Wet'suwet'en Final Oral Reply

1. Good morning, my name is Peter Grant/Michael Ross. We are here today to speak on behalf of the Office of the Wet'suwet'en.

2. First, we would like to thank the Panel, the proponent, and all the Interveners for their time in undergoing and participating in this review. In addition, as has been done by Interveners before me, I'd like to thank the Panel's staff as I understand you have been incredibly helpful to us throughout this process.

3. At paragraph 207 of its Written Argument, Enbridge cities Dr. Ruitenbeek for the claim that its Cost Benefit Analysis likely over-predicted potential impacts on ecological goods and services values." It then goes on to speak of Mr. Anielski as confirming the claim, saying that he "noted that, in light of the fact that the RoW [Right of Way] would be generally located in disturbed and affected areas, the assumption of disturbance had overestimated impacts on ecological goods and services."[1]

4. The Office of the Wet'suwet'en ["OW"or "the Wet'suwet'en"] firstly reply that it doesn't follow from the purported fact that Enbridge's right of way would be, taken as a whole, generally located in disturbed and affected areas, that it would be, relative to Wet'suwet'en territory, generally located in disturbed and affected areas. Creating a strip crossing the east-west length of the Wet'suwet'en Territory that cannot be reforested will lead to impacts on game resources and the access to game by non-Wet'suwet'en hunters. Enbridge concedes that it cannot reforest all of the impacted areas and that, indeed, the right of way will not be able to be reforested.

5. Secondly, the Wet'suwet'en reply that portions of Wet'suwet'en territory up to this time remain pristine, including the Burnie Lake and Clore River area, access to which is only by walking or helicopter. Hence, for these portions of Wet'suwet'en territory at least, Mr. Aneilski's claim is not applicable and thus lends no support to Enbridge's dismissal of the serious concerns of the impacts raised by the OW. Significantly, this is the area in which the Clore Tunnel and associated Staging area/Camp site and Waste-rock disposal area is proposed to be constructed.

---

[1] Exhibit B226-2, Northern Gateway Pipelines Inc. Written Argument ("ENGP Written Argument"), p. 67, Paragraph 207.

6. The OW notes finally that Mr. Aneilski's assumption that where Enbridge's right of way intrudes on already disturbed and affected areas, its impacts on ecological goods and services are lessened, compared to undisturbed and unaffected areas, treats Aboriginal peoples' territories as black boxes, with no need to consider internal tenure systems. Hence, Mr. Aneilski and so Enbridge assume that the effects of its right of way on those portions of Wet'suwet'en house territories already disturbed and affected is the same for each house. They thus overlook even the possibility that Wet'suwet'en houses living with significant disturbance to their lands may experience the addition of the impacts of Enbridge's right of way even more keenly in regard to their ecological goods and services.

7. At paragraph 243, Enbridge relies on its Project's economic benefits to Aboriginal peoples. It relies on Mr. Carruthers' argument that First Nations communities either have to accept the Project and some risk of spills or have to say they don't want the Project's benefits, especially economic benefits, not only for themselves but for all Canadians:

   25565. If you want to make the chance of spill zero, you have to have no project and then you have to say we don't want the benefits. So you can say, well, I don't want a spill, but in fact you're saying I don't want the billions of dollars that Canada economy sees, that improves our standard of living. I don't want the $44 billion that Canadian governments get to provide for services, and I don't want the jobs.

   25566. So yes, we can get it to zero, but we also have to, in that aspect, say we don't want the benefits the project provides.[2]

8. In reply, the Wet'suwet'en say that Enbridge is creating a false dichotomy. The Wet'suwet'en have never taken the position that an infinitesimal risk of a spill would make Enbridge's Project unacceptable. The Project's problem is its real and actual risk of major impacts on one or more of the water systems that flow through Wet'suwet'en Territory or the land resources on Wet'suwet'en territory, not some hypothetical risk approaching zero. It is easy to say that there is a remote chance of a spill but once a spill happens that chance is 100% and there is no turning back at that point. The devastation to the water or land resources has occurred. This is what makes the proposed project unacceptable to the Wet'suwet'en.

9. Enbridge's argument on this point is facilitated even further by the fact that they did not and, indeed, even presented evidence that " there is no acceptable way of quantifying

---

[2] ENGP Written Argument, p. 80-81, Paragraph 243.

cultural effects in economic terms".[3] Their expert, Dr. Ruitenbach conceded that, stating : ". But in terms of valuing an entire culture, and entire entity, such as a First Nation or a particular ethnic group, for example, there are definitely no acceptable ways of quantifying those."[4]

10. When any value is not quantified or is deemed not to be 'quantifiable' , such values are not given as much weight. Therefore, Enbridge is, in effect arguing that the JRP should accept the minimization of cultural values and aboriginal values, notwithstanding the constitutional entrenchment and protection of aboriginal rights since 1982.

11. Understood thus, the Office of Wet'suwet'en question how anyone, including Mr. Carruthers, could, consider it a rational approach for the Wet'suwet'en to put their people and culture at risk of significant harm - to a roll of the dice - for the sake of short-term jobs and some money for themselves and the long-term enrichment of others. The implication is that Wet'suwet'en society and culture have little value in Western terms and certainly cannot come close to match the value of such an impressive economic project as the proposed Northern Gateway. Unfortunately, this builds in an ethno-centric bias against the Wet'suwet'en which is what they have fought against since the earliest contact and takeover of Wet'suwet'en territory in the late 1800's as told by the late Johnny David in the *Delgamuukw* case.[5]

12. In reply to paragraphs 393 – 399 of Enbridge's Written Argument, which responds to the Wet'suwet'en concerns of the impacts of metal leeching and Acid Rock Drainage [ARD],[6] the Office of Wet'suwet'en replies, that Enbridge in its argument concedes that "the exact amount of PAG rock at the tunnels is unknown". This is precisely the point raised by the Wet'suwet'en. There cannot be a determination of the scope of the impact without knowing what amount of acid rock will be released. It is significant that one of the biggest areas of impact will be in the Clore River area which is a pristine area of the Wet'suwet'en Territory.

13. It is noteworthy and significant that Enbridge do not respond in argument to the fact that their proposed route will go through areas in Wet'suwet'en territory already affected by acid rock drainage including at Owen Lake and Equity Mine site. These areas have been

---

[3] Transcript Volume 92, Paragraphs 14642-14644.
[4] Transcript Volume 92, Paragraphs 14644-14647.
[5] *Delgamuukw v. The Queen*, 1991 CanLII 2372 (BCSC), p. 72. Also: Hang Onto These Words: Johnny David's Delgamuukw Evidence U of Toronto Press 2005, pp.97-98 Also Introduction, p.8
[6] ENGP Written Argument, pp. 122-124, Paragraphs 393-399.

significantly impacted already and this would increase the risk of further impacts on the Wet'suwet'en ability to exercise their aboriginal rights. These areas are significant Wet'suwet'en territories upon which the Wet'suwet'en have traditionally relied upon and continue to rely for their resources. The adverse impacts of the Equity Mine site on Wet'suwet'en resources has demonstrated to the Wet'suwet'en that when developments such as this occur, they are literally and figuratively left to deal with the fallout on their land.

14. Enbridge states that "The effectiveness of the installed mitigation measures would be monitored. Management of potential acid rock drainage will not be a problem." [7] Unfortunately, the Wet'suwet'en have heard such promises in the past from other project proponents such as Equity Silver. Where is the mining company now that the acid rock drainage is a long term problem? The Wet'suwet'en are still there having to deal with the impact on their lands and resources.

15. At paragraph 639 of Enbridge's Written Argument , they respond to the Wet'suwet'en *Oil Spill Pathway Analysis* and summarily dismiss this analysis. It is noteworthy that they do not address the reduced attenuation [evaporation and biological breakdown] in winter months when there is ice on the rivers.

16. In reply, the Wet'suwet'en points out that they do not have the resources to do the detailed and exhaustive analysis which Enbridge has at its disposal. The point of the *Analysis* presented by the Wet'suwet'en was to raise the questions as to what proven methods have been demonstrated by Enbridge for cleaning spilled oil product along the Spill Pathway under ice in the winter and during freshet flows. It is not sufficient to say that the chance of such a spill is remote as the potential adverse effects on the fishery resource which is a critical element of the entire Wet'suwet'en social system and social structure could be devastating. Unfortunately, instead of answering this issue, Enbridge decided to minimize and discount the means by which the Wet'suwet'en raised this issue through the *Oil Spill Pathway Analysis.* The Wet'suwet'en ask that the JRP not be distracted by Enbridge's dismissal and consider Enbridge's failure to answer the questions raised as part of their own case.

17. At paragraph 1279 of Enbridge's Written Argument it says:

---

[7] ENGP Written Argument, p. 124, Paragraph 399.

One other aspect of the Office of the Wet'suwet'en participation warrants comment. Office of the Wet'suwet'en witnesses made a point of referring to Wet'suwet'en customs for executing trespassers and the issuance of trespass warnings in the form of eagle feathers. This was unfortunate and detracted from otherwise helpful testimony.[8]

18. In reply, the Wet'suwet'en says here that Enbridge exhibits its failure to even try to understand the context in which those statements were made. Even the Supreme Court of Canada has elicited the importance of such evidence. The approach of Enbridge is one that suggests a narrow, ethno-centric and, indeed, 19th century approach to Aboriginal Nations.

19. Enbridge fails to comprehend that this evidence demonstrates the central inter-relationship between the Wet'suwet'en and their lands and resources. This is not a perspective that Enbridge appears able to understand. The lands and resources are vital to the survival of Wet'suwet'en society. This evidence demonstrates the serious import of that relationship and how it was addressed in pre-contact times. Indeed, the Wet'suwet'en relationship to their land has and continues to be a matter of 'life and death' in that it is not only integral, but also critical to the survival of the Wet'suwet'en society.

20. Indeed, the Supreme Court of Canada, in considering the significance of this kind of evidence, recognized that it supports the Wet'suwet'en claim to aboriginal title as stated over 15 years ago in 1997:

> 157 A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. **For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity.** As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.[9]

---

[8] ENGP Written Argument, p. 348, Paragraph 1279.
[9] *Delgamuukw v The Queen* [1997] SCC, para. 157(emphasis added).

21. At paragraph 1280 Enbridge argues that 100% of its Right of Way is now covered by ATK studies.[10]

22. In reply, the Office of the Wet'suwet'en says that, rather than do an ATK study, it commissioned a Rights and Title analysis which is consistent with the Wet'suwet'en position before the Courts in *Delgamuukw v. The Queen, the Inter-American Commission on Human Rights* and in its efforts at treaty negotiations. The Wet'suwet'en are far beyond the Traditional Knowledge Study stage which they worked on prior to the Delgamuukw trial commenced in 1987.

---

23. At paragraph 1243 of Enbridge's Written Argument, firstly, Enbridge acknowledges that the Wet'suwet'en did not support the Pacific Trails Pipeline. Secondly, it is facile to suggest that Enbridge can rely on Aboriginal support of a particular project which they assessed does not have as high risks with Enbridge's project.[11] Indeed, even the Province has taken different approaches with each Project including for the reasons of relative environmental risks. That is what this Panel has to assess. The Wet'suwet'en opposition to this project is based on, inter alia, the environmental impacts which have the potential of destroying a significant portion of several Wet'suwet'en House territories.

24. Although irrelevant to this Project, notwithstanding Enbridge's effort to bootstrap onto the Pacific Trails Pipeline, the Office of Wet'suwet'en replies that one-third of the proposed PTP passes through Wet'suwet'en Territory and it is very significant and this is why the Wet'suwet'en did not sign onto this project.

25. At paragraph 1278 of Enbridge's Written Argument, it says:

> In any event, even if Aboriginal title were to be proven in respect of all or a portion of the proposed RoW, that would not mean that the Project should not, or could not, proceed. Rather, the Office of the Wet'suwet'en would be entitled to deep consultation – something that has been afforded in this process. It should be noted that, in assessing the Wet'suwet'en strength of claim in the course of the Pacific Trails Pipeline environmental assessment, the B.C. EAO arrived at exactly the same conclusion – without making any findings or conclusions regarding the existence of Aboriginal title.[12]

---

[10] ENGP Written Argument, p. 349, Paragraph 1280.
[11] ENGP Written Argument, p. 343, Paragraph 1243.
[12] ENGP Written Argument, p. 348, Paragraph 1278.

26. In reply, the Wet'suwet'en submit that Enbridge is confusing the duty owed prior to proof of title with the duty owed in the face of proven title . The Supreme Court of Canada has made it clear that with respect to the infringement of aboriginal title, "in most cases, it will be significantly deeper than mere consultation [and some cases] may even require the full consent of an aboriginal nation" [13]The assumption that this process 'afforded' deep consultation is misleading in that the Courts have made it clear that the issues of each aboriginal nation need to be addressed and, in fact, the arguments made by Enbridge are generalized arguments of impacts over the whole pipeline and not specific impacts to the Wet'suwet'en as was set out in our Argument.

27. In Enbridge's oral submissions on June 17th, they relied on legal authority to justify not having addressed certain impacts. [14] Enbridge argued :

> 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.

28. Contrary to this Argument, Enbridge acknowledged during testimony that the Morice was not even sampled:[15]

---

[13] Delgamuukw v. The Queen [SCC] par. 168
[14] International Reporting Inc. - 13-06-17 - Volume 176 - A3I5D7 (Adobe page 22)
[15] 12-11-08 International Reporting Inc. - OH-4-2011 Hearing Nov. 8, 2012 - Vol. 104 (A49083) (Adobe page 114)

29967. Are you saying that you've done habitat mapping and assessment down in Reach 2 of the Morice River?

--- (A short pause/Courte pause)

29968. MR. PAUL ANDERSON: Yes, sorry, I should be clear.

29969. We did not sample -- we didn't sample in the Morice. We proposed to cross the Morice using a horizontal directional drill. There is a lot of information available on the Morice River main stem.

29970. What I was referring to is we did sample in the lower reaches of the tributaries to the Morice as they come down and enter into the Morice River main stem.

29. Contrary to the final oral submissions of Enbridge, the fundamental issue of the impact of the proposed project on the most significant river within Wet'suwet'en territory has not been assessed. It is misleading to suggest that there was full sampling of these watersheds.

30. This is another key part of the impact of the project which has more questions unanswered than answered at the end of this process.

31. At paragraph 1235 of its Written Argument, citing Delgamuukw, Enbridge has this to say about Aboriginal title:

> Assertions of an Aboriginal right to make land or marine use decisions must be viewed with the same degree of caution. Even if a parcel of land were proven to be subject of Aboriginal title (which has not yet been done in Canada), that title would not confer upon the Aboriginal group in question the unfettered right to decide land use. The Supreme Court of Canada discussed this at some length in *Delgamuukw*, in holding that even Aboriginal title lands could be used for development, such as mining, forestry and infrastructure.[16]

32. In reply, the Office of Wet'suwet'en state that:

    a. The Wet'suwet'en Hereditary Chiefs were plaintiffs in *Delgamuukw;*
    b. The Supreme Court of Canada did not use the term "unfettered" in describing the scope of Aboriginal title;

[16] ENGP Written Argument, p. 342, Paragraph 1235.

c. What the Court said was that Aboriginal title confers upon its holder the exclusive right to decide land use, exclusive of provincial and federal governments and thus of third parties such as Enbridge; who rely on permits from the federal or provincial governments;
d. The uses to which the Canada may put Aboriginal title lands are thus infringements of the right and as such cannot proceed absent constitutional justification;
e. The Wet'suwet'en's case for Aboriginal title is strong and was not rejected by the Supreme Court of Canada in *Delgamuukw.*

33. Intending their talk of Aboriginal title to be taken seriously, the Wet'suwet'en submits that Enbridge's efforts, first, to characterize the Wet'suwet'en's and other First Nations' opposition to their project as unreasonable and even unfair in that it would, if it stopped their project, imperil the future of Canada's economic and social structure and, further, to imply that if the Wet'suwet'en and other First Nations cannot justify their opposition to the satisfaction of Enbridge and its picture of what counts as reasonable, an apparently impossible task, reveal a blindness to what Aboriginal title means.

34. As the Wet'suwet'en observe in their Written Argument, their Aboriginal title gives the Wet'suwet'en the right – indeed the exclusive right – to decide to what if any uses their lands may be put.[17] The choice is theirs by right. Exercise of the right, similar to the right of a fee simple owner, does not require justification to anyone. Justification is Enbridge's and Canada's problem. They are the ones contemplating infringement. Thus Enbridge, not the Wet'suwet'en, has to demonstrate reasonableness.

35. Enbridge's blindness regarding Aboriginal title extends to their discussion of "tradeoffs" and "balancing" in their oral reply argument of June 17th and its implications for the Wet'suwet'en. At paragraphs 226 and 227, they say:

> 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 hs developed such extensive programs for local and Aboriginal economic opportunities. It's also why the Project has

[17] ENGP Written Argument,

committed to such a comprehensive suite of mitigation measures for environmental protection.

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 this balance.

36. Underlying these remarks is the belief that it doesn't matter what the Wet'suwet'en decide and that it most certainly doesn't matter if the Wet'suwet'en decide against the Project because at the end of the day it is really about big picture tradeoffs and balancing of interests. Wet'suwet'en Aboriginal title and Wet'suwet'en's efforts, against the odds, to carry on as their forefathers on their lands are irrelevant and their title-grounded decisions of no effect.

37. Enbridge has a lot to say about consultation. Treating Aboriginal title as it does shows a failure to appreciate the special purpose of consultation in the face of Aboriginal title. As the Supreme Court of Canada made clear in *Delgamuukw*, because Aboriginal title "encompasses within it a right to choose to what ends a piece of land can be put," the Crown has a duty, when contemplating a title infringing activity, to seek "the involvement of aboriginal peoples in decisions taken with respect to their lands." Consultation in the face of Aboriginal title is directed at involving the people who have the prior and constitutional right to decide how the land is used in those Crown decisions with infringing effects. As the Court also made clear, it is not open to the Crown to treat an Aboriginal community's decisions about its lands as irrelevant and never, including when they are opposed to a project, of any force and effect.[18]

38. There is no doubt that approval of Enbridge's Project would constitute a serious infringement of Wet'suwet'en title.

39. In conclusion, Enbridge has minimized and, indeed, not even valued the rights of the Wet'suwet'en; has globally viewed widely diverse aboriginal values of the Wet'suwet'en and their acknowledged social system of governance over their lands and resources which are critical to their social structure and the Haida or Gitga'at with completely different resource systems and aboriginal governance systems; has suggested that they will address

[18] *Delgamuukw*, para. 168.

potentially massive Acid Rock in a pristine area of the Wet'suwet'en territory; has failed to sample or assess the risks of spill path and ultimately is asking the Wet'suwet'en and other Aboriginal Nations to trust them and their technology to somehow protect our aboriginal rights and title.

40. With respect, that is what the Wet'suwet'en have been told since the first white settler fenced the lands where the late Johnny David's father lived in the late 1800's. This is what was promised by Equity Silver when they opened the mine overlooking Goosly Lake which is a critical area for the Wet'suwet'en. This is what has happened since the Supreme Court of Canada urged the Wet'suwet'en to negotiate a resolution of their title with the Crown in 1997. The promises have continued but the devastation of our lands and resources have continued without any long lasting protection and agreement with the Crown.

41. As the Wet'suwet'en Chief Namox stated at the hearings in Burns Lake:

> 6654. "This proposed project endangers our promises to our grandchildren that we would look after our land, our culture, our people for them. We cannot break this promise to our grandchildren".[19]

---

[19] Transcript Volume 12, Paragraph 6654