



DONOVAN & COMPANY

Barristers and Solicitors

6th Floor, 73 Water Street
Vancouver, BC V6B 1A1
Telephone (604) 688-4272
Fax (604) 688-4282
Website: www.aboriginal-law.com

Reply to:
jennifer_griffith@aboriginal-law.com

Allan Donovan*
Karim Ramji*
Jennifer Griffith
Niki Sharma
Hana Boye

Merrill W. Shepard†
Chris Roine
James Hickling
Vandana Sood

*Denotes Law Corporation
†also of the NWT Bar

May 22, 2012

ELECTRONIC FILING

Joint Review Panel
Enbridge Northern Gateway Project
444 – Seventh Avenue S.W.
Calgary, AB T2P 0X8

Attention: Ms. Sheri Young, Secretary to the Joint Review Panel

Dear Ms. Young:

Re: Hearing Order OH4-2011 Northern Gateway Pipelines Inc. Enbridge Northern Gateway Project Application of 27 May, 2010 – File OF-Fac-Oil-N304-2010-01 – Procedural Comments

We are writing to register for the procedural conference scheduled for May 30, 2012, on behalf of the Haisla Nation, and to provide comments on the questions and points raised in the Panel's May 9, 2012 letter.

The comments of the Haisla Nation are provided in response to the relevant section of the Panel's letter, reproduced in italics below. These comments must be understood in terms of who the Haisla people are and how the proposed Northern Gateway Project has the potential to impact on the Haisla people and their way of life.

The Haisla Nation occupies a territory that includes the Kitimat River Valley, Kitimat Arm, and Douglas Channel. The proposed marine terminal is to be located on land the Haisla Nation claims aboriginal title to, directly across Kitimat Arm from the main Haisla community at Kitimaat IR No. 2. The planned oil and condensate pipelines would run through the Kitimat River Valley. The Kitimat River and its valley are home to culturally significant eulachon and salmon populations, as well as a number of other traditional foods. The tankers associated with the proposed project would travel through Kitimat Arm and Douglas Channel, marine resource use areas of the Haisla people. No other First Nation stands to be as severely impacted by the proposed project as the Haisla Nation. No other peoples' traditional resources that are being put at as great a risk by the proposed project as those of the Haisla Nation.

The Haisla Nation must be allowed to examine in detail the application material put forward by Northern Gateway, so that it can fully understand the proposed project, and the potential impacts of the proposed project on the environment, on Haisla Nation aboriginal rights, including aboriginal title, and on Haisla cultural heritage. The Haisla Nation will have to participate in every aspect of the hearings. Yet the Panel is currently not proposing to hold any

DONOVAN & COMPANY

- 2 -

of the questioning phase or final hearings in Kitimat. As set out in the comments below, the Haisla Nation is of the view that the questioning and final hearing locations slated for the western terminus of the project should be held in Kitimat, not in Prince Rupert.

General

1. *Will you be participating in the procedural conference? Do you plan to participate in person or by telephone?*

The Haisla Nation plans to participate in the procedural conference by telephone and WebEx.

Questioning Phase

2. *Final hearings for questioning will take place in three locations. The Panel intends to hold these hearings in Prince Rupert, BC, Prince George, BC and either Edmonton or Calgary, AB. These locations are centrally located, have adequate facilities and reasonable transportation access. Would fewer than three locations be appropriate? What are your comments on the locations chosen by the Panel?*

The Haisla Nation questions why no final hearings are proposed for Kitimat. Given the significant new infrastructure associated with the project that is proposed to be located in the Kitimat area, Kitimat is a logical location for hearings. Kitimat is serviced by the Terrace airport, which is only 56 km away. Kitimat also has dock facilities for parties who may be travelling to the hearings by boat. Finally, there is ample accommodation in the Kitimat / Terrace area. Prince Rupert is not a logical location for any of the hearings. The proposed pipeline does not go near Prince Rupert, the terminal is far from Prince Rupert, the tankers would go through Douglas Channel, not past Prince Rupert. Prince Rupert is not accessible to the Haisla Nation by way of a direct flight.

3. *For the duration of the questioning phase, the Panel anticipates that it will sit from Monday to Saturday for two week periods, followed by a one week break. Standard sitting hours would be from 8:30 a.m. to 1:00 p.m. Any specific exceptions to the general schedule will be addressed, as the final hearings proceed. Do you have any input on the proposed general schedule?*

The Haisla Nation does not have any input into the proposed general schedule as set out above, but does question the two-month period provisionally allotted for the questioning phase in accordance with the revised Hearing Order. The Haisla Nation anticipates that the questioning phase will require substantially more than two months.

4. *The Panel intends to have questioning on oral evidence completed prior to questioning based on written evidence pertaining to the List of Issues.*

The Haisla Nation suggests that the questioning on oral evidence should come after the questioning on the written evidence. As set out in response to item 5 below, the Haisla Nation is suggesting that the Potential Impacts on Aboriginal interests and the Consultation issues be dealt with last. It makes sense to also deal with the oral evidence last.

DONOVAN & COMPANY

- 3 -

-
5. *Questioning of witness panels will proceed at each location based on issues. These issues largely mirror the List of Issues set out in the Hearing Order (dated 5 May 2011) and discussed in the Panel Session Results and Decision (dated 19 January 2011). The Panel intends to address each issue listed below in relation to the entire Project at only one location. The location for each issue is as follows: [LIST OF LOCATIONS/ISSUES] Do you have any additional issues for each hearing location or any input on the general format identified?*

The Haisla Nation disagrees with the proposed approach to hearing locations and issues. The issue categories are extremely broad, and will likely result in extended hearing requirements for each category, covering all three aspects of the project: pipeline, marine terminal, and tanker traffic. Yet certain aspects of the project may be of little interest to some parties. For example, with the exception of the Haisla Nation, coastal First Nations are not affected by the pipeline. Alberta First Nations are not affected by the marine terminal or tanker traffic.

The Haisla Nation suggests that the hearing should be broken down by facility / infrastructure as well as by issues. This will allow more effective participation by parties.

Further, issues relating to the marine terminal should be addressed at hearings held in Kitimat, where the terminal will be located. Tanker traffic should also be dealt with in Kitimat, as it is the largest center near Douglas Channel and as the tankers will be spending more time in Kitimat than anywhere else along the route. The only reason holding hearings in Prince Rupert would make sense is if Northern Gateway were to change the location of its proposed marine terminal to Prince Rupert.

Alternatively, given that the Haisla Nation has no affiliation with Prince Rupert and Haisla Nation legal counsel is located in Vancouver, if Kitimat is deemed by the Panel to be unsuitable for some reason, hearings for these aspects of the project should be held in Vancouver. Many other parties have legal counsel who appear to be located in Vancouver, making this a convenient location for them also.

It is not clear whether the Panel proposes to hear the issues in the same sequence in which it listed them. If so, the Haisla Nation requests that the order be revised so that the potential impacts on Aboriginal interests and the Consultation issues are dealt with last.

The Haisla Nation presumes that the sub-issues associated with each of the listed issues in the Hearing Order will be covered despite not being specifically identified in the list above. For example, Environmental Effects would include: potential effects on the environment; potential effects of the environment on the project; potential effects of accidents or malfunctions; cumulative effects. If this is not the case, then these issues should be added to the list and we would request that we be permitted to suggest further additions to the list.

Finally, the list of issues fails to include the following specific issues:

- Purpose of the project
- Alternatives to the project
- Alternative means of carrying out the project; and
- Issues relating to Canadian public interest

DONOVAN & COMPANY

- 4 -

-
6. *What parties' witnesses do you anticipate questioning during the final hearings? What issues do you anticipate you will ask questions about? How much time do you anticipate you will require for questioning for each issue? (for planning purposes only)*

The Haisla Nation anticipates questioning witnesses for Northern Gateway, and, with the permission of the Panel, for the federal government and for the government of Alberta. The Haisla Nation anticipates questions relating to all the issues outlined in the approach proposed in section 5, relating to the pipeline, the marine terminal, and tanker traffic.

Haisla Nation time *estimates* are as follows:

- Potential Impacts of the Proposed Project on Aboriginal Interests (socio-economic matters; asserted and proven Aboriginal and treaty rights) – 15 hours
 - Environmental Effects – 85 hours
 - Socioeconomic Effects – 15 hours
 - Consultation (with the public and Aboriginal groups) – 30 hours
 - Safety, Accident Prevention and Response (related to the marine terminal and marine transportation) – 30 hours
 - Potential Impacts of the Proposed Project on Landowners and Land Use (pipeline crossings; depth of cover; impacts on agricultural soils) – 15 hours
 - Routing (general route of the pipeline and route selection criteria). General location of the facilities and siting of a marine terminal – 65 hours
 - Design, Construction and Operation – 55 hours
 - Follow up and monitoring – 85 hours
 - Safety, Accident Prevention and Response (related to the pipeline) – 55 hours
 - Need for the Proposed Project (supply and markets; commercial support; economic feasibility) – 15 hours
 - Potential Impacts of the Proposed Project on commercial interests – 15 hours
 - Financial and Tolling Matters (tolling structure and methodology; proposed financing; financial responsibility of the applicant) – 15 hours
 - Purpose of the project – 5 hours
 - Alternatives to the project – 10 hours
 - Alternative means of carrying out the project – 15 hours
 - Issues relating to Canadian public interest – 30 hours
7. *The Panel is considering a process for expert witnesses which would entail having expert witnesses for parties with conflicting opinions seated together in a single witness panel and questioned at the same time. This approach would be specific to issues or sub-issues that are highly technical in nature such as those related to Safety, Accident Prevention and Response. This process would be used to assess complex expert evidence, understand differences, and focus on certain technical issues in an efficient manner. Parties will not be precluded from seating their expert witnesses independently for other issues that are not highly technical in nature. Please provide any input you may have on this proposal.*

The Haisla Nation agrees that this may be a useful approach, but has a few concerns. Firstly, it was the Haisla Nation's understanding that parties cannot bring their own evidence in chief through witnesses, and are limited to providing witnesses for cross-examination at the request of another party. The statement above that "[p]arties would not be precluded from seating their expert witnesses independently..." suggests a different approach to the use of witnesses. The Haisla Nation requests that the procedure around the use of witnesses be clarified.

DONOVAN & COMPANY

- 5 -

Secondly, and depending on the clarification requested above, the witness panel makeup may be open to influence through the selection of witnesses to be examined in person. To avoid this, each party must be allowed to put forward its own expert on a topic identified for this approach.

Finally, if this approach is used, it would have to be subject to some rules or common agreement on how and by whom the witnesses will be questioned.

8. *The Panel intends to permit questioning of witnesses by telephone and is exploring other remote means. Do you have any input on the process that should be established for remote participation (either of witnesses or intervenors asking questions remotely)? Do you have any input on the type of technology that should be considered for remote participation?*

The Haisla Nation is generally supportive of the concept of remote participation, subject to a requirement for the consent of the party seeking to examine a witness to that witness' attendance via phone / remote technology. The Haisla Nation does not have any input on technology at this point in time.

Final Argument Phase

9. *The Panel anticipates allowing parties to present final argument either: (i) orally; or (ii) in writing. On an exception basis, parties may request permission of the Panel to allow final argument on a specific topic both in writing and orally.*

The Haisla Nation anticipates presenting final argument both orally and in writing.

10. *The Panel anticipates holding hearings for final argument in two locations; namely Prince Rupert, BC and either Edmonton or Calgary, AB. Mechanisms will be established to allow parties to participate remotely (i.e. via telephone or other electronic means). Do you have any input on these locations?*

The Haisla Nation respectfully submits that hearings for the western terminus of the project should be located in Kitimat, not Prince Rupert, or alternatively in Vancouver, for the reasons set out above.

11. *How and when should any outstanding motions, including Constitutional Questions such as that raised by the Gitxaala Nation, be addressed?*

The Haisla Nation anticipates that a number of motions could arise during the process. The process should be flexible, to deal with motions as they arise and when they are most relevant.

Respectfully submitted,

DONOVAN & COMPANY



Jennifer Griffith
JG/lb