

FORM 301- Rule 301

NOTICE OF APPLICATION

Court File No. T-1863-06

FEDERAL COURT

BETWEEN:

David Luggi, Tribal Chief,  
on behalf of the Carrier Sekani Tribal Council,  
and on behalf of the members of the Carrier Sekani Tribal Council,  
the Burns Lake Band, Nak'azdli Band, Nadleh Whut'en First Nation, Saik'uz First Nation, Takla  
Lake First Nation, Tl'azt'en Nations, and the Wet'suwet'en First Nation

Applicants

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
As represented by  
the MINISTER OF THE ENVIRONMENT

Respondents

NOTICE OF APPLICATION

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act* R.S.C. 1985, c. F-7 and  
Rule 301 of the Federal Court Rules, 1998.

TO THE RESPONDENTS:

Her Majesty the Queen in Right of Canada, as represented by the Minister of the  
Environment

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the  
applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial  
Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by  
the applicants. The applicants request that this application be heard at Vancouver.

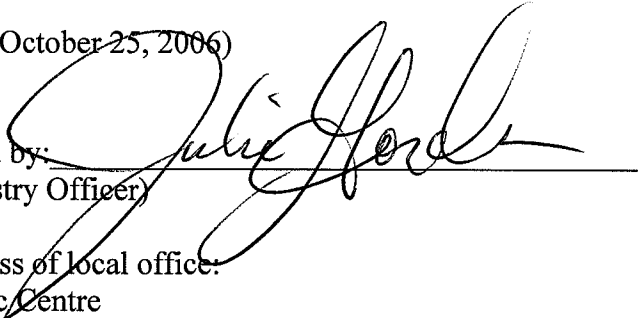
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the  
application or to be served with any documents in the application, you or a solicitor acting for  
you must prepare a notice of appearance in Form 305 prescribed by the Federal Court Rules,  
1998 and serve it on the applicant's solicitor, or where the applicant is self-represented, on the  
applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date October 25, 2006)

Issued by:  
(Registry Officer)

A handwritten signature in black ink, appearing to read "Julie Ford", is written over a horizontal line. The signature is fluid and cursive.

Address of local office:  
Pacific Centre  
P.O.Box 10065  
701 West Georgia Street  
Vancouver, British Columbia  
V7Y 1B6

TO:

The Minister of the Environment  
The Honourable Rona Ambrose  
Les Terrasses de la Chaudiere  
10 Wellington Street, 28<sup>th</sup> Floor  
Hull, Québec K1A 0H3

## APPLICATION

This is an application for judicial review of the Minister of the Environment's (the "Minister") decision dated September 29, 2006 to refer the Enbridge Gateway Pipeline and Marine Infrastructure Project (the "Project") to a Review Panel whereby the review of the Project will be conducted jointly with the National Energy Board (the "Joint Review Panel") pursuant to sections 25, 29 and 40(2) of the *Canadian Environmental Assessment Act* ("CEAA").

The applicant makes application for:

1. A declaration that the Minister has a constitutional duty to consult with the Carrier Sekani Tribal Council with respect to and prior to any decision as to the exercise of discretion pursuant to sections 25, 29 and 40(2) of the *CEAA*.
2. An order quashing the Minister's September 29, 2006 decision to assess the Project by Joint Review Panel with the National Energy Board.
3. An order for *mandamus* compelling the Minister to consult with the Carrier Sekani Tribal Council with respect to and prior to any decision as to the exercise of discretion pursuant to sections 25, 29 and 40(2) of the *CEAA*.
4. Such other order as this Honourable Court may deem appropriate; and
5. Costs.

The grounds for the application are:

### **Introduction**

1. The Carrier Sekani Tribal Council ("CSTC") represents seven First Nations, which are members of the CSTC. Those First Nations are the Burns Lake Band (Ts'il Kaz Koh First Nation), Nak'azdli Band, Nadleh Whut'en First Nation, Saik'uz First Nation, Takla Lake First Nation, Tl'azt'en Nations, and the Wet'suwet'en First Nation.
2. There are approximately five thousand individual members of the First Nations that make up the membership of the CSTC.
3. David Luggi is the elected Tribal Chief of the CSTC. He makes this application on his own behalf and as an elected representative of the CSTC, and seeks standing to make these legal submissions in the interests of the members of the CSTC.
4. Enbridge Gateway Pipelines Inc. ("Enbridge") proposes to construct a pipeline system between the Edmonton, Alberta area, and Kitimat, British Columbia. The pipeline would consist of a petroleum export pipeline, a condensate import pipeline, and a marine terminal (the "Project").

### **Duty to consult**

5. One third of the route (or, approximately 450 km) of the Project proposes to traverse the traditional territory of the CSTC, to which the member First Nations claim aboriginal rights and title. The Project proposes to significantly infringe upon CSTC claimed rights, title and interests.
6. Canada has knowledge of CSTC's claimed rights, title and interests. The CSTC filed a statement of intent with the British Columbia Treaty Commission in 1994. The CSTC is currently at stage four of treaty negotiations with British Columbia and Canada.
7. The proposed Project triggers statutory obligations for several federal agencies under the *CEAA*. In particular, the National Energy Board may issue a certificate under s. 52 of the *National Energy Board Act*; Transport Canada may grant leave under subsection 108(4) of the *National Energy Board Act* and may issue a permit under paragraph 5(1)(a) of the *Navigable Waters Protection Act*; Fisheries and Oceans Canada may issue an authorization under subsection 35(2) of the *Fisheries Act* and Indian and Northern Affairs Canada may provide access to federal lands for the purpose of enabling the project to be carried out.
8. Accordingly, Canada contemplates activity that might adversely affect CSTC claimed rights, title and interests. Canada therefore has a duty to consult with and if appropriate accommodate the CSTC in respect of the proposed Project.
9. The CSTC brings this application for Judicial Review because the Minister has refused to consult with the CSTC with respect to the exercise of her statutory discretion in making a significant decision that will have fundamental impacts upon the assessment of the proposed Project and the Project itself.

### **Statutory framework**

10. The proposed Project requires environmental assessment under the *CEAA*. Various federal agencies are Responsible Authorities under the *CEAA*. These include the National Energy Board ("NEB"), Transport Canada, Fisheries and Oceans Canada, and Indian and Northern Affairs Canada (the "Responsible Authorities").
11. On or about November 1 2005, Enbridge Gateway Pipeline Inc. ("Enbridge") submitted a Preliminary Information Package ("PIP") for the Project to the National Energy Board, the Canadian Environmental Assessment Agency and other federal departments.
12. In the PIP, Enbridge specifically suggested that "the Project be immediately referred to a review panel, and, further, that the Minister of Environment enter into an agreement with the NEB to establish a joint review panel pursuant to subsection 40(2) of the *CEAA*."
13. In advocating this proposed course, by letter dated January 9, 2006 to the NEB, Enbridge suggested that a Joint Review Panel could meet the Crown's obligations to consult and where appropriate accommodate First Nations who would be affected by the proposed Project.

14. By letter dated January 12, 2006 the CSTC wrote to the NEB and CEAA stating:

“We note that Enbridge requests in its PIP that a Joint Review Panel be established between the NEB and CEAA for the purposes of reviewing the proposed Gateway project. This would be a significant decision that should not be approached without full involvement of the CSTC. We ask that your staff do not discuss this proposal, nor take any further steps towards it without providing full information to the CSTC and inviting us to be involved in your deliberations.”
15. By letter dated February 9, 2006, the NEB wrote to the Minister recommending jointly on behalf of the Responsible Authorities and pursuant to s. 25 of the CEAA that the proposed Project be referred to a review panel. This recommendation was made without consultation with the CSTC despite their prior request.
16. This recommendation engaged the Minister’s discretion as to how the environmental assessment of the proposed Project should proceed.

**CSTC requests for consultation**

17. By letter dated February 22, 2006 counsel for the CSTC wrote to the Minister, requesting that she not make a determination as to whether the assessment should proceed by Joint Review Panel before consulting with the CSTC.
18. By letter dated March 20, 2006 the Minister wrote to the Chairman of the National Energy Board acknowledging his letter of February 9, 2006 recommending that the environmental assessment proceed by review panel. The Minister stated that she had instructed the Canadian Environmental Assessment Agency to begin discussions with the National Energy Board to develop a joint review panel agreement.
19. By letter dated July 5, 2006 counsel for the CSTC wrote to the NEB:

“We did ... learn that NEB and federal Environment officials have been meeting to discuss a possible process for a review panel on the Gateway project. Accordingly, we asked you to convey to your superiors and to those representatives of the Minister of Environment that First Nations have an equal role in these discussions and should be involved in all future meetings.

We also informed you about a proposed First Nation Review Process which is under discussion between the CSTC and a number of other First Nations. It is essential that the Minister of Environment and NEB make no decisions about a review process for the Enbridge pipeline (or other similar projects) without reconciling their process with a potential First Nations one.”
20. By letter dated August 23, 2006 CSTC again wrote to the Minister requesting again that the Minister make no decisions or announcements until she had consulted with the CSTC.
21. By letter dated August 25, 2006 counsel for the CSTC wrote again to the Minister repeating their prior requests that she not proceed with a decision respecting a Joint Review Panel before consultation with the CSTC had occurred.

22. By letters dated September 22, 2006, the Minister wrote to the CSTC and to their counsel stating that it is her statutory responsibility to determine the type of environmental assessment that would be required, and that she would be announcing her decision shortly. The Minister did not offer to consult with the CSTC before making this decision.
23. On September 29, 2006 the Minister announced that the proposed Project had been referred for assessment by a Joint Review Panel. This referral was made without consultation with the CSTC despite their prior requests.
24. Between the CSTC's first in what became a series of requests for consultation commencing in January, 2006, and the Minister's decision made September 29, 2006, there was at no time any consultation between the Minister or any representative of the Minister or of Canada and the CSTC with respect to this fundamental decision respecting the assessment of the proposed Project.
25. The CSTC says that in ignoring CSTC's repeated requests for consultation regarding a significant decision about a Project that would have profound impacts upon CSTC's aboriginal interests, the Minister has failed to meet her constitutional obligation to consult with the CSTC.

This application will be supported by the following material:

Affidavit of Tribal Chief David Luggi, CSTC

This affidavit will be supported by the following material:

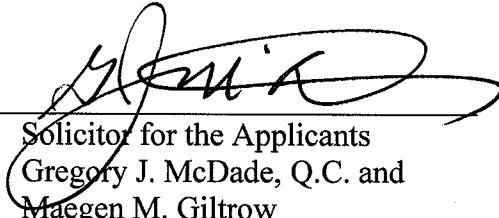
- (a) Enbridge Gateway Pipeline Inc. Preliminary Information Package, November 1 2005;
- (b) Letter from Enbridge to NEB dated January 9, 2006;
- (c) Letter from CSTC to NEB and CEAA dated January 12, 2006;
- (d) Letter from NEB to the Minister dated February 9, 2006;
- (e) Letter from counsel for CSTC to the Minister dated February 22, 2006;
- (f) Letter from the Minister to the NEB dated March 20, 2006;
- (g) Letter from counsel for the CSTC to the NEB dated July 5, 2006;
- (h) Letter from CSTC to the Minister dated August 23, 2006;
- (i) Letter from counsel for the CSTC to the Minister dated August 25, 2006;
- (j) Letter from the Minister to the CSTC dated September 22, 2006;
- (k) Letter from the Minister to counsel for the CSTC dated September 22, 2006;

- (1) Referral to Joint Review Panel by the Minister, from Canadian Environmental Assessment Registry, dated September 29, 2006.

The applicant requests the Minister to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Minister to the applicant and to the Registry:

All documents pertaining to the proposed Project that were before the Minister prior to the impugned decision of September 29, 2006 that is the subject of this Application.

October 25, 2006



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