

# Enbridge Northern Gateway Project Joint Review Panel

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File OF-Fac-Oil-N304-2010-01 01  
29 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  
Motion filed by Coastal First Nations on 2 April 2013  
Ruling no. 160**

## **Motion**

On 2 April 2013, Coastal First Nations (CFN) filed a motion (Motion), seeking the following relief:

1. CFN respectfully requests that the Testimony of NGP Witness, Mr. Michael Cowdell of Worley Parsons Canada Services Ltd., identified in this Motion be expunged from the Hearing Record.
2. That the JRP discount the weight given to Mr. Cowdell's entire evidence because of his actions.
3. That the JRP further reduce any weight assigned to the Pacific Pilotage Authority Letter of Comment to the extent it takes it into consideration in its deliberations because of Mr. Cowdell's actions and because CFN and other Intervenors were not given a cross-examination opportunity.

The impugned testimony of Mr. Cowdell, as identified in the Motion, appears at the following transcript references: Volume 157, 20 March, lines 274 – 277; Volume 158, 21 March, lines 2457, 2462 –3, 2480-1; Volume 159, 22 March, lines 2960-2, 2982-3, 3738-40, 3753.

In the Motion CFN argued that it had previously sought an order of the Panel, to compel the Pacific Pilotage Authority (PPA) to file certain evidence, so that "CFN and other Intervenors would have an opportunity to cross-examine them on any evidence filed." CFN further asserted that in Ruling No. 78, dated 14 August 2012, the Panel noted that it had been advised that PPA would file a letter of comment on the record, on its own initiative. CFN stated that the Panel then refused to grant the order sought, noting that CFN and other Intervenors would not be given the opportunity to cross-examine on any letter of comment filed by the PPA.

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CFN went on to note several instances where Mr. Michael Cowdell, on behalf of Northern Gateway, referenced the PPA letter of comment in response to questions on cross-examination. In light of the Panel's earlier ruling, CFN was of the view, that this represented an attempt to file evidence on the record improperly.

### **Other Comment Letters**

The Panel subsequently received the following letters in support for the CFN Motion between 2 and 5 April 2013: ForestEthics Advocacy, Living Oceans Society and Raincoast Conservation Foundation (Coalition); Council of the Haida Nation; Haisla Nation (Haisla); Gitxaala Nation (Gitxaala); and Ms. Josette Wier.

The Coalition objected to Northern Gateway witnesses reading into the record, referring to and adopting as evidence documents prepared by other parties that are either not in evidence or are on the registry as letters of comment. That is because in those instances, there is no opportunity to question the author of the document.

In the Haisla's view, the Motion raised important issues about the reliance on material which has expressly been characterized as not constituting evidence.

The Gitxaala also asserted that it would be procedurally unfair for Northern Gateway witnesses to rely on information filed on the registry, which cannot otherwise be tested. Gitxaala submits that the purpose of questioning Northern Gateway witnesses is to test the credibility of Northern Gateway's evidence; any statements made by Mr. Cowdell which rely on the PPA letter of comment ought to be expunged.

Ms. Wier further expressed support for the Motion, in light of the Panel's earlier ruling on the PPA letter of comment.

### **Decision**

The Panel notes that the grounds cited for the Motion are largely based on Ruling No. 78, dated 14 August 2012. In that ruling, the Panel noted that it could not compel a non-party (such as the PPA) to attend to give evidence and produce specific documents, without a subpoena. No such request was made. Further, while the Panel understood that the PPA would be submitting a letter of comment on the record on its own initiative, "this information will not be subject to questioning at the final hearings as PPA is not a party." Through this phrase, the Panel meant to relay that the PPA (as a non-party) would not be attending to answer questions on any letter of comment filed. This is consistent with the procedure laid out in the Hearing Order, the Board's *Rules of Practice and Procedure*, and the practice undertaken through the joint review process.

Through the Motion CFN has asserted that in Ruling No. 78, the Panel intended that no party could make any reference to the PPA letter of comment during questioning. This is not consistent with the Panel's intent, or standard practice. The Panel notes that throughout the questioning phase, parties have cited materials or information that are not directly on the record in order to answer questions or provide further clarity about evidence that is on the record. This, in the Panel's view, is a key purpose of cross-examination. Parties have also made extensive use of aids to questioning, which are similarly untested and are not on the public record.

Should a party take issue with the quality of evidence placed on the record through questioning (or otherwise), or the credibility of an individual witness, then submissions can be made in final argument as to the appropriate weight to give such evidence.

Accordingly, the Panel rules as follows:

- 1) The impugned transcript references will not be expunged;
- 2) Arguments regarding the weight of any individual evidence may be raised during final argument; and
- 3) The PPA letter of comment is untested evidence, the weight of which parties may address in final argument.

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

