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**VIA ELECTRONIC FILING
TO FOLLOW BY FACSIMILE**

Secretary to the Joint Review Panel
Enbridge Northern Gateway Project
444- Seventh Avenue S.W.
Calgary, Alberta T2P OX8

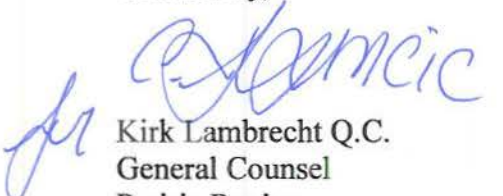
Attention: Ms. Sheri Young

Dear Madam:

**Re: Hearing Order OH-4-2011
Enbridge Northern Gateway Project
7 January 2013 Letter Requesting Heiltsuk Tribal Council to question
Government of Canada Witnesses**

Please find enclosed the Government of Canada's response in regards to the Panel's letter dated January 28, 2013, allowing the Federal Government Participants to provide comments by February 5, 2013 regarding the request by the Heiltsuk Tribal Council to question Government of Canada witnesses during the final hearing.

Yours truly,


Kirk Lambrecht Q.C.
General Counsel
Prairie Region
Department of Justice Canada

Encl.

cc: Parties to OH-4-2011

Northern Gateway Project

**Written Response of the Attorney General of Canada
to the Letter Dated January 7, 2013
from the Heiltsuk Tribal Council
Requesting Leave to Question Government Participants**

Contents

Overview 2

Facts 3

 Heiltsuk Tribal In-House Counsel Participation..... 3

 Federal Participation in the Panel Process 3

 Participation Methods Open to Government Organizations 4

 Participation Methods Selected by Federal Government Organizations 4

 Written Evidence Filed by the Government Participants 5

 Relationship Between Written Evidence and Cross Examination of Witnesses at the Final
 Hearings 6

Brief Submissions Re Criteria for Consideration 7

 Scope of Explanation for Delay in Making Request to Question..... 7

 Scope of Questioning..... 8

ENDNOTES..... 10

Overview

1. The Attorney General of Canada responds to a letter dated January 7, 2013, from Counsel for the Heiltsuk Tribal Council.¹ The Heiltsuk Tribal Council seeks leave of the Panel to allow questions of “the Government of Canada” during the questioning phase of final hearings in Prince Rupert. Time for seeking leave of the Panel to question expired on July 6, 2012; but the Panel provided a process for consideration of specific requests to question which were filed as late as August, 2012.² The request for leave explains that the law firm of Ng Ariss Fong is “Counsel for the Intervenor Heiltsuk Tribal Council (HTC)” and that “[w]e make this request past the deadline [for seeking leave to question Government Participants] “as we were recently been retained by HTC to act on their behalf for the questioning phase of the hearings and we therefore were unable to meet the filing deadline.”³
2. In its Hearing Order and Amending Order the Panel directs that requests for leave of the Panel to question Government Participants discharge an onus of proof by demonstrating the nature of the questions, the relevance of the questions to the proceeding, and why fairness requires the questions. Where an application is made late, the request should provide a justification for the delay.
3. In this instance, the request meets the criteria for questioning stated in the Hearing Order, so the issue addressed here is not whether the Hearing Order criteria have been met. Rather, the issue addressed here is what criteria should apply to consideration of a request to question which is made after the conclusion of the time provided in the Hearing Order for seeking leave to question. The Attorney General neither consents to nor opposes the Heiltsuk Tribal Council request to question.

Facts

Heiltsuk Tribal In-House Counsel Participation

4. Heiltsuk Tribal Council registered as an Intervenor on July 7, 2011. The Registration filed at that time indicated that it was unknown whether any person would be speaking on its behalf.⁴ However, Heiltsuk Tribal Council appears to have been advised by In-House Legal Counsel at all material times in 2012.⁵ During 2012, In-House Legal Counsel for the Heiltsuk Tribal Council brought a motion to the Panel to file late evidence,⁶ communicated with the Panel respecting witness lists for final hearings,⁷ scheduling of community hearings,⁸ and the venue of the community hearings.⁹ By August 1, 2012, In-House Legal Counsel for the Heiltsuk Tribal Council had written to the Panel confirming the intention of the Heiltsuk Tribal Council to question witnesses at the final hearing.¹⁰

Federal Participation in the Panel Process

5. Paragraphs 6 to 17 of these submissions are duplicated from the submissions filed by the Attorney General in relation to the earlier requests to question Government Participants.¹¹ They are duplicated here for convenience, rather than being incorporated by reference, so that all of the submissions material to the Heiltsuk Tribal Council request are in one document.
6. At this stage of the regulatory review of the Enbridge Northern Gateway Project, Federal Government organizations participate in the Panel's process in order to provide to the Panel expert or specialist information or knowledge within their specific organizational mandates as applied to the List of Issues set out in the Hearing Order. This information is provided to assist the Panel in discharging its statutory mandate, and the obligations which fall to the Panel under the Joint Review Panel Agreement. In addition, the Crown has provided the Panel with documents containing information respecting the Crown's Aboriginal Consultation Framework for the Enbridge Northern Gateway Project.

Participation Methods Open to Government Organizations

7. Section 7.0 of Hearing Order OH-4-2011 provides that there are four options for participating in the joint review process:

1. submit a letter of comment;
2. make an oral statement;
3. become an Intervenor; or
4. become a Government Participant – federal, provincial, territorial or municipal government bodies.

Each option has a different type of involvement in the joint review process. Section 7.3.2 of the Hearing Order provides that “Government organizations may choose any of the participation methods outlined in this Hearing Order.”

Participation Methods Selected by Federal Government Organizations

8. None of the Federal Government organizations participating in the Panel process for review of the Enbridge Northern Gateway Project elected to participate by way of Intervenor status.
9. Five of the Federal Government organizations elected to participate by way of Government Participant status: Environment Canada,¹² Fisheries and Oceans Canada,¹³ Natural Resources Canada,¹⁴ Indian and Northern Affairs Canada¹⁵ and Transport Canada¹⁶ [“the Federal Government Participants”]. Section 7.3.2 of the Hearing Order, defines the status associated with the organizations of the Federal Government electing to participate as a Government Participant:

“Government Participant status allows you to:

- submit information requests to Northern Gateway;
- ask information requests of other Intervenors or Government Participants **with prior approval of the Panel;**
- submit evidence in written format;
- question Northern Gateway orally at the final hearings;
- question other Intervenors orally at the final hearings **with prior approval of the Panel;**

- receive all documents submitted in the joint review process, including notices of motion and related materials;
- participate in processes for notices of motion submitted; and
- submit final argument.

Government Participant status requires you to respond in writing to written information requests and answer oral questions during the final hearings (if Parties receive prior Panel approval to ask oral questions).”
[emphasis in original]

10. Other organizations of the Government of Canada intend to participate by way of Letter of Comment.¹⁷ Letters of Comment are due by August 31, 2012. The National Energy Board describes Letters of Comment as follows:

“Letters of comment will be taken into consideration during the hearing process. They will not be considered sworn evidence and are not subject to questioning. As a result, letters of comment may not be given the same weight as sworn evidence in a hearing, although the weight of the letters depends on a number of factors, including the content. All letters of comment become public documents once they have been submitted. They will be available on the NEB website and copies are sent to all parties participating in the hearing.”¹⁸

Written Evidence Filed by the Government Participants

11. Section 7.3.2 of the Hearing Order provides that Government Participants may submit evidence in written format. The Federal Government Participants filed Written Evidence relating to the expert or specialist information or knowledge within their Departmental mandates which may assist the Panel in the discharge of its mandate. The Federal Government Participants also collectively provided a narrative description of the Federal Government’s approach to Aboriginal consultation in relation to the Enbridge Northern Gateway Project as published in the Aboriginal Consultation Framework for the Enbridge Northern Gateway Project (2008). The Federal Government Participants subsequently responded to Information Requests from many Parties.

Relationship Between Written Evidence and Cross Examination of Witnesses at the Final Hearings

12. Within the Hearing Order procedures, Written Evidence is a material step in the development of subsequent phases of the public hearing process. The intent of the Hearing Order process is to allow “Parties”¹⁹ to tender evidence in writing, to obtain clarification on that evidence via Information Requests, and to test the evidence through cross examination.
13. Section 8.7 of the Hearing Order relates Information Requests *to the evidence submitted by Government Participants*:

8.7 Information Requests to other Parties

“Northern Gateway, Intervenors and the Panel may ask information requests on the evidence submitted by other Intervenors and Government Participants.” [emphasis added]

14. Similarly, section 8.9 of the Hearing Order relates questions asked of witnesses during the final hearings *to the evidence submitted*, and specifically limits the calling of new evidence.

“During the first part of the final hearings, Parties may ask oral questions about the evidence that has been submitted by other Parties during the joint review process. Parties may not present new evidence during the final hearings except in response to oral questions. The purpose of oral questions is to allow the Panel and Parties to “test” the evidence submitted.” [emphasis added]

15. Information Requests are described in section 7.3.1 of the Hearing Order

“An information request is a written question to another Party asking for additional information about or clarification of evidence already submitted.” [emphasis added]

16. Further, section 8.9 of the Hearing Order provides that Government Participants are required to answer oral questions during the final hearings if Parties seeking to question receive prior

Panel approval to ask oral questions. The Panel asks those who seek to question to Government Participants to demonstrate:

- the nature of the questions;
- the relevance of the questions to the proceeding; and
- why fairness requires the questions.

17. The Amended Hearing Order and Revised Hearing Schedule, dated January 27, 2012, also provides that Northern Gateway and Intervenors must file a request to obtain leave of the Panel to question a Government Participant orally during the final hearings. The following timeline was established to obtain leave of the Panel for this purpose:

- The request must be submitted to the Panel with a copy sent to all Parties by **6 July 2012**.
- A Government Participant may submit to the Panel a response to a request to be questioned and send a copy to all Parties by **20 July 2012**.
- The Party requesting the right to question the Government Participant may submit to the Panel a reply to the response of the Government Participant and send a copy to all Parties by **3 August 2012**.
- The Panel will then consider the request and give its decision.

Brief Submissions Re Criteria for Consideration

Scope of Explanation for Delay in Making Request to Question

18. The letter of January 7, 2013, does not provide an explanation for the delay between the time that In-House Counsel confirmed that the Heiltsuk Tribal Council would question at the final hearings, and the time that Ng Ariss Fong were retained for this purpose. In-House Counsel confirmed in August of 2012 that the Heiltsuk Tribal Council would question witnesses during the final hearings. At that time the Panel was providing a process for consideration of late requests to question Government Participants.

19. In Ruling No. 127, dealing with a late request to submit a letter of comment, the Panel stated that “[t]he Panel sets deadlines for submission of documents in order to be transparent, fair and consistent with all participants.”²⁰

Scope of Questioning

20. The letter of January 7 refers to ‘the federal government’s assessment of the proposed project’. The Panel is conducting an assessment of the proposed project. Government Participants provide the Panel with specialist or expert information or knowledge to assist the Panel in discharging its mandate.
21. The letter of January 7, 2013, uses the term ‘the federal government’ to describe the party to be questioned by the Heiltsuk Tribal Council. Under the Hearing Order, an Intervenor’s ability to question is related to Government Participants.
22. When granting leave to other Parties who sought to question Government Participants, the Panel stated the following condition:


“Where approval has been granted, it is on the condition that the questions that are asked be on the evidence filed and be about matters on the List of Issues.”²¹

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Edmonton, Alberta this 5th day of February, 2013.

William F. Pentney
Deputy Attorney General of Canada

Per:



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ENDNOTES

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- ¹ Letter from Ng Ariss Fong dated January 7, 2013: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624476/901371/D85-19-1 - Questioning of Government Participants 2013-01-07 - A3E6I4.pdf?nodeid=901585&vernum=0>.
- ² Late Requests to Question Federal Government Participants: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/849447/A231-1 - Late Requests to Question Federal Government Participants - A2X9C3.pdf?nodeid=849248&vernum=0>.
- ³ Letter from Ng Ariss Fong dated January 7, 2013: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624476/901371/D85-19-1 - Questioning of Government Participants 2013-01-07 - A3E6I4.pdf?nodeid=901585&vernum=0>.
- ⁴ Registration for Intervenor Status, <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/701584/D85-1-1 - Heiltsuk Tribal Councillor - Registration for Intervenor Status A2A4U5.pdf?nodeid=701585&vernum=0>.
- ⁵ Letter to Joint Review Panel, July 6, 2011, co-signed by Legal Counsel, Heiltsuk Tribal Council: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/830035/D85-9-1 - Heiltsuk Tribal Council - Heiltsuk Information Request Response No 1 July 6 12 - A2U7J3.pdf?nodeid=830036&vernum=0>.
- ⁶ Notice of Motion dated March 22, 2012: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/802585/D85-5-40 - Heiltsuk Tribal Council - 42- Notice of Motion 2012-03-22 - A2R5S5.pdf?nodeid=802820&vernum=0>.
- ⁷ Letter to JRP dated July 18, 2011 [sic] re Heiltsuk Nation Response to JRP Request to Identify Witnesses for Final Hearings: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/832411/D85-11-1 - Heiltsuk Tribal Council - Letter - A2V1A8.pdf?nodeid=832716&vernum=0>.
- ⁸ Letter dated July 6, 2011 [sic] re Heiltsuk Tribal Council (Heilstuk) – Schedule for Community Hearings: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/830104/D85-10-1 - Heiltsuk Tribal Council - Heiltsuk Schedule Community Hearings - Witnesses July 6 12 - A2U7J5.pdf?nodeid=830042&vernum=0> and <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/833073/D85-16-1 - Heiltsuk Tribal Council - Notice of Motion Change of Venue July 19 12 - A2V1Q5.pdf?nodeid=832964&vernum=0>.
- ⁹ Notice of Motion Signed by In-House Legal Counsel for the Heiltsuk Tribal Council: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/832811/D85-12-1 - Heiltsuk Tribal Council - Notice of Motion - Venue - A2V1I7.pdf?nodeid=832812&vernum=0>
- ¹⁰ Letter dated August 1, 2012 : <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/701668/835343/D85-14-1 - Heiltsuk Tribal Council - Letter - A2V4L3.pdf?nodeid=835344&vernum=0>

¹¹ Response of the Attorney General of Canada to Requests from Twenty-one Parties
For Leave of the Panel to Question Federal Government Participants

¹¹ During the Questioning Phase of Final Hearings at https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/718030/833053/E9-24-2_-_Government_of_Canada_-_Response_to_Requests_to_Question_Government_Participants_during_Final_Hearings_dated_July_20_2012_-_A2V1K9.pdf?nodeid=833057&vernum=0.

¹² Environment Canada: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/701810/701675/Environment_Canada_-_Declaration_of_Government_Participant_Status_-_A2A5C4.pdf?nodeid=701884&vernum=0

¹³ Fisheries and Oceans: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/701102/700898/Fisheries_and_Oceans_Canada_-_Declaration_of_Government_Participant_Status_-_A2A3Y7.pdf?nodeid=700899&vernum=0

¹⁴ Natural Resources Canada: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/702463/701994/Natural_Resources_Canada_-_Declaration_of_Government_Participant_Status_-_A2A5T6_.pdf?nodeid=702113&vernum=0

¹⁵ Indian Affairs and Northern Development: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/702552/702082/Department_of_Indian_Affairs_and_Northern_Development_-_Declaration_of_Government_Participant_Status_-_A2A5L7.pdf?nodeid=702083&vernum=0

¹⁶ Transport Canada: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624911/701712/701633/A2A4X0_-_Declaration_of_Government_Participant_Status.pdf?nodeid=701634&vernum=0

¹⁷ ORDER AO-001-OH-4-2011 (Amending Hearing Order OH-4-2011 established 31 August 2012 as the deadline for submitting a letter of comment. See: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/785932/A98-1_-_Amending_Hearing_Order_AO-001-OH-4-2011_-_A2L5W0.pdf?nodeid=785933&vernum=0

¹⁸ *The Public Hearing Process - Your Guide to Understanding NEB Hearings*, at <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pblchrng/pblchrngpmpht-eng.html>

¹⁹ Parties are defined in the Hearing Order as follows: “Parties” in this process means Intervenors, Government Participants, and Northern Gateway.

²⁰ Panel Ruling No. 127: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/891463/A301-1_-_Panel-Commission_-_Ruling_no._127_-_Notice_of_Motion_-_Late_Request_to_Submit_Letters_of_Comment_-_A3D8X4?nodeid=891464&vernum=0

²¹ Joint Review Panel Ruling on Questioning the Federal Government Participants: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/852299/A239-1_-_Panel-Commission_-_Ruling_on_Questioning_the_Federal_Government_Participants_-_A2Y5F1.pdf?nodeid=852469&vernum=0