

Enbridge Northern Gateway Project

Joint Review Panel

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

Mr. Bruce Watkinson
Gitxaala Nation
P.O. Box 149
Kitimat, BC V0V 1C0

Ms. Rosanne M. Kyle
Janes Freedman Kyle Law Corporation
(on behalf of) Gitxaala Nation
340 - 1122 Mainland Street
Vancouver, BC V6B 5L1

Dear Mr. Watkinson and Ms. Kyle:

**Northern Gateway Pipelines Inc. (Northern Gateway)
Enbridge Northern Gateway Project Application of 27 May 2010
Hearing Order OH-4-2011
Notice of Motion filed by the Gitxaala Nation on 31 October 2012
Ruling no. 131**

On 31 October 2012 a Notice of Motion (Motion) was filed by the Gitxaala Nation (Gitxaala) asking for relief from the Joint Review Panel (Panel) from the requirement as noted in Procedural Direction #9, that a witness must adopt written evidence filed and confirm that:

- 1) The written evidence was prepared by the witness or under his or her direction and control; and
- 2) The evidence is accurate to the best of the witness' knowledge and belief.
(Affidavit Requirements)

Background

The Gitxaala had filed a number of historical documents with their written evidence, which were listed as Appendix A to the Motion (Historical Documents). These documents are of historical nature, prepared between 1891 and 1961. For this reason, the authors of the documents are not available and the Gitxaala were unable to comply with the Affidavit Requirements.

The Gitxaala argue that the Historical Documents should be exempt and admissible in their own right under the rule for admission of historical (or ancient) documents. This is an exception to the hearsay rule and, the Gitxaala state, a well accepted rule by the Canadian courts, in particular for aboriginal or treaty rights cases. The rule provides that documents not less than thirty years old which have been provided from proper custody, in the absence of circumstances of suspicion, are admissible.

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The Gitxaala note that the rules of evidence may not be directly applicable to the joint review process, however in their view, the test for admissibility of Historical Documents should not be stricter than it would be in a court of law.

On 13 November 2012, the Panel requested comments on the Motion from Northern Gateway as well as Federal Government Participants (FGP).

On 15 November 2012, Metis Nation of BC filed a comment in support of the Gitxaala's Motion to have the Historical Documents admitted.

On 19 November 2012, the FGP filed their response stating that they take no position in the Gitxaala's motion.

On 19 November 2012 Northern Gateway filed their response stating that they did not oppose the relief sought by the Gitxaala, subject to:

- (i) clarifying the identification of the Historical Documents (Northern Gateway provided a revised Appendix A);
- (ii) verifying the "proper custody" of the documents described as "Final Report – Bella Coola Agency: Minutes of Decision" and the "Kitlathla Tribe Minutes of Decision – Bella Coola Agency" (Bella Coola Agency documents); and
- (iii) questioning the legibility of some of the Historical Documents.

Northern Gateway also suggested that the weight to be ascribed to the Historical Documents should not be decided by the Panel while the hearing is ongoing, as suggested in the Motion.

On 23 November 2012 the Gitxaala filed their response, and addressed the comments made by Northern Gateway as follows:

- (i) the Gitxaala accepted the revisions of Appendix A proposed by Northern Gateway;
- (ii) filed an Affidavit confirming the custody at the Library and Archives of Canada of the Bella Coola Agency documents;
- (iii) clarified that the Gitxaala was only seeking to admit pages 4 and 6 of the Bella Coola Agency documents; and
- (iv) advised that the legibility of some of the copies was beyond their control.

The Gitxaala agreed with Northern Gateway's comment that the weight of these documents was subject to further submissions and argument and that it is not necessary for the Panel to determine at this time.

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Original versions of all of the Historical Documents are held in the custody of the Public Archives Canada and Library and Archives Canada. These documents have been filed in relation to the Gitxaala's aboriginal rights and title to their Traditional Territory.

Analysis and Decision

The Panel accepts that the Historical Documents are filed in relation to Gitxaala's aboriginal rights and title to their Traditional Territory. Given the date of the documents, it is not feasible to have the Gitxaala comply with the Affidavit Requirements. The Panel also understands that some courts have accepted ancient or historical documents in the past, particularly for aboriginal or treaty rights cases.

The Panel is also however of the view that the justification underlying the Affidavit Requirements remains important; namely, there may be issues in admitting evidence on its face without having someone available to attest and speak to the facts contained within the document.

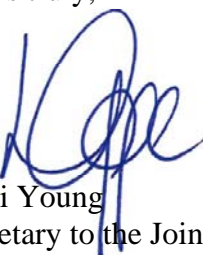
In the circumstances, the Panel agrees to exempt the Gitxaala from the Affidavit Requirements for the Historical Documents as listed in the revised Appendix A. The Panel would however require the Gitxaala to have one (or more) of their experts available to speak to the Historical Documents, and confirm the expert's belief, as to:

- 1) their authenticity; and
- 2) their contents and reliability.

The Gitxaala could then be questioned on the Historical Documents in relation to Gitxaala's aboriginal rights and title to their Traditional Territory (should any party wish to do so).

If you have any questions related to this ruling, 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