Dockets: A-56-14, A-59-14, A-63-14,
A-64-14, A-67-14, **A-437-14**,
A-439-14, A-440-14, A-442-14,
A-443-14, A-445-14, A-446-14,
A-447-14, A-448-14, A-514-14,
A-517-14, A-520-14, A-522-14

FEDERAL COURT OF APPEAL

BETWEEN:

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

Applicants and appellants

and

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Respondents

and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
AMNESTY INTERNATIONAL and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

Interveners

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS/APPELLANTS FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY AND RAINCOAST CONSERVATION FOUNDATION

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OVERVIEW

1. The applicants/appellants ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation (together, the "Coalition") challenge the approval of the Enbridge Northern Gateway Pipeline Project ("Project").

2. The Coalition challenges the *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1: Connections* and *Volume 2: Considerations* (together, the "*JRP Report*") on the basis that the Joint Review Panel ("Panel"):

   a. failed to comply with the requirements of subsection 79(2) of the *Species at Risk Act*, SC 2002, c 29 ("*SARA*");

   b. considered economic benefits that were outside of the scope of the environmental assessment of the Project; and

   c. failed to complete a lawful assessment of the Project in accordance with sections 19 and 43 of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 ("*CEAA 2012*").[1]

3. Further, the Coalition challenges the approval of the Project on the basis that the Governor in Council failed to provide reasons for its approval of the Project as required by subsection 54(2) of the *National Energy Board Act*, RSC 1985, c N-7 ("*NEB Act*").[2]

4. In so doing, the Panel and the Governor in Council created a house of cards that cannot stand. In the absence of a lawful environmental assessment of the Project, the Governor in Council's Order approving the Project is a nullity. In the absence of a

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[1] ForestEthics Advocacy et al v Canada (Attorney General) et al, Notice of Application for Judicial Review, Court File No. A-56-14 (17 January 2014) **[CB, Vol 1, Tab 2, page 16]**.

[2] ForestEthics Advocacy et al v Canada (Attorney General) et al, Notice of Application for Judicial Review, Court File No. A-440-14 (3 October 2014) [A-440-14] **[CB, Vol 1, Tab 9, pages 171-172]**.

lawful Order, the National Energy Board's issuance of Certificates for the Project is also a nullity.[3]

PART I: STATEMENT OF FACTS

5. The Coalition adopts and relies on the Statement of Agreed Facts.[4]

PART II: STATEMENT OF ISSUES

6. The following issues are to be determined in relation to the judicial review of the *JRP Report*:

> **Issue 1**: Did the Panel err in law or jurisdiction or both by failing to comply with subsection 79(2) of the *SARA*, specifically by failing to ensure that the measures taken to avoid or lessen the effects of the Project on the Humpback Whale and the Little Smoky herd of Boreal Caribou were consistent with the recovery strategies for those populations?
>
> **Issue 2**: Did the Panel err in law or jurisdiction or act unreasonably by considering and giving weight to irrelevant evidence, namely the induced upstream economic benefits of the Project?
>
> **Issue 3**: Did the Panel err in law or jurisdiction or both or act unreasonably by failing to conduct a lawful environmental assessment of the Project as required by sections 19 and 43 of the *CEAA 2012* by:
>
> a. unlawfully determining that diluted bitumen spilled in the marine environment was not likely to cause significant adverse environmental effects, when an assessment of spilled diluted bitumen was not complete and feasible mitigation measures were not taken into account; and

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[3] A-440-14, *supra* note 2 **[CB, Vol 1, Tab 9, pages 168-171]**; ForestEthics Advocacy et al v Northern Gateway Pipelines et al, Notice of Appeal, Court File No. A-514-14 (24 November 2014) [**CB, Vol 1, Tab 16, pages 325-326**].

[4] Statement of Agreed Facts ["*Agreed Facts*"] **[Book of Major Documents ["MB"] Tab 1, pages 1-42]**.

b. unlawfully determining that geohazard risks were not likely to cause significant adverse environmental effects when an assessment of the geohazards was not complete and feasible mitigation measures were not taken into account?

7. The following issues are to be determined in relation to the judicial review of Order in Council P.C. 2014-809 ("Order"):

Issue 4: Did the Governor in Council err in law by failing to provide any reasons or failing to provide adequate reasons in the Order, contrary to subsection 54(2) of the *NEB Act*?

Issue 5: Did the Governor in Council have jurisdiction to issue the Order when the Panel had not completed an environmental assessment and report in compliance with the *NEB Act*, the *CEAA 2012*, the *SARA* and the *Amended Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project* ("*Amended Agreement*")?

8. The following issue is to be determined in relation to the appeal of the issuance of Certificates OC-060 and OC-061 ("Certificates") by the National Energy Board ("Board"):

Issue 6: Did the Board have jurisdiction to issue the Certificates when the statutory prerequisites to the issuing of the Certificates had not been met, namely the completion of a lawful environmental assessment and report by the Panel and the issuance of a lawful Order by the Governor in Council?

PART III: SUBMISSIONS

Standing

9. In seeking the leave of the Court to bring the judicial review in Court File No. A-440-14 and to bring the appeal in Court File No. A-514-14, the Coalition stated its

longstanding interest in the issues raised in these applications and their involvement in the Panel proceedings.[5]

10. In the Motion Record in response to those applications for leave, Northern Gateway Pipelines Limited Partnership ("Northern Gateway") challenged the public interest standing of the Coalition.[6]

11. The Court subsequently granted leave to the Coalition to bring the application for judicial review in Court File No. A-440-14 and to file the Notice of Appeal in A-514-14.[7] Therefore, the issue of standing is *res judicata* with respect to those two proceedings.

12. The Coalition submits that, similarly, they have met the test for public interest standing with respect to the proceeding in Court File No. A-56-14.

13. The test for public interest standing on judicial review is set out in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, namely:

a. whether there is a serious justiciable issue raised;

b. whether the plaintiff has a real stake or a genuine interest in the issue; and

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[5] *ForestEthics at al v Canada (Attorney General) et al*, Docket No. 14-A-39, Applicants' Motion Record, Motion for leave to apply for judicial review of Order-in-Council P.C. 2014-809 made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*, Memorandum of Fact and Law, at paras 7-8 **[Coalition Compendium of References ["CCR"], Book 2, Tab 13, page 571]**; *ForestEthics et al v Canada (Attorney General) et al*, Docket No. 14-A-38, Applicants' Motion Record, Motion for leave to appeal pursuant to subsection 22(1) of the *National Energy Board Act*, Memorandum of Fact and Law at paras 8-9 [**CCR, Book 2, Tab 14, pages 599-600]**.

[6] *ForestEthics et al v Canada (Attorney General) et al*, Docket Nos. 14-A-38 and 14-A-39, Northern Gateway Motion Record, Memorandum of Fact and Law, at paras 24, 28-36 **[CCR, Book 2, Tab 15, pages 627, 629-632]**.

[7] *ForestEthics et al v Canada (Attorney General)* (26 September 2014), Ottawa, Docket No. 14-A-39, Order (FCA) **[CCR, Book 2, Tab 16, page 659]**; *ForestEthics et al v Canada (Attorney General) et al*, (26 September 2014), Ottawa, Docket No. 14-A-38, Order (FCA) **[CCR, Book 2, Tab 17, page 661]**.

c. whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.[8]

14. The Issues identified in paragraph 6 above are serious justiciable issues and these proceedings are necessary to ensure that unlawful government actions are not immunized from legal challenge.[9]

15. The Coalition organizations have demonstrated a genuine interest in the issues before the Court, through their longstanding interest and involvement with respect to these issues, and through their active participation in the Panel hearing process.[10]

16. The Coalition organizations were granted intervener status before the Panel, provided written evidence during the hearing process, provided written responses to information requests regarding that evidence, submitted written information requests to other parties, provided witnesses for questioning, questioned the witnesses of other parties and made submissions.[11] In particular, the Coalition made submissions to the Panel on the very issues now before the Court.[12]

17. The application in Court File No. A-56-14 is a reasonable and effective way for the Coalition to bring the issues before the Court. The Coalition raises issues that have not been raised by other parties. Where there was overlap between the issues

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[8] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 2, 18-20, 37 **[Joint Book of Authorities ["JBA"]**; *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, [2014] FCJ 1089 (QL), 2014 FCA 245 at para 32 **[JBA];** *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, at para 162-165, 179-186 **[JBA].**

[9] *Globalive Wireless Management Corp v Public Mobile Inc.*, 2011 FCA 194, [2011] FCJ No 774 (QL), at para 56 **[JBA]**.

[10] *Agreed Facts*, *supra* note 4 at paras 165-167 **[MB, Tab 1, pages 36-38]**.

[11] *Ibid* **[MB, Tab 1, pages 36-38]**.

[12] Final Written Argument of ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation, (30 May 2013), Joint Review Panel Exhibit No. D-66-31-2 at paras 73-94, 155-181 **[CCR, Book 1, Tab 5, pages 191-195, 210-218]**; Final Oral Argument of ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation, *Hearing Transcript, Vol 177* (18 June 2013)**,** Lines 2177-2184, 2190-2241 **[CCR, Book 2, Tab 12, pages 539-548]**

raised by the various parties to these consolidated proceedings, the parties have worked diligently to coordinate their efforts in order that the issues may be brought before the Court in a reasonable and effective manner. Further, the presence of other applicants/appellants does not necessarily preclude public interest standing.[13]

18. Therefore, the Coalition submits that they have met the test for public interest standing with respect to all issues they raise before the Court in these proceedings.

Issue 1: Did the Panel err in law or jurisdiction or both by failing to comply with subsection 79(2) of the *Species at Risk Act*?

19. Subsection 79(2) of the *SARA* places an obligation on the person responsible for conducting an environmental assessment to identify the adverse effects of the project on listed wildlife species and to ensure that the measures taken to avoid or lessen those effects are consistent with the applicable recovery strategy. The Panel failed to meet this obligation with respect to the Project.

A. The standard of review on Issue 1 is correctness.

20. The first step in judicial review is for the Court to assess whether existing case law has already determined the standard of review applicable to a particular category of question. Only if existing case law is unhelpful is the Court then required to proceed to analyze the relevant factors to identify the proper standard of review.[14]

21. With respect to Issue 1, the Coalition submits that the Panel failed to meet the clear and mandatory requirements of subsection 79(2) of the *SARA*. The Federal Court has determined that the failure to comply with a statutory requirement is an error of law subject to a standard of correctness.[15]

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[13] *Manitoba Metis Federation Inc v Canada (Attorney General),* [2013] 1 SCR 623, 2013 SCC 14 at para 43 **[JBA]**.
[14] *Dunsmuir v New Brunswick,* 2008 SCC 9 at paras 57, 62 [*Dunsmuir*] **[JBA]**.
[15] *Great Lakes United v Canada (Minister of the Environment),* 2009 FC 408 at paras 237-240 [*Great Lakes United*] **[JBA]**; *Nunavut Wildlife Management Board v*

22. In the alternative, if this Court finds that past case law has not satisfactorily determined the applicable standard of review, the standard of correctness should still apply. While deference should be given to an adjudicative tribunal in interpreting its enabling statute or a statute closely connected to its function, the Panel, in the current matter, was not acting as an adjudicative tribunal with respect to the *SARA* and the Panel did not have any particular expertise in interpreting the *SARA*. Further, the *SARA* does not contain a privative clause that would signal deference to the Panel on this issue. This is not a case in which the Court should give deference to the Panel's interpretation of the *SARA.*[16]

23. Subsection 79(2) of the *SARA* imposes legal obligations on the Panel to carry out certain actions. No deference is due to the Panel on the statutory interpretation of subsection 79(2) of the *SARA* as it applies to duties imposed on the Panel itself. In the *SARA*, Parliament did not grant the Panel any discretion in interpreting subsection 79(2) or in determining if the mandatory obligations of subsection 79(2) have been met.[17] That role has been left to the Court.

B. The Panel's obligations under Section 79(2) of the SARA.

24. Subsection 79(2) of the *SARA* places certain obligations on the Panel with respect to the adverse effects of the Project on listed species at risk.

25. The purposes of the *SARA* are:

> …to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.[18]

Canada (Minister of Fisheries and Oceans), 2009 FC 16 at para 61 [*Nunavut Wildlife Management Board*] **[JBA]**.

[16] *Dunsmuir*, *supra* note 14 at paras 54-55 **[JBA]**.

[17] *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, 2012 FCJ No 157, [2013] 4 FCR 155 at paras 96-105 **[JBA]**.

[18] *Species at Risk Act*, SC 2002, c 29, s 6 [*SARA*] **[JBA]**.

26. The *SARA* achieves these purposes through certain mandatory provisions including a prohibition on killing or harming certain categories of listed species, a prohibition on damaging or destroying the residences of certain categories of listed species, a requirement for the timely preparation of recovery strategies and action plans, the identification and protection of critical habitat and the special consideration of listed species in environmental assessment processes.[19]

27. Subsection 79(2) of the *SARA* provides that:

> (2) [Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted] must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.[20]

28. In this case, the Panel is the "person" required to ensure that an assessment of the environmental effects of the Project is conducted.[21]

29. Environment Canada and Parks Canada interpretive documents confirm that subsection 79(2) of the *SARA*:

a. confers obligations on the responsible authority to identify <u>all</u> adverse effects of the project on a listed wildlife species and its critical habitat, and, if the project is carried out, to ensure that those effects are mitigated and monitored;

b. establishes a requirement to avoid or lessen <u>all</u> adverse effects of a project on listed wildlife species and critical habitat, regardless of the significance of those effects;

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[19] *Ibid*, s 32-33, 37, 47, 58, 61, 79, 132 **[JBA]**.
[20] *Ibid*, s 79(1), 79(2) **[JBA]**.
[21] *Amended Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project*, (3 August 2012), at clauses 1, 6.1 [*Amended Agreement*] **[MB, Tab 10, pages 216-217, 224]**.

c. if a recovery strategy or action plan exists for the species, the measures must be taken in a way that is consistent with that recovery strategy or action plan;

d. these obligations are in addition to the requirements set out for an assessment of the environmental effects of the project; and

e. in meeting the requirements of the relevant environmental assessment legislation, the obligations under the *SARA* are not necessarily met.[22]

(Underlining added.)

C. The Panel failed to ensure that the measures taken to avoid or lessen the effects of the Project on the Humpback Whale were consistent with the recovery strategy for that population.

30. The Humpback Whale (*Megaptera novaeangliae*), North Pacific population, was listed as Threatened under the *SARA* on January 12, 2005. The Minister of Fisheries and Oceans was required to post a final recovery strategy for the Humpback Whale by April 14, 2009. The final recovery strategy for the Humpback Whale ("*Humpback Whale Recovery Strategy*") was posted on October 21, 2013, more than 4 years after it was due.[23]

31. In *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)* 2014 FC 148 ("*Western Canada Wilderness Committee*"), the Court found that the unlawful delay of the final recovery strategy deprived the Humpback Whale

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[22] Environment Canada and Parks Canada, *Addressing Species at Risk Act Considerations under the Canadian Environmental Assessment Act for Species under the Responsibility of the Minister Responsible for Environment Canada and Parks Canada* (Ottawa: Government of Canada, 2010) at 5, 13-16, 34, 36-37, 42 **[JBA]**; Environment Canada and Parks Canada, *The Species at Risk Act Environmental Checklists for Species under the Responsibility of the Minister Responsible for Environment Canada and Parks Canada: Support Tool for the Required Elements under the Species at Risk Act for Environmental Assessments conducted under the Canadian Environmental Assessment Act*, (Ottawa: Government of Canada, 2010) at 7, 10-11 **[JBA]**.

[23] *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 at paras 26, 28, 94 [*Western Canada Wilderness Committee*] **[JBA]**.

of identified critical habitat and delayed the legal protections that are triggered by the posting of the final recovery strategy.[24] As a result of the Minister's unlawful delay, the *Humpback Whale Recovery Strategy* that should have been available to the Panel at the commencement of the hearing process was not.

32. In *Western Canada Wilderness Committee*, the Minister of Fisheries and Oceans submitted that work done on a proposed recovery strategy for the Humpback Whale was used in the formulation of her department's submission to the Panel. However, the Court stated that the making of a submission to a regulatory panel cannot be equated to the level of protection that would be provided had the final recovery strategy been posted within the timelines required by law.[25]

33. The *Humpback Whale Recovery Strategy* was added to the *SARA* public registry by the Minister of Fisheries and Oceans on October 21, 2013, two months before the Panel was required to issue the *JRP Report*. On November 13, 2013, following the posting of the *Humpback Whale Recovery Strategy*, Josette Wier, an intervener in the Panel proceedings, brought a motion before the Panel attempting to put the *Humpback Whale Recovery Strategy* before the Panel as new evidence.[26]

34. On November 14, 2013, the Panel denied the motion brought by Ms. Wier, stating incorrectly that the recovery strategy provisions of the *SARA* were "part of a legislative scheme that operates independently of the joint review process."[27] Subsection 79(2) of the *SARA* created an obligation on the Panel to ensure that the measures taken to avoid and lessen the effects of the Project on the Humpback Whale were consistent with the *Humpback Whale Recovery Strategy*. Despite this obligation, the Panel refused to consider the *Humpback Whale Recovery Strategy*.

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[24] *Ibid* at para 60 **[JBA]**.
[25] *Ibid* at paras 56-60 **[JBA]**.
[26] Josette Wier, Notice of Motion #24 (13 November 2013) [Affidavit of Fraser Thomson, affirmed 2 February 2015 [Thomson Affidavit], Exhibit "C"] **[CCR, Book 2, Tab 18C, pages 771-773]**.
[27] Panel Ruling No. 166: Notice of Motion #24 filed by Josette Wier dated 13 November 2013 (14 November 2013) [Thomson Affidavit, Exhibit "D"] **[CCR, Book 2, Tab 18D, pages 775-776]**.

35. The *Humpback Whale Recovery Strategy* identified potential threats to the Humpback Whale that were directly relevant to the Project, including vessel strikes, oil spills and acoustic disturbance as threats to the recovery of the Humpback Whale populations.[28]

36. The *Humpback Whale Recovery Strategy* also:

a. identified the area in the vicinity of Gil Island as critical habitat for Humpback Whales. The Project Application indicates that the proposed shipping route for the Project passes through this area, now identified as critical habitat;[29]

b. identified that received levels of acute acoustic noise are an attribute of the Humpback Whale critical habitat;[30] and

c. identified the determination of appropriate measures for shipping corridors within the identified critical habitat as a recommended approach to meet the population and distribution objectives of the *Humpback Whale Recovery Strategy*.[31]

37. As of October 21, 2013, when the *Humpback Whale Recovery Strategy* was included in the *SARA* public registry, the Panel was obliged, pursuant to subsection 79(2) of the *SARA*, to identify all adverse effects of the Project on the Humpback Whale and to ensure that measures be taken to avoid or lessen those adverse effects consistent with the *Humpback Whale Recovery Strategy*. The Panel's own conclusions with respect to the Humpback Whale indicate that this obligation was not met.

38. In the *JRP Report, Vol. 2*, the Panel found:

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[28] Fisheries and Oceans Canada, *Recovery Strategy for the North Pacific Humpback Whale (Megaptera novaeangliae) in Canada* (Ottawa: Fisheries and Oceans Canada, 2013) at 14-17, 19-23 [*Humpback Whale Recovery Strategy*] [Thomson Affidavit, Exhibit "B"] **[CCR, Book 2, Tab 18B, pages 715-718, 720-724]**.
[29] *Ibid* at 32-34 **[CCR, Book 2, Tab 18B, pages 733-735]**.
[30] *Ibid* at 37, 41 **[CCR, Book 2, Tab 18B, pages 738, 742]**.
[31] *Ibid* at 30 **[CCR, Book 2, Tab 18B, page 731]**.

a. Northern Gateway had collected only a limited amount of baseline data for the purpose of predicting and mitigating adverse effects on marine mammals, including the Humpback Whale;[32]

b. the increase in vessel strikes of whales resulting from the Project was unknown;[33]

c. vessel strikes, from both Project-related tankers or from any other tankers or vessels navigating through the region at the present time or in the future, cannot be completely avoided;[34]

d. some individual marine mammals may be injured or killed if struck by Project-related vessels;[35]

e. noise from Project-related tankers or from any other tankers or vessels navigating through the region at the present time or in the future cannot be completely mitigated;[36]

f. noise from the Project-related vessels could lead to short-term displacement or behavioral changes for marine mammals;[37] and

g. there is uncertainty as to whether those individuals may remain displaced or return to the area when the noise disturbance has passed.[38]

39. Therefore, the Panel has conceded that various adverse effects of the Project on the Humpback Whale, such as vessels strikes and noise, are either unknown or cannot be mitigated or both.

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[32] Joint Review Panel for the Enbridge Northern Gateway Project, *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 2: Considerations* [*JRP Report, Vol. 2*] at 231 (Col 3, para 3)-232 (Col 1, para 1) **[CB, Vol 2, Tab 21, pages 670-671]**.
[33] *Ibid* at 235 (Col 1, para 2) **[CB, Vol 2, Tab 21, page 674]**.
[34] *Ibid* at 237 (Col 3, para 1) **[CB, Vol 2, Tab 21, page 676]**.
[35] *Ibid* **[CB, Vol 2, Tab 21, page 676]**.
[36] *Ibid* at 241 (Col 2, para 1) **[CB, Vol 2, Tab 21, page 680]**.
[37] *Ibid* at 242 (Col 1, para 2) **[CB, Vol 2, Tab 21, page 681]**.
[38] *Ibid* at 242 (Col 1, para 3) **[CB, Vol 2, Tab 21, page 681]**.

40. Further, the Panel had an obligation under subsection 79(2) of the *SARA* to ensure that any measures identified to avoid or lessen the effects of the Project on the Humpback Whale were consistent with the final *Humpback Whale Recovery Strategy*. By refusing to consider the final *Humpback Whale Recovery Strategy* while preparing the *JRP Report*, the Panel could not and did not meet this obligation.

41. In particular, the Panel failed to consider the identification of critical habitat in the *Humpback Whale Recovery Strategy* and the protections that follow that identification, failed to explicitly consider if the noise levels produced by the Project contravene the identified attributes of the critical habitat identified in the *Humpback Whale Recovery Strategy* and failed to consider appropriate measures for shipping corridors within the identified critical habitat.

42. The Panel's refusal to consider the *Humpback Whale Recovery Strategy*, when it was available to the Panel two months prior to the release of the *JRP Report*, was an error in law that further compounded the Minister's lengthy and unlawful delay in finalizing the recovery strategy several years beyond the required time period set out in the *SARA*.

43. The Coalition submits that the Panel has therefore contravened subsection 79(2) of the *SARA*. The *JRP Report* must be returned to the Panel for reconsideration and the Panel must ensure that the mitigation measures identified in the *JRP Report* are consistent with the *Humpback Whale Recovery Strategy*.

D. The Panel failed to ensure that the measures taken to avoid or lessen the effects of the Project on the Little Smoky herd of Boreal Caribou were consistent with the recovery strategy for that population.

44. The Minister of the Environment issued the final *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada* ("*Boreal Caribou Recovery Strategy*") on October 5, 2012.[39] The *Boreal Caribou*

[39] *Agreed Facts*, supra note 4 at para 70 **[MB, Tab 1, page 16]**.

Recovery Strategy applies to the Little Smoky herd of Boreal Caribou. The *Boreal Caribou Recovery Strategy* was in evidence before the Panel.[40]

45. The *Boreal Caribou Recovery Strategy* states the following with respect to the Little Smoky herd:

a. the herd is a small isolated population;

b. the population size was estimated at 78 animals;

c. the population trend of the herd is declining;

d. 95 percent of the herd's range has been disturbed by anthropogenic disturbances; and

e. the status of the herd is non-self sustaining.[41]

46. The *Boreal Caribou Recovery Strategy* states the following with respect to the recovery of Boreal Caribou:

a. the recovery goal for Boreal Caribou is to achieve self-sustaining local populations in all Boreal Caribou ranges throughout their current distribution in Canada, to the extent possible. Current evidence supports the conclusion that the recovery of all local populations is biologically and technically feasible.[42]

b. for Boreal Caribou ranges where local populations are declining, such as the Little Smoky herd, stabilizing the local population by halting its decline will require immediate action;[43]

c. for all ranges wherein the local population size is small, achieving a stable population trend and recovering the population to a minimum of 100 animals will be necessary to mitigate risk of quasi-extinction;[44]

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[40] Environment Canada, *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada* (Ottawa: Environment Canada, 2012), Panel Exhibit No. E6-2-2 [*Boreal Caribou Recovery Strategy*] **[CCR, Book 1, Tab 7]**.
[41] *Ibid* at 18-19, 68 **[CCR, Book 1, Tab 7, pages 314-315, 364]**.
[42] *Ibid* at 19 **[CCR, Book 1, Tab 7, page 315]**.
[43] *Ibid* at 22 **[CCR, Book 1, Tab 7, page 318]**.

d. a disturbance management threshold of 65 percent undisturbed habitat in a range would provide a measurable probability (60 percent) for a local population to be self-sustaining;[45]

e. for Boreal Caribou ranges with less than 65 percent undisturbed habitat, such as the Little Smoky herd, restoration of disturbed habitat to a minimum of 65 percent undisturbed habitat will be necessary;[46]

f. activities that are likely to result in the destruction of critical habitat include industrial and infrastructure development and any activity resulting in the fragmentation of habitat by human-made linear features including roads and pipelines;[47]

g. Boreal Caribou ranges will need to be managed to ensure their current and future ability to support self-sustaining local populations;[48] and

h. cumulative impacts may result in the destruction of critical habitat.[49]

47. In the *JRP Report*, the Panel found the following with respect to Woodland Caribou, including the Little Smoky herd of Boreal Caribou:

a. the proposed pipeline route overlaps with the range of the Little Smoky herd of Boreal Caribou;[50]

b. the Little Smoky herd is declining in population and is considered at risk of extirpation;[51]

c. the addition of linear features, such as roads and pipelines, is a key concern for the Little Smoky herd, as well as certain other herds;[52]

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[44] *Ibid* **[CCR, Book 1, Tab 7, page 318]**.
[45] *Ibid* at 22-23 **[CCR, Book 1, Tab 7, pages 318-319]**.
[46] *Ibid* at 23 **[CCR, Book 1, Tab 7, page 319]**.
[47] *Ibid* at 36-37 **[CCR, Book 1, Tab 7, pages 332-333]**.
[48] *Ibid* at 29 **[CCR, Book 1, Tab 7, page 325]**.
[49] *Ibid* at 37 **[CCR, Book 1, Tab 7, page 333]**.
[50] *JRP Report, Vol. 2, supra* note 32 at 204 (Col 2, para 3) **[CB, Vol 2, Tab 21, page 643]**.
[51] *Ibid* at 204 (Col 3, para 1) **[CB, Vol 2, Tab 21, page 643]**.
[52] *Ibid* at 212 (Col 2, para 1) **[CB, Vol 2, Tab 21, page 651]**.

d. there is uncertainty about Northern Gateway's proposed mitigation measures to control access and achieve the goal of no net gain, or a net decrease, in linear feature density;[53] and

e. there would likely be significant cumulative adverse effects of the Project on the Little Smoky herd, as well as certain other herds, that can be justified in the circumstances.[54]

48. As discussed above with respect to the Humpback Whale, subsection 79(2) of the *SARA* requires that the person responsible for the environmental assessment of a project, in this case, the Panel, ensure that the measures taken to avoid or lessen the effects are taken in a way that is consistent with any applicable recovery strategy.

49. The goal of the *Boreal Caribou Recovery Strategy* is to achieve self-sustaining local populations in all Boreal Caribou ranges throughout their current distribution. The *Boreal Caribou Recovery Strategy* identifies that the recovery of the Little Smoky herd will require immediate action to restore disturbed habitat and to prevent further linear development that will cause additional fragmentation of the habitat. However, the Panel found that there was uncertainty about the effectiveness of Northern Gateway's proposed measures to reduce linear feature density. Rather, the Panel found that the Project will likely result in residual significant cumulative adverse environmental impacts on the Little Smoky herd.

50. Subsection 79(2) of the *SARA* requires that all adverse effects on the listed species be avoided or lessened in a way that is consistent with the applicable recovery strategy. It is not open to the Panel to simply declare that there are significant cumulative adverse effects on the Little Smoky herd and that the proposed mitigation measures are "uncertain". If the Project will result in significant cumulative adverse effects and the mitigation measures are uncertain, the Panel was obliged to require Northern Gateway to present alternatives that would further reduce those effects such as rerouting the pipeline out of the Little Smoky caribou range or identifying

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[53] *Ibid* **[CB, Vol 2, Tab 21, page 651]**.
[54] *Ibid* at 212 (Col 2, para 2) **[CB, Vol 2, Tab 21, page 651]**.

mitigation measures that would reduce any impacts with certainty. “Risk of extirpation” of the Little Smoky herd, as determined by the Panel, is not an option that is consistent with the objective of achieving self-sustaining local populations in all Boreal Caribou ranges throughout their current distribution.

51. Further, the Panel stated that the significant cumulative adverse effects on the Little Smoky herd and other herds “can be justified in the circumstances.”[55] While subsection 52(2) of the *CEAA 2012* permits the Governor in Council to determine that significant adverse environmental effects are “justified in the circumstances”, there is no similar provision in the *SARA* that would allow the Panel or the Governor in Council to determine that the adverse effects on *SARA* listed species identified with respect to subsection 79(2) can be “justified in the circumstances”.[56] Therefore, the Panel cannot simply dismiss the residual environmental effects on the Little Smoky herd as “justified in the circumstances”.

52. Therefore, the Panel failed to meet its legal obligation to ensure that the measures identified to avoid or lessen the effects of the Project on the Little Smoky herd were consistent with the *Boreal Caribou Recovery Strategy*. The Panel’s failure to identify mitigation measures that will protect the Little Smoky herd with certainty and thereby reduce the risk of extirpation cannot reasonably be found to be consistent with the *Recovery Strategy* objective of achieving a self-sustaining population within its current range.

53. The *JRP Report* must be returned to the Panel for reconsideration and the Panel must ensure that measures are identified that will reduce the disturbance associated with linear features, contribute to the restoration of disturbed habitat and result in no significant cumulative adverse environmental effects for the Little Smoky herd, consistent with the *Boreal Caribou Recovery Strategy*.

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[55] *Ibid* **[CB, Vol 2, Tab 21, page 651]**.
[56] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 19, para 52(2) [*CEAA 2012*] **[JBA]**; *SARA*, s 79(2) **[JBA]**.

Issue 2: Did the Panel err in law or jurisdiction or act unreasonably by considering and giving weight to irrelevant evidence, namely the induced upstream economic benefits of the Project?

54. The Panel, after determining that upstream oil development activities related to the Project were to be excluded from the environmental assessment of the Project, then unlawfully and unfairly considered and gave weight to the economic benefits of those same upstream activities.

55. The Panel's consideration of irrelevant evidence, namely the economic benefits of upstream oil development induced by the Project, raises a question of procedural fairness. The conclusion of the Panel that the Project is in the public interest must be quashed if the Panel may have been influenced by irrelevant and extraneous evidence.[57]

A. Standard of Review on Issue 2.

56. On questions of natural justice and procedural fairness, the standard of review analysis does not apply. Instead, it is for the Court to determine whether the requirements of procedural fairness and natural justice were met.[58]

57. In the alternative, if a standard of review analysis does apply, the standard of review on a question of procedural fairness is correctness.[59]

B. The Panel erred by considering and giving weight to irrelevant evidence, namely the induced upstream economic benefits of the Project.

58. Early in the hearing process, the Panel determined that the effects of upstream oil production activities induced by the Project, including the economic impacts, were

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[57] *Canadian Union of Public Employees (CUPE), Local No 21 v Regina (City)*, [1989] 81 Sask R 16, [1989] SJ 574 (QL) at 2, 6, 7 (QL) [*CUPE, Local No 21*] **[JBA]**.
[58] *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100 **[JBA]**; *Hughes v Canada (Attorney General)*, 2010 FC 837 at para 12 **[JBA]**.
[59] *Mission Institution v Khela*, 2014 SCC 24 at para 79 **[JBA]**; *Air Canada v Greenglass*, 2014 FCA 288 **[JBA]**.

to be excluded from the environmental assessment. The Panel then unlawfully considered and gave weight to the economic benefits of those same activities in determining that the Project was in the public interest. The Panel's consideration of this irrelevant evidence of economic benefits raises a question of procedural fairness and balance.

59. Throughout the hearing process, the Coalition made efforts to ensure that the Panel's approach was fair and that the Panel did not consider the economic benefits of induced upstream oil development while excluding consideration of the environmental impacts of that same development.

60. On September 7, 2010, in response to the Panel's *Procedural Direction*,[60] the Coalition provided comments to the Panel submitting, *inter alia*, that the Panel must consider the environmental impacts of upstream and downstream activities that are induced by the Project.[61]

61. On January 19, 2011, the Panel released the *Panel Session Results and Decision*, stating that there was not a sufficiently direct connection between the Project and any particular existing or proposed oil sands development, or other oil production activities, to warrant consideration of the environmental effects of such activities as part of the assessment of the Project.[62]

62. By way of a letter dated March 10, 2011, the Coalition requested that the Panel reconsider its decision to exclude from its consideration the environmental effects of upstream activities induced by the Project.[63] By way of a letter dated April 13, 2011,

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[60] *Agreed Facts*, *supra* note 4 at para 29 **[MB, Tab 1, pages 7-8]**; *Joint Review Panel Direction No. 1, Pre-Hearing Comments* at 1 **[MB, Tab 15, page 240]**.
[61] Letter from Living Oceans Society, Raincoast Conservation Foundation and ForestEthics to Joint Review Panel, (7 September 2010) [Thomson Affidavit, Exhibit "A"] at 6-13 **[CCR, Book 2, Tab 18A, pages 672-679]**.
[62] *Panel Session Results and Decision*, (19 January 2011), Panel Exhibit No A22-3, at 13 **[MB, Tab 7, page 144]**.
[63] Letter from Living Oceans Society, Raincoast Conservation Foundation and ForestEthics to the Joint Review Panel (10 March 2011), Panel Exhibit No D66-1-1 at 1-7 **[CCR, Book 1, Tab 4, pages 157-163]**.

the Panel requested that matters such as that raised in the Coalition's letter of March 10, 2011 be brought as a motion following the issuance of the *Hearing Order*.[64]

63. The List of Issues to be considered by the Panel, as identified in the *Hearing Order* released on May 5, 2011, included both the potential effects of the Project on the environment as well as on employment and the economy.[65]

64. On October 13, 2011, the Coalition brought a Notice of Motion before the Panel requesting, *inter alia*, that the Panel include in the List of Issues to be considered by the Panel the environmental effects of the upstream oil sands development induced by the Project or in the alternative that the Panel exclude from its consideration the economic benefits of upstream oil sands development induced by the Project.[66]

65. By way of letter dated December 6, 2011, the Panel denied the Coalition's motion, stating that the issue of the exclusion of the consideration of the economic benefits of upstream oil sands development induced by the Project may be adequately raised in final argument.[67]

66. The Coalition, in both its final written and oral arguments, submitted that the Panel, having expressly excluded the consideration of the effects of upstream activities in the *Panel Session Results and Decision*, could not consider or give weight to the economic benefits of induced upstream development.[68]

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[64] Letter from Joint Review Panel to Ecojustice, response to letter dated 10 March 2011 (13 April 2011), Panel Exhibit No. A29-1 **[CCR, Book 1, Tab 1, page 1]**.
[65] *Hearing Order* (OH-4-2011) at 21-22 **[MB, Tab 8, page 194-195]**.
[66] Living Oceans Society, Raincoast Conservation Foundation and ForestEthics – Notice of Motion (13 October 2011), Panel Exhibit No D122-3-02, at 1, 14, 20-21 **[CCR, Book 1, Tab 6, pages 263, 276, 282-283]**.
[67] Panel Ruling No 4 – Notice of Motion filed 13 October 2011 by Living Oceans Society, Raincoast Conservation Foundation and ForestEthics (6 December 2011), Panel Exhibit No A69-1 at 3 **[CCR, Book 1, Tab 2, page 5]**.
[68] Final Written Argument of ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation (30 May 2013) Panel Exhibit No D66-31-2, at paras 73-94 **[CCR, Book 1, Tab 5, pages 191-195]**; Final Oral

67. In the *JRP Report, Vol. 2*, the Panel stated:

> The Panel notes the argument advanced by the Coalition to the effect that, since evidence of the environmental effects of upstream oil and gas development induced by the project were not considered, the upstream benefits of oil and gas development induced by the project must be excluded from the Panel's consideration. In the Panel's view, there was not a sufficiently direct connection between the project and any particular existing or proposed oil sands development or other oil production activities to warrant consideration of the effects of these activities. During its deliberations, the Panel did not assign weight to any specific estimates of potential induced upstream benefits.[69]
>
> (Underlining added.)

68. Thus, on the surface, it appears that the Panel heeded the Coalition's concerns about considering and giving weight to the economic benefits of induced upstream development while excluding evidence of the environmental effects of that same induced upstream development.

69. However, in the *JRP Report, Vol. 2*, the Panel also concluded:

> The Panel finds that the overall economic effects that could result from the construction and operation of the project, as estimated by Northern Gateway, could be substantial, including more than $300 billion in potential gain to Canadian GDP, approximately $70 billion in additional Canadian labor income, a gain of $90 billion in government revenues, and more than 900,000 person-years of employment.[70]

70. The economic benefits identified by the Panel in the quote in paragraph 69 above are drawn directly from Northern Gateway's evidence to the Panel and include the economic benefits of the induced upstream development that the Panel claimed not to consider or give any weight to.

Argument of ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation, *Hearing Transcript, Vol. 177* (18 June 2013), at Lines 2180-2184 **[CCR, Book 2, Tab 12, page 540]**.

[69] *JRP Report, Vol. 2, supra* note 32 (Col 3, para 2) at 332 **[CB, Vol 2, Tab 21, page 771]**.

[70] *Ibid* at 296 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 735]**.

71. The economic benefits quoted in paragraph 69 above correspond to the totals found in Table 3.1 of the *Public Interest Benefit Evaluation of the Enbridge Northern Gateway Pipeline Project, Update and Reply Evidence* ("*Public Interest Benefit Evaluation*"), prepared for Northern Gateway by Wright Mansell Research Ltd.[71]

72. Table 3.1 of the *Public Interest Benefit Evaluation* includes the values found in Table 3.7 of the *Public Interest Benefit Evaluation*, which contains the economic benefits of increased upstream oil and gas production induced by the Project.[72]

73. Therefore, despite having acknowledged the Coalition's concern and explicitly declaring that the induced upstream economic benefits of the Project would be given no weight, the Panel concluded that the economic benefits of the Project were those listed in Table 3.1 of the *Public Interest Benefit Evaluation*, which included the economic benefits of the induced upstream development found in Table 3.7. Both statements cannot be true.

74. Based upon the benefits identified in the *Public Interest Benefit Evaluation*, the economic value of the increased upstream oil and gas production induced by the Project identified in Table 3.7 accounts for approximately 35 percent of the total economic benefits of the Project.[73] The Panel considered these economic benefits in determining that the Project was in the public interest.[74]

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[71] Wright Mansell Research Ltd., *Public Interest Benefit Evaluation of the Enbridge Northern Gateway Pipeline Project: Update and Reply Evidence*, Chapter 3: "Estimates of Economic Impact", Panel Exhibit No B83-4 [*Public Interest Benefit Evaluation*] at 54 **[CCR, Book 1, Tab 3, page 62]**.

[72] *Ibid* at 58, 62 **[CCR, Book 1, Tab 3, pages 66, 70]**; Questioning of Dr. Robert Mansell, Wright Mansell Research Ltd., *Hearing Transcript, Vol. 69* (4 September 2012) at Lines 14973-14976 **[CCR, Book 2, Tab 8, page 449]**; *Hearing Transcript, Vol. 73* (8 September 2012) at Lines 19628-19630) **[CCR, Book 2, Tab 9, page 481]**.

[73] For example, Table 3.1 of the *Public Interest Benefit Evaluation* states that the total GDP impact of the Project is $311,514 million. Table 3.7 states that the GDP component of that total arising from increased oil and gas production induced by the Project is $109,589 million. The value in Table 3.7 is 35 percent of the value in Table

75. In *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 ("*Council of the Innu*"), the proponent of a hydroelectric project relied on the economic benefits of the project as justification for the adverse environmental effects of the project. The appellants alleged that one proposed hydroelectric dam that was part of the project would not be built and that the proponent could not therefore rely on the anticipated economic benefits of that dam. While the Court found that there was no factual basis for the allegation that the dam would not be built, the Court stated that if that fact were true, it would raise serious questions about the validity of the environmental assessment and the impugned decisions.[75]

76. In the current matter, the Panel should have considered the evidence of induced upstream economic benefits to be irrelevant and outside of the scope of the hearing in accordance with its decision in the *Panel Session Results and Decision*. Instead, the Panel has included the induced upstream economic benefits in their determination of the benefits of the Project. Similar to the finding in *Council of the Innu*, this raises serious questions about the validity of the Panel's environmental assessment and the subsequent Governor in Council decision.

77. The Panel's consideration of this irrelevant evidence of the economic benefits of induced upstream development is procedurally unfair. Even on the most deferential standard, the consideration of irrelevant evidence is unreasonable.[76] Consideration of irrelevant extraneous material by the Panel is sufficient to warrant an order quashing the Panel's decision.[77]

3.1 [*Public Interest Benefit Evaluation*, *supra* note 71 at 54, 62 **[CCR, Book 1, Tab 3, pages 62, 70]**].

[74] *JRP Report*, *Vol. 2*, *supra* note 32 at 12 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 451]**.

[75] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 54 [*Council of the Innu (FCA)*] **[JBA]**.

[76] *Vo v Alberta (Workers' Compensation Board, Appeals Commission)* [2006] 411 AR 230, 2006 ABQB 899, at para 88 **[JBA]**.

[77] *CUPE, Local No 21*, *supra* note 57 at paras 2, 25-27 **[JBA]**.

78. Further, with respect to the recommendation to be made pursuant to section 52 of the *NEB Act*, the Board must balance the totality of the benefits of the Project against the totality of the burdens of the Project to come to its final determination as to whether the Project is in the present and future public interest and necessity.[78]

79. The Panel cannot fairly balance the totality of the benefits of the Project against the totality of the burdens of the Project when the induced upstream economic benefits are included in the Panel's determination of the economic benefits of the Project while evidence of the environmental effects of that same induced development has been expressly excluded from the Panel's consideration.[79]

80. Therefore, the Coalition submits that the *JRP Report* must be returned to the Panel for reconsideration excluding the 35 percent of the total economic benefits of the Project attributable to the induced upstream development activities.

Issue 3: Did the Panel err in law or jurisdiction or both or act unreasonably by failing to conduct a lawful environmental assessment of the Project as required by sections 19 and 43 of the *CEAA 2012*?

81. The Panel's analyses of diluted bitumen ("dilbit") spills and geohazard risks is unlawful because it failed to take into account three mandatory factors under section 19 of *CEAA 2012*:

a. the Panel's analyses of the environmental effects of dilbit spills and geohazard risks was based on incomplete information;

b. as a result, the Panel failed to take into account the significance of those environmental effects; and

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[78] *Emera Brunswick Pipeline Company Ltd.* (31 May 2007), NEB Decision GH-1-2006 at 93-94 **[JBA]**; *Sumas Energy 2 Inc. v Canada (National Energy Board)*, 2005 FCA 377 at para 33 **[JBA]**; *Panel Session Results and Decision*, at 11-12 **[MB, Tab 7, pages 142-143]**.

[79] Michael M. Wenig and Patricia Sutherland, "Considering the Upstream/Downstream Effects of the Mackenzie Pipeline: Rough Paddling for the National Energy Board", (2004) 86 Resources 1 at 3 [Appendix D to ForestEthics Final Written Argument, Panel Exhibit No. D66-31-2] **[CCR, Book 1, Tab 5, page 257]**.

c. as a result, the Panel failed to consider feasible mitigation measures.[80]

82. The fate and behaviour of spilled dilbit, particularly the likelihood that it will sink when spilled, are important to identifying the Project's environmental effects.[81] This is particularly relevant to spill response where the effectiveness of different response technologies depends on whether the dilbit floats, submerges, or sinks in the marine environment.[82]

83. Risks posed by geohazards are also important to determining the environmental effects of the Project. A geohazard is a threat from a naturally-occurring geological, geotechnical or hydrotechnical condition that may lead to damage, such as landslides, rock falls, debris flows and avalanches.[83]

A. The standard of review on Issue 3 is reasonableness.

84. Issue 3 raises the questions of whether the Panel erred in law by failing to gather sufficient information to make reasonable determinations on the significance of certain environmental effects and whether the Panel erred by relying on future research to identify technically and economically feasible mitigation measures.

85. These matters involve questions of statutory interpretation, judgment on the facts and circumstances of the particular environmental effect, and a weighing of the

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[80] *CEAA 2012*, *supra* note 58, ss 19(1)(a), (b), and (d) **[JBA]**.
[81] Questioning of Dr. Bruce Hollebone, Environment Canada, *Hearing Transcript, Vol. 167* (22 April 2013) at Lines 17122-17127 **[CCR, Book 2, Tab 10, pages 496-497]**; *Hearing Transcript, Vol. 171* (26 April 2013) at Lines 23604-23614 **[CCR, Book 2, Tab 11, pages 527-529]**; Questioning of Thomas King, Fisheries and Oceans Canada, *Hearing Transcript, Vol 167* (22 April 2013) at Line 17408-17414 **[CCR, Book 2, Tab 10, pages 521-522]**.
[82] *JRP Report, Vol. 2*, *supra* note 32 at 151 (Col 1, Bullets 5-6) **[CB, Vol 2, Tab 21, pages 590];** Questioning of Grant Hogg, Environment Canada, *Hearing Transcript, Vol. 167* (22 April 2013) at Lines 17128-17130, 17138-17142 **[CCR, Book 2, Tab 10, pages 497-498]**;
[83] *JRP Report, Vol. 2*, *supra* note 32 at 84 (Col 3, para 3) -85 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 523-524]**.

significance of the evidence with respect to a particular environmental effect. The Coalition submits that the standard of review on such questions is reasonableness.[84]

B. The CEAA 2012 Framework.

86. The purposes of the *CEAA 2012* include assessing designated projects in a precautionary and careful manner to avoid significant adverse environmental effects and protecting the environment.[85] These purposes also require that those who administer the *Act* "exercise their powers in a manner that protects the environment and human health and applies the precautionary principle."[86] (Underlining added.)

87. Section 19 of the *CEAA 2012* sets out the factors that must be considered by a review panel when conducting an environmental assessment. These factors include:

a. the environmental effects of the Project, including the effects of malfunctions or accidents;[87]

b. the significance of those effects;[88] and

c. mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects.[89]

88. Environmental effects are those set out in section 5 of the *CEAA 2012*.

89. These mandatory considerations were expressly adopted in the *Amended Agreement*, which is to be "interpreted in a manner consistent with" the *CEAA 2012*.[90]

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[84] *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463, at paras 27-28 **[JBA]**; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2013 FC 418, at para 70 **[JBA]**; *Council of the Innu (FCA), supra* note 75 at paras 41-42 **[JBA]**.
[85] *CEAA 2012*, *supra* note 56, ss 4(1)(a) and (b) **[JBA]**.
[86] *Ibid*, s 4(1) **[JBA]**.
[87] *Ibid*, s 19(1)(a) **[JBA]**.
[88] *Ibid*, s 19(1)(b) **[JBA]**.
[89] *Ibid*, s 19(1)(d) **[JBA]**.

90. The precautionary principle stipulates that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[91]

91. The Panel's errors with regard to malfunctions and accidents have been described Part III-B of the Memorandum of Fact and Law of the Federation of British Columbia Naturalists. The Coalition adopts those submissions and agrees that the Panel failed to lawfully fulfil its obligations under the *CEAA 2012* with regard to accidents and malfunctions.

92. As set out below, the Coalition submits that the Panel's determinations regarding dilbit spills and geohazard risks failed to lawfully consider the mandatory factors prescribed by the *CEAA 2012*, including the requirement to apply the precautionary principle.[92]

C. The Panel unlawfully determined that dilbit spilled in the marine environment was not likely to cause significant adverse environmental effects, and thereby failed to consider feasible mitigation measures in the event of a dilbit spill.

93. The Panel failed to take into account the environmental effects of spilled dilbit in the marine environment thereby rendering its assessment incomplete. As such, the Panel failed to consider the significance of those effects and feasible mitigation measures for any significant adverse environmental effects associated with spilled dilbit.[93]

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[90] *Amended Agreement*, *supra* note 21, at clause 3.0(b) and Terms of Reference, Part II **[MB, Tab 10, pages 219, 227]**.
[91] 114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40 at para 31 **[JBA]**.
[92] *Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc,* 2015 FC 575 at para 43 [*Morton*] **[JBA]**.
[93] *CEAA 2012*, *supra* note 56, ss 19(1)(a), (b) and (d) **[JBA]**.

94. Dilbit spills were important enough that the Panel dedicated Chapter 6 of the *JRP Report, Vol. 2* to this issue.[94] As the *JRP Report* makes clear, there is significant uncertainty about dilbit's behaviour in the marine environment. The Panel has said:

a. additional research is required to answer outstanding questions related to the detailed behaviour and fate of dilbit;[95]

b. there is scientific uncertainty and ongoing debate about certain effects associated with spilled dilbit;[96]

c. details of oil behaviour and response options cannot be specified until the actual circumstances of a spill are known;[97]

d. dilbit can sink in some circumstances and has presented significant cleanup challenges;[98]

e. testing results presented to the Panel did not consider multiple factors of interaction between density, viscosity, potential emulsion formation, and environmental conditions collectively despite the recognition that these must all be examined together in considering the fate of spilled oil;[99]

f. dilbit fate and behaviour has not been studied as much as other oils;[100] and

g. there is potential for oil to sink if it interacts with sediment or suspended particulate matter, or due to natural weathering processes.[101]

95. Importantly, the Panel does not know if dilbit will float, submerge or sink when spilled in the marine environment. Thus the Panel cannot determine the significance of environmental effects from a dilbit spill if it does not know how dilbit will react over time and under various conditions when spilled.

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[94] *JRP Report, Vol. 2, supra* note 32 at 90-101 **[CB, Vol 2, Tab 21, pages 529-540]**.
[95] *Ibid* at 101 (Col 2-3) **[CB, Vol 2, Tab 21, page 540]**.
[96] *Ibid* at 101 (Col 1) **[CB, Vol 2, Tab 21, page 540]**.
[97] *Ibid* at 99 (Col 1, para 2) **[CB, Vol 2, Tab 21, page 538]**.
[98] *Ibid* at 100 (Col 1, para 2 to Col 2, para 1) **[CB, Vol 2, Tab 21, page 539]**.
[99] *Ibid* at 99 (Col 3, para 4) **[CB, Vol 2, Tab 21, page 538]**.
[100] *Ibid* at 99 (Col 2, para 1) **[CB, Vol 2, Tab 21, page 538]**.
[101] *Ibid* at 129 (Col 1, para 4 to Col 2, para 1) **[CB, Vol 2, Tab 21, page 568]**.

96. This is critical information because oil spill response requirements and mitigation will differ depending on whether dilbit floats, submerges or sinks.[102]

97. If the environmental effects of dilbit spilled in the marine environment were not considered, it is not possible for the Panel to perform its statutory duty to take into account the significance of the environmental effects. In other words, determining the environmental effects of a dilbit spill is a necessary precondition to the Panel taking into account the significance of a dilbit spill and fulfilling its statutory duty to do so.

98. Moreover, the Panel cannot take into account feasible mitigation measures for dilbit spills because the Panel does not know if dilbit will float or sink. Thus the requirements of the *CEAA 2012* cannot be met unless the Panel has considered the environmental effects of sinking or submerged dilbit.

99. Pursuant to subsection 19(1)(a) of the *CEAA 2012*, the Panel was to consider "environmental effects…including the environmental effects of malfunctions or accidents that may occur in connection with the designated project."[103] (Underlining added). The use of the word "may" requires that the Panel consider even unlikely environmental effects, even where there is scientific uncertainty.[104]

100. The Panel concluded that "although there is some uncertainty regarding the behaviour of dilbit spilled in water, the Panel finds that the weight of evidence indicates that dilbit is no more likely to sink to the bottom than other heavier oils with similar physical and chemical properties."[105] (Underlining added.)

101. The Panel's conclusion acknowledges that the potential environmental effects of spilled dilbit are sufficiently likely that the Panel must take into account feasible

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[102] Questioning of Grant Hogg, Environment Canada, *Hearing Transcript, Vol. 167* (22 April 2013) at Lines 17138-17142 **[CCR, Book 2, Tab 10, page 498]**.
[103] *CEAA 2012*, *supra* note 56, s 19(1)(a) **[JBA]**.
[104] *Morton*, *supra* note 92 at para 97 **[JBA]**.
[105] *JRP Report, Vol. 2*, *supra* note 32 at 99 (Col 2, para 2) **[CB, Vol 2, Tab 21, page 538]**.

mitigation measures. Notably, different mitigation would be required depending on whether dilbit floats, sinks or submerges, after a spill.

102. The Panel concludes that dilbit is as likely to sink as other similar heavy oils. Also, it concludes that in previous spills, the behaviour of heavier oils can be dynamic, stating that "some oil floats, some sinks, and some is neutrally buoyant and subject to submergence and overwashing".[106]

103. Yet, on the basis of the uncertain conclusion that dilbit is unlikely to sink, the Panel did not consider the significance of environmental effects of sunken or submerged dilbit in the marine environment. Thus, the Panel failed to fulfil its statutory duty to consider the environmental effects of spills of dilbit.

104. The unlawfulness of the Panel's failure is heightened by its concomitant acknowledgement of the unknown but potential seriousness of a dilbit spill. The Panel states that a marine oil spill could cause significant adverse environmental effects while also saying that the effects of an oil spill are not well understood.[107] The Panel also states that mitigation would be part of recovery for a large oil spill.[108] Thus, mitigation is required, yet the Panel failed to consider mitigation because it determined that dilbit is "no more likely" to sink than other heavier oils.

105. The Panel could not reasonably determine the environmental effects, significance, or feasible mitigation measures without knowing how dilbit will react in the marine environment. This is evident from the condition imposed by the Panel that Northern Gateway conduct a research program on the behaviour and clean-up of heavy oils, which entails that issues such as dilbit weathering, dispersion, oil/sediment interactions, submergence, behaviour and clean-up be considered.[109]

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[106] *Ibid* at 99 (Col 1, para 4) **[CB, Vol 2, Tab 21, page 538]**.
[107] *Ibid* at 99-101, 129 (Col 1, para 3) **[CB, Vol 2, Tab 21, pages 538-540, 568]**.
[108] *Ibid* at 146 (Col 3, para 3) **[CB, Vol 2, Tab 21, page 585]**.
[109] *Ibid* at 389 (Conditions 169-170) **[CB, Vol 2, Tab 21, page 828]**.

106. The Panel was not in a position to fulfill its legal obligations under section 19 of the *CEAA 2012* without this information and has unlawfully attempted to fulfill this obligation by imposing future research requirements on Northern Gateway.

107. Regardless of the Panel's desire or intent, the Federal Court has determined that "possibilities of future research and development do not constitute mitigation"[110] and cannot satisfy the duty to assess environmental effects or their significance. While it is accepted that a Panel can recommend further studies be conducted after construction, the Panel could not meet its obligations under section 19 while assigning the assessment of the behaviour and clean-up of dilbit to future studies. That was the very question that the Panel was required to assess and determine as part of the environmental assessment.

108. The Panel admits there is a possibility dilbit will sink. It was unlawful to not consider the effects, significance of, and mitigation for, sinking dilbit. The precautionary approach reinforces the obligation to consider effects, significance and mitigation under section 19 of the *CEAA 2012* where there is uncertainty. By including the precautionary principle in the *CEAA 2012*, Parliament recognizes that uncertainty is part of an environmental assessment, and is to be addressed in project reviews. It is not an excuse to avoid the duties imposed by the *CEAA 2012*.

D. The Panel unlawfully determined that the risks of geohazards were not likely to cause significant adverse environmental effects and thereby failed to consider feasible mitigation measures in relation to geohazard risks.

109. The Panel was required to take into account environmental effects, significance of effects, and feasible mitigation measures for significant adverse environmental effects associated with geohazard risks in relation to the Project. Similar to its findings with respect to dilbit, the Panel erred by reaching its conclusion based on incomplete information, without considering environmental effects that "may" occur, and without considering technically and economically feasible mitigation measures.

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[110] *Pembina Institute for Appropriate Development v Canada (Attorney General)*, [2008] FCJ No. 324, 2008 FC 302, at para 25 [*Pembina InstituteI*] **[JBA]**.

110. The pipelines are proposed to travel over six physiographic regions, including mountainous terrain.[111] Geohazards are among the issues considered in Chapter 5 of the *JRP Report, Vol. 2* dealing with Public Safety and Risk Management. By Northern Gateway's own admission, geohazards were one of the primary considerations in determining the Project's feasibility.[112]

111. The Panel acknowledged deficiencies in its understanding of the environmental effects, significance of effects, and feasible mitigation measures associated with geohazard risks by making it a condition that Northern Gateway complete a Geohazard Assessment, Mitigation and Monitoring Report, prior to construction.[113]

112. In particular, the Panel noted:

a. the Kitimat Terminal area is known to be subject to seismic activity;[114] and

b. Northern Gateway recognizes that more work remains to be done to understand and predict geohazards including acquiring additional information such as LiDAR [Light Detection and Ranging remote sensing] data, and involving other experts in geohazards assessment, mitigation and monitoring.[115]

113. By leaving it to Northern Gateway to identify geohazards that could have a reasonable probability of impacting the Project and identifying specific design measures to mitigate geohazards after the review was completed, the Panel failed to consider feasible mitigation measures based on the assessed environmental effects.

114. This important work, which forms a crucial part of the public safety and risk management, needed to be done as part of the environmental assessment. This statutory requirement was for the Panel to complete during the review, not by

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[111] *JRP Report, Vol. 2, supra* note 32 at 85 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 524]**.
[112] *Ibid* at 85 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 524]**.
[113] *Ibid* at 387 (Conditions 145-147) **[CB, Vol 2, Tab 21, page 826]**.
[114] *Ibid* at 85 (Col 1, para 1) **[CB, Vol 2, Tab 21, page 524]**.
[115] *Ibid* at 86 (Col 2, para 3) **[CB, Vol 2, Tab 21, page 525]**.

Northern Gateway at some future time. Thus, the Panel determined that the geohazard assessment was complete despite a clear admission that "more work remains to be done with regards to understanding and predicting geohazards".[116]

115. The Panel could not consider feasible mitigation measures for geohazards that have not yet been identified. As a result of the unlawful approach taken by the Panel, the section 19 factors have not been taken into account, as required by law.

116. In this context, caselaw also supports the Coalition's contention that the Panel erred in reaching its conclusions under subsection 19(1) of the *CEAA 2012* because the Panel decided that its subsection 19(1) obligations were satisfied by leaving uncertainty about geohazards to be addressed by future research despite the fact that "possibilities of future research and development do not constitute mitigation measures."[117]

117. Further, the Panel breached its requirement to apply a precautionary approach by completing its assessment despite clearly acknowledged information gaps and uncertainty.

118. Overall, in regard to Issue 3, the Panel failed to fulfill its information gathering and assessment obligations as set out in the *CEAA 2012* by deferring research and studies on dilbit and geohazards until the construction phase.[118] Pursuant to section 19 of the *CEAA 2012*, the Panel was required to take into account the environmental effects, significance of those effects, and feasible mitigation measures. Because the Panel deferred information gathering on both issues until after the review was completed, the Panel did not perform its duty under section 19. The deficiencies in the Panel's approach render the Panel's outcome with respect to the risks posed by dilbit and geohazards unjustifiable and not defensible in respect of the facts and the law.

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[116] *Ibid* at 86 (Col 2, para 3) **[CB, Vol 2, Tab 21, page 525]**.
[117] *Pembina Institute*, *supra* note 110, at para 25 **[JBA]**.
[118] *Greenpeace Canada*, *supra* note 84, at para 357 **[JBA]**.

Issue 4: Did the Governor in Council err in law by failing to provide any reasons or failing to provide adequate reasons for making the Order in the Order, contrary to subsection 54(2) of the *NEB Act*?

119. The Governor in Council failed to set out the reasons for issuing the Order in the Order as required by subsection 54(2) of the *NEB Act*.

A. The standard of review on Issue 4.

120. The Coalition submits that the failure to comply with the statutory requirement to provide reasons in the Order is an error of law subject to a standard of correctness.[119] Where an administrative tribunal has a legal obligation to give reasons, the Court must ensure that the tribunal complies with its legal obligation. Where no reasons are given when they are required by statute, there is a breach of the law.[120] The standard of review in making this determination is correctness.[121]

121. Where the adequacy of reasons, rather than the absence of reasons, is the issue, the standard of review is reasonableness.[122]

B. The Governor in Council erred in law by failing to set out the reasons for the Order.

122. Subsection 54(2) of the *NEB Act* establishes an explicit requirement that the Order of the Governor in Council ordering the issuance of the certificates "must set out the reasons for making the order".[123] The Governor in Council does not have the discretion to do otherwise. [124]

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[119] *Great Lakes United*, *supra* note 15 at paras 237-240 **[JBA]**; *Nunavut Wildlife Management Board*, *supra* note 15 at para 61 **[JBA]**.
[120] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 22 [*Newfoundland Nurses*] **[JBA]**.
[121] *Clifford v Ontario (Attorney General)*, [2009] 98 OR (3d) 210, 2009 ONCA 670, [2009] OJ No. 3900 [QL] at para 22 **[JBA]**; *Pembina Institute*, *supra* note 110 at para 41 **[JBA]**.
[122] *Newfoundland Nurses*, *supra* note 120 at para 22 **[JBA]**.
[123] *National Energy Board Act*, RSC 1985, c N-7, s 54(2).
[124] *Greenisle Environmental Inc. v Prince Edward Island*, [2005] 248 Nfld & PEIR 39, 2005 PESCTD 33, [2005] PEIJ No. 41 [QL] at para 42 **[JBA]**.

123. The purpose of reasons is to provide justification, transparency and intelligibility with respect to the decision made.[125] Where there is an obligation to give reasons, the reasons must contain at least some degree of reasoning and analysis.[126] The reasons must be sufficient to permit the parties to understand why the decision maker made the decision and to enable judicial review.[127] The decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.[128]

124. In the current matter, the Order does not provide any reasons. Rather, the Order merely contains a list of recitals which accept the Panel's conclusions and recommendations regarding the Project. These recitals are not reasons. In certain circumstances, extraneous material such as the record before the tribunal or the conclusions and recommendations of the tribunal may fulfil the purpose of providing reasons.[129] However, subsection 54(2) of the *NEB Act* requires that the reasons be set out in the Order itself. This precludes relying on extraneous sources for the reasons.

125. Even if the Governor in Council is permitted to rely on the conclusions and recommendations of the Panel, the Order fails to provide any reasoning, analysis, rationale or logic for the decisions that were made by the Governor in Council.

126. In *Northwestern Utilities Ltd. v Edmonton (City)*, [1979] 1 SCR 684 ("*Northwestern Utilities*"), there was a statutory requirement that the Public Utilities Board provide reasons for its decision with respect to a rate application. The reasons provided by the Public Utility Board consisted, as in the current matter, of a list of

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[125] *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 13 [*YVR*] **[JBA]**.
[126] *Ibid* at para 16 **[JBA]**; *Vennat v Canada (Attorney General)*, [2007] 2 FCR 647, 2006 FC 1008, [2006] FCJ No. 1251 [QL] at para 93 [*Vennat*] **[JBA]**.
[127] *Newfoundland Nurses, supra*, note 120, at para 9 **[JBA].**
[128] *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25, [2000] FCJ No 1685, at para 22 [FCA] **[JBA]**.
[129] *YVR*, *supra* note 125 at para 17 **[JBA]**.

recitals followed by the Board's orders.[130] The Supreme Court of Canada found that when the recitals were eliminated from that decision, there was only a single conclusion left, and that this failure to set out reasons meant that the statutory obligation on the Public Utilities Board was not met.[131] The Court stated that the obligation to give reasons is not met by the bald assertion that "my reasons are that I think so".[132]

127. Similar to the finding in *Northwestern Utilities*, in the current matter, where the Governor in Council was required to make certain decisions under the *NEB Act* and the *CEAA*, the Governor in Council cannot rely on recitals. Some justification must be articulated beyond "my reasons are that I think so." The Order does not contain any articulation as to why the Project is and will be required by the present and future public convenience or why the significant adverse environmental effects are justified in the circumstances.

128. Where there is a statutory duty to give reasons, failure to do so may result in the decision being quashed.[133]

129. Therefore, the Coalition submits that the Order must be quashed, rescinded or set aside and that any new Order issued pursuant to subsection 54(1) of the *NEB Act* must contain reasons for the Order.

Issue 5: Did the Governor in Council have jurisdiction to issue the Order when the Panel had not completed an environmental assessment and report in compliance the *NEB Act*, the *CEAA 2012*, the *SARA* and the *Amended Agreement*?

130. If the Court finds that the Panel erred in law, erred in jurisdiction or made unreasonable findings as alleged in any of Issues 1 through 3 above, then the

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[130] *Northwestern Utilities Ltd. v Edmonton (City)*, [1979] 1 SCR 684 at 15-17 [QL] [*Northwestern Utilities*] **[JBA]**.
[131] *Ibid* at 17 [QL] **[JBA]**.
[132] *Ibid*.
[133] *Manitoba Pool Elevators v Assiniboine-Fort Garry Community Committee*, [1978] MJ 1 [QL] at paras 55-61 **[JBA, Vol x, Tab x, page x]**.

Coalition submits that the Order has been made without jurisdiction and is a nullity. In the alternative, the Coalition submits that the Order must be quashed, rescinded or set aside until such time as the *JRP Report* is reconsidered and rewritten in accordance with the law, and another decision is made by the Governor in Council. With respect to this Issue 5, the Coalition adopts and relies on Part III.B(i) of the Memorandum of Fact and Law of the applicant/appellant Unifor.

Issue 6: Did the Board have jurisdiction to issue the Certificates when the statutory prerequisites to the issuing of the Certificates had not been met?

131. If the Court finds that the Order issued by the Governor in Council was not lawful, then the Coalition submits that the Certificates were issued without jurisdiction and are a nullity. With respect to this Issue 6, the Coalition adopts and relies on Part III.F of the Memorandum of Fact and Law of the applicant/appellant Unifor.

PART IV: ORDERS SOUGHT

132. The Coalition seeks the following orders:

a. an order declaring that the Panel erred in law or in jurisdiction or both by failing to comply with subsection 79(2) of the *SARA*;

b. an order that the *JRP Report* be returned to the Panel for reconsideration and that the Panel must ensure that the mitigation measures identified in the *JRP Report* are consistent with the *Humpback Whale Recovery Strategy*;

c. an order that the *JRP Report* be returned to the Panel for reconsideration and that the Panel must ensure that the mitigation measures identified in the *JRP Report* with respect to the Little Smoky herd of Boreal Caribou are consistent with the *Boreal Caribou Recovery Strategy;*

d. an order declaring that the Panel erred in law or jurisdiction or both or acted unreasonably by considering and giving weight to irrelevant evidence, namely the induced upstream economic benefits of the Project;

e. an order that the Panel must reconsider the public interest test under section 52 of the *NEB Act* while excluding the 35 percent of the total economic benefits of the Project attributable to the induced upstream development activities;

f. an order declaring that the Panel erred in law or jurisdiction by failing to conduct a lawful environmental assessment of the Project as required by section 19 of the *CEAA 2012* by:

(i) unlawfully determining that dilbit spilled in the marine environment was not likely to cause significant adverse environmental effects and thereby failing to take into account feasible mitigation measures in the event of a dilbit spill;

(ii) unlawfully determining that the risks posed by geohazards were not likely to cause significant adverse environmental effects and thereby failing to take into account feasible mitigation measures from the risk of geohazards;

g. an order that the *JRP Report* be returned to the Panel for reconsideration in order that the mandatory requirements of section 19 of the *CEAA 2012* are met in relation to dilbit spills and geohazard risks;

h. an order declaring that the Governor in Council erred in law or erred in jurisdiction by failing to give reasons for the Order as required by subsection 54(2) of the *NEB Act*;

i. in the alternative to sub-paragraph (h) above, an order declaring that the Governor in Council erred in law or jurisdiction by failing to give adequate reasons for the Order;

j. an order declaring that the Governor in Council had no jurisdiction to issue the Order until the Panel completed an environmental assessment and report in compliance with the *NEB Act*, the *CEAA 2012*, the *SARA* and the *Amended Agreement*;

k. an order declaring that the Order is a nullity;

l. in the alternative, an order quashing, rescinding or setting aside the Order.

m. an order declaring that the Board erred in law or erred in jurisdiction by issuing the Certificates in the absence of a lawful and valid Order;

n. an order declaring that the Certificates are a nullity;

o. in the alternative, an order quashing, rescinding or setting aside the Certificates.

133. In the event that any of the Applications in A-56-14 and A-440-14 and the Appeal in A-514-14 are dismissed, the Coalition seeks an order that the Coalition shall not be required to pay costs to the respondents, pursuant to Rule 400 of the *Federal Courts Rules*.

134. In the event that this Application is successful, the Coalition seeks an order granting costs of the proceeding.

135. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of May, 2015.

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Barry Robinson and Karen Campbell
Counsel for the Applicants/Appellants Forest Ethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation

PART V – LIST OF AUTHORITIES

Note that Authorities will be found in the Joint Book of Authorities.

Appendix A: Statutes and Regulations

Statutes and Regulations

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, paras 4(1), 5, 19, 52(2)
National Energy Board Act, 1985 RSC c N-7, ss 52, 54 (2)
Species at Risk Act, SC 2002, c 29, ss 6, 32, 33, 37, 47, 58, 61, 79 & 132

Appendix B: Case Law and Authorities

Cases

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40.
Air Canada v Greenglass, [2014] FCJ No. 1286, 2014 FCA 288.
Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, [2012] SCR 524, 2012 SCC 45.
Canadian Union of Public Employees (C.U.P.E). v Ontario (Minister of Labour), [2003] SCJ No. 28, 2003 SCC 29
Canadian Union of Public Employees (CUPE), Local No 21 v Regina (City), [1989] 81 Sask R 16, [1989] SJ 574 (QL).
Clifford v Ontario (Attorney General), [2009] 98 OR (3d) 210, 2009 ONCA 670, [2009] OJ No. 3900 [QL].

Council of the Innu of Ekuanitshit v Canada (Attorney General), [2013] FCJ No. 466, [2013] 431 FTR 219, 2013 FC 418
Council of the Innu of Ekuanitshit v Canada (Attorney General), [2014] FCJ No. 862, 2014 FCA 189.
Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9.
Emera Brunswick Pipeline Co. (Re), [2007] LNCNEB 3, No. GH-1-2006
Forest Ethics Advocacy Assn. v Canada (Attorney General), [2014] FCJ No. 2089, 2014 FCA 245
Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans), 2012 FCJ No 157, [2013] 4 FCR 155, 2012 FCA 40
Globalive Wireless Management Corp v Public Mobile Inc, 2011 FCA 194, [2011] FCJ No 774 (QL)
Great Lakes United v Canada (Minister of the Environment), [2009] FCJ No. 484, 2009 FC 408
Greenisle Environmental Inc. v Prince Edward Island, [2005] PEIJ No. 41, 2005 PESCTD 33.
Greenpeace Canada v Canada (Attorney General), [2014] FCJ No. 515, 2014 FC 463.
Hughes v Canada (Attorney General), [2010] FCJ No. 1036, 2010 FC 837.
Manitoba Metis Federation Inc v Canada (Attorney General), [2013] 1 SCR 623, 2013 SCC 14.
Manitoba Pool Elevators v Assiniboine-Fort Garry Community Committee, [1978] 2 WWR 486, [1978] MJ 1.

MiningWatch Canada v Canada (Minister of Fisheries and Oceans), [2007] FCJ 1249, 2007 FC 955
Mission Institution v Khela, [2014] 1 SCR 502, 2014 SCC 24.
Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc, [2015] FCJ No. 566, 2015 FC 575
Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] SCJ No. 62, 2011 SCC 62.
Northwestern Utilities Ltd. v Edmonton (City), [1979] 1 SCR 684.
Nunavut Wildlife Management Board v Canada (Minister of Fisheries and Oceans), [2009] FCJ No. 45, 2009 FC 16.
Pembina Institute for Appropriate Development v Canada (Attorney General), [2008] FCJ No. 324, 2008 FC 302.
Sumas Energy 2 Inc. v Canada (National Energy Board), [2005] FCJ 1895, 2005 FCA 377
Vancouver International Airport Authority v Public Service Alliance of Canada, [2010] FCJ 809, 2010 FCA 158
Vennat v Canada (Attorney General), [2007] 2 FCR 647, 2006 FC 1008.
Via Rail Canada Inc v National Transportation Agency, [2001] 2 FC 25, [2000] FCJ No 1685
Vo v Alberta (Workers' Compensation Board, Appeals Commission), [2006] 411 AR 230, 2006 ABQB 899
Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans), [2014] FCJ No. 151, 2014 FC 148.

Appendix C: Secondary Sources

Environment Canada and Parks Canada, *Addressing Species at Risk Act Considerations under the Canadian Environmental Assessment Act for Species under the Responsibility of the Minister Responsible for Environment Canada and Parks Canada* (Ottawa: Government of Canada, 2010)
Environment Canada and Parks Canada, *The Species at Risk Act Environmental Checklists for Species under the Responsibility of the Minister Responsible for Environment Canada and Parks Canada: Support Tool for the Required Elements under the Species at Risk Act for Environmental Assessments conducted under the Canadian Environmental Assessment Act*, (Ottawa: Government of Canada, 2010)