

Enbridge Northern Gateway Project Joint Review Panel

File OF-Fac-Oil-N304-2010-01 01
8 February 2013

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 ForestEthics, Living Ocean Society and Raincoast
Conservation Foundation (Coalition)
Ruling no. 142**

On 6 February 2013, Ms. Karen Campbell, counsel for ForestEthics, Living Ocean Society and Raincoast Conservation Foundation (Coalition), orally brought a motion requesting that the Panel:

- require Northern Gateway to produce a study that one of its witnesses relied on to support the contention that bitumen would not sink;
- provide an opportunity for intervenors to introduce new evidence on this issue; and
- allow intervenors to cross-examine Northern Gateway on the study.

Views of the Parties

In support of the motion, Ms. Campbell stated that the information was not part of Northern Gateway's application or reply evidence, and had generally not been disclosed to any of the intervenors. She also noted that the issue of whether bitumen will sink or float is a critical issue, and that parties have filed evidence and asked information requests in relation to this issue.

Accordingly, Ms. Campbell argued that it is highly prejudicial for Northern Gateway to attempt to rely upon the study without submitting it into evidence.

On behalf of the Gitxa'ala Nation, Ms. Roseanne Kyle stated support for the motion. However, in her view any prejudice cannot be remedied by merely allowing Northern Gateway to file the study as evidence at this stage and providing parties an opportunity to cross-examine on the evidence. This is because parties have not had an opportunity to make information requests, file expert evidence and to follow the process that the Joint Review Panel has set for the filing of evidence.

Ms. Jennifer Griffith, counsel for the Haisla Nation, also noted support for the motion and stated that Northern Gateway had shared this study with Environment Canada and some third parties but had not filed it in these proceedings. This contravenes the rules of procedural fairness and raised issues of Aboriginal engagement and consultation.

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Douglas Channel Watch and the Heiltsuk Tribal Council also supported the motion.

Mr. Dennis Langen, counsel for Northern Gateway, acknowledged that the issue addressed in the study is an important one. He asserted that Northern Gateway continues to do ongoing work to address important issues, and that witnesses are required to tell the truth including about that ongoing work.

In his view, evidence is tested by cross-examination and new evidence comes from that process. This in fact is the purpose of cross-examination. Mr. Langen further noted that this situation is not prejudicial and is distinct from a party seeking to file additional written evidence.

Mr. Langen indicated that Northern Gateway would file the study and that it was not lengthy. The witnesses on Northern Gateway's current panel (Marine Emergency Preparedness and Response) would be available to be questioned on the study this week and, after next week's break, as long as the witness panel remains on the stand (anticipated until the end of February).

In reply, Ms. Campbell stated that procedural fairness required that there be an opportunity to respond to this study including time for Coalition counsel to review the study with their clients and experts, and an opportunity to bring additional evidence through an IR process or submission of additional evidence. In order to do this, Ms. Campbell proposed that the Panel allow questioning on this study during the Shipping and Navigation witness panel.

Panel Decision

The Panel ruled on the record, on 6 February, that Northern Gateway file the study and that reasons would follow to address the other relief requested.

Where relevant studies are generated based on new or evolving information, the Panel encourages parties to seek leave from the Panel to file this information as late written evidence, as soon as practical. This may help to alleviate the type of situation that has transpired this week, which has the potential to prejudice other parties. The Panel acknowledges that there may be circumstances when new information is disclosed in cross-examination, where it is appropriate for parties to be granted additional time to address that information.

In this circumstance however, the Panel notes that the study, entitled *Meso-scale Weathering of Cold Lake Bitumen / Condensate Blend* has now been filed on the record as Exhibit B-193. This study is not lengthy and the witness panel will be available for cross-examination on this information until the end of February. As such, at this time, the Panel is of the view that the Coalition and other parties to the process will have sufficient opportunity to review and respond to the study and do not need to have questions delayed until the Shipping and Navigation witness panel.

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Accordingly the Panel denies the remainder of the additional relief requested. However, after having reviewed the study, parties may seek leave of the Panel to introduce rebuttal evidence or otherwise address the study.

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

Yours truly,

A handwritten signature in blue ink, appearing to be 'S. Young', written over a printed name.

for
Sheri Young
Secretary to the Joint Review Panel