

IN THE MATTER OF

ENBRIDGE NORTHERN GATEWAY PROJECT JOINT REVIEW PANEL

NOTICE OF MOTION

Name of person bringing motion: LIVING OCEANS SOCIETY
RAINCOAST CONSERVATION FOUNDATION
FOREST ETHICS
(together, the “Applicants”)

Decision or order requested:

1. That the Panel determine if recent statements by the Prime Minister or by the Minister of Natural Resources who is responsible for the National Energy Board constitute an attempt by those Ministers to undermine or have had the effect of undermining the Panel hearing process or the credibility of any intervenor or any person appearing before the Panel resulting in unfairness in the hearing process, and if so, that the Panel identify the steps it will take to correct such unfairness.
2. That the Panel determine if recent statements by the Prime Minister or by the Minister of Natural Resources have contributed to an appearance that the outcome of the Panel’s proceedings has been predetermined, undermining the Parties’ and public confidence in the independence of the Panel.
3. That the Panel issue a statement:
 - (i) confirming that the Panel is independent of and not influenced by statements of the Prime Minister, the Minister of Natural Resources or other Ministers of the Crown;
 - (ii) confirming that the credibility of Parties and witnesses will be tested only through information requests and cross examination and will not be influenced by statements of the Prime Minister, the Minister of Natural Resources or other Ministers of the Crown;
 - (iii) confirming that the Panel will be guided only by the principles of environmental assessment and the requirements of the *National Energy Board Act* and the *Canadian Environmental Assessment Act*; and

(iv) requesting that Ministers of the Crown refrain from further public comments on the proceedings of the Panel and participants in the proceedings until the Panel's proceedings are concluded.

4. That the Panel receive written evidence and allow for oral argument with respect to the above listed issues prior to determining each of the above decisions.

January 27, 2012

Date Submitted



Signature

Submitted by:

Barry Robinson

Barrister & Solicitor

Representative for Living Oceans Society, Raincoast Conservation Foundation & ForestEthics

Suite 900, 1000 – 5th Ave. SW

Calgary, Alberta T2P 4V1

Tel: 403-705-0202

Fax: 403-264-8399

E-mail: brobinson@ecojustice.ca

BACKGROUND AND PURPOSE

1. The public statements of Prime Minister Stephen Harper and the Minister of Natural Resources and Minister responsible for the National Energy Board, Joe Oliver (“Minister Oliver”), documented below, have had the effect of undermining the credibility of the Panel hearing process and the credibility of certain Parties to the Panel process, including the Applicants.
2. The public statements of Prime Minister Harper and Minister Oliver, documented below, have raised issues of “radicalness”, foreign interference in the hearing process and whether certain Parties are acting contrary to the Canadian public interest. These statements have created an appearance of interference in the hearing process and created confusion for both the Parties and the public as to whether these issues are relevant to the Panel hearing process.
3. The public statements of Prime Minister Harper and Minister Oliver have contributed to an appearance that the outcome of the Panel’s proceedings has been predetermined, undermining the independence of the Panel.
4. The purpose of the Applicants’ motions are:
 - (a) to correct any appearance of unfairness that may result from the public statements of Prime Minister Harper and Minister Oliver;
 - (b) to assist the Panel and Parties to the hearings by maintaining the integrity, transparency and independence of the Panel process from outside political influence; and
 - (c) to ensure that the Panel hearings continue to proceed in a transparent, fair and respectful manner.

STATEMENT OF FACTS

5. On January 2, 2010, the Ethical Oil organization launched its “OurDecision” campaign alleging that “foreign interests or their local puppet groups” were “manipulating our decision about our pipeline.” It encouraged readers to “Ban foreigners and their local puppets from appearing before the pipeline review panel” by writing to Minister Oliver.

Ethical Oil, [http://www.ethicaloil.org/news/ethicaloil-org-launhes\[sic\]-ad-campaign-that-reveals-foreign-interests-sabotaging-canada’s-economy/](http://www.ethicaloil.org/news/ethicaloil-org-launhes[sic]-ad-campaign-that-reveals-foreign-interests-sabotaging-canada’s-economy/) (2 January 2012), accessed 19 January 2012 [Book of Authorities, Tab A]; Ethical Oil, “EthicalOil.org calls on Canadians to ask Minister Oliver to ban foreigners from the Northern Gateway Pipeline review hearings,” <http://www.ethicaloil.org/news/ethicaloil-org-calls-on-canadians-to-ask-minister-oliver-to-ban-foreigners-from-the-northern-gateway-pipeline-review-hearings/> (5 January 2012), accessed 13

January 2012 [Book of Authorities, Tab B]; OurDecision, <http://www.ourdecision.ca/>, (2 January 2012), accessed 19 January 2012 [“OurDecision.ca”] [Book of Authorities, Tab C].

6. On January 6, 2012, Prime Minister Harper stated:

“We have to have processes in Canada that come to a decision in a reasonable amount of time and processes that cannot be hijacked... In particular, growing concern has been expressed to me about the use of foreign money to really overload the public consultation phase of regulatory hearings for the purpose of slowing down the process. This is something that is not good for the Canadian economy, and the government of Canada will be taking a close look at how we can ensure that our regulatory processes are effective and deliver decisions in a reasonable amount of time.”

Bob Weber, “Harper warns of ‘hijacked’ hearings on Northern Gateway pipeline,” *The Canadian Press – Online Edition*, <http://www.winnipegfreepress.com/business/breakingnews/harper-warns-of-hijacked-hearings-on-northern-gateway-pipeline-136829528.html>, (6 January 2012), accessed 20 January 2012 [Book of Authorities, Tab D].

7. On January 8, 2012, in a interview on CTV – Question Period, Minister Oliver, made the following statements:

“Well, we are concerned that radical environmental groups are taking money from the United States and that people from the US are coming here with very large personal environmental footprints to lecture Canadians on what we should do with our resources. It’s important that the regulatory process be fair, be open, be independent, but also be expeditious. In other words, it should take as long as it needs to but no longer. And some of the dilatory tactics that some of these groups have used in the past are not really helpful and not in the Canadian national interest...”

Well we obviously want to see the oil which is moved, which can be moved by pipeline from Alberta to British Columbia, to the coast of British Columbia, moved by tankers to Asia, so we’re obviously supportive of tanker traffic moving from the west coast to the markets, the huge markets that exist...

...There have been very few pipelines indeed that have ever been rejected by the National Energy Board. I think there have been only two out of, you know, tens of thousands, and **so we expect a positive decision ultimately**, but you know, there may be conditions attached and so on...”

(Emphasis added)

Transcript, “Interview with Joe Oliver – CTV-Question Period” (8 January 2012), accessed 20

January 2012, (compared to original online: <http://watch.ctv.ca/news/ctvs-question-period/#clip597088>, accessed 20 January 2012) [Book of Authorities, Tab E].

8. On January 9, 2012, the day prior to the opening of the community hearings before the Panel in Kitimaat Village, B.C., Minister Oliver issued an open letter alleging that environmental and other radical groups “threaten to hijack our regulatory system to achieve their radical ideological agenda.” The Minister stated that such groups “seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to undermine Canada’s national economic interest.”

Natural Resources Canada, “An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada’s commitment to diversify our energy markets, and the need to further streamline the regulatory process in order to advance Canada’s national economic interest” (9 January 2012) [Book of Authorities, Tab F].

9. On January 17, 2012, Prime Minister Harper, in an interview with Peter Mansbridge on “The National”, made the following statements:

“...obviously there’s people who oppose things for various reasons, but I am concerned, the government is concerned that our processes are subject to extraordinary delay, and they’re increasingly vulnerable to foreign money coming in for the sole purpose of delaying the process...

...But just because certain people in the United States would like to see Canada be one giant national park for the northern half of North America, I don’t think that’s part of what our review process is all about. Our process is there to determine what the needs and desires of Canadians are.”

Transcript, “Peter Mansbridge talks with Stephen Harper,”
<http://www.cbc.ca/news/politics/story/2012/01/17/pol-mansbridge-interview-harper-transcript.html> (17 January 2011), accessed 19 January 2012 [Book of Authorities, Tab G].

10. In speeches given on January 24 and 25, 2012, Minister Oliver repeated his allegations that radical environmental groups sought to delay and manipulate the Panel hearing process.

Nicole Mordant and Jeffrey Jones, “Ottawa must back oilsands: Natural Resources Minister Oliver”, Reuters, 24 January 2012; Financial Post, “Time limits coming for regulatory review hearings: Joe Oliver”, Financial Post, 26 January 2012 [Book of Authorities, Tab H]

11. The relevance of these issues, raised publicly by Prime Minister Harper and Minister Oliver, to the Panel proceedings has become a matter of significant public concern.

Gloria Galloway, “Foreign money’ could gum up pipeline approval, Harper warns”, *Globe and Mail Update* (6 January 2012); John Ibbitson, “Radical groups’ spur Tories to speed pipeline review process”, *Globe & Mail* (9 January 2012); Jack Knox, “Jack Knox looks at the Enbridge pipeline proposal”, *Victoria Times Colonist* (10 January 2012); Barbara Yaffe, “Harper government undermining pipeline review with “radical’ cracks”, *Postmedia News* (9 January 2012); Terry Glavin, “The real foreign interests in the oilsands”, *Ottawa Citizen* (12 January 2012) [Book of Authorities, Tab I].

12. The interference of these issues in the Panel process is demonstrated by numerous statements by Parties at the initial community hearings, whereby Parties either feel obliged to distinguish their interests, or to express dismay at the statements made by Prime Minister Harper and Minister Oliver.

Excerpts from Hearing Transcripts [Book of Authorities, Tab J].

GROUNDS FOR THE REQUEST

A. The Panel has a duty to be fair to all participants

13. It is a well established principle of law that administrative tribunals operate under a duty of fairness.
14. The Supreme Court of Canada has clearly stated that “The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority ... The nature and extent of this duty, in turn, “is eminently variable and its content is to be decided in the specific context of each case” (as *per* L’Heureux-Dubé J. in *Baker, supra*, at para. 21).”

***Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249, at para 75 [Book of Authorities, Tab K].**

15. Statements by Prime Minister Harper and Minister Oliver alleging “foreign interference” in the hearing process and alleging that “radicals” are attempting to manipulate the hearing process, are entirely prejudicial to the Applicants. These public statements have created confusion for the Parties, created an appearance of prejudgment of the credibility of certain Parties and have raised a legitimate and genuine concern about the fairness of the Panel process.

16. Parties to the hearing process have entered the process in good faith. Prime Minister Harper's and Minister Oliver's statements about radicals and foreign interests have undermined that good faith, causing some to raise these issues in their oral statements before the Panel.
17. To protect the integrity of the hearing process, the Panel must determine if either Prime Minister Harper's or Minister Oliver's public statements constitute an attempt or have had the effect of undermining the credibility of any intervenor or person appearing before the Panel resulting in unfairness in the Panel process. Further, the Panel must identify the steps it will take to ensure fairness in the Panel process in light of these allegations.
18. To ensure that the Panel's duty of fairness is met, the Panel must provide clarification that these statements have not affected the Panel's deliberations and that the Parties are not required to address these issues in the hearing process.

B. The public statements of Prime Minister Harper and Minister Oliver must not be permitted to undermine the Parties' and public confidence in the independence of the Panel.

19. Both Prime Minister Harper and Minister Oliver have alleged foreign interference and the interference of "radicals" in the Panel process.
20. Both Prime Minister Harper and Minister Oliver have made public statements clearly indicating their support for approval of the Project.
21. The members of the Panel are permanent or temporary members of the National Energy Board appointed by Governor in Council.

**Agreement between the National Energy Board and the Minister of the Environment concerning the Joint Review of the Northern Gateway Pipeline Project, s. 5.1-5.3 [Book of Authorities, Tab L];
*National Energy Board Act, R.S.C. 1985, c. N-7, s. 3(1).***

22. Prime Minister Harper and Minister Oliver are members of the Governor in Council.
23. In *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 S.C.R. 3, Chief Justice Lamer stated, "...a party should not be required to present its case before a tribunal whose members have been appointed by the opposing party."

***Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, at para 100
[Book of Authorities, Tab M].**

24. While the Applicants do not allege that the Panel has lost its independence as a result of Prime Minister Harper's or Minister Oliver's comments, nor is the Governor in Council a

Party to these hearings, the Applicants submit that the principle stated by Chief Justice Lamer applies. Prime Minister Harper and Minister Oliver are members of the Governor in Council that has appointed the Panel members. Prime Minister Harper's and Minister Oliver's position with respect to the approval of the Project has been clearly stated. Parties opposed to approval of the Project have now been put in the position of presenting their case before a tribunal appointed by those with clearly opposing positions. Prime Minister Harper's and Minister Oliver's public statements have negatively impacted the appearance of independence required to maintain the integrity of the hearing process.

25. The recently released federal government draft "Pan-European Oil Sands Strategy" which characterized the National Energy Board as an "ally" and environmental non-governmental groups as "adversaries" has further contributed to the perception of a loss of independence of the Panel.

Pan-European Oil Sands Strategy [Book of Authorities, Tab N]

26. To protect the integrity of the hearing process, the Panel must determine if either Prime Minister Harper's or Minister Oliver's public statements have created an appearance of lack of independence of the Panel. Further, the Panel should identify the steps it will take to ensure its independence in determining if the Project is in the public interest and should confirm its independence in a public statement.

C. A ruling on this motion can be accommodated within the existing Panel process

27. It is the Applicants' position that these matters should be investigated by the Panel and that the Panel should issue a statement that clarifies these issues for both the Parties and the public.
28. The Applicants request that the Panel receive written evidence and allow for oral argument with respect to the above listed issues prior to determining each of the above decisions. However, recognizing that the community hearings have been scheduled and are underway and given that the Applicants do not wish to delay or interfere with those hearings, the Applicants are not requesting any adjournment of the community hearings while these issues are considered by the Panel.

DECISION AND REMEDIES SOUGHT

1. That the Panel determine if recent statements by the Prime Minister or by the Minister of Natural Resources who is responsible for the National Energy Board constitute an attempt by those Ministers to undermine or have had the effect of undermining the Panel hearing process or the credibility of any intervenor or any person appearing before the Panel resulting in unfairness in the hearing process, and if so, that the Panel

identify the steps it will take to correct such unfairness.

2. That the Panel determine if recent statements by the Prime Minister or by the Minister of Natural Resources have contributed to an appearance that the outcome of the Panel's proceedings has been predetermined, undermining the Parties' and public confidence in the independence of the Panel.
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4. That the Panel receive written evidence and allow for oral argument with respect to the above listed issues prior to determining each of the above decisions.