



Court File No. A-63-14

FEDERAL COURT OF APPEAL

BETWEEN:

HAISLA NATION

Applicant

AND

**CANADA (MINISTER OF ENVIRONMENT)
ATTORNEY GENERAL OF CANADA
NATIONAL ENERGY BOARD
NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP**

Respondents

APPLICATION UNDER SECTIONS 18.1 AND 28 OF THE *FEDERAL COURTS ACT*,
R.S.C. 1985, c. F-7 and RULE 301 OF THE *FEDERAL COURTS RULES*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor

acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: JAN 17 2014

Issued by: ORIGINAL SIGNED BY
MODELISA HENNESSY
A SIGNÉ L'ORIGINAL

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of filed in the Court on the JAN 17 2014 day of _____ A.D. 20 ____

Dated this _____ day of JAN 17 2014 20____

M. Hennessy

**MODELISA HENNESSY
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APPLICATION

This is an application for judicial review in respect of a report dated December 19, 2013, issued by the Enbridge Northern Gateway Project Joint Review Panel (Panel) established pursuant to an Agreement between the Minister of Environment and the Chair of the National Energy Board to conduct an environmental assessment under *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)* and a certificate assessment under the *National Energy Board Act* for the Northern Gateway Pipeline Project.

The applicant makes an application for:

1. An order quashing the recommendations of the Panel;
2. An order that the following findings of the Panel be set aside or quashed:
 - a) the finding that Northern Gateway's environmental assessment was sufficient;
 - b) the finding that impacts to Haisla Nation Culturally Modified Trees (CMTs) can be mitigated;
 - c) the finding that a large spill from the pipeline facilities, terminal or tankers is unlikely;
 - d) the finding that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low;
 - e) the recommendation that the project is not likely to result in significant adverse effects with respect to freshwater fish and fish habitat;
 - f) the recommendation that the project is not likely to result in significant adverse effects with respect to marine fish and fish habitat;
 - g) the recommendation that the project is not likely to cause significant adverse environmental effects in Canada on cultural heritage; and
 - h) the finding that the project is in the public interest;
3. An order that the report of the Panel be referred back to the Panel for reconsideration;
4. An order directing the Panel to obtain and consider the necessary information about the marine environment and freshwater and marine fish habitat;
5. An order directing the Panel to provide its assessment of effects of the project on Haisla Nation cultural heritage;

6. An order directing the Panel to consider the Haisla Nation's submissions on conditions;
7. An order directing the Panel to provide its assessment of adequacy of Crown consultation to date;
8. An order directing the Panel reconsider its public interest assessment after considering adequacy of consultation, impacts to cultural heritage, and impacts to aboriginal rights and interests;
9. A declaration that the Panel report as issued on December 19, 2013 does not contain the recommendations required pursuant to s. 29 of *CEAA, 2012*;
10. The costs of this application;
11. An order that the applicants shall not be required to pay costs to the respondents of this application, pursuant to Rule 400 of the Federal Courts Rules, in the event this application is dismissed; and
12. Such other relief as this Court deems appropriate.

The grounds for the application are:

Panel Process

1. The Enbridge Northern Gateway Project is for an oil and condensate pipeline from Bruderheim, Alberta to Kitimat, BC, through the Kitimat River Valley, a tank and marine terminal on the west side of Kitimat Arm, and marine shipping of oil and condensate in Kitimat Arm and Douglas Channel.
2. The Haisla Nation is an Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*, an aboriginal people within the meaning of s. 5 of the *CEAA, 2012*, and a band within the meaning of s. 2 of the *Indian Act*.
3. The Haisla Nation occupies a Territory that encompasses the Kitimat River Valley, Kitimat Arm and Douglas Channel and has done so since time immemorial. The Haisla Nation main residential reserve is located across Kitimat Arm from the proposed marine terminal site. The Haisla Nation has and continues to use and occupy these areas and asserts aboriginal title to and exercises other aboriginal rights in these areas.
4. On December 4, 2009, the Minister of Environment and the Chair of the National Energy Board entered into an agreement that the project would be referred to a Joint Review Panel for assessment under the *National Energy Board Act* and the *Canadian Environmental Assessment Act*.

5. On July 6, 2012, the federal government enacted legislative amendments to the *National Energy Board Act* and replaced the *Canadian Environmental Assessment Act* with *CEAA, 2012*.
6. On August 3, 2012, the Minister of the Environment and the Chair of the National Energy Board issued amendments to the Joint Review Panel Agreement to reflect revisions to Panel's mandate as a result of the legislative amendments.
7. The Haisla Nation participated extensively in the Panel's review process, providing oral and written evidence, questioning Northern Gateway witnesses and federal government witnesses, and filing extensive written argument. The Haisla Nation evidence and argument set out the existence and evidence in support of a finding of Haisla Nation aboriginal rights, including aboriginal title, the nature of Haisla Nation cultural heritage, and the potential effects of the project on Haisla Nation aboriginal rights and cultural heritage.
8. *CEAA, 2012* requires a review panel to conduct an environmental assessment in accordance with *CEAA, 2012* and additional requirements that are set out in the agreement establishing the panel. The *Amended Joint Review Panel Agreement* includes *Terms of Reference* which require the Panel to consider the factors identified in the *Terms of Reference* and in a document issued by the Canadian Environmental Assessment Agency titled "Scope of Factors – Northern Gateway Pipeline Project, August, 2009" (*Scope of Factors*).
9. The *Amended Joint Review Panel Agreement* requires the Panel to meet the requirements of, *inter alia*, *CEAA, 2012*.
10. The *Terms of Reference* require the Panel to review the project in a careful and precautionary manner.
11. The *Scope of Factors* document states that the proponent must provide a sufficient description of the local setting to allow the Panel, other regulators, the public, and others to clearly understand the rationale for environmental assessment decisions.
12. The *Scope of Factors* document requires the proponent to either provide baseline information outlined in various subsections or a rationale for why the proponent has not done so.
13. Section 52 of the *National Energy Board Act* requires the Panel to assess whether the project is required for the present and future public convenience and necessity, or in other words whether the project is in the public interest.

14. The Government of Canada has set out how it will consult with Aboriginal groups about the impacts of the project in its *Aboriginal Consultation Framework*.

Panel Report

15. On December 19, 2013, following the conclusion of a public hearing process, the Panel issued its report regarding the project.
16. The Panel report made recommendations and findings that are relevant to this application, including but not limited to:
 - a) that a certificate of public convenience and necessity be issued pursuant to the *National Energy Board Act*;
 - b) that the project is in the public interest;
 - c) that Northern Gateway's environmental assessment was sufficient for the purposes for which it was intended;
 - d) that the project is not likely to result in significant adverse effects with respect to freshwater fish and fish habitat;
 - e) that the project is not likely to result in significant adverse effects with respect to marine fish and fish habitat;
 - f) that a large spill from the pipeline facilities, terminal or tankers is unlikely;
 - g) that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low; and
 - h) that, with respect to Aboriginal peoples, the project is not likely to cause significant adverse environmental effects in Canada on health and socio-economic conditions; physical and cultural heritage, current use of lands and resources for traditional purposes, or any structure, site, or thing that is of historical, archaeological, paleontological, or architectural significance.

Grounds for Review

17. The Panel erred in law and/or jurisdiction by failing to consider the factors listed in s. 19 of *CEAA, 2012* and in the *Amended Joint Review Panel Agreement*. Without limiting the generality of the foregoing, the Panel erred by:
 - a) making findings about potential impacts to the marine environment and freshwater and marine fish habitat without having before it information it was required to consider under the *Scope of Factors* document.

- b) failing to assess the environmental effects of the project on Haisla Nation cultural heritage.
18. The Panel erred in law and/or jurisdiction by failing to adhere to the requirements of s. 43 of *CEAA, 2012*. Without limiting the generality of the foregoing, the Panel erred by:
- a) failing to provide a rationale for its conclusion that there would be no adverse environmental effects on cultural heritage;
 - b) failing to provide a rationale for its conclusions regarding significant adverse effects, including but not limited to the conclusion that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low; and
 - c) failing to provide a summary of comments received from interested parties on potential conditions.
19. The Panel based its conclusions and recommendations on erroneous findings of fact that it made without regard to the material before it. Without limiting the generality of the foregoing, the Panel based the following conclusions on erroneous finding of facts:
- a) concluding that impacts to Haisla Nation Culturally Modified Trees (CMTs) can be mitigated by including a condition that Northern Gateway file a plan to protect and manage post-1846 CMTs;
 - b) concluding that a large spill from the pipeline facilities, terminal or tankers is unlikely; and
 - c) concluding that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low.
20. In the alternative, the Panel failed to adhere to the standard of reasonableness required of it. Without limiting the generality of the foregoing, the Panel report:
- a) fails to provide a rationale for how impacts to Haisla Nation CMTs can be mitigated;
 - b) fails to justify its conclusion that a large spill from the pipeline facilities, terminal or tankers is unlikely;
 - c) fails to justify its conclusion that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low;

- d) fails to provide a rationale for the conclusion that there would be no adverse environmental effects on cultural heritage; and
 - e) fails to provide a summary of comments received from interested parties on potential conditions.
21. The Panel failed to conduct its assessment in a precautionary manner, including when it:
- a) recommended that the project is not likely to result in significant adverse effects with respect to freshwater fish and fish habitat;
 - b) recommended that project is not likely to result in significant adverse effects with respect to marine fish and fish habitat;
 - c) recommended that the project is not likely to cause significant adverse environmental effects in Canada on cultural heritage;
 - d) concluded that a large spill from the pipeline facilities, terminal or tankers is unlikely;
 - e) concluded that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low; and
 - f) concluded that the project is in the public interest.
22. The Panel erred in law and/or jurisdiction, or in the alternative, failed to adhere to the standard of reasonableness required of it, when it failed to assess the adequacy of Crown consultation that has occurred in relation to the project to date in its assessment of public interest.
23. The Panel failed to adhere to the standard of reasonableness required of it in determining whether or not the project is in the public interest. Without limiting the generality of the foregoing, the Panel failed to consider impacts to aboriginal rights or interests in its assessment of public interest.
24. The Panel failed to observe procedural fairness in the hearing and deliberation, through actions that include but are not limited to:
- a) failing to extend timelines as reasonably requested by parties;
 - b) failing to consider all the information available to it about the large spill of oil as a result of the rupture of the Enbridge pipeline in Kalamazoo, Michigan;

- c) failing to assess impacts to aboriginal rights or interests in its public interest assessment; and
- d) failing to fully consider the submissions of the Haisla Nation on potential conditions for the project.

This application will be supported by the following material:

- 1. The Affidavit of Ellis Ross, on behalf of the Haisla Nation;
- 2. The Panel's Report;
- 3. The record before the Panel; and
- 4. Such further and other material as counsel for the Applicant may advise.

Date: January 17, 2014



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