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CHARITIES IN THE SPOTLIGHT: THE RULES OF THE GAME

From the outset of the public hearings on the proposed Northern Gateway project, there has been much controversy over the scope and extent of participation. A flashpoint of this controversy has been the role (actual or purported) of environmental charities in the hearing process. In this article, we’ll discuss the law of charities, including limitations on charities’ activities, in the context of the Northern Gateway regulatory process.

What is a charity?

In Canada, charitable status is tied primarily to tax considerations, as registered charities are exempt from paying income tax and can issue charitable receipts for donations they receive, meaning their donors can claim income tax deductions. However, there is no “Charities Act” or other piece of legislation that is solely focused on charities. Canadian charities law has its roots in British common law¹ and is predominantly legislated as part of the federal *Income Tax Act*.² There is no definition of “charity” or “charitable” in the *Income Tax Act*. Common law decisions from both Britain and Canada have been used to provide guidance in determining whether an organization is a charity or its activities are charitable. Not every group or organization that

operates on a not for profit basis or carries on activities aimed at benefiting others is a charity. To claim legally sanctioned charitable status, an organization must register with the Canada Revenue Agency (CRA) as a charitable organization. To qualify for registration as a charity, an organization must have objects that are solely charitable and carry out activities that support those objects. It must show that it uses all its resources, which include money, staff, volunteers and property, to carry out those activities and must also show that its objects and activities provide a measurable benefit to the public as a whole or a significant segment of the public.³ Based on the common law guidance referred to above, there are four broad categories of charitable purpose:⁴

- advancement of religion; and
- other purposes beneficial to the community.

Both the CRA and the courts refer to these four categories and previous examples of registered charities to determine whether a particular organization qualifies as a charity.

Charities & “political activity”

Registered charities have to play by rules that don’t apply to the average Canadian or other organizations (including corporations). One of these is a CRA policy on political activities.⁵ Charities are allowed to carry on some political activity in pursuit of their charitable objects. The policy sets out three categories of activities in relation to political activity, as illustrated below:⁶

- poverty relief;
- advancement of education;

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By Cindy Chiasson, *Executive Director*





Prohibited activity

- Illegal activity
- Partisan political activity: direct or indirect support for/opposition to any political party/candidate
- None allowed



Political activity

- Non-partisan; connected & subordinate to charity's purposes
- Seeking to change/oppose/retain a law/policy/government decision through:
 - Public call to political action (contact an elected official to urge action)
 - Public communications
 - Explicit statement of intent
- Limit of 10% of annual resources (financial assets; staff, volunteers, premises, equipment)



Charitable activity

- Doesn't fall into other 2 categories
- Related to issue(s) connected to charity's purposes
- Must be well-reasoned; no false/inaccurate/misleading information
- No limits

While the CRA policy document is long, the line it sets out between political activity and charitable activity is not clear. It appears that the presence of a call to political action is a key element that would push an otherwise charitable activity into the political realm. The CRA defines a “call to political action” as “...an appeal to the members of the charity or to the general public, or to segments of the general public, to contact an elected representative or public official to urge them to retain, oppose or change the law, policy or decision of any level of government.”⁷

However, communication by a charity with the public and with elected and other government officials is an accepted part of charitable activity under the CRA policy document. This can include public awareness campaigns, direct communication with elected and government officials, and public release of submissions to government. These types of activities must:⁸

- relate to an issue or issues connected with the charity’s purpose;
- be well-reasoned and not contain false, misleading or inaccurate information; and
- not make an explicit call to political action.

A charity’s communications to elected and government officials can include positions that a law, policy or government decision be changed, retained or opposed and are considered part of the charitable activities, as long as they are not the main focus on the charity, relate to an issue tied to the charity’s purposes and are well-reasoned.

There are charities participating in the Northern Gateway pipeline hearing and charities have participated in regulatory and court proceedings in the past. Whether such activity is part of their ongoing charitable activities, which are unlimited, or permitted political activity, for which they can use up to 10% of their annual resources, is an organization by organization determination. It depends on the specific charity’s purpose and objects, as well as the scope of their activities in the particular proceeding. Where a charity participates in a hearing as a participant, presenting material on an issue related to its charitable purpose, it would likely be considered part of its charitable activity. If these activities included an explicit call to political action by the public, the activity would then likely be considered to be political activity.

Confused yet? As mentioned above, the lines in this area aren’t particularly clear. However, remember that charities are allowed to carry out some political activity, as discussed above.

Charities & accountability

Since the start of the Northern Gateway hearing, there has also been much ado around the accountability of charities, particularly in relation to foreign funding. In this context, it’s important to understand that Canadian charities are not prohibited from receiving funds from donors or other sources outside Canada. So what disclosure and funding requirements must Canadian charities meet?

While registered charities are exempt from payment of income tax and thus do not file income tax returns, they are required to file an annual “Registered Charity Information Return” that provides a broad range of information about their activities and finances.⁹ Within the information return, a charity must indicate whether it carried out any political activities (the 10% referred to above) and if so, the total amount spent on those activities. In relation to foreign funding, in the information return a charity must indicate:

- any donations or gifts of \$10,000 or more received from a donor not resident in Canada; and
- the total amount of non-tax receipted revenue (e.g., grants, business revenue, investments) from all sources (both government and non-government) outside Canada.

In its 2012 budget, the federal government has proposed expanding the information requirements for charities in relation to political activity and foreign funding:¹⁰

...Budget 2012 does propose certain amendments to ensure that all funding intended for political activities is reported in a charity’s annual information return. Budget 2012 also proposes to increase transparency by requiring more information about political activities, including the extent to which funding from foreign sources is used to carry on political activities.

As of the time of writing, the federal government had not yet made public the specific changes it intends to make to these information requirements.

Information about registered charities, including their past Registered Charity Information Returns, is searchable online through the Canada Revenue Agency’s website at <http://www.cra-arc.gc.ca/chrts-gvng/listngs/menu-eng.html>. •

¹ *Charitable Uses Act, 1601*, 43 Eliz. 1, preamble; see also *The Commissioners for Special Purposes of the Income Tax Act v. Pemsel*, H.L.(E) (1891), reproduced in Arthur B.C. Drache, Q.C., *The Charity & Not-For-Profit Sourcebook* (Toronto: Thomson Carswell, 2006) at 2-14.

² RSC 1985, c. 1 (5th Supp.).

³ Canada Revenue Agency, “What is charitable?”, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/cpc/wtc-eng.html>.

⁴ Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, Reference Number CPS-024 (Canada Revenue Agency, 2006), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/plcy/cps/cps-024-eng.html#footnote1>.

⁵ Canada Revenue Agency, *Policy Statement: Political Activities*, Reference Number CPS-022 (Canada Revenue Agency, 2003), online: Canada Revenue Agency http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html#P193_18869.

⁶ For a more detailed explanation of charities and advocacy activity (including political activity), see *Influencing Public Policy: Rules for Charities Engaging in Advocacy* (Calgary: Calgary Chamber of Voluntary Organizations, 2010), online: Calgary Chamber of Voluntary Organizations http://www.calgarycvo.org/sites/default/files/resources/In_Brief_7_Updated_May2010.pdf.

⁷ *Supra* note 5, Appendix I – Definitions, “Call to political action”.

⁸ *Ibid.*, section 7.

⁹ Canada Revenue Agency, *Registered Charity Information Return* (Form T3010), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/E/pbg/tf/t3010-1/t3010-1-10e.pdf>.

¹⁰ Canada Revenue Agency, *Message from the Director General: Budget 2012 – Transparency and Accountability*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdgt/2012/dgltr-eng.html>.



NORTHERN GATEWAY PROJECT: AN EXPLANATION OF THE JOINT PANEL REVIEW PROCESS

There has been a lot of media coverage lately regarding the Northern Gateway Project. There has been talk about foreign funding of environmental groups, allegations of intervenors abusing process, concerns about excessively long process and so forth. But what is the hearing really about? What is being decided? Who is making the decision?

A description of the Northern Gateway Project

The Northern Gateway Project (the “Project”) is designed to allow transportation of petroleum products from northern Alberta oil-sands facilities to the B.C. coast and, ultimately, to Asian and other markets. This involves the construction of two pipelines and a marine terminal.

Each pipeline is anticipated to follow a route from Bruderheim in northern Alberta to Kitimat in northern B.C. covering about 1,170 km. It is anticipated that the majority of both pipelines will be buried up to 1 metre below ground although, in some instances, the pipelines will run above water crossings. One pipeline is designed to carry an average of 525,000 barrels per day of petroleum products. The other pipeline is designed to carry an average of 193,000 barrels per day of condensate (which is used to thin petroleum products for pipeline transport). The proposed pipeline route crosses over a small amount of private lands, over public lands and over lands claimed by various Aboriginal groups. It also passes through portions of the Great Bear Rainforest.¹

The marine terminal associated with the pipelines will be located in Kitimat, B.C. at the eastern end of the Douglas Channel. It is anticipated that the marine terminal will have two ship berths and 14 storage tanks (for condensate and petroleum). The proposed tanker routes will pass through a portion of the Great Bear Rainforest and through marine areas surrounding the Haida Gwaii islands.²

An explanation of the process

The Northern Gateway Project hearing is being conducted by the National Energy Board (the “NEB”) and is a combination of several distinct processes. Firstly, the NEB is considering an application under the *National Energy Board Act*³ for a Certificate of Public Convenience and Necessity. Secondly, the NEB has been appointed as

a Joint Review Panel under the *Canadian Environmental Assessment Act*.⁴ Finally, the Government of Canada is relying upon the consultation effort of the proponent and the Joint Review Panel to discharge its duty to consult with Aboriginal groups.

National Energy Board Act

Interprovincial and international natural gas, oil and commodities pipelines are regulated by the NEB.⁵ In this case, a Certificate of Public Convenience and Necessity must be issued by the NEB to allow the Project to proceed.⁶ In making its decision, the NEB may consider several factors including any public interest that may be affected by the grant or refusal of the certificate. Ultimately, a certificate may be issued subject to any terms or conditions that the NEB considers necessary or desirable for the public interest. While the term “public interest” is not defined in the *NEB Act*, the NEB states in its mandate that the “public interest is inclusive of all Canadians and refers to a balance of environmental, economic and social considerations that changes as society’s values and preferences evolve over time.”⁷

As indicated in its *Filing Manual*,⁸ the NEB does consider environmental and socio-economic effects of proposed projects. The NEB’s objectives for environmental and socio-economic assessment are that:⁹

- the potential effects of projects receive thorough consideration before any decisions on the project are made allowing a project to proceed;
- projects are not likely to cause significant adverse effects or contribute to significant adverse cumulative effects;
- there is an opportunity for meaningful public and Aboriginal participation; and
- the NEB’s process and decisions are transparent and reflect the input received from those participating in the environmental assessment and regulatory review process.

It should be remembered that under the *NEB Act*, the NEB is determining whether the proposed project is in the public interest. This means that it can consider factors other than environmental effects of the proposed project, such as, direct socio-economic effects.

By Brenda Heelan Powell, *Staff Counsel*

Ultimately, the NEB’s decision to issue a Certificate of Public Convenience and Necessity is subject to the final approval of the Governor-in-Council (i.e. the Governor General acting on the advice of the Federal Cabinet).



Canadian Environmental Assessment Act (CEAA)

Because decisions regarding issuance of a Certificate of Public Convenience and Necessity trigger *CEAA*, the NEB is a Responsible Authority¹⁰ under *CEAA* and must conduct an environmental assessment in accordance with *CEAA*.¹¹ It should be noted that the NEB is not the only Responsible Authority for the Project. Other Responsible Authorities include Fisheries and Oceans, Transport Canada and Indian and Northern Affairs Canada (i.e., these governmental departments will also be required to make decisions pertinent to the Project).¹² The NEB has been appointed by the Minister of Environment to be a Joint Review Panel to conduct the environmental assessment under *CEAA* on behalf of all the Responsible Authorities.

The factors that must be considered in an environmental assessment under *CEAA* are set out in the Act.¹³ These include:

- the environmental effects of the project including cumulative environmental effects;
- the significance of the environmental effects of the project;
- comments from the public;
- measures that are technically and economically feasible and that would mitigate any significant environmental effects of the project; and
- any other relevant matter, such as need and alternatives.

The environmental assessment may also consider community knowledge and aboriginal traditional knowledge.¹⁴ Community knowledge is that information held by community members – such as farmers, hunters, fishers and naturalists – who are familiar with the environment

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in a specific geographic area. Aboriginal traditional knowledge is that knowledge held by and unique to aboriginal peoples.

Ultimately, under *CEAA*, the environmental assessment is trying to determine whether a project:

- is not likely to cause significant environmental effects; or
- is likely to cause significant environmental effects that can be justified in the circumstances.

At the end of the hearing, the NEB (as Joint Review Panel) will report to the federal Minister of Environment on its findings in the environmental assessment process. The NEB (as Joint Review Panel) only makes recommendations to the Minister and other Responsible Authorities under *CEAA*. Each Responsible Authority must take the Joint Review Panel Report into consideration when making its decision regarding the Project. It is possible that the other Responsible Authorities, with the approval of the Governor-in-Council, could disagree with the findings made by the NEB (as Joint Review Panel).

Joint Review Panel Agreement

The framework for the hearing is set out in the *Joint Review Panel Agreement*.¹⁵ This agreement identifies the various Responsible Authorities for the Project and establishes the NEB as the Joint Review Panel. It also deals with administrative matters such as establishing a public registry, administering a participant funding program and required process steps.

This agreement details the scope of the project to be reviewed by the NEB. The project scope includes the construction, operation, decommissioning and abandonment of:

- two pipelines and associated infrastructure (such as pump stations, roads, electrical power requirements);
- tunnels through North Hope Peak and Mount Nimbus to facilitate crossing of the Coast Mountains by the pipelines;
- two marine loading and unloading berths; and
- all related works and activities (such as temporary work camps, temporary access roads, bridges and watercrossings, water withdrawals).

The project scope also includes consideration of the proposed marine transportation of oil and condensate within the Douglas Channel to Camano Sound, Hecate Strait and the proposed shipping routes within the limits of the Territorial Sea of Canada.

This agreement also lists the factors to be considered in the review by the NEB. These include all factors listed by *CEAA* (see discussion above). In addition, the NEB must consider:

- need for the project;
- alternatives to the project;
- community knowledge and Aboriginal traditional knowledge;
- measures to enhance any beneficial environmental effects; and
- environmental protection, environmental monitoring and contingency and emergency response plans.

The agreement indicates that the Government of Canada will be relying upon the consultation effort of the proponent and the Joint Review Panel process to assist in meeting the Crown's duty to consult with Aboriginal peoples.

Who makes the ultimate decision on the Project?

As discussed, the NEB is fulfilling two roles in this hearing:

- acting in its own regulatory capacity to determine whether or not to issue a Certificate of Public Convenience and Necessity; and
- acting as the Joint Review Panel to conduct the environmental assessment under *CEAA* on behalf of all the Responsible Authorities.

The NEB may decide, as regulator, that a Certificate of Public Convenience and Necessity should not be issued. If that is the case, the Project has been rejected by the NEB and cannot proceed.¹⁶ On the other hand, if the NEB decides that the Certificate should be issued, the Project may proceed only with the approval of the Governor-in-Council.

In contrast to its role as regulator under the *NEB Act*, the NEB (as Joint Review Panel) cannot outright reject the Project under *CEAA*. If the NEB decides that the Project causes significant adverse environmental effects, the other Responsible Authorities can still decide

that the adverse environmental effects can be justified in the circumstances and that the Project should be allowed to proceed (albeit only with the approval of the Governor-in-Council). However, the Project can still only proceed if the NEB (as regulator) recommends that the Certificate of Public Convenience and Necessity be issued.¹⁷

Get more information

More information about the Enbridge Northern Gateway Project can be found on the National Energy Board website <http://gatewaypanel.review-examen.gc.ca/clf-nsi/index.html>. The website includes all documents that have been filed in the application and proceeding to date. The project proponent also has a website <http://www.northerngateway.ca>. Concerns that have been raised by First Nations groups, community groups and ENGOs are discussed at <http://pipeupagainstenbridge.ca>. •

¹ See National Geographic map at <http://ngm.nationalgeographic.com/2011/08/canada-rainforest/rainforest-map>.

² *Ibid.*

³ *National Energy Board Act*, RSC 1985, c. N-7 ("NEB Act").

⁴ *Canadian Environmental Assessment Act*, SC 1992, c. 37 ("CEAA").

⁵ See definition of "pipeline" in the *NEB Act*, *supra* note 3.

⁶ *Ibid.*, *NEB Act* at s. 52.

⁷ See *Protecting Canadians and the Environment: Overview of the National Energy Board's Mandate and Regulatory Framework* on the NEB website at <http://www.neb-one.gc.ca>.

⁸ National Energy Board, *Filing Manual* (Calgary: National Energy Board, 2004). See Chapter 4.2, Guide A.2 – Environmental and Socio-economic Assessment.

⁹ *Ibid.* at page 4A-17.

¹⁰ A responsible authority is a federal authority that is required by *CEAA* to ensure that an environmental assessment of the project is conducted. A federal authority becomes a responsible authority when it is required to make a decision in relation to the project (for example, the federal authority is a project proponent, a project funder, administers federal lands associated with the project or issues certain permits/approvals for the project).

¹¹ *Law List Regulations*, SOR/94-636 which are promulgated under *CEAA*.

¹² The *Joint Review Panel Agreement*, *infra.* note 15, lists the Responsible Authorities.

¹³ *CEAA* at s. 16, *supra* note 4.

¹⁴ See the *Glossary* under the Policy & Guidance section on the Canadian Environmental Assessment Agency website at <http://www.ceaa.gc.ca>.

¹⁵ The agreement can be found online at <http://gatewaypanel.review-examen.gc.ca/clf-nsi/index.html>.

¹⁶ It should be noted that the recent federal budget bill, if passed, will amend the *NEB Act*. The NEB will no longer be able to reject projects; rather, the NEB will make recommendations to Cabinet. The ultimate decision to approve or not approve a particular project will rest with Cabinet.

¹⁷ See comment at note 16.

ASSESSING ENVIRONMENTAL RISKS: PART SCIENCE, PART ASSUMPTIONS, AND PART PERSPECTIVE

By Jason Unger, *Staff Counsel*

The Northern Gateway Project is the subject of a Joint Review Panel struck pursuant to the *Canadian Environmental Assessment Act (CEAA)* and the *National Energy Board Act*.¹ The hearing (and the resulting Joint Review Panel report) will be used to inform federal Responsible Authorities whether to approve the pipeline. If the “project is **likely to cause significant adverse effects** that cannot be justified in the circumstances” when mitigation measures are taken into account, the Responsible Authority is prohibited from issuing its authorization.

The question then becomes, on what basis is the “significance” and “likelihood” of the environmental impact framed? Guidance to the determination of “significance” in the context of *CEAA* can be gleaned from the Canadian Environmental Assessment Agency - *A Reference Guide for the Canadian Environmental Assessment Act: Determining whether a project is likely to cause significant adverse environment effects*.²

The determination of significance and likelihood of an impact is informed by the environmental impact assessment report produced by the proponent. Scrutiny of the report occurs through the Joint Review Panel hearing and public input. The determination of “significance” primarily relates to the magnitude of effects on the environment or the gravity of environmental harm (if one rolls in the adverse nature of the impact). This includes the extent, duration, frequency and ecological context of the impact.³ The approach taken to quantifying impact includes reference to environmental standards, guidelines and objectives, where available, and/or a quantitative risk assessment of potential harm where sufficient scientific knowledge exists to assess impacts in this manner.⁴ It is important to recall that *CEAA* indicates that the significance of potential harm is to be considered in light of proposed mitigation measures.

The “likelihood” determination is derived by conducting a probabilistic risk assessment, which may include an articulation of the probability of an adverse event occurring in light of any uncertainty that may be identified.⁵

This methodology typically includes statistical analysis and is based on a variety of assumptions.

Some problems with risk assessment

There are both process and content related concerns with risk assessment being used in project approval hearings. First, there is a process issue as it relates to the quantification, assumptions and complexities of risk being undertaken by the proponent rather than being independently generated. This creates difficulties in assessing how risk assessments are conducted and thwarts public participation and review of the proponent’s perspective on environmental risks.⁶ While the hearing process may allow for more fulsome assessment of risk and critique of the proponent’s risk assessment, the issue remains highly complex and may include significant subjective (albeit expert) perceptions of risk that may be difficult to isolate.

The proponent proclamation of having taken a conservative approach to risk assessment is standard and often requires intensive commitment and resources to challenge. The intricacies and complexity of rigorous risk assessment often make it an “ivory tower” assessment that is not readily evaluated by the general public, even those with significant resources.

When evaluating a risk assessment one must closely and thoroughly review:

- assumptions that are made as part of the assessment;
- the nature and efficacy of mitigation measures; and

- the nature of uncertainty that typically pervades analysis of ecological risks. How is uncertainty characterized, if at all? Are different statistical models used to inform the nature of uncertainty (such as Bayesian analysis or informational theory)?



This issue of uncertainty is one that is not easily overcome. As noted by the International Nuclear Safety Group of the International Atomic Energy Agency in reference to uncertainty and risk based decision making:⁷

Some of the serious abnormal observations and events that have actually taken place were not predicted by existing analyses. It is thus necessary to recognize the uncertainties resulting from the incompleteness of the risk model. Scenarios might be left out because the analysts are not able to identify them or do not regard them as conceivable.

The science of cause and effect impacts on biological systems and ecosystems is rudimentary in most instances. The ability to understand nonlethal or chronic impacts on wildlife *in situ* is difficult to assess and typically carries significant assumptions. Existing research may be insufficient to inform risk assessment processes or may be inadequate to establish causal links between an activity or environmental harm and related ecological consequences. This, in turn, makes mitigation extremely

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difficult. Also, where an impact is likely on a specific species, the resulting ecosystem or broader ecological risks are often not well understood, if not completely ignored.

In light of scientific uncertainty we rely on expert opinion about potential impacts. This often turns into a battle of subjective perspectives between experts. This in itself presumes that scientific opinion on acceptable risk is what should govern the day. The characterization of what is an acceptable risk to a landowner will likely differ from that of an engineer, which will differ from that of a marine biologist.

Another difficulty in this process is the melding of mitigation measures in the determination of significance. This may prove problematic insofar as the Joint Review Panel and Responsible Authorities may rely excessively on mitigation measures that may be subject to significant, if not absolute, failures. As a stark example, the Fukushima reactor in Japan was protected by a tsunami wall. This mitigation measure proved grossly inadequate to deal with the inherent risks, according to a recent report.⁸

Finally, the assessment of the significance of harm, while informed by science, has a considerable subjective component in relation to what is acceptable.

Conclusion

The fallibility of humans in all our endeavours, whether it is steering a ship, drilling a well or conducting a risk assessment, must not be overlooked. Yet, this is the imperfect system on which our regulatory processes rely. An augmented form of risk assessment is captured by the precautionary principle (or precautionary approach), which advocates for proactive steps being taken to protect the environment even where uncertainty exists. In the environmental assessment process the precautionary principle may be embodied in a requirement that the decision-maker be cautious in its treatment of potential impacts where uncertainty exists. The *Canadian Environmental Assessment Act* mandates that consideration of projects takes place in a "careful and precautionary manner."⁹

Unfortunately this provision is not often reflected in Joint Review Panel decisions as there is typically an absence of fulsome analysis of uncertainty in relation to the likelihood and significance of impacts or whether mitigation measures are likely to be successful.

One might further note that the appropriate approach to risk assessment, where determining the "public interest," might be better dealt with through a thorough and rigorous assessment of public perception of risk (both in terms of probability and magnitude of harm). In this case, if one is to accept a recently reported survey which found that 52% of British Columbians oppose the Northern Gateway pipeline, presumably on some notion of the acceptability of risks, the project would be put into question immediately.¹⁰ •

¹ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 and the *National Energy Board Act*, R.S.C. 1985, c. N-7.

² Federal Environmental Assessment Review Office (Hull: Federal Environmental Assessment Review Office 1994), online: CEAA Registry <http://www.ceaa.gc.ca/D213D286-2512-47F4-B9C3-08B5C01E5005/Determining_Whether_a_Project_is_Likely_to_Cause_Significant_Adverse_Environmental_Effects.pdf>.

³ *Ibid.* at 190.

⁴ *Ibid.* at 191.

⁵ *Ibid.* at 193.

⁶ See Daniel J. Fiorino (US EPA) "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms" (1990) *Science, Technology and Human Values Science Technology Human Values* 15:2 at 226-243.

⁷ *A Framework for an Integrated Risk Informed Decision Making Process INSAG-25 (A report by the international Nuclear Safety Group)* (Vienna: International Atomic Energy Agency, 2011), online: International Atomic Energy Agency <http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1499_web.pdf> at 17.

⁸ See James M. Acton, Mark Hibbs, *Why Fukushima was Preventable*, (Washington, Carnegie Endowment for International Peace, March 2012), online: Carnegie Endowment for International Peace <<http://carnegieendowment.org/files/fukushima.pdf>>.

⁹ *Supra* note 1 at s.4.

¹⁰ Gordon Hoekstra, "More than half in B.C. oppose Northern Gateway pipeline, Poll suggests" *Vancouver Sun*, (12 April 2012), online: Vancouver Sun <<http://www.vancouversun.com/news/national/More+than+half+oppose+Northern+Gateway+pipeline+poll+suggests/6450274/story.html>>.

Gateway <<http://www.northerngateway.ca/project-details/regulatory-consultation-and-application/>>.

ENVIRONMENTAL LAW CENTRE NEWS BRIEF VOLUME 27 NUMBER 2, 2012

News Brief (ISSN 1712-6843) is published a minimum of four times a year by the Environmental Law Centre (Alberta) Society.

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SOME NOTES OF INTEREST REGARDING THE ENBRIDGE RISK ASSESSMENT

For a critique of the Enbridge risk assessment in relation to management of spills for the Northern Gateway pipeline and the terminal see a memorandum submitted by the Dogwood Initiative for the hearing process (Volumes 7B and 7C).¹ This critique concludes:²

There are major sources of uncertainty that are not adequately acknowledged and/or incorporated into the analysis. There are no evaluations of the effectiveness of prevention and mitigation measures in the context of the actual environment of the pipeline and marine terminal. There are no commitments by the proponent to research and development of prevention and mitigation measures.

Similarly, the approach to marine transport raises some additional questions. The probability of marine spills uses a quantitative risk assessment much of which is being completed as a part of Technical Review Process of Marine Terminal Systems and Trans-shipment Sites process.³ The probability assessment uses in part the Lloyd's register Fairplay Marine incident database (LRFP 2007) as cited in the Marine Assessment.⁴ It is interesting to note that a peer reviewed article published in 2010 found significant underreporting of marine accidents.⁵

The efficacy of mitigation must be considered in light of the assumptions made. These assumptions include:⁶

- Safe to commence initial response operations;
- The cause of the spill has no effect on the size or duration of the spill event; and
- No injuries are associated with the incident.

The hazard of a spill to ecological receptors is characterized with reference to studies arising from the Exxon Valdez oil spill (EVOS).⁷ What is not clearly articulated is whether the EVOS related oil is an accurate comparator to the oil being carried by the proposed pipeline, particularly in relation to polycyclic aromatic hydrocarbons (PAHs). Further, risks regarding chronic exposure to contaminants are outlined, yet there are numerous questions about the statistical power of relying on studies arising from EVOS. For instance, how are impacts of chronic exposure to migratory birds and animals characterized? Answering such a question requires in-depth analysis of the EVOS studies. Further questions include whether the relative abundance and frequency of species between the EVOS study area and the proposed area were considered. •

¹ See Swanson Environmental Strategies, "Review of Risk Assessment and Management of Spills – Pipeline and Kitimat Terminal: Northern Gateway Project", Three Memorandums from the Dogwood Initiative, June 15, 2011, (A29828,) online: Canadian Environmental Assessment Registry <<http://www.ceaa-acee.gc.ca/050/documents/50897/50897E.pdf>>.

² *Ibid.* at page 29/54.

³ Enbridge Northern Gateway Project, Section 52 application submission to the National Energy Board and the Canadian Environmental Assessment Agency, Section 52 Application Volume 8C: Risk Assessment and Management of Spills- Marine Transportation (2010), at page 11-19, online: Northern Gateway <<http://www.northerngateway.ca/project-details/regulatory-consultation-and-application/>> at page 3-1.

⁴ *Ibid.*

⁵ See Psarros G., Skjong R, Eide MS, "Under-reporting of maritime accidents" (2010). *Journal of Accident Analysis & Prevention* 42(2): 619-25.

⁶ *Supra* note 3. Enbridge Northern Gateway Project, Section 52 application submission to the National Energy Board and the Canadian Environmental Assessment Agency, Section 52 Application Volume 8C: Risk Assessment and Management of Spills- Marine Transportation (2010), at page 11-19, online: Northern Gateway <<http://www.northerngateway.ca/project-details/regulatory-consultation-and-application/>>.

⁷ *Ibid.* at 11-10.

DOUBLE DUTY OR DOUBLE TROUBLE?

SUPER-BOARDS WILL STRUGGLE WITH APPROPRIATE PARTICIPATION

What does "one project-one review" mean to you? Federally and provincially, the future will see the consolidation of multiple agency processes under large energy regulators. Federally, the 2012 budget bill would see the National Energy Board's application process for federally certified energy projects take the place of joint panel reviews involving multiple agencies.¹ In Alberta, the future Single Energy Regulator is anticipated to be responsible for oil and gas project approvals as well

as any required water licenses and surface access. Should environmental assessment be added to that list? The effect of a proposed project on the environment is a mandatory consideration for project approvals and discovering that effect is the purpose of environmental assessment.

Unfortunately, as exemplified by the Northern Gateway Pipeline debate, consolidated regulatory processes cause confusion as to what they are about. That causes confusion over who

should participate. Environmental assessment and project approvals have different purposes and therefore engage different interests.

Public participation is an expressed purpose of federal environmental assessment. Bill C-38 may erode that purpose but it doesn't eliminate it. Someone in Ottawa understands that



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restricting participation in environmental assessment to directly affected persons, as done in Alberta, is designed to fail. Much of the best “information or expertise” as contemplated by the new bill may come from parties with no direct interest. The approval stage is slightly different. Representations on outstanding environmental issues are necessary but arguments for restricting participation are harder to ignore. (see “How to Hijack a Hearing,” page 9).

So who will attend streamlined hearings? Under the proposed federal changes, the participants most able to establish that they are “interested parties” based on relevant information and expertise might be the same sophisticated environmental organizations that are purportedly undesirable. It might even be possible to boost the tiny percentage of participants that the environmental sector represents (see the following table). Pipeline hearings will continue to be large for the same reason as before: due to the objections of directly affected landowners, who by virtue of that status cannot be excluded. The persons most likely to be excluded include local stewardship groups, wildlife harvesters, recreationalists, migrants and regional communities. These are the exact persons who could support a project in principle, have the site-specific knowledge to make it better, and the local presence to assist with the follow up and enforcement contemplated by the new bill. I would not be surprised if “one-review” causes double trouble. •

How to get a federal pipeline certificate		
	Currently:	Under Bill C-38:
Conduct an Environmental Assessment:	Due to the involvement of a federal permitting agency.	<ul style="list-style-type: none"> If the project type is designated in a future regulation -and- <ul style="list-style-type: none"> The requirement is not waived by administrative discretion.
The assessment will cover:	A broad definition of effects.	“Environmental Effects” on: <ul style="list-style-type: none"> Fish and fish habitat Aquatic Species at Risk Migratory Birds Components of the environment designated by Cabinet
A purpose of the assessment is to “ensure opportunities for”:	<ul style="list-style-type: none"> timely and meaningful public participation throughout the environmental assessment process. [CEAA, Section 4(1)(d)]	<ul style="list-style-type: none"> meaningful public participation during an environmental assessment” [CEAA (2012), Section 4(1)(e)]
The review is conducted by:	A Joint Review Panel or the NEB	The NEB
Participants will include:	The “public”	Any “interested party”, meaning a person who: <ul style="list-style-type: none"> is “directly affected” -or- <ul style="list-style-type: none"> Has “relevant information or expertise”
The reviewer will consider:	“any public interest” that may be affected.	Considerations that are “directly related” to the project.
The reviewer can:	Deny the certificate -or- Grant the certificate if Cabinet approves that recommendation.	Cabinet will have the final say in all cases. This change could apply to reviews in progress.

¹ Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, 1st Sess., 38th Parl., 2011-2012.

FROM THE EDITOR

By Leah Orr, *Communications Coordinator*

What a busy spring we’ve had around the ELC. Between the provincial election, the Northern Gateway Pipeline review and the federal budget bill we’ve been hopping.



In my case, “hopping” means letting the lawyers read through 420+ pages of the budget bill and write about which rules apply to environmental charities. I let them look at the Northern Gateway approval process and summarize how it works (or doesn’t). In short, I let them do the heavy lifting.

This issue of *News Brief* is using the Northern Gateway Project as a case study to look at topics we’ve discussed in *News Brief* in the past year and issues currently in the news on environmental decision making. We hope you find it a valuable resource while considering the information and opinions being circulated.

If you have comments, questions or concerns (or ideas for future *News Brief* issues), contact me at lorr@elc.ab.ca. I always enjoy hearing from our readers.

Have a great summer!
Leah

HOW TO “HIJACK” A HEARING

By Adam Driedzic, *Staff Counsel*

Did environmental masterminds discover a loophole for grinding our country to a halt? Hardly. The participation rules for the Northern Gateway Pipeline hearings were set and clear. Here is a checklist for hopeful radicals:

Find out who runs the hearing

The hearings are conducted by a Joint Review Panel (JRP) of the National Energy Board and the Canadian Environmental Assessment Agency (CEA Agency). The NEB is an independent regulatory agency. The CEA Agency has delegated powers within the Ministry of Environment. All JRP members are deemed NEB members for the purpose of this review.

Find out what they say about participation

“The joint review process is designed to gather information from all viewpoints. The process is public and open to anyone who wishes to participate. The continued participation of all those affected by the Project is important to the Panel as it will consider all relevant information received in making its decision.”¹

(Joint Review Panel)

“Public participation is an important element of an environmental assessment process. It strengthens the quality and credibility of environmental assessments. . . . Review panels have the unique capacity to encourage an open discussion and exchange of views. They also inform and involve large numbers of interested groups and members of the public by allowing individuals to present evidence, concerns and recommendations at public hearings.”²

(CEA Agency)

“The level of public engagement should be appropriate for the setting and the nature and magnitude of each project. . . . The NEB processes are designed so that decision makers are presented with the complete range of views required to make fully-informed decisions in the Canadian public interest.”³

(National Energy Board)

Learn their rules

The Joint Review Panel Agreement (JRP Agreement) provides that: “The Panel will conduct its review in a manner which will facilitate the participation of the public and Aboriginal peoples, and enable them to convey their views on the project to the Panel by various means.”⁴ The Agreement provides that the review will consider community knowledge and Aboriginal traditional knowledge in accordance with the *Canadian Environmental Assessment Act (CEAA)*.⁵ It further provides that the JRP will consider all evidence about the potential impact of the project on Aboriginal rights and interests provided Aboriginal peoples, other participants, federal authorities and provincial departments.⁶

Participants may choose the manner in which they wish to participate in the project review. These options are set in the Hearing Order as:⁷

- Oral statements (with advance registration);
- Letters of comment;
- Intervenors; and
- Government participants.

Intervenors and Government Participants have the full rights of parties and are included on the List of Parties (see table page 10).

The JRP Agreement is structured to meet the legislated responsibilities of the NEB and the CEA Agency.

Participation under the CEA Agency is governed by *CEAA*.⁸ Public participation is an expressed purpose of *CEAA* (see Table, page 8).⁹ Meeting this purpose includes considering “community knowledge and aboriginal traditional knowledge” in conducting environmental assessments.¹⁰ The degree of participation follows the depth of the assessment. Most *CEAA* assessments offer no legal rights to participate. The rarest and largest form of assessment is a review panel. Review panels are reserved for projects that may cause significant adverse environmental effects or a high degree of public concern. Review panels must “hold hearings in a manner that offers the public an opportunity to participate in the assessment.”¹¹ An alternative to review panels is to “substitute” the review process of another federal authority that would need to issue a permit for the project,¹² or, as with the Northern Gateway Pipeline, two federal authorities can enter a JRP agreement.¹³ The condition for using JRPs, or substitution, is that “the public will be given an opportunity to participate in the assessment.”¹⁴

Participation at the NEB is governed by the *National Energy Board Act*.¹⁵ The NEB is not automatically required to hold hearings, but a hearing will be necessary on big pipeline applications. Hearings are mandatory for pipelines where written statements in opposition have been filed by persons whose lands may be directly affected.¹⁶ These filers have a right to a hearing unless their statement is “frivolous or vexatious or is not made in good

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faith.”¹⁷ The NEB must also consider, but not necessarily hold a hearing on, “the objections of any interested person.”¹⁸ “Interested person” was not defined in legislation before Bill C-38. The NEB decides who is an interested person. Some interested persons can be identified through the consultation programs that project proponents must conduct as part of their application.¹⁹ The expectations for consultation provide guidance on the information that the NEB would typically need to make its decision on a proposed project. However, consultations that are aimed at persons with directly affected interests in land do not catch all interested persons. Where the NEB requires the application to include an environmental and socio-economic assessment, it expects an “opportunity for meaningful public and Aboriginal participation.”²⁰ Determining the significance of the project’s impact requires public input into “the project” and into the “the environmental and socio-economic setting.”²¹ The NEB’s current approach at the certificate stage is to allow for broad public scrutiny of the proposed project so as to catch all interested persons. After a certificate is issued there may be further hearings on the route details. The NEB must consider filed statements before approving the route details but it has the power to deny interventions on broader concerns.²²

The NEB makes its own rules for hearing participants.²³ It decides whether to hold an oral or written hearing and may consider submissions on the appropriate process.²⁴ The hearing process is set by a Hearing Order. The issues for the hearing are set by NEB to:

- address matters not sufficiently raised by filed documents;
- assist the NEB; and,
- assist the parties in participating more effectively.

Like the JRP, the NEB may accept letters of comment and oral submissions, but the only persons who can become true parties to the proceeding will be landowners, other holders of directly affected interests in land, and those who qualify as “intervenor.” These parties can lead evidence, make arguments, conduct cross examinations and be required to respond in turn. “Interested persons” who wish to become “intervenor” must file an application justifying this status, the issues they intend to address and the relevance of those issues.²⁵ Parties who object to the intervention may file an objection.²⁶ The NEB may request submissions from other parties on the necessity or desirability of interventions.²⁷ The NEB may accept or disallow the intervention.²⁸ The NEB Rules may be varied by the NEB at any time in a proceeding “where considerations of public interest and fairness so require.”²⁹ Time limits and variations of time limits must consider the fair conduct of proceedings.³⁰

In sum, the JRP framework combines the participatory goals of CEAA with the role categorization and process controls of the NEB Rules. The JRP should be able to reap the benefits of public participation without undue burdens on the process. The legislation in place at the time of the JRP Agreement and the Hearing Order enable this balancing. That balance happened to favor broad participation. If that were not the outcome, we would have to ask who the real hijackers are. •

¹ Hearing Order OH-4-2011 for the Northern Gateway Pipeline Project, 5 May 2011, (CEAA Registry reference number 06-05-21799), online: Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50073>>.

² Canadian Environmental Assessment Agency, Basics of Environmental Assessment, online: Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=B053F859-1#panel>>.

³ National Energy Board, *Public Participation and Land Matters*, online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/nvlvngthpblc-eng.html>>.

⁴ Joint Review Panel Agreement, (CEAA Registry reference number 06-05-21799), online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=39960_section_6.4>.

⁵ *Ibid.*, Terms of Reference, Part IV.

⁶ *Ibid.*, Section 6.5.

⁷ Hearing Order, *supra* note 1, section 7.1 – 7.3.

⁸ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. (CEAA).

⁹ *Ibid.*, s.4(1)(d).

¹⁰ *Ibid.*, s.16.1

¹¹ *Ibid.*, s.34(b).

¹² *Ibid.*, s.43. (1).

¹³ *Ibid.*, s40(1)(a)-(c), s.40(2).

¹⁴ *Ibid.*, s.41(e), 40(2), 43. (1) and 44(b).

¹⁵ *National Energy Board Act*, R.S.C. 1985, c. N-7. (NEBA).

¹⁶ See NEBA, *ibid.*, s.34,s.35.

¹⁷ *Ibid.*, s.34(5).

¹⁸ *Ibid.*, s.53.

¹⁹ National Energy Board, *Filing Manual* (Chapter 3.3 Consultation), online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/flngmnl/flngmnl-eng.html>>.

²⁰ See *Filing Manual, ibid.*, Guide A, especially Guide A-2.

²¹ *Ibid*, Guide A, Table A-3.

²² NEBA, *supra* note 15, s.36).

²³ *Ibid.*, s.8(b); *National Energy Board Rules of Practice and Procedure*, S.O.R./95-208 (NEB Rules).

²⁴ NEB Rules, *ibid.*, s.22. (1)(2).

²⁵ *Ibid.*, s. 28.(1)(c)(d); NEBA, *supra* note 15, s.25(1)(2)(3).

²⁶ NEB Rules, *supra* note 23, s.28(4)(5).

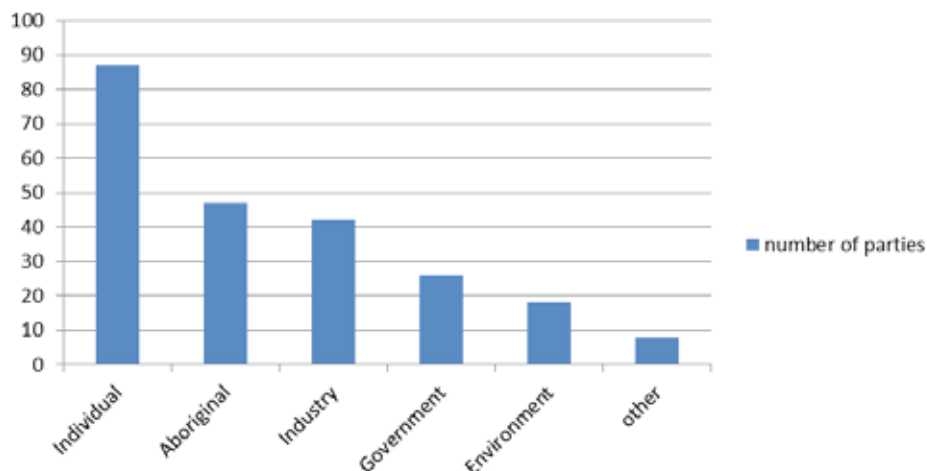
²⁷ *Ibid.*, s.26.

²⁸ *Ibid.*, s.28(3).

²⁹ *Ibid.*, s.4(1).

³⁰ *Ibid.*, s.5.

Parties to the Northern Gateway Pipeline Project Review



Data source: List of Parties (A30408), (CEAA Registry number reference number 06-05-21799), online: Canadian Environmental Assessment Agency

<http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=51421>