

Enbridge Northern Gateway Project Joint Review Panel

File OF-Fac-Oil-N304-2010-01 01
26 April 2013

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

**Northern Gateway Pipelines Inc. (Northern Gateway)
Application for the Enbridge Northern Gateway Project (Project)
Hearing Order OH-4-2011
Notice of Motion filed by BC Nature/Nature Canada on 2 April 2013
Ruling no. 159**

Motion

On 2 April 2013, BC Nature/Nature Canada (BCN/NC) filed a motion (Motion), in which it sought to have the Joint Review Panel (Panel) to issue a further Procedural Direction, to address the following two questions:

- a) What is the content of the right of cross-examination in the Enbridge Northern Gateway Joint Review Panel hearing?
- b) What are the obligations of witnesses in this hearing when under cross-examination?

BCN/NC further sought to have the Northern Gateway Shipping and Navigation panel extended, and to have any ensuing panels stayed pending a ruling on the Motion. This, BCN/NC argued, would provide BCN/NC and any other intervenors with the opportunity to reopen their cross-examination of the Northern Gateway Shipping and Navigation panel based on the clarifications and elaborations in any Procedural Direction the Panel issues.

In support of the Motion, BCN/NC argued that there was some urgency in having the two questions answered, and having clear and neutral rules of procedure governing witness testimony established, as the “lack of clarity and certainty”, has had a profound influence on the procedures followed and evidence adduced throughout the hearing. BCN/NC alleged that while there has been some guidance relating to cross-examination (largely restrictions), there has been little comparable guidance regarding witness testimony.

BCN/NC went on to answer the questions posed, submitting that the content of the right to cross-examine must include at a minimum:

- the right to confront an individual witness under oath and secure an answer to questions posed;
- the right to pursue a relevant and responsive answer from an individual witness subject only to the jurisdiction of the tribunal to ensure that the witness is not badgered or harassed;
- the right to cross-examine witnesses on any evidence (documentary or otherwise) relevant to issues before the tribunal; and
- the right to object and secure timely rulings on the admissibility of witness testimony.

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- 2 -

Further, the obligations of witnesses sworn to testify must include, at a minimum:

- the obligation to provide, and be responsible for, witness testimony individually, and to refrain from conferring with other witnesses, counsel or other Parties with respect to their testimony while under cross-examination;
- the obligation to provide truthful, relevant and responsive answers, and not to decline or refuse to answer questions unless the JRP rules that a question is irrelevant or that the question seeks to elicit inadmissible evidence;
- the obligation not to refer to notes or other documentation without explicit permission from the JRP; and
- the obligation to yield and cease testimony immediately when an evidentiary or procedural objection has been put to the JRP.

BCN/NC then cites various instances, largely within the testimony of the Northern Gateway Shipping and Navigation panel, where BCN/NC believes these proposed principles were not followed. The examples provided include (without limitation):

- The Panel has condoned the practice of Northern Gateway witness conferencing; such conferencing was particularly pronounced with the Shipping and Navigation panel.
- Some questions put to Northern Gateway witnesses were: declined to be answered; “intercepted” by another witness; or answered in the collective with witnesses using the plural “we” as opposed to the singular “I”.
- The Panel appears to allow the practice of sworn ‘front row’ witnesses communicating with unsworn ‘back row’ witnesses, in the course of giving testimony.
- There was a tendency on the part of certain witnesses to make lengthy speeches about topic unrelated to the question asked.
- The Panel and counsel for Northern Gateway have been derelict in their duty to police attempts by witnesses to adduce inadmissible or improper evidence onto the record.
- Witnesses would at times read unidentified documents, while they are in the midst of testifying.

Other Comments Received

On 3 April, letters in support of the Motion were filed by Coastal First Nations (CFN), ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation (Coalition) and the Council of the Haida Nation.

CFN noted that the examples referenced in the Motion regarding the fairness of the process were similar to those raised previously by the CFN.

In its comments the Coalition agreed that the Motion raised serious questions regarding procedural fairness. The Coalition went on to cite instances where the Shipping and Navigation panel appeared to consult unnecessarily, and where Northern Gateway witness testimony was either unresponsive or did not directly relate to the question asked.

At the commencement of the hearings on 4 April (Transcript Volume 160), the Panel advised that it would receive written comments on the Motion, as follows:

... from parties in support of the motion by noon Pacific Standard Time on Friday, the 5th of April, 2013. Parties opposed to the motion may comment in writing by noon Pacific Time on Monday, the 8th of April, 2013. BC Nature may reply in writing by noon Pacific Time on the 10th of April, 2013.

.../3

- 3 -

On 4 April, the Haisla Nation (Haisla) provided its comments, stating that the Motion expressed legitimate concerns about the cross-examination process. While, in the Haisla's view, the Panel's procedural directions and general Board practice may permit conferral among witness panels, it should not result in questions being deflected or not being answered by the witness most knowledgeable.

On 5 April, comments were received from CFN and Ms. Josette Wier. Ms. Wier expressed support for the Motion, and noted that she is also seeking a clearer definition of what an "expert" witness is and the conditions for disqualification. CFN noted that it would require additional time to adequately provide further written comments.

On 6 April, C.J. Peter Associates Engineering (CJPAE) provided its comments in support of the Motion, together with reasons as to why the submissions were late. On the substance of the Motion, CJPAE noted an instance where, in its view, Northern Gateway deflected certain questions and the Panel allowed this to occur.

Northern Gateway provided its comments opposing the Motion on 8 April. Northern Gateway outlined its understanding on the ways in which proceedings before administrative tribunals, including the joint review process, do not parallel court proceedings and are in fact, less formal. It is fully consistent with long-standing Board practice that witnesses be permitted to appear in witness panels, confer and determine the best witness to answer the question posed. This, in Northern Gateway's view, promotes efficiency and facilitates obtaining the best evidence.

In terms of the 'back row' witnesses these individuals were available to - and on seven occasions did - become sworn, front row witnesses. In all other instances, the evidence was still being put forward by witnesses under oath.

With respect to questions being intercepted and answered by an alternate witness, Northern Gateway asserted that there were no instances where counsel for BCN/NC raised an objection with the Panel to insist that a particular witness answer a question, within his or her specific expertise or evidence. Similarly, in Northern Gateway's view, there are no facts to substantiate the claim that inadmissible evidence was provided on the record.

Lastly, in Northern Gateway's view, it is unfair to the applicant that the Motion be brought so late in the process.

On 4 April, counsel for Northern Gateway further provided oral comments on the Motion. As noted by the Panel at that time (Transcript Volume 160, line 4082), the Panel will handle the Motion as a written matter, and will not consider any oral statements made on the record.

In its reply comments, filed 10 April, BCN/NC reiterated its view that the lack of clarity and certainty in the procedural rules for the hearing has influenced the process. Specifically, while witness panels' conferring is contemplated in Procedural Direction #9, this direction fails to regulate such conferencing in a "meaningful, intelligible and predictable way." BCN/NC further takes issue with back row support staff, as well as more generally, witnesses conferring during (as opposed to before) testimony being given. Lastly, BCN/NC asserted that it did in fact raise clear objections on certain testimony.

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- 4 -

Decision of the Panel

On 4 April, the Panel made a ruling from the bench (Transcript Volume 160, line 4056), on the second part of the relief sought in the Motion as follows:

The Panel will not extend the hearing time for the current shipping and navigation witness panel or otherwise defer future witness panels at this time. If necessary, witnesses could be recalled to testify. Accordingly, until further notice, we will proceed as planned with the current witness panels.

The Panel will now respond to the remaining relief sought in the Motion.

As a preliminary observation, the Panel notes that the Motion seeking procedural clarity was filed 2 April 2013, approximately four days before the last of Northern Gateway's nine witness panels were excused, and approximately seven months after the start of the final hearings for questioning. Limited justification was provided by BCN/NC as to why the Motion was brought so late in the process, how other Parties could be prejudiced by the late filing, or why only the final Northern Gateway witness panel would need to be recalled to provide additional testimony (as opposed to the other witness panels that preceded the Shipping and Navigation panel).

In considering the Motion, the Panel has also reviewed the principles proposed by BCN/NC and the examples provided of situations in which, BCN/NC has asserted, these principles were not followed.

In terms of some of the specific issues raised in the Motion, the Panel would note as follows.

The process of sworn witness panels conferring is a long-standing practice of the Board, and has been consistently and uniformly utilized in the joint review process. The practice has been referenced in procedural directions, as well as in workshops with Panel staff, and could be observed at every hearing location since the start of the questioning phase on 4 September 2012. The Panel is of the view that it would be arbitrary to attempt to define "how much" or what kind of witness conferral would be appropriate. Rather, should a party be of the view that a witness' behavior on the stand calls into question his or her credibility, then that issue may be raised in submissions about the relative weight of the evidence, during final argument. This is standard Board practice and, in the Panel's view, does not offend any rules of procedural fairness for an administrative tribunal.

The reliance on 'back row' support staff has also been undertaken in a consistent and transparent manner since the start of the questioning phase in September 2012 (Transcript Volume 69, line 14434 to 14436). In each instance, counsel has identified and introduced the back row staff, who would be available to be sworn, as required. No concerns about this practice have previously been brought to the Panel's attention and the Panel is of the view that it does not offend any rules of procedural fairness. Rather, to disallow and censure this practice at this stage of the proceeding would create prejudice and procedural uncertainty.

Lastly, BCN/NC has raised a number of issues with the manner in which witnesses for Northern Gateway have provided their evidence (i.e. providing lengthy and unresponsive answers, having alternate witnesses provide a response, using the term "we" instead of "I", adducing improper evidence, and reading from unidentified documents).

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- 5 -

In the Panel's view, all of these situations were, or could have been, properly raised during the course of cross-examination in order for the Panel to rule upon them. Should a party disagree with the Panel's ruling on an objection (which is made properly and in a timely manner) then that ruling can be challenged through a review, under section 21 of the *National Energy Board Act*. Any such request for a review should also be brought in a timely manner. In the Panel's view, it is wholly inappropriate to continue with an examination and then seek to impugn a host of evidence adduced, weeks or months later. Such an approach lacks regulatory certainty, fairness and consistency.

Ultimately, the Panel is not persuaded that there is any merit in providing additional clarity on the content of the right of cross-examination or the obligations of witnesses in this hearing. The existing parameters are consistent with administrative law principles and have been consistently applied throughout the hearing process. Any objections on an individual witnesses' testimony are more appropriately assessed on a case-by-case basis. For these reasons, the Motion is dismissed.

Should you have any questions about this ruling, please contact Mr. Andrew Hudson, Legal Counsel at 403-299-2708 or 1-800-899-1265.

Yours truly,



Sheri Young
Secretary to the Joint Review Panel