

## OH-4-2011

### Notice of Motion

Name of person bringing motion: Haisla Nation

Decision or order requested:

This Motion by the Intervenor, Haisla Nation, is made pursuant to Hearing Order OH-4-2011 and section 35 of the *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208, for:

- a. Northern Gateway is required to provide answers to Haisla Nation IR Nos. 1.10p), 1.10s), 1.10y), 1.10z), 1.10bb) and Haisla Nation IR Nos. 2.3a), 2.3b), 2.3c), and 2.41g), 2.41h), 2.41i) and 2.41j), by a date to be fixed by the Panel;
- b. Northern Gateway is required to file evidence relating to the Kalamazoo Spill which identifies the cause of the pipeline rupture and the extent to which Enbridge's maintenance, monitoring and response approach caused and contributed to the volume of the spill, by a date to be fixed by the Panel;
- c. Northern Gateway is required to file the following information by a date to be fixed by the Panel:
  - i. Information required to identify the potential impacts of a pipeline rupture on northern forested ecosystems (as set out at paras. 38-39, and 45 of the Written Evidence of NRCan);
  - ii. geohazards mapping adequate to support proposed routing and valve placement strategy (as set out at paras. 74-49, 82, 88-89, 102 and 105 of the Written Evidence of NRCan and confirmed in the GoC response to Haisla Nation IR No. 1.8a));
  - iii. actual draft fish habitat compensation plans (as opposed to conceptual ones) (as set out at paras. 87, 135, and 141, and s. 3.2.8, recommendation 3 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC response to Haisla Nation I.R. No. 1.22);
  - iv. additional information required to assess potential effects on eulachon, including information on geo-spatial extent and overlap of proposed activities with spawning locations, migratory corridors, run times and larval retention time in the estuary and brackish surface water of the inlet and proposed mitigation measures (as set out at para. 118 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC Response to Haisla IR No. 1.24);
  - v. additional information about the fate and effects of released products (as identified in paras. 64 to 68 of the Written Evidence of

- Environment Canada and confirmed in the GoC responses to Haisla Nation IR No. 1.39e) and 1.46 and to Gitxaala IR No. 1.8.2.5);
- vi. additional information about spill behaviour and available response technology (as identified in paras. 80 to 100 of the Written Evidence of Environment Canada and confirmed in the GoC responses to Haisla Nation IR Nos. 1.39d) and 1.42);
  - vii. information that provides an understanding of how the range of petroleum products would behave if introduced into the aquatic environment and the extent and degree of effects of this over time (as set out at para. 154 to 156 of the Written Evidence of Transport Canada and confirmed in the GoC responses to Haisla Nation IR Nos. 1.73a) and 1.73b)); and
  - viii. additional modelling and risk assessment studies, as identified by an expert scientific committee established to oversee the definition, scope and delivery of the research studies (as recommended at paras. 80 to 100 and Recommendation 2-9 of the Written Evidence of Environment Canada, and confirmed in the GoC responses to Haisla Nation IR Nos. 1.52g), 1.53a), and 1.54b) and to Gitxaala Nation IR Nos. 1.8.5.2 and 1.8.5.6).
- d. Northern Gateway is required to provide details of its proposed additional design features for thicker pipes for the pipeline generally and at identified watercourse crossings, for additional valve placements, and for additional remote monitoring, as well as all studies and reports that support how these additional design features enhance pipeline safety, by a date to be fixed by the Panel;
  - e. the Panel has determined, pursuant to s. 48(1) of the *National Energy Board Act* as provided for in s. 104 of the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19), that s. 48(1) applies, and that the period of time taken by Northern Gateway to comply with any order issued by the Panel is not included in the calculation of any period established under subsection 126(4) of the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19);
  - f. the commencement of the Oral Questioning phase of the Final Hearings be deferred until the information required pursuant to any order issued as a result of this motion has been provided;
  - g. Hearing Order OH-4-2011 and Amending Hearing Order AO-011-OH-4-2011 be amended to provide for new timelines in accordance with any order that is granted; and
  - h. such other relief as the Panel may consider appropriate in the circumstances.

Date submitted:

July 30, 2012

Signature:

A handwritten signature in black ink, appearing to read "Jennifer M. Griffith". The signature is written in a cursive style with a large, stylized initial "J".

Print Name:

Jennifer M. Griffith

Attachments:

Notice of Motion with concise statement of relevant facts; grounds for request; and detailed description of the decision or order sought.

Northern Gateway Pipelines Inc.  
Section 52 of the *National Energy Board Act* Application for  
Enbridge Northern Gateway Project  
NEB File OF-Fac-Oil-N304-2010-01 01  
Filed 27 May 2010

**OH-4-2011**

**NOTICE OF MOTION OF THE HAISLA NATION**

**JULY 30, 2012**

**INTRODUCTION**

1. In its Information Request (“IR”) Nos. 1 and 2 to Northern Gateway, the Haisla Nation asked a number of questions relating to Enbridge’s spill of 3,785,000 litres of diluted bitumen into the Kalamazoo River at Marshall, Michigan (the “Kalamazoo Spill”) (A2C4Q1 and A2H2E3). In a number of instances, Northern Gateway refused to reply as the matter was under investigation by the United States National Transportation Safety Board (A2E8Y0 and A2I8V1). The NTSB’s Accident Report was adopted on July 10, 2012 and has now been released to the public. The basis for Northern Gateway’s refusal to answer the Haisla Nation’s information requests is, therefore, no longer present.
2. In their Written Evidence, a number of Federal Government Participants identified areas where Northern Gateway’s information and evidence submitted in support of its application were not adequate to assess potential impacts of the project or the suitability or likelihood of success of proposed mitigation measures (A37927).
3. In its IR No. 1 to the Government of Canada, the Haisla Nation sought specific additional information about a number of these information gaps (A2T0K4).
4. In its Response to Haisla Nation IR No. 1, the Government of Canada confirmed its written evidence but has stated a number of times that “it is the Government of Canada’s position that the determination of the adequacy in the range and scope of information provided is more appropriately addressed by the Joint Review Panel through the panel process” (A2U6I8).
5. In its Reply Evidence (A2V1R6), Northern Gateway has identified additional design features, which it states will “enhance the safety and reliability of the pipelines over and above standard industry practice”. The design features identified in the Reply Evidence include increased wall thickness of the pipeline, additional increases in pipe thickness for crossings at major tributaries to the Fraser, Skeena and Kitimat River, the placement of remotely operated isolation valves on each side of major tributaries of the Fraser, Skeena and Kitimat Rivers, and dual remote monitoring systems (A2V1R6, p. 69). Northern Gateway has not provided any details relating to these proposed design features. Their relevance and suitability to enhancing safety and reliability of the pipelines cannot, therefore, be assessed.

6. The Haisla Nation, therefore, brings this motion for the following order:
- a. that Northern Gateway is required to provide answers to Haisla Nation IR Nos. 1.10p), 1.10s), 1.10y), 1.10z), 1.10bb) and Haisla Nation IR Nos. 2.3a), 2.3b), 2.3c), and 2.41g), 2.41h), 2.41i) and 2.41j) , by a date to be fixed by the Panel;
  - b. that Northern Gateway is required to file evidence relating to the Kalamazoo Spill which identifies the cause of the pipeline rupture and the extent to which Enbridge's pipeline maintenance, monitoring and response approach caused and contributed to the volume of the spill by a date to be fixed by the Panel;
  - c. that Northern Gateway is required to file the following additional information by a date to be fixed by the Panel:
    - i. Information required to identify the potential impacts of a pipeline rupture on northern forested ecosystems (as set out at paras. 38-39, and 45 of the Written Evidence of NRCan);
    - ii. geohazards mapping adequate to support the proposed routing and valve placement strategy (as set out at paras. 74-49, 82, 88-89, 102 and 105 of the Written Evidence of NRCan and confirmed in the GoC response to Haisla Nation IR No. 1.8a));
    - iii. actual draft fish habitat compensation plans (as opposed to conceptual ones) (as set out at paras. 87, 135, and 141, and s. 3.2.8, para. 3 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC response to Haisla Nation IR No. 1.22);
    - iv. additional information required to asses potential effects on eulachon, including information on geo-spatial extent and overlap of proposed activities with spawning locations, migratory corridors, run times and larval retention time in the estuary and brackish surface water of the inlet and proposed mitigation measures (as set out at para. 118 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC Response to Haisla IR No. 1.24);
    - v. additional information about the fate and effects of released products (as identified in paras. 64 to 68 of the Written Evidence of Environment Canada and confirmed in the GoC responses to Haisla Nation IR No. 1.39e) and 1.46 and to Gitxaala IR No. 1.8.2.5);
    - vi. additional information about spill behaviour and available response technology (as identified in paras. 80 to 100 of the Written Evidence of Environment Canada and confirmed in the GoC responses to Haisla Nation IR Nos. 1.39d) and 1.42);
    - vii. information that provides an understanding of how the range of petroleum products would behave if introduced into the aquatic environment and the extent and degree of effects of this over time (as set out at para. 154 to 156 of the Written Evidence of Transport Canada and confirmed in GoC responses to Haisla Nation IR Nos. 1.73a) and 1.73b)); and

- viii. additional modelling and risk assessment studies, as identified by an expert scientific committee established to oversee the definition, scope and delivery of the research studies (as recommended at paras. 80 to 100 and Recommendation 2-9 of the Written Evidence of Environment Canada, and confirmed in the GoC responses to Haisla Nation IR Nos. 1.52g), 1.53a), and 1.54b) and to Gitxaala Nation IR Nos. 1.8.5.2 and 1.8.5.6);
- d. that Northern Gateway is required to provide details of its proposed additional design features for thicker pipes for the pipeline generally and at identified watercourse crossings, for additional valve placements, and for additional remote monitoring, as well as all studies and reports that support how these additional design features enhance pipeline safety, by a date to be fixed by the Panel;
- e. that the Panel has determined, pursuant to s. 48(1) of the *National Energy Board Act* as provided for in s. 104 of the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19), that s. 48(1) applies and that the period of time taken by Northern Gateway to comply with any order issued by the Panel is not included in the calculation of any period established under subsection 126(4) of the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19);
- f. that the commencement of the Oral Questioning phase of the Final Hearings be deferred until the information required pursuant to any order issued as a result of this motion has been provided;
- g. that Hearing Order OH-4-2011 and Amending Hearing Order AO-011-OH-4-2011 be amended to provide for new timelines in accordance with any order that is granted; and
- h. for such other relief as the Panel may consider appropriate in the circumstances.

## **FACTS SUPPORTING THIS MOTION**

- 7. On May 5, 2011, the Joint Review Panel (the “Panel” or “JRP”) issued Hearing Order OH-4-2011, which set various deadlines for the filing of evidence and information requests in these proceedings.
- 8. On July 21, 2011 the Haisla Nation filed a Notice of Motion seeking an order that Northern Gateway be required to provide specific additional information, that the JRP’s review of the proposed Project be adjourned pending the provision of this information, and that the Hearing Order for the proposed Project be amended to adjust timelines for the filing of information requests and written evidence, accordingly (A30426).
- 9. The July 21, 2011 Haisla Nation Motion identified that additional information was required to show a risk-based approach to pipeline routing, design and emergency

response planning and to allow for a proper assessment of the consequences of a release into Kitimat Arm, the Kitimat River or Kitimat River tributaries.

10. On July 29, 2011 the Panel responded to the Haisla Nation's July 21, 2011 Notice of Motion, denying the relief sought on the basis that the Motion was premature, and ruling that the Haisla Nation could "request the Additional Information directly from Northern Gateway, through the information request process" (A30539).

#### Information About the Kalamazoo Spill

11. On August 25, 2011, the Haisla Nation submitted its Information Request No. 1 to Northern Gateway (A2C4Q1).
12. On October 6, 2011, Northern Gateway provided responses to the Haisla Nation's IR No. 1 (A2E8Y0).
13. In response to questions relating to Enbridge's spill of 3,785,000 litres of oil from Enbridge's pipeline into the Kalamazoo River in Michigan, Northern Gateway refused to provide the requested information on the basis that the matter was being actively investigated by the United States National Transportation Safety Board. Northern Gateway took this position in response to Haisla IR Nos. 1.10p), 1.10s), 1.10y), 1.10z), 1.10bb).
14. On October 28, 2011, the Haisla Nation filed a Notice of Motion, seeking an order that Northern Gateway be directed to respond to a number of the IRs to which it had, in the view of the Haisla Nation, not provided adequate responses (A34832).
15. On November 3, 2011 the Haisla Nation filed its IR No. 2 to Northern Gateway (A2H2E3).
16. On November 24, 2012, Northern Gateway provided responses to Haisla Nation IR No. 2 (A2I8V1).
17. In response to questions relating to the Kalamazoo Spill, Enbridge again declined to provide the requested information on the basis that the matter was being actively investigated by the United States National Transportation Safety Board. Northern Gateway took this position in response to Haisla IR Nos. 2.3a), 2.3b), 2.3c), 2.41g), 2.41h), 2.41i) and 2.41j).
18. In its response to Haisla Nation IR No. 2.4c), Northern Gateway stated: "Northern Gateway will track IRs that have not been responded to and will respond, as appropriate and in adherence to any legal restrictions, following release of the NTSB incident report" (A2I8V1, p. 11).

Information Gaps Identified by Government of Canada

19. In its Written Evidence (A37927), the Government of Canada (“GoC”) identified numerous inadequacies and deficiencies in the information provided by Northern Gateway. The GoC identified the following information gaps:
- Information required to identify the potential impacts of a pipeline rupture on northern forested ecosystems (as set out at paras. 38-39, and 45 of the Written Evidence of NRCan);
  - geohazards mapping adequate to support proposed routing and valve placement strategy (as set out at paras. 74-49, 82, 88-89, 102 and 105 of the Written Evidence of NRCan);
  - fish habitat compensation plans (as set out at paras. 87, 135, and 141, and s. 3.2.8, para. 3 of the Written Evidence of Fisheries and Oceans Canada);
  - additional information required to assess potential effects on eulachon, including information on geo-spatial extent and overlap of proposed activities with spawning locations, migratory corridors, run times and larval retention time in the estuary and brackish surface water of the inlet and proposed mitigation measures (as set out at para. 118 of the Written Evidence of Fisheries and Oceans Canada);
  - information about the fate and effects of released products (as identified in paras. 64 to 68 of the Written Evidence of Environment Canada);
  - information about spill behaviour and available response technology (as identified in paras. 80 to 100 of the Written Evidence of Environment Canada);
  - information that provides an understanding of how the range of petroleum products would behave if introduced into the aquatic environment and the extent and degree of effects of this over time (as set out at para. 154 to 156 of the Written Evidence of Transport Canada); and
  - additional modelling and risk assessment studies, as identified by convening an expert scientific committee convened by Northern Gateway to oversee the definition, scope and delivery of the research studies (as recommended at paras. 98 to 100 and Recommendation 2-9 of the Written Evidence of Environment Canada).
20. In its IR No. 1 to the GoC, the Haisla Nation sought specific additional information about a number of these information gaps (A2T0K4).
21. In its responses to a number of Haisla Nation IRs to the GoC confirmed its written evidence but stated that “it is the Government of Canada’s position that the determination of the adequacy in the range and scope of information provided is more appropriately addressed by the Joint Review Panel through the panel process” (A2U6I8).
22. Haisla Nation IR No. 1.6 asked the GoC about specific information required to properly assess the potential impacts of a pipeline rupture on northern forested ecosystems. In



its response, the GoC stated: “Although, the information requested is related to evidence filed by the Government of Canada, it is the Government of Canada’s position that the determination of the adequacy in the range and scope of information provided is more appropriately addressed by the Joint Review Panel through the panel process” (A2U6I8, pp. 17-18).

23. In IR No. 1.8a), the Haisla Nation asked the GoC about specific information required relating to the adequacy of geohazards mapping to determine the adequacy of Northern Gateway’s approach to valve placement at water crossings. In its response, the GoC stated that “a conclusion on the appropriateness of a single valve at a water crossing should be determined after a review of the mapped geohazards at that location. Since Natural Resources Canada does not have the mapped geohazards at those locations this review could not be completed” (A2U6I8, p. 21).
24. In IR No. 1.22, the Haisla Nation asked the GoC whether, in DFO’s view, it is necessary that DFO and the Panel have the ability to consider Northern Gateway’s fish habitat compensation plan prior to issuing a report. The GoC stated: “It is Fisheries and Oceans Canada’s view that it would be beneficial to the environmental assessment process if Northern Gateway provided the fish habitat compensation plan for consideration by the Joint Review Panel and others”, but that the Panel “will decide what information is required for its environmental assessment determination” (A2U6I8, p. 40).
25. In its response to Haisla Nation IR No. 1.29, the GoC stated that “Fisheries and Ocean has not yet received a fish habitat compensation plan so it would be premature to determine the likelihood that the project would achieve the guiding principle of “no net loss of productive capacity of fish habitat” set out in DFO’s Policy for the Management of Fish Habitat (A2U6I8, p. 51).
26. On July 12, 2012, Northern Gateway filed conceptual fish habitat compensation plans (A2U9E7 & A2U9E8), but these are still not adequate to determine the likelihood that the project would achieve the guiding principle of no net loss of productive capacity of fish habitat.
27. In IR No. 1.24, the Haisla Nation requested the GoC to identify additional information which is, in DFO’s view, required so that the proposed project impacts on eulachon may be adequately assessed. In its response to Haisla Nation IR No. 1.24, the GoC identified specific additional information which would be beneficial for the Joint Review Panel’s assessment of potential effects of the project on eulachon (A2U6I8, p. 42).
28. In IR No. 1.39, the Haisla Nation asked the GoC about the adequacy of information available regarding the fate, effects and available response technology. In its response to IR No. 1.39a), the GoC stated that “Recovery and mitigation options for sunken oils are limited” (A2U6I8, p. 71).

29. In its response to IR No. 1.39d), the GoC stated, "Environment Canada recommends an approach that evaluates a range of spill scenarios and variables to cover a wide range of possible spill risks" (A2U6I8, p. 72).
30. In its response to IR No. 1.39e), the GoC stated, "In brief, more information was requested for oil-suspended particulate matter interactions in the marine environment; evaporation of the condensate; emulsification of the products; remediation options; and the range of variability in all products" (A2U6I8, p. 72).
31. In IR No. 1.42, the Haisla Nation asked the GoC whether it was taking the position that additional research and studies regarding spill behaviour, fate, and modelling should be carried out prior to the final review of the proposed project. In its response, the GoC confirmed its Recommendation #2-3 (para. 67) of its Written Evidence (Vol. 7-Part 2, A2K4U1). This recommendation states:

Environment Canada recommends that the Proponent consider an ongoing research effort into the environmental behaviour and fate models for the hydrocarbon products to be shipped.

This recommendation followed Environment Canada's statement at para. 65:

Because of these continuing uncertainties with respect to product behaviours in the marine environment, Environment Canada considers the response scenario results to be of limited value in the use for spill response planning and risk assessment. Significant knowledge gaps remain for predicting what these relatively-unstudied products will do in a British Columbia northwest coast marine environment (A2K4U1, para. 65).

In addition, the GoC stated that it "takes the view that any determination of whether the additional research and studies should be carried out prior to the final review of the Project is within the purview of the Joint Review Panel, rather than that of Government of Canada Participants" (A2U6I8, p. 76).

32. In IR No. 1.46a), the Haisla Nation asked the GoC about knowledge gaps about the fate and behaviour of diluted bitumen, synthetic crude and condensate when released into the environment, and the implications of these knowledge gaps for project review. In its response, the GoC stated that a limited assessment of the effectiveness of spill response operations could be made, and that uncertainties remained, "particularly with regard to the behaviour of the product in the environment and the use of chemical countermeasures." The GoC went on to state, "To ameliorate this situation, Environment Canada has recommended further research as indicated in Recommendations #2-3 and #2-4 (paragraphs 67 and 68) of the Government of Canada Written Evidence, Volume 7-Part 2 (A2K4U1)" (A2U6I8, p. 85).

33. In its response to Haisla Nation IR 1.46 b), the GoC stated that “In terms of the extent that these uncertainties need to be addressed prior to any decision on the Project, it is the view of the Government of Canada that such a determination is within the purview of the Joint Review Panel, rather than that of Government Participants” (A2U6I8, p. 85).
34. In IR No. 1.52c) and 1.52d), the Haisla Nation asked questions about the detailed technical review of Northern Gateway’s approach to spill modelling that Environment Canada is conducting. In its response, the GoC stated that it will make the completed review available to the Panel for its information, and stated that “Environment Canada is of the view that a determination regarding adequacy of information to assess potential impacts is within the purview of the Joint Review Panel, rather than that of Government Participants” (A2U6I8, p. 95).
35. In IR No. 1.52g), the Haisla Nation asked whether Environment Canada, based on its technical review of Northern Gateway’s spill modelling, is confident that the application and the studies and materials submitted by Northern Gateway provide credible spill models and provide accurate information on which to assess effects and consequences of a potential spill. In its response, the GoC did not state that Environment Canada was confident. Instead, it stated:

The discussions in paragraphs 80 to 97 of the Government of Canada Written Evidence, Volume 7 – Part 2 (A2K4U1), raised a number of questions related to: choice of modelling scenarios; selection of models and inputs; need to account for variability; and need to validate model predictions. In order to improve confidence in the model predictions, Recommendation #2-9 (paragraphs 98 to 100) suggests additional spill modelling and risk assessment studies be undertaken to address the concerns identified and that Northern Gateway consider convening an expert scientific committee to oversee the definition, scope and delivery of the research studies (A2U6I8).

36. The above-noted recommendation was also identified in the GoC’s responses to Haisla Nation IR Nos:
- 1.53a), which sought details about the additional spill scenario modelling recommended by the GoC; and
  - 1.54b), which sought information about meteorological and oceanographic inputs into spill modelling.
37. In IR Nos. 1.73a) and 1.73b), the Haisla Nation sought information about the GoC’s ability to evaluate Northern Gateway’s General Oil Spill Response Plan (“GOSRP”) in the absence of an understanding of “how the range of petroleum products would behave if introduced into the marine environment and time impact over time, known as fate and effects”. In its response, the GoC stated “It is Transport Canada’s view that the determination of adequacy for the purpose of evaluating the General Oil Spill Response Plan for the context of the environmental assessment is a matter before the Joint Review Panel” (A2U6I8).

38. On May 11, 2012, the Gitxaala Nation filed its IR No. 1 to the GoC (A2T0Z5). On July 6, 2012, the GoC filed its response to Gitxaala IR No. 1 (A2U6I5).
39. In its IR No. 1.8.2.5, the Gitxaala Nation asked how the analysis of the spill likelihoods, spill trajectories, or fate and behaviour of chemicals of potential concern are relevant to the determination of clean-up strategies in the event of a spill (A2T0Z5, p. 24).
40. In response to Gitxaala Nation IR No. 1.8.2.5, the GoC stated that “the properties of the products to be transported are fundamental to understanding the behaviour of the product following any release, its eventual fate, and the effects it may have on the ecosystems it touches” (A2U6I5, p.59).
41. In its IR No. 1.8.5.2, the Gitxaala Nation asked what specific concerns DFO has about the spill modelling and/ or the analysis of overall risk of an oil spill conducted by Northern Gateway (A2T0Z5, p. 27).
42. In response to Gitxaala Nation IR No. 1.8.5.2, the GoC stated: “A more detailed and rigorous response to questions asked by Fisheries and Oceans Science Branch would allow for a better assessment and understanding of the analysis, particularly of the conclusions about catastrophic spill frequency.... Fisheries and Oceans Canada requested more information from Northern Gateway in order to be in a better position to make a fully informed opinion on the potential environmental impacts of the project, and to provide advice to the Joint Review Panel” (A2U6I5, p. 65).
43. In its IR No. 1.8.5.6, the Gitxaala Nation asked what Environment Canada sees as the significance of failing to adequately consider the consequences of a spill (as opposed to just probability) (A2T0Z5, p.28).
44. In response to Gitxaala Nation IR No. 1.8.5.6, the GoC stated: “If the consequences of a spill are not adequately considered, there is a lack of confidence in ecological risk assessment predictions” (A2U6I5, p. 65).
45. In its IR No. 1.8.6.1, the Gitxaala Nation asked whether Transport Canada was satisfied that the risks associated with the Project could be adequately assessed without information identified by Transport Canada as missing from Northern Gateway’s GOSRP (A2T0Z5, p. 28).
46. In response to Gitxaala Nation IR No. 1.8.6.1, the GoC stated: “It is Transport Canada’s view that the determination of adequacy of information in order to assess the risks associated with the Project is a matter within the purview of the Joint Review Panel” (A2U6I5, p. 65).

47. In its IR No. 1.8.6.2. the Gitxaala Nation asked how the information identified by Transport Canada as missing from Northern Gateway's GOSRP is relevant to the assessment of potential risks of the Project (A2T0Z5, p. 28).
48. In response to Gitxaala IR No. 1.8.6.2, the GoC stated: "This information is relevant to the assessment of potential risks because it will inform the assessment of mitigation measures and follow-up programs" (A2U6I5, p. 66).
49. As demonstrated by IRs Haisla Nation and Gitxaala Nation IRs to the GoC and the GoC responses to these, set out above briefly above and in much more detail in the GoC responses, the GoC has identified a number of areas where Northern Gateway has not supplied information that is critical to assessing the potential impacts of the proposed project and the efficacy of proposed mitigation.

#### Information Required as a Result of Northern Gateway Reply Evidence

50. On July 20, 2012, Northern Gateway filed its Reply Evidence. In its Reply Evidence (A2V1R6), Northern Gateway has identified additional design features, which it states will "enhance the safety and reliability of the pipelines over and above standard industry practice". The design features identified in the Reply Evidence include:
  - increased wall thickness of the pipeline;
  - additional increases in pipeline thickness for crossings of major tributaries to the Fraser, Skeena and Kitimat Rivers;
  - the placement of remotely operated isolation valves on each side of major tributaries of the Fraser, Skeena and Kitimat Rivers; and
  - installation of dual leak detection systems (A2V1R6, p. 69-70).
51. Northern Gateway has not provided any details relating to these proposed additional design features.
52. Further details of the proposed additional design features are required to determine the extent to which they may address the risk of a spill from the pipeline, and the extent and degree of effects of such a spill.
53. These details are critical to understanding design approaches to reducing risks associated with the pipeline in the Kitimat River Valley. This information is required by the Haisla Nation in order to assess the potential impacts of the proposed projects on Haisla Nation lands, waters, and resources, on Haisla Nation aboriginal rights, including aboriginal title, and on Haisla Nation culture and cultural heritage.

## GROUNDS FOR MOTION

54. This Motion is brought pursuant to the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, s. 35, and Hearing Order OH-4-2011, s. 10, seeking relief on the basis of:
- a. The *Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Review of the Northern Gateway Pipeline Project*, ss. 6.2 to 6.4, and Appendix – *Terms of Reference*;
  - b. Sections 4, 18, 37(1) and 37(2) of the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208;
  - c. Hearing Order OH-4-2011, s. 4;
  - d. section 104 of the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19), and s. 48(1) of the *National Energy Board Act* as provided for in s. 104 of the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19);
  - e. section 126(4) of the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19); and
  - f. principles of natural justice and procedural fairness.
55. The *Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Review of the Northern Gateway Pipeline Project*, s. 6.3, requires the Panel to conduct its review in a careful and precautionary manner.
56. The *Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Review of the Northern Gateway Pipeline Project*, s. 6.4, requires the Panel to conduct its review in a manner which will facilitate the participation of the public and Aboriginal peoples.
57. The *Terms of Reference* require the consideration of the environmental effects that may occur in connection with the proposed Project, including from malfunctions or accidents, as well as the significance of such effects. Determining the significance of effects requires a thorough understanding of the risks related to the proposed design and implementation of the proposed Project. This in turn requires an adequate foundation of information on the extent and degree of environmental effects due to the proposed Project, as well as the effects of the environment on the proposed Project, to support a scientifically defensible assessment.
58. An adequate information base is required to properly assess the potential impacts of the proposed project and whether there will be significant adverse environmental effects that cannot be mitigated.

59. The Panel has recognized the importance of having adequate information, in its IR No. 4.32, which sought information about a number of critical concerns identified in Exhibit A1Z9Z4.
60. The Federal Government Participants have identified a number of areas where information that is critical to assessing both the potential for and significance of effects and the adequacy of proposed mitigation measures is missing from the information currently before the Panel.
61. In its letter responding for requests for leave by various intervenors to question witnesses of the Federal Government Participants, the GoC has characterized the role of the Federal Government Participants in the following manner:

At this stage of the review of the Enbridge Northern Gateway Project, Federal Government organizations participate in the Panel's process in order to provide to the Panel expert or specialist information or knowledge within their specific organizational mandates as applied to the List of Issues set out in the Hearing Order and the written evidence filed by the Government Participants (A2V1K9, p. 5).

62. The additional information sought by the Haisla Nation pursuant to this motion is useful and relevant, and is required in order for the Panel to fulfil its mandate under the *Canadian Environmental Assessment Act*, the *National Energy Board Act*, and the *Joint Review Panel Agreement and Terms of Reference*.
63. Further, the List of Issues identified in the Hearing Order and the *Scope of the Factors – Northern Gateway Pipeline Project*<sup>1</sup> is broader than those for “conventional” NEB proceedings. They specifically include potential impacts on Aboriginal interests, including asserted Aboriginal rights. The Panel has been tasked to “receive information from Aboriginal peoples related to the nature and scope of the potential or established Aboriginal and treaty rights that may be affected by the project and the impacts or infringements that the project may have on potential or established Aboriginal or treaty rights”.<sup>2</sup> The Panel is required to reference, in its report, information which is provided by Aboriginal peoples regarding the manner in which the Project may affect, *inter alia*, Aboriginal rights.
64. The project is proposed for an area to which the Haisla Nation has always claimed Aboriginal rights and title. The *Aboriginal Consultation Framework for the Northern Gateway Pipeline Project* states that:

The JRP process will be the primary mechanism for Aboriginal groups to learn about the project and present their views to the federal government about... *inter alia* ... the effects any change in the environment resulting from the project may have on their current use of land and resources for traditional purposes ...

And:

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<sup>1</sup> Scope of the Factors – Northern Gateway Pipeline Project, August, 2009.

<sup>2</sup> Joint Review Panel Agreement, ss. 8.1 and 8.2.

The federal government will rely on the JRP process, to the extent possible, to fulfil its duty to consult with Aboriginal groups.

And:

The JRP's environmental assessment report and the record established through the JRP process will be the primary source of information to support the federal government's assessment of the project's potential impact on potential or established Aboriginal and treaty rights.

65. In its response to Haisla Nation IR No. 1, the GoC wrote: "The Haisla Nation have been directed to Northern Gateway as the first opportunity to have issues addressed, as Northern Gateway has the ability to make changes to the project to address concerns raised by Aboriginal groups and other stakeholders" (A2U6I8, p. 5).
66. Northern Gateway's evidence is incomplete and has been submitted in an ad hoc manner, resulting in significant information gaps which must be addressed through the provision of additional information. The information sought is required to understand the likelihood and potential effects and consequences of, and therefore the risk associated with, a potential spill. This information must be made available in order to ensure a full and fair review of the proposed Project.
67. Northern Gateway's failure to provide the required information prevents the Panel and Haisla Nation from:
  - a. fully understanding Northern Gateway's intentions with respect to geohazards and the proposed routing and valve placement strategy;
  - b. fully understanding Northern Gateway's intentions with respect to fish habitat compensation plans;
  - c. fully understanding the potential effects of the proposed project on eulachon, including information on geo-spatial extent and overlap of proposed activities with spawning locations, migratory corridors, run times and larval retention time in the estuary and brackish surface water of the inlet and proposed mitigation measures;
  - d. fully understanding the fate and effects of released products, spill behaviour and available response technology; and
  - e. fully understanding the effects of the full range of petroleum products, and how they would behave, if introduced into the aquatic environment and the extent and degree of effects of this over time.
68. Further, Northern Gateway's failure to provide the required information prevents the Haisla Nation from:



- a. adequately understanding all of the potential impacts and risks associated with the proposed project that could result in significant environmental effects, and how Northern Gateway proposes to address these impacts and risks in order to avoid having significant adverse environmental effects occur;
  - b. adequately understanding the mitigation measures being proposed, and the extent and degree to which these proposed measures will be able to mitigate adverse environmental effects; and
  - c. preparing, formulating and making submissions with regards to all of the potential impacts of the proposed project, for consideration by the Panel as part of its review of the proposed project, and for consideration by the GoC as part of its duty to consult with the Haisla Nation prior to rendering any decision on the proposed project.
69. During the course of its review of the proposed project, the Panel is required to uphold the principles of natural justice and procedural fairness. As a general common law principle, the principle of procedural fairness applies to every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para. 38.
70. The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute governing the process at issue and the rights which stand to be affected. The purpose of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22 [*"Baker"*].
71. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive: *Baker, supra*, at paras. 21-28.
72. The Haisla Nation believes that the proposed project has the potential to seriously affect the Haisla Nation's rights, privileges and interests. Principles of natural justice and procedural fairness require that the process assessing the proposed project has available to it enough information for an informed decision.
73. In *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at 25, the Supreme Court of Canada stated that "[d]isclosure can act as an important safeguard against the

use of inaccurate material or untested theories. It can also contribute to the efficiency of the hearing by directing argument and information to the relevant issues and materials". In the context of the Panel's review, the Haisla Nation submits that the necessity of disclosure as a safeguard against the use of untested theories should be applied to dictate the requirement of an information base that is broad enough to safeguard against reliance on insufficient information about potential environmental effects and Northern Gateway's proposed mitigation measures.

74. The GoC has stated that it is relying on the Joint Review Panel process as "an effective means of gathering, distributing and assessing information regarding the potential adverse impacts of the proposed project on potential or established Aboriginal or Treaty rights, and that it is well-suited to address such impacts through the assessment of potential environmental effects and the identification of mitigation and avoidance measures" (GoC response to Haisla Nation IR Nos. 1.1d) and 1.1e), A2U618).
75. The Government of Canada has also identified specific areas where, in its view, additional information is required in order to adequately assess the potential environmental effects and identify mitigation and avoidance measures.
76. The Haisla Nation considers that the information requested is relevant, and in fact, necessary to assist the Panel, the Haisla Nation, other parties, and the Canadian public to adequately understand all of the potential impacts and risks associated with the proposed project that could result in significant adverse effects, and how the proponent, Northern Gateway, proposes to address these impacts and risks in order to avoid having significant adverse environmental impacts occur.
77. Further, in order to participate meaningfully in the Panel's review process, the Haisla Nation requires the information sought pursuant to this motion. Without this information, the Haisla Nation will not be able to adequately form its views on the impacts of the proposed project on the lands, waters and resources of Haisla Nation Territory, on Haisla Aboriginal rights and title, and on Haisla Nation culture and cultural heritage, and would not be able to fully present its views and concerns to the Panel.
78. The Haisla Nation stands to be severely impacted by the construction of the proposed project and any of the adverse effects resulting from the construction and operation of the proposed project, including accidents and malfunctions. As a result, the Haisla Nation has a legitimate expectation that the Panel will ensure that the information that informs its review of the proposed project will be adequate for a meaningful assessment of the extent and degree of potential effects flowing from the proposed project.

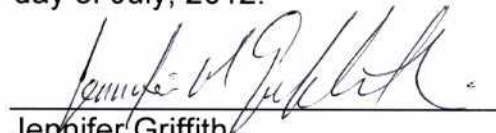
#### **ORDER SOUGHT**

79. The Haisla Nation therefore brings this motion, pursuant to Hearing Order OH-4-2011 (the "Hearing Order") and section 35 of the *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208, for an order:

- a. that Northern Gateway is required to provide answers to Haisla Nation IR Nos. 1.10p), 1.10s), 1.10y), 1.10z), 1.10bb) and Haisla Nation IR Nos. 2.3a), 2.3b), 2.3c), and 2.41g), 2.41h), 2.41i) and 2.41j), by a date to be fixed by the Panel;
- b. that Northern Gateway is required to file evidence relating to the Kalamazoo Spill which identifies the cause of the pipeline rupture and the extent to which Enbridge's maintenance, monitoring and response approach caused and contributed to the volume of the spill, by a date to be fixed by the Panel;
- c. that Northern Gateway is required to file the following information by a date to be fixed by the Panel:
  - i. Information required to identify the potential impacts of a pipeline rupture on northern forested ecosystems (as set out at paras. 38-39, and 45 of the Written Evidence of NRCan);
  - ii. geohazards mapping adequate to support proposed routing and valve placement strategy (as set out at paras. 74-49, 82, 88-89, 102 and 105 of the Written Evidence of NRCan and confirmed in the GoC response to Haisla Nation IR No. 1.8a));
  - iii. actual draft fish habitat compensation plans (as opposed to conceptual ones) (as set out at paras. 87, 135, and 141, and s. 3.2.8, recommendation 3 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC response to Haisla Nation I.R. No. 1.22);
  - iv. additional information required to assess potential effects on eulachon, including information on geo-spatial extent and overlap of proposed activities with spawning locations, migratory corridors, run times and larval retention time in the estuary and brackish surface water of the inlet and proposed mitigation measures (as set out at para. 118 of the Written Evidence of Fisheries and Oceans Canada and confirmed in the GoC Response to Haisla IR No. 1.24);
  - v. additional information about the fate and effects of released products (as identified in paras. 64 to 68 of the Written Evidence of Environment Canada and confirmed in the GoC responses to Haisla Nation IR No. 1.39e) and 1.46 and to Gitxaala IR No. 1.8.2.5);
  - vi. additional information about spill behaviour and available response technology (as identified in paras. 80 to 100 of the Written Evidence of Environment Canada and confirmed in the GoC responses to Haisla Nation IR Nos. 1.39d) and 1.42);
  - vii. information that provides an understanding of how the range of petroleum products would behave if introduced into the aquatic environment and the extent and degree of effects of this over time (as set out at para. 154 to 156 of the Written Evidence of Transport Canada and confirmed in the GoC responses to Haisla Nation IR Nos. 1.73a) and 1.73b)); and

- viii. additional modelling and risk assessment studies, as identified by an expert scientific committee established to oversee the definition, scope and delivery of the research studies (as recommended at paras. 80 to 100 and Recommendation 2-9 of the Written Evidence of Environment Canada, and confirmed in the GoC responses to Haisla Nation IR Nos. 1.52g), 1.53a), and 1.54b) and to Gitxaala Nation IR Nos. 1.8.5.2 and 1.8.5.6).
- d. that Northern Gateway is required to provide details of its proposed additional design features for thicker pipes for the pipeline generally and at identified watercourse crossings, for additional valve placements, and for additional remote monitoring, as well as all studies and reports that support how these additional design features enhance pipeline safety, by a date to be fixed by the Panel;
- e. that the Panel has determined, pursuant to s. 48(1) of the *National Energy Board Act* as provided for in s. 104 of the *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19), that s. 48(1) applies, and that the period of time taken by Northern Gateway to comply with any order issued by the Panel is not included in the calculation of any period established under subsection 126(4) of the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19);
- f. that the commencement of the Oral Questioning phase of the Final Hearings be deferred until the information required pursuant to any order issued as a result of this motion has been provided;
- g. that Hearing Order OH-4-2011 and Amending Hearing Order AO-011-OH-4-2011 be amended to provide for new timelines in accordance with any order that is granted; and
- h. for such other relief as the Panel may consider appropriate in the circumstances.

All of which is respectfully submitted this 30<sup>th</sup> day of July, 2012.

  
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