BRITISH COLUMBIA

Direct Line: (250) 356-6519
Email: paul.yearwood@gov.bc.ca

December 7, 2012

VIA ELECTRONIC FILING
TO FOLLOW BY FACSIMILE

Secretary to the Joint Review Panel
Enbridge Northern Gateway Project
444 – Seventh Avenue S.W.
Calgary, Alberta T2P 0X8

Attention: Ms. Sheri Young

Dear Madam:

Re: Hearing Order OH-4-2011 and File No. OF-Fac-Oil-N304-2010-01-01
Enbridge Northern Gateway Project Application
Gitxaala Nation Notice of Constitutional Question

The Province of British Columbia has reviewed the written submissions of the Attorney General of Canada (Canada) filed today in response to the November 16, 2012 letter from the Joint Review Panel to the Gitxaala Nation. The Province agrees with the submissions of Canada.

The Gitxaala Nation, in their submissions, rely extensively upon the decision of the Supreme Court of Canada in *Paul v. British Columbia (Forest Appeals Commission),* to support their argument that the Panel must decide the constitutional questions they have raised. However, as emphasized by Canada, a full factual context is necessary for the proper resolution of complex constitutional questions. It is important to consider the context in which the constitutional issue arose in *Paul* and the mandate of the Forest Appeals Commission. Unlike the situation currently before the Panel, the matter before the Forest Appeals Commission was an appeal of an existing Crown decision – that being a decision by a District Manager that Mr. Paul had contravened a prohibition in the *Forest Practices Code* against the cutting of Crown timber. Mr. Paul asserted that he had an aboriginal right to cut timber and accordingly the Code prohibition did not apply to him. The Supreme Court found, at paragraph 6, that "[t]he effect of the Code is ... to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the Commission, as opposed to before a superior court judge." The constitutional issue in that case did not arise prior to a Crown decision being made, as it does in the current review before the Panel. The mandate of the Panel is not an appeal of an existing Crown decision, nor does the Panel's mandate prescribe that it adjudicate on whether asserted Aboriginal rights and title have been proven to exist. In fact the Panel, as stated in their August 4, 2010 letter and other documents as referred to by Canada, is not even mandated to make

final determinations about the strength of an Aboriginal group's asserted rights – much less whether they have been proven to exist. If in the future a CPCN is actually issued for this Project, the Gitxaala will have remedies available to them to seek to prove their asserted rights and title interests and to advance their claim that the CPCN is an unjustified infringement of those interests. However, at this stage, such an inquiry is clearly premature and inconsistent with the stated mandate of the Panel.

In concurring with the submissions made by Canada, the Province does not suggest that the requirements it has established for considering support for the Project have changed. In particular, the Province submits that it is entirely appropriate for the interests of First Nations to be fully considered by the Panel, and for the Panel to report on the potential impact of the Project on those asserted interests. However, determinations with respect to claims to rights and title are not necessary for this to occur. As the federal government has submitted, it is neither necessary nor appropriate for the Panel to make determinations on the claims to rights and title made by the Gitxaala, or any other First Nation participating in these proceedings.

Respectfully,

P. Yearwood

Paul E. Yearwood
Counsel for the Province of British Columbia