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Review Panel, Roberts Bank Terminal 2 Project
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Dear Panel Members:

Re: T'Sou-ke Nation's closing remarks for the Review Panel's environmental assessment of the Roberts Bank Terminal 2 Project

A. Overview

We are T'Sou-ke Nation's ("**T'Sou-ke**") lawyers in this matter. We write in accordance with the Procedures for Closing Remarks to provide T'Sou-ke's closing remarks for the Review Panel's environmental assessment of the Roberts Bank Terminal 2 Project ("**Project**").

As set out below, the Panel is not in a position to lawfully prepare an environmental assessment report for two reasons:

- Minister McKenna unlawfully excluded Project-related marine shipping between the 12 nautical mile limit of Canada's territorial sea (the "**Territorial Sea**") and the 200 nautical mile limit of Canada's exclusive economic zone (the "**EEZ**") from the designated project to be assessed under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ("**CEAA 2012**"). As a result, there is no information before the Panel of the Project's environmental effects on Southern Resident Killer Whales ("**SRKWs**") in the EEZ; and

- over T'Sou-ke's repeated objection, the proponent Vancouver Fraser Port Authority (the "**Port**") has misappropriated T'Sou-ke's traditional knowledge. The Port has purported to use a marine traditional use study ("**MTUS**") T'Sou-ke caused to be prepared for a different regulatory approval process for a different project, directly contrary to Canadian Environmental Assessment Agency (the "**Agency**") guidance. Distressingly, the Panel has itself indicated that it intends to take the same approach. The net effect of these actions is that the Panel has no information properly before it on the Project's environmental effects on T'Sou-ke's current use of land and marine resources pursuant to s. 5(1)(c)(iii) of CEAA 2012 or to its Aboriginal title, rights and treaty rights pursuant to s. 35 of the *Constitution Act, 1982*.

Rather than preparing an environmental assessment report at this time, the Panel must:

- write to the Minister to request that she amend the Panel's terms of reference to include Project-related marine shipping within the EEZ within the designated project to be assessed to comply with the legal requirements of CEAA 2012; and

- direct the Port pursuant to s. 44(2) of CEAA 2012 to:

    - commission and pay for a specific and tailored MTUS to assess how the Project may impact T'Sou-ke's Aboriginal title, rights, and treaty rights as well as its current use of lands and resources for traditional purposes; and

    - submit a revised Environmental Impact Statement ("**EIS**") containing this information.

However, if the Panel prepares an environmental assessment report (i) based on the Minister's unlawful decision to exclude Project-related marine shipping within the EEZ from the designated project to be assessed under CEAA 2012 (the "**Scoping Decision**"); and (ii) using T'Sou-ke's misappropriated traditional knowledge, it will not qualify as a "report" within the meaning of CEAA 2012.[1] As a result, any decision of the Minister or the Governor in Council made in reliance upon it will be highly vulnerable to legal challenge.[2]

In any event, if these legal errors are not corrected the Minister, and ultimately the Governor in Council, will not be able to rely on the Panel's environmental assessment report to determine whether Canada has discharged its duty to consult and accommodate T'Sou-ke in relation to the Project. Instead, they will need to provide further avenues for meaningful consultation and accommodation with T'Sou-ke on this issue. Otherwise any subsequent decisions they make will be constitutionally infirm and will need to be quashed. In *Chippewas of the Thames*, the Supreme Court of Canada clarified that:

> As we conclude in *Clyde River*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani*, at para. 60; *Clyde River*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the

[1] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para. 470, T'Sou-ke's Written Submission Book of Authorities, filed April 15, 2019 ("**Submission BOA**") Tab A7.
[2] *Tsleil-Waututh Nation* at paras. 766, 768, Submission BOA Tab A7.

basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.[3]

Alternatively, if the Panel does prepare a "report" relying only on the evidence on the record, it must nevertheless recommend that: (i) the Project will cause significant adverse effects to SRKWs and T'Sou-ke's cultural uses of them; and (ii) those significant adverse environmental effects cannot be justified in the circumstances.

B. Issues

T'Sou-ke's closing remarks address the following five issues:

1. *Minister McKenna unlawfully excluded Project-related marine shipping within the EEZ from the designated project to be assessed under CEAA 2012*;

2. *the Port has misappropriated T'Sou-ke's traditional knowledge and the Panel has indicated that it may do the same*;

3. *the Panel must take steps to ensure it has sufficient information before it rather than preparing an environmental assessment report at this time*;

4. *on the current record, Project-related marine shipping will visit significant adverse environmental effects on SRKWs and T'Sou-ke's Indigenous uses of the whales*; *and*

5. *the significant adverse environmental effects that Project-related marine shipping will visit upon SRKWs and T'Sou-ke's Indigenous uses of the whales cannot be justified in the circumstances*.

C. Discussion

1. *Minister McKenna unlawfully excluded Project-related marine shipping within the EEZ from the designated project to be assessed under CEAA 2012*

The former Minister excluded Project-related marine shipping from the designated project to be assessed under CEAA 2012. Since December 18, 2015, including most recently on October 26, 2018, T'Sou-ke has advised Minister McKenna and the Panel that the former Minister's decision in that regard was unlawful and must be corrected.[4]

[3] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 32 (emphasis added), T'Sou-ke's Closing Remarks Book of Authorities, filed August 26, 2019 ("**Closing Remarks BOA**") Tab A1.
[4] See T'Sou-ke's letters to the Panel of December 18, 2015, October 27, 2016, November 20, 2017, and October 26, 2018.

On March 8, 2019, Minister McKenna wrote to the Panel to inform it that she intended to amend its terms of reference to include marine shipping in the designated project, but only to the extent of the Territorial Sea. She then solicited comments on the proposed amendment from the Panel and potentially affected Indigenous groups.

On March 28, 2019, T'Sou-ke provided its comments on the proposed amendment to Minister McKenna.[5] In its March 28 letter, T'Sou-ke agreed that Project-related marine shipping should be included as part of the designated project because it is "incidental to" the marine terminal component of the designated project that must be assessed under CEAA 2012. However, T'Sou-ke "disagree[d] strongly" with the proposed exclusion of Project-related marine shipping within the EEZ from the designated project, for the reasons it later provided to the Panel at pp. 9 – 15 of its April 15, 2019 written submission, discussed further below.

On April 24, 2019, Minister McKenna informed the Panel that she was amending the Panel's terms of reference to include Project-related marine shipping, but only within the Territorial Sea. In her April 24 letter, she tersely explained to the Panel that she "decided that it is reasonable to establish the spatial extent of Project-related marine shipping that would be included as part of the designated project at the 12 nautical mile limit of Canada's territorial sea".

Curiously, the Minister did not provide her rationale for the Scoping Decision to the Panel. However, she did set out a "summary of [her] considerations" for the Scoping Decision to T'Sou-ke in an April 23, 2019 letter.[6] That letter is not currently on the record before the Panel but is being submitted concurrently with these closing remarks.

The Minister's rationale for excluding Project-related marine shipping in the EEZ set out in her April 23 letter is as follows:

- one of the purposes of CEAA 2012 is to "ensure timely environmental assessments", and that limiting that assessment to the Territorial Sea "is both reasonable and will not frustrate this timeliness";

- because there are no specified shipping lanes outside of the Territorial Sea, the conclusions of an environmental assessment regarding the EEZ "would be unreliable due to challenges in identifying appropriate spatial boundaries, accurately predicting the project-environment interactions, identifying potential effects, or adequately evaluating the technically and economically feasible mitigation for the Project";

[5] Affidavit of Camilla Arrica, filed April 15, 2019 concurrently with T'Sou-ke's written submission (the "**Arrica Affidavit**"), Exhibit "E".
[6] Affidavit of Tamara Huang, filed August 26, 2019 concurrently with T'Sou-ke's closing remarks, Exhibit "A".

- limiting the environmental assessment to exclude the EEZ "will also maximize Canada's ability to enact and enforce measures to protect the important components of the environment within the legislative jurisdiction of Parliament", including the authority to impose vessel traffic practices and procedures;

- other environmental assessments in B.C. that have considered the geographic extent of the assessment of project-related marine shipping did not extend their assessment beyond the Territorial Sea; and

- the Court in *Tsleil-Waututh Nation* "did not raise concerns with the geographic extent of marine shipping considered by the National Energy Board in its assessment of the Trans Mountain Expansion Project, which included marine shipping to the [Territorial Sea]".

Limiting the scope of the designated project to the Territorial Sea is a critical error that will jeopardize the lawfulness of any subsequent Project approval decision that relies on it or the Panel's environmental assessment report.

The Minister has put the Panel in the absurd position of assessing the environmental effects of a ship at one point in its route that is within Parliament's legislative authority (in the Territorial Sea), and then ignoring its effects in another (in the EEZ). This interpretation is directly contrary to the modern approach to statutory interpretation,[7] and the need to approach environmental legislation purposively, as a "blueprint for protective action".[8]

T'Sou-ke primarily relies on its detailed legal position on this matter as set out at pp. 9 – 15 of its written submission to the Panel on the unlawfulness of the Scoping Decision and the corresponding need to assess the Project's environmental impacts in the EEZ. In summary:

- through CEAA 2012 and related legislation, including the *Species at Risk Act*, S.C. 2002, c. 29 ("**SARA**"), Parliament has unambiguously expressed its intent that physical activities which are components of a designated project and are proposed to occur in the EEZ (including those which are incidental to the designated project, such as Project-related marine shipping) must be included in the designated project to be assessed;

- a key purpose of the Project is to facilitate shipping between Canada and Asia. As such, Project-related marine shipping will be traversing through Canada's EEZ;

[7] See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, Submission BOA Tab A6: "'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'"

[8] See *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 9-12, Submission BOA Tab A5. In short, CEAA 2012 must be interpreted and "applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action."

- once the Minister determined that Project-related marine shipping is "incidental to" the Project's marine terminal and therefore part of the designated project that must be assessed pursuant to CEAA 2012, she had no discretion to geographically "scope out", or otherwise limit the Panel's assessment of the environmental effects of, Project-related marine shipping in the EEZ;

- T'Sou-ke's position in this regard is supported by at least two environmental assessments that the Agency is currently conducting in which it is assessing marine shipping activities in the EEZ as part of the designated project under CEAA 2012: the Newfoundland Orphan Basin Exploration Project and the Husky Oil Exploration Drilling Project; and

- a decision that unlawfully scopes the EEZ out of the designated project will prevent the Panel from assessing the Project's environmental effects on SRKWs within the EEZ, a species that Minister McKenna and the Minister of Fisheries, Oceans and the Canadian Coast Guard recently concluded was facing imminent threats to its survival and recovery.[9]

Further, in specific response to the Minister's rationale set out in her April 23 letter to T'Sou-ke:

- it is unreasonable to wield a purpose of CEAA 2012 (ensuring environmental assessments are completed in a timely manner) to undercut the Panel's substantive obligations imposed by Parliament to ensure that all of the environmental effects of a Project are taken into account in an environmental assessment;[10]

    - the fact that conducting an environmental assessment in the EEZ would, in the Minister's view, pose methodological "challenges" is irrelevant where a proper interpretation of CEAA 2012 (as outlined above) demands an assessment of all environmental effects "within the legislative authority of Parliament", which includes the EEZ. In this regard, the Supreme Court has very recently reaffirmed that **free-floating policy considerations "cannot be permitted to distort the actual words of the statute" read in light of the principles of statutory interpretation, and that the perceived "inconvenience" of a statutory obligation imposed by Parliament does not allow a decision-maker "to re-cast the legislation as it sees fit in order to avoid such difficulties"**;[11]

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[9] Department of Fisheries and Oceans, "Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada" (December 5, 2018) (the "**Recovery Strategy**") at 17, Arrica Affidavit, Exhibit "D".

[10] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, (Markham: LexisNexis Canada, 2014) at 454-455, Closing Remarks BOA Tab B2.

[11] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at paras. 79, 87, *per* Moldaver J., writing for himself and Gascon, Côté, Brown and Rowe JJ., Closing Remarks BOA Tab A3.

- the fact that Canada, at present, chooses to exercise more authority over marine shipping in the Territorial Sea than the EEZ has no bearing on the reality that the EEZ is within "the legislative authority of Parliament", and is thus irrelevant to determining whether a physical activity (here, Project-related marine shipping) is "incidental to" the designated project to be assessed under CEAA 2012;

- the Minister's attempt to minimize the precedential value of the Agency's assessment of marine shipping within the EEZ in the examples referenced above on the ground that, in those cases, the "primary designated activity" occurs in the EEZ, has no bearing on the inquiry imposed by CEAA 2012 because:

    - on this rationale, the Minister would unlawfully superimpose a limitation of her own design into CEAA 2012 that would require an environmental assessment to take into account incidental activities in the EEZ only if the designated project itself also occurs in the EEZ. Parliament did not include any such requirement in CEAA 2012;

    - specifically, the Minister's apparent policy preference is directly contrary to the requirements in ss. 2(1) and 5(1)(a) of CEAA 2012 that an environmental assessment must take into account "any physical activity" incidental to the designated project as long as it is within the legislative authority of Parliament. To take this irrelevant factor into account jeopardizes the lawfulness of that decision;[12] and

- the Minister misapprehends the *Tsleil-Waututh Nation* decision by reading it to suggest that the Court condoned an environmental assessment concerning project-related marine shipping that extended only to the Territorial Sea. In that case:

    - the Court did not determine either (i) project-related marine shipping was part of the designated project in that case; or (ii) whether it was reasonable for the Board to exclude project-related marine shipping in the EEZ from the designated project; and

    - the only issue the Court decided was that the exclusion of project-related marine shipping from the designated project, on the facts before it, was unreasonable. It quashed the project approval decision on that basis.[13]

[12] *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, 2017 BCCA 451 at para. 39, Closing Remarks BOA A2; Donald J.M. Brown, Q.C. and Hon. John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters) (loose-leaf rel. 2018-4, updated 2019) at § 14:5442, Closing Remarks BOA Tab B1.

[13] *Tsleil-Waututh Nation* at paras 470, 766, 770, Submission BOA Tab A7.

If the Minister erroneously restricts the Panel's assessment of Project-related marine shipping to the Territorial Sea, and the Panel similarly fails to take any steps to urge the Minister to address her legal error, the Panel will be left with a deficient assessment of the Project's environmental effects. Any environmental assessment report issued on the basis of such erroneous parameters will be legally and factually deficient and have the effects outlined below:

- the Panel will not assess the environmental effects of the designated project under s. 5(1) of CEAA 2012 in the EEZ, even though the EEZ is included in the definition of "federal lands" and is "within the legislative authority of Parliament";

- the Panel will not consider any of the s. 19 factors in connection with Project-related marine shipping within the EEZ;

- the Panel will not determine whether Project-related impacts to SARA-protected species, such as SRKWs, are likely to occur within the EEZ;

- without having information on the above points:

    - the Panel will be unable to lawfully prepare a report with respect to the environmental assessment pursuant to s. 43(1)(d), including by assessing whether Project-related marine shipping is likely to cause significant adverse environmental effects within the EEZ;

    - the Minister will be unable to lawfully determine whether the Project-related marine shipping is likely to cause significant adverse environmental effects within the EEZ pursuant to s. 52(1); and

    - the Governor in Council will be unable to lawfully determine whether the significant adverse environmental effects Project-related marine shipping within the EEZ is likely to cause can be justified in the circumstances pursuant to s. 52(4).

In summary, unless these issues are addressed, the Panel's environmental assessment report will be "so deficient that it could not qualify as a "report" within the meaning of" s. 43(1)(*d*) of CEAA 2012.[14] In those circumstances, any decision by the Minister or the Governor in Council in reliance on that report will be unreasonable and can be quashed on judicial review.[15]

[14] *Tsleil-Waututh Nation* at para. 470, Submission BOA Tab A7.
[15] *Tsleil-Waututh Nation* at paras. 470, 766, 768, Submission BOA Tab A7.

2. *The Port has misappropriated T'Sou-ke's traditional knowledge and the Panel has indicated that it may do the same*

The Panel has no information that is properly before it on the Project's potential impacts to T'Sou-ke's Aboriginal title, rights, and treaty rights or on its current use lands and resources for traditional purposes pursuant to s. 5(1)(c)(iii) of CEAA 2012 or s. 35 of the *Constitution Act, 1982*. As T'Sou-ke informed the Panel on October 27, 2016, November 20, 2017, October 26, 2018, March 28, 2019, and August 16, 2019, the Port appropriated T'Sou-ke's traditional knowledge, without its consent, by purporting to include into its EIS for this Project a MTUS that T'Sou-ke commissioned for use in the National Energy Board's assessment of the Trans Mountain Expansion Project.

As set out in that correspondence:

- the Port's course of action is directly contrary to the Agency guidance[16] on this matter which establishes, among other things, that *only T'Sou-ke "can decide if they are willing to provide access to their [traditional knowledge]",* and that the Port *"must work closely with the community"* to seek prior, informed consent for its use; and

- an untailored, non-Project-specific MTUS is, in any event, wholly insufficient to properly assess the Project's environmental effects or impacts to T'Sou-ke's s. 35 rights.

At T'Sou-ke's June 13, 2019 community hearing session, T'Sou-ke Chief Gordon Planes reiterated these serious concerns for the Panel, and also shared the deep offence visited upon T'Sou-ke by the Port's misappropriation of its traditional knowledge, including that:

- the misappropriated traditional knowledge included "information that was handed down from our elders who aren't here anymore, they're gone";

- T'Sou-ke's lack of response to administrative correspondence from the Port asking for T'Sou-ke's after-the-fact consent to the misappropriation "doesn't mean yes. It doesn't"; and

- under T'Sou-ke law, to properly remedy the harm done by the Port's misappropriation, "there's ways we do it in protocol in the longhouse, that we need to do that work to correct it. And that's something that comes to mind under our culture".[17]

[16] Canadian Environmental Assessment Agency, "Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*" (March 2015), Submission BOA Tab B1.
[17] June 13, 2019 Community Hearing Session Transcript ("**T'Sou-ke Transcript**") at 4570-4571.

Distressingly, rather than directing the Port to correct this serious deficiency, the Panel formally indicated to T'Sou-ke on June 28, 2019 that it also intended to use the misappropriated information from the Trans Mountain MTUS in its assessment of this Project.

T'Sou-ke responded to the Panel's position in its August 16 letter, in which it informed the Panel that its objections in relation to the Port's misappropriation of its traditional knowledge "apply with equal force to the Panel's purported use" of that information. Accordingly, T'Sou-ke indicated that it does not consent to the Panel's use of that information in these proceedings.

Through these actions, the Panel is laying the unsound foundation of a report under s. 43(1)(*d*) of CEAA 2012 that does not in any way lawfully assess (i) the Project's environmental effects to T'Sou-ke's current use of lands and resources for traditional purposes under s. 5(1)(*c*)(iii); (ii) T'Sou-ke's traditional knowledge under s. 19(3), or (iii) the Project's impacts to T'Sou-ke's Aboriginal title, rights and treaty rights.

3. The Panel must take steps to ensure it has sufficient information before it rather than preparing an environmental assessment report at this time

As a result of the serious legal error in the Scoping Decision and the misappropriation of T'Sou-ke's traditional knowledge, the Panel has no information before it on the Project's (i) environmental effects in the EEZ, (ii) the effects occurring in Canada (including within the EEZ) of any change that may be caused the Project to the environment on T'Sou-ke's current use of lands and resources for traditional purposes, or (iii) the impacts the Project will visit upon T'Sou-ke's Aboriginal title, rights and treaty rights.

However, the Panel is not foreordained to simply prepare a flawed environmental assessment report in the face of this critical factual vacuum. Indeed, there are two steps the Panel must take that will begin to correct these errors and allow it to prepare an environmental assessment report that discharges the Panel's obligations under CEAA 2012:

- the Panel must write to the Minister to urge her to amend its terms of reference to include Project-related marine shipping within the EEZ as part of the designated project to be assessed under CEAA 2012; and

- the Panel must exercise its powers under s. 44(2) of CEAA 2012 to require the Port to:

  (1) commission and pay for a MTUS to be carried out by T'Sou-ke to assess how the Project may impact T'Sou-ke's Aboriginal title, rights, and treaty rights as well as its current use of lands and resources for traditional purposes; and

  (2) submit a revised EIS which incorporates this information.

4. On the current record, Project-related marine shipping will visit significant adverse environmental effects on SRKWs and T'Sou-ke's Indigenous uses of the whales

The evidence before the Panel establishes that SRKWs are already in a critical state, and that the Project's environmental effects on the whales, and T'Sou-ke's Indigenous uses of them, will necessarily be significant.

In the Recovery Strategy, the Department of Fisheries and Oceans summarized the plight of SRKWs and their particular vulnerabilities:

- in May 2018, the competent ministers for SRKWs under SARA announced that they had formed that SRKWs face imminent threats to their survival and recovery;[18]
- due to its small size, the SRKW population will be particularly vulnerable to catastrophic events and continues to have a high risk of extinction;[19]
- the principal threats to the recovery of the SRKW population include: environmental contamination (including oil spills), reductions in the availability or quality of prey, and both physical and acoustic disturbance;[20]
- human-caused underwater noise interferes with SRKWs' detection of prey; impedes communication between SRKWs; reduces the distance at which social groups can detect each other; and masks echolocation, reducing the distance at which SRKWs can detect prey;[21]
- commercial shipping is responsible for the greatest increase in anthropogenic noise;[22]
- there is rapidly growing awareness in the international conservation community that noise is a significant threat that degrades habitat and adversely affects marine life;[23]
- because SRKWs "rely on sound to carry out their life functions, including foraging and socializing, the acoustic environment is an important component of critical habitat. Threats to the acoustical integrity of critical habitat include both acute and chronic noise…Chronic noise is primarily associated with vessel traffic, and can result in masking of communication and echolocation signals of [SRKWs]";[24]

[18] Recovery Strategy at 17, Arrica Affidavit, Exhibit "D".
[19] Recovery Strategy at viii, Arrica Affidavit, Exhibit "D".
[20] Recovery Strategy at vi, 17, Arrica Affidavit, Exhibit "D".
[21] Recovery Strategy at 28, Arrica Affidavit, Exhibit "D".
[22] Recovery Strategy at 33, Arrica Affidavit, Exhibit "D".
[23] Recovery Strategy at 28, Arrica Affidavit, Exhibit "D".
[24] Recovery Strategy at 54, references omitted, Arrica Affidavit, Exhibit "D".

- SRKWs do not appear to avoid spilled oil, the exposure to which can cause behavioural changes, inflammation of mucous membranes, lung congestion, pneumonia, liver disorders, and neurological damage;[25]

- the threat of a spill of oil or other toxic material within the areas of critical habitat poses not only an immediate and acute risk to the health of the SRKW population, but has the potential to make critical habitat areas uninhabitable for an extended period of time;[26] and

- the Recovery Strategy identifies acoustic disturbances from vessel traffic and oil spills as examples of activities likely to result in the destruction of critical habitat of SRKWs.[27]

The Port has identified in its own EIS that Project-related marine shipping will visit significant adverse environmental effects on SRKWs, and that there are no known mitigation measures.[28]

T'Sou-ke has provided the Panel with written and oral evidence which establishes, among other things, that Project-related marine shipping will also visit significant adverse environmental effects on its Indigenous uses of SRKWs and, therefore, infringe its Aboriginal title, rights, and treaty rights.[29]

Written evidence filed by other participants before the Panel further establishes that Project-related marine shipping will visit significant adverse environmental effects upon SRKWs, especially in light of the findings in the Recovery Strategy, as follows:

Prey availability and ability to forage

- Project-related marine shipping will have significant adverse effects on Chinook salmon, a critical component of the SRKW diet;[30]

[25] Recovery Strategy at 35, Arrica Affidavit, Exhibit "D".
[26] Recovery Strategy at 54, Arrica Affidavit, Exhibit "D".
[27] Recovery Strategy at Table 6, 56, Arrica Affidavit, Exhibit "D".
[28] EIS Addendum s. 8.2 (Marine Mammals Effects Assessment) at 8.2-36, 8.2-54 – 8.2-56.
[29] See T'Sou-ke's letter to the Panel of November 20, 2017, which outlines the potential impacts of the Project on T'Sou-ke's cultural uses of SRKWS; harvesting rights; right to marine navigation and travel; and right to self-governance; see also the T'Sou-ke Transcript at 4551, 4557 – 4559, 4564 – 4566, 4569 – 4570,
[30] Transcript of the Panel's May 23, 2019 Public Hearing Day on Marine Mammals and Underwater Noise ("**May 23 Hearing Transcript**") at 2029.

- the Port's conclusion that the ability of individual SRKWs to forage in their critical habitat will not be impeded by Project-related increases in marine shipping "has a high level of uncertainty because of significant limitations, assumptions and caveats associated with modelled parameters";[31]

- under existing conditions, Fisheries and Oceans Canada ("**DFO**") has observed that shipping noise is already causing a reduction in SRKW foraging opportunities, and further reductions are anticipated under future operation conditions if the Project proceeds, which will result in a temporary loss of function of SRKW critical habitat;[32]

Underwater noise caused by marine shipping

- the Port's conclusion that Project-related underwater noise will not have a significant cumulative effect on "individual SRKW survival and fecundity or on population growth" is based on the results of a model that "has multiple compounding uncertainties, assumptions and data gaps in key input parameters that limit its predictive value…and must be interpreted cautiously";[33]

- Project-related marine shipping would "add noise to an already-too-noisy environment", reducing echolocation space in a large part of SRKW critical habitat and increase lost foraging time;[34]

- even if the Port's claim that the number of container ships calling at Roberts Bank might not increase with the Project, "the status quo is already too much noise; furthermore, if the source levels of noise increase as ship size increases, the result is still an increase in noise";[35]

- the source level of noise from a vessel increases with the size of the vessel. If vessel size continues to increase, as the Port describes, the underwater noise from vessels will correspondingly increase;[36]

[31] Written Submissions of Fisheries and Oceans Canada, filed April 15, 2019 ("**DFO Written Submissions**") at 56, s. 6.3.2
[32] May 23 Hearing Transcript at 2064.
[33] DFO Written Submissions at 47, s 6.1.3.
[34] Written submissions of David Suzuki Foundation, Georgia Strait alliance, Raincoast Conservation Foundation & Wilderness Committee, filed April 15, 2019 ("**Suzuki et al Written Submissions**") at para. 103.
[35] Suzuki et al Written Submissions at para. 103.
[36] Suzuki et al Written Submissions at para. 103.

Vessel strikes

- under existing conditions, DFO has observed that shipping noise is already causing a reduction in SRKW foraging opportunities, and further reductions are anticipated under future operation conditions if the Project proceeds, which will result in a temporary loss of function of SRKW critical habitat;

Fuel spills and other contaminants

- due to the small population size of SRKWs and low numbers of breeding individuals, effects of a fuel oil spill on even an individual SRKW can have population level consequences, and, due to their tendency to travel as a group, a spill could affect multiple individuals at once;[37]

- a fuel spill could similarly affect SRKW prey availability and even short-term impacts on prey availability could impact the SRKW population and its future viability if the spill results in a failure of a SRKW to reproduce, or one or more mortalities;[38] and

- chemical and biological contaminants can be introduced into SRKWs via shipping, and can be indirectly introduced into SRKWs via contaminated prey. SRKWs ingest contaminants through Chinook salmon, which feed at the upper trophic levels of the food web.[39]

In light of this evidence, if the Panel prepares an environmental assessment report at this time it must recommend that the Minister conclude that the Project:

- will likely cause significant adverse environmental effects on SRKWs and T'Sou-ke's Indigenous use of those whales and that those effects cannot be mitigated; and

- will cause serious adverse impacts to, and indeed infringements of, T'Sou-ke's Aboriginal title, rights, and treaty rights in relation to SRKWs.

5. *The significant adverse environmental effects that Project-related marine shipping will visit upon SRKWs and T'Sou-ke's Indigenous uses of the whales cannot be justified in the circumstances*

The only harmonious reading of CEAA 2012 and SARA together, which coherently advances the federal legislative objective of protecting and rehabilitating species-at-risk, is to recommend that the Governor in Council determine that significant adverse environmental effects to SRKWs and T'Sou-ke's Indigenous uses of them cannot be justified in the circumstances.

[37] Suzuki et al Written Submissions at para 136.
[38] Suzuki et al Written Submissions at para 136.
[39] Suzuki et al Written Submissions at para. 126

T'Sou-ke relies on its detailed written submission on this issue at pp. 17 – 22. In summary, when interpreting CEAA 2012 and SARA, which are related pieces of legislation, "it must be presumed that the laws 'are meant to work together, both logically and teleologically, as parts of a functioning whole'".[40]

In view of the alarming findings on the impacts to SRKWs reviewed above, there is a palpable danger that the endangered SRKW population will soon be lost forever, defeating the very *raison d'être* of both CEAA 2012 and SARA. Any attempt to justify further, significant adverse environmental effects that Project-related marine shipping will visit upon SRKWs, and T'Sou-ke's Indigenous uses of those whales, must be viewed in that light.

Of further relevance to the Panel's justification recommendation, the above-referenced governmental documents, and the Port's own evidence establish that Project-related marine shipping would violate SARA, which prohibits harming individual SRKWs and destroying any part of their critical habitat:

- SRKWs are listed as "endangered" under Part 2 of Schedule 1 of *SARA*;
- s. 32(1) sets out a specific prohibition that "[n]o person shall kill, harm, harass, capture or take an individual of a [SARA-listed] wildlife species";
- s. 58(1) prohibits the destruction of "any part of the critical habitat of any listed endangered species" if, *inter alia*, the listed species is an aquatic species such as SRKWs;
- s. 58(4) provides that the prohibition in s. 58(1) applies to "the critical habitat or portion of critical habitat…specified in an order made by the competent minister";
- on December 13, 2018, the competent minister issued the *Critical Habitat of the Killer Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order*, S.O.R./2018-278, which specifies that s. 58(1) applies to the critical habitat of SRKWs identified in the Recovery Strategy;
- the critical habitat identified in the Recovery Strategy includes significant portions of the Salish Sea which intersect with the marine shipping route for the Project; and
- the evidence cited above establishes that Project-related marine shipping will:
    - harm, and may kill, individual SRKWs; and
    - destroy the acoustic component of SRKW critical habitat.

[40] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 186 (*per* Karakatsanis J., writing for the majority in the lead appeal), BOA Tab A2.

Moreover, the competent minister would not be able to issue permits to authorize such impacts as the necessary preconditions of s. 73(3) of SARA cannot be met in the circumstances:

- under s. 73(1), the competent minister may issue a permit authorizing a person to engage in an activity "affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals", but "only if the competent minister is of the opinion that":
    - the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
    - the activity benefits the species or is required to enhance its chance of survival in the wild; or
    - affecting the species is incidental to the carrying out of the activity;[41]
- while the last potentially permitted activity appears broad on its face, SARA sets out three conjunctive preconditions for issuing a permit pursuant to s. 73(3) that must be met, which requires the competent minister to form the following opinion:
    - all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
    - all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
    - the activity will not jeopardize the survival or recovery of the species;
- like CEAA 2012, SARA binds the Crown.[42] Accordingly, neither the Port nor Canada may engage in or authorize activities such as marine shipping which harm SRKWs or destroy any part of their critical habitat; and
- an internal Department of Fisheries and Oceans January 18, 2016 e-mail entitled "SARA vs Fisheries Act Discussion" in relation to the Trans Mountain Expansion Project and the Roberts Bank Terminal 2 Project concludes that "…*it does not appear that a permit may be awarded [under SARA] to exempt a shipping activity from occurring in SRKW critical habitat*." The January 18 e-mail reaches that conclusion on the basis of the author's view that none of the relevant conjunctive preconditions under s. 73(3) could be satisfied.[43]

[41] SARA, s. 73(2), Submission BOA Tab D4.
[42] SARA, s. 5, Submission BOA Tab D4.
[43] Arrica Affidavit, Exhibit "A".

Curiously, neither the Port nor Canada has provided any evidence or argument respecting whether the competent minister could issue such a s. 73(1) permit or how it proposes to address these issues, notwithstanding that T'Sou-ke first raised the matter in its written submission.

Tellingly, the Port's evidence on this issue also strongly suggests that a s. 73(1) permit could not be issued for marine shipping, precisely because such activities will "jeopardize the survival or recovery" of SRKWs. As such, it would appear that the s. 73(3)(c) mandatory pre-condition cannot be satisfied.

It is axiomatic that, if current threats alone have made the survival and recovery of SRKWs "unlikely or impossible" in the opinion of the competent ministers, any additional Project-related impacts will increase the already imminent threats that SRKWs face and jeopardize the "survival or recovery" of SRKWs. For these reasons, the competent ministers likely could not issue a s. 73(1) permit for marine shipping.

The endangered status of SRKWs and associated species protection requirements cannot be overstated. As indicated in a decision from the Joint Review Panel on the Lower Churchill Hydroelectric Generation Project: "compliance with federal and provincial species protection legislation should be seen as a minimum standard."[44]

E. Closing

As set out above, the Panel is not in a position to prepare an environmental assessment report that qualifies as a "report" within the meaning of CEAA 2012.

Further, over T'Sou-ke's repeated objections the Port has misappropriated T'Sou-ke's traditional knowledge and put the Panel in a position where it has no Project-specific MTUS data to rely open to assess the full extent of the impacts to T'Sou-ke's Aboriginal title, rights, and treaty rights or T'Sou-ke's current use of lands and resources for traditional purposes.

Rather than directing the Port to correct this offensive misuse of T'Sou-ke's traditional knowledge, the Panel has indicated that it may compound that violation by purporting to use the information in its environmental assessment report.

If the Minister or the Governor in Council relies upon such a "report" in making a Project approval decision, it will be highly vulnerable to legal challenge.

[44] *Lower Churchill Hydroelectric Generation Project*, Report of the Joint Review Panel (August 2011) at 109–110, Submission BOA Tab B2.

Rather than preparing an environmental assessment report at this time, the Panel must:

- write to the Minister requesting that she amend its terms of reference to include Project-related marine shipping within the EEZ within the “designated project”; and

- direct the Port to prepare a specific and tailored MTUS that captures the Project’s impacts to T’Sou-ke’s Aboriginal title, rights, treaty rights, and interests as well as its current use of lands and resources for traditional purposes, and to submit a revised Environmental Impact Statement containing this information.

If the Panel does prepare a “report” without taking those steps, it must nevertheless recommend that Project-related marine shipping will visit significant adverse environmental effects on SRKWs and T’Sou-ke’s Indigenous uses of the whales which cannot be justified in the circumstances.

Yours sincerely,

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