to tell you why.

829. There are several examples that show that in the application -- I'm not going to take you to every one but there's a few points I want to make.

830. Number one, I asked them -- the shippers told us that they did not plan production once they knew the transportation alternatives. In fact, they said that -- they corrected me when I suggested that to them and they said no, it was the other way around. *[Reference to shipper evidence]*

831. And that evidence is quoted, I believe, in the argument of either CAPP or one of the shippers. So what you can take from that is that the shippers are not altering their production based on the transportation available to them. They're making their plans about production and then they're looking for transportation alternatives secondly.

832. Dr. York, when he was asked, he indicated that the shippers would not reduce their production when all the North American bitumen started to hit -- when the North American bitumen started to hit the less complex refineries. You remember his graphs with all the tiers that went down. And as the bitumen flowed to the least attractive refinery, I asked him well why wouldn't they curtail supply.

833. And you recall I asked him about supply and demand and he said, they would still sell it because it's still profitable for them to produce and sell at those lower prices. *[Dr. York shippers still ship]*

834. And I remind you that at those lower prices, it's not just on the leftover bits that go into the low refineries but as I'm sure everyone else understood before and I now do, that then, at some point -- he said theoretically at one barrel but

probably not in practice -- but at some point, that then changes the price of all the bitumen including what's sold to the complex refineries.

835. It all comes down to a lower price. He said that market signal would not lead the producers in western Canada to stop production or to slow down production. They would continue to supply. So from that you can conclude that even if Northern Gateway is not built, they will continue to supply.

836. And in fact, that accords with what Muse Stancil said in their reports. They said that those reports were premised on the same supply of Western Canadian oil being sold in the North American market whether or not Northern Gateway was in place *[Muse reports same supply]* and, in fact, they gave you price projections as to what the cost of that would be.

837. Much, I now understand to be similar to what Dr. York was saying, and although we took issue with the accuracy of the prices and the predictions, certainly, the Muse Stancil group and Mr. Earnest felt comfortable giving you prices; again, because the market is going to continue to supply even if the oil has to be sold at a lower price.

838. And, in fact, the other thing I -- another thing we want you to note is all the projections of upcoming supply that you heard in this hearing -- and you heard them from various different sources, from various different parties. A lot came from CAPP. Some came from Enbridge. Some came from other intervenors putting sources of supply to the experts -- all of those sources suggested pretty much, without exception, that there was going to be more and more bitumen hitting the markets over the next 10 to 15 years, whether or not Northern Gateway was built.

839. So the producers state in their argument -- and it's supported by CAPP and I believe also by Enbridge -- that they want market diversity but they have shown no harm to their continued economic success to their businesses in being required to utilize the transportation network that's already in place. They've said it will cost them more, but that's a different thing than showing that there would be harm to their success.

840. We submit that the only conclusion that you can reach in this case is that the producers -- and they're supported in that by the other proponents of the Northern pipeline -- they're not focussed, in our submission, on supporting or -- or ensuring that a reasonable free market is operating.

841. What they're hoping to do is to continue to be able to sell the bitumen or in the future sell the bitumen at prices higher than the free market prices that they require to operate their businesses. They're not going to slow production.

842. They're not going to slow their level of supply when the bitumen price drops or is discounted and, given that they're going to continue to sell it even when the supply is sufficient to reach that less complex refinery and thus bring the price down of all of the bitumen they're selling, we submit to you it's clear the economics of their businesses don't require that to be economic. Their business will still be healthy. It will still be profitable.

843. So we submit that, while the precedents of the NEB suggest that the indicators of the North American free market are one of the indicators of the Canadian public interest, we submit that there is no precedent and none has been brought before you in any of the arguments that suggests that the desires of a group of producers of raw bitumen to achieve what we would submit to you can only be concluded to be extraordinary profit is not such an indicator -- is not a free market.

844. So, at the end of the day, you're going to be asked to review this and consider whether or not the evidence leads you to determine that this pipeline is in the best interest of Canadians.

845. The proponents, and in -- in that word, and I'm probably using it wrong. The people supporting the pipeline, Enbridge and also the shippers and CAPP, the Alberta Government, they believe it's in the best interest of Canadians. They urge that decision on you, but we ask you, why -- we ask you: Why is achieving those extraordinary profits for a handful of producers in Alberta in the interest of Canadians?

846. And we say that having understood you to be taking into account all of our arguments made in our written argument as well, which I'm not going to repeat here about how the evidence clearly shows, based on what was provided to you, that the benefits predicted are too high, that based on what Dr. York said and the other expert evidence taken in the context of his, the best we're going to do is get extra benefits for one to two years.

847. And -- and when I say that that's besides the economic benefits that simply come from constructing the pipeline, we've left that out of the equation

because those are very temporary benefits. The construction phase will create its own economic activity, but that's only for the two to three years of construction, maybe four, depending on how they phase that in.

848. So we would say to you: Why is that in the interest of Canadians?

849. And we would remind you the producers are, for the most part, not Canadian companies.

850. Many of those producers are, in fact, run by companies -- are companies run by the Chinese Government entirely: Synopec, for example; many of them have substantial Asian investment.

851. Those companies make decisions in whole or in part based on the home government -- their home country's government policy and not the free market and the world market.

852. We also point out to you that the shippers came -- who came forward to participate in this hearing, in their written arguments, appear to be opposing the draft condition to increase the percentage of the pipeline that might be open to spot shippers from 5 to 10 percent.

853. You'll recall they had proposed 5 percent and that's what's in the materials, but the condition is to increase that to 10 percent. It seems to us that they want most of the space in both the export and the import condensate pipeline to be allocated to them exclusively for their long-term contracts and that makes it almost a private pipeline.

854. They also -- and, again, I'm sure there's nuance to this that -- that the AFL doesn't understand, but the shippers also state that they oppose the draft condition that requires them to file their final agreements with the Board in part because it would reveal the identity of the shippers and their private commercial details. To us, that makes it sound more like -- the Project sound more and more like a private pipeline for secret shippers to obtain extraordinary profit.

855. We submit that, in the final analysis, the Panel must conclude that the answer to the question: What is the -- is this pipeline in the best interest of Canadians? That the answer is: No. The Northern Gateway Pipeline Project is not, on the evidence before you, in the best interest of Canadians.

856. The AFL came to these hearings to tell the Panel how Alberta's workers feel about the Northern Gateway Pipeline Project and why workers would prefer value-added industry to happen in Canada. Ordinary Canadians have come forward also to tell you. We -- we've read -- we haven't read all of the comments. We were going to before the end.

857. We wanted to respect them, but we know that you have and you heard from thousands of people who've brought you their individual comments. We also know that others have raised environmental and Aboriginal issues and -- and we're not going to comment on those. That's not our area of expertise.

858. But we submit to you that there is no reliable evidence of the promised significant economic benefits from the -- that Northern Gateway and its experts promised.

859. Further, there is there is no reliable evidence of a functioning free market that requires this pipeline to ensure the health of the businesses of the producers in Western Canada. And to some degree, Madam Chair, Members of the Panel, that was our understanding of the decisions in Keystone and in Alberta Clipper was there -- it was necessary for the viability of the -- the producers to continue on in the oil patch, but we're not hearing that here. They'll continue on with our without this pipeline.

860. Now, I want to just take a minute to pause. Mr. Neufeld made a point this morning. He talked about the concern and I believe he was talking -- I don't think he was talking about my argument, but he was talking about somebody's argument and he pointed out that there was, when -- when the Panel heard from some of the communities, that people had come forward and talked about how they had crushing unemployment in some of the communities that -- that you heard from and the AFL is concerned about that as well.

861. And we do agree that there are some very big regional disparities in Canada and there's some communities that are -- are very underemployed.

862. We want to address briefly that comment that came up and the sort of -- the -- there are statements in the written arguments as well about how this -- this pipeline will bring jobs -- jobs to Canadians, and to some degree, the pipeline will bring some jobs. And we don't want to leave that comment without addressing it.

863. For two to three or four years, while the pipeline is being constructed, there will be a significant amount of construction activity, for those two to three years and -- and we don't have any reason to take issue with the projections that Northern Gateway made about how long that will take or how many people will be employed but, once that pipeline is finished being constructed, those construction workers will have no more work from Northern Gateway pipeline.

864. They might go work in other projects across Canada, they might have gained some skills, but their employment there will be over. That two, to three, to four-year period is not going to be a long-term job for a family. It won't be something that you can retire on.

865. After that the evidence says that there will be somewhere in the order of just under 300 permanent jobs. And we heard on the very first Keystone one, and we made a point of -- I made a point remembering it, that the Keystone, the very first one, is going to create 17 permanent jobs and we thought that was too few.

866. This one is going to do more and in a large part -- but still under 300. In a large part that's because there's going to be a terminal, a marine terminal setup in Kitimat. And there will be permanent employment there. And those I expect will be long-term jobs; that might well be a job for a family to settle in the community and live off of.

867. But we want you to contrast that with the amazing number of jobs that would be created if instead the 525,000 barrels of bitumen was upgraded and perhaps refined in Canada. And you have evidence of that from, the reports that we filed from Informetrica.

868. You also, in essence, have evidence of that from the evidence that you have from Dr. Mansell because the same benefits of the investment, the economic investment in Canada, would hold through to an economic investment in upgrade in refinery but they would more. They would be more because those workers would continue to work each year and there would be the ongoing economic benefit.

869. So while we agree with Mr. Neufeld's comment that it's not fair to ignore the crushing unemployment in some of the local communities that are impacted by -- and may well be positively impacted by the construction of the pipeline, it's a temporary, very small, little blip in the lives of those folks; it's not

a long-term solution for them.

870. And although it's better certainly than a life of crushing unemployment to have that work for that short time, it's not a long-term solution and although -- it's not in the best interest of Canadians when you weigh it against all of the other extraordinary costs of this pipeline.

871. So we ask you to find that this pipeline isn't in the public interest and that you recommend that it not proceed.

872. In the event that you do, we -- or in the alternative we understand you must provide conditions either way, we generally endorse the conditions that you have proposed. We won't speak to the ones for which we have no expertise. We're certain that other people will. And we've given you our points with respect to Condition 147.

873. Subject to your questions, I'd like to thank the Joint Review Panel for allowing the Alberta Federation of Labour to participate in these proceedings. We want to thank your staff. The staff of the National Energy Board are always extremely helpful and friendly and they never, ever, have trouble helping us with our stupid questions, getting us on track and getting us here.

874. We like -- again would like to echo the comments of Mr. Neufeld. The participants in this proceeding, the counsel, the other parties, have been also exceptional and we would like to thank them as well. People have treated us professionally. They've been very polite. They've been helpful and congenial. Even when they don't disagree with us, they've been more than courteous and we'd very much like to echo his point in that regard.

875. Finally, the last thing I'd like to say to you is though, although we very much appreciate the opportunity to have a final word on the -- back up the list grouping, we're not going to be able to be here to do that.

876. We know that you won't assume that means that we agree with everything that was said that's different from what we've brought forward and we know that you'll understand our position and where it might vary but we just are unable to expend the resources to be here.

877. We figured that in all of time we've been here, with our written argument and our comments today that we've well had a chance to canvass our

positions and we thank you for that opportunity. We mean no disrespect by not taking advantage of it and we very much thank you for your attention.

878. **THE CHAIRPERSON:** Thank you, Ms. Chahley. The Panel has no questions of you.

879. And just also note that because it's a Joint Review Panel Secretariat, it's not only the NEB staff who go above and beyond but also the CEAA folks.

880. **MS. CHAHLEY:** Oh, well I'm so sorry. And of course it's to everyone who's been extremely helpful.

881. But I mean, truly they do a lot of administrative work in other areas, the staff of the tribunals that I've encountered in the bitumen export pipeline hearings, let's call it that, all of them have just been amazing. You really have got excellent people working for you.

882. Thank you.

883. **THE CHAIRPERSON:** Thank you Ms. Chahley, we agree.

884. **MS. CHAHLEY:** How did I do?

--- (Laughter/Rires)

885. **THE CHAIRPERSON:** I was going to say ---

--- (Laughter/Rires)

886. **MS. CHAHLEY:** In reference of the time?

887. **THE CHAIRPERSON:** Ms. Mills is so efficient she's already reset the clock but she says seven minutes was what you had left over. Thank you very much.

888. Call next BC Nature and Nature Canada?

--- (A short pause/Courte pause)

889. **MR. TOLLEFSON:** Good afternoon, Madam Chair.

890. **THE CHAIRPERSON:** Good afternoon, Mr. Tollefson.

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

891. **MR. TOLLEFSON:** Nice to be back. I would like to, if I could -- and I will stand because I brought along an extra person today and I'll be introducing them shortly.

892. I want to, first of all, thank you for the opportunity to address you on reply. As you know I will be attempting to weave our reply to both the written arguments as well as the oral reply submissions we've heard this morning and this afternoon.

893. With me today once again is Mr. Anthony Ho, who is with the Environmental Law Centre; Ms. Natasha Gooch who is our articling student and as well, on the far right, Ms. Rosemary Fox who is the Conservation Chair of BC Nature.

894. And I thought for convenience and interest of time, when I'm referring to BC Nature, Nature Canada, who are two clients, I think I will say BCN/NC, or our clients, as opposed to going through the whole wrote.

895. By way of preliminary, Madam Chair, Members of the Panel, based on our review of Northern Gateway's written argument, there were only a few areas where, this afternoon, we wish to make submissions. We're content to, I think, to leave with you our lengthy written argument.

896. So we'll very much focus on a few issues, four issues in particular, that I will be identifying shortly. Those four areas are -- first of all we'd like to address a couple of what we consider to be fairly significant factual errors in Northern Gateway's written argument. We want to respond to those in some detail because of their significance, both to our client and to the case that we've been making here today.

897. We'd also like to respond to arguments and submissions that are made in the written argument, and again here today by Mr. Neufeld, that our clients and some other intervenors have raised criticisms for criticisms sake.

898. That they haven't played a constructive role, they haven't put forward constructive proposals and therefore that should be, somehow, taken into account in the weighing of the value of our contribution. We want to make a submission on that.

899. There -- as well, in the third area, I want to talk about a few miscellaneous comments about the state of the evidence and how to characterize the evidence arising, both from things that Mr. Neufeld has said today as well as issues in the written argument. Primarily in that regard, issues relating to the recovery following the Exxon Valdez spill and the QRA.

900. And then finally what I propose to do in the time remaining, and I am going to keep track carefully of the time, is under the general heading "Legal Arguments" which I believe was Mr. Neufeld's final -- or second final area as well and I want to talk about, in that regard, the final portion of our own written argument which deals with the admissibility of expert opinion evidence.

901. I want to distinguish what we are proposing to you in our written argument on that issue from the motion that we earlier made. And then finally, I want to make some comments on the important distinction between sufficiency and completeness.

902. Now, you've heard both in the written argument as well as today, those terms being put forward by Northern Gateway and by Mr. Neufeld. And on behalf of BC Nature, Nature Canada, I propose to offer some thoughts on that topic.

903. I would like to, if I could, start with two points relating to errors that we say have crept into the argument submitted by Northern Gateway.

904. In their written argument, Northern Gateway says that we, our clients, describe ourselves as, quote, "associations of scientists" end quote, but that we provide no information regarding our membership or how those members are affected by the Project. And I think Mr. Neufeld made comments of a similar nature this morning as well.

905. In the written argument, in support of the quote that I've just offered, Northern Gateway cites one document and that is the letter of intervention that my clients filed on July 11th, 2011. It's a two-page document, very short.

906. We in fact, excerpt in our own written argument, most of it in the second paragraph and I want to underscore this. Nowhere, nowhere in that letter do our clients describe themselves as an "association of scientists".

907. Moreover, contrary to what is stated in the written argument, we say that the letter actually provides fairly significant information on membership. It says as follows, quote:

> *"BC Nature is a province-wide federation of naturalists and naturalist clubs', with approximately 4,500 members."*

908. It goes on to state that Nature Canada, quote:

> *"...is the national voice of naturalists in Canada."*

909. Moreover, contrary to what the written argument says, the letter does go on to provide information as to what the interest of these memberships are in this particular project.

910. BC Nature's interest is stated in the letter to be *"the maintenance of the integrity of B.C.'s wide range of ecosystems and rich biodiversity, and in related public education"*.

911. And Nature Canada's mission is stated, quote:

> *"...to protect and conserve wildlife habitats in Canada by engaging people and advocating on behalf of nature..."*

912. It further goes on to identify that Nature Canada partners with international groups to mount the IBA, the Important Bird Area program in Canada and that BC Nature coordinates that program here in British Columbia.

913. I'm saying all this because it does bemuse and confuse me that my friend would feel that he does not know enough about what BC Nature and Nature Canada -- who they are and why they're here and what we've been doing in this process over the last two years.

914. As you know, we've adduced a written evidence of three experts into the record, only one of whom was cross-examined by the Proponent. The legal team was retained about a year ago and we've been quite active, as you know, in

this hearing process. We've, I think, added value to the process. So I just want to kind of make that comment and leave it.

915. I won't speculate on why the comment was made by my friend today or in the written argument but I do say this, that if he was inclined to find out more about BC Nature, Nature Canada's views, the opportunity for him to cross-examine two of our experts, which he chose not to take up, that opportunity presented itself and for reasons that I won't speculate, was not taken up.

916. So I want to just leave that point there and move on to my somewhat related point, I guess, which is that around the same part of the argument, the written argument, there is an assertion made by the Proponent that our clients have grasped at -- this is a quote:

> *"...grasped at evidentiary straws to show that the assessment of the project effects are flawed."*

917. That we've grasped at evidentiary straws and then as an example of that, the Proponent asserts, and I quote:

> *"...that questioning went as far as to impugn the professional integrity of Northern Gateway's wildlife advisers."*

918. End quote.

919. This general criticism, which is raised by the Proponent, we'll deal with subsequently in our argument but we do want you to take a close look at the substance of what is being alleged here.

920. It's being alleged that we have impugned the professional integrity of Northern Gateway's advisers and yet in the portion of the transcript which the Proponent references as supporting that claim, it is made clear that that was absolutely not the case.

921. And I think that hopefully you will recall this exchange when Mr. Langen raised the spectre that I had put the professional reputations of their witnesses in issue. I responded at paragraph 25997 as follows:

> *"My friend completely misconstrues what I'm saying.*

> *The professional reputations that I am talking about are of the three individuals to whom was attributed erroneously a linear feature density that they never advocated for." [Vol. 101, paras. 25997-25998]*

922. And of course, that is a reference to Mr. Francis, Mr. Anderson and Mr. Dyer, who are the authors of the report that we were cross-examining on that we said did not stand for -- absolutely did not stand for 1.8 linear feature density metric, which the Proponent had said that it did and continued to maintain that position up until the 11th hour, right before that panel when by an errata, they changed the reference.

923. So rather than putting -- rather than raising any questions as to professional integrity in terms of Northern Gateway, what I was trying to do was to clarify the professional reputations of these other individuals who had clearly -- and Northern Gateway later admitted this -- clearly never advocated for this 1.8 linear feature density metric. *[Vol. 101, para. 26226]*

924. It's not only important to clarify the record in that regard, it's also important to underscore, Madam Chair, that this is a very key substantive feature of the case in front of you, that we say that the linear feature density threshold issue is fundamental to the question of whether the Proponent has adequately dealt with protecting caribou and caribou habitat.

925. And we say that rather than raising this old argument about professional reputations, we say that what the Proponent should have done is recognize that the 1.8 metric had been discredited by the cross-examination and they should have come back and offered an alternative metric or an alternative approach, possibly one based on the Sorenson model, that would help to rehabilitate that issue, that weakness in their argument. And they did not do that and I won't comment further.

926. Now, Madam Chair, I want to move on to the second part of my argument, which is a response to the suggestion somehow that groups -- and I think he specifically named -- Mr. Neufeld names us and the Environmental Coalition in this regard -- the groups that raise criticisms without offering alternative approaches or mitigation strategies, that somehow their evidence, their contribution should be valued less, that their evidence should be weighted less in the final analysis.

927. Northern Gateway, in their written argument, calls this "criticisms for criticism sake". In fact, Northern Gateway says it's disappointing to them that our wildlife expert, who they did cross-examine, the one expert they did cross-examine, found it disappointing that he didn't offer any practical suggestions regarding how the Project effects could be mitigated.

928. And Northern Gateway carries on in the same light in relation to evidence that has been tendered by Raincoast suggesting that, for similar reasons that that evidence should be deemed to be of marginal -- of marginal value. That it should somehow be discounted.

929. You know, Madam Chair, I have to say that out of all the things that I'm going to make submissions on, this is one of the most troubling. I would submit that this criticism that has been made against ourselves and against Raincoast, that it betrays a fundamental misunderstanding of what this process is really about.

930. This is an adversarial process. This is a quasi-judicial adversarial process, and I believe that we have operated in that way; that you have governed this proceeding largely in that vein.

931. We would say further that, given that it's an adversarial process, that that implies that the party who is bringing the application has the burden of proof that, at all times, in relation to all of the key issues that are alive here -- public interest, necessity, the absence of significant adverse environmental effects, completeness of the Application -- that in all of those respects in relation to all of those legal tests, this Proponent has the legal burden.

932. It is not our job to help them discharge that burden, Madam Chair. It is our job to help test the evidence. And I think, at various points, comments from the JRP have reinforced that that is the division of labour here. We are here -- and I think you understand that -- to test the evidence. We do that through cross-examination. We've done that through the IR process. We do that, in a sense, right up until -- right up until now.

933. Now, I recognize that Mr. Neufeld softened somewhat the tone of what is said in their written argument on this point today and I appreciate that, at a couple of points in his oral submission, he recognized the need to appreciate, while there were differences of views, that everybody has made a genuine contribution here.

934. But in the written argument, if you read the written argument, Northern Gateway has made a fairly powerful and I think a legally incorrect submission, which is that because we haven't put forward mitigation strategies or come up with constructive proposals, that our evidence should be considered as being of lesser value, a contribution of lesser value.

935. And as you know, we've worked hard in this process. We've worked hard in a genuine and *bona fide* way. We've cross-examined for 25 hours. We won't go into all of the contributions we feel we've made. Others have made many good contributions.

936. The notion that a party should disentitle themselves to having their evidence taken seriously to being weighted on equal footing with other parties' evidence because they're offering criticisms in an adversarial process where a proponent is carrying the burden of proof, is an astounding proposition. And perhaps Mr. Neufeld has backtracked from that today, but I believe in the written argument that is their position.

937. I'll like to turn to Part 3, please, which is some comments on the state of the evidence, as you shortly will retire to consider it. And the first concern is the evidence relating to recovery of Prince William Sound after the EVOS disaster.

938. In its written argument -- and the citation is provided already to Ms. Niro -- in its written argument, Northern Gateway says as follows:

> *"As Dr. Pearson, Dr. Maki and Mr. Moore make very clear, the Prince William Sound ecosystem has returned to obviously good health."*

939. That is the quote, that is the sentence that we want to take issue with. We note -- and I find it a little ironic because Mr. Neufeld made the point that Northern Gateway is concerned that some parties have put forward propositions that are unreferenced, that are not sourced. We note that statement is not sourced. There is no citation. There's no footnote.

940. But more importantly, we say that that statement is completely at variance with the record. There is certainly some evidence -- and Dr. Pearson's report, I think, falls into this category that there has been recovery of Prince

William Sound post-EVOS. But we say there's significant evidence to the contrary, which that statement completely discounts and much of that evidence, a good chunk of it, was evidence that we put in, in writing through our two experts that weren't cross-examined.

941. We also canvassed this issue at length in cross-examination. And we put to the experts and we recite this in our written argument at some length; we put it to these experts, Dr. Pearson, Dr. Maki. We say: There is a significant difference of opinion about whether there has been recovery in Prince William Sound; do you not agree?

942. And while they don't specifically agree, they don't disagree either. And the evidence is, in fact, I think clear that there is a difference of opinion.

943. We also put something to Dr. Pearson which is notable and we deal with this in our written argument, we asked him why it is that none of the sources that are critical about whether there's been recovery in Prince William Sound, none of the sources sponsored by funding provided by the EVOS Trustees counsel, why none of that research found its way into what was otherwise presented as a comprehensive research effort led by Dr. Pearson.

944. At various points, several points, we ask him that very question, and I think he's an honest man. I don't say there was any conspiracy. Mr. Neufeld was suggesting -- put the word out there, there was maybe conspiracy or was suggesting something improper.

945. No. I just think there's a big gap in that research, in that body of research that's unexplained; that it doesn't properly give airtime, it doesn't give proper credence to competing views. And there's no explanation as to why that is, and we're certainly not going to offer an explanation as to why it is in the absence of one from Dr. Pearson.

946. Bottom line, Madam Chair, the statement that these three individuals have made it clear that Prince William Sound and its ecosystem has returned to obviously good health, that simply cannot stand. You cannot rely on that assertion, and it would certainly fly in the face of significant evidence that you must take account of.

947. I would like then, if I can -- and I'll just do a little time check here. I would like then to talk about some evidentiary issues relating to the QRA. And

this is in response to the Northern Gateway written argument.

948. You'll recall, I think, during the cross-examination that we did at the Shipping and Navigation Panel, that we ask the experts about sensitivity analyses. *[Vol. 156, paras. 32314-32315]* They had only done a sensitivity analysis of about four of the inputs into the model, and we asked why there hadn't been further sensitivity analyses done, especially given, as they admitted, that they hadn't done confidence intervals, which is another way of testing the reliability of evidence.

949. And in their written argument, Northern Gateway does respond to that -- does respond to that issue by saying that, in the case of under-reporting, i.e. the base frequency that's reported in terms of spills and other incidents, that they didn't do a sensitivity analysis because it wasn't interesting. It wouldn't "add value" in terms of the -- in terms of the analysis.

950. I guess, you know, I want to make a point of this. Again, it goes to the nature of this process. At various points in that cross-examination, whether it's Mr. Cowdell at 32315 or Mr. Brandsaeter at 32257, *[Vol. 156]*, the answer that we get when we say, "Well, why didn't you do a sensitivity analysis of this input or that input", the answer is basically "We didn't think it was 'interesting'." We say that that is not -- that is not a proper -- that is not a fulsome, that is not a robust way of standing up and answering the demands of the burden of proof.

951. In this -- in this proceeding and in particular in this QRA, DNV does not deny that under-reporting i.e. the phenomena that many spills and instances don't get reported into the Lloyd's database and other databases, they don't deny that that's a problem. And in fact, they characterize it or they agree with our characterization of it as a significant issue.

952. We say that if there is an issue that could impact the data, regardless of whether you think it's interesting or not, that you should do a sensitivity analysis, which is basically quite a simple calculation that would shed some light on the reliability of the conclusions that you've -- that you've reached.

953. Neither Northern Gateway, nor for that matter DNV, has, in our view, either explained why in the QRA there is no reference to under-reporting, given its significance as an issue and certainly as a potential impact on the reliability of data, nor have they explained why, apart from saying that they weren't interested in it, why no sensitivity analysis was done on that input.

954. And we say that's -- that is a problem, that -- because that, in our view, is just another way that the way that this application has been put forward is to deprive the JRP of an ability to have all of the evidence. It should be you who decide what's interesting, what's relevant. That's what you should be looking at. You shouldn't have to rely on the conclusion of another expert to say "We didn't bother because it wasn't interesting".

955. This, I would submit, has some similarities as an issue to the one that Mr. Neufeld brought forward this morning around double-counting, which is another issue that we say ought to have been subjected to a sensitivity analysis. Of course the problem with double-counting is that if the mitigation measure that is being proposed has already been factored into the raw data, then you shouldn't be giving credit to yourself for using that mitigation measure, because it's already reflected in the outputs and the data.

956. Mr. Neufeld said that -- I don't know whether he was referring to us, but he -- I think he did use the words "fast and loose". He said that some of the submissions on this were a little fast and loose. And I just want to reassure you that we -- that is my client -- in our submission, we strive always to be fair and balanced. And we believe in presenting this argument we were just as fair and balanced as we were in all of our other submissions.

957. If you go to our written argument at paragraphs 2010 to 2016, I think you'll see that not only do we make reference to the individual Mr. Scalzo that is -- his evidence which is the subject of his comments this morning, we also referenced virtually all of the other individuals who gave evidence on this topic. We recognize that the evidence points in different directions and Mr. Scalzo's evidence changes a little bit over time.

958. We're not saying that we have the answer as to how much there was double-counting or the, you know, the exact magnitude of the problem. But I do want to read you this just from our -- from our written argument just to -- I think -- probably just to reassure you that we have taken a balanced approach here to the issue and leave to you the more challenging job of figuring out what to do -- what to do with the evidence as it's stands.

959. Here's what we say at 2016, which is the conclusion of that portion of the evidence and I believe this may be the same portion that Mr. Neufeld cited, this is what we say:

> *"Given the fact that the use of tug escorts has been implemented, either legally or on a voluntary basis, in terminals and tanker traffic areas around the world during the period examined by the QRA, it follows that the effect of tug escorts would already be reflected in the incident frequency data used by DNV from the IHS Fairplay [Lloyd's database]. "*

960. We say that's a fair statement based upon the state of the evidence. We're not arguing -- we're not making a submission as to the magnitude of the problem but we're saying that there is a problem and that all of those individuals, including Mr. Scalzo, said that in many areas around the world, there is either now voluntarily or legally mandated tug escorts.

961. So let -- I'm just going to continue on in 216 (sic), so then we say:

> *"Therefore, DNV failed to demonstrate that the QRA does not double-count the use of tugs as a mitigation measure."*

962. That's also a fair statement. They don't mention double-counting relevant to tugs at all in the report, although they do talk about tugs as a mitigation measure. So that is a very fair and accurate statement as well.

963. The third sentence in that paragraph:

> *"As such, the Proponent has failed to provide a proper analysis of the potential impact of spills on to the marine environment as required by the scope of factors."* (As read)

964. And then there's a reference to the scope of factors, which are factors that, as you know, CEAA has put out largely in recognition of the marine component here. It's a somewhat unique feature of this process. We say those factors are ones that you must take account of. The Proponent's not bound to follow the scope of factors. I think the evidence is they look at it as guidance. But you must consider the scope of factors. And in fact, many of the factors are framed in the mandatory shall or must.

965. So I just wanted to point that out to reassure you that in this area and in others, we have tried to be absolutely scrupulous about how we present the evidence. And we certainly would never act in a way that is fast and loose when

it comes to evidence. We take evidence very seriously as my next submission -- as my next submission will underscore.

966. So the final two arguments pertain to what might be characterized as legal issues between us and the Proponent. The Proponent has said that when it comes to this procedural deficiencies argument that is set out in the last 20 pages of our written argument, that this is essentially an argument that has -- the same argument that has been made and dismissed by this Panel pursuant to the motion that we filed on April 2nd.

967. You know, sometimes it's a lawyer's job to pretend that, you know, they're confused or maybe surprised by things, and I think he's -- Mr. Neufeld said he was surprised to see the argument again. He's a very able and experienced counsel and I can see why he would say that.

968. But the reality is this is a completely different argument. We are -- in the motion asking for guidance from you, as a Panel, as to the rules governing cross-examination and the conduct of witnesses and we catalogued why we thought that you might want to use your discretion to issue a procedural directive in that regard, and you quite appropriately exercised your discretion at that stage of the hearings for reasons that you set out, to not to do that and that's fine.

969. This motion goes to a different issue. We say at this stage of the hearing, in our written argument what we're asking you to do and what you have to do is mandatory, you have to sift through the evidence to decide what's admissible and what is not admissible. And where experts have given opinion evidence, you have to decide whether those experts have testified within the four corners of their qualification. That is something quite different.

970. Also, in terms of remedy, as I said, we were asking in the motion for a procedural direction. Here in our final argument, we're saying "Here's what the principles are that you have to apply when it comes to assessing this expert opinion evidence".

971. And we say, when it comes to Mr. Michel and when it comes to Mr. Cowdell, -- but only in the area that I'll just mention -- when those two individuals are testifying relative to risk assessment, when they're testifying relative to the QRA, we say that evidence is not admissible. It cannot be considered because it is beyond the scope of their expert qualification.

972. And we say that that's a threshold issue. You have to look at whether the experts have testified within the four corners of their expertise. Northern Gateway's made the same argument in relation to Professor Darimont and other witnesses as well. We say you have to look at whether the experts are testifying within their credentials and if they haven't been, then it's not admissible. It's only admissible because they've been qualified.

973. If they haven't been properly qualified and they haven't stayed within that qualification, then it's not admissible. It's only then that you get into the process of weighing the evidence and I won't, recognizing time and recognizing the scope of reply, I won't get into that point any further.

974. Now, I do want to though -- because it was raised in oral argument this morning, I do want to talk about Mr. Michel. We say that the only expert who is properly qualified to testify about the QRA and risk assessment was Mr. Brandsaeter. Neither Michel -- Mr. Michel nor Mr. Cowdell were properly qualified. Although they did testify in those areas, we say that testimony should not be considered in the final deliberations and we say that, when you look at -- based upon a close examination of the qualification process of both individuals.

975. When you look at, for instance, Mr. Michel -- and I think Mr. Michel is probably the most important of the two cases -- when you look at what the proponent filed as Mr. Michel's direct evidence, there was a CV and then there was also a statement that said that Mr. Michel -- and I have the -- the citation already provided -- Mr. Michel was to respond to questions concerning -- or related to the evidence of Northern Gateway concerning marine transportation including in respect of matters pertaining to design and construction of oil tankers and corrosion inspection and maintenance of oil tankers. So that's what -- in his direct evidence that was filed on the public registry, that's what it was set out that he would testify to.

976. Now, the Proponent might say in reply, well, marine transportation is a big topic. That means that we kind of left it open that he could talk about risk assessment as well. But I would submit that argument doesn't carry weight because all of the panellists -- all of them were qualified, generically, for marine transportation and then, specifically, for areas within marine transportation.

977. I want to be clear about this and we say this in our argument. We're not necessarily disputing that Mr. Michel might be an expert in risk assessment. It's mentioned in his CV in passing. It's not entirely clear that he's had any

experience dealing with a -- with an analysis like the QRA in this case. The problem, though, is that he wasn't properly qualified and the next stage of the qualification, of course, is when he was actually presented to -- to you, the Panel, and here is what was said when he was presented to you, the Panel, at 31083. *[Vol. 155]:*

> *"MR. CROWTHER: You are appearing as a member of this witness panel to speak generally to the evidence of Northern Gateway concerning…"*

978. And -- and see how close this aligns with the -- what's put on the registry:

> *"…concerning operations, safety and accident prevention related to the proposed marine terminal and marine transportation, and specifically…"*

979. And it goes on to talk about an exhibit that deals with:

> *"…"Corrosion Inspection and Maintenance of […] Tankers# and [another exhibit which deals with] […] "Design and Construction of Oil Tankers"; correct?"*

980. So when he's being presented, that's what -- that's what he's being presented for and Mr. Michel says:

> *"Yes, that's correct."*

981. It's really only at the very tail end of the process and you know how the process works. There's a -- there's a stage where the counsel will finally present the witness and say or ask you to accept them and Mr. Crowther does this at 31099. *[Vol. 155]* So after all of this, only at the 11th hour, does Mr. Crowther say this. He says:

> *"Madam Chair, I ask that Mr. Michel be accepted as an expert qualified in respect of […] subject areas of naval architecture, tanker design, maintenance and inspection, corrosion in tankers…"*

982. And then he adds three words.

"…and risk assessment…"

983. Those three words do not appear in his presentment or in his direct evidence except in the CV and we say that those three words render defective his qualification as an expert relative to risk assessment because the intervenors and the other parties didn't have proper notice. Those three words are added on at the absolute tail end of the qualification process. Could have easily been the case that parties didn't hear those three words.

984. We rely on what's put on the public registry. We rely on what is said when a party is presented. We reasonably relied -- I have to say this -- we reasonably relied that there was one witness being tendered by the Proponent to deal with QRA and risk assessment and that was Mr. Brandsaeter.

985. Had Mr. Michel been explicitly and properly presented through the qualification process as an expert on risk assessment and the QRA, it's very likely that he would have been exposed to questioning. He was not because he wasn't properly presented.

986. You know what the -- it's very strange and curious, Madam Chair, that not only does Northern Gateway not feel it is necessary to respond to this important legal argument, today, but they repeat what they say in their written argument which is that Mr. Michel is "*a world-leading expert in marine risk assessment"*. That is in their written argument and it was repeated again by Mr. Neufeld today.

987. There is not a scintilla of evidence to support that, in my -- in my respectful submission. That statement by the way is footnoted. It is footnoted in Northern Gateway's written argument but the footnote doesn't mention Mr. Michel at all. It only relates to another party, Mr. Scalzo. So that's a -- that's a pretty big assertion that's hanging out there given the cloud that, in my respectful submission, hangs over his qualifications.

988. I won't go into Mr. Cowdell's qualifications. I think it should be common -- it should be common ground that Mr. Cowdell was not qualified as an expert in risk assessment or the QRA. If you follow our written argument, that's abundantly clear. Notwithstanding the fact that at various points, numerous points throughout that panel, Mr. Cowdell answered questions as if he were an expert, all of that evidence relative to the risk assessment and relative to the QRA,

we say is legally inadmissible. You must exclude that evidence just as we say, based upon the flawed qualification of Mr. Michel, that you must do likewise for his evidence.

989. My final point -- how much time do I have? Oh, I guess I didn't need to go so fast. Okay, I'll slow down. All right, I'll take a drink too -- of water.

--- (Laughter/Rires)

990. **MR. TOLLEFSON:** All right. So the final argument, Madam Chair, pertains to two terms that in your -- in your final reasons on this Application, I submit you will need to dig into and reflect on very carefully and these two words -- these two concepts are: completeness and insufficiency.

991. Today, Mr. Neufeld framed much of his presentation as a rejoinder to arguments that he attributed to various intervenors which claimed that, in various facets, this Application was insufficient and I think he did a -- he did a very good job of covering all of the bases. I will give him credit for that.

992. He also, in the course of that, made reference to what he calls -- and I guess not only does he call it but Northern Gateway in its written argument describes it as a "sufficiency decision" rendered by the Panel.

993. Now, I went looking on the public registry for something called a "sufficiency decision". I could not find it. I found a document dated the same date that he -- that is attributed to be the sufficiency decision, but what I take to be -- when what Northern Gateway seems to be describing as a sufficiency decision is a decision that the JRP made back in Prince George -- I believe it was Prince George. I wasn't really involved around this issue -- a decision that turned on this: Was this Application ready to go to a hearing?

994. Was there enough substance? Had the various guidance documents and scope of factors and other legal documents that were necessary to provide a structure to this process was the application for that matter in a reasonable enough shape for a conclusion to be reached that we could say that we were ready -- the "we" being the JRP -- to go to a hearing. We say that the sufficiency decision cannot and should not be conflated with what we call your completeness decision.

995. Completeness and sufficiency are two different things and they serve different purposes. Temporally they arise at different parts of the process.

Sufficiency really is a threshold issue that arises, that you have to turn your minds to in terms of whether you're ready to start hearing evidence in terms of the hearing process. The threshold for that will be calibrated accordingly.

996. It will be recognized that there will be more evidence coming in and there will be new issues that emerge. It's -- I think we all recognize, this is a somewhat iterative process and it can be frustrating as a result. Sufficiency recognizes that, the notion of sufficiency recognizes and adjusts for that.

997. We say that completeness is an entirely different concept. Completeness, for one thing, is a term that appears in the *National Energy Board Act*, in section 52(1) and it appears as a statutory precondition that you must turn your minds to and be satisfied of before there's any duty on you and maybe even any legal authority bested in you to make a recommendation to the federal minister.

998. So completeness is also a threshold issue but it's a threshold issue that pertains to the exercise of your powers to make a recommendation. Section 52(1), I think, underscores what I am saying. It says in part, if the Board is of the opinion -- and let's be candid, that connotes a very discretionary standard. You -- it's your opinion that matters but if the Board is of the opinion that an application for a certificate -- and of course, there could be various certificates issued in respect of a pipeline.

999. If you are of the opinion that an application for a certificate in respect of a pipeline is complete -- if it is complete, then you shall prepare and submit a report to the Minister and talking about your recommendations. And the recommendations, of course, can vary widely and can, of course, include conditions. We say that this is a fundamental legal question that you have yet to ask and you have certainly yet to answer.

1000. The corollary of asking the question is that if the application, in your opinion, is not complete, we say that not only do you have no duty but you may not have no power to make a recommendation relative to this project.

1001. Now, I said there's good policy behind both of these concepts. Sufficiency recognizes the iterativeness of the Project and the application requirements. The fact that we have to kind of work together to some degree, although it's adversarial process, to test the evidence and figure out weaknesses and maybe the Proponent will be able to fix those but there is also finality built

into this.

1002. At a certain point the evidence is closed. At a certain point the job is up to you. At a certain point you have to decide if the application is complete. It either is or isn't at this point. That's your call. It can't be fixed one way or the other and when we say completeness, we mean everything.

1003. We mean does it comply with the *National Energy Board Act* and regs, filing manual, with CEAA, with the scope of factors with your Terms of Reference. We say that there has to be substantial completeness on all of those fronts before you can look at the next question.

1004. The next question is, is this a project that you should recommend should proceed or not? If you're recommending that it should proceed on what conditions.

1005. We looked hard at this question and thought about it a lot. You'll see in our submission that we -- and I think some other submitters as well -- have come to the conclusion that the only way to look at this body of evidence, the only way to look at this application in a way that is balanced and fair, the only way that we say it makes sense to look at this application right now is to say that it's not complete and that therefore the issue of a recommendation does not arise.

1006. That's what we submit but it is ultimately your decision and we hope that in making that decision that you will ask the questions in the sequence that we've just proposed.

1007. Thank you very much.

1008. **THE CHAIRPERSON:** Thank you, Mr. Tollefson.

1009. The Panel has no questions. Thank you very much.

1010. Let's take our afternoon break and come back at 3:45 please.

--- Upon recessing at 3:28 p.m./L'audience est suspendue à 15h28
--- Upon resuming at 3:43 p.m./L'audience est reprise à 15h43

1011. **THE CHAIRPERSON:** If we could get everyone to take their seats please.

1012. Thank you very much everyone for taking your seats so that we can resume. This is a long, narrow room so it's harder for me to get right to the back of the room and tell everybody it's sit down time. Thank you very much for coming back to your seats.

1013. So we'll go now to the Province of British Columbia and we note the time is 3:45 and we just wanted to let you know that rather than cut you off 45 minutes into your argument, we will sit the extra 15 minutes to 4:45 so that you can complete this afternoon.

1014. **MR. JONES:** That's great. Thank you Madam Chair. I'm hoping to be finished by 4:30.

1015. **THE CHAIRPERSON:** Thanks, Mr. Jones.

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

1016. **MR. JONES:** Thank you, Madam Chair. The Province of British Columbia appreciates this opportunity to provide final argument to you with respect to the Northern Gateway Project.

1017. I did want to first off, introduce the people who are with me today. I think you know most of them. To my right is my co-counsel Elizabeth Graff and to my left is Jim Hofweber from the Ministry of Environment and to my far right is Geoff Plant with Heenan Blaikie, also counsel for the province.

1018. I did want to echo the comments of Ms. Chahley earlier. I wanted to thank both yourselves and your staff, both NEB and CEAA, with respect to their work. It's -- it is really appreciated. They have been remarkably helpful for us, including the magical and clairvoyant Ms. Niro, and her colleague Ms. Gilbert. So very much appreciated by the province throughout the process. Also, thank you very much for reading all of our 2,700 pages, including our 50 some, so thanks again for that.

1019. With respect to the arguments, I had some concern when all of the parties were submitting argument at exactly the same time and was hoping that we wouldn't be ships passing in the night. I think as it turned out, the parties have

-- especially Northern Gateway and the province, have effectively joined issue on the important issues for the province and our reply will therefore be relatively brief.

1020. The Joint Review Panel is faced with two clearly different views with respect to whether it would be in the public interest to recommend the issuance of a certificate at this time. Every project must be evaluated on its own terms.

1021. The province's view, as set out in the argument, is that given the unique circumstances of this pipeline, including the real challenges of responding effectively to a spill, from either the pipeline or a tanker, Northern Gateway must be able to show that the mitigation measures it has put forward will be effective. The province submits that it has not yet done so.

1022. It would be inconsistent, we submit, with the public interest to allow this Project to proceed in the absence of this assurance from Northern Gateway.

1023. It would also be inconsistent with the fundamental principles underlying environmental assessment, as applied to this Project specifically. Environmental assessment is intended to identify significant environmental effects of a project before the project has been started and identify the practicable litigation measures that can reduce those effects. This is all the more important when what is proposed is claimed to be one of the most important pipelines ever constructed in this country, according to Northern Gateway.

1024. We do have some specific comments in reply, and I'll be taking you through the different paragraphs of the Northern Gateway argument.

1025. First, with respect to some comments that Mr. Neufeld made this morning with respect to the arguments of other parties concerning the sufficiency of information, it's not the Province's position that there's an absence of information here and, certainly, Northern Gateway has produced a tremendous amount of information. Many thousands of pages of evidence have been produced in this proceeding.

1026. But specifically with respect to paragraphs 504 to 508 of its argument, Northern Gateway states that emergency preparedness and response is not so much a collection of documents setting out all possible release scenarios and all possible response actions. Rather, it is a process subject to:

"... continual assessment adaptation and refinement ..."

1027. Whether or not it's a process, the Province's position is that if Northern Gateway claims that its emergency preparedness and response has effective measures to mitigate the potentially significant effects of a spill, the Joint Review Panel must be satisfied that the mitigation measures will, in fact, be effective. To be sure, emergency preparedness and response may well undergo testing and exercise to refine and improve the ability to respond to a spill. In fact, that's something that we will be addressing later with respect to conditions.

1028. And we do not suggest, at this stage, every possible -- or as Mr. Neufeld said this morning -- all conceivable spills must be modeled and all response actions be delineated.

1029. This reference by Northern Gateway is presumably intended to be hyperbole.

1030. What we do say is that what Northern Gateway has presented is only conceptual, leaving it unclear today whether, in the coming years, Northern Gateway will be able to prepare a spill response regime that lives up to the commitment it has set for itself, a world-class regime that will be able to respond effectively to all spills.

1031. Northern Gateway submits in its argument the additional work that has been done for the Kitimat River -- and I'm referring to paragraphs 522 forward of its argument. However, it's clear that the Kitimat report is a preliminary document that does little to show the practicability of spill response. This is discussed in our argument and more fully in the Haisla argument at paragraphs 1026 and forward.

1032. Indeed, in its argument, Northern Gateway notes that optimal response locations and tactical watercourse plans would only be investigated and confirmed following final routing and detailed engineering. It also states:

"...only that it is committed to investigating various options for ensuring access to the Kitimat River valley and response sites."

1033. That's a quote from paragraph 526.

1034. At paragraph 507, Northern Gateway submits that those parties who

have criticized its spill response planning to date have:

> *"...unfairly denigrated Northern Gateway's commitments."*

1035. The Province sees nothing unfair about these criticisms.

1036. As noted in our argument, the fact is that Northern Gateway has not yet shown it will be able to live up to those commitments. Rather, as set out in our argument, the evidence shows that, in the event of a spill into a watercourse, for example, Northern Gateway's own response time target of six to twelve hours could mean that significant damage would occur before any spill response event was -- spill response was commenced with significant environmental effects as a result. And this, of course, assumes that some active response will be undertaken, something that is not yet clear.

1037. Regarding the issue of sinking oil, which took up a great deal of time during the proceeding, at paragraph 543, Northern Gateway refers to the possibility of a *"small fraction"* of oil sinking. Of course, what may sink will depend on the circumstances, as Northern Gateway said itself during the proceeding. We need not go over again the problem of sinking oil that Enbridge faced in Michigan.

1038. It is worth noting that the reference for this part of the argument -- which is Northern Gateway's Response to the JRP IR No. 10, at page 23 -- does not refer to a *"small fraction of oil"* but rather states that -- and I'll just quote briefly:

> *"...some fraction of the oil may become entrained in the water column, submerge or sink in both freshwater and marine environments."*

1039. On the following page of Northern Gateway's argument, Northern Gateway refers to the documents it has prepared to deal with submerged and sunken oil. The Province noted the preliminary and immature nature of these documents in its argument, something that Northern Gateway has conceded, in our respectful submission.

1040. Certainly, these tactics would have questionable applications in a marine environment and, as noted in our argument, have not been tested for use in B.C. conditions. This issue is again -- explored in greater depth in the Haisla

argument.

1041. In the same paragraph, Northern Gateway refers to the "small amount" of oil that remains submerged from the Michigan spill. Again, I'm not sure what Northern Gateway means by "small" but, as referenced in our argument, Enbridge has recently been ordered to continue clean-up activities, as we approach the third anniversary of that spill.

1042. Also, with respect to the Michigan spill, at paragraph 556 of its argument, Northern Gateway argues the following, and I'll just briefly quote it:

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

1043. The Province disagrees. The root-cause of what happened in Michigan and the extent to which Enbridge has shown an ability to learn from mistakes, or not, is entirely relevant to this proceeding. If Enbridge does not show this ability then this obviously raises a concern about the potential for similar mistakes to be repeated. Northern Gateway has made much of its policy of continuous improvement.

1044. At paragraph 547 of its argument, it states that continuous improvement is a matter of course. If that claim is not borne out by the historical record, that record is, of course, relevant to this proceeding.

1045. Also regarding the issue of sinking oil, this time, in a marine environment, Northern Gateway states, at paragraph 835, so later in the argument, that:

> *"Transport Canada is confident that, within the timeframe associated with spill response, none of the synthetic crude, dilbit or diluted bitumen would sink."*

1046. And I believe Mr. Neufeld made reference to Transport Canada's views in that regard this morning. This assertion is founded upon the evidence of Mr. Roussel, a Transport Canada witness, Northern Gateway quotes at length at paragraph 834. In the Province's view, Mr. Roussel's evidence is not quite as clear and unambiguous as described by Northern Gateway, at paragraph 835.

1047. In addition, Mr. Roussel seems to indicate that further information on the behaviour of dilbit and synbit is required. And the reference for that is Volume 173 at line 25539. Therefore, his evidence is consistent with that given by other federal government witnesses referred to in the Province's final argument at paragraphs 47 and following. The behaviour of dilbit is not fully understood and further research is required.

1048. Further, unlike the other government witnesses that I've just referred to, Mr. Roussel is not an expert in the fate and behaviour of spilled hydrocarbons; his expertise lies in the area of marine safety and security policy.

1049. Moving on, at paragraph 856, Northern Gateway states that the gap analysis prepared by the Haisla Nation was not particularly helpful. First, the province cannot agree, the gap analysis is the best evidence, we submit, before the JRP with respect to the conditions under which a response to a spill may not be possible in the marine portion of the Project.

1050. Surely this is relevant evidence that the JRP may consider as part of determining whether or not the Project is in the public interest. Indeed, Northern Gateway's own witnesses commended the gap analysis. And for that reference, see the province's argument and also the Haisla argument at paragraph 1464.

1051. It hardly lies, we submit, in Northern Gateway's mouth, to say that the Haisla gap analysis was not helpful, when it stated it had prepared something similar but declined to provide it because it was not in a state where it was appropriate yet to file.

1052. At paragraph 973, Northern Gateway states that the exact quantification of the probability of events in the quantitative risk assessment, or the QRA, is less important than identifying relative risks along the tanker route so that effective mitigation measures can be identified.

1053. While the identification of such risks may be one of the purposes of the QRA, it does appear that Northern Gateway is trying to have it both ways on this point, with respect. It is clear that Northern Gateway is encouraging the JRP to accept the results of the QRA with respect to the likelihood of spills.

1054. For example, at paragraph 1022 of its argument, Northern Gateway states that the return periods in the QRA are conservative. As set out in the

province's argument, given the limited factual foundation set out in the QRA, the JRP should be -- should put limited weight on the conclusions set out in that document.

1055. Finally, before we address Northern Gateway's comments on the conditions, I want to address something Northern Gateway states right at the very end of its argument, at paragraph 1469.

1056. Northern Gateway suggests that those opposed to the Project base their opposition on philosophical grounds. The province cannot of course speak for other intervenors, they're very capable of doing that themselves. But I can say that the province's position is not based on philosophy but on the evidence and what we submit is a proper reading of the law under the *Canadian Environmental Assessment Act* and the *National Energy Board Act*, the Acts under which you are making your recommendations.

1057. Now, we do have some response with respect to Northern Gateway's comments on your proposed conditions and also on the conditions we have proposed. Of course, just to be clear, the province's position remains that you ought not to be recommending approval of this project at this time. In the event that you were, in the alternative we do have recommendations with respect to conditions as set out in our argument and as I'll discuss now.

1058. At paragraph 1440 of its argument, Northern Gateway states that it intends to have at least one major on-water recovery task force on sight within the confined channel assessment area, or CCAA, within six to 12 hours. While this may be its intention, what Northern Gateway has committed to is effective and world-class spill response, which is different than simply going one step beyond the existing Transport Canada requirements.

1059. To be world-class, Northern Gateway needs to be, at a minimum, on par with our closest neighbours, we submit. Northern Gateway's gap -- I'm sorry, NUCA's gap analysis has prepared for the Haisla Nation, demonstrated what is needed in regard to open water task forces. And Northern Gateway chose not to submit their own gap analysis or call into question the NUCA findings in this regard.

1060. The goal is effective response and therefore Northern Gateway must demonstrate an ability -- sorry, a realistic response capability. Effective mitigation to prevent adverse impacts requires rapid response, containment, and

recovery to minimize the spread and impact of spills.

1061. If a suitable number of recovery resources are not available in the early hours of the spill, then the damage will obviously be more extensive. And on-water recovery may no longer be a valid response option if the oil has reached and stranded on shorelines.

1062. For a major release, the province has concerns that a single open water task force on scene by the 12-hour mark may not achieve the effective rate of recovery and therefore, mitigation.

1063. The province expects Northern Gateway to live up to the commitment to effective and world-class spill response.

1064. Northern Gateway has requested changes to the proposed conditions respecting watercourse crossing plans and those are sort of in two different places, and the first reference is at Proposed Conditions 142 to 143.

1065. While the province understands the concerns expressed by Northern Gateway about the time to have alternative crossing methods approved, there are obvious concerns about having an appropriate method for crossing that is safe and impacts the environment as little as possible.

1066. Now, as the province understands it from Northern Gateway's proposed amendments to Proposed Conditions 83 and 84, Northern Gateway is proposing to have in place both primary and alternative watercourse crossing methods in place in advance. That is if the primary crossing method is not feasible then the alternative would be used.

1067. If this approach is acceptable to the Joint Review Panel, in our submission, Condition 83-84 should be more clearly drafted in this regard. In addition, it should be clear that Northern Gateway must provide a clear rationale for the change to the alternative form of crossing.

1068. At paragraphs 1444 and following, Northern Gateway request changes to the response exercise regime proposed in Condition 168. Northern Gateway does so in part on the basis that the requirements are in excess of industry best practices.

1069. However, Northern Gateway states that, quote: "Enbridge typically

adopts the most stringent standard for the areas in which it operates." End quote. It considers this to be industry best practice.

1070. First, Northern Gateway provides no reference there to evidence that this approach is in fact industry best practice. More importantly, Northern Gateway has made much in these proceedings of putting in place world-class spill response capability, which I've mentioned.

1071. Northern Gateway should be held to this higher standard. Northern Gateway needs to be able to confirm that Northern Gateway is living up to that world-class standard in its commitments and will demonstrate this through tabletop and full-scale exercises.

1072. We don't want to be in a situation where Northern Gateway's plans look good on paper but are not effective under real conditions. The higher level exercises demonstrate and test planning, preparedness, and response to a higher degree.

1073. In addition, Northern Gateway states at paragraph 1446, that unannounced full-scale exercises are not practicable. While the province appreciates the complexity of such exercises, it is essential that Northern Gateway's response regime be tested in this manner. The province can see no other means to ensure that Northern Gateway's spill response regime is in fact capable of full-scale mobilization.

1074. And in particular, unannounced drills represent the closest approximation to how Northern Gateway would respond in a real incident. Announced drills and exercises allows significant planning and preparation time which can lead to the impression of preparedness and response effectiveness that may not be matched without lead time -- lead up time.

1075. In addition, Northern Gateway has, itself, stated the importance of unannounced exercises. I just wanted to read you a very brief reference to the transcript at Transcript Volume 148, at lines 22365 and 66 and this is Dr. Taylor speaking:

> *"The other one […] 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. Your operational people enjoy it because it's different, but it also*

> *really gives you a sense of how prepared you are. Usually only a couple [of] people know that this is going to happen, but then it becomes something that is very effective at providing feedback on your response capability."*

1076. With respect to Condition 147, which my friend Ms. Chahley was just referring to, the Province opposes the amendments proposed to that condition by Northern Gateway. As Footnote 6 -- which is the Joint Review Panel's Footnote 6 to that condition states:

> *"The insurance requirements in this proposed condition were developed on the basis of extensive information on the record in this proceeding."*

1077. It would not be appropriate, I submit, to allow this carefully considered condition to be superseded by unknown regulations in the future. Indeed, the Province would be concerned that this would amount to inappropriate sub-delegation. The JRP, yourselves, are charged with recommending appropriate conditions.

1078. The Joint Review Panel cannot delegate that task to another entity; in this case, future legislators. If those legislators see fit to enact the -- enact regulations such that they would supersede conditions such as this one, then that question can be left to those regulators.

1079. With respect to proposed Condition 195, the Province does not agree with the change to an annual summary for response exercises. And I should say that -- as I understand it, that was other than for major tabletop and full scale exercises.

1080. While the Province understands Northern Gateway's desire for administrative efficiency in this regard, we submit it would be important for the regulator to have prompt information with respect to the results of all exercises in order to identify and rectify shortcomings.

1081. As Northern Gateway now suggests that the National Energy Board could be waiting for up to a year to receive the results of exercises, this, we submit, is especially important of -- in light of the challenges Northern Gateway has experienced in learning from mistakes in the past, as set out in our argument.

1082. Lastly, with respect to a couple of the conditions that my friend, Mr. Neufeld, referred to this morning, I was going to address the first condition -- excuse me -- first condition in Appendix B to our argument, which had to do with the recovery on-water oil. And I did want to point out first that that condition is, in fact, derived first from one of the commitments that Northern Gateway had made.

1083. And I did refer to this briefly in our argument but I will read out the commitment that Northern Gateway had proposed in this regard. Unfortunately, it prints out in about 5 point type and so you'll have to bear with me.

1084. It's Commitment ERM-04-09 where Northern Gateway said:

> *"Northern Gateway will maintain or contract a response organization capable under the planning standards of containing and recovering within 10 days or earlier, up to 32,000 tonnes of on-water oil."*

1085. So that was their commitment. We built on that somewhat and changed it somewhat to reflect the capacity of B.C.'s closest neighbour, Alaska, and that's what changed the 72 hours. It is in response to what my friend said this morning intended to be a planning standard. That was the intention of our condition.

1086. I also understand that there may have been a concern with respect to the absence of a geographic limit in that condition. There was no geographic limit in the Northern Gateway commitment I just read to you but we would have no difficulty with the condition we drafted being applicable to the CCAA and the Open Water Area, the OWA as well.

1087. My friend, Mr. Neufeld, also made reference this morning to the proposed -- condition proposed by the Province with respect to geographic response plans. I don't have anything further to add to what we said in our argument in that regard and I would commend that part of the 2700 pages to you.

1088. So subject questions from the Panel, those are the submissions of the Province.

1089. **THE CHAIRPERSON:** Thank you, Mr. Jones.

1090. We'll just pull back for a moment.

--- (A short pause/Courte pause)

1091. **MR. JONES:** Should I be worried?

1092. **THE CHAIRPERSON:** Very.

--- (Laughter/Rires)

1093. **THE CHAIRPERSON:** Thank you very much everyone for your patience. What the Panel would like to do is we'll finish for today and then we would ask the Province of B.C. to be back again tomorrow morning in case we have questions of you at that point to pose.

1094. **MR. JONES:** Sure.

1095. **THE CHAIRPERSON:** Thank you very much.

1096. **MR. JONES:** We'll be here.

1097. **THE CHAIRPERSON:** So with that, we'll close for this afternoon.

1098. Thank you very much to everybody for your participation and attendance today and we'll sit again tomorrow morning at 8:30.

1099. Good evening.

--- Upon adjourning at 4:25 p.m./L'audience est ajournée à 16h25