

Enbridge Northern Gateway Project

Joint Review Panel

File OF-Fac-Oil-N304-2010-01 01
11 December 2012

To: All Parties to Hearing Order OH-4-2011

Northern Gateway Pipelines Inc. (Northern Gateway)
Application for the Enbridge Northern Gateway Project
Hearing Order OH-4-2011
Notice of Motion filed by the Council of the Haida Nation
Ruling no. 129

On 16 October 2012, the Joint Review Panel (Panel) for the Enbridge Northern Gateway Project (Project) received a Notice of Motion (Motion) from the Council of the Haida Nation (CHN), requesting an order as follows:

- a) Allowing the CHN to submit the following documents as written evidence:
1. 1995 09 13 Affidavit of Guujaaw,
 2. 1995 09 14 Affidavit of Dr. John Enrico,
 3. 1995 09 14 Affidavit of Dr. Marianne Boelscher Ignace,
 4. 1999 12 28 Affidavit of Guujaaw,
 5. 1999 12 28 Affidavit of Kathleen Pearson,
 6. 2000 06 01 Affidavit of Edward John, and
 7. 2003 10 22 Affidavit of Daniel Watts.

The CHN state that the proposed late written evidence relates to:

- a) The strength of the Haida Nation's assertion of Aboriginal rights and interests, including Aboriginal title, to all the lands and surrounding waters of Haida Gwaii, and
- b) The nature and scope of the Crown's duty to engage in meaningful consultation and accommodate the Haida Nation.

The affidavits are, in CHN's view, supplementary to the oral traditional evidence given previously, and relate to two issues to be covered at the Prince Rupert hearings, namely: (1) potential impacts of the Project on Aboriginal rights and interests; and (2) Aboriginal engagement and consultation.

The CHN further states that this evidence is relevant to the Panel's mandate which, under sections 6.5, 8.1 and 8.2 of the Amended Joint Panel Agreement (JRP Agreement), includes collecting and referencing information relating to strength of claim respecting Aboriginal rights and title.

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On 31 October 2012, the Panel went out for comments from Northern Gateway and the federal government participants on the Motion.

By letter dated 7 November 2012, the federal government participants responded, advising that they did not oppose the Motion to file the proposed late written evidence.

By letter dated 6 November 2012, Northern Gateway acknowledged that it is appropriate to afford procedural latitude to presenters, particularly with respect to traditional use matters. For that reason, it did not object to the late filing of the majority of the affidavits. Northern Gateway did take issue with two of the affidavits filed (Edward John, dated 1 June 2000; and Daniel Watts dated 22 October 2003), as they do not relate to matters directly relevant to this proceeding and could and should have been filed in a timely manner.

By letter dated 15 November 2012, the CHN advised that it is withdrawing its request to file the affidavits of Edward John and Daniel Watts, in light of Northern Gateway's opposition.

The Panel is of the view that the five remaining affidavits that CHN seeks to file late are sufficiently relevant to the CHN's rights and interests. The Panel is also satisfied, in light of the comments received, that there is unlikely to be any prejudice as a result of their filing. For all of these reasons, the Panel grants the CHN's motion to file five affidavits late, namely:

1. 1995 09 13 Affidavit of Guujaaw,
2. 1995 09 14 Affidavit of Dr. John Enrico,
3. 1995 09 14 Affidavit of Dr. Marianne Boelscher Ignace,
4. 1999 12 28 Affidavit of Guujaaw, and
5. 1999 12 28 Affidavit of Kathleen Pearson.

The Panel notes however that as the hearings progress, it will be more likely that prejudice will be caused by late filings. As such, it is increasingly likely that late evidence will not be accepted onto the record without, among other things, adequate justification as to why the documents are late. The Panel would refer parties to section 4 of the Hearing Order (entitled Fairness and Efficiency), which outlines the factors the Panel will generally consider on a motion for late evidence.

If you have any questions, please contact Mr. Andrew Hudson, Legal Counsel at 403-299-2708 or toll-free number at 1-800-899-1265.

Yours truly,

for 
Sheri Young
Secretary to the Joint Review Panel