

# Enbridge Northern Gateway Project Joint Review Panel

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2 May 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 Gitxaala Nation dated 27 March 2013  
Ruling no. 161**

## ***Background***

On 27 March 2013, the Gitxaala Nation (Gitxaala) filed a Notice of Motion (Motion) in relation to the Joint Review Panel (Panel) requirement that Parties provide affidavits for adopting their written evidence, as noted in Procedural Direction No. 9 (Affidavit Requirement).

Gitxaala has been able to comply with the Affidavit Requirement for the majority of its written evidence. However, Gitxaala has filed a number of documents and reports for which it is not possible for Gitxaala to prepare affidavits as the ability to prove the authenticity of the documents lies outside of their control.

These documents are as follows:

- a) Documents received by Gitxaala through Access to Information requests made of the Department Fisheries and Oceans (DFO) and Natural Resources Canada (NRCan) (the ATIP Documents);
- b) Documents received by Gitxaala through a Freedom to Information request made of the Province of British Columbia's Department of Environment (the FOI Documents);
- c) Documents retrieved by Gitxaala from the websites of NRCan and the BC Ministry of Energy and Mines (Government Reports); and
- d) Copies of Hansard debates (Hansard Debates).

Collectively these are known as the "Official Documents" as described in detail in Appendix A to the Motion.

In the Motion, the Gitxaala states that the Official Documents are relevant to the Panel process as they relate to the status of the west coast tanker moratorium and the tanker exclusion zone. These issues are relevant to the shipping activity proposed by Northern Gateway, as part of the project and to evidence filed by the Federal Government Participants (FGP) and Northern Gateway in this proceeding.

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### ***Motion***

Gitxaala requested that the Panel issue an order that:

- a) Gitxaala is exempt from the Affidavit Requirement in relation to the Official Documents outlined in Appendix A;
- b) The Official Documents be admitted as evidence to be considered by the Panel; and
- c) In the alternative, Gitxaala requests that the Panel summon Ms. Norma McLelland (DFO) and Ms. Yvonne Robinson (NRCan), the authors of the letters received by Gitxaala attaching the ATIP Documents, and Elizabeth Vander Beesen, the author of the letter received by Gitxaala attaching the FOI Documents, to affirm their authenticity, pursuant to section 40 of the *National Energy Board Rules of Practice and Procedure*.

### ***Comments***

The Panel went out for comments from all Parties on this Motion, with a deadline of 16 April 2013. Reply comments from Gitxaala, were due 19 April 2013.

On 12 April 2013, the Haisla Nation (A51251) filed comments in support of the Motion and stated that the documents were relevant to the status of a west coast tanker moratorium and tanker exclusion zone.

On 15 April 2013, the Council of the Haida Nation (CHN) (A51279) filed comments in support of the Motion, as arguing that these documents are relevant to the shipping activity as proposed by the Applicant.

CHN went on to ask the Panel for clarification of Procedural Direction No. 9. CHN submitted that all Parties should be allowed to rely upon all of the written evidence that has been properly filed, whether adopted by affidavit or not. CHN suggested that the reliability of un-adopted evidence should go to the weight of the evidence, not its admissibility.

On 16 April 2013, the Province of British Columbia (Province) (A51303) filed a letter stating that it takes no position on whether the Motion should be granted. The Province further provided some comments on the Documents obtained from the Province, and reserved the right to make submissions on any subpoena that may be issued prior to such issuance.

On 16 April 2013, Northern Gateway (A51320) filed comments on the Motion requesting that the Panel deny Gitxaala an exemption from the Affidavit requirement, as set out in the Motion. Northern Gateway stated that the Panel is not bound by the rules of evidence. Further, in accordance with the *Rules of Practice and Procedure*, subsections 36(2) and (3), as well as Procedural Direction No. 9 witnesses are required to adopt their evidence to confirm that it:

- Was prepared by the witness or under the witness' direction and control; and
- Was accurate to the best of the witness' knowledge and belief.

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Northern Gateway asserted that, under Procedural Direction No. 9 and the Panel's letter of 10 April 2013, if the witness is not required to appear at the hearings for questioning, the witness can adopt their evidence by affidavit. Northern Gateway argued that submitted materials which have not been prepared by the party or under their direction or control and for which there is no witness to answer questions about them or confirm their accuracy, ought not to be given the weight of sworn evidence.

On 16 April 2013, the Attorney General of Canada (Canada) (A51333) filed comments on the Motion, requesting that the Panel deny the Motion to exempt the Gitxaala from the Affidavit Requirement. Canada's view is that if Gitxaala is able to provide evidence that the search for these documents was done under their direction and control, and that the documents are accurate to the best of their knowledge and belief, that is sufficient to satisfy the requirements of Procedural Direction No. 9. Canada further took the position that it was premature to order that the Official Documents be "admitted" and considered by the Panel, as this is a question of relevance. Lastly, the request for subpoenas should be dismissed.

On 19 April 2013, Gitxaala replied to these comments (A51534). Among its arguments, Gitxaala submitted that given the differing interpretations of Procedural Direction No. 9, presented by Northern Gateway and Canada, the Panel should assist parties by clarifying the precise nature of the Affidavit Requirement. Gitxaala submitted that the Official Documents are relevant to the existence of a tanker moratorium off the west coast of British Columbia. As such, these documents should be admitted so that the Panel has the most complete information possible for its deliberations.

### ***Discussion***

The Panel has reviewed the comments received as well as prior procedural directions issued and notes that there seems to be a lack of clarity surrounding the Affidavit Requirement. As such, the Panel is of the view that it would be appropriate to provide some general comments to clarify its position on the requirements for written evidence in this matter:

- Procedural Direction No. 9 is consistent with subsections 36(2) and (3) of the *National Energy Board Rules of Practice and Procedure*;
- Any evidence that has not been adopted and sworn/affirmed will be treated as unsworn evidence;
- All evidence that is filed on the record in this proceeding is part of the record and may be used in argument by any of the parties;
- Parties may address in final argument the question of weight that the Panel should give to unsworn evidence.

The Panel will be issuing a further Procedural Direction shortly, to provide further clarity with respect to these and other issues relating to final argument.

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With respect to the Motion, all of the Official Documents are already filed on the public registry. As such Gitxaala may refer to the Official Documents in argument.


The Panel has reviewed all of the comments made by the parties in this issue and is not convinced that it is necessary to waive the requirements of Procedural Direction No. 9. The Gitxaala, and other parties, may address the weight that should be given to these documents in final argument.

The Panel is further not persuaded that it is necessary to subpoena any third parties, to affirm the authenticity of the Official Documents.

Therefore, the Motion is dismissed.

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

Yours truly,



for  
Sheri Young  
Secretary to the Joint Review Panel