

BACK TO THE DRAWING BOARD

Looking to have the federal decision on the Enbridge pipeline ruled 'invalid'

The next milestone in the ongoing effort to defend northern BC from oil pipelines and supertankers is just around the corner. This October, 13 applicants – Gitga'at First Nation; Gitxaala Nation; Haida Nation; Haisla Nation; Heiltsuk Nation; Kitasoo/Xai'Xais Nation; Nadleh Whut'en; Nak'azdli Whut'en; BC Nature; Forest Ethics Advocacy Association; Living Oceans Society; Raincoast Conservation Foundation; and Unifor – are taking Canada to court to challenge the federal cabinet's approval of Enbridge's Northern Gateway project and the Joint Review Panel's (JRP) report on which it is based.

The Respondents

The respondents to the legal challenges are the Attorney General of Canada; Northern Gateway Pipelines Limited Partnership; and the National Energy Board.

The Hearing

The hearing at the Federal Court of Appeal will take place in Vancouver on October 1–2 and 5–8, 2015. It is open to the public. The applicants will divide their submissions over three days and the respondents will have an additional three days for their arguments. There is no deadline for the Court to render its decision following these hearings, although it will likely provide a ruling in early 2016.

The Arguments

Each applicant's arguments are relevant to the specific nation or organization that they represent. The main arguments include: infringement of Aboriginal title and rights; breaches of the duty to consult and accommodate; inadequate JRP consideration of issues relating to First Nations; effects on wildlife; inadequate evaluation of the public interest, and; inadequate evaluation and response to risks and impacts.

West Coast Environmental Law has authored a paper summarizing the arguments presented in this case. The summary is available online at wcel.org.

The Ruling

The court may decide in favour of the applicants and declare cabinet's Northern Gateway approval invalid, or, the court may rule that cabinet's Northern Gateway approval and acceptance of the JRP report is valid.

If the court decides it is invalid, it will provide remedies. 'Remedies' are any direction, declaration, or penalties enforceable by the court and can include a wide range of requirements. In deciding on its remedies, the court will take the applicants' arguments and the respondents' rebuttals into consideration.

In 2012, the federal government passed an omnibus budget bill that made the process of challenging pipeline approvals more difficult. Rather than proceeding straight to the Federal Court, parties must now obtain judicial permission to bring their case (which the applicants have obtained already), and the case is heard at the higher-level Federal Court of Appeal. This eliminates one level in the appeal process. That means that, if the Federal Court of Appeal rules the federal approval is valid, any applicants that want to appeal the decision must apply to do so at the Supreme Court of Canada (SCC), Canada's highest court. If they were accepted, the case would then go to the SCC.

The best possible decision will be that the JRP decision and/or the cabinet approval is 'invalid' and the court will provide remedies that uphold the applicants' arguments. Essentially, this ruling would send Canada and Enbridge back to the drawing board, seriously delaying the project and potentially making the project unviable.