

## **Appendix D.19 – Tsartlip First Nation**

### **I - Background Information**

Tsartlip First Nation (Tsartlip) is located in British Columbia (BC) on the south side of Vancouver Island, on the shore of the Saanich Inlet. Tsartlip (pronounced “Tsar-lip”) has four reserve lands: Goldstream no. 13 (shared with Malahat First Nation, Pauquachin, Tsartlip First Nation and Tseycum), Mayne Island no. 6, Senanus Island no. 10, and South Saanich no. 1. Tsartlip’s main community is located on the Saanich peninsula about 20 kilometres (km) north of Victoria. Their main reserve is South Saanich #1 located on the west side of the peninsula. Tsartlip’s total registered population as of July 2016 is 994, which includes: 524 living on Tsartlip reserves, 120 living on other reserves, and 350 living off reserve. Tsartlip members traditionally speak the Hul’qumi’num and Senc’oten languages.

The Province of BC understands Tsartlip to be a Douglas Treaty beneficiary and was a member of the Sencot’en Alliance, but is not part of the BC treaty process. Canada recognizes the Douglas Treaties and understands that Tsartlip has members who are descendants of one or more signatories to one or more Douglas Treaties.

Tsartlip is a party to a *Writ of Summons* as part of the Saanich Nation dated 2003.

### **II - Preliminary Strength of Claim Assessment**

- Approximately 38 km of the marine shipping route would pass within the northeastern part of the asserted traditional territory of the Saanich Nation, of which Tsartlip is a member. The Project’s marine corridor is approximately 15 km from the main reserve, and approximately 12 km from the Mayne Island reserve.
- The Province of B.C. understands that Tsartlip has Douglas Treaty rights to fish as formerly and hunt on occupied lands within its historic traditional territory. Ethnographic sources associate the Tsartlip, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Saltspring Island, Sidney Island, Stuart Island, Pender Islands, Mayne and Saturna Islands). Tsartlip resided on the western side of the Saanich Peninsula in Brentwood Bay.
- Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Tsartlip and to explore opportunities to honour and recognize the Douglas Treaties.

### **III - Involvement in the NEB and Crown Consultation Process**

Given the nature and location of the Project, and the potential impacts of the Project on Tsartlip’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Tsartlip lies at the middle portion of the *Haida* consultation spectrum. Tsartlip was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Tsartlip opportunities to be consulted at a deeper level.

Tsartlip participated in the NEB review process as an intervenor and submitted written evidence and final arguments, provided additional correspondence to the NEB, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [\[A71236\]](#). Tsartlip was also present at the Oral Traditional Evidence Hearing in Victoria, BC.

Tsartlip received a total of \$20,347 in National Energy Board (NEB) participant funding during the review process. The Major Projects Management Office (MPMO) offered Tsartlip \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsartlip an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Tsartlip did not sign contribution agreements and did not make use of this funding opportunity.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tsartlip for review and comment on August 17, 2016. The Crown received comments from Tsartlip on the draft Report on September 19, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Tsartlip provided comments on November 16, 2016.

#### **IV - Summary of Key Tsartlip Issues and Concerns Raised**

This section offers a summary of the key issues raised by Tsartlip, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsartlip's key Project-related issues and concerns are summarized below:

##### Environmental Impacts

- Potential environmental impacts related to forests and lands within Tsartlip's asserted traditional territory, aquatic resources, water quality, as well as the importance of salmon in their cultural ceremonies;
- Potential environmental and socio-economic impacts of increased marine shipping traffic; and
- Potential for accidents and malfunctions leading to an oil spill, the ability to prevent and clean-up a spill, and the type of oil that would be shipped.

##### Impacts on Traditional and Cultural Practices

- Potential disruption to archeological artifacts, including burial sites.

##### Impacts on Aboriginal Interests

- Potential infringement from the proposed marine shipping effects on Tsartlip's Aboriginal Interests; and
- Potential impacts to Tsartlip members' ability to continue to hunt, fish and collect resources in the future.

### Economic Impacts

- Interest in potential job opportunities, economic development and community capacity building.

### Marine Impacts

- Interest in the navigation and navigation safety for the Project, including anchorage, pilotage, tugboat escort, ballasting, and types of fuel used;
- Potential effects of increased marine shipping on whales and salmon; and
- In its feedback to the first draft of this Report, and subsequent letter of November 16, 2016, Tsartlip emphasized the profound importance of and concern for the Southern Resident Killer Whale population due to Project impacts potentially leading to reduced prey availability, marine contamination, and acoustic disturbance. Tsartlip seeks a comprehensive, evidence-based plan that will be effective in mitigating such impacts on killer whales and encouraging their recovery.

### ***Tsartlip's Response to the NEB Recommendation Report***

To the Crown's knowledge, Tsartlip has not provided direct feedback on the *NEB Recommendation Report*. It is the Crown's understanding that Tsartlip chose instead to intervene in a judicial review of the Report dated May 19, 2016.

### **V - Potential Impacts of the Project on Tsartlip's Aboriginal Interests**

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tsartlip's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Tsartlip's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tsartlip's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, proponent commitments, recommended NEB

conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

It is the Crown's understanding that Tsartlip completed an independent, third-party traditional marine resource use (TMRU) study for the Project ([A4J7W5](#)). The Crown hopes to discuss the information in this study to inform the Crown's understanding of the potential impacts on Tsartlip's Aboriginal Interests. Tsartlip also submitted Oral Aboriginal traditional evidence, including many exhibits, to the NEB ([A4F2C3](#), [A4F2C4](#), [A4F2C5](#), [A4F2C6](#)).

### ***Impacts on Hunting, Trapping, and Plant Gathering***

Tsartlip raised the following concerns with potential Project-related impacts relating to hunting, trapping and gathering activities:

- Potential environmental impacts related to lands within Tsartlip's traditional territory, aquatic resources, water quality, as well as the importance of salmon in Tsartlip's cultural ceremonies;
- Potential impacts to Tsartlip members' ability to continue to hunt and collect resources in the future; and
- Potential effects of increased marine shipping on whales.

The general direct and indirect effects of the Project on hunting, trapping, and gathering activities, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tsartlip's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Tsartlip's hunting, trapping and plant gathering activities.

### ***Impacts on Marine Fishing and Harvesting***

Tsartlip raised the following concerns with potential Project-related impacts on their marine fishing and harvesting activities:

- Potential environmental and socio-economic impacts of increased marine shipping traffic;
- Potential impacts to Tsartlip members' ability to continue to fish and collect resources in the future; and
- Potential effects of increased marine shipping on salmon.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels are expected to cause temporary disruptions to Tsartlip's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes.

As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Tsartlip community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Tsartlip's cultural activities and sharing of marine food with the community. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tsartlip's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Tsartlip's marine fishing and harvesting activities.

#### ***Impacts on Other Traditional and Cultural Practices***

Tsartlip raised the following concerns with potential Project-related impacts on other traditional and cultural practices:

- Potential disruption to archeological artifacts, including burial sites;
- Potential environmental impacts related to forests and lands within Tsartlip's traditional territory, aquatic resources, water quality, as well as the importance of salmon in Tsartlip's cultural ceremonies; and
- Cultural impacts on the Southern Resident Killer Whale.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Tsartlip's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Tsartlip identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from Project-related marine shipping would be considered significant.

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Tsartlip's other traditional and cultural practices.

### ***Impacts Associated with Accidental Tanker Spills***

Tsartlip expressed concerns regarding the impact of a potential oil spill on its Aboriginal Interests, including the effects of a spill on the Southern Resident Killer Whale and its habitat and the ability to prevent and clean-up a spill, and the type of oil that would be shipped.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Tsartlip's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Tsartlip's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill<sup>1</sup>.

### **VI - Conclusion**

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Tsartlip's Aboriginal Interests would be up to moderate.

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<sup>1</sup> Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Tsartlip's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Tsartlip's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on the Tsartlip First Nation. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.