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FEDERAL COURT OF APPEAL

BETWEEN:

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

Applicants and appellants

and

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Respondents

and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
AMNESTY INTERNATIONAL and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

Interveners

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OVERVIEW

1. Unifor challenges the Joint Review Panel's (the "Panel") report concerning the pipeline (the "Project") proposed by Northern Gateway Pipelines Limited Partnership ("NGP") on three grounds.

2. First, the Panel committed an error of procedural fairness and natural justice in its application of the burden of proof to interveners, and particular to those interveners that offered evidence concerning potential adverse economic impacts of the Project. The National Energy Board (the "Board") has found that, in determining whether to issue Certificates of Public Necessity and Convenience to a project, while the onus of proof may shift to interveners during a hearing to refute the applicant's case, the ultimate burden of proof will always rest with the applicant, on a balance of probabilities. Yet in this case, on the issue of the effect of the Project on the security of oil supply to Canadian upgraders and refiners, the Panel held the interveners to an unreasonable and unequal standard of proof, by requiring them to demonstrate "compelling" evidence to support the propositions they were advancing. This was a clear breach of procedural fairness and natural justice.

3. Second, in assessing the public interest of Canadians with respect to the Project, the Panel considered the interests of the pipeline owners and users as paramount, to the virtual exclusion of other competing interests, including those of commercial third parties that may be adversely impacted by the Project. It did so on the basis of an unsubstantiated and ill-defined policy choice in favour of "properly functioning petroleum markets." In doing so, the Panel acted unreasonably and lost sight of its statutory mandate in the *National Energy Board Act* ("*NEB Act*") to protect the public interest of all Canadians.

4. Finally, the Panel acted unreasonably in failing to consider greenhouse gas emissions and other upstream environmental impacts associated with oil sands development that would be served and enabled by the Project. It did so based on an overly narrow conception of its mandate, which is out of step with the approach taken by other regulators and fails the consider the ultimate harm to the ability of Canadian

oil producers to access foreign markets. Moreover, the Panel refused to consider "upstream" environmental effects of the pipeline, while putting great weight on its "upstream" economic effects in support of its recommendation that the Project be approved.

5. For each of these reasons, the Panel's report on the Northern Gateway Pipeline was materially and fundamentally flawed. Since the Panel's report was a necessary prerequisite to the issuance of Order in Council P.C. 2014-809 (the "GIC Order") by the Governor in Council (the "GIC"), the GIC Order and Certificates of Public Convenience and Necessity OC-060 and OC-061, issued pursuant to the GIC Order, should be invalidated as nullities.

PART I - STATEMENT OF FACTS

6. Unifor adopts and relies on the Statement of Agreed Facts,[1] in addition to the facts stated below.

7. NGP proposes to build and operate a terminal at Kitimat, British Columbia, and two pipelines: one leading to that terminal from Bruderheim, Alberta and the other running in parallel with that pipeline but in the opposite direction. The three major components of the Project are:

a. an export pipeline that would carry an average of 525,000 barrels per day of oil products west from Bruderheim to Kitimat;

b. a parallel import pipeline that would carry an average of 193,000 barrels of condensate per day east from Kitimat to the terminal at Bruderheim; and

c. a terminal at Kitimat with 2 tanker berths, 3 condensate storage tanks, and 16 oil storage tanks.[2]

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[1] Statement of Agreed Facts ["Agreed Facts"] **[Book of Major Documents ["MB"], Vol 1, Tab 1 at pp 1-42]**.

8. A primary purpose of these proposals is to provide access for Canadian oil, primarily from the oil sands in Alberta, to international markets including existing and future refiners in Asia and the United States West Coast. The pipeline flowing from British Columbia to Alberta is intended to provide greater diversification in the supply of condensate used for diluting heavy oil produced in the Albert oil sands.[3]

9. The raw resource extracted from the Alberta oil sands is a tar like substance known as bitumen. In order to flow through a pipeline, bitumen must be diluted. The condensate pipeline of the Project will carry the "diluent" necessary for that purpose. Depending on its particular character, the condensate pipeline will carry a sufficient volume of diluent to facilitate the export of approximately 525,000 barrels per day of diluted bitumen, in other words the same volume that the Project pipeline can transport back to Kitimat.[4]

10. Both the Communications Energy and Paperworkers Union ("CEP") and the United Fishermen and Allied Workers' Union-CAW ("UFAWU"), now both Unifor, were granted standing as interveners in the proceedings and adduced evidence and presented argument concerning the potential adverse impacts of the Project on the environment and economy. That evidence concerned both the direct interests of their members, and a broader concern for the public interest in managing Canadian natural resources in a sustainable manner.

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[2] Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 2 ["JRP Report, Vol 2"] at p 3 **[Basic Common Book ["CB"], Vol 2, Tab 21 at p 442]**

[3] JRP Report, Vol 2, *supra* at p 3 **[CB, Vol 2, Tab 21 at p 442]**.

[4] Evidence of the Communications Energy and Paperworkers Union of Canada, dated January 31, 2012, Full Electronic Record, Tab 33, Exhibit D39-3-1 ["CEP Evidence"] at para 8 **[Unifor's Compendium of References ["UCR"], Tab 1 at p 2]**.

11. Both CEP and UFAWU opposed approval of the Project on the grounds that the Project was not in the public interest because its adverse economic and environmental effects would be significantly greater than its putative benefits.[5]

12. Unifor supports the responsible development of the oil sands, and understands the importance of foreign markets as it does the role of export pipelines to serve them. It also understands the importance of a healthy oil and gas industry which can provide stable, good jobs for its members, and create wealth for their communities and all Canadians.

13. CEP's evidence concerned the adverse impact of the Project on Canada's prospects for developing a diversified and sustainable oil and gas industry. It explained that, because the Project is primarily intended to facilitate bitumen exports from Canada, it will undermine security of supply to, and future investment in, Canadian upgraders and refiners. This is not only likely to undermine Canadian energy security, but also the jobs and livelihoods of Unifor members and many others. CEP also introduced arguments concerning the climate change impacts of increased oil sands exploitation that would result from the Project.[6]

14. UFAWU's evidence described the West Coast fishing industry, which is the largest private sector employer on the North Coast, and which added hundreds of millions of dollars to the provincial economy in 2010. It presented concerns regarding the shipping operations that would be a consequence of the Project, including the potential contamination of shellfish in areas where vessels tie up, the destruction of shorelines by vessel wakes, interference with shoreline harvesting and the introduction of invasive species from hull fouling. It also described the impacts of

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[5] Final Argument of the Communications Energy and Paperworkers Union of Canada, dated May 31, 2013, Full Electronic Record, Tab 33, Exhibit D39-13-1 ["CEP Final Argument"] **[UCR, Tab 2 at pp 15-28]**; Final Argument of the United Fishermen and Allied Workers' Union-CAW, dated May 31, 2013, Full Electronic Record, Tab 33, Exhibit D203-14-1 ["UFAWU Final Argument"] **[UCR, Tab 3 at pp 29-88]**.

[6] CEP Final Argument, *supra* **[UCR, Tab 2 at pp 15-28]**; CEP Evidence, *supra* **[UCR, Tab 1 at pp 1-14]**.

increased vessel traffic in fishing and diving areas that would endanger fishermen and their boats, and the effects that marine loading and transport operations, including spills, leakage, and bilge pumping of vessels, would have on the fisheries.[7]

PART II - STATEMENT OF ISSUES

15. Unifor's application for judicial review of the GIC Order and its appeal of the Certificates of Public Convenience and Necessity raise the following issues:

a. What is the legal framework for reviewing the Governor in Council's exercise of its statutory power of decision under s. 54(1) of the *National Energy Board Act*?

b. Did the Joint Review Panel impose an unreasonable burden of proof on the interveners to present "compelling" evidence of the potential adverse impacts of the proposed pipeline?

c. Did the Joint Review Panel err in law by holding that "well-functioning petroleum markets" should be paramount in determining the public interest?

d. Did the Joint Review Panel err by refusing to consider greenhouse gas emissions from, and other effects of oil sands development and activities that would be enabled and served by the Project, while taking into account putative economic benefits from those same developments and activities?

e. If the Governor in Council's Order is quashed or found to be a nullity, are the Certificates of Public Convenience and Necessity a nullity?

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[7] UFAWU Final Argument, *supra* **[UCR, Tab 3 at pp 29-88]**.

PART III - SUBMISSIONS

A. Standing

16. NGP argued in the applications for leave that Unifor has neither direct nor public interest standing to participate in these proceedings. These arguments were not accepted by the Court in considering the applications for leave, and therefore should not be accepted at this stage.

17. In any event, Unifor satisfies the criteria to be granted either direct or public interest standing in this proceeding. The Agreed Facts set out the central role that Unifor members play in the oil and gas industry and the West coast fishery, and the potential impact of the Project on their employment. The Agreed Facts and the evidence in the record equally note that CEP and UFAWU participated in the Panel hearings into the Project as interveners, including by adducing expert evidence, exchanging information requests and responses, presenting witnesses for questioning, and making final arguments concerning the interests of their members.[8] This interest is sufficient to qualify for direct standing.[9]

18. Alternatively, Unifor is entitled to public interest standing, under the test set by the Supreme Court. The first requirement, that there be a "serious justiciable issue," is satisfied by this Court having granted leave.[10] The second step, asking whether Unifor "has a real stake in the proceedings or is engaged with the issues they raise,"[11] is met for the reasons already stated above.[12] Finally, Unifor's proceedings

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[8] Agreed Facts, *supra* at paras 169-73 **[MB, Vol 1, Tab 1 at pp 39-40]**; CEP Evidence, *supra* at paras 6-7, 10-11, 16-30 **[UCR, Tab 1 at p 2, 3, 4-9]**; UFAWU Final Argument, *supra* **[UCR, Tab 3 at pp 29-88]**.
[9] *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at para 58.
[10] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 at para 42 [*Downtown Eastside*].
[11] *Downtown Eastside*, *supra* at para 43.
[12] See also *Construction and Specialized Workers' Union, Local 1611 v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1353 at paras 19, 20 [*CSWU*].

are a reasonable and effective means of bringing the issue before the court,[13] based on the following facts: Unifor has the capacity and resources to bring this claim forward on behalf of its members;[14] it is the only party proposing to challenge the scope of the Panel's jurisdiction on economic issues;[15] and the strict timelines involved in challenging the orders in question would make it impossible for these arguments to be raised by other means.

B. The review of the Governor in Council's exercise of a statutory power of decision

(i) When based on a Panel report that is issued contrary to the law, the Governor in Council's Order is a nullity

19. Under the Joint Review Panel Agreement, the Panel was charged with conducting an assessment of the environmental effects of the Project under both the *Canadian Environmental Assessment Act, 2012* (the "*CEAA 2012*") and the *NEB Act*, and with determining under the *NEB Act* whether the Project is and will be required by the present and future public convenience and necessity. Both the *CEAA 2012* and the *NEB Act* require that the GIC receive and consider a report from a review panel, in this case the Panel, prior to approving a project.

20. Under the *CEAA 2012*, where an environmental assessment is referred to a review panel, that panel must prepare a report that includes the Panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and a summary of any comments received from the public. It must submit that report to the Minister of the Environment, who is customarily the decision-maker under the *CEAA 2012*.[16] In this case, by virtue of the transitional provisions in the *Jobs, Growth and Long-term Prosperity Act*, this power is exercised by the GIC,

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[13] *Downtown Eastside*, *supra* at paras 49-51.
[14] See *CSWU*, *supra* at paras 24-25.
[15] See Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1 ["JRP Report, Vol 1"] at p 18 **[CB, Vol 1, Tab 20 at p 374]**.
[16] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*], ss 43(1)(d), (e).

which must, after receiving the Panel's report, determine whether the designated project is likely to cause significant adverse environmental effects, and if so, whether these are justified in the circumstances.[17] However, the GIC may only do so "after taking into account the review panel's report with respect to the environmental assessment" (emphasis added).[18]

21. In similar fashion, the *NEB Act* requires that the Board prepare and submit a report to the Minister of Natural Resources providing its recommendation as to whether the pipeline is and will be required by the present and future public convenience and necessity, and should therefore be issued a certificate.[19] "After the Board has submitted its report," the GIC is entitled to direct the Board to either issue a certificate "and to make the certificate subject to the terms and conditions set out in the report", or to direct the Board to dismiss the application (emphasis added).[20] Where the GIC directs that a certificate be issued, the Board is required to do so within seven days of the GIC Order.[21]

22. Several decisions of this Court and the Federal Court have indicated that under the precursor to the *CEAA 2012*, the review panel report is a necessary prerequisite to the Minister or the GIC's decision on an environmental assessment. In *Greenpeace*, the Federal Court recently held "that gathering, disclosing, and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the *Act*".[22] For that reason,

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[17] *CEAA 2012*, *supra*, ss 52(1), (4).
[18] *CEAA 2012*, *supra*, s 47(1); *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 104(4)(a) [*JGLP Act*].
[19] *National Energy Board Act*, RSC, 1985, c N-7, s 52(1) [*NEB Act*].
[20] *NEB Act*, *supra*, s 54(1).
[21] *NEB Act*, *supra*, s 54(5).
[22] *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 at para 235 [*Greenpeace*].

this Court held in *Alberta Wilderness Assn* held that "the panel report is an essential statutory pre-requisite to the issuance of approvals" (emphasis added).[23]

23. As a corollary, under the *CEAA 2012*, the Minister or the GIC is not entitled to decide whether a project is likely to cause significant environmental effects and whether any such effects can be justified on the basis of a deficient or fundamentally flawed panel report. Accordingly, in *Alberta Wilderness Assn*, the Court permitted the applicants to "seek prohibition against the Minister on the basis that the panel report is materially deficient".[24] Similarly, in *Imperial Oil*, the Federal Court concluded that a "fundamentally flawed Report ... could not lawfully receive the approval of the Governor in Council," and that an authorization granted by the GIC was therefore a nullity.[25]

24. The relevant language has remained unchanged in the *CEAA 2012*. Accordingly it is clear in the jurisprudence of this Court and of the Federal Court that should the Panel's report on the Project be found to be materially deficient, a GIC Order based on such a report would be a nullity.

25. Similarly, the *NEB Act* indicates that receipt of the report is a prerequisite the GIC's decision. Thus the *NEB Act* provides that "[a]fter the Board has submitted its report", the GIC may direct the Board to issue a certificate and "to make the certificate subject to the terms and conditions set out in the report".[26] Further, the *NEB Act* provides that the GIC may only make the certificate "subject to the terms and conditions set out in the report", indicating a statutory intention that the GIC Order be made only upon careful consideration of and reliance on the findings of the

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[23] *Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans)*, [1999] 1 FC 483, [1998] FCJ No. 1746 (FCA) at para 17 (QL) [*Alberta Wilderness*], relying on *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.
[24] *Alberta Wilderness*, *supra* at para 19.
[25] *Imperial Oil Resources Ventures Limited v Canada (Fisheries and Oceans)*, 2008 FC 598 at para 6 [*Imperial Oil*]. See also *Greenpeace*, *supra* at para 399.
[26] *NEB Act*, *supra*, s 54(1).

report. This is reflective of the panel's obligation to assemble and assess the evidentiary foundation for the decision, as noted in *Greenpeace*.

26. On this basis, Unifor submits that under both the *CEAA 2012* and the *NEB Act*, the GIC's decision on an environmental assessment and on whether to issue certificates of public convenience and necessity can only be made on the basis of a legally valid report from the review panel and/or the Board. In this case, of course, these functions under both Acts were carried out by the Panel. Accordingly, should the Panel's report be found to be "materially deficient" on either a substantive or procedural basis, the GIC Order based on that report will be a nullity.

(ii) *The standard of review of the Joint Review Panel's report*

27. In considering whether there are material deficiencies in the Panel's report that would render the GIC Order a nullity, the standard of review of the Panel report on questions of fact, questions of statutory interpretation of a home statute, and questions of mixed fact and law related to the weighing of evidence are presumptively subject to a reasonableness standard of review.[27] This presumption can be rebutted where the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction.[28]

28. In applying the reasonableness standard under the *Dunsmuir* framework, reasonableness review refers to "both to the process of articulating the reasons and to outcomes." It is therefore concerned "with the existence of justification, transparency and intelligibility within the decision-making process" and "with whether the

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[27] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 54 [*Dunsmuir*]; *Greenpeace*, *supra* at para 27.
[28] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at para 30.

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[29] That is, under reasonableness review, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes".[30]

29. While questions of fact, law and mixed fact and law under the *NEB Act* are subject to a reasonableness standard of review, other questions arising on this judicial review will attract a correctness standard. As noted, these include constitutional issues, but also questions of procedural fairness.[31] In conducting a correctness review on these questions, "a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question".[32]

(iii) *Alternative argument: standard of review of the Governor in Council*

30. The primary argument on the applicable standard of review, set out above, argues that this judicial review should focus on the Panel's report, and that the GIC Order is a nullity if based on an illegal or unreasonable Panel report. In the alternative, should this Court find that the GIC has adopted the Panel's report, then the GIC decision will be the focus of this judicial review and the GIC must be taken to have adopted the Panel's reasoning. Nevertheless, if the GIC Order is the focus of the judicial review, Unifor submits that the same standards of review will apply.

31. The Supreme Court recently had the opportunity to consider the standard of review applicable to decisions of the GIC in *Canadian National Railway Co v Canada*.[33] In that case, the Court clarified that we should distinguish between the review of decisions of the GIC when it is acting in a legislative capacity—such as

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[29] *Dunsmuir*, *supra* at para 47.
[30] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 13.
[31] *Mission Institution v Khela*, [2014] 1 SCR 502 at para 79.
[32] *Dunsmuir* at para 50.
[33] *Canadian National Railway Co v Canada (Attorney General)*, [2014] 2 SCR 135, 2014 SCC 40 [*Canadian National Railway*].

cases that question whether a regulation made by the GIC are *intra vires* its authority—and when it is exercising a statutory power of decision. In the latter case, where the GIC is exercising a statutory power of decision, the Supreme Court held that "the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review" of the decision.[34]

32. As with a review of the Panel's report, the GIC Order will attract deference in interpreting its home statute or statutes closely connected to its function, with which it will have particular familiarity.[35] This will create a presumption of a reasonableness standard of review, which will only be rebutted where the question at issue falls into one of the categories discussed above.[36]

33. While "policy considerations" may be at play in the GIC's determination of whether a project should be approved this does not entail a 'more deferential' standard of review. As the Supreme Court noted in *Canadian National Railway*, "although there may be policy considerations underlying the question at issue, that does not transform the nature of the question to one of policy or fact".[37] This Court has similarly noted that there is no "distinct standard of review under the *Dunsmuir* framework" in respect of the GIC when it is exercising its statutory decision-making power.[38]

34. In *Canadian National Railway*, the Court determined that the GIC had "particular familiarity" in the area of "economic regulation", and that it therefore benefitted from the presumption of reasonableness review.[39] As a result, should this Court determine that the GIC Order is the subject of review in this application, the GIC's interpretation of questions of law in the *NEB Act* and its determination under s. 54(1) of that *Act* to accept or reject the recommendation of the Board that a pipeline

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[34] *Canadian National Railway*, *supra* at para 51.
[35] *Dunsmuir*, *supra* at para 54; *Canadian National Railway*, *supra* at para 55.
[36] *Canadian National Railway*, *supra* at para 55.
[37] *Canadian National Railway*, *supra* at para 33.
[38] *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 194 at para 32 [*Globalive*].
[39] *Canadian National Railway*, *supra* at para 56.

is and will be required by the present and future public convenience and necessity is a question of mixed fact and law, and should be reviewed on a reasonableness standard.[40]

35. For the same reasons noted above, the GIC order will attract a correctness standard of review where there are constitutional issues at play, or on questions of procedural fairness.

C. The Joint Review Panel imposed an unreasonable standard of proof on the interveners to present "compelling" evidence of the potential adverse impacts of the proposed pipeline

(i) The standard of review on the application of the standard of proof

36. The application of the burden and standard of proof are matters of procedural fairness that are subject to a correctness standard of review.[41]

(ii) Application

37. In numerous instances, Courts have quashed administrative decisions because of a failure to state the onus or standard of proof being applied, or applying the wrong standard of proof.[42] For example, this Court and the Federal Court have granted applications for judicial review where:

a. the Trade-Marks Registrar had denied the registration of a mark because it was "still left in doubt as to whether there would be a reasonable likelihood of confusion," which "impos[ed] a burden on the applicant more onerous than would apply in civil proceedings";[43]

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[40] See also *Globalive*, *supra* at paras 31-33.
[41] See e.g. *Vennat v Canada (Attorney General)*, [2007] 2 FCR 647, 2006 FC 1008 [*Vennat*].
[42] Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Carswell) at para 12:3200.
[43] *Christian Dior, SA v Dion Neckwear Ltd*, [2002] 3 FCR 405, 2002 FCA 29 at paras 4, 10.

b. the Governor in Council imposed an overly strict burden of proof on an individual to rebut statements made by a judge in a proceeding in which the individual was not a party, which the Court considered "a serious error vitiating the entire procedure";[44]

c. an adjudicator had required that an employer demonstrate "a serious fault" to justify termination of an employee, when it was only required to demonstrate "just and sufficient cause";[45]

d. the Immigration and Refugee Board required proof to "the preponderance of probability" when it should have applied a "balance of probabilities standard";[46] and

e. the Minister found that it was "unable to conclude that there was a contravention" in an Indian Band election, when the regulation required only "proof of the appearance of wrongdoing" in order to initiate an investigation. The Court in that case rejected the argument that the words used were simply "unfortunate", finding that "[t]he words speak for themselves" and "constitut[ed] a fundamental error in law [by] appl[ying] an incorrect evidentiary standard".[47]

38. This jurisprudence provides clear authority for two propositions. First, an administrative decision-maker will be assumed to have applied the standard of proof that is expressed in its reasons. Second, the application of the incorrect standard of proof by an administrative decision-maker is a serious error that warrants quashing the decision.

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[44] *Vennat*, *supra* at paras 208-12.
[45] *National Bank of Canada v Lajoie*, 2007 FC 1130 at paras 36-37.
[46] *Munoz v Canada (Citizenship and Immigration)*, 2008 FC 995 at paras. 3-6.
[47] *Keeper v Canada*, 2011 FC 307, at para 3-5, appeal refused for mootness, 2012 FCA 90. See also *Canada (Minister of Citizenship and Immigration) v Jan*, 2006 FC 40 at paras. 16-18.

39. In the context of the assessment of whether a project is in the public interest under s 52 of the *NEB Act*, the Board has dealt with the allocation of the burden and standard of proof in a number of cases. In *Westcoast Energy*, it explained that the applicant has an initial "obligation to present to the Board an application containing sufficient evidence amounting to a *prima facie* case in support of the relief requested". Once the applicant has met this *prima facie* burden, "the onus of proof may shift to the intervenors during the course of the hearing to refute the applicant's case".[48] Nevertheless:

> Notwithstanding this perception of a shifting onus of proof, the ultimate burden of proof, or burden of persuasion as it is often called, always remains with the applicant. The applicant must satisfy the Board, on the balance of probabilities, that the relief sought in its application should be granted.[49]

40. Accordingly, it is clear that the applicant will always hold the burden of proof to establish that a project is in the public interest, on a balance of probabilities. While the onus of proof may shift to interveners during a hearing to refute an applicant's *prima facie* case, the ultimate burden of proof will always rest with the applicant. Moreover, to the extent that interveners will have an onus to lead evidence at various points during the proceeding, they cannot be held to a higher standard of proof than the applicant itself.

41. Yet in this case, on the issue of the effect of the Project on the security of supply to Canadian upgraders and refiners, the Panel held the interveners to a higher standard of proof, by requiring them to demonstrate "compelling" evidence to support the propositions they were advancing. This was a clear breach of procedural fairness that warrants quashing the Panel's report.

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[48] *Westcoast Energy Inc.* (August 1992), Reasons for Decision, RH-1-92 at p 3 [*Westcoast*].

[49] *Westcoast*, *supra* at pp 3-4. See also *TransCanada PipeLines Limited* (July 1988), Reasons for Decision, GH-2-87 at pp 80-81; *Maritimes & Northeast Pipeline Limited Partnership (Re)*, 2000 LNCNEB 20 at paras 144-148 (Q.L.).

42. As described by the Panel, NGP said that its estimate of the total economic effects of the Project included the positive economic effects on Canadian and regional investment, labour income, GDP, employment, and government revenues. The economic model it used for this purpose included a consideration of certain potential adverse economic consequences, or burdens, arising from the Project, such as lost revenues to other pipeline operators and increased feedstock costs for Canadian refineries.[50]

43. However, NGP's assessment of potential adverse impacts on commercial third parties failed to consider the adverse impact of the pipeline on the security and cost of supply of bitumen to existing Canadian upgraders, or on investment in building new upgraders that would create thousands of new jobs in Canada. These facilities would otherwise process bitumen that the Project is in large measure designed to export. The only evidence on of these potential adverse consequences of the Project was adduced by the interveners, CEP and the Alberta Federation of Labour ("AFL").

44. The evidence adduced by CEP included the uncontested expert evidence of Mr. Michael McCracken, the principal at Informetrica and expert in quantitative economic research. The report he prepared for the proceedings quantifies the foregone economic development and employment benefits that may result from the export of unprocessed bitumen made possible by the Project, noting that the primary purpose of the Project was to facilitate the export of bitumen largely for upgrading in export markets. With respect to the employment consequences of this export of these unprocessed Canadian natural resources, he testified:

> Accordingly, unless there is very rapid development of the oil sands (Scenario 3) the export of bitumen from Canada will preclude the job creation that would follow from establishing upgrading and refining facilities in Canada. As a first approximation, the incremental jobs involved in upgrading the Gateway volume would be about 26,000... Suffice it to say however, that in any scenario, the foregone economic opportunity involved, if measured in jobs created, would be significant

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[50] JRP Report, Vol 2, *supra* at pp 283, 286-87 **[CB, Vol 2, Tab 21 at pp 722, 725-26]**.

> and larger than the operational requirements of the Gateway pipeline designed for bitumen exports from Canada.[51]

45. CEP's evidence noted that the only purpose of the condensate pipeline is to facilitate the export of raw bitumen from the oil sands. Indeed, with a 30% dilution rate, the 193,000 barrels of condensate per day that are projected to flow into Alberta through the condensate pipeline is enough, when blended with bitumen to entirely fill the 525,000 barrels per day capacity of the export pipeline.[52] CEP also adduced the evidence of its President, describing the decline of the Canada's ability to provide for its own oil and gas needs, leaving Canadian consumers increasingly reliant on foreign supplies to meet their needs. As yet another export pipeline, the Project would exacerbate this problem.[53]

46. The AFL introduced extensive evidence explaining the benefits of upgrading and refining oil domestically rather than exporting raw bitumen. It noted that upgrading of petroleum products had been considered by the Alberta government to generate large numbers of jobs,[54] compared with the 104 permanent jobs generated by the Northern Gateway pipeline. It further pointed out that an increase in bitumen prices, which Northern Gateway forecasted as the result of the Project, would undermine the domestic upgrading and refining industry which depended on lower feedstock prices.[55]

47. In its Report, the Panel acknowledged the concerns raised by AFL and CEP "that exporting raw bitumen by pipeline has a detrimental impact on domestic investment in upgraders and refineries in Alberta and Canada", and accepted that they raised "valid public interest considerations". However, the Panel went on to hold that

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[51] M.C. McCracken, "Employment Consequences of Exporting Bitumen", dated January 31, 2012, Full Electronic Record, Tab 33, Exhibit D39-3-2 ["McCracken"], **[UCR, Tab 4 at pp 89-94]**.
[52] CEP Evidence, *supra* at para 8 **[UCR, Tab 1 at p 2]**.
[53] CEP Evidence, *supra* at paras 4-30 **[UCR, Tab 1 at pp 1-9]**.
[54] Written Evidence of the Alberta Federation of Labour, dated January 2012, Full Electronic Record, Tab 33, Exhibit D4-2-02 ["AFL Evidence"] at paras 32-38 **[UCR, Tab 5 at pp 111-114]**.
[55] AFL Evidence, *supra* at pp 6-15 **[UCR, Tab 5 at pp 100-109]**.

it was not convinced that developing export pipeline infrastructure deters investment in upgraders and refineries in Canada. However, in support of that conclusion it stated that it "had no compelling evidence before it to support the proposition that the project would result in existing refineries experiencing feedstock shortages" (emphasis added).[56]

48. The Panel was certainly entitled to reject the evidence of CEP and AFL, but it was not entitled to do so having imposed an unreasonable standard of proof on the interveners to refute the applicant's case, and certainly not one more onerous than the applicant's ultimate burden of proof to demonstrate the merits of the application on a balance of probabilities. Nowhere in the Panel's decision did it impose a similar obligation on NGP to adduce "compelling evidence" to support the merits of the Project.

49. As the jurisprudence cited above makes clear, the Panel must be taken to have applied the standard of proof as expressed in its reasons. Based on those reasons, the Panel applied an unreasonable and unequal burden of proof on the interveners to refute the merits of the application. This constitutes a material breach of procedural fairness and natural justice that warrants quashing the Panel's decision.

D. The Joint Review Panel erred in law by holding that "well-functioning petroleum markets" should be paramount in determining the public interest

(i) The standard of review of the Panel's public interest determination

50. The Panel's assessment of whether the Project is in the public interest should be assessed on a reasonableness standard.

(ii) Application

51. In its decision, the Panel described its public interest mandate under s. 52 of the *NEB Act* as follows:

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[56] JRP Report, Vol 2, *supra* at p 335 **[CB, Vol 2, Tab 21 at p 774]**.

> When applying the "present and future public convenience and necessity" test under Part III of the *National Energy Board Act* the Panel must consider the overall "public interest." The *National Energy Board Act* requires the Panel to consider any public interest that may be affected by granting or refusing the application. The Panel considers the burdens the project could place on Canadians, and the benefits the project could bring to Canadians.[57]

52. In carrying out its mandate, the Panel must assess the commercial arrangements entered into between the proponent of a pipeline project and those who have contracted to use the services it will provide (shippers).[58] It must be satisfied that those commercial arrangements are sound and that pipeline services will be provided at tariff rates pipeline users are willing to pay. In other words, the Panel must determine that there are sound market arrangements underpinning the Project and, inherent to that determination, that shippers have markets for the oil and gas the Project will carry.

53. The Panel is not however entitled to equate the commercial arrangements that justify the market need for the pipeline with the public interest. Indeed, this fact is clear in the structure of the *NEB Act*, which requires separate consideration of the "any public interest" *in addition to* the existence of markets supporting the Project.[59] Accordingly, the Panel is not entitled to give commercial arrangements paramount consideration, and certainly not to the virtual exclusion other public interest considerations. Those other and potentially competing considerations may include environmental impacts, but also other commercial interests that may be harmed by the Project,[60] such as those represented by Unifor, in seeking to create jobs from adding value to Canadian resources before they are exported, or to protect jobs in the

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[57] JRP Report, Vol 2, *supra* at p 8 **[CB, Vol 2, Tab 21 at p 447]**.
[58] JRP Report, Vol 2, *supra* at pp 327-29 **[CB, Vol 2, Tab 21 at pp 766-68]**.
[59] *NEB Act*, *supra*, s 52(2)(b), (c), (e).
[60] See *Alliance Pipeline Ltd* (November 1998), Reasons for Decision, GH-3-97 at p 8.

fishery industries that may be lost as a result of a pipeline spill that damages the fishery.[61]

54. In this case, the Panel can be seen as having given paramount consideration to the policy or principle of supporting "properly functioning petroleum markets", and to the virtual exclusion of other commercial interests, in several ways.

55. To begin with, there is no ambiguity in the fact that the Panel clearly saw the notion of well-functioning markets as being an important aspect of what constituted the "public interest" under s. 52 of the *NEB Act*. Thus it explained that:

> The Panel is of the view that properly functioning petroleum markets require adequate transportation capacity to be in place and, further, that the type of commodity to be transported on a pipeline is a decision properly made by the market. The Panel is of the view that well-functioning markets tend to produce outcomes that are in the public interest.[62] [Emphasis added]

56. The fact that market arrangement may determine the type of commodity to be transported on a pipeline does not absolve the Panel of considering the impacts of those market arrangements. Moreover, in the case of the Project, the diluent pipeline, which flows to Alberta, will only carry diluent, a commodity that will be used for one purpose: to facilitate the export of bitumen. The adverse impact of bitumen exports on the commercial third parties was therefore clearly a relevant concern.

57. More important however, is that in expressing the view that well-functioning petroleum markets further the public interest, the Panel was clearly expressing a policy choice or guiding principle that it was applying to the matter before it. This was the approach urged upon it by the oil and gas industry during the hearings. For

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[61] UFAWU Final Argument, *supra* at pp 37-53 **[UCR, Tab 3 at pp 66-82]**; Written Evidence of Intervenors, United Fishermen And Allied Workers' Union-CAW, Submission: UFAWU-CAW 2.1, Fish and Fisheries: Impacts of Oil, dated January 2012, Full Electronic Record, Tab 33, Exhibit D203-4-11 **[UCR, Tab 6 at pp 144-156]**.

[62] JPR Report, Vol 2, *supra* at p 335; see also p 328 **[CB, Vol 2, Tab 21 at pp 767, 774]**.

example, the Panel summarized the submissions of the Canadian Association of Petroleum Producers to the effect that:

> ... it is the clear policy of the Canadian government that, subject to meeting all applicable regulatory and legal requirements, the operation of market forces should determine when energy developments and infrastructure should proceed and how supply and markets are connected. In its view, the Enbridge Northern Gateway Project is an example of the market working to put necessary infrastructure in place to accommodate Canadian crude oil supply growth.[63] [Emphasis added]

58. No support for such a policy can be found in the provisions of the *NEB Act*, and the Panel offers no reference to any policy instrument of the federal government to which it had looked for guidance. Indeed, the Panel provides no specific elucidation of what it intends by the term "well-functioning markets" other than the passage reproduced above. In doing so, the Panel acted unreasonably in adopting and applying, as an overarching consideration, an ill-defined policy choice or guiding principle of its own creation.

59. The paramount status accorded the Panel's notion of "well functioning markets" can also be seen in its treatment of competing policy considerations. Thus, while the Panel acknowledged that the public interest should involve a consideration of the economic effects of the Project on the regions that it would affect, it simply rejected the arguments advanced by CEP and the AFL regarding the security of supply to and investment in Canadian oil value-added processing (upgraders and refineries). On this point, the Panel stated:

> The Panel notes the Alberta Federation of Labour position that project approval would undermine the policy goals of Alberta and Canada in regards to the desire to realize more value-added crude oil processing.

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[63] JPR Report, Vol 2, *supra* at p 324 **[CB, Vol 2, Tab 21 at p 763]**; see also the submissions of the Government of Alberta at p 334 **[CB, Vol 2, Tab 21 at p 773].**

> While the Panel is informed by current economic and energy policy, it does not set policy.[64] [Emphasis added]

60. In doing so, the Panel mischaracterized the argument being made by CEP and the AFL, which was to invite the Panel to take into account *existing* provincial and federal policy in favour of value-added processing, and not to *set* economic and energy policy. Indeed, the AFL pointed out in its written evidence that Alberta's *Provincial Energy Strategy* states that "Alberta needs to add value to its products and exports and expand its economy by encouraging the further processing of bitumen, oil, natural gas, and coal in Alberta to increase jobs, diversify the economy and raise tax revenues for Albertans" and affirms the "aspirational goal" that no more than one-third of Alberta's bitumen should be exported without upgrading.[65]

61. Further, the Panel's statement that it is not a policy making body is impossible to reconcile with its adoption of the notion of "well-functioning markets" as not only a valid, but a determinative factor in weighing the public interest. While the Panel has discretion in its assessment and balancing of the evidence, the Panel cannot assess the evidence in an internally inconsistent and uneven manner.[66] It was not therefore entitled to adopt an inherent policy in support of "well-functioning markets," which favoured the commercial interests of pipeline owners and users, while refusing to consider factors related to value-added domestic crude oil processing on the sole basis that the Panel "does not set policy".

62. Finally, the paramount and improper weight given by the Panel to the importance of "properly functioning petroleum markets" is shown in the burden of proof that it applied to interveners as compared to NGP, as discussed above. By imposing a disproportionate burden of proof on interveners to adduce evidence of the negative commercial impacts on those not served by the market arrangements

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[64] JRP Report, Vol 2, *supra* at p 335 **[CB, Vol 2, Tab 21 at p 774]**.
[65] AFL Evidence, *supra* at paras 33, 36 **[UCR, Tab 5 at pp 111, 113]**.
[66] *Brown v. Canada (National Capital Commission)*, 2009 FCA 273, [2009] FCJ No 1196 at paras 8-9.

between the owners and users of the Project, the Panel once again reflected the paramountcy of the 'markets test' it had adopted.

63. The Panel was certainly entitled to consider the commercial interests of certain participants in the oil development, extraction and exportation industries as a component of the public interest. These interests are a reasonable component of the public interest. However, it making the importance of "properly functioning petroleum markets" paramount, and equating the *private interests* of pipeline service providers and users with the *public interest* of Canadians, the Panel lost sight of its statutory mandate in the *NEB Act* to protect the latter. This approach is unreasonable and a basis for quashing the Panel's report and the GIC Order.

E. The Joint Review Panel erred by refusing to consider greenhouse gas emissions from, and other effects of oil sands development and activities that would be enabled and served by the Project, while taking into account putative economic benefits from those same developments and activities

(iii) *The standard of review*

64. The Panel's assessment of whether the Project is in the public interest should be assessed on a reasonableness standard.

(iv) *Application*

65. The Supreme Court and this Court have also confirmed the broad scope of the public interest examination that the Board, or in this case the Panel, should undertake under s. 52 of the *NEB Act*. In cases where lower courts had concluded that the Board's jurisdiction did not extend to considering the broader environmental impact of a project, these courts concluded that the Board was not limited in the breadth of social, economic and environmental effects that could be considered in determining the public interest.[67]

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[67] *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at para 56 (QL); *Sumas Energy 2, Inc v Canada (National Energy Board)*, 2005 FCA

66. While the Panel's determination of what falls within the public interest must be afforded deference, as an interpretation of its home statute,[68] it is important to distinguish a review of the manner in which the Panel has weighed the evidence from a review of the Panel's decision about whether it should even consider certain evidence. The Court must play an important supervisory role in ensuring that the Panel does not unreasonably exclude evidence that should be considered in determining the public interest.

67. In its preliminary decision concerning the List of Issues that were to be considered by the Panel,[69] and once again in the first volume of its report, the Panel noted that it had been asked by "many people" to consider matters that it described as being beyond its scope and mandate. These included the "upstream oil development effects" of the approval of the Project. Specifically, it noted that "many people said the project would lead to increased greenhouse gas emissions and other environmental and social effects from oil sands development". Yet the Panel declined to give any consideration to these effects in assessing the Project.[70] The Panel explained its reasons for taking that position this way:

> We did not consider that there was a sufficiently direct connection between the project and any particular existing or proposed oil sands development or other oil production activities to warrant consideration of the effects of these activities. We based our decision on four factors:
>
> - Provincial and federal energy and environmental authorities already regulate oil sands development and other oil production activities.
>
> - Northern Gateway applied only for a transportation project and did not indicate any intention to develop oil sands or other oil

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377 at paras 13, 21-25; *Nakina (Township) v Canadian National Railway Co*, [1986] FCJ No 426 (FCA) at pp 3-4 (QL).

[68] See *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245.

[69] Panel Session Results and Decision, dated January 19, 2011 at p 4 **[MB, Vol 1, Tab 1 at p 4]**.

[70] JRP Report, Vol 1, *supra* at p 17 **[CB, Vol 1, Tab 20 at p 373]**.

production.

- The Bruderheim Station would not be located near oil sands developments and could receive oil from a variety of sources.

- Oil sands projects and activities were not included in our terms of reference under the Joint Review Panel Agreement. The agreement was reached after consultations with the public and Aboriginal groups.[71]

68. None of these rationales stand up to scrutiny.

69. In respect of its first rationale, the fact that environmental impacts may be subject to regulation by other authorities provides no justification for refusing to consider them as falling within the scope of the Panel's mandate. In fact, all of the environmental impacts of the project which were taken into account by the Panel, such as the potential impact on wildlife and wildlife habitat,[72] are subject to provincial and/or federal regulation.[73] The Panel properly and readily found such impacts to fall within the scope of its public interest mandate. Indeed, the issue of greenhouse gas emissions related to the construction and operation of the Project, which were considered by the Panel,[74] are subject to the very same regulations that the Panel suggested precluded it from considering the effect of the Project on increased oil sands development.

70. In respect of its second rationale, the fact that NGP is not the developer of oil sands production has no bearing on the Panel's obligation to take into account the impacts, in this case greenhouse gas emissions, associated with the developments that will be served or enabled by the Project. In fact, in respect of the economic benefits of the Project, the Panel specifically and repeatedly took into account those associated with oil sands developments that would be served and supported by the

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[71] JRP Report, Vol 1, *supra* at p 17 **[CB, Vol 1, Tab 20 at p 373]**.
[72] JRP Report, Vol 2, *supra* at pp 202-257 **[CB, Vol 2, Tab 21 at pp 641-696]**.
[73] See e.g. JRP Report, Vol 2, *supra* at p 214 **[CB, Vol 2, Tab 21 at p 653]**.
[74] JRP Report, Vol 2, *supra* at p 3 **[CB, Vol 2, Tab 21 at p 442]**.

pipelines, regardless of the fact that NGP was not directly involved with those developments.

71. Indeed, while the Panel suggested that it would not consider any specific "upstream" economic benefits of the Project on oil sands development or production, the economic benefits that would be derived in "upstream" oil sands development and production is an underlying premise of many of the panel's findings.[75] The Panel repeatedly noted the importance of the Project in "provid[ing] access for Canadian oil to international markets including existing and future refiners in Asia and the United States".[76] Indeed, in the Cost Benefit Analysis that NGP presented in support of the application, the "oil price uplift" that would result from the Project – that is, the price bonus that would be garnered by oil development and production companies – was described as "the major contributor to net benefits". Further, NGP stated that "the amount and the duration of the oil price uplift are critical factors underpinning the robustness of the estimated social net benefits".[77] In other words, having acknowledged the relationship between the Project and oil sands producers for the purpose of assessing the economic benefits of the Project, the Panel cannot then say that no such relationship exists with respect to the greenhouse gas emissions from those same producers.

72. As a third rationale for refusing to consider the greenhouse gas emissions from oil sands development and activities, the Panel relied on the fact that Bruderheim Station (the eastern terminal of the pipelines) would receive oil from a variety of sources. This is in effect a variant of its second rational, which is to say that if the Project cannot be associated in any particular oil sands producer, the Panel need not consider the role the pipeline will play in serving and supporting oil sands development and production generally. Putting aside the fact that several of the shippers that have contracted to use the pipeline have production facilities in

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[75] JRP Report, Vol 2, *supra* at p 332 **[CB, Vol 2, Tab 21 at p 771]**.
[76] JRP Report, Vol 2, *supra* at p 3; see also pp 327-329 **[CB, Vol 2, Tab 21 at pp 442, 766-768]**.
[77] JRP Report, Vol 2, *supra* at p 287 **[CB, Vol 2, Tab 21 at p 726]**.

Alberta,[78] this justification can carry no weight. As already noted, the primary justification for the construction of the Project is to develop export markets for bitumen extracted from the oil sands, which NGP described as the driver of supply growth in Western Canadian oil.[79]

73. Finally, the Panel asserted that oil sands projects and activities were not included in its terms of reference under the Joint Review Panel Agreement. Yet those terms of reference specifically instructed it to consider:

> The environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out.[80] [Emphasis added]

74. These Terms of Reference establish a very broad scope for the Panel's analysis, which includes the cumulative environmental effects of the Project, "in combination with other projects and activities that have been or will be carried out" (emphasis added). This broad scope is not reflected in the Panel's reasons for refusing to consider greenhouse gas emissions from production facilities the Project is intended to serve. More importantly, even were that to be otherwise, the Terms of Reference cannot supplant the Panel's statutory mandate to consider all factors that affect the public interest.

75. Accordingly, each of the rationales offered by the Panel to justify its refusal to consider the upstream environmental effects of the Project on oil sands development and production does not stand up to scrutiny. This alone is a basis for finding that the Panel's decision on this point is unreasonable.

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[78] JRP Report, Vol 2, *supra* at pp 322-24 **[CB, Vol 2, Tab 21 at pp 761-63]**.
[79] JRP Report, Vol 2, *supra* at p 315 **[CB, Vol 2, Tab 21 at p 754]**.
[80] Joint Review Panel Agreement and Terms of Reference, Appendix 4 to the JRP Report, Vol 2, supra at p 408 **[CB, Vol 2, Tab 21 at p 847]**.

76. Yet even leaving these aside, the Panel's failure to consider the greenhouse gas emissions emanating from oil sands developments was unreasonable for several reasons.

77. To begin with, among the evidence on climate change impacts the Panel declined to consider was the following evidence of CEP's:

> According to the Royal Society of Canada's Oil Sands Study (2010) the projected GHGs resulting from reaching oil sands production of 3.6 million bpd by 2020 will be 110-120 million tonnes – 73 million tonnes more than in 2008. At the same time, Canada's international commitment made at the Copenhagen COP 15 is to reduce GHG emissions by 17% below 2005 levels, or by 127 million tonnes, roughly equal to the increase resulting from oil sands expansion. Unless and until these radically contradictory trends are explained and resolved to the satisfaction of the international community, Canada's oil sands will remain mired in controversy, and accessing foreign markets will become increasingly difficult.[81]

78. CEP also pointed to the process followed in the United States in assessing whether construction of the Keystone pipeline was in the public interest. In that process, the State Department was required to advise the President as to whether "issuance of a permit to the applicant would serve the national interest".[82] In a letter included in CEP's evidence before the Panel, the Environmental Protection Agency ("EPA") commented on the failure of Statement Department's initial draft report to properly consider greenhouse gas emissions that could be attributed to the pipeline, and stated:

> ... there is a reasonably close causal relationship between issuing a cross-border permit for the Keystone XL project and increased extraction of oil sands crude in Canada intended to supply that pipeline. Not only will this pipeline transport large volumes of oil sands crude for at least fifty years from a known, dedicated source in Canada to refineries in the Gulf Coast, there are no significant current

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[81] CEP Evidence, *supra* at paras 32-34 **[UCR, Tab 1 at p 10]**.

[82] *Executive Order 13337 of April 30, 2004: Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 87 FR 25299.

> export markets for this crude oil other than the U.S. Accordingly, it is reasonable to conclude that extraction will likely increase if the pipeline is constructed.[83] [Emphasis added]

79. The EPA further stated that "[t]he social cost of carbon includes, but is not limited to, climate damages due to changes in net agricultural productivity, human health, property damages from flood risk, and ecosystem services due to climate change". In the EPA's view, these harms should all be considered in the scope of reviewing whether a proposed pipeline project is in the national interest.[84]

80. Notably, in its Final Supplemental Environmental Impact Statement for the Keystone XL Project, issued in January 2014 – the equivalent to the Panel's report in this case – the State Department engaged in a detailed discussion of the greenhouse gas emissions that could be connected to the Keystone pipeline in considering whether the project was in the "national interest". This included consideration of "[t]he [greenhouse gas] emissions associated with the construction and operation of the proposed Project" as well as the "potential increase in indirect lifecycle (wells to-wheels) [greenhouse gas] emissions associated with the [Western Canadian Sedimentary Basin] crude oil that would be transported by the proposed Project" (emphasis added). It further considered how all of these emissions "cumulatively contribute to climate change" and "the effects that future projected climate change could have in the proposed Project area and on the proposed Project".[85]

81. By adopting a narrow scope for assessing the impacts of the Project, the approach taken by the Panel is entirely out of step with that of the State Department and the EPA, in interpreting whether a pipeline is in the United States' "national interest". Instead, the Panel adopted an unreasonably narrow approach to its determination of the public interest, on an issue of significant importance.

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[83] CEP Evidence, *supra* at para 39 **[UCR, Tab 1 at p 12]**.
[84] CEP Evidence, *supra* at para 40 **[UCR, Tab 1 at p 13]**.
[85] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, Executive Summary (January 2014) at pp ES-15-17.

82. Finally, by considering the economic benefits of the oil sands development associated with the Project but declining to consider the environmental burden associated with that same development, the Panel failed to reasonably exercise its public interest mandate. It isolated environmental impacts from economic ones, and in doing so failed to implement a central tenet of sustainable development, which is a purpose of the environmental assessment process,[86] and requires the integration of the two. As the Supreme Court has put it:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[87]

83. In sum, based on the Panel's statutory mandate, the broad terms of its Terms of Reference, the jurisprudence on this question and the approach adopted by U.S. regulators, the Panel unreasonably failed to consider greenhouse gas emissions from oil sands development that is to be served by the Project, and the consequent effects of such emissions on climate change.

F. If the Governor in Council's Order is quashed or found to be a nullity, the Certificates of Public Convenience and Necessity are a nullity

84. Certificates of Public Convenience and Necessity OC-060 and OC-061 were issued by the Board on June 18, 2014. Those Certificates were issued pursuant to the direction in Order in Council P.C. 2014-809, and under sections 54(1) and (5) of the

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[86] Canadian Environmental Assessment Agency, *Scope of Factors – Northern Gateway Pipeline Project* (August 2009) at p 2 **[MB, Vol 1, Tab 7 at p 115]**; JRP Report, Vol 1, *supra* at p 11 **[CB, Vol 1, Tab 20 at p 367]**; *CEAA 2012*, *supra*, ss 2 "sustainable development", 4.

[87] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40 at para 31.

NEB Act, which give the Board no discretion in deciding the issue certificates once ordered to do so by the GIC.[88]

85. As noted above (see paras. 19-26), where the GIC order is based on a panel report that is materially deficient, the GIC order is a nullity. On similar reasoning, should this Court determine that the GIC order is a nullity, or alternatively that the GIC order should be quashed, then the certificates issued by the Board as a result of that order are also a nullity. Simply put, lacking a mandatory statutory prerequisite, the Board did not have authority to issue the certificates.[89]

86. On this point, it is noteworthy that its response to the motions for leave to appeal the Certificates of Public Convenience and Necessity, the Attorney General of Canada opposed leave to appeal on the basis that the applications were unnecessary. It argued that "if the Court were to set aside the [Order in Council] on judicial review, the Certificates would automatically be invalidated, thereby rendering any appeals of the Certificates moot".[90] Unifor agrees with Canada that the certificates are automatically invalidated following a successful application to quash the Order in Council.

PART IV - ORDERS SOUGHT

87. Unifor accordingly seeks:

a. A declaration that the conclusions in the Joint Review Panel's report were unreasonable or based on errors of procedural fairness and natural justice;

b. An order invalidating Order in Council P.C. 2014-809 as a nullity;

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[88] *NEB Act*, *supra*, ss 54(1), (5).
[89] *Imperial Oil*, *supra* at para 6; *Greenpeace*, *supra* at para 399.
[90] Memorandum of Fact and Law of the Respondent Attorney General of Canada on the Motions for Leave, dated July 30, 2014 at paras 8-10.

c. In the alternative, an order quashing, rescinding or setting aside Order in Council P.C. 2014-809 as unreasonable and based on errors of procedural fairness and natural justice; and

d. An order invalidating Certificates of Public Convenience and Necessity OC-060 and OC-061 as a nullity.

e. In any event of the cause, Unifor does not request costs and requests that no costs order be made against it, pursuant to Rule 400 of the *Federal Courts Rules*.

f. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2015.

May 22, 2015

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PART V - LIST OF AUTHORITIES

A. Statutes and Regulations

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52
Jobs, Growth and Long-term Prosperity Act, SC 2012, c 19
National Energy Board Act, RSC, 1985, c N-7
Executive Order 13337 of April 30, 2004: Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, 87 FR 25299
United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, Executive Summary (January 2014) at pp ES-15-17

B. Case Law and Authorities

League for Human Rights of B'Nai Brith Canada v Odynsky, 2010 FCA 307
Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524, 2012 SCC 45
Construction and Specialized Workers' Union, Local 1611 v Canada (Minister of Citizenship and Immigration), 2012 FC 1353
Greenpeace Canada v Canada (Attorney General), 2014 FC 463
Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans), [1999] 1 FC 483, [1998] FCJ No. 1746 (FCA)
Imperial Oil Resources Ventures Limited v Canada (Fisheries and Oceans), 2008 FC 598
Dunsmuir v New Brunswick, [2008] 1 SCR 190, 2008 SCC 9
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, [2011] 3 SCR 654, 2011 SCC 61
Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62

Mission Institution v Khela, [2014] 1 SCR 502
Canadian National Railway Co v Canada (Attorney General), [2014] 2 SCR 135, 2014 SCC 40
Globalive Wireless Management Corp v Public Mobile Inc, 2011 FCA 194
Vennat v Canada (Attorney General), [2007] 2 FCR 647, 2006 FC 1008
Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Carswell) at para 12:3200
Christian Dior, SA v Dion Neckwear Ltd, [2002] 3 FCR 405, 2002 FCA 29
National Bank of Canada v Lajoie, 2007 FC 1130
Munoz v Canada (Citizenship and Immigration), 2008 FC 995
Keeper v Canada, 2011 FC 307
Keeper v Canada, 2012 FCA 90
Canada (Minister of Citizenship and Immigration) v Jan, 2006 FC 40
Westcoast Energy Inc. (August 1992), Reasons for Decision, RH-1-92
TransCanada PipeLines Limited (July 1988), Reasons for Decision, GH-2-87
Maritimes & Northeast Pipeline Limited Partnership (Re), 2000 LNCNEB 20
Alliance Pipeline Ltd (November 1998), Reasons for Decision, GH-3-97
Brown v. Canada (National Capital Commission), 2009 FCA 273, [2009] FCJ No 1196
Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159
Sumas Energy 2, Inc v Canada (National Energy Board), 2005 FCA 377
Nakina (Township) v Canadian National Railway Co, [1986] FCJ No 426 (FCA)
Forest Ethics Advocacy Association v Canada (National Energy Board), 2014 FCA 245
114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40