

By Joan Russow PhD

Global Compliance Research Project -A Project of the Ecological Rights Association



File photo of a worker at Enbridge's Michigan oil spill. File photo of a worker at Enbridge's Michigan oil spill. The Cabinet Decision's mimicked the flawed Decision by the Joint Review Panel If one reviews the initial submissions to the panel in August 2010, one can clearly see that the issues raised by the submissions were completely ignored.

**Proceeding with the pipeline and the tankers would be grossly negligent and in defiance with International obligations. There is sufficient evidence of precedents, such as Enbridge spills, regional earth quakes, potential tsunamis, grounding of a drilling rig and widespread pollution of land and water bodies to invoke the precautionary principle...**

ISSUES IGNORED, INTERNATIONAL NORMS DEFIED, AND GROSS NEGLIGENCE, PERCEIVED

**The August 2010 submissions to the Joint Review Panel in Kitimat, were intended to inform the panel about the issues that should be addressed in the terms of reference.**

### **The interveners raised the following issues**

**The need to examine the TOTAL IMPACT OF oil sands, pipelines and tankers, and the importance of addressing the threats to indigenous rights, to livelihood and subsistence, to marine life and resources, to future generations and to cultural and natural heritage. And to address the question; Does Canada really need this project?**

**After reviewing the issues presented, I realized that the current terms of reference of the Review panel have ignored many of these issues even though Canada has existing obligations in international law related to them.**

.

### **1.FOSSIL FUEL TRIAD**

**At the 2010 panel the issue of the increased impact on climate change was raised.**

**Pat Moss from the Friends of Wild Salmon said the inquiry should consider the impact of tar sands expansion and related pipeline infrastructure on climate change**

**Under Article 2 of the legally binding UN Framework Convention on Climate change,**

**states are “to stabilize greenhouse gases below a level of dangerous anthropogenic emissions.”**

**The Enbridge pipeline will facilitate Canada's increased non-compliance with Article 2. And Canada has already caused a significant move towards this dangerous level**

## **2.INDIGENOUS RIGHTS**

**At the 2010 PANEL the issue of indigenous rights was raised.**

**Chief John Ridsdale from THE WET'SUWET'ENn (wit so-it en) stated:**

**“the United Nations Declaration on Rights of Indigenous Peoples, came out of the recognition of the urgent need to respect and promote the inherent rights of indigenous peoples”**

**Article 26.1 of Declaration on the Rights of Indigenous Peoples states**

**Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.**

**AND under Article 26.3 is the obligation to**

**give legal recognition and protection to these lands,**

**territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.**

**While Canada finally adopted the Declaration, the government proceeded to undermine it by claiming that it was only aspirational. The universal adoption, however, of the Declaration has resulted in the provisions becoming international norms- thus obligations of all states. Sadly the spirit and the letter of the Declaration have now been violated by Bill C-45, in which the government has altered a section of the Indian Act to allow First Nations to give up their rights to reserve lands, without a majority vote of the community .**

### **3 LIVELIHOOD SUBSISTENCE**

**At the August 2010 Panel, the issue of the threat to livelihood, and subsistence was raised**

**Gerald Amos from the Haisla First Nation stated: "the Enbridge project -- has a huge possibility of wiping out our livelihood."**

**The right to livelihood was recognized as a human right in Article 25 of the seminal 1948 Universal Declaration of human Rights**

**Under Article 1 of the legally binding International Covenant on Civil and Political Rights is the following obligation:**

**"In no case may a people be deprived of its own means of subsistence".**

**The livelihood and subsistence of First Nations within and around the tarsands have been deprived of their livelihood and subsistence:**

**Melina Laboucan Massimo, a Lubicon Cree decried: "before the tar sands, my community used to live sustainably off the land; our community was self-sufficient...before my family was able to drink from the waters..."**

**Undoubtedly, BC First Nations will also be deprived of their livelihood and subsistence, if the Enbridge pipeline proceeds**

#### **4. HUMAN RIGHT TO WATER**

**At the 2010 Panel the issue of threat to source of water was raised:**

**Kelly Marsh from Kitimat stated” I hope that the financial interest doesn't trump the environmental interest. Water is life. Without water we don't live. Are we just going to put at risk another thousand rivers and streams?”**

**In 2010, the UN General Assembly overwhelmingly agreed to a resolution declaring the human right to “safe and clean drinking water and sanitation”**

**If the Enbridge pipeline proceeds, the right to water cannot be guaranteed**

## **5 HEALTH**

**At the 2010 Panel, the issue of threat to health was raised:**

**Kyle Clifton from Gitga'at First Nation exclaimed; "No-one can guarantee us that there will be no spills. If the Panel recommends the project then in effect you are forcing us to live in fear, which will have effects on both our health and our economy."**

**Under article 12 of the legally binding International Covenant on Economic Social and Cultural Rights is the obligation "to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. and the obligation to take appropriate steps to ensure the realization of this right."**

## **6 SEA RESOURCES**

**At the 2010 Panel, issue of threat to sea resources was raised:**

**Kyle Clifton from the Gitga'at First Nation stated: "Our future will be ensured through the protection of these precious sea resources because without them we have nothing."**

**In Article 8j of the legally binding Convention on Biological Diversity is the following obligation"**



**To respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological *diversity***

## **7. FISH INCLUDING MIGRATORY SPECIES**

**At the 2010 panel, the issue of the threat, to fish habitat, and marine life was raised**

**Chief John Ridsdale from The Wet'suwet'en (WIT'SO-IT'EN) First Nations stated: "We have watched our land being stripped bare. We have seen the destruction of fishing sites and spawning grounds and the extinction of salmon stocks ."**

Under Article 194 5. of the legally binding UN Law of the Sea is the obligation

to prevent, reduce and **control pollution**

**of the marine environment and to take measures necessary to protect and preserve fragile ecosystems as well as the habitat of ... forms of marine life.**

**And under Article 66 1&2, of the Convention is the following obligation:**

**1. States in whose rivers anadromous stock (such as salmon and surgeon) originate shall have the primary interest in and responsibility for such stocks and shall ensure their conservation**

**In the omnibus bill 38 the Harper government weakened section 35 of the Fisheries Act; Undoubtedly, the weakening of section 35 was in contravention of the Law of the Sea and its agreements..**

***Under Article 8k of the Convention on Biological Diversity is the following obligation;***

**8(k) to Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations :**

**The white sturgeon is listed as an endangered species under the IUCN red list of threatened species.**

**The pipeline is planned to cross the Stewart and Nechako rivers, and impact on the Nechako White Sturgeon species**

**<https://www.cbc.ca/news/politics/story/2013/01/07/pol-two-bands-duty-to-consult-court-challenge.html?cmp=rss>**

## **Under Article 65, of Law of the Sea, is the obligation**

To cooperate with a view to the conservation of marine

mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation,

An international study headed by Christine Erbe, *director of the Centre for Marine Science and Technology at from* Curtin University in Perth, Australia, predicts total underwater shipping noise could increase 10-fold in B.C.'s northern fiords if Northern Gateway proceeds. And that

“With the cumulative effect, the levels would be way above anything these animals would ever have experienced naturally,” *Erbe, a former research scientist with Canada's federal Fisheries department,* and that

. “There is a worry they will go away and not come back to these fiords. This is critical habitat, important to them”

## **8. FUTURE GENERATIONS HERITAGE**

**At The 2010 Panel the issue of the threats to future generations was raised**

***Chief Councillor Delores Pollard* from Haisla First Nation affirmed:**

**“We depend on the land for everything, but the most important thing that we depend on the land for is to maintain our connection to our children and future generations ...”**

**Under the article 4 of 1972 legally binding UN Convention on the Protection of Cultural and Natural Heritage, there is**

**the duty of ensuring the identification, protection, conservation, preservation and transmission to future generations of cultural and natural heritage**

**Under Article 12, of the Convention on biological Diversity**

**there is an obligation to conserve and sustainably use biological diversity for the benefit of present and future generations,**

**In the framework Convention on Climate change, there is determination to protect the climate system for present and future generations,**

## **9 THREATS AND THE PRECAUTIONARY PRINCIPLE**

**At the 2010 Panel the issue of living under constant threats was raised**

***Chief Councillor Delores Pollard*** from Haisla First Nation stated: “The scale of activity contemplated even with no accidents or malfunctions will drastically alter habitats, fish and wildlife in our territory for years beyond the time when the oil sands have been mined out. “

**CHIEF HARVEY HUMCHITT** from the Heiltsuk stated: expressed concern about “increased tanker traffic in the rugged Central Coast of B.C.”

***Canada is bound by the precautionary principle*** which reads

**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 the threat." (Rio Declaration, UNCED1992).**

**This principle is also contained in**

**In the Convention on Biological Biodiversity, the precautionary principle read;**

**where there is a threat of significant reduction or**

**loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat**

**in the UN Framework Convention on climate change**

**and in 1995 agreement "relating to the Conservation and management of straddling fish stocks and highly migratory fish stocks ...is the obligation to invoke the precautionary principle.**

## **B.FEDERAL DEPARTMENTS HAVE MISCONSTRUED THE PRECAUTIONARY PRINCIPLE**

**In April 2013, I filed a petition with the Commissioner on the Environment and raised the issue of Canada's failure to abide by the precautionary principle . I referred to 14 issues, two of which were related to the tarsands and pipelines**

**QUESTION 1. There is sufficient scientific evidence that the continued exploitation of the tar sands will cause Canada to fail its obligations under the United Nations Convention on Climate Change (UNFCCC) Under Article 2. Of the Convention**

**Under Article 2 of the legally binding UN Framework Convention on Climate change, states are "to stabilize greenhouse gases below a level of dangerous anthropogenic emissions."**

**The Department of Natural Resources responded that the Government takes the issue of climate change seriously, and under the 2009 Copenhagen Accords, Canada has committed to reducing its greenhouse gas (GHG) EMISSIONS BY 17 % FROM 2005 LEVELS BY 2020.**

**At Copenhagen, Canada agreed to far less than the EU that agreed to 20% below 1990 levels by 2020 and would have been prepared to go as far as 30% if other states had been willing.**

**QUESTION 2. There is sufficient evidence that accidents on pipelines have occurred and that pipelines are proposed through sensitive environmental areas in British Columbia and through First Nations' land; Why will the precautionary principle not be invoked to prevent pipelines and tanker from Enbridge and Kinder Morgan Proposals.**

**In the response from the Department of Natural Resources gave their definition of the precautionary approach as the following:**

**"The Framework outlines guiding principles for precautionary measures and their application in science-based decision making in areas of federal regulatory activity for the protection of health, safety and the environment, as well as the conservation of**



**natural resources. It also addresses the issue of terminology and definition directly in the introduction which states:**

**The application of “precaution”, “the precautionary principle” or “the precautionary**

**approach” recognizes that the absence of full scientific certainty shall not be used as a reason for postponing decisions where there is a risk of serious or irreversible harm.**

**□ I interpret this in the following way the application of “precaution”, “the precautionary principle” or “the precautionary**

**approach” recognizes that the absence of full scientific certainty [that it is safe] shall not be used as a reason for postponing decisions where there is a risk of serious or irreversible harm.**

**[□ If the emphasis is on science that demonstrates □ that it is safe; it is easy to ignore evidence that it is unsafe.]**

**On the Other hand the international version of the precautionary principle essentially affirms that**

**where there is a threat of significant reduction or loss of biological diversity, climate change, or irreversible harm the lack of full scientific certainty [that it is unsafe] should not be used as a reason for postponing measures to avoid or minimize such a threat**

**There is sufficient evidence that there could be serious irreversible damage, loss of significant biological diversity, adverse effects of climate change, and harm to marine life to justify invoking the precautionary principle and end the fossil fuel triad.**

## **0 CONCLUSION**

**If the Enbridge pipeline is permitted to proceed, Canada will demonstrate yet again its defiance of international law.**

**I raise these issues of international law because from my experience at international UN conferences, the Harper government has caused Canada to be perceived as an international pariah because of its obsession with profiting from the tarsands at any cost, while being willing to disregard its duty to guarantee fundamental indigenous and**

**ecological rights and to discharge obligations under international law**

**If the panel, respects the issues raised, by the interveners at the August 2010 review panel, and wishes to abide by international obligations and norms, the panel must reject, unconditionally, the Enbridge pipeline.**

**Proceeding with the pipeline and the tankers would be grossly negligent. There is sufficient evidence of precedents, such as Enbridge spills, regional earth quakes, potential tsunamis, grounding of a drilling rig and widespread pollution of land and water bodies.**

**that a prudent or reasonable person would not permit the Enbridge pipeline and tanker traffic .□ :**

**Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons” (where ‘duty’ means a duty imposed by law). (Section 216, Canadian Criminal Code)**

**At the August 20 10 Panel Walter Thorn from Kitimat Valley Naturalists Club: asked the Question: Does Canada really need this project? The answer from the Panel and from Harper must be a categorical No!**