



First Nations and Environmental Groups Apply To Reopen Northern Gateway Project Environmental Joint Review Panel

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First Nations and environmental groups are asking the courts to quash the report by the Joint Review Panel (Panel) for Enbridge's Northern Gateway Pipeline project or to order the reopening of the review and reconsideration of the Panel's findings. The legal challenges follow the Panel's December 19, 2013 recommendation to the federal Government to approve the project, subject to 209 conditions. Opponents claim the Panel made errors in law and ignored key environmental considerations. They also claim the Crown failed to ensure that Aboriginal communities were fully consulted. Regardless of the outcome of the appeals, the challenges underscore the need to clarify Aboriginal consultation procedures.

Joint Review Panel Recommendation

After 180 days of public hearings, the Panel found that the Northern Gateway Project, if built and operated in compliance with the conditions set out in its report, would be "in the public interest." Federal Cabinet has 180 days following submission of the Panel report to make a decision on the project and order the National Energy Board to issue certificates for the project or to dismiss the application.

Gitga'at First Nation and Others File Legal Challenges

With 14 reserves located along the proposed shipping route of the project, the Gitga'at First Nation has become the most recent group hoping to forestall the Government's expected approval of the project by filing a legal challenge. Gitga'at's Notice of Application alleges that the project's environmental impacts threaten Gitga'at social, cultural and economic well-being. It also alleges that the Crown cannot rely on the Panel process to satisfy its duty to consult. Lawyers for the Gitga'at state that the Gitga'at have not surrendered their Aboriginal rights and title through treaties. The lawyers have asked the Federal Court to overturn the Panel's findings or, failing that, to refer the outstanding issues back to the Panel for its consideration and resolution.

Some 10 environment groups and First Nations communities have filed legal challenges with the Federal Court and the Federal Court of Appeal (it is unclear which court has jurisdiction). Other applications made include those by the Haisla Nation, Gitxaala Nation, the Federation of B.C. Naturalists, the Environmental Law Centre at the University of Victoria on behalf of B.C. Nature, and Ecojustice on behalf of ForestEthics Advocacy, the Living Oceans Society and the Raincoast Conservation Foundation.

Impact of Pending Appeals on Cabinet Decision Uncertain

It is uncertain whether the pending appeals will delay a final Cabinet decision on the Northern Gateway Project. The federal Government has several options: (i) it could accept the Panel's recommendation and direct the National Energy Board to issue certificates of public convenience and public necessity; (ii) it could direct the National Energy Board to dismiss the Northern Gateway application; or (iii) it could order the National Energy Board to reconsider the recommendation or any of the conditions.

The federal Government has stated that it intends to continue to consult with Aboriginal groups after the issuance of the Panel report. In light of this stated intention to continue Aboriginal consultation, it will be interesting to see how the courts deal with the issue of adequacy of consultation.

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