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LEGAL BACKGROUNDER: WHAT ARE THE NORTHERN GATEWAY COURT CHALLENGES ABOUT?

Summary Of The Applicants' Written Arguments
In The Legal Challenges To The Enbridge Northern Gateway Approval

This backgrounder provides a high-level summary of the written arguments of the Applicants that are challenging the federal government's approval of Enbridge's Northern Gateway pipelines and tankers project (the "Project") in the Federal Court of Appeal.

BACKGROUND

In June 2014, the federal Cabinet issued an order approving the Project. The order accepted the recommendations of the Joint Review Panel (the "JRP"), issued in its December 2013 report. Eight First Nations, four environmental organizations and one labour union have launched legal challenges to the federal government's approval of the Project. They are: Gitga'at First Nation; Gitxaala Nation; Haida Nation; Haisla Nation; Heiltsuk Nation; Kitasoo Xai'Xais Nation; Nadleh Whut'en; Nak'azdli Whut'en; BC Nature; ForestEthics Advocacy Association; Living Oceans Society; Raincoast Conservation Foundation; and Unifor (together, the "Applicants").

Some of the Applicants brought legal challenges jointly or as a group, and some Applicants brought multiple legal challenges for procedural reasons, with the result that there were 18 legal challenges in total filed in the Federal Court of Appeal. The Applicants are generally making their own separate arguments; however, the legal challenges have been consolidated so that they will all be heard at the same time in a hearing before the Federal Court of Appeal in Vancouver, scheduled to take place over six days on October 1-2 and 5-8, 2015.

The responding parties in the legal proceedings are: the Attorney General of Canada; Northern Gateway Pipelines Limited Partnership ("Northern Gateway"); and the National Energy Board (together, the "Respondents"). There are also three intervenors making arguments in the proceedings: Amnesty International; the Canadian Association of Petroleum Producers; and the Attorney General of British Columbia.

This backgrounder distils the Applicants' written arguments, which number over 350 pages, into many of the key issues. The backgrounder does not include all of the arguments made by the Applicants, nor is it intended to represent the view of any particular Applicant.[1] Rather it is a basic,

[1] West Coast Environmental Law is part of the legal team representing Nak'azdli and Nadleh Whut'en in their judicial review of the federal approval of the Project; however, this backgrounder is not intended to represent their views.

high-level summary, provided for public information, which addresses the question: "what are the main issues that the Applicants say are wrong regarding the federal approval of the Northern Gateway Project?"

ARGUMENTS REGARDING EFFECTS ON WILDLIFE

Certain Applicants argued that the JRP acted unreasonably in recommending that significant adverse effects likely to be caused by the Project to certain wildlife species were justified. Other Applicants argued that the JRP failed to meet its legal obligations with regard to considering and protecting certain wildlife species protected under the *Species at Risk Act* ("*SARA*").

- Argument: The JRP contravened the *SARA* by failing to consider in its report the recovery strategy for humpback whales.[2]
- Argument: The *SARA* requires the JRP to ensure that Northern Gateway identifies mitigation measures to avoid with certainty extirpation of the endangered Little Smoky herd of Boreal Caribou. The JRP failed to do so because it recommended approval of the project despite identifying a "risk of extirpation" for that species and finding Northern Gateway's mitigation measures for impacts on the Little Smoky herd to be "uncertain".[3]
- Argument: The JRP and Cabinet were not legally entitled to find that significant adverse effects on grizzly bears and caribou were "justified in the circumstances."[4] Moreover, the JRP improperly failed to provide a rationale for why the adverse effects were "justified in the circumstances."[5]

ARGUMENTS ON INADEQUATE EVALUATION OF THE PUBLIC INTEREST

The JRP was required to consider the overall "public interest" in its deliberations and recommendation as to whether the Project should be approved.[6] A number of Applicants argued that the JRP made errors when assessing the public interest.

- Argument: The JRP determined that it would not consider the effects of upstream oil production activities induced by the project, including climate change-related impacts, yet the JRP considered and gave weight to the economic benefits of those same activities in deciding the project was in the public interest. This was unlawful by virtue of being imbalanced and procedurally unfair.[7]
- Argument: The private interests of pipeline service providers and users were wrongly equated with the public interest of all Canadians. The JRP gave priority to the commercial

[2] *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, ForestEthics Advocacy Association, Living Oceans Society & Raincoast Conservation Foundation ("Coalition") Memorandum of Fact and Law [Coalition Factum], filed May 22, 2015 at para 41.
[3] Coalition Factum*, supra*. Note 2 at paras 47-52.
[4] *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, British Columbia Naturalists ("BC Nature") Memorandum of Fact and Law [BC Nature Factum], filed May 22, 2015 at paras 83-87.
[5] BC Nature Factum, *supra.* Note 4 at para 88.
[6] See for example *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Unifor Memorandum of Fact and Law [Unifor Factum], filed May 22, 2015 at para 51.
[7] Coalition Factum*, supra*. Note 2 at para 58.

consideration of supporting "properly functioning petroleum markets", to the exclusion of other diverse public interest considerations.[8]

- Argument: The JRP held interveners to a higher standard of proof than Northern Gateway in presenting evidence about whether the project is in the public interest, which was procedurally unfair.[9]
- Argument: In its evaluation, the JRP failed to consider important components of the public interest such as: whether the Crown's constitutional duty to consult First Nations had been carried out; the seriousness of impacts upon or infringements of First Nations' constitutionally protected title and rights; and the objective of pursuing reconciliation between First Nations and non-Aboriginal Canadians. Thus the JRP's evaluation of the public interest was incomplete and unreasonable.[10] The federal Cabinet appears to rely entirely on the flawed report of the JRP in determining that the Project is in the public interest.[11]

ARGUMENTS ON INADEQUATE JRP CONSIDERATION OF ISSUES RELATING TO FIRST NATIONS

In addition to the arguments of certain Applicants, set out above, that the JRP's evaluation of the public interest excluded important considerations regarding First Nations, Applicants argued that the JRP failed to meet other statutory or constitutional obligations related to impacts on, or issues raised by, First Nations.

- Argument: The *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*") requires the JRP to assess direct or indirect effects of the Project on Aboriginal peoples in terms of current use of lands and resources for traditional purposes.[12] Haisla argued that the JRP's finding that construction and operation of the Project would not have any significant adverse effects on the ability of First Nations to use lands, waters or resources for traditional purposes is unreasonable because it ignores the fact that construction of the marine terminal would permanently prevent Haisla members from using the lands and waters at and around that site.[13]
- Argument: *CEAA 2012* requires the JRP to assess direct or indirect effects of the Project on Aboriginal peoples in terms of physical and cultural heritage. [14] Haisla argued that the JRP's finding that the Project would have no significant adverse effects on cultural heritage is unreasonable because the JRP made the finding on a global basis for First Nations as a

[8] Unifor Factum, *supra.* Note 6 at paras 52-54 *et seq*.
[9] Unifor Factum, *supra.* Note 6 at paras 2, 40.
[10] *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Haisla Memorandum of Fact and Law [Haisla Factum], filed May 22, 2015 at paras 145-165; *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Gitxaala Memorandum of Fact and Law [Gitxaala Factum], filed May 22, 2015 at paras 104-110; *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Haida Memorandum of Fact and Law [Haida Factum], filed May 22, 2015 at paras 72(d), 125-126; *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Gitga'at Memorandum of Fact and Law [Gitga'at Factum], filed May 22, 2015 at paras 91, 136-142.
[11] Haisla Factum, *supra.* Note 10 at para 163.
[12] Haisla Factum, *supra.* Note 10 at para 15.
[13] Haisla Factum, *supra.* Note 10 at paras 24-29.
[14] Haisla Factum, *supra.* Note 10 at para 15.

whole, without assessing the impacts on cultural heritage of specific First Nations**.** In particular, Haisla states that construction of the marine terminal requires the extensive destruction of a large number of Haisla Culturally-Modified Trees, and that the JRP overlooked or misunderstood the uncontroverted evidence on this issue.[15]

- Argument: While the JRP received extensive evidence from First Nations, in making its recommendation the JRP conducted no analysis of the impacts of the Project on the constitutionally protected rights of First Nations. This includes a failure to assess potential impacts on First Nations' governance rights and title, which includes an ability to exclusively use and occupy the title area and make decisions about how it is to be used.[16]
- Argument: The JRP did not adequately consider the perspectives of First Nations, giving evidence from First Nations less weight or consideration than Northern Gateway's evidence, without reason.[17]
- Argument: The JRP failed to ensure sufficient information was considered regarding issues of core importance to certain First Nations, for example relating to certain keystone species of great importance to particular First Nations and impacts in the "Open Water Area" (open marine waters beyond the channels connecting to Kitimat) adjacent to certain coastal First Nations.[18]

ARGUMENTS ON INADEQUATE EVALUATION AND RESPONSE TO RISKS AND IMPACTS

Certain Applicants argued that the JRP failed to fulfill its statutory obligations regarding the assessment of risks from the Project and mitigation of those risks, as well as failing to apply the precautionary principle. *CEAA 2012* requires the application of the precautionary principle, which stipulates that, where there are threats of serious damage, scientific uncertainty should not be used as a reason to postpone measures to prevent environmental degradation.[19]

- Argument: The JRP failed to meet its environmental assessment obligations under *CEAA 2012* and failed to apply the precautionary principle by completing its assessment despite acknowledged information gaps and uncertainty, particularly with regard to: (i) the effects, significance of and mitigation for diluted bitumen spills that may sink in water; and (ii) identifying geohazards and designing mitigation measures.[20]

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[15] Haisla Factum, *supra.* Note 10 at paras 19-23, 30-37.

[16] Gitga'at Factum*, supra*. Note 10 at paras 104-105; Haisla Factum, *supra.* Note 10 at paras 147-153; *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law, filed May 22, 2015 [Nak'azdli & Nadleh Whut'en Factum] at paras 77, 94-100; Gitxaala Factum, *supra.* Note 10 at paras 47-48; Haida Factum, *supra.* Note 10 at paras 53, 62.

[17] Gitga'at Factum*, supra*. Note 10 at paras 81, 85, 89-91, 101; Haida Factum, *supra.* Note 10 at paras 48, 52.

[18] Gitga'at Factum*, supra*. Note 10 at paras 81, 96; *Gitxaała Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Kitasoo Xai'Xais & Heiltsuk Memorandum of Fact and Law [Kitasoo Xai'Xais & Heiltsuk Factum], filed May 22, 2015 at para 22; Haida Factum, *supra.* Note 10 at paras 42, 54-56, 106; Haisla Factum, *supra.* Note 10 at para 46.

[19] Coalition Factum*, supra*. Note 2 at paras 86, 90.

[20] Coalition Factum*, supra*. Note 2 at paras 92-118; Haisla Factum, *supra.* Note 10 at para 39; Gitga'at Factum*, supra*. Note 10 at paras 115-117; Gitxaala Factum, *supra.* Note 10 at para 99.

- Argument: The JRP and Cabinet improperly delegated their environmental assessment obligations by approving the Project on conditions that require Northern Gateway to address, at a later date, unresolved issues such as geohazard identification and mitigation, as well as the potential effects of a spill and the effectiveness of mitigation, with the National Energy Board to approve such future plans. This "approve first, plan later" approach is inconsistent with statutory environmental assessment requirements and the precautionary principle, as well as the duty to consult First Nations because it defers important assessments and decisions to future decision-makers with no standards or guidance to ensure that proper consultations are carried out.[21]
- Argument: The JRP erred by proceeding on the basis that, because it found the likelihood of a large spill to be low, it was unnecessary to engage in a detailed examination of the potential environmental impacts of a large spill and their significance. It was also unreasonable for the JRP to conclude that adverse effects of a large marine oil spill could be mitigated below the level of "significance" without sufficient basis in the evidence. Furthermore, the JRP acted beyond its mandate in concluding that the risk associated with a large marine oil spill was "manageable" and "acceptable." On these issues the JRP further failed to provide adequate reasons.[22]

ARGUMENTS REGARDING FAILURE TO PROVIDE REASONS

Certain Applicants argued that Canada failed to provide proper reasons for its decision as required by statute or by constitutional law on the duty to consult and accommodate First Nations.

- Argument: The federal Cabinet failed to set out sufficient reasons for its approval order as required by the *National Energy Board Act*.[23]
- Argument: The federal Crown was required to give reasons regarding the adequacy of consultation with First Nations, which showed that their Aboriginal rights were considered in making the approval order and revealed what impact they had on the order. The Crown failed to do so.[24]

ARGUMENTS ON INFRINGEMENT OF ABORIGINAL TITLE AND RIGHTS

Aboriginal rights are protected by Canada's Constitution. Aboriginal title is an Aboriginal right, which includes the right to decide the uses to which the title area will be put, to benefit from the title area, and to proactively manage the title area. Once an Aboriginal right has been "established" in Canadian law through treaty or Court declaration, the Crown cannot infringe

[21] Gitxaala Factum, *supra.* Note 10 at paras 92-103; Coalition Factum, *supra*. Note 2 at paras 105-107, 111, 113-115; Haida Factum, *supra.* Note 10 at para 122.
[22] BC Nature Factum, *supra.* Note 4 at paras 23-76; Haisla Factum, *supra.* Note 10 at paras 39-53; Haida Factum, *supra.* Note 10 at para 104; Gitxaala Factum, *supra.* Note 10 at footnote 223.
[23] Coalition Factum, *supra*. Note 2 at para 119 *et seq*.; Haisla Factum, *supra.* Note 10 at para 168.
[24] Haisla Factum, *supra.* Note 10 at paras 168-171; Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at paras 129-132; Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 105-106; Gitxaala Factum, *supra.* Note 10 at footnote 99.

that right unless it passes a stringent justification test. Certain First Nations argue that Canada has unjustifiably infringed their established Aboriginal rights in approving the Project.

- Argument: Certain First Nations argue that the evidence they led before the JRP proves their existing Aboriginal title and/or governance rights in areas that would be impacted by the Project. The federal Cabinet's approval of the Project without the consent of those First Nations infringes their title and governance rights with respect to using, occupying and benefitting from their territories, making decisions about the uses to which their territories will be put, and maintaining their special connection to their territories. Canada has not shown the legally required justification for this infringement of title and/or governance rights.[25]
- Argument: The Heiltsuk Nation argues that the federal Cabinet's approval of the Project infringes its established right to harvest and sell herring spawn, which was recognized by the Supreme Court of Canada, and that Canada has not shown the legally required justification for this infringement.[26]

ARGUMENTS ON BREACHES OF THE DUTY TO CONSULT AND ACCOMMODATE

Where a First Nation's rights have not yet been "established" in Canadian law through a treaty or court declaration, the Crown nonetheless owes a duty to consult and, where appropriate, accommodate a First Nation regarding Crown conduct that may negatively impact its asserted Aboriginal rights. For a variety of reasons, all Aboriginal Applicants argue that Canada has failed to properly consult them in making its decision to approve the Project.

- Argument: The process adopted by Canada for undertaking consultation on the Project was insufficient for a number of reasons identified by different First Nations, including:
    - The process for consultation on the Project was unilaterally developed by Canada despite repeated requests from First Nations to be involved in the design of the process;[27]
    - Canada relied to the extent possible on the JRP to carry out consultation, but the JRP was an adversarial, quasi-judicial tribunal that functioned as a one-way information gathering process, which could not accommodate back-and-forth discussions between First Nations and Canada;[28]
    - Canada refused to consult with First Nations outside the JRP process, even regarding issues that were outside the mandate of the JRP;[29]

[25] Gitxaala Factum, *supra.* Note 10 at paras 73-89; Gitga'at Factum, *supra*. Note 10 at paras 23-57.
[26] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 14, 98-102.
[27] Haisla Factum, *supra.* Note 10 at paras 84-86; Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at para 104; Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at para 75; Haida Factum, *supra.* Note 10 at para 116; Gitga'at Factum, *supra*. Note 10 at para 64.
[28] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 77-78; Haisla Factum, *supra.* Note 10 at paras 93-100; Haida Factum, *supra.* Note 10 at para 116; Gitga'at Factum, *supra*. Note 10 at para 74; Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at paras 117-118.
[29] Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at 118-128; Haisla Factum, *supra.* Note 10 at para 90; Haida Factum, *supra.* Note 10 at paras 120-121.

- Certain First Nations stated that they could not access adequate funding to enable consultations;[30]
- The first point in time Canada directly met First Nations to discuss the substance of the Project occurred after the JRP recommended approval of the Project, creating momentum in favour of approval and prejudicing meaningful discussions;[31]
- Canada set arbitrary and unrealistically short timelines for its consultations with First Nations following the release of the JRP report;[32] and
- In the consultation meetings between Canada and First Nations following the JRP report, Canada's representatives did not have authority to make decisions and there was not an opportunity for meaningful give-and-take discussion.[33]

- Argument: Canada failed to obtain certain information that was critical to meaningful consultation with particular First Nations, such as information regarding certain effects of the Project in the Open Water Area and impacts to species of concern to First Nations.[34]
- Argument: Canada failed to assess and consult on Aboriginal title and governance rights or the impacts of the Project on those rights, because Canada incorrectly determined that rights relating to management and decision-making in a First Nation's territories were not subject to the duty to consult and accommodate, but rather could only be addressed through treaties.[35]
- Argument: Canada did not evaluate the strength of claim to title and rights of individual First Nations, nor assess the impacts of the Project on the title and rights of those individual First Nations; rather, Canada approached its duty to consult on a generic, one-size-fits-all basis that was not responsive to the circumstances or issues raised by particular First Nations.[36]
- Argument: Canada did not consult in good faith; rather, Canada determined in advance that it wished to achieve a particular result and approached consultations with First Nations with a closed mind.[37]

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[30] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 29-30.
[31] Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at para 120; Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 88-89; Haisla Factum, *supra.* Note 10 at paras 62-63; Haida Factum, *supra.* Note 10 at para 121; Gitxaala Factum, *supra.* Note 10 at paras 45-47.
[32] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at para at 36; Haisla Factum, *supra.* Note 10 at paras 101-107; Gitxaala Factum, *supra.* Note 10 at para 48; Haida Factum, *supra.* Note 10 at para 116.
[33] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at para at 36; Haisla Factum, *supra.* Note 10 at paras 116-120; Haida Factum, *supra*. Note 10 at paras 116, 120; Gitga'at Factum*, supra*. Note 10 at para 74.
[34] Kitasoo Xai'Xais & Heiltsuk Factum, *supra.* Note 18 at paras 22-24; Haida Factum, *supra.* Note 10 at paras 104-115.
[35] Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at paras 70-102, 133-138; Gitxaala Factum, *supra.* Note 10 at paras 44-72.
[36] Haisla Factum, *supra.* Note 10 at paras 109-115, 125-133; Haida Factum, *supra.* Note 10 at paras 74-77; Gitga'at Factum*, supra*. Note 10 at paras 85-105; Nak'azdli & Nadleh Whut'en Factum, *supra.* Note 16 at paras 125-137; Gitxaala Factum, *supra.* Note 10 at para 69.
[37] Gitxaala Factum, *supra.* Note 10 at para 71.

The hearings for these legal proceedings are scheduled to take place at the Federal Court of Appeal in Vancouver on October 1-2 and 5-8, 2015. They are open to the public.

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