Court File No. ________

FEDERAL COURT OF APPEAL

Motion for leave to apply for judicial review of Order in Council, P.C. 2014-809 made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*

BETWEEN:

UNIFOR

Moving Party

- and –

ATTORNEY GENERAL OF CANADA, AND
NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP

Responding Parties

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY, UNIFOR

July 14, 2014

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Contents

PART I - STATEMENT OF FACT 1

A. Overview 1

B. Unifor 1

C. The pipeline project and the proceedings 2

D. The positions of CEP and UFAWU before the Joint Review Panel 3

E. Recommendations of the Joint Review Panel 4

F. Order of the GIC and issue of certificates 4

PART II - POINTS IN ISSUE 5

PART III - SUBMISSIONS 5

A. The decision at issue 5

B. The test for granting leave to apply for judicial review 6

C. The nature of the Panel's public interest mandate 7

D. The Panel's report, as adopted by the Governor in Council, imposed an unjustified burden of proof on the Interveners to establish the potential adverse impacts of the proposed pipeline on investments in Canadian oil value-added processing 8

E. The Board erred in law, and declined jurisdiction, in holding that "well functioning petroleum markets" produce public interest outcomes 12

F. The Panel's report, as adopted by the Governor in Council, erred in law and declined jurisdiction in concluding that consideration of the the climate change impacts associated with upstream developments in the oil sands that would be serviced by the Project was outside of its mandate 15

PART IV - ORDER REQUESTED 22

PART V - AUTHORITIES i

PART I - STATEMENT OF FACT

A. Overview

1. This is an application by Unifor for leave to seek judicial review by the Federal Court of Appeal with respect to the Order of the Governor in Council authorizing, *inter alia,* the issuance of Certificates of Public Convenience and Necessity for the Northern Gateway Pipelines Project.

B. Unifor

2. In the energy sector, Unifor (previously CEP) represents tens of thousands of workers employed in oil and gas exploration, transportation, refining and conversion in the petrochemical and plastics sectors. In respect of the Northern Gateway Project, Unifor members work in production and refining facilities in Alberta and British Columbia that produce bitumen and oil products that would be transported on the Pipeline. Unifor members also work in refining and oil handling facilities in British Columbia that would receive energy goods transported on the Pipeline. The jobs and economic interests of these Unifor members would be directly affected by the Project.

> Evidence of the Communications Energy and Paperworkers' Union of Canada, dated January 31, 2012 [**"CEP Evidence"**], para. 2, Exhibit A to the Affidavit of Kalyn Lord, sworn July 14 [**"Lord Affidavit"**], Motion Record, Tab 4.
>
> Affidavit of Benjamin Piper, sworn July 14, 2014, para. 2, Motion Record, Tab 5.

3. In the fisheries sector, Unifor (previously UFAWU) represents 11,000 fisheries workers on both the East and the West coasts of Canada, and on Lake Erie. On the west coast of Canada, Unifor members are commercial fishermen and fish plant workers who rely on healthy fish stocks and fish habitat in that region. The jobs and communities of these Unifor members would be directly affected by marine oil spills arising from, or in consequence of, the Project.

> Final Argument of the United Fishermen and Allied Workers' Union-CAW, dated May 31, 2013 [**"UFAWU Arguments"**], Exhibit D to the Lord Affidavit, Motion Record, Tab 4.

C. The pipeline project and the proceedings

4. Northern Gateway Pipelines Limited Partnership ("Northern Gateway") 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 its proposals (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.

> Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 2 [**"Joint Review Panel Report, vol. 2"**], p. 3, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

5. 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.

> Joint Review Panel Report, vol. 2, p. 3, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

6. 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.

CEP Evidence, para. 8, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

7. The Minister of the Environment and the Chair of the National Energy Board established the Joint Review Panel (the "Panel") under the *Canadian Environmental Assessment Act* and the *National Energy Board Act* to assess the Project's environmental, social, and economic effects. The Panel held public hearings, in which it heard from Northern Gateway, industry associations, representateive of several First Nations, municipal, provincial and federal governments, environmental groups, many members of the general public, and others.

Joint Review Panel Report, vol. 2, p. 3, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

D. The positions of CEP and UFAWU before the Joint Review Panel

8. Both CEP and the UFAWU were granted standing as interverners 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.

9. 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.

Final Argument of the Communications Energy and Paperworkers' Union of Canada, dated May 31, 2013 [**"CEP Final Argument"**], Exhibit B to the Lord Affidavit, Motion Record, Tab 4.

UFAWU Arguments, Exhibit D to the Lord Affidavit, Motion Record, Tab 4.

10. 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.

11. 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 Northern Gateway project.

CEP Final Argument, Exhibit B to the Lord Affidavit, Motion Record, Tab 4.

CEP Evidence, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

12. UFAWU's evidence described the West Coast fishing industry, which is the largest private sector employer on the North Coast, and whichadded 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 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..

UFAWU Arguments, Exhibit D to the Lord Affidavit, Motion Record, Tab 4.

E. Recommendations of the Joint Review Panel

13. On December 19, 2013, the Panel published the Report, in which, *inter alia*, it recommended to the Governor in Council that Certificates of Public Convenience and Necessity, incorporating the Panel's conditions, be issued for both the oil and condensate pipelines pursuant to the *National Energy Board Act*.

F. Order of the GIC and issue of certificates

14. On June 17, 2014, the Governor in Council issued Order in Council P.C. 2014-809, entitled *Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern*

Gateway Pipelines Inc. for the Northern Gateway Pipelines Project. That Order in Council was published in the Canada Gazette on June 28, 2014.

> *Order - Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Pipelines Inc. for the Northern Gateway Pipelines Project*, P.C. 2014-809, dated June 17, 2014, Motion Record, Tab 2.

15. Pursuant to s. 54(5) of the Act, the National Energy Board issued Certificates of Public Convenience and Necessity on June 18, 2014.

PART II - POINTS IN ISSUE

16. Unifor submits that leave to apply for judicial review should be granted so that this Court may consider the following questions of significant public and national importance:

a. Did the Panel's report, as adopted by the Governor in Council, err in law or exceed its jurisdiction in imposing an unjustified burden of proof on the Interveners to establish the potential adverse impacts of the proposed pipeline on investments in Canadian oil value-added processing?

b. Did the Panel's report, as adopted by the Governor in Council, err in law and decline jurisdiction in holding that "well-functioning petroleum markets" should determine the public interest?

c. Did the Panel's report, as adopted by the Governor in Council, err in law and decline jurisdiction in concluding that consideration of the climate change impacts associated with upstream developments in the oil sands that would be serviced by the Project was outside of its mandate?

PART III - SUBMISSIONS

A. The decision at issue

17. This motion for leave concerns the judicial review of Order in Council P.C. 2014-809, issued on June 17, 2014. That Order in Council relies entirely on the findings of the Panel and provides that:

> … the Governor in Council accepts the Panel's finding that the Project, if constructed and operated in full compliance with the conditions set out in Appendix 1 of Volume 2 of the Panel Report, is and will be required by the present and future public convenience and necessity, and accepts the Panel's recommendation.
>
> *Order - Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Pipelines Inc. for the Northern Gateway Pipelines Project*, P.C. 2014-809, dated June 17, 2014, Motion Record, Tab 2.

18. The Order in Council then directs the National Energy Board to issue Certificates of Public Convenience and Necessity in respect of the Project.

19. Given the reliance of the Governor in Council on the recommendations and findings of the Panel, this application for leave, and any ensuing judicial review if leave is granted, concerns errors of law and jurisdiction committed by the Panel which Unifor contends impugn the validity of the Order of the Governor in Council.

B. The test for granting leave to apply for judicial review

20. Section 55(1) of the Act provides that:

> Judicial review by the Federal Court of Appeal with respect to any order made under subsection 54(1) is commenced by making an application for leave to the Court.

21. The test for leave under s. 55(1) has not yet been defined by this Court. However, it would presumably mirror the test for leave to appeal the awarding of a certificate by the Board under s. 22 of the Act. Indeed, the Federal Court has applied the test for leave to appeal in determining whether to grant leave to apply for judicial review under s. 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

> See e.g. *Urbanczyk v. Canada (Public Safety and Emergency Preparedness)*, 2009 FC 552, paras. 5-7, Moving Party's Book of Authorities, Tab 14.

22. Accordingly, the test for granting leave to apply for judicial review under s. 55(1) of the Act should ask whether "a fairly arguable case is disclosed for the relief proposed to be sought if leave were to be granted". In applying this standard, this Court has noted that it is "the other side

of the coin of the traditional jurisdiction to summarily terminate proceedings that dispose no reasonably arguable case".

> *Bains v. Canada (Minister of Employment and Immigration)* [1990] F.C.J. No. 457 (C.A.), Moving Party's Book of Authorities, Tab 10.

C. The nature of the Panel's public interest mandate

23. In its decision, the Panel described its public interest mandate under section 52 of the Act this way:

> 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.

> Joint Review Panel Report, vol. 2, p. 8, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

24. In considering the scope of the National Energy Board's public interest mandate, this Court has held that the "public interest" includes the interests of all of the affected members of the public and that excluding from consideration any class or category of interests is an error of law justifying the intervention of the Court.

> *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, [2005] F.C.J. No. 1895 (C.A.), paras. 9 and 23, Moving Party's Book of Authorities, Tab 13.

> *Nakina (Township) v. Canadian National Railway Co.*, [1986] F.C.J. No. 426 (F.C.A.), Moving Party's Book of Authorities, Tab 11.

25. In the *Alliance Pipeline* case, the Board acknowledged the importance of considering the potential for commercial impacts on persons other than the owners and users of the pipeline:

> A large-scale project such as that proposed by Alliance inevitably raises the potential for commercial impacts on persons other than the owners and users of the pipeline. Paragraph 52(e) [public interest] of the NEB Act enables the Board to consider these potential impacts in its overall assessment of whether the applied-for project is in the public convenience and necessity. Other aspects

> considered under this paragraph include environmental protection, socio-economic impacts, and public safety.
>
> *Alliance Pipeline Ltd,* GH-3-97, at p. 8, Moving Party's Book of Authorities, Tab 9.

26. It is therefore clear in the case law that the Board's final determination of whether the project is in the public interest must consider the economic, social and environmental effects of the project, including commercial impacts on persons other than the owners and users of the pipeline.

D. The Panel's report, as adopted by the Governor in Council, imposed an unjustified burden of proof on the Interveners to establish the potential adverse impacts of the proposed pipeline on investments in Canadian oil value-added processing

27. The Panel clearly considered that the burden to establish whether the project was in the public interest lay on the applicant. However, in considering the evidence introduced by the interveners, it imposed an unjustified standard of proof, requiring them to lead "compelling evidence" of the potential adverse impacts of the proposed projects. This was an error of both law and jurisdiction.

28. The National Energy Board has previously considered how it should apply the burden of proof in matters before it. In *Westcoast Energy Inc.*, it stated:

> The overall concept of the burden of proof has many components. In GH-2-87, the reference to the burden of proof was in the context of the applicant's overall or ultimate burden of proof which the applicant must discharge at the close of the hearing in order to obtain the relief that was requested in its application. The process by which the applicant undertakes to discharge its ultimate burden of proof begins with the initial filing of its application in which the applicant is under an obligation to present to the Board an application containing sufficient evidence amounting to a *prima facie* case in support of the relief requested. This evidence is augmented by responses to information requests, written evidence and cross-examination. Depending upon the particular strengths and weaknesses of the applicant's *prima facie* case, the onus of proof may shift to the intervenors during the course of the hearing to refute the applicant's case. 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.

> In discharging the initial burden of presenting a *prima facie* case, it is for the applicant to determine the extent and validity of the evidence that it chooses to file. Whether or not this evidence is sufficient to discharge the applicant's ultimate burden of proof is a matter to be determined in the particular circumstances of each case. Suffice it to say that intervenors are given an opportunity to cross-examine and to present their own evidence in opposition to the applicant. They need not do so as it is for each intervenor to determine the extent to which the onus of proof has shifted from the applicant. Ultimately, it is for the Board to determine, on the totality of the evidence which is before it, whether the applicant has discharged its burden of proof. [Emphasis added]

> *Westcoast Energy Inc.*, Reasons for Decision, RH-1-92, August 1992, pp. 3-4, Moving Party's Book of Authorities, Tab 15.

29. It is therefore the applicant who bears the ultimate burden of proof before the National Energy Board. Moreover, while interveners may at times bear the burden to refute the applicant's case, they should not be held to a higher standard of proof than the 'balance of probabilities' standard that applies to the applicant.

30. Yet in this case, on the issue of the effect of the Project on the security of supply to Canadian upgraders and refiners, the Joint Review Panel held the interveners to a higher standard of proof, by requiring them to demonstrate "compelling" evidence to support the propositions they were advancing.

31. As described by the Panel, Northern Gateway 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.

> Joint Review Panel Report, vol. 2, p. 283, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

32. However, Northern Gateway's assessment of potential adverse impacts on commercial third parties failed to consider the impact of the pipeline on the security and cost of supply of bitumen to existing Canadian upgraders, or on investment in building future Canadian upgraders.

These facilities would otherwise process bitumen that the Project is designed to facilitate the export of. The only evidence on these adverse consequences of the Project was adduced by the interveners, CEP and the Alberta Federation of Labour ("AFL").

33. The evidence adduced by CEP included the expert evidence of Mr. Michael McCracken, the principal at Informetrica. 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. These would include the 'loss' of 26,000 jobs that would otherwise be created in the Canadian economy if bitumen extracted in Alberta was upgraded in Canada. Much greater employment gains would follow from further refining of upgraded bitumen extracted from Canada's oil sands.

> Michael McCracken, "Employment Consequences of Exporting Bitumen", Attachment A to CEP Evidence, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

34. As Mr. McCracken's uncontroverted evidence stated:

> In the case of the Northern Gateway Project, our understanding is that the primary purpose of the pipeline will be to export as much as 525,000 barrels per day of conventional light and heavy oil, synthetic oil, bitumen blended with condensate and bitumen blended with synthetic oil. In addition, the project includes a condensate pipeline running in the opposite direction, with throughput capacity of 193,000 barrels per day. That condensate would be reused to facilitate the transportation of bitumen largely for upgrading in export markets.
>
> 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. (This is the proportional increase of the upgrading volume from 400,000 barrels per day to 525,000.) Suffice it to say however, that in any scenario, the foregone economic opportunity involved, if measured in jobs created, would be significant and larger than the operational requirements of the Gateway pipeline designed for bitumen exports from Canada.
>
> Michael McCracken, "Employment Consequences of Exporting Bitumen", Attachment A to CEP Evidence, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

35. 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.

> CEP Evidence, paras. 4-30, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

36. The AFL introduced extensive evidence explaining the clear 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, as compared with the 104 permanent jobs generated by the Northern Gateway pipeline. It further pointed out that an increase in bitumen prices, that Northern Gateway forecasted would be the result of the Project, would undermine the domestic upgrading and refining industry which depended on lower feedstock prices.

> Written Evidence of the Alberta Federation of Labour, dated January 2012 [**"AFL Evidence"**], pp. 6-15, Exhibit C to the Lord Affidavit, Motion Record, Tab C.

37. The Joint Review 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 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 <u>no compelling evidence</u> before it to support the proposition that the project would result in existing refineries experiencing feedstock shortages" (emphasis added).

> Joint Review Panel Report, vol. 2, p. 335, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

38. 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 and onerous burden of proof on the interveners to refute the applicant's case, despite the fact that the ultimate burden of proof to demonstrate the merits of the application rests with the applicant, on a balance of probabilities. Moreover,

nowhere in the Panel's decision did it impose a similar obligation on Northern Gateway to adduce "compelling evidence" to support the merits of the Project. In doing so, the Joint Review Panel erred in law and exceeded its jurisdiction.

39. It is submitted therefore there is a "fairly arguable case" that the decision of the Governor in Council should be set aside for having accepted and relied upon the recommendation of the Panel, which was fatally flawed in having imposed an unjustified burden of proof on the interveners to provide "compelling evidence" in respect of a valid public interest consideration, namely the potential adverse impact of the Project on jobs and Canadian energy security.

E. The Board erred in law, and declined jurisdiction, in holding that "well functioning petroleum markets" produce public interest outcomes

40. In rejecting the arguments advanced by CEP and AFL regarding the security of supply to, and investment in Canadian oil value-added processing (upgraders and refineries) 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. While the Panel is informed by current economic and energy policy, it does not set policy.
>
> Joint Review Panel Report, vol. 2, p. 335, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

41. 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, not make, provincial and federal policy in favour of value-added processing.

42. More importantly, having noted that it is not a policy making body, the Panel in fact expressed and applied a policy of its own making as a determinative factor in support of its conclusion to recommend approval of the Project. 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. <u>The Panel is of the view that well-functioning markets tend to produce outcomes that are in the public interest</u>. [Emphasis added]
>
> Joint Review Panel Report, vol. 2, p. 335, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

43. Equating well-functioning markets with the public interest is clearly a policy choice and one the industry and the province of Alberta urged upon the Panel as such. For example, the Panel summarized the submissions of the Canadian Association of Petroleum Producers to the effect that:

> … <u>it is the clear policy of the Canadian government</u> 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. [Emphasis added]
>
> Joint Review Panel Report, vol. 2, p. 324, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

44. No support for such a policy can be found in the provisions of the Act, and the Panel offers no reference to any policy instrument of the federal government to which it has looked for guidance. Indeed, the Panel provides no elucidation of what it intends by the term "well functioning markets" other than the passage reproduced above (see paragraph 42).

45. In effect, in the describing well-functioning markets as it has, the Panel is simply acceding to the commercial arrangements entered into by large energy companies which determine whether – in their interest – a pipeline is needed, and what it will carry. In adopting this approach, the Panel is equating the private interests of the energy industry with the public interest of Canadians, and in doing has lost sight of its statutory mandate to protect the latter.

46. Decisions about the establishment and operation of oil and gas pipelines are not matters that Parliament or Canadian legislators have left to the market, hence the establishment of regulatory regimes such as the National Energy Board. Contrary to this statutory framework, and confounding its own mandate, the Panel has adopted an approach to pipeline approvals that

improperly diminishes its role in providing market oversight and regulation, in the public interest.

47. Compounding this error, the Panel has adopted a double standard in determining which policies it may take into account and which it may not. Thus it explained that policies favouring value-added processing are outside its mandate, while those favouring "properly functioning markets" are key to deciding the public interest. This is despite the fact that, as the AFL pointed out in its written evidence, 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.

> Joint Review Panel Report, vol. 2, p. 170, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.
>
> AFL Evidence, paras. 33, 36, Exhibit C to the Lord Affidavit, Motion Record, Tab 4.

48. Finally, and while it is a lesser point, what is missing from the Panel's analysis – which asserts that it is for the market decide what will be shipped in the pipelines – is the fact that the condensate pipeline in the Northern Gateway Project has only one purpose, which is to ship diluent to the oil sands to facilitate bitumen exports. In other words, with respect to the condensate pipeline, the Project at issue does not let the market decide what will be shipped in the pipelines, it makes the decision for the market.

49. Having declared that its role was not to set economic and energy policy, the Panel has rested its conclusions on a clear policy choice, namely that further pipeline development would promote "well-functioning petroleum markets", and was therefore in the public interest. Accordingly, there is at least a "fairly arguable case" that, by relying heavily on the vague concept of "well-functioning petroleum markets", while declining to consider stated policy goals of developing value-added crude oil processing, the Panel erred in law and improperly declined its jurisdiction.

F. The Panel's report, as adopted by the Governor in Council, erred in law and declined jurisdiction in concluding that consideration of the the climate change impacts associated with upstream developments in the oil sands that would be serviced by the Project was outside of its mandate

50. 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 consider these effects in assessing the Project. In doing so, it erred in law and wrongfully declined its jurisdiction.

> Joint Review Panel Report, vol. 1, p. 17, Exhibit E to the Lord Affidavit, Motion Record, Tab 4.

51. The exclusion of any class or category of interests when considering the public interest has been found to be an error of law justifying the intervention of the Court. This principle emerges from *Nakina (Township) v. Canadian National Railway Co.*, in which a Railway Transport Commission had specifically declined to consider the effect that abandonment of a railway station would have on the community. This Court held:

> … To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this Court.
>
> …
>
> … To put the matter another way, while the Commission may have the jurisdiction, in the public interest, to regulate questions of technical operation, safety and service, those fields of jurisdiction do not themselves constitute either a limitation or a definition of what the public interest is, either generally or with regard to any particular case.
>
> If evidence is relevant to the determination of the question of public interest, it must be admitted and considered. For my part, I find it impossible to say that evidence dealing with the probable economic effects of the proposed changes on the surrounding communities would not be relevant to the question of the public interest.

> Accordingly, it is my opinion that it would have been error for the Committee not to admit the appellant's evidence; having admitted it, it was error for the Committee to hold that it could not consider it. For clarity, however, I would emphasise that the error lies simply in the failure to consider. Clearly the weight to be given to such consideration is a matter for the discretion of the Commission,, which may, in the exercise of that discretion, quite properly decide that other considerations are of greater importance. [Emphasis added]
>
> *Nakina (Township) v. Canadian National Railway Co.*, [1986] F.C.J. No. 426 (F.C.A.) (Q.L.), p. 3, Moving Party's Book of Authorities, Tab 11.

52. The breadth of interests that fall within the "public interest" was dealt with by the Supreme Court in *Quebec (Attorney General) v. Canada (National Energy Board)*, where the National Energy Board had granted a licence to Hydro-Québec for an export transmission line, but had imposed two conditions relating to the successful completion of environmental assessments of future generating facilities that would produce the electricity to be transported by the power line. It imposed these conditions based on considerations that were not found in its own Act. The Court reinstated the Board's conditions, commenting:

> I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. <u>To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question</u>. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. <u>Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought</u>. [Emphasis added]
>
> *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, para. 56, Moving Party's Book of Authorities, Tab 12.

53. And, more recently, in *Sumas Energy 2, Inc. v. Canada (National Energy Board)*, this Court considered whether the National Energy Board could consider the environmental impact in Canada of a power plant in the United States, in dismissing an application to construct an international power line. The Court found that, in carrying out its public interest mandate, the

Board was entitled to rely on evidence "showing that any burden (as well as benefit) that might be felt in Canada from the power plant was directly linked to the IPL".

> *Sumas Energy 2, Inc. v. Canada (National Energy Board)*, 2005 FCA 377, paras. 13, 21, Moving Party's Book of Authorities, Tab 13.

54. Contrary to the approach endorsed in these cases, the Panel refused requests that it consider the environmental effects of the oil sands developments that would be served by both the oil and condensate pipelines. The Joint Review 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 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.
>
> Joint Review Panel Report, vol. 1, p. 17, Exhibit E to the Lord Affidavit, Motion Record, Tab 4.

55. None of these rationales stand up to scrutiny.

56. 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, are subject to provincial and/or federal regulation. 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, 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. In failing to consider these environmental impacts on this basis, the Board failed to exercise its duty to assess public interest before recommending approval of the Project.

> Joint Review Panel Report, vol. 2, pp. 189-92, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

57. In respect of its second rationale, the fact that Northern Gateway is not the developer of oil sands production has no bearing on the Panel's obligation to take into account the impacts associated with the developments that will be served by the Project. In fact, in respect of the economic benefits of the Project, the Panel specifically took into account those associated with oil sands developments that would be served by the pipelines, regardless of the fact that Northern Gateway was not directly involved with those developments.

> Joint Review Panel Report, vol. 2, p. 3, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

58. 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 exercise its public interest mandate. Moreover by isolating environmental impacts from economic ones, the Panel failed to implement a central tenet of sustainable development, which 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.

> *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 31, citing the *Bergen Ministerial Declaration on Sustainable Development* (1990), para. 7, Moving Party's Book of Authorities, Tab 8.

59. Third, the Joint Review Panel relied on the distance of the Bruderheim Station from the oil sands developments. 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. Moreover, as CEP noted in its evidence before the Panel, 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 come through the condensate pipeline is more than sufficient to fill the 525,000 barrels per day capacity of the export pipeline. In any event, even if we were to accept that the Bruderheim Station was to be used to transport "other" oil, this is simply one factor that could be considered – along with the projected impact of the project on greenhouse gas emissions from oil sands development – in a full Sustainable Development analysis, to determine whether the project is in the public interest.

> CEP Evidence, para. 8, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

60. Finally, the Joint Review 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 <u>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</u>. [Emphasis added]

> Joint Review Panel Agreement and Terms of Reference, Appendix, in the Joint Review Panel Report, vol. 2, p. 408, Exhibit F to the Lord Affidavit, Motion Record, Tab 4.

61. These Terms of Reference establish a very broad scope for the Panel's analysis, which includes the <u>cumulative</u> environmental effects of the project, "<u>in combination with other projects</u> and activities that have been <u>or will be carried out</u>" (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, the Terms of Reference cannot supplant the Panel's statutory mandate to consider all factors that affect the public interest. 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.

CEP Evidence, paras. 32-34, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

62. CEP also pointed that the US Environmental Protection Agency had adopted the opposite approach in deciding whether to approve the Keystone XL pipeline. The EPA considered the estimated greenhouse gas emissions associated with upstream oil sands production intended for the pipeline, and wrote:

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

CEP Evidence, para. 39, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

63. The EPA 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 its view, these harms should all be considered in the scope of reviewing whether a proposed pipeline project is in the public interest.

CEP Evidence, para. 40, Exhibit A to the Lord Affidavit, Motion Record, Tab 4.

64. The approach taken by the Joint Review Panel is entirely out of step with that of the EPA. Instead, it adopted a narrow scope for assessing the impacts of the Project. Based on the Panel's statutory mandate, the broad terms of the Joint Review Panel Agreement, the jurisprudence on this question, and the approach adopted by U.S. regulators, the Panel should have considered the

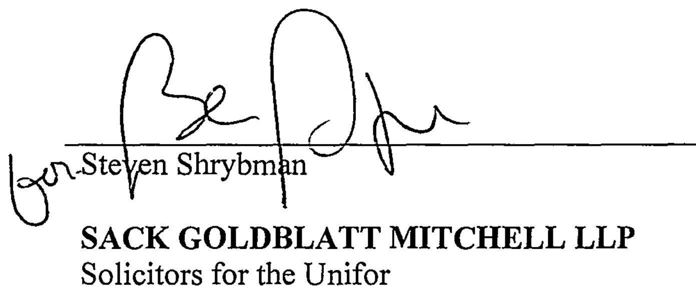
evidence presented to it concerning the effect that the Project would have in expanding oil sands production, and the corresponding impact on greenhouse gas emissions and climate change. Unifor submits that there is a "fairly arguable case" that, by failing to consider this evidence, the Joint Review Panel erred in law and inappropriately declined its jurisdiction, imparting a fatal flaw to the Order of the Governor in Council.

PART IV - ORDER REQUESTED

65. For all the reasons set out above, Unifor's proposed arguments disclose a fairly arguable case for the relief proposed to be sought if leave were to be granted. Unifor therefore requests that this Court grant leave to apply for judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 14, 2014



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Solicitors for the Unifor

PART V - AUTHORITIES

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40

Alliance Pipeline Ltd, GH-3-97

Bains v. Canada (Minister of Employment and Immigration) [1990] F.C.J. No. 457 (C.A.)

Nakina (Township) v. Canadian National Railway Co. [1986] F.C.J. No. 426 (F.C.A.)

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159

Sumas Energy 2 Inc. v. Canada (National Energy Board), [2005] F.C.J. No. 1895 (C.A.)

Urbanczyk v. Canada (Public Safety and Emergency Preparedness), 2009 FC 552

Westcoast Energy Inc., Reasons for Decision, RH-1-92, August 1992

APPENDIX A – STATUTORY PROVISIONS

***National Energy Board Act*, S.C. ch. N-7**	***Loi sur l’Office national de l’énergie*, L.R., 1985, ch. N-7**
22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.	22. (1) Il peut être interjeté appel devant la Cour d’appel fédérale, avec l’autorisation de celle-ci, d’une décision ou ordonnance de l’Office, sur une question de droit ou de compétence.
52. (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out (a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and (b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.	52. (1) S’il estime qu’une demande de certificat visant un pipeline est complète, l’Office établit et présente au ministre un rapport, qu’il doit rendre public, où figurent : a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d’utilité publique, tant pour le présent que pour le futur, du pipeline; b) quelle que soit sa recommandation, toutes les conditions qu’il estime utiles, dans l’intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l’Office de le délivrer, notamment des conditions quant à la prise d’effet de tout ou partie du certificat.
(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following: (a) the availability of oil, gas or any other commodity to the pipeline; (b) the existence of markets, actual or	(2) En faisant sa recommandation, l’Office tient compte de tous les facteurs qu’il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit : a) l’approvisionnement du pipeline en pétrole, gaz ou autre produit; b) l’existence de marchés, réels ou

potential; (c) the economic feasibility of the pipeline; (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and (e) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.	potentiels; c) la faisabilité économique du pipeline; d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l’ingénierie ainsi qu’à la construction du pipeline; e) les conséquences sur l’intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.
54. (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order, (a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or (b) direct the Board to dismiss the application for a certificate. (2) The order must set out the reasons for making the order. (3) The order must be made within three months after the Board’s report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit. (4) Every order made under subsection (1) or (3) is final and conclusive and is binding on	54. (1) Une fois que l’Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret : a) donner à l’Office instruction de délivrer un certificat à l’égard du pipeline ou d’une partie de celui-ci et de l’assortir des conditions figurant dans le rapport; b) donner à l’Office instruction de rejeter la demande de certificat. (2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci. (3) Le décret est pris dans les trois mois suivant la remise, au titre de l’article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l’Office pour effectuer le réexamen et faire rapport n’est pas comprise dans le calcul du délai imposé pour prendre le décret. (4) Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel et lient

the Board.	l'Office.
(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.	(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.
(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.	(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.
55. (1) Judicial review by the Federal Court of Appeal with respect to any order made under subsection 54(1) is commenced by making an application for leave to the Court. (2) The following rules govern an application under subsection (1): (a) the application must be filed in the Registry of the Federal Court of Appeal ("the Court") within 15 days after the day on which the order is published in the Canada Gazette; (b) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice; and (c) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance.	55. (1) Le contrôle judiciaire par la Cour d'appel fédérale de tout décret pris en vertu du paragraphe 54(1) est subordonné au dépôt d'une demande d'autorisation. (2) Les règles ci-après s'appliquent à la demande d'autorisation : a) elle doit être déposée au greffe de la Cour d'appel fédérale — la Cour — dans les quinze jours suivant la publication du décret dans la Gazette du Canada; b) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour; c) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne.

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27**
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.