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Tuesday, February 26, 2013

Ms. Gillian McEachern  
Mr. Adam Scott  
Environmental Defence  
116 Spadina Ave  
Suite 300  
Toronto, Ontario  
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Dear Ms. McEachern and Mr. Scott,

***Re: Provincial authority and options respecting Enbridge's Line 9 pipeline project***

It is our opinion that the Province of Ontario can order an environmental assessment (EA) into aspects of the Enbridge Line 9 pipeline reversal and capacity expansion project that relate to carefully articulated matters of provincial concern and jurisdiction. As well, the Province could go beyond an assessment of Line 9 alone and order what is sometimes called a *comprehensive* or *strategic* EA that more broadly reviews the myriad environmental and socio-economic impacts of expanding heavy oil imports from Western Canada into and across Ontario. We note, however, that in the case of either an individual or a strategic EA the fact of some constitutional ambiguity relating to provincial authority, as we set out below, will likely make the Ontario government reluctant to act.

***Background***

Enbridge's application to reverse the second portion of its Line 9 pipeline and expand the capacity of the entire line was filed with the National Energy Board (NEB) in November 2012. In December the NEB determined that the application was complete and ordered a limited public hearing, which is now set for late August 2013. The NEB's hearing of the Enbridge application will consider issues such as the purpose of the project, the engineering design and integrity of the proposed project, as well as the potential environmental and socio-economic effects of the project. (Comments are currently being solicited on the draft list of issues prepared by the NEB.) Since this is an existing pipeline, there is no issue as to the particular route.

The current application includes three requests:

- Reversal of the direction of flow of Line 9 from Hamilton (North Westover) to Montreal (referred to as Line 9B) -- a distance of approximately 600 km. The application to reverse the flow of Line 9 from Sarnia to Hamilton --- a distance of about 200 km --- which the company had called *Phase 1* (or what is now called Line 9A) was granted in July 2012, after a limited public hearing;
- An increase in the capacity of the pipeline from 240 000 to 300 000 barrels per day along its entire length, facilitated by the introduction of a synthetic *Drag Reducing Agent*; and
- A change in the existing *tariff* so that the entire length of the pipeline can be used to ship heavy oil (as opposed to light and medium crude) originating from Western Canada through Sarnia and on to Montreal via Hamilton.

The pipeline runs over or under private and public lands. In the case of private lands the company will have some type of *right of way* or *easement* either negotiated with the landowner or ordered under the NEB Act. The land itself remains in the hands of the property owner but Enbridge will have a right of access for purposes of operating and maintaining its pipeline. The pipeline crosses over many watercourses, lands subject to provincial source water protection plans, and municipal or Crown land, including protected areas such as parks, as well as passing near or across land to which First Nations have existing or claimed treaty rights

In the spring of 2012, Enbridge publicly announced what it calls an *Eastern Canadian Refinery Access Initiative* – a \$2 billion plan to bring Western Canadian crude to eastern Canada, including Ontario, Quebec and New Brunswick. The company had previously pursued, then abandoned, its *Trailbreaker* initiative which was to bring western crude to Portland, Maine and then to refineries in the southern U.S. In its application to the NEB, Enbridge does not acknowledge that the Line 9 project involves any desire to bring western crude to eastern ports and then to foreign refiners or markets. By the same token, in the hearing for Line 9A (or Phase 1), the company asked that the matter be treated as a *stand-alone* application and would not acknowledge its intention to subsequently reverse all of Line 9, or that the long term plan was to use the pipeline to ship heavy oil, including tar sands bitumen.

### ***Environmental assessments, generally***

The EA process, whether federal or provincial, is considered a planning tool. The process is designed to give decision-makers, as well as the public (which has a legal right to participate at various stages of the process) full and complete information about the potential adverse environmental impacts of undertakings in order to either mitigate or eliminate such impacts – or reject the project outright.

Although the NEB hearing into the Line 9 project will look at issues of pipeline integrity and safety as well as the commercial demand and need for the project, it is not likely to explore or assess in depth the potential impact of heavy oil on waterways and drinking water in the event of a spill, the increase in toxic and greenhouse gas (ghg) emissions from higher energy use at refineries, adverse effects on provincial lands, including spills that might prejudice the habitat of threatened or endangered species, or other impacts on areas of provincial interest.

We note that the federal EA process no longer applies to the Line 9 application given the repeal of the *Canadian Environmental Assessment Act* and its replacement with the *Canadian Environmental Assessment Act, 2012*. In fact, the federal EA process into Line 9A which had already begun was terminated because of the change in the law and prior to the NEB's final decision in July 2012. For this reason, an assessment of the *cumulative* impacts, for instance, of Line 9B that would have been required under the federal EA Act is no longer required. The NEB may still look at environmental effects of the pipeline but it is not obliged to do so, and not required to follow the detailed process under the federal EA law.

The purpose of the Ontario EA Act is “the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation, and wise management in Ontario of the environment.” Although the Act generally applies to public undertakings, private enterprises or activities can be *designated* for assessment by the provincial Minister of Environment. As a recent example of the exercise of this power, a private plan to build a giant aggregate quarry in the Township of Melancthon, Ontario was designated for an EA by the Minister after significant public concern was expressed. (In that case, however, there was no distinct federal jurisdiction being asserted.)

### ***Division of powers***

Under Canada's constitution, environmental issues fall under both federal and provincial jurisdiction. Interprovincial pipelines (similar to interprovincial railways) fall under federal jurisdiction. Provincial laws, however, still apply to interprovincial pipelines to the extent that they deal with matters of articulated and clear provincial interest and do not result in conflict with existing federal laws. Areas of provincial interest which might be impacted by the Line 9 project include potential contamination of Ontario water bodies which serve as drinking water sources (for example, the particular characteristics of bitumen when spilled into such water bodies could make clean up more difficult), increased air and ghg emissions from refining heavy or tar sands crude in Ontario, and impacts on provincial Crown land from leaks or spills.

Ontario, for example, creates *Source Protection Plans* under the *Clean Water Act* for particular watersheds. The objective is to protect the province's drinking water from threats. Line 9 passes through a number of *Source Protection Areas* (SPAs). Under these plans, threats from oil pipelines can be assessed and properly addressed. The SPAs are developed by Source Protection Committees and then approved by the Ontario Ministry of Environment. Thus, Ontario has a well developed regulatory regime for drinking water protection, and a provincial EA could validly examine how a pipeline spill from Line 9 might impact source water regulated within this regime.

As noted, the federal pipeline approval process focuses strongly on ensuring the pipeline is operated and maintained in a safe manner so that oil does not escape. Once oil does escape and, for instance, reaches particular water bodies or threatens drinking water, then matters of provincial interest come to the fore. By analogy, the federal jurisdiction over interprovincial railways is clear. This does not mean, however, that federal railway operations are exempt from all provincial laws. If the burning of brush on the railway right of way causes serious negative impacts on neighbouring homeowners it is clear that the province has a lawful role to play in enforcing its environmental laws to prevent such harm.

The federal process also considers such issues as the commercial need and commercial demand for the pipeline and the product being shipped.

### ***Analysis***

Based on the above review of the law, it is our opinion that the province of Ontario has the authority to designate aspects of Enbridge's Line 9 pipeline project for a provincial EA, provided the designating regulation (and the *terms of reference* or *scope* of the assessment) is carefully targeted to matters of clear provincial jurisdiction and the regulation does not conflict with existing federal law. It is worth noting that if the Province orders an EA it can also refer the matter to the provincial Environmental Review Tribunal for a public hearing.

To be clear, the provincial EA process cannot simply usurp or pre-empt the federal regulatory process for this pipeline. The province would not be able to deny approval for the project if the federal cabinet approves it since this would amount to a conflict with the existing federal regulatory regime. However, an EA that focuses on the impacts on provincial areas of jurisdiction, as outlined above, would be valid. The province could impose conditions on Enbridge to protect from harm areas of provincial interest. This would not amount to a conflict with federal law because the project could still go ahead if Enbridge complied with the stricter provincial conditions. Putting the matter another way, we believe that the federal government could not simply approve a pipeline that runs across Ontario and thereby purport to push aside a provincial assessment of the impacts on local water, land, and air.

In addition, given the concerted effort of oil and pipeline companies to find routes for tar sands product out of Western Canada it is clear that the failure of a particular pipeline proposal will simply prompt a new proposal and a new application to the NEB. As mentioned, the Ontario EA Act provides the opportunity for comprehensive or strategic EAs that encompass a broader assessment of proposals, plans or programs.

Strategic or comprehensive provincial EAs may be better suited to evaluating a province-wide plan, program, or proposal. We note, however, that only a small number of examples of such EAs can be cited, and these date back a number of years. If the province were, for instance, to propose a new climate plan that attempts to curtail investments in carbon infrastructure and reduce fossil fuel consumption, then such an overarching policy would be a good subject for a strategic EA. This EA might include a study of the environmental and socio-economic implications of acting as a conduit for tar sands bitumen and thereby facilitating tar sands expansion, as well as considering particular adverse impacts on Ontario's air, water, and soil, the ability to meet provincial ghg reduction targets or to build a green economy.

### ***The designation of projects under provincial EA law***

- a. In order for a commercial or business *undertaking* to be made the subject of an individual EA under the provincial act, a *designation*, by regulation, must be made by the Minister of the Environment. A member of the public, such as your organization, can make a written designation request to the Minister. Alternatively, Ecojustice could make this request on your behalf. The letter would include the rationale and evidence supporting the designation.

The track record of success for *requests* by the public for the EA designation of a project is poor. In this particular case the Minister may be particularly wary of the constitutional implications that an EA designation may raise. As well, the Ministry may believe that its jurisdiction is limited to *responding* to pollution (such as pipeline spills to watercourses or adverse effects on drinking water) instead of acting *proactively*. Given the preventive nature and purpose of the EA process, such a position would be unfortunate. In any case, there are additional benefits to making the request in order to educate the public about the EA opportunity and to oblige the government to put its mind to this approach -- or to articulate its reasons in the case of a denial.

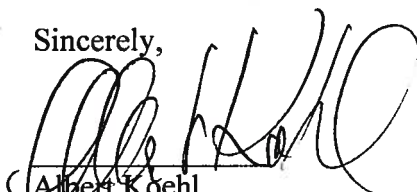
- b. In terms of a *strategic* EA, the province would have to carefully identify and then designate a particular *proposal, plan, or program*. In the case of a government proposal, plan, or program, a particular ministry would have to be identified as the *proponent*. Each of these steps can be challenging. Designating (by regulation) a business or commercial proposal, plan, or program may be even more challenging. For example, Enbridge's *Eastern Canadian Refinery Access Initiative* only includes a relatively small component within Ontario. TransCanada's proposal to convert its mainline pipeline from natural gas to oil is not part of the same proposal, plan, or program.

### **Conclusions**

In sum, it is our legal opinion that the Province of Ontario has the legal authority to:

1. *designate* this private enterprise or activity, namely the Enbridge Line 9 project relating to its pipeline reversal and change in product and capacity, for an EA under the Ontario *Environmental Assessment Act*, but ensuring that the assessment is limited to matters of clear provincial interest and jurisdiction, and does not result in conflict with existing federal law; and
2. *order* a strategic EA for an overarching government policy relating to carbon infrastructure, for example, one aimed at reducing fossil fuel dependence, including pipeline infrastructure, and moving to a green economy; alternatively *designate* a business or commercial *project, plan, or proposal* that encompasses Enbridge's *Eastern Canadian Refinery Access Initiative* and similar oil pipeline and related refining projects to undergo a *strategic* EA to assess environmental and socio-economic impacts from bringing more tar sands crude into and across Ontario to other jurisdictions.

Sincerely,



Albert Koehl  
Staff Lawyer