

Court File No. A - 56 - 14

**FEDERAL COURT OF APPEAL**

BETWEEN:

FORESTETHICS ADVOCACY,  
LIVING OCEANS SOCIETY and  
RAINCOAST CONSERVATION FOUNDATION

Applicants

AND:

ATTORNEY GENERAL OF CANADA,  
MINISTER OF THE ENVIRONMENT,  
NATIONAL ENERGY BOARD and  
NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP

Respondents

APPLICATION UNDER SECTION 28 OF THE *FEDERAL COURTS ACT*, RSC  
1985, c F-7

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

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 applicants. The applicants request 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 applicants' 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.

ORIGINAL SIGNED BY  
MODELISA HENNESSY  
A SIGNÉ L'ORIGINAL

Date: JAN 17 2014

Issued by: \_\_\_\_\_

Courts Administration Service  
P.O. Box 10065, 3<sup>rd</sup> Floor  
701 West Georgia Street  
Vancouver, B.C. V7Y 1B6

Address of local office: Federal Court of Appeal  
Pacific Centre  
701 West Georgia Street  
Vancouver, B.C. V74 1B6

TO: ATTORNEY GENERAL OF CANADA  
284 Wellington Street  
East Memorial Building, 4<sup>th</sup> Floor  
Ottawa, Ontario K1A 0H8  
Tel: (613) 992-4621  
Fax: (613) 990-7255

I HEREBY CERTIFY that the above document is a true copy of the original issued out of \_\_\_\_\_ filed in the Court on the \_\_\_\_\_

day of JAN 17 2014 A.D. 20\_\_\_\_

Dated this \_\_\_\_\_ day of JAN 17 2014 20\_\_\_\_



**MODELISA HENNESSY**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

MINISTER OF THE ENVIRONMENT  
c/o Attorney General of Canada and Department of Justice Canada  
284 Wellington Street  
East Memorial Building, 4<sup>th</sup> Floor  
Ottawa, Ontario K1A 0H8  
Tel: (613) 992-4621  
Fax: (613) 990-7255

NATIONAL ENERGY BOARD  
444 Seventh Avenue S.W.  
Calgary, Alberta T2P 0X8  
Tel: (403) 292-4800  
Fax: (403) 292-5503

NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP  
3000, 425 – 1<sup>st</sup> Street S.W.  
Calgary, Alberta T2P 3L8  
Tel: (403) 231-3900  
Fax: (403) 718-3525

## APPLICATION

This is an application for judicial review in respect of the *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1 and Volume 2* (the “Report”), published on December 19, 2013 by the Joint Review Panel established by the Minister of the Environment and the National Energy Board to conduct an environmental assessment of the Enbridge Northern Gateway Project (the “Project”) pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“*CEAA 2012*”) and the *National Energy Board Act*, RSC 1985, c N-7 (“*NEB Act*”). This application also seeks to prohibit the Governor in Council, the Minister of the Environment and the National Energy Board from making any decisions, issuing any orders or taking any other actions to enable the Project to proceed until an environmental assessment has been completed in accordance with *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, SC 2002, c 29, the *Panel Sessions Results and Decision*, the *Hearing Order OH-4-2011 for the Northern Gateway Pipelines Inc. Enbridge Northern Gateway Project* (the “*Hearing Order*”), the *Amended Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project* (the “*Amended Agreement*”) and the *Terms of Reference* for the Project.

The applicants make application for:

1. An order or orders:
  - (a) declaring that the Joint Review Panel for the Project erred in law or in jurisdiction or both by failing to comply with subsection 79(2) of the *Species at Risk Act*;
  - (b) declaring that the Joint Review Panel erred in law or in jurisdiction or both by considering irrelevant evidence, namely the induced upstream economic benefits of the Project, contrary to the applicable sections of

*CEAA 2012, the Panel Session Results and Decision, the Hearing Order, the Amended Agreement and/or the Terms of Reference;*

- (c) in the alternative to paragraph (b) above, declaring that the Joint Review Panel unreasonably considered and gave weight to the induced upstream economic benefits of the Project in the Report while refusing to hear evidence with respect to or consider the induced upstream environmental impacts of the Project;
  
- (d) declaring that the Joint Review Panel erred in law or in jurisdiction or both in determining, contrary to the applicable sections of *CEAA 2012*, that it was not likely that the Project would have significant adverse environmental effects, in the absence of adequate evidence to support that determination, with respect to:
  - (i) the assessment of the impact of diluted bitumen spilled in the marine environment; and
  - (ii) the assessment of the risk of geohazards along the pipeline route.
  
- (e) in the alternative to paragraph (d) above, declaring that the Joint Review Panel acted unreasonably in determining that it was not likely that the Project would have significant adverse environmental effects with respect to:
  - (i) the assessment of the impact of diluted bitumen spilled in the marine environment; and
  - ii) the assessment of the risk of geohazards along the pipeline route.

- (f) declaring that the Report failed to comply with *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and/or the *Terms of Reference* and is therefore invalid and unlawful;
- (g) directing that the Report and the environmental assessment contained therein be referred back to the Joint Review Panel for further consideration and determination in accordance with such directions as the Court considers appropriate to assure compliance with the legal requirements of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference*;
- (h) declaring that *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* must be complied with before the Minister of the Environment may lawfully make a decision pursuant to subsection 52(1) of *CEAA 2012* or take any other action to enable the Project to proceed;
- (i) declaring that *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* must be complied with before the Governor in Council may lawfully do any of the following:
  - (i) make a decision pursuant to subsections 31(1)(a)(i), 31(1)(a)(ii) or 52(4) of *CEAA 2012*;
  - (ii) issue an order pursuant to subsection 54(1)(a) of the *NEB Act*;

- (iii) make a decision pursuant to clause 9.3 of the *Amended Agreement*; or
  - (iv) take any other action to enable the Project to proceed;
- (j) prohibiting the Minister of the Environment from making any decision with respect to the Project pursuant to subsection 52(1) of *CEAA 2012* until the requirements of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* have been complied with;
- (k) prohibiting the Governor in Council from making any of the following decisions or taking any of the following actions with respect to the Project until the requirements of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* have been complied with, namely:
  - (i) making a decision pursuant to subsections 31(1)(a)(i), 31(1)(a)(ii) or 52(4) of *CEAA 2012*;
  - (ii) issuing an order pursuant to subsection 54(1)(a) of the *NEB Act*;
  - (iii) making a decision pursuant to clause 9.3 of the *Amended Agreement*; or
  - (iv) taking any other action to enable the Project to proceed;

- (l) quashing or setting aside any decision the Minister of Environment may make with respect to the Project pursuant to subsection 52(1) of *CEAA 2012* until the requirements of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* have been complied with;
  - (m) quashing or setting aside any decision the Governor in Council may make with respect to the Project pursuant to subsections 31(1)(a)(i), 31(1)(a)(ii) or 52(4) of *CEAA 2012*, any order the Governor in Council may issue with respect to the Project pursuant to subsection 54(1)(a) of the *NEB Act* or any decision the Governor in Council may make pursuant to clause 9.3 of the *Amended Agreement* until the requirements of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* have been complied with; and
  - (n) quashing or setting aside any authorizations, permits or approvals that the Minister of the Environment or the National Energy Board may issue, prior to the hearing of this matter, for the purpose of enabling the Project to proceed.
2. In the event that this application is dismissed, an order that the applicants shall not be required to pay costs to the respondents, pursuant to Rule 400 of the *Federal Courts Rules*.
3. Costs.
4. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

***The Parties***

1. The applicant ForestEthics Advocacy is a non-profit society registered under the British Columbia *Society Act*, RSBC 1996, c 433 (the "*Society Act*").
2. The applicant Living Oceans Society is a non-profit society registered under the *Society Act*.
3. The applicant Raincoast Conservation Foundation is a non-profit society registered under the *Society Act*.
4. The applicants are non-profit organizations with a longstanding interest in environmental protection. The applicants are concerned about the environmental effects of the Project. The applicants are concerned about the lawful application of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference*.
5. The applicants participated as intervenors in the Joint Review Panel hearings into the Project.
6. The respondent Minister of the Environment has decision making responsibilities for the Project pursuant to *CEAA 2012*.
7. The Attorney General of Canada is named as a respondent on behalf of the Governor in Council.
8. The Governor in Council has decision making responsibilities for the Project pursuant to *CEAA 2012*, the *NEB Act* and the *Amended Agreement*.



9. The respondent National Energy Board is the responsible authority with respect to the environmental assessment of the Project pursuant to paragraph 15(b) of *CEAA 2012*. The National Energy Board is also responsible for preparing and submitting to the Minister of Natural Resources a report setting out its recommendation as to whether or not a certificate of public convenience and necessity should be issued for the Project pursuant to subsection 52(1) of the *NEB Act*.
10. The respondent Northern Gateway Pipelines Limited Partnership is the proponent of the Project and a party directly affected by the orders sought in this Application pursuant to subsection 303(1)(a) of the *Federal Courts Rules*.

#### ***The Environmental Assessment Proceedings***

11. On October 31, 2005, Gateway Pipeline Inc. submitted a Preliminary Information Package on the Project to the Canadian Environmental Assessment Agency.
12. On September 29, 2006, the Minister of the Environment referred the environmental assessment of the Project to a review panel pursuant to the *Canadian Environmental Assessment Act*, SC 1992, c 37.
13. On December 4, 2009, the Minister of the Environment and the National Energy Board entered into an *Agreement Concerning the Joint Review Panel for the Northern Gateway Pipeline Project* establishing the Joint Review Panel to conduct the environmental assessment of the Project.
14. On May 27, 2010, Northern Gateway Pipelines Limited Partnership applied to the National Energy Board for authorization to construct and operate the Project including:

- (a) an oil export pipeline commencing near Fort Saskatchewan, Alberta and terminating in Kitimat, British Columbia;
  - (b) a condensate import pipeline commencing in Kitimat, British Columbia and terminating near Fort Saskatchewan, Alberta; and
  - (c) a tank terminal and marine terminal to be located near Kitimat, British Columbia.
15. On January 19, 2011, the Joint Review Panel issued the *Panel Session Results and Decision* including the List of Issues to be considered by the Joint Review Panel.
16. On May 5, 2011, the Joint Review Panel issued the *Hearing Order*. The hearings commenced on January 10, 2012.
17. On July 6, 2012, the *Canadian Environmental Assessment Act*, SC 1992, c 37 was repealed and replaced by *CEAA 2012*.
18. On August 3, 2012, the Minister of the Environment and the National Energy Board entered into the *Amended Agreement*, including the *Terms of Reference*, which continued the assessment of the Project by the Joint Review Panel under the process established under *CEAA 2012* as if it had been referred to a review panel under section 38 of *CEAA 2012*.
19. The *Amended Agreement* is considered to have been entered into by the Minister of the Environment and the National Energy Board under section 40 of *CEAA 2012*.

20. Between January 10, 2012 and June 24, 2013, the Joint Review Panel held 173 days of hearings with respect to the Project. The applicants participated in the hearings as intervenors, providing written evidence, providing witnesses for questioning, questioning the witnesses of other parties and making submissions.
21. On December 19, 2013, the Joint Review Panel published the Report.
22. In the Report, the Joint Review Panel:
  - (a) found that the Project was not likely to have significant adverse environmental effects, except for significant cumulative adverse environmental effects on certain populations of woodland caribou and grizzly bear;
  - (b) found that the Project is in the Canadian public interest; and
  - (c) recommended to the Governor in Council that Certificates of Public Convenience and Necessity, incorporating the Panel's conditions, be issued pursuant to the *NEB Act*.
23. The Minister of the Environment has not, as of this date, made a decision pursuant to subsection 52(1) of *CEAA 2012* with respect to the Project.
24. The Governor in Council has not, as of this date, made a decision pursuant to subsections 31(1)(a) or 52(4) of *CEAA 2012*, nor issued an order pursuant to subsection 54(1)(a) of the *NEB Act*, nor made a decision pursuant to section 9.3 of the *Amended Agreement* with respect to the Project.
25. The National Energy Board has not, as of this date, issued a Certificate of Public Convenience and Necessity for the Project.

***Grounds for the Application – Failure to comply with subsection 79(2) of the Species at Risk Act***

26. The Woodland Caribou (*Rangifer tarandus caribou*), Southern Mountain population (“Southern Mountain Caribou”) was listed as Threatened under Schedule 1 of the *Species at Risk Act* on June 5, 2003.
27. The Woodland Caribou (*Rangifer tarandus caribou*), Boreal population (“Boreal Caribou”) was listed as Threatened under Schedule 1 of the *Species at Risk Act* on June 5, 2003.
28. On October 5, 2012, the Minister of the Environment included the final *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada* on the Species at Risk Public Registry.
29. The Humpback Whale (*Megaptera novaeangliae*), North Pacific population (“Humpback Whale”) was listed as Threatened under Schedule 1 of the *Species at Risk Act* on January 12, 2005.
30. On October 21, 2013, the Minister of Fisheries and Oceans included the final *Recovery Strategy for the North Pacific Humpback Whale (Megaptera novaeangliae) in Canada* on the Species at Risk Public Registry.
31. On November 14, 2013, the Joint Review Panel denied a motion by intervenor Josette Wier to have the recovery strategy for Humpback Whale added to the hearing record.
32. The Joint Review Panel erred in law or in jurisdiction or both by failing to meet the requirements of subsection 79(2) of the *Species at Risk Act*. Without limiting the generality of the foregoing, the Joint Review Panel:

- (i) failed to ensure that measures are taken to avoid or lessen the effects of the Project on the Hart Ranges, Telkwa, Quintette and Narraway herds of Southern Mountain Caribou, contrary to subsection 79(2) of the *Species at Risk Act*;
- (ii) failed to ensure that measures are taken to avoid or lessen the effects of the Project on the Little Smoky herd of Boreal Caribou and its critical habitat, contrary to subsection 79(2) of the *Species at Risk Act*;
- (iii) failed to ensure that the measures identified to avoid or lessen the effects of the Project on the Little Smoky herd of Boreal Caribou and its critical habitat were consistent with the recovery strategy for Boreal Caribou contrary to subsection 79(2) of the *Species at Risk Act*; and
- (iv) failed to ensure that the measures identified to avoid or lessen the effects of the Project on the Humpback Whale and its critical habitat were consistent with the recovery strategy for Humpback Whale, contrary to subsection 79(2) of the *Species at Risk Act*.

***Grounds for Application – The Joint Review Panel considered irrelevant evidence***

- 33. In the *Panel Results and Decision* issued on January 19, 2011, the Joint Review Panel ruled that there was not a sufficiently direct connection between the Project and upstream hydrocarbon production activities induced by the Project to consider the environmental effects of those activities.
- 34. The Joint Review Panel subsequently erred in law or in jurisdiction or both by considering and giving weight in the Report to the induced upstream economic benefits of the Project while refusing to hear evidence with respect to or to consider the induced upstream environmental impacts of the Project,

contrary to sections 5, 19 and 43 of *CEAA 2012* and contrary to the *Panel Sessions Results and Decision*.

35. The Joint Review Panel unreasonably considered and gave weight to the induced upstream economic benefits of the Project in the Report while refusing to hear evidence with respect to or to consider the induced upstream environmental impacts of the Project.

***Grounds for Application – Failure to conduct a lawful assessment of the environmental effects***

36. In the Report, the Joint Review Panel found that diluted bitumen is unlikely to sink due to natural weathering processes alone or in the absence of sediment or other particulate matter interactions. The Joint Review Panel found that there is some uncertainty regarding the behavior of diluted bitumen spilled in water.
37. In the Report, the Joint Review Panel found that more work remained to be done with respect to understanding and predicting the geohazards associated with the Project and that more information was required with respect to geohazard assessment, mitigation and monitoring.
38. The Joint Review Panel erred in law or in jurisdiction or both by failing to meet the requirements of sections 5, 19 and 43 of *CEAA 2012*. Without limiting the generality of the foregoing, the Joint Review Panel erred by:
  - (a) failing to conduct a lawful environmental assessment of the Project by determining that diluted bitumen was unlikely to sink in water despite uncertainty as to the behaviour of diluted bitumen spilled in water and in the face of evidence to the contrary, and failing to conduct a comprehensive review of the evidence with respect to the behaviour of diluted bitumen spilled in water; and

- (b) failing to conduct a lawful environmental assessment of the risks of geohazards caused by or related to the Project.
39. The Joint Review Panel unreasonably determined that diluted bitumen was unlikely to sink in water despite uncertainty as to the behaviour of diluted bitumen spilled in water and in the face of evidence to the contrary, and by failing to conduct a comprehensive review of the evidence with respect to the behaviour of diluted bitumen spilled in water.
40. The Joint Review Panel unreasonably determined that diluted bitumen spilled in water was unlikely to have significant adverse environmental effects despite uncertainty as to the behaviour of diluted bitumen spilled in water and in the face of evidence to the contrary, and while failing to conduct a comprehensive review of the evidence with respect to the behaviour of diluted bitumen spilled in water.
41. The Joint Review Panel unreasonably determined that the geohazards caused by or related to the Project were not likely to cause significant adverse environmental effects when an assessment of the geohazards was not completed.

***Basis for Seeking Relief against the Minister of Environment, the Governor in Council and the National Energy Board***

42. Compliance with the requirements of subsections 4(2), 5(1), 5(2), 19(1) and 19(2) and section 43 of *CEAA 2012*, subsection 79(2) of the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* are all prerequisites to the Minister of the Environment making a decision pursuant to subsection 52(1) of *CEAA 2012*. Until these prerequisites are met, the Minister of the

Environment has no jurisdiction to make a decision pursuant to subsection 52(1) of *CEAA 2012*.

43. Compliance with the requirements of subsections 4(2), 5(1), 5(2), 19(1), 19(2) and 52(1) and section 43 of *CEAA 2012*, section 52 of the *NEB Act*, subsection 79(2) of the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* are all prerequisites to the Governor in Council making a decision pursuant to subsections 31(1)(a) or 52(4) of *CEAA 2012*, to the Governor in Council issuing an order pursuant to subsection 54(1)(a) of the *NEB Act* and to the Governor in Council making a decision pursuant to section 9.3 of the *Amended Agreement*. Until these prerequisites are met, the Governor in Council has no jurisdiction to make a decision pursuant to subsection 31(1)(a) or 52(4) of *CEAA 2012*, to issue an order pursuant to subsection 54(1)(a) of the *NEB Act* or to make a decision pursuant to section 9.3 of the *Amended Agreement*.
44. Compliance with subsections 4(2), 5(1), 5(2), 19(1), 19(2) and 52(1) and section 43 of *CEAA 2012*, section 52 of the *NEB Act*, subsection 79(2) of the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference* are all prerequisites to the National Energy Board submitting the Report and recommendations to the Minister of Natural Resources pursuant to subsection 52(1) of the *NEB Act*. Until these prerequisites are met, the National Energy Board has no jurisdiction to submit the Report and recommendations to the Minister of Natural Resources or to issue a Certificate of Public Convenience and Necessity for the Project.



***General Grounds for the Application***

45. The applicants rely on section 28 of the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, CEEA 2012, the *NEB Act*, the *Species at Risk Act*, the *Panel Sessions Results and Decision*, the *Hearing Order*, the *Amended Agreement* and the *Terms of Reference*.
46. Such further additional grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

1. The affidavit of Karen Wristen on behalf of the Applicants, to be served.
2. The Report.
3. The record before the Joint Review Panel.
4. Such further and additional materials as counsel may advise and this Honourable Court may allow.

**Rule 317 Request**

The applicants request the Joint Review Panel to send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Joint Review Panel to the applicants and to the Registry:

1. the record of all materials placed before and considered by the Joint Review Panel in preparing the Report other than those already found on the public registry of the Joint Review Panel.

Date: January 17, 2014



---

Karen Campbell  
Solicitor for the Applicants  
214 – 131 Water Street  
Vancouver, B.C. V6B 4M3  
Tel: (604) 685-5618, ext. 287  
Fax: (604) 685-7813