

December 3, 2013

**Quebec Parliamentary Committee on Agriculture, Fisheries, Energy and Natural Resources- Public
Hearings on acceptability of Enbridge Pipeline's Line 9B Project**

Summary of Written Brief- Mohawk Council of Kahnawà:ke

The Mohawks of Kahnawà:ke have Aboriginal title and exercise Aboriginal rights on the lands crossed by and in proximity to the Enbridge pipeline, including from the Six Nations First Nation Territory in Ohsweken, Ontario to the Territory of Kahnawà:ke. Mohawks of Kahnawà:ke exercise Aboriginal rights, including hunting, fishing and harvesting rights throughout their ancestral lands and bodies of water that are in close proximity to the Enbridge pipeline.

The MCK's concerns pertain to all three of the issues being investigated by the Committee, namely Security of Persons, Protection of the Environment, and Economic Benefit for Quebecers, in addition to the issue of aboriginal consultation. In light of our concerns, we are not in a position to support the Enbridge proposal. However, we do also propose many conditions that we believe will reduce the risks associated with the project.

With respect to security of persons, MCK continues to have concerns with incident response times and the lack of pre-defined response strategies. While Enbridge is working towards developing site specific response plans, we believe approval is premature prior to these plans being in place for all high consequence areas. Further, the installation of additional automated emergency shutdown valves would reduce the impact of releases in the face of the reality of delayed response times resulting from dangerous weather conditions, traffic jams, and other incidents. Finally, MCK recommends that during a flooding event, the pipeline be proactively shutdown as both the risk of incident and the reduction in possible remediation result in an unnecessarily high risk to the security of persons during these times.

Concerning the protection of the environment, MCK maintains concerns with the existing integrity of the pipeline and the methods used to detect pipeline deficiencies. The large number of features (cracks, dents, and corrosion) identified by Enbridge in recent inspections illustrates the on-going wear on the line. Only a fraction of the features located are being excavated for closer inspection and Enbridge's own reporting indicates that many more features are not being detected by in-line inspection. MCK recommends a hydrostatic test be completed to re-establish the maximum operating pressure and provide additional assurances concerning the integrity of the pipeline.

On the issue of economic benefits for Quebec, Quebec should consider whether this project will create economic benefits or opportunities for First Nations. First Nations are taking on a large part of the risk by having these operations being carried out on and in proximity to our aboriginal title lands, and the lands on which we exercise our aboriginal rights. We therefore believe that Quebec should consider whether the individuals and communities that are taking on the risks of this pipeline will actually benefit economically from it, and whether it is fair to impose this risk on those that will not benefit.

Finally, Quebec must ensure that any final decision it makes pertaining to its analysis as to the acceptability of the Project, and any conditions it may decide to establish or recommend take into account the duty to consult the Mohawks of Kahnawà:ke in a meaningful way. The Crown has offloaded the duty to consult with First Nations to the NEB, a situation that has limited the ability of First Nations to participate in this process due to shortened timelines, inflexible and unreasonable funding arrangements, and limiting the scope of issues to be discussed.

Within this brief, MCK provides sound argumentation to support its position that Enbridge's project is not acceptable in its current form, and many detailed and commonsense conditions that will reduce the inherent risks of this undertaking.

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Written Brief- Mohawk Council of Kahnawà:ke

1. Introduction

On November 29, 2012 Enbridge applied for National Energy Board (NEB) approval to i) reverse the flow of a 639-km long section of its Line 9 oil pipeline from North Westover Station to Montreal (Line 9B segment); ii) increase the annual capacity of the entire Line 9 from 240 to 300 thousand barrels per day; and iii) revise the Line 9 Rules and Regulations Tariff to allow for the transportation of heavy crude oil on Line 9 ("Project"). This Brief outlines the position of the Mohawk Council of Kahnawà:ke (MCK) to the Quebec Parliamentary Committee on Agriculture, Fisheries, Energy and Natural Resources ("Committee") regarding the acceptability of this Project.

The Brief was prepared by Chief Clinton Phillips, Mr. Patrick Ragaz, Environmental Advisor, and Me Francis Walsh, Legal Counsel. Chief Phillips is a duly elected Chief for the MCK, which is the elected government in and for the Mohawk Territory of Kahnawà:ke. Mr. Ragaz is employed as the Environmental Advisor for the MCK and is licensed by the Professional Engineers of Ontario as an Engineer with a specialization in Water Resources. Me Walsh is a lawyer with the MCK Legal Services Department, and specializes in Aboriginal law.

The MCK participated as an Intervenor in the NEB's review of the Project and filed Written Evidence regarding Issues 4, 6, 7 and 9 of the NEB's List of Issues on August 6, 2013¹ (attached as Schedule A). The MCK has also had two Information Request exchanges with Enbridge² and made its Oral Final Argument before the NEB on October 9, 2013³ (attached as Schedule B). At this hearing, the MCK expressed its opposition to the approval of the project, in its current form, by the

¹ See MCK's Written Evidence and the documents attached to and cited therein, filed with the NEB on August 6, 2013: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=981179&objAction=browse&viewType=1>

² See MCK Information Request 1 to Enbridge: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=961868&objAction=browse&viewType=1> ; Enbridge Response to MCK Information Request 1 https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918445/964899/B18-13_-_Response_to_Mohawk_Council_of_Kahnawake_IR_No_1_-_A3I6Q8.pdf?nodeid=965008&vernum=-2 ; MCK Information Request 2 to Enbridge: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=971630&objAction=browse&viewType=1> ; Enbridge Response to MCK Information Request 2: https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918445/976803/B35-31_-_Response_to_Mohawk_Council_IR_No_2_-_A3J3V5.pdf?nodeid=977022&vernum=-2

³ See transcript of MCK's Oral Final Argument: https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/1045209/1045480/A3I.8X8_-_13-10-09_-_Volume_2.pdf?nodeid=1045593&vernum=-2

NEB and also formulated extensive recommendations pertaining to the potential conditions that the NEB should impose if the project is granted approval.

The MCK's position is based on the fact that Enbridge has failed to persuade the MCK that the project is in the public interest, notably due to the numerous outstanding safety and security concerns. Furthermore, the draft potential conditions suggested by the NEB did not meet the majority of the recommendations made by the MCK in its Written Evidence of August 6, 2013. In particular, many crucial items pertaining to the safety and integrity of the pipeline and emergency preparedness would only be partially addressed after Enbridge has received Leave to Open the pipeline from the NEB, whereas MCK believes that these items should be fully dealt with prior to Leave to Open being granted. We also note that the Draft Potential Conditions do not contain any firm obligations with regard to ongoing consultation and engagement of First Nations.

Enbridge stated before this hearing that they have undertaken extensive communication efforts with communities along the pipeline. This communication is welcome, but we have heard from many communities that the effort has fallen short to date. Enbridge also indicated in its presentation to this Committee that they have "to the extent practicable" addressed the concerns expressed by Aboriginal groups⁴. With respect to MCK, Enbridge has been open to dialogue; however they have not yet concretely addressed any of our outstanding concerns, rather, to date, they have only stated that they will work towards addressing our concerns to the extent possible.

In the Public Consultation document prepared by the Government of Quebec, three major criteria are put forth to judge the suitability of the Line 9B reversal proposal. These are 1) Security of persons; 2) Protection of the Environment; and 3) Economic benefits for all Quebecers. The provided document concludes that economic benefits do exist therefore the question before the Committee is whether these economic benefits can be realized while guarding the security of persons and protection of the environment.

In this brief, the MCK will outline its rights and interests as they pertain to the project. We will then make representations regarding each of the three categories of criteria established by Quebec for its review of the Project. We will divide our safety and security concerns among these two categories in a similar manner as to what was presented in the Public Consultation document. Therefore concerns related to security of persons will speak to the Emergency Response Planning and watercourse contamination, including contamination of drinking water, while protection of the environment arguments will focus on pipeline integrity while also discussing some of the important habitats that may be affected by a spill. We will then outline the MCK's position on aboriginal consultation, social acceptability and economic benefits of the project.

As will be elaborated in this brief, the majority of the MCK's concerns pertaining to these issues have yet to be addressed by Enbridge or the NEB. The MCK therefore has no alternative but to

⁴ <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/capern-40-1/journal-debats/CAPERN-131126.html>

maintain its opposition to the Project. The MCK therefore recommends that the Committee conclude that the project is not in the interests of Quebec. However, should the Committee conclude that the Project is acceptable, subject to certain conditions that it will impose and/or submit to the NEB, the MCK will submit a series of recommendations as to the conditions that should be adopted by the Committee.

2. The Rights and Interests of the Mohawks of Kahnawà:ke in the project

The Mohawks of Kahnawà:ke have Aboriginal title and exercise Aboriginal rights on the lands crossed by and in proximity to the Enbridge pipeline, including from the Six Nations First Nation Territory in Ohsweken, Ontario to Kahnawà:ke (the pipeline is within approximately 3 and 40 kilometers of all Mohawk “reserves” stretching from Six Nations to Tyendinaga to Akwesasne to Kanesatake to Kahnawà:ke).

Mohawks of Kahnawà:ke exercise Aboriginal rights, including hunting, fishing and harvesting rights throughout their ancestral lands and bodies of water that are in close proximity to the Enbridge pipeline. These rights are described more fully in paragraphs 9 to 16 of the MCK’s Written Evidence (Schedule A) and the documents attached to and cited therein.

Fishing rights include, but are not limited to, fishing and netting of Walleye; Perch, Muskie and Sturgeon for personal subsistence and spiritual and ceremonial purposes in the waters of Kahnawà:ke, the St. Lawrence River; Lake of Two Mountains; the Ottawa River; Trent River; Bay of Quinte (Tyendinaga) and Lake St. Francis. Of particular importance to the Mohawks of Kahnawà:ke is the fishing and spawning sites of the Walleye in the Bay of Quinte area, which is in very close proximity to the Enbridge pipeline Line 9 right-of-way.

Hunting rights include, but are not limited to, the hunting of deer for personal subsistence and spiritual and ceremonial purposes on the lands on and in proximity to Six Nations; Tyendinaga; Akwesasne; Kanesatake; and Kahnawà:ke. Gathering rights, in particular for the gathering of traditional medicines, are also exercised on the lands on and in proximity to Six Nations; Tioweró:ton; Tyendinaga; Akwesasne; Kanesatake; and Kahnawà:ke and Enbridge Line 9.

The Mohawks of Kahnawà:ke also rely on the bodies of water in proximity to the pipeline as its source of drinking water.

Furthermore, we are also directly concerned with the conservation of numerous vulnerable species of plants and animals, such as the American Eel, on our Territory and Title lands. Our concern extends to Species at Risk and the existence of important nesting and spawning sites in proximity to the pipeline.

The Mohawks of Kahnawà:ke therefore have a direct interest in ensuring that the integrity of its Aboriginal title lands and the waters flowing through these lands and the exercise of its Aboriginal rights are not compromised by any approval that this project may receive.

3. Outstanding Concerns pertaining to Security of Persons

Emergency Response Planning: Enbridge presented information to the Committee indicating that they have been working in a collaborative manner with all municipalities, aboriginal groups, and other concerned citizens throughout the application process. However, many concerns were raised by these groups, including MCK, which have not been adequately addressed to date.

One major concern held by MCK and others is the response time to a spill. Enbridge has indicated that they have a response time of between 1.5 – 4 hours. Already, this raises concerns as others have estimated that within four hours spilled oil could already be reaching drinking water intakes in some locations. In other locations, it is currently unknown how quickly oil will reach intakes or other critical infrastructure. Enbridge has responded to these concerns by indicating that there is no regulated minimum response time in Canada to an oil spill. This does not assuage the concerns of MCK. Further, these response times only apply in ideal conditions. Enbridge has acknowledged that these times would be increased even more in case of a winter storm, flooding, heavy traffic, etc. Enbridge has committed to establishing another emergency response centre in Mississauga as a result of pressure from the communities in and around Toronto. A review of the response locations in Quebec is warranted given the tacit acknowledgement by Enbridge that their response capacity in the GTA is inadequate.

Another strategy for reducing the impact of a spill is shutting down the pipeline as quickly as possible. Currently, Enbridge continues to have a number of emergency shutdown valves along the line that can only be operated manually. With response times of 1.5 – 4 hours or more these valves do not provide the level of protection one would expect from an emergency stop valve. MCK believes that all valves that remain in manual operation should be converted to automatic operation prior to the reversal of flow in the pipeline. In addition, MCK has provided in our oral argument (Schedule B) several other criteria for the placement of new automatic shutdown valves. These include on either side of all major watercourses, on either side of significant wetlands, and in areas of high groundwater recharge. These criteria should be a minimum level of protection in addition to other valve locations determined through Enbridge's Intelligent Valve Placement Program.

MCK also has concerns with the operation of the pipeline during flooding events. Enbridge cited ground movement caused by flooding as the cause of a recent spill in Alberta. Erosion associated with flooding is commonplace and is a major threat to pipeline integrity. High water levels cause major complications for clean-up efforts. These include fast moving water which quickly disperses spilled oil, wide floodplains which can block access to shut-off valves and oil collection locations, and safety concerns for clean-up crews who at times may be restricted from implementing any clean-

up due to unacceptable safety risks. Climate change is increasing the frequency and intensity of storm events which may lead to an increased frequency of flooding. The combination of increased risk of failure and decreased opportunity for remediation leads MCK to conclude that for maximum security of persons, the Line 9B pipeline should be stopped proactively when a flood event is occurring. In our Oral Argument (Schedule B), we present some of the criteria that should be considered to define a “flood event”. Additional inspections of the pipeline should also be carried out after significant rain events to ensure that no mass erosion has occurred.

Enbridge stated in its presentation to this body that site-specific plans are being developed for high consequence areas (HCA). This is a relatively new effort that is being undertaken by Enbridge, and is one that MCK applauds. However, these plans are only now being developed and many HCA’s remain without a detailed plan. As noted above, time to travel to many important water intakes and other infrastructure is not currently known as indicated by Enbridge during the NEB hearings (e.g. Enbridge assumes that in the event of a spill oil will reach Lake Ontario but does not know how long it will take). Enbridge has stated that they are working closely with other stakeholders to gather information along the pipeline to inform their spill response. MCK has encouraged this type of data sharing in our Written Evidence and Oral Argument and welcome this initiative. However throughout the NEB process, many parties indicated that the level of communication and data sharing was not sufficient for their needs. MCK encourages the Government to consider the testimony of other stakeholders before determining whether an appropriate level of engagement has occurred. It is also critical that this data sharing continue to occur in the future as new information becomes available including changes to the locations and extents of HCA’s. To this end, the onus is not only on Enbridge but on all other stakeholders including various levels of government to ensure that information is shared in a timely manner.

4. Outstanding Concerns pertaining to Protection of the Environment

As the Public Hearing document limited comments on the Protection of the Environment to concerns regarding the integrity of the pipeline, MCK will do the same. However, we would also note the many important habitats and ecosystems that the pipeline traverses or that may be impacted if a spill were to occur. These include homes for many Species at Risk and other fish, bird, mammal and plant species. The pipeline traverses wetlands, rivers, forests, and grasslands. A spill in any of these ecosystems could be devastating. While it may be possible for Enbridge to be responsible for the costs of cleaning up the oil, the full restoration of a fragile ecosystem may be impossible. These losses would also impact the Aboriginal Title and Rights of the Mohawks of Kahnawà:ke.

Pipeline Integrity

MCK has numerous concerns with the integrity of the pipeline and the process used to assess this integrity. Enbridge speaks about their state of the art inspection program as described in the Pipeline Integrity Engineering Assessment Report prepared for the NEB hearing. We have concerns with the effectiveness of in-line inspection (ILI), the criteria used to conduct an integrity dig, the ability to

respond to multiple features on an aging pipeline, and the unwillingness of Enbridge to apply other tools to enhance their inspection program.

Effectiveness of ILI

As outlined in detail in our Written Evidence (Schedule A), MCK has concerns with the reliability of the ILI process. The detection capability of this technology is much less than 100 %, as evidenced by the large number of false negatives identified by Enbridge in their reporting. Thus, it is likely that many features that could lead to a pipeline failure remain undetected.

Criteria for an integrity dig

Enbridge has set up certain criteria for determining whether an integrity dig is required to confirm the integrity of the pipeline. In our assessment of the reporting and the previous causes of failure along the pipeline, we conclude that the criteria are not stringent enough and may lead to failure in some cases. We note that of the many thousands of features found in the last ILI data that has been publicly released (most recent data has not been shared), Enbridge is currently planning only 600 excavations. Clearly the possibility exists that some dangerous features are not being fully investigated.

Ability to respond

The Line 9B pipeline is close to forty years old. Enbridge has stated that with proper care, a pipeline has an unlimited lifespan. However, based on the Pipeline Integrity Engineering Assessment, it appears that the cost of that on-going lifespan is a lot of additional maintenance. The six hundred integrity digs that were planned for this year (the timeline for completing these digs has now been extended into 2014) is many more than have been previously carried out on this line. The delays in carrying out these digs are understandable as there is only so much capacity to physically carry out this work. However, the longer these features go uninvestigated, the greater the risk of failure. In the Marshall, Michigan incident, the problem was not that the features had not been identified; it was that they were not repaired. With more and more features being located in this aging line, it is likely that the timelines for repair will continue to lengthen. This creates an unacceptable risk and one that must be weighed carefully by Quebec when deciding their position on this application.

Use of other integrity tests

MCK would like to reiterate the importance of implementing a hydrostatic test of the pipeline prior to the reversal taking effect. A hydrostatic test, while not a perfect tool, is another valuable way of ensuring that the pipeline can handle the new pressure being applied to it. We note that while Enbridge plans to stay within the existing maximum operating pressure, this pressure is much higher than that which the pipeline has been operating for the last several years. Part of the reason for this

is a self-induced reduction in Maximum Operating Pressure (MOP). Clearly, Enbridge was also concerned with the integrity of the pipeline. A hydrostatic test that could expose failures under a low risk environment is an important check of the pipeline's integrity as it will ensure that the pipeline is capable of handling the new pressure regime at least at that moment in time.

Potential Conditions

With respect to the potential conditions laid out in the NEB process, MCK is generally in agreement with the rationale for the conditions although we do provide enhancements to these conditions in our Oral Argument (Schedule B). The main concern we have is the timelines for completing the work outlined in the conditions. It is the position of MCK that the conditions be complied with prior to leave to open being granted (except in conditions that involve on-going monitoring). Further, the regular reporting should continue beyond the two or three year period recommended in the conditions. Since the pipeline does not have an estimated lifespan, neither should the reporting.

In summary, MCK proposes several additional conditions and modifications to the potential conditions that were recommended by the NEB. If the pipeline is supported by Quebec, we believe these conditions are necessary and should be adopted by Quebec to ensure the security of persons and protection of the environment. These recommended conditions will be outlined as part of the conclusions of this Brief.

5. Outstanding concerns pertaining to Consultation with Aboriginal groups and the potential impacts of the proposed Project on Aboriginal interests

The duty to consult the Mohawks of Kahnawà:ke

The MCK established in its Written Evidence (Schedule A) filed with the NEB how the project, and in particular, the outstanding safety and security concerns pertaining to the project and the corresponding potential adverse impacts on its Aboriginal title and rights triggered the Crown's duty to consult. The MCK submits that its Written Evidence establishes a strong *prima facie* case for the existence of Aboriginal rights of significant economic, social and cultural importance to the Mohawks of Kahnawà:ke that are exercised in the present day within close proximity to Enbridge's Line 9B right of way.

Furthermore, the MCK submits that the magnitude of the project and the safety and security concerns raised in its Written Evidence (Schedule A) and Oral Final Argument (Schedule B) before the NEB establish a strong potential adverse impact stemming from the proposed project.

MCK's position is that the Project does not solely pertain to the works that will be undertaken within the right-of-way. The Project also pertains to the operation of the pipeline, and the potential transportation of 300,000 barrels of oil, including heavy crude. When Enbridge talks about the advantages of the project they emphasize the 300,000 barrels of oil that will be moved during

operations, and the anticipated wealth that it will create, but when we enter into the sphere of discussing the scope of the duty to consult First Nations they try to limit the scope of the project to the immediate impacts that stem from construction activities within scoped project areas only.

This is a project that Enbridge argues will create significant wealth for oil producers, oil refiners, and benefit for the Canadian economy in general. Enbridge argues that it can carry out this project safely and with little risk to Canadians and that this is why it is in the public interest for its Application to be granted. However, even if Enbridge evaluates the risk associated with this project as low, they cannot claim that it is completely risk free. Many Interveners before the NEB filed evidence to the contrary and argue that the risks are high.

The fact is there are risks associated with the Enbridge's proposed operations, and whether Enbridge wishes to acknowledge it or not, they are asking First Nations to take on part of this risk. Furthermore, when evaluating the potential adverse impact it is submitted that we must look not only at the likelihood of an adverse impact, but also the potential magnitude of the adverse impact. Enbridge considered these two aspects at the NEB hearings arguing that potential negative impacts were both remote and minor.

Given our outstanding safety concerns, and the history of pipeline incidents to varying degrees of severity, the MCK does not qualify the risks of an incident as remote. In fact, the CBC recently reported that rate of pipeline related incidents has doubled since 2000 indicating that statistically speaking pipelines are decreasingly safe in terms of number of incidents⁵. Furthermore, given the real life Marshall Incident that occurred a mere three years ago, we can hardly qualify the risks as minor.

The quantity and quality of product that Enbridge proposes to transport and the potential adverse impacts to the *sui generis* First Nations could be significant and far reaching, and not compensable with the awarding of damages. Considering the strong *prima facie* case established by the Mohawks of Kahnawà:ke, the importance of the rights involved, and the serious potential adverse impact of this project, the MCK submits that it has met the threshold for establishing a duty to consult at the higher end of the spectrum.

The use of the NEB process to discharge the Crown's duty

Further to this, as part of its Written Evidence (Schedule A), the MCK also outlined how the Crown relied on the NEB process to discharge its duty to consult the Mohawks of Kahnawà:ke on this Project. We also identified how Enbridge has thus far failed to adequately identify and address the interests of the Mohawks of Kahnawà:ke, along with the failure to adopt measures to mitigate potential impacts of the Project on the rights of the Mohawks of Kahnawà:ke.

⁵ <http://www.cbc.ca/news/pipeline-safety-incident-rate-doubled-in-past-decade-1.2251771>

We argued before the NEB that the Board must exercise its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution. The Board must consider the potential impact that the project will have on the Aboriginal rights and title of First Nations, including Kahnawà:ke and must consider whether Enbridge has adequately addressed these concerns⁶. The MCK argued that the Board's obligation was to establish more stringent accommodative requirements on the proponent.

The MCK maintains this position, but would also like to go on record to denounce the limitations of the delegation of the duty to consult to the NEB process and explain why the NEB is a poor substitute for Crown consultation. Meaningful participation in the process is hampered, notably by the short timelines established by the NEB (which are largely due to short timeframes established in legislation for the NEB to review a Project) for the carrying out of its review process, by inflexible and unreasonable funding eligibility requirements and by the limited scope of issues that the NEB is permitted to consider in reviewing a project (this latter point will be elaborated upon below).

With respect to Quebec and this Committee's work, the MCK submits that Quebec's duty in this instance includes ensuring that any final decision it makes pertaining to its analysis as to the acceptability of the Project, and any conditions it may decide to establish or recommend take into account the duty to consult the Mohawks of Kahnawà:ke in a meaningful way. This includes the specific issues that the Mohawks of Kahnawà:ke have raised pertaining to consultation and emergency response planning, but also the greater issue of whether the NEB process has allowed for the meaningful participation of First Nations more generally.

Furthermore, the Mohawks of Kahnawà:ke request that Quebec maintain consultation and dialogue with First Nations following the conclusion of these Committee hearings to ensure our participation in any subsequent steps of Quebec's review process. We request that Quebec ensure that consultation funding be available to ensure Kahnawà:ke's ongoing and meaningful participation.

Specific issues of ongoing engagement, emergency response planning and archeological works

In its Written Evidence, the MCK also formulated recommendations on how its concerns pertaining to the ongoing engagement and emergency response planning could be addressed. More specifically, the MCK identified conditions that the NEB could adopt for the integration of its concerns pertaining to the safeguard of its interests in the event of a significant incident, including by ensuring that Enbridge included consideration for Aboriginal rights in its Emergency Response plan.

Enbridge has responded to MCK's concern by saying at this hearing that they have committed, when conducting emergency response exercises, to communicate with relevant First Nations that may be involved in emergency response and to consult them in developing and updating the

⁶ Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 SCR 159, at p. 185.

emergency procedures manual⁷. While the MCK appreciates Enbridge's initiative, this commitment falls short of the undertaking that MCK recommended before the NEB.

The MCK would have preferred Enbridge commit to a specific undertaking to include consideration for the lands and resources used by the Mohawks of Kahnawà:ke in the exercise of their aboriginal rights. While Enbridge's undertaking does not necessarily exclude this level of commitment, there are no guarantees that these concerns will be integrated into Enbridge's emergency response planning. MCK also notes that Enbridge's undertaking does not contain any information as to the duration and frequency of these obligations. We therefore recommend that Quebec remain mindful of the respective obligations of the Crown, the NEB and of the proponent with respect to the safeguard of aboriginal rights and interests in analyzing whether this Project is in the public interest of Quebec.

The MCK therefore maintains its proposal to the NEB that the NEB's draft potential conditions regarding this issue should be significantly revised and read:

Enbridge shall file with the Board a First Nations Engagement Report prior to requesting Leave to Open, which shall include:

- A listing of First Nations and other Aboriginal groups that are included in Enbridge's emergency response plan;
- An inventory identifying the rights and interests (and the locations of these) that "included" First Nations have provided to Enbridge that will be considered in the event of an emergency situation occurring on those lands;
- Detail as to how Enbridge plans to take these rights and interests into account in the event of an emergency situation and how Enbridge will ensure that these rights and interests are not effectively extinguished through an occurrence or significant event;
- An inventory identifying any other concerns raised by included First Nations regarding the project and how Enbridge plans to address these concerns.

We further submitted before the NEB, that Enbridge must update this type of Report as part of an Ongoing Engagement Report every six months for the first three years of operation for the continued operation of Line 9 and that this report be updated every year thereafter for the duration of the Pipeline's Operations. We further directed that the Board should also ensure that First Nations are provided with ongoing capacity funding and resources by the proponent in order to pursue meaningful engagement throughout the Ongoing Engagement. The MCK further recommended that these Reports be scrutinized, with the Board ensuring that First Nation concerns have been adequately addressed by Enbridge.

⁷ <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/capern-40-1/journal-debats/CAPERN-131126.html>

On the issue of ongoing consultation requirements, the MCK also adopted the position before the NEB that Enbridge be directed to consult archaeologists, conduct a stage one archeological assessment where necessary, and ensure the participation and notification of First Nations.

Summary of position on consultation

To summarize, the MCK's position on consultation issues regarding this Project are as follows:

- The Crown's duty to consult is at the higher end of the spectrum;
- The Crown has failed to consult the Mohawks of Kahnawà:ke in any way regarding this project and has elected to rely on the NEB process;
- Enbridge, while it has engaged with the Mohawks of Kahnawà:ke in information sharing and information request exchanges, has not addressed the legitimate concerns of the Mohawks of Kahnawà:ke pertaining to the security and safety of the proposed project, both with respect to the safety and security of the project in general, and with respect to the potential impact on the exercise of its Aboriginal rights and the integrity of its title lands;
- The National Energy Board must exercise its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution, and must ensure that the concerns raised by First Nations have been adequately addressed by Enbridge;
- The Mohawks of Kahnawà:ke submit that the outstanding issues raised pertaining to safety and security issues and to consultation, and in particular pertaining to consultation and the development of emergency response planning must be adequately addressed prior to leave to open being granted;
- The Mohawks of Kahnawà:ke further submit that in the event that a stage one archeological assessment is required and conducted, that Enbridge ensure the participation and notification of First Nations;
- The Mohawks of Kahnawà:ke further submit that the draft potential conditions developed by the Board must be revised in order to ensure that our concerns are adequately addressed in accordance with the recommendations outlined in our Written Evidence, Oral Final Argument and this brief.
- The MCK submits that Quebec's duty in this instance includes ensuring that any final decision it makes pertaining to its analysis as to the acceptability of the Project, and any conditions it may decide to establish or recommend take into account the duty to consult the Mohawks of Kahnawà:ke in a meaningful way. Furthermore, that Quebec maintain consultation and dialogue with First Nations following the conclusion of these Committee hearings to ensure our participation in any subsequent steps of Quebec's review process. We request that Quebec ensure that

consultation funding be available to ensure Kahnawà:ke's ongoing and meaningful participation.

7. Social Acceptability and Economic Benefits

One of the issues that has been raised during these hearings is the social acceptability of the Project. Minister Blanchet also indicated in his presentation that Quebec was looking to have open and inclusive hearings whereby parties would be permitted to touch on issues such as climate change that were deemed to be beyond the scope of the NEB review⁸. The MCK would therefore also like to take this opportunity to speak to some of the larger concerns that we have with pipelines and the current national energy policy. In Kahnawà:ke, the social acceptability of the Project is often linked to the larger context of Canada's national energy policy. We believe that it is only by looking at the larger picture can one develop appropriate policies that will ensure the long-term sustainability of our environment and Canada's economic resource base.

MCK is concerned with the Energy policy of the Government of Canada. Ultimately, our current path will lead to serious problems not only for the environment, but for the economy as well. On the issue of climate change, Canada continues to fall further behind. We have abandoned the Kyoto Protocol. The less stringent carbon reduction targets set by the Government will not be achieved according to a recent Environment Canada report. World leaders are threatening sanctions on Canadian oil and stalling pipeline projects as a result of our record on climate change. Canada was ranked last among OECD countries on the environment in a recent survey. The government continues to cut funding for research on climate and other environmental issues. An example of the continued degradation of environmental policies in this country is the changes to the scope of issues that can be considered by the NEB. MCK strongly believes that all aspects of a pipeline project must be considered when evaluating whether a project should be approved.

This panel has heard from many project supporters speaking about the jobs that will be created and saved at various refineries in Quebec. Why should we not be able to speak about the real environmental, and ultimately, economic costs that are being incurred by extracting these materials from the oilsands? The economic costs associated with climate change and severe weather events continue to increase and will eventually outweigh the immediate economic benefits of this project. Quebec must consider all of these issues when deciding whether or not to support this proposal. MCK believes that by including this issue as an important part of its review of this Project, the government of Quebec will send a strong signal that a larger conversation on energy issues is urgently needed in this country.

Another issue that is important in terms of the social acceptability of the project in Kahnawà:ke is the Marshall, Michigan incident. Enbridge has often repeated the statement that we are no longer in

⁸ <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/capern-40-1/journal-debats/CAPERN-131126.html>

2010 and that things have changed. They argue that modifications to their system since the Marshall, Michigan incident will ensure that a spill of that magnitude is far less likely to ever happen again. Enbridge further notes that they are recognized on lists of “Best Corporate Citizens”, “Most Sustainable Companies” and “Top Employers of Canada”, thus showing that they are a responsible corporate citizen. What is concerning to MCK is that all of the accolades received and commitments made by Enbridge also applied in 2010. They received all of these honours in 2010, 2011, 2012, and 2013. With respect to their efforts to ensure that spills do not occur, Enbridge stated the following in their 2010 Corporate Social Responsibility Report:

Enbridge’s goal is to prevent all spills, leaks and releases from its energy transportation and distribution systems. Enbridge implements rigorous mitigation measures during design, construction and operation of its pipelines to prevent spills from occurring. These measures include, among others, avoidance of environmentally sensitive areas, meeting all special design requirements for areas such as road, river and creek crossings, and investing heavily in pipeline safety and integrity programs. These measures contribute to reducing the risk of a release but they cannot eliminate it. In order to address these residual risks, Enbridge has comprehensive spill response and environmental mitigation plans in place to respond rapidly and completely if spills do occur.

It is evident that in 2010, Enbridge also believed that it was doing everything it could to minimize the risk of a pipeline spill. And yet a spill did occur, and many mistakes were made. The fact is the improvements that have been made are largely untested and to this point have largely been plans only. While it is anticipated that these changes will help reduce spill frequency and quantity, only time will tell. The MCK believes additional action is required now to further reduce the likelihood of a spill. MCK has recommended many possible actions to improve safety in the evidence and argumentation we submitted to the NEB. These recommendations as well as those from other parties must all be seriously considered and discussed to ensure pipeline safety.

On the issue of economic benefits for Quebec, Kahnawà:ke wishes Quebec to consider whether this project will create economic benefits or opportunities for First Nations. As mentioned before, there are big risks associated with the Enbridge’s proposed operations. First Nations are taking on an important part of this risk by having these operations being carried out on and in proximity to our aboriginal title lands, and the lands on which we exercise our aboriginal rights.

To our knowledge, these risks are not accompanied by potential economic benefits for First Nations, or for the very least, the Mohawks of Kahnawà:ke. The Mohawks of Kahnawà:ke have not yet received any evidence that the economic activities and benefits associated with the Project will trickle down to our community or its members. We therefore believe that Quebec should consider whether the individuals and communities that are taking on the risks of this pipeline will actually benefit economically from it, and whether it is fair to impose this risk on those that will not benefit.

This is particularly an issue for First Nations given the unique *sui generis* nature of aboriginal rights and the connection to the land.

Finally, on the issue of economic benefits, the MCK adopted the position before the NEB that Enbridge be required to establish training and contracting opportunities for First Nations, and enter into Agreements to address environmental stewardship. The MCK also maintains this position before the Committee, and recommends that Quebec consider the importance of Enbridge ensuring concrete and substantial economic benefits for First Nations should this project move forward.

7. Conclusion: Final Position and Recommendations

The MCK recommends that the Committee conclude that the project is not in the interests of Quebec. The MCK submits that Quebec's duty includes ensuring that any final decision it makes pertaining to its analysis as to the acceptability of the Project, and any conditions it may decide to establish or recommend take into account the duty to consult the Mohawks of Kahnawà:ke in a meaningful way. This means that Quebec must meaningfully consider the concerns raised by the Mohawks of Kahnawà:ke in its analysis of this Project. Furthermore, that Quebec maintain consultation and dialogue with First Nations following the conclusion of these Committee hearings to ensure our participation in any subsequent steps of Quebec's review process. We also request that Quebec ensure that consultation funding be available to ensure Kahnawà:ke's ongoing and meaningful participation.

The MCK also encourages Quebec to conduct its review with consideration of the impacts of this project as part of the larger context of Canada's national energy policy.

Should the Committee conclude that the Project is acceptable, subject to certain conditions that it will impose and/or submit to the NEB, the MCK recommends that the Committee establish the following conditions (please note that in numbering the potential conditions, we have used the numbering scheme presented by the NEB in their potential conditions):

- a. In relation to Potential Condition 9: That the board require an enhanced Pipeline Engineering Assessment be completed 60 days prior to leave to open which follows an approved Terms of Reference determined by Enbridge, the Board, and a knowledgeable third party.
- b. In relation to Potential Condition 10: That all pipeline replacements be completed using 1/2 inch thick pipe.
- c. In relation to Potential Condition 11: That a hydrostatic test be completed to establish a new maximum operating pressure and to remediate identified deficiencies prior to leave to open.
- d. In relation to Potential Condition 15: That all manual valves be upgraded to automatic valves and that valves be installed on either side of major watercourses as defined in Potential Condition 22 in addition to those valves identified as required through the Intelligent Valve Placement Program.

- e. In relation to Potential Condition 21: That Enbridge shall file with the Board a First Nations Engagement Report prior to requesting Leave to Open, which shall include:
 - i. A listing of First Nations and other Aboriginal groups that are included in Enbridge's emergency response plan;
 - ii. An inventory identifying the rights and interests (and the locations of these) that "included" First Nations have provided to Enbridge that will be considered in the event of an emergency situation occurring on those lands;
 - iii. Detail as to how Enbridge plans to take these rights and interests into account in the event of an emergency situation and how Enbridge will ensure that these rights and interests are not effectively extinguished through an occurrence or significant event;
 - iv. An inventory identifying any other concerns raised by included First Nations regarding the project and how Enbridge plans to address these concerns.

Enbridge must update this Report as part of an Ongoing Engagement Report every six months for the first three years of operation for the continued operation of Line. This report must be updated every year thereafter for the duration of the Pipeline's Operations. The Board must also ensure that First Nations are provided with ongoing capacity funding and resources by the proponent in order to pursue meaningful engagement throughout the Ongoing Engagement.
- f. In relation to Potential Condition 22:
 - i. That the Watercourse Crossing Management Plan be complete prior to leave to open.
 - ii. That an independent task force be developed to determine the definition of a major watercourse taking into account flow characteristics, creek and bank materials, proximity to other relevant features, and local knowledge
 - iii. That wetlands be included in the list of crossings.
 - iv. That larger regulatory storms be included in flood volume and floodplain calculations where available and that flood plains be determined for all major crossings.
 - v. That the flood volume, frequency, and extents be revised bi-annually or as data becomes available to take into account climate change.
 - vi. That the NEB determine maximum allowable timelines for pipeline deficiencies.
- g. In relation to Potential Condition 24: That the integrity improvement plan be required within 12 months of approval of LTO with an update on progress provided on an annual basis thereafter.
- h. In relation to Potential Condition 25: That pressure cycling data be provided to the NEB monthly for the first six months after LTO and then every six months thereafter and that cycling frequency not exceed that of the 2009-2012 period.
- i. More generally, that the NEB take a more proactive role in developing terms of reference and developing project specific evaluation criteria. Other conditions proposed by MCK include:

- j. That the following conditions be implemented with respect to NEB's Pipeline Performance Measures Reporting Requirements Program:
 - i. The results of features that meet excavation criteria be made available to proximate first responders to provide a heightened awareness of the increased potential for an incident.
 - ii. Any ILI features detected that are not investigated and remediated within prescribed timelines as set out by the NEB should result in immediate shutdown of the line until such time as inspection and repair have been completed.
 - iii. Any issues that are identified that may become 'overdue' prior to the next reporting period should be followed up on by the NEB with interim reporting required to proactively ensure timelines are respected.
 - k. That the NEB require that Line 9B be proactively stopped during significant flooding events to minimize potential impacts resulting from an incident with the definition of a significant flooding event to be determined by an independent panel
 - l. That the NEB require that field inspections of the pipeline occur after each significant rainfall event within all defined floodplain areas and slope hazards.
 - m. That worst case scenario modeling occur with the definition of worst case being an actual release that has previously occurred thereby taking into account human error and other intangibles that cannot be adequately modeled in a worst-case estimation exercise.
 - n. That a worst-case scenario analysis be completed for all High Consequence Areas.
 - o. That Enbridge be required to hold regular meetings with interested stakeholders along the length of the pipeline that can contribute to the database of information available to Enbridge to improve its understanding of local conditions so that reactive response to incidents can be as informed as possible.
 - p. That the NEB ensure that Enbridge has the sufficient financial capacity, including insurance coverage to compensate interest holders, including First Nations interest holders, in the event of a significant spill prior to Leave to Open being granted.
 - q. That Enbridge be directed to consult archeologists, conduct a stage one archeological assessment where necessary, and ensure the participation and notification of First Nations.
- AND
- r. That Enbridge be required to establish training and contracting opportunities for First Nations, and enter into Agreements to address environmental stewardship.

File OF-Fac-Oil-E101-2012-10 02
OH-002-2013
Enbridge Pipelines Inc. (Enbridge)
Line 9B Reversal and Line 9 Capacity Expansion Project (Project)
Application under section 58 (Application) of the National Energy Board Act

Written Evidence of Mohawk Council of Kahnawà:ke

Introduction

1. On November 29, 2012 Enbridge applied for NEB approval to i) reverse the flow of a 639-km long section of Line 9 from North Westover Station to Montreal (Line 9B segment); ii) an increase in the annual capacity of the entire Line 9 from 240 to 300 thousand barrels per day; and iii) a revision of the Line 9 Rules and Regulations Tariff to allow for the transportation of heavy crude oil on Line 9 (“Project”).
2. More specifically, Enbridge seeks the following relief:
 - (a) an order, pursuant to section 58 of the NEB Act, exempting the project from the provisions of paragraph 30(1) b) and sections 31, 33 and 47 of the NEB Act.
 - (b) approval under Part IV of the NEB Act for the revised Line 9 Rules and Regulations Tariff; and
 - (c) such further and other relief as Enbridge may request or the Board may deem appropriate pursuant to section 20 of the NEB Act (“Application”).

Enbridge: “Application for Line 9B Reversal and Line 9 Capacity Expansion Project”, November 29, 2012.¹

3. The Intervenor Mohawk Council of Kahnawà:ke (“MCK”) is the elected government in and for the Mohawk Territory of Kahnawà:ke.
4. The Mohawks of Kahnawà:ke have Aboriginal title and Aboriginal rights to lands crossed by and in proximity to Line 9, including, but not limited to the lands in and around the Mohawk Territory of Kahnawà:ke.
5. As a result of these rights and interests, the MCK applied for, and was granted Intervenor status by the NEB and will provide written evidence regarding Issues 4, 6, 7 and 9 as outlined in the NEB’s Procedural Update No. 1- List of Issues and Application to Participate form, dated April 4, 2013.

NEB: “Procedural Update No. 1- List of Issues and Application to Participate form”, April 4, 2013.²

¹ <https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/750475/B1-1 - Cover Letter to NEB - Line 9B Reversal and Line 9 Capacity Expansion Project Application - A3D7I0.pdf?nodeid=750476&vernum=0>

² <https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770785/782068/A5-1 ->

Position on Application

6. The MCK hereby opposes Enbridge's Application for an order, pursuant to section 58 of the NEB Act, exempting the project from the provisions of paragraph 30(1)b) and 47 of the NEB Act.
7. The MCK also makes a series of recommendations (Issue 9) for the NEB's consideration. The MCK submits that these recommendations should be implemented prior to any potential approval for the Project.
8. The MCK's final position on the Application and the acceptability of the Project as a whole will be submitted to the NEB at the time of MCK's written or oral final argument.

The rights and interests of the Mohawks of Kahnawà:ke in the proposed project

9. The Mohawks of Kahnawà:ke affirm Aboriginal title and rights on the lands crossed by and in proximity to the Enbridge pipeline from the Six Nations First Nation Territory in Ohsweken, Ontario to Kahnawà:ke (the pipeline is within approximately 3 and 40 kilometers of all Mohawk "reserves" stretching from Six Nations to Tyendinaga to Akwesasne to Kanesatake to Kahnawà:ke). The Mohawks of Kahnawà:ke exercise their Aboriginal rights throughout these ancestral lands and on these bodies of water that are in close proximity to the Enbridge pipeline.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

R v. Adams [1996] 3 S.C.R. 101(p. 123-129)³

BAPE (Bureau d'audience publique sur l'environnement). QUÉBEC. 2004. Annexe F Patrimoine archéologique et historique, Documentation déposée au BAPE dans le cadre du projet de Gazoduc Les Cèdres par TransCanada Pipelines ltée: PR3.3 Documents annexes- Volume 3, novembre 2004, pagination diverse.⁴

[Procedural Update No. 1 - Hearing Order OH-002-2013 Line 9B Reversal and Line 9 Capacity Expansion Project Enbridge Pipelines Inc. - A3G6J4?nodeid=782069&vernum=0](#)

³ <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1420/index.do?r=AAAAAQAFYWRhbXMAAAAAAAAAAB>

⁴ http://www.bape.gouv.qc.ca/sections/mandats/gazoduc-cedres/documents/PR3-3_ann_F.pdf

10. More specifically, the Mohawks of Kahnawà:ke exercise Aboriginal fishing and hunting rights and harvesting rights (including for traditional medicines). The Mohawks of Kahnawà:ke also use these lands and their resources to exercise cultural rights (gathering sites of spiritual and recreational importance).

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

R v. Adams [1996] 3 S.C.R. 101(p. 123-129)⁵

11. Fishing rights include, but are not limited to, fishing and netting of Walleye; Perch, Muskie and Sturgeon for personal subsistence and spiritual and ceremonial purposes in the waters of Kahnawà:ke, the St. Lawrence River; Lake of Two Mountains; The Ottawa River; Trent River; Bay of Quinte (Tyendinaga) and Lake St. Francis.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

R v. Adams [1996] 3 S.C.R. 101(p. 123-129)⁶

12. Of particular importance to the Mohawks of Kahnawà:ke is the fishing and spawning sites of the Walleye in the Bay of Quinte area, which is in very close proximity to the Enbridge pipeline Line 9 right-of-way.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5,

13. Hunting rights include, but are not limited to, the hunting of deer for personal subsistence and spiritual and ceremonial purposes on the lands on and in proximity to Six Nations; Tyendinaga; Akwesasne; Kanesatake; and Kahnawà:ke.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

⁵ See note 3 for link to decision.

⁶ See note 3 for link to decision.

14. Gathering rights include, but are not limited to, the gathering of wild onions, wild garlic, berries, and various field and wetland plants for food (personal subsistence), spiritual and ceremonial purposes, and as traditional medicines on the lands on and in proximity to Six Nations; Tioweró:ton; Tyendinaga; Akwesasne; Kanesatake; and Kahnawà:ke and Enbridge Line 9.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

15. The Mohawks of Kahnawà:ke also rely on the bodies of water in proximity to the pipeline as its source of drinking water.

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013

16. Furthermore, the Mohawks of Kahnawà:ke are directly concerned with the conservation of numerous vulnerable species of plants and animals, such as the American Eel, on its Territory and Title lands, including Species at Risk and the existence of important nesting and spawning sites in proximity to the pipeline.

See information from Environment Canada on Lake Saint-François National Wildlife Area.⁷

See information from Environment Canada on Iles de la Paix National Wildlife Area.⁸

EXHIBIT 5- AECOM. 2013. Kahnawà:ke Fish and Fish Habitat

The safety, security, and contingency planning associated with the construction and operation of the proposed Project, including emergency response planning and third-party damage prevention (Issue 6)

17. This Section will elaborate on the concerns and views of the MCK pertaining to Issue 6 and will address pipeline integrity; emergency response implementation; emergency response assumptions; emergency response planning; reactive spills management and communications.

Safety of Project: Pipeline integrity

18. Enbridge estimates that approximately 600 integrity digs will take place prior to December 31, 2013.

Enbridge: "Response to National Energy Board Information Request No. 3.12.b", filed on June 25, 2013.⁹

⁷ <http://www.ec.gc.ca/ap-pa/default.asp?lang=En&n=D9C57AEF-1>

⁸ <http://www.ec.gc.ca/ap-pa/default.asp?lang=En&n=D354901F-1>

19. It is unknown what proportion of these integrity digs will require pipeline remediation.
20. Enbridge states that prior to the 2012 ILI assessment, a total of 168 defects met excavation criteria from ML to NW.

Enbridge: "Line 9B Reversal and Line 9 Capacity Expansion Project, Pipeline Integrity Engineering Assessment" p. 19-20, November 2012⁹.

21. The currently proposed 600 integrity digs represents a significant increase in required digs for Line 9B. As the pipeline continues to age, it would follow that the number of integrity issues experienced by the pipeline will continue to increase.
22. As the number of pipeline integrity issues increases, MCK is concerned that response times to investigate and remediate the potential issues will also increase, resulting in a longer duration during which the pipeline is susceptible to the potential integrity issues discovered through ILI.
23. The discovery of pipeline integrity issues and subsequent failure to address identified issues was one factor contributing to the Marshall Incident on Line 6B.

U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration: "Notice of Probable Violation and Proposed Civil Penalty", File No. CPF 3-2012-5013, dated July 2, 2012.¹¹

24. The Line 6B pipeline is of a similar age and construction as the Line 9B.
25. In addition, MCK has concerns that the pipeline inspection protocols and detection methods are insufficient. In particular, with respect to the *Pipeline Integrity Engineering Assessment* ("PIEA"), MCK notes the following:
 - a. 206 false negative features were identified in the report (p. 63 of *PIEA*). While it is noted that of these features, the lowest predicted failure pressure is 125 %, MCK has concerns regarding the potential for other unidentified features currently existing within the pipeline as well as the possibility that future, more critical features, may go undetected.
 - b. Reported probability of detection values for portions of the line are between 52 % and 94 % (p. 67 of *PIEA*). MCK has concerns with the low percentages detected particularly for crack like and notch like features.

⁹ [https://www.neb-one.gc.ca/ll-fre/livmlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6L7 - Response to NEB IR No 3.pdf?nodeid=801644&vernum=0](https://www.neb-one.gc.ca/ll-fre/livmlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6L7_-_Response_to_NEB_IR_No_3.pdf?nodeid=801644&vernum=0)

¹⁰ [https://www.neb-one.gc.ca/ll-fre/livmlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/750475/B1-15 - Attachment 7 - Pipeline Engineering Assessment - A3D7J4.pdf?nodeid=750518&vernum=0](https://www.neb-one.gc.ca/ll-fre/livmlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/750475/B1-15_-_Attachment_7_-_Pipeline_Engineering_Assessment_-_A3D7J4.pdf?nodeid=750518&vernum=0)

¹¹ <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Press%20Releases/NOPV.pdf>

- c. Report notes that an investigation was done to determine remaining life expectancy of 4105 unexcavated crack-related features (p. 75 of *PIEA*). MCK has concerns with the number of unexcavated crack-related features.
- d. Report indicates that as of the time of printing (Nov. 2012), 25 reported features were expected to reach critical dimensions prior to Oct. 2013, however under current operating pressure none of the features would reach critical dimensions until Dec. 2013 and further that Enbridge is re-inspecting Line 9B to further evaluate these features (p. 80 of *PIEA*). MCK notes that the increased timeframe to reach critical dimension when comparing Maximum Operating Pressure (“MOP”) with existing operating pressure demonstrates that approval of the reversal will increase the speed of pipeline deterioration compared to the existing condition. While Enbridge has noted that there is no increase in the regulated MOP, in practice a reversal will lead to higher pressure in the line and therefore greater risk for pipeline deterioration and failure. Further, MCK has concerns that features that were identified to reach critical dimension within a relatively short timeline would be re-inspected rather than proceeding immediately with excavation and remediation.
- e. Report indicates that the Enbridge excavation criterion applicable to mechanical damage programs is: Dents ≥ 6.0 % except under certain conditions when the criterion is 2.0 % (p. 84 of 96). MCK has concerns that this criterion is not sufficiently stringent. MCK notes that in a summary of known events provided in Attachment 1 to NEB IR 1.27(A), a dent of 4.3 % resulted in a leak on 2/25/1997. The location of the dent suggests that excavation would not have occurred prior to the incident (dent < 6 %).
- f. Report indicates that the “pressure that a geometry is exposed to has little impact in comparison to the pressure cycling it may undergo” and that “the cycling of the proposed configuration is not expected to exceed those operating conditions previously indicated in Section 4.3...” (p. 91 of *PIEA*). MCK has concerns with this statement and the lack of regulation mandated with respect to cycling pressures. If cycling pressure is the critical determinant in mechanical damage features, MCK recommends that NEB implement standards with respect to cycling frequency. In addition, MCK is concerned that the amount of cycling that will occur has not been further explored in support of the application.
- g. Report indicates that “There is one river crossing site along the Line 9 ROW that is currently exposed and undergoing remediation preparations. A partial pipeline exposure at the MP 1923 Rouge River crossing was identified in 2010.” (p. 93 of *PIEA*). While it is acknowledged that the site was assessed and emergency repairs were deemed unnecessary, MCK has concerns that as of the time of the document (November 2012), the remediation was still on-going. Of further concern, Enbridge notes in their response to *Toronto IR 2.30 d*) that the exposure had already been discovered prior to their 2009 depth of cover survey which suggests that the pipeline

was exposed for at least three years. MCK recommends that maximum timelines be implemented to remediate pipeline exposures.

- h. The report indicates numerous activities that are required prior to flow reversal (p 94 of *PIEA*). The MCK is concerned about the number and scope of the outstanding activities that Enbridge must carry out prior to flow reversal.

Enbridge: "Line 9B Reversal and Line 9 Capacity Expansion Project, Pipeline Integrity Engineering Assessment"
p. 19-20, November 2012¹²

*Enbridge response to Toronto IR 2.2.30 d)*¹³

*Enbridge: Attachment 1 to NEB IR 1.27(A)*¹⁴

- 26. In light of MCK's concerns outlined in the previous paragraph, MCK recommends that more stringent conditions be placed on Enbridge concerning their monitoring program and the timelines and criteria for implementing pipeline feature investigations and repairs. These concerns are sufficient for the MCK to oppose Enbridge's request for an Order exempting the Project from the Leave to Open requirements. Furthermore, the MCK recommends, at a minimum, that a decision on the application be stayed or conditional until the completion of these outstanding issues.
- 27. Enbridge has acknowledged that thicker pipelines are installed as added protection in sensitive areas such as water crossings. MCK therefore recommends a condition be placed on Enbridge that requires, as a minimum standard, that all future pipeline replacement repairs be completed with ½" thick pipe regardless of location.

*Enbridge: Response to Paul Keubler IR 1.4.a) filed June 25, 2013.*¹⁵

- 28. MCK notes that the NEB has implemented new Pipeline Performance Measures Reporting Requirements that require self-reporting by certain operators which includes reporting on pipeline integrity.

*National Energy Board: "Pipeline Performance Measures Reporting Requirements", March 2012.*¹⁶

¹² See Note 10 for link to *PIEA*.

¹³ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3S7_-02_-Response to Toronto IR No. 2?nodeid=809857&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3S7_-02_-Response%20to%20Toronto%20IR%20No.%202?nodeid=809857&vernum=0)

¹⁴ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/780656/B8-17_-Attachment 1 to NEB IR 1.27a - Description of Table 3-2 Known Integrity Features - A3G4T3?nodeid=780899&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/780656/B8-17_-Attachment%201%20to%20NEB%20IR%201.27a%20-%20Description%20of%20Table%203-2%20Known%20Integrity%20Features%20-%20A3G4T3?nodeid=780899&vernum=0)

¹⁵ [https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/92263/790736/890819/918445/964209/A3I6X3_-Response to Paul Kuebler IR No 1.pdf?nodeid=964310&vernum=0](https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/92263/790736/890819/918445/964209/A3I6X3_-Response%20to%20Paul%20Kuebler%20IR%20No.%201.pdf?nodeid=964310&vernum=0)

29. MCK recommends the following conditions be implemented with respect to NEB's Pipeline Performance Measures Reporting Requirements Program:
- The results of features meeting excavation criteria be made available to proximate first responders to provide a heightened awareness of the increased potential for an incident.
 - Any ILI detected that is not investigated and remediated within prescribed timelines as set out by the NEB should result in immediate shutdown of the line until such time as inspection and repair have been completed.
 - Any issues that are identified that may become 'overdue' prior to the next reporting period should be followed up on by the NEB with interim reporting required to proactively ensure timelines are respected.

Emergency Response Implementation

30. Enbridge indicates that a response time to an incident of between 1.5 hours and 4 hours is realistic based on emergency response exercises performed each year.

*Enbridge: "Response to Mohawk Council of Kahnawà:ke Information Request No. 1 – 2.3", filed June 25, 2013.*¹⁷

31. Enbridge further states that manual valves can be closed within ten to fifteen minutes once a technician has reached the site.

*Enbridge: "Response to Toronto Region Conservation Authority Information Request No. 1. g)", filed June 25, 2013.*¹⁸

32. In response to a recent incident on Enbridge's Line 37 Pipeline, Enbridge President of Liquids Pipelines and Major Projects stated:

The unprecedented rainfall and extremely wet conditions at the site have had a significant impact on the ability of crews and heavy equipment to safely access the site of the release, complete excavations and conduct visual inspections. While our focus was on bringing all possible human and equipment resources to bear in responding as quickly as possible, we committed from the outset that we would not compromise safety, nor restart our pipelines until we could ensure that it would be safe to do so [...]

¹⁶ <http://www.neb-one.gc.ca/clf-nsi/rsfyndthbvrnmmt/sfy/pplnprfrmncmsr/pplnprfrmncmsrrprtngqrmt-eng.pdf>

¹⁷ [https://www.neb-one.gc.ca/ll-fre/livlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6Q8_-_Response to Mohawk Council of Kahnawake IR No 1.pdf?nodeid=801943&vernum=0](https://www.neb-one.gc.ca/ll-fre/livlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6Q8_-_Response%20to%20Mohawk%20Council%20of%20Kahnawake%20IR%20No%201.pdf?nodeid=801943&vernum=0)

¹⁸ [https://www.neb-one.gc.ca/ll-fre/livlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6U1_-_Response to TRCA IR No 1.pdf?nodeid=802056&vernum=0](https://www.neb-one.gc.ca/ll-fre/livlink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6U1_-_Response%20to%20TRCA%20IR%20No%201.pdf?nodeid=802056&vernum=0)

Enbridge: “Enbridge Restarts Athabasca Pipeline; Provides Update on Regional Oil Sands System Status”, news release dated July 1, 2013.¹⁹

33. It is apparent that the response times referenced above apply only in optimal conditions and that worker safety is necessarily a priority.
34. It is apparent that severe weather events such as extreme rain events have the potential to impact pipeline integrity through the promotion of mass erosion, exposing pipelines to ground movement as was the case in the Line 37 incident outlined below:

Line 37 had been shut down June 22 as a result of a release of light synthetic crude oil caused by high rains which led to 1-in-100 year water levels that triggered ground movement on the right-of-way. [...]

Enbridge: “Enbridge Restarts Line 37 Pipeline, Returns Athabasca Pipeline to Full Service”, news release dated July 11, 2013.²⁰

35. There has been an increase in extreme rain events over the last fifty years as a result of changes in climate and extreme weather is expected to continue to increase in frequency.

Intergovernmental Panel on Climate Change: “Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007”, dated 2007.²¹

36. Given the numerous possible weather events that could lead to unsafe working conditions around a pipeline incident, the need to limit the volume released is of primary importance as containment procedures may not be feasible in the immediate aftermath of an event.

37. Currently, Enbridge maintains a total of 51 valves on Line 9B, of which 43 or 84 % are automated.

Enbridge: “Response to Toronto Information Request No. 1.28 a)”, filed June 25, 2013.²²

38. MCK recommends that additional valves be incorporated into the system and that all valves be converted to automatic operation.

39. Valves should be included on both sides of all significant water crossings (annual average flow greater than 1 m³/s) as well as in areas adjacent to significant wetlands, and in proximity to significant groundwater recharge areas.

¹⁹ <http://www.enbridge.com/MediaCentre/News.aspx?yearTab=en2013&id=1736736>

²⁰ <http://www.enbridge.com/MediaCentre/News.aspx?yearTab=en2013&id=1739861>

²¹ http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm

²² https://www.necb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/802074/A3I6X8_-_Response_to_Toronto_IR_No_1.pdf?nodeid=802093&vernum=0

40. Additionally, backup valves should be placed in proximity to major watercourses outside of mapped floodplain extents to ensure access is possible in case of valve malfunction.
41. Backup power supplies should be included for all automated valves particularly given power outages are also common during severe weather.
42. Given that flooding events have led to recent failures and the increased likelihood of potential damage and difficulty in remediation of an incident under these conditions, MCK recommends that Line 9B be proactively stopped during significant flooding events to minimize impacts that would result from an incident.
43. In addition, field inspections of the pipeline should occur after each significant rainfall event within all defined floodplain areas and slope hazards.

Emergency Response Assumptions

44. Enbridge utilizes the following assumptions when determining a worst-case discharge volume:
 - an assumption of guillotine rupture (100% volume-out)
 - design pipeline capacity to determine the amount of product released prior to a rupture being isolated by closure of remote-controlled mainline valves
 - an assumption that all of the product in the pipe, except that isolated by either elevation or the location of existing remote-controlled valves, will be discharged at a leak location

Enbridge "Book 7: Emergency Response", p.22 of 177 Exhibit A317D1 filed June 25, 2013.²³

45. The assumptions utilized are said to be conservative however they are premised on full functionality of all leak mediation devices i.e. valves fully close in design timeframe. MCK has concerns that the methodology used does not adequately represent a conservative, worst-case scenario.
46. The Marshall Incident on Line 6B illustrates a recent example of a similar pipeline where the worst case release scenario was greatly exceeded. The estimated worst-case scenario was 3,608 bbls versus over 20,000 bbls actually released.

U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration: "Notice of Probable Violation and Proposed Civil Penalty", File No. CPF 3-2012-5013, dated July 2, 2012.²⁴

²³ https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/802168/A317D1_-_Attachment_1_to_Ontario_IR_1.44.b.v?nodeid=802272&vernum=0

²⁴ See Note 11 for link to a copy of Notice.

47. Given the existence of a recent, real-world scenario that clearly illustrates the numerous complications that can occur and that cannot be adequately anticipated or modeled, MCK recommends that worst case scenario modeling occur using the 20,000 bbls value that was actually released in the Line 6B incident. This value represents a more realistic “worst-case” scenario and would assist with the development of emergency response and resource requirements for such an event as well as illustrate the potential impacts of a spill from Line 9B.

Emergency Response Planning

48. Enbridge has indicated that site specific emergency response plans are initiated upon discovery of an incident. More specifically, Enbridge states:

Enbridge is committed to the protection of the environment and develops emergency response plans for all releases. Each release is unique and the response depends on the volume and type of product released, the location of the incident, the time of year, climatic conditions at the time of the incident, as well as the nature and characteristics of the soils, geology, surface waters, and groundwater. Immediately upon discovery of a release Enbridge initiates emergency response protocols and uses internal and external resources to address the circumstances of the incident. The fully developed response plan for any incident of significance is developed in consultation with the NEB and the other applicable regulatory agencies.

The response plan considers stakeholder and regional priorities and includes site specific strategies. The plan for a release of significance may include, but not necessarily be limited to a resources at risk assessment to understand the environmental and cultural receptors in the area; spill trajectory modeling to understand potential waterway impacts; a SCAT (Shoreline Cleanup Assessment Technique) assessment to assess, catalog, prioritize, and plan shoreline cleanup activities; a submerged oil plan (if applicable), activation of our third party wildlife support unit to deter wildlife from the area as well as capture and clean affected wildlife; activation of our third party air monitoring support to assess and track air quality; generation of a waste management plan to manage or treat the materials generated from the response; and surface and groundwater monitoring plans to track to water impacts. Enbridge works with the NEB and applicable regulators to implement a site specific remedial action plan through the NEB Remediation Process to remediate all impacts to the environment in compliance with all regulatory requirements.

*Enbridge: “Response to Toronto Region Conservation Authority Information Request No. 1.f) iii)”, filed June 25, 2013.*²⁵

²⁵ See note 18 for link to Response.

49. Enbridge has not provided specifics asked for in numerous information requests regarding providing clean drinking water, addressing odours from a release, implementing spill response, or possible spill consequences.

e.g. *Enbridge: Response to A2A IR No. 1.2.e*)²⁶, *Response to Toronto Region Conservation Authority IR No. 1.i*)²⁷, *Response to Grand River Indigenous Solidarity IR No. 1.2.a*)²⁸, *Response to Durham CLEAR IR 1.4.b.ii*)²⁹ all filed June 25, 2013.

50. MCK notes that Enbridge states that they assume a spill will reach Lake Ontario as a conservative assumption therefore it is not necessary to estimate the time required to do so.

Enbridge: Response to Ontario IR 2.7 a - b)³⁰

51. MCK has concerns that the failure to calculate the time required for oil to reach critical infrastructure or provide details concerning specific worst case scenarios will negatively impact the implementation of an effective spills response as this information could assist Enbridge as well as affected communities to properly respond to a worst-case incident.
52. MCK recommends that, if the Application is granted, a condition be placed on the approval that requires a worst-case scenario analysis be completed for all High Consequence Areas. Release amounts should be based on a real world 'worst-case' incident, e.g. the Marshall Incident with a release volume of 20,000 bbls. Time to reach the nearest receiving watercourse should be estimated as well as total spill extent and time to reach water intake and other significant infrastructure.
53. Similar exercises are being undertaken in Ontario through the Ministry of Environment's Source Water Protection Program. An established protocol exists that could be adapted for this purpose which provides guidance on environmental variables to use for estimation purposes.

*Ontario Ministry of Environment: Source Water Protection.*³¹

²⁶ https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6Q9_-_Response_to_A2A_IR_No_1.pdf?nodeid=801883&vernum=0

²⁷ See Note 18 for link to Response.

²⁸ https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6S2_-_Response_to_Grand_River_Indigenous_Solidarity_IR_No_1.pdf?nodeid=801999&vernum=0

²⁹ https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/801640/A3I6R3_-_Response_to_Durham_CLEAR_IR_No_1?nodeid=801952&vernum=0

³⁰ https://www.neb-one.gc.ca/ll-fre/livelihood.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3W2_-_37_-_Response_to_Ontario_IR_No_2?nodeid=810053&vernum=0

³¹ http://www.ene.gov.on.ca/environment/en/subject/protection/STDPROD_080598.html

Reactive Spills Management

54. MCK acknowledges that reactive spills management is also required during an incident. Effective reactive planning relies heavily on knowledge of the surroundings where an incident is taking place and the contributing factors that may complicate the response. Enbridge notes that it maintains catalogues of relevant information such as Species at Risk locations and river access locations.

eg. Enbridge: Response to Mohawk Council of Kahnawà:ke Information Request 1.2.12³²; Response to Toronto IR No. 2.30 f) all filed on June 25, 2013.³³

55. Further, Enbridge has indicated that information such as sewer infrastructure and river flowrates will be gathered from local sources after an incident has occurred.

Enbridge: "Response to Toronto Region Conservation Authority Information Request No. 1.f) iii)", filed June 25, 2013.³⁴

56. MCK has concerns that Enbridge is not maintaining sufficient local information in advance of an incident to respond in an optimal way. For example the extent of floodplains and their impacts on identified access sites, location of critical infrastructure such as water intakes and sewer networks, information on river flow and flooding conditions, and weather data should be kept and maintained.
57. Much of this information is available from various sources, some of which include Environment Canada, Water Survey Canada, the Québec Ministère du Développement durable, de l'Environnement et des Parcs, the Québec Ministère des Ressources naturelles, the Ontario Ministry of Environment, the Ontario Ministry of Natural Resources, Ontario's Conservation Authorities and Source Water Protection Groups, and municipalities.
58. Increasingly, this type of information is available on-line through partnership agreements. Products such as predictive weather radar are also being produced and would assist with decision making.
59. MCK recommends that Enbridge be required to hold regular meetings with interested stakeholders along the length of the pipeline that can contribute to the database of information available to Enbridge to improve its understanding of local conditions so that reactive response to incidents can be as informed as possible.

Communications

³² See note 17 for link to Response.

³³ See note 22 for link to Response.

³⁴ See note 18 for link to Response.

60. An investigation of the Marshall Incident on Enbridge Pipeline 6B revealed numerous breakdowns in communication amongst Enbridge personnel. Shift changes occurred without notification of what had occurred on previous shifts. Emergency Management Procedures were not implemented despite alarms. The Operating Centre did not implement emergency management protocol until a non-Enbridge employee notified the Operating Centre 17 hours after the start of the incident.

U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration: "Notice of Probable Violation and Proposed Civil Penalty", File No. CPF 3-2012-5013, dated July 2, 2012.³⁵

61. This incident highlights the problems that can occur in real world scenarios that cannot be anticipated in planning documents. MCK recommends that additional steps be implemented in an effort to provide additional safeguards to reduce human error.
62. Suggested conditions include the inclusion of automatic triggers that close down valves in the event of an alarm. These valves would then have to be reset at the valve site after investigation of the alarm.
63. MCK further recommends that a debriefing occur between operations personnel at the end of every shift change so that new shift workers are aware of any issues that have occurred. These debriefing sessions should be documented for auditing purposes.

The potential environmental and socio-economic effects of the proposed Project, including the potential effects of malfunctions or accidents that may occur, and any cumulative environmental effects that are likely to result from the proposed Project (Issue 4)

64. This Section will elaborate on the concerns and views of the MCK pertaining to Issue 4 and will address the potential environmental and socio-economic effect of any malfunctions or accidents that may occur. In particular, any potential impacts on the rights and interests of the Mohawks of Kahnawà:ke in the event of a release of oil from the pipeline.
65. The MCK submits that Enbridge's Application, in its current form, does not adequately address a number of safety, security and emergency planning issues. This heightens the likelihood of an accident or malfunction and of potential environmental and socio-economic effects and damages.
66. If an incident causes the release of oil from Enbridge Line 9, the rights, interests and traditional territories of the Mohawks of Kahnawà:ke will be directly impacted.
67. More specifically, the MCK is concerned about temporary or irreparable harm to:

³⁵ See note 11 for link to Notice.

- the integrity of Kahnawà:ke's Aboriginal title lands;
- the Walleye, Perch, Sturgeon, Muskie, Deer and other game animals, and the ability of the Mohawks of Kahnawà:ke to hunt, fish, and consume these species and use them for ceremonial and other cultural purposes;
- the plants gathered and the ability of the Mohawks of Kahnawà:ke to consume these plants and use them for ceremonial, medicinal and other cultural purposes.
- the Walleye and Sturgeon spawning sites
- the species at risk found in proximity to the pipeline's right of way

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013;

EXHIBIT 3-Affidavit of Rakwiréenh:tha Frank Diabo, August 5, 2013; and

EXHIBIT 4- Affidavit of Corleen Montour, August 3, 2013.

EXHIBIT 6- Van Hinte, T., Gunton, T.I., Day, J.C, "Evaluation of the Assessment Process for Major Projects: a case study of oil and gas pipelines in Canada", Impact Assessment and Project Appraisal, February 20, 2012, p. 125-127.

*EPA: "Wildlife and Oil Spills"*³⁶

68. The Mohawks of Kahnawà:ke are also concerned about the integrity of its drinking water supply. In case of emergency, the MCK only has a 24-hour reserve capacity for its community of 7750 residents.

EXHIBIT 1-Affidavit of Chief William J. Diabo, August 5, 2013;

EXHIBIT 2-Affidavit of Chief Clinton Phillips, August 5, 2013.

*CBC News "Alberta Oil Spill Will Take Months to Clean Up", June 11, 2012, retrieved online on August 5, 2013*³⁷

69. As will be elaborated upon in Issue 7, the Mohawks of Kahnawà:ke are also concerned that Enbridge does not have an adequate plan to address Kahnawà:ke's rights and interests in the event of a malfunction or accident causing the release of oil from Enbridge Line 9 that would impact these rights and interests.
70. The Mohawks of Kahnawà:ke are concerned with Enbridge's financial ability to support a "clean up" of a significant spill and its abilities to return the land and the environment to its original pre-spill condition. More specifically, the MCK is concerned with Enbridge's financial ability and

³⁶ http://www.epa.gov/osweroe1/docs/oil/edu/oilspill_book/chap5.pdf

³⁷ <http://www.cbc.ca/news/canada/calgary/story/2012/06/11/calgary-oil-spill-animals.html>

willingness to compensate the Mohawks of Kahnawà:ke in the event that a spill causes a significant impact on the ability to exercise its Aboriginal rights and interests.

71. The MCK recommends that the NEB ensure that Enbridge has the sufficient financial capacity to compensate interest holders in the event of a significant spill.
72. The Mohawks of Kahnawà:ke are also concerned with potential environmental and socio-economic impacts stemming from any “clean-up” (eg. Dredging) that may be required to help remediation in the event of a release of oil along Enbridge Line 9.

Consultation with Aboriginal groups and the potential impacts of the proposed Project on Aboriginal interests (Issue 7)

73. This Section will address Issue 7 and explain how the Crown relied on the NEB process to discharge its duty to consult the Mohawks of Kahnawà:ke on this Project. Enbridge’s failure to identify and address the interests of the Mohawks of Kahnawà:ke, along with the failure to adopt measures to mitigate potential impacts of the Project on the Mohawks of Kahnawà:ke will be outlined.

Consultation- the Crown’s duty and how it was carried out thus far

74. As outlined throughout the MCK’s Evidence, the Project, in its current form, has a potential adverse impact on the Aboriginal rights and title of the Mohawks of Kahnawà:ke that triggers the duty to consult. The concerns that are raised in this submission are concrete and not merely “speculative” in nature.

Rio Tinto Alcan v. Carrier Sekani Tribal Council, 2010 SCC 43 at paras 44 and 46.³⁸

75. This duty applies to lands held by Enbridge (“private lands”) and all other lands in proximity to the pipeline that could be impacted by an incident.

Hupacasath First Nation v. British Columbia (Minister of Forests) et al., 2005 BCSC 1712 at paras. 199-200.³⁹

76. The Crown did not consult or make any attempt to consult the Mohawks of Kahnawà:ke with respect to this Project. It is presumed that the Crown is relying on Enbridge’s “Aboriginal and Native American Policy” and the NEB process to ensure that First Nations have been adequately consulted.

EXHIBIT 2- Affidavit of Chief Clinton Phillips, August 5, 2013.

³⁸ <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7885/index.do?r=AAAAAQAJcmlyIHRpbmRvAAAAAAAAAQ>

³⁹ <http://www.courts.gov.bc.ca/jdb-txt/sc/05/17/2005bcsc1712.htm>

77. The Crown never carried out a strength of claim assessment nor an assessment of the seriousness of the potentially adverse effect upon the right or title claimed.
78. The MCK does not acknowledge that the Crown has met its legal duty to consult for this Project by relying on Enbridge and the NEB to fulfill Crown obligations.
79. However, for the purposes of its Written Evidence, and without prejudice to any recourse against the Crown, the MCK approaches Issue 7 from the standpoint that the NEB cannot reasonably conclude that Enbridge has effectively identified and addressed the concerns of the Mohawks of Kahnawà:ke.
80. The activities reported in Enbridge's "Aboriginal Engagement Activities Summary" for Kahnawà:ke consisted of Enbridge providing basic information on its Project and exchanges of correspondence in view of scheduling follow-up meetings. No consultation or meaningful information exchanges occurred between MCK and Enbridge during the period reported in their summary (May 17, 2012 to September 28, 2012).

Enbridge: Attachment 6 "Aboriginal Engagement Activities- Kahnawà:ke First Nation" (p. 6-7) of Project Application, November 29, 2012.⁴⁰

81. The MCK cautions the NEB not to interpret each meeting or exchange between Enbridge and a First Nation as qualifying as a consultation.
82. Since September 28, 2012, the MCK has had two meetings with Enbridge regarding the Project, on February 6, 2013 (with MCK representatives) and on April 10, 2013 (between MCK Chief and Council and representatives).

EXHIBIT 2- Affidavit of Chief Clinton Phillips, August 5, 2013.

83. The MCK raised some initial concerns related to the project at these meetings, and, at the April 10, 2013 meeting asked several initial questions regarding the Project. These meetings did not constitute a consultation process since the initial comments shared by the MCK at these meetings did not include and were not based on a review of Enbridge's Project, and a review of the rights and interests of the Mohawks of Kahnawà:ke (with the necessary community input).

EXHIBIT 2- Affidavit of Chief Clinton Phillips, August 5, 2013.

⁴⁰ <https://www.neb-one.gc.ca/llfre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/750475/B1-14 - Attachment 6 - Aboriginal Engagement Activities Summary - A3D7J3.pdf?nodeid=750515&vernum=0>

84. The written response provided by Enbridge to the initial concerns raised by MCK at the April 10, 2013 meeting between the Parties was followed by Information Request exchanges as part of the NEB proceedings. However, no additional meetings have taken place between Enbridge and MCK since that time.

MCK Information Request on June 11, 2013⁴¹; Enbridge response to Information Request on June 26, 2013⁴²; MCK follow-up Information Request on July 5, 2013⁴³ and Enbridge response to follow-up Information Request on July 23, 2013⁴⁴.

85. Enbridge's Application and the responses to the MCK's Information Request and follow-up Information Request have failed to address a number of concerns, which are now being raised in this submission.
86. Therefore, Enbridge and the NEB must accommodate the concerns raised by the MCK in its Written Evidence in order for the Crown to discharge its duty to consult the Mohawks of Kahnawà:ke by relying on the NEB process.

Enbridge has failed to adequately identify and consider the concerns of the MCK

87. MCK acknowledges that the Project does not require the taking of additional lands subject to Aboriginal rights or title. Rather, the Project is to be exercised on lands already in the possession of Enbridge over which Enbridge claims that the exercise of "traditional use" is incompatible.

This statement has been made by Enbridge in numerous responses, see for example: Enbridge: Enbridge Response to Jesse McCormick Information Request No.1- 1.1 c), filed on June 25, 2013.⁴⁵

88. MCK does not agree that Line 9 lands held by Enbridge are necessarily exempt from the exercise of Aboriginal rights due to incompatibility. The Aboriginal title and rights of the Mohawks of Kahnawà:ke and other First Nations are not extinguished by the mere fact of the pipeline; rather, the rights of Enbridge and of First Nations must be reconciled according to the factors specific to the exercise of each right.

⁴¹ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/794638/794766/799678/A3I3J4 -
_Information_Request.pdf?nodeid=799679&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/794638/794766/799678/A3I3J4_-_Information_Request.pdf?nodeid=799679&vernum=0)

⁴² See note 17 for link to Response.

⁴³ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/794638/794766/806239/A3I9W6 -
_MCK_Information_Request_No_2_OH-002-2013.pdf?nodeid=806240&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/794638/794766/806239/A3I9W6_-_MCK_Information_Request_No_2_OH-002-2013.pdf?nodeid=806240&vernum=0)

⁴⁴ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3V5 - 30 -
_Response_to_Mohawk_Council_IR_No_2.pdf?nodeid=810032&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3V5_-_30_-_Response_to_Mohawk_Council_IR_No_2.pdf?nodeid=810032&vernum=0)

⁴⁵ [https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/802074/A3I6X4 -
_Response_to_Jesse_McCormick_IR_No_1.pdf?nodeid=802084&vernum=0](https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/802074/A3I6X4_-_Response_to_Jesse_McCormick_IR_No_1.pdf?nodeid=802084&vernum=0)

EXHIBIT 7- *Tsilhqot'in Nation v. British Columbia* [2008] 1 C.N.L.R. 112 (paras 998 to 1000).

89. In any case, the interests of the Mohawks of Kahnawà:ke in the Project are not limited to the impacts stemming from the works that will take place within the pipeline's right-of-way.
90. All Issues identified by the Board and outlined in the "List of Issues", including, the conditions attached with an eventual approval of the Project, have a direct impact on the safety of the Project and by extension the rights and interests of the Mohawks of Kahnawà:ke.

NEB: "Procedural Update No. 1- List of Issues and Application to Participate form", April 4, 2013.⁴⁶

91. Enbridge's actions and omissions that caused the Line 6B accident near Marshall, Michigan in July 2010 resulted in the contamination of approximately 61 kilometers of the Kalamazoo River. An incident of similar or even lesser importance on Line 9 could severely impact the exercise of the Aboriginal rights and title of the Mohawks of Kahnawà:ke.

U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration: "Notice of Probable Violation and Proposed Civil Penalty", File No. CPF 3-2012-5013, dated July 2, 2012.⁴⁷

92. This fact was recognized by Enbridge:

If a release reached an area where First Nations exercised their Aboriginal or treaty rights, impacts would be possible. The effects of a release would depend on many incident and site-specific variables [...]

If a release resulted in oil entering a waterway where First Nations exercised their Aboriginal or treaty right to fish, impacts could be possible.

Enbridge: *Enbridge Response to Jesse McCormick Information Request No.2- 2.2 c) and d)*, filed on July 23, 2013.⁴⁸

93. The Mohawks of Kahnawà:ke therefore argue that, in spite of the fact that the Project does not require the taking of "new" lands subject to Aboriginal rights and title, the potential severity of harm to the exercise of their Aboriginal rights and title resulting from a significant incident occurring on Line 9 is sufficient to warrant the NEB adopting the recommendations that the MCK shall make in its Written Evidence.

⁴⁶ See note 2 for link to List of Issues.

⁴⁷ See note 11 for link to Notice.

⁴⁸ <https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3V6 - 31 - Response to Jesse McCormick IR No 2.pdf?nodeid=810035&vernum=0>

94. More specifically, the Mohawks of Kahnawà:ke will submit several specific recommendations pertaining to pipeline integrity, emergency response implementation, emergency response assumptions, emergency response planning, reactive spills management, communication, and the mitigation of potential impacts on the exercise of Aboriginal rights and interests.
95. The safety concerns addressed by MCK's recommendations, in conjunction with the potential for serious consequences stemming from a large-scale accident (such as the Line 6B Kalamazoo incident), establish that Application, in its present form, has a strong potential adverse impact on the Aboriginal rights and interests of the Mohawks of Kahnawà:ke.

Enbridge failed to address issue of mitigation of potential adverse impacts on the exercise of Aboriginal rights

96. In addition to the more general issues that remain unaddressed as outlined in our treatment of Issues 6 and 4 above, Enbridge has failed to adequately address the issue of its plans to mitigate potential adverse impacts of the Project on Title lands and the exercise of Aboriginal rights.
97. Enbridge's response to the follow up Information Request for details as to Enbridge's plans to mitigate potential adverse impacts on the exercise of Aboriginal rights was:

In the unlikely event of an incident, the proximity of impacted communities would depend on the unique circumstances of the incident.

For planning purposes, Enbridge considers communities in proximity to its pipelines and facilities as those that would potentially be impacted should an incident occur. Should an incident occur in close proximity to lands that Enbridge learns are subject to Aboriginal title or on lands upon which Aboriginal or Treaty Rights are exercised, these factors would be taken into account.

During the course of ongoing operational discussions and Project consultation activities, Enbridge works with individual Aboriginal communities to determine where there are traditional activities being practised in relation to its pipelines and facilities. Enbridge also takes into consideration its operating history in the region.

As discussed in response to AFN and COTTEN IR 1 Question 1.12, as part of Enbridge's ongoing operational relationship, Enbridge looks for opportunities to meet with Aboriginal communities to share the relevant details of its existing emergency response plans and to help Enbridge understand how traditional knowledge may inform and/or enhance those plans.

98. Enbridge's response is vague as it does not:
- Provide criteria or standard defining what Enbridge would consider "in proximity" as "potentially impacted" communities;
 - Provide any information explaining the manner in which Aboriginal or treaty rights would be taken into account in the event of an incident;
 - Contain an actual undertaking to consider Aboriginal rights and interests in its emergency response plans.
99. MCK submits that there is a reasonable probability that Enbridge would not be able to develop and carry out a process for the identification of First Nations that are impacted by an emergency, which rights and interests need to be taken into account stemming from an emergency and how their emergency response plans need to be altered, only after an emergency situation arises.
100. MCK recommends that the NEB require that Enbridge provide the NEB with a report outlining:
- Which First Nations are included in Enbridge's emergency response plan (i.e. which First Nations are considered "proximate" and "potentially impacted" along with the criteria used for this determination)
 - An inventory identifying the rights and interests (and the locations of these) that "included" First Nations have provided to Enbridge that will be considered in the event of an emergency situation occurring on those lands;
 - Detail as to how Enbridge plans to take these rights and interests into account in the event of an emergency situation and how Enbridge will ensure that these rights and interests are not effectively extinguished through an occurrence or significant event. These should be developed in conjunction with First Nations and contain information on concrete measures that will be taken in the event of an emergency incident impacting First Nation rights and interests.
101. The MCK recommends that Enbridge be required to address community specific concerns in this Report. In the case of Kahnawà:ke, the MCK will request that Enbridge produce details as to its emergency response plan in the event that an oil release impacts Kahnawà:ke's 24-hour drinking water reserve.
102. The MCK further recommends that the NEB require that this Report, along with a revised version of Enbridge's emergency response plan that implements this Report be submitted prior to Enbridge's Project being approved.

⁴⁹ <https://www.neb-one.gc.ca/ll-fre/livelink.exe/fetch/2000/72399/72487/74088/660700/750773/770854/809850/A3J3V5 - 30 - Response to Mohawk Council IR No 2.pdf?nodeid=810032&vernum=0>

103. The MCK is aware of past NEB decisions that “note” the willingness of proponents to “ongoing consultation” with First Nations post-approval.

See for example, previous NEB Letter of Decision File-OF-Fac-Oil-E101-2011-01 01 at p. 11⁵⁰

104. The MCK submits that vague undertakings of this nature, without any parameters as to content and reporting requirements, do not meet the expectations of the Mohawks of Kahnawà:ke in terms of the concrete measures and tasks that must be accomplished in order for Enbridge to mitigate the potential impact that the Project may have on the Aboriginal rights and interests of the Mohawks of Kahnawà:ke.

MCK Recommendations: The terms and conditions related to the above issues, to be included in any approval the Board may issue for the proposed Project (Issue 9)

105. This Section shall address Issue 9 and contain the MCK’s position on the Application for Exemption from Leave to Open, in addition to a summary of the recommendations made throughout MCK’s Written Evidence.

Position on Application for Exemption from Leave to Open

106. The MCK opposes Enbridge’s Application for an order, pursuant to section 58 of the NEB Act, exempting the project from the provisions of paragraph 30(1)b) and 47 of the NEB Act and recommends that the NEB deny this Application.

Recommendations regarding Pipeline Safety

107. The MCK recommends that the following measures and standards be required of Enbridge prior to any approval of its Application and Project:
- That the NEB implement standards with respect to cycling frequency and that Enbridge be required to provide additional detail as to the amount of cycling that will occur;
 - That maximum timelines be implemented and enforced to remediate pipeline exposures, subject to forced pipeline shutdown in case of non-compliance;
 - That more stringent conditions be placed on Enbridge concerning their monitoring program and the timelines and criteria for implementing pipeline feature investigations and repairs;

⁵⁰<https://www.neb-one.gc.ca/ll-fre/livmlink.exe/fetch/2000/72399/72487/74088/582161/581927/701543/701607/A2V3K2 - Letter Decision OH-005-2011.pdf?nodeid=701608&vernum=0>

- That the NEB impose a condition on Enbridge that requires, as a minimum standard, that all future pipeline replacement repairs be completed with ½” thick pipe or greater regardless of location.
- The following conditions be implemented with respect to NEB’s Pipeline Performance Measures Reporting Requirements Program:
 - a. The results of features that meet excavation criteria be made available to proximate first responders to provide a heightened awareness of the increased potential for an incident.
 - b. Any ILI detected that is not investigated and remediated within prescribed timelines as set out by the NEB should result in immediate shutdown of the line until such time as inspection and repair have been completed.
 - c. Any issues that are identified that may become ‘overdue’ prior to the next reporting period should be followed up on by the NEB with interim reporting required to proactively ensure timelines are respected.

Recommendations regarding Emergency Response Implementation

108. The MCK recommends that the following measures and standards be required of Enbridge prior to any approval of its Application and Project:
- Additional valves be incorporated into the system and that all valves be converted to automatic operation;
 - Valves be included on both sides of all significant water crossings (annual average flow greater than 1 m³/s) as well as in areas adjacent to significant wetlands, and in proximity to significant groundwater recharge areas. Backup valves should also be placed in proximity to major watercourses outside of mapped floodplain extents to ensure access is possible in case of valve malfunction;
 - That the NEB require that Line 9B be proactively stopped during significant flooding events to minimize potential impacts resulting from an incident;
 - That the NEB require that field inspections of the pipeline should occur after each significant rainfall event within all defined floodplain areas and slope hazards.

Recommendation regarding Emergency Response Assumptions and Planning

109. The MCK recommends that the following measures and standards be required of Enbridge prior to any approval of its Application and Project:
- That worst case scenario modeling occur using the 20,000 bbls value that was actually released in the Line 6B incident.
 - That a worst-case scenario analysis be completed for all High Consequence Areas.

Recommendation regarding Reactive Spills Management and Communications

110. The MCK recommends that the following measures and standards be required of Enbridge prior to any approval of its Application and Project:
- That Enbridge be required to hold regular meetings with interested stakeholders along the length of the pipeline that can contribute to the database of information available to Enbridge to improve its understanding of local conditions so that reactive response to incidents can be as informed as possible.
 - That a debriefing occur between operations personnel at the end of every shift change so that employees are aware of any issues that have occurred. These debriefing sessions should be documented for auditing.

Recommendation regarding Mitigation of Potential Impacts on Aboriginal Rights

111. The MCK recommends that the following measures and standards be required of Enbridge prior to any approval of its Application and Project:
- That the NEB require that Enbridge provide the NEB with a report outlining:
 - a. Which First Nations are included in Enbridge's emergency response plan (i.e. which First Nations are considered "proximate" and "potentially impacted" along with the criteria used for this determination);
 - b. An inventory identifying the rights and interests (and the locations of these) that "included" First Nations have provided to Enbridge that will be considered in the event of an emergency situation occurring on those lands;
 - c. Detail as to how Enbridge plans to take these rights and interests into account in the event of an emergency situation and how Enbridge will ensure that these rights and interests are not effectively extinguished through an occurrence or significant event. These should be developed in conjunction with First Nations and contain information on concrete measures that will be taken in the event of an emergency incident impacting First Nation interests.
 - Enbridge be required to address community specific concerns in this Report. For example, in the case of Kahnawà:ke, the MCK will request that Enbridge produce details as to its emergency response plan in the event that an oil release impacts Kahnawà:ke's 24-hour drinking water reserve;
 - That the NEB require that this Report, along with a revised version of Enbridge's emergency response plan that implements this Report be submitted prior to Enbridge's Project being approved.
 - That the NEB ensure that Enbridge has the sufficient financial capacity to compensate interest holders, including First Nations interest holders, in the event of a significant spill.

Other conditions

112. The MCK also recommends that the NEB determine any other conditions that it may deem necessary to ensure the safe operation of the pipeline prior to any Project approval being granted.

Conclusion

113. The MCK opposes Enbridge's Application for an order, pursuant to section 58 of the NEB Act, exempting the project from the provisions of paragraph 30(1)b) and 47 of the NEB Act and recommends that the NEB deny this Application.
114. Furthermore, the MCK has raised numerous specific, concrete and realizable recommendations on how the NEB can ensure that Enbridge mitigates the potential impact that the Project may have on the rights and interests of the Mohawks of Kahnawà:ke. The MCK submits that these recommendations should be implemented prior to any potential approval being granted.
115. The MCK's final position on the Application and the acceptability of the Project as a whole will be submitted to the NEB at the time of MCK's written or oral final argument.

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1209. **LA PRÉSIDENTE:** Messieurs, votre plaidoirie était très claire.
Donc, on n'a plus de questions. Nous vous remercions de votre participation.

1210. **M. SIMARD:** Merci.

1211. **M. GAUDREAU:** Merci.

1212. **LA PRÉSIDENTE:** Il est encore tôt. Je crois que nous avons le
temps d'entendre le Conseil de Mohawk, s'ils sont ici et disponibles.

--- (A short pause/Courte pause)

1213. **LA PRÉSIDENTE:** Bonjour. Même si c'est proche de l'heure du
lunch, soyez assuré que vous aurez toute notre attention.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MOHAWK
COUNCIL OF KAHNAWÀ:KE:**

1214. **Me WALSH:** Merci, beaucoup. Je m'appelle Francis Walsh, je suis
un avocat avec le Conseil Mohawk de Kahnawà:ke. Nous allons présenter les
trois aujourd'hui.

1215. À ma droite ici il y a le Chef Clinton Phillips et monsieur Patrick
Ragaz -- ah, j'ai oublié que je devais parler en anglais plutôt -- and Mr. Patrick
Ragaz, which is our environmental advisor.

1216. Yes, for respect for our client, I'm going to speak in English, because
that's the language that they understand.

1217. So Chief Phillips is going to start. We have provided a copy of our
presentation to the steno, and also to the people in the back doing the translation.
So the exhibit numbers will all be referenced on the document itself. I don't think
it's going to be that helpful to put them up on the board, but if ever the need arises
we can always do that.

1218. So Chief Phillips is going to start ---

1219. **THE CHAIRPERSON:** I would suggest that the Regulatory Officer
put up the reference. You know, they're very good ---

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1220. **MR. WALSH:** Okay.

1221. **THE CHAIRPERSON:** --- at it's often helpful for the Panel.

1222. **MR. WALSH:** Okay, yeah, no problem.

1223. So Chief Phillips is going to start, and he's going to talk in general, as to why the MCK chose to intervene, and the rights and interests that are involved, and he'll do a very brief summary of that. Mr. Ragaz, then, will speak about the more technical issues and the outstanding concerns that we have, and then I'm going to deal with the more legal aspects pertaining to consultation.

1224. Thank you.

1225. **CHIEF PHILLIPS:** Good morning. My name is Clinton Phillips; I am a duly-elected Chief for the intervenor, Mohawk Council of Kahnawà:ke, which is the elected government in and for the Mohawk Territory of Kahnawà:ke.

1226. I will now provide a brief introduction outlining the Mohawk Council of Kahnawà:ke's participation and reasons for intervening in this application.

1227. The MCK has applied for and was granted intervenor status by the NEB and filed written evidence regarding Issues 4, 6, 7 and 9 of the NEB's List of Issues on August 6th, 2013. The MCK has also had two information request exchanges with Enbridge. [*Exhibit C4-4-2 (MCK Written Evidence), Exhibit C4-2-1 (Information Request Number 1), Exhibit B18-13 (Response to IR Number 1), Exhibit C4-3-1 (Information Request Number 2), Exhibit B35-31 (Response to IR Number 2)*]

1228. The Mohawks of Kahnawà:ke have Aboriginal title and exercise Aboriginal rights on the lands crossed by and in proximity to the Enbridge pipeline, including from the Six Nations Mohawk Territory in Oswego, Ontario to Kahnawà:ke, the pipeline is within approximately 3 and 40 kilometres of all Mohawk reserves, stretching from Six Nations to Tyendinaga to Akwesasne, to Kanesatake, to Kahnawà:ke.

1229. We exercise Aboriginal rights, including hunting, fishing, harvesting rights throughout our ancestral lands and bodies of water that are in close proximity to the Enbridge pipeline. These rights are described more fully in paragraphs 9 to 16 of the Mohawk Council of Kahnawà:ke's written evidence and

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the documents attached to and cited therein. *[Exhibit C4-4-2]*

1230. To summarize, fishing rights include but are not limited to fishing and netting of wildlife, perch, muskie, sturgeon for personal subsistence and spiritual and ceremonial purposes in the waters of Kahnawà:ke, the St. Lawrence River, Lake of Two Mountains, the Ottawa River, the Trent River, the Bay of Quinte, Tyendinaga, and Lake St. Francis. Of particular importance to the Mohawks of Kahnawà:ke is the fishing and spawning sites of the wildlife in the Bay of Quinte area, which is in very close proximity to the Enbridge Pipeline 9 right-of-way.
1231. Hunting rights include, but are not limited to, the hunting of deer for personal subsistence and spiritual and ceremonial purposes on the lands on and in proximity to Six Nations, Tyendinaga, Akwesasne, Kanesatake, and Kahnawà:ke. Gathering rights are also exercised on the lands on and in proximity to Six Nations, Tiowero:ton, Tyendinaga, Akwesasne, Kanesatake and Kahnawà:ke and Enbridge Line 9.
1232. We also rely on these bodies of water in proximity to a pipeline as our source of drinking water. Furthermore, we are also directly concerned with the conservation of numerous vulnerable species of plants and animals such as the American eel on our territory and title lands. Our concerns extend to species at risk and the existence of important nesting and spawning sites in proximity to the pipeline.
1233. The Mohawks of Kahnawà:ke, therefore, have a direct interest in ensuring that the integrity of the Aboriginal lands and the waters flowing through these lands and the exercise of its Aboriginal rights are not compromised by any approval this project may receive.
1234. I will now summarize the MCK's position on this application. The basis of this position will be elaborated upon throughout our oral evidence.
1235. The MCK is opposed to Enbridge application being granted in its current form and based on the draft potential conditions we have reviewed. In the alternative, should the Board grant the reversal, the Mohawk Council of Kahnawà:ke is opposed to the revision of Line 9 rules and regulation tariff to allow the transportation of heavy crude.
1236. In the further alternative, should the Board grant the reversals, the Mohawk Council of Kahnawà:ke is opposed to the Board granting the increase in

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the annual capacity of its entire Line 9 from 240 to 300,000 barrels per day.

1237. In the further alternative, should the Board grant the reversal, the Mohawk Council of Kahnawà:ke is opposed to Enbridge being granted an exemption from the NEB's Act leave to open requirements. In the further alternative, should the Board grant the relief sought in whole or in part, the Mohawk of -- Council of Kahnawà:ke submits that the terms and conditions outlined by the Mohawk Council of Kahnawà:ke, in its written evidence and in our oral final agreement, be imposed by the Board.
1238. The Mohawk Council of Kahnawà:ke's position is based on the fact that the Applicant has failed to persuade the Mohawk Council of Kahnawà:ke that its project is in the public interest, notably, due to the numerous outstanding safety and security concerns.
1239. Furthermore, the draft potential suggests -- conditions suggest that the Board do not meet the vast majority of the recommendations made by the Mohawk Council of Kahnawà:ke in its written evidence of August 6, 2013.
1240. In particular, we note that many crucial items pertaining to the safety and integrity of the pipeline and emergency preparedness would only be partially addressed after Enbridge has received leave to open, whereas the Mohawk Council of Kahnawà:ke believes that these items should be fully dealt with prior to leave of open being granted. We also note that the draft potential conditions do not contain any firm obligations with regard to ongoing consultation and engagement of First Nations.
1241. My environmental advisor, Patrick Ragaz, will now elaborate on the Mohawk Council of Kahnawà:ke's position pertaining to some of the outstanding issues that the Mohawk Council has with the application, including the shortcomings we have identified with the draft potential conditions.
1242. **MR. RAGAZ:** Thank you, Chief Phillips.
1243. Madam Chair, hello Board Members.
1244. My name is Patrick Ragaz, and I am employed as the Environmental Advisor for the Mohawk Council of Kahnawà:ke. I am licensed by the Professional Engineers of Ontario as an engineer with my specialization being water resources.

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1245. I will be speaking to Issues 4 and 6 as set out by the NEB, namely, the potential environmental and socio-economic effects of the proposed project and the safety, security, and contingency planning associated with the construction and operation of the proposed project respectively.
1246. As stated by Chief Phillips, the MCK opposes the proposal by Enbridge in its current form. Our primary concerns involve pipeline security and spill response.
1247. In our written evidence, *[Exhibit C4-4-2]* we put forth numerous conditions for consideration, which will improve the safety and emergency response of the project, along with supporting rationale. We have also reviewed the draft conditions proposed by the NEB for the project.
1248. In light of the oral argument presented by Enbridge yesterday, MCK is compelled to respond to the issue of the scope of the project. I will take a few minutes to do so now, prior to presenting the remaining -- remainder of our oral argument.
1249. Enbridge noted in particular when arguing the extent that it must consult First Nations and possible environmental impacts that the scope of the proposal is limited to works on Enbridge terminals and are contained within properties in Enbridge's control. Enbridge reasoned that there will be no long-term environmental impact from the proposal in the sense that the construction activities taking place around the terminals are limited and will be mitigated.
1250. They referred to the revised risk assessment, Exhibit B21-2, to demonstrate that an increase of risk exists on only 2.2 percent of the Mainline. MCK notes that the calculation of risk pertains solely to the probability of pipe failure. MCK further notes that the risk assessment analysis does not provide a quantifiable value as to the level of increased risk, rather it simply provides a qualitative increase or decrease in risk.
1251. More importantly, the evidence shows that the risk assessment does not consider the increased release of oil that would occur if a spill were to occur or the potential impact of the type of material that would be spilled.
1252. Given the increased volume of product being pumped, Enbridge has acknowledged that in the event of a spill more oil would initially be released

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because of the higher flow rate. In, for example, the response to Toronto Information Request 1.10, sections (a) and (b), this increased rate of release would continue until such time as pumping was stopped. From this perspective the increased capacity of the pipeline thereby creates an increased risk of consequence should a spill occur over 100 percent of the pipeline.

1253. Finally, given that the pipeline has been operated at reduced operating pressures over the last number of years, the real risk of pipeline failure will increase over more of the pipe compared with the revised risk assessment which considers only the theoretical maximum operating pressure. Support for this concept is provided in the pipeline risk assessment, Exhibit B1-15, page 80, which notes that increasing the pressure will reduce the time to failure for various features.
1254. Enbridge has tried to present the scope of the project as limited. However, as referenced by Enbridge, for example in Exhibit A19-1, the scope involves modifications to allow the reversal of crude oil as well as the capacity increase and change to the rules and regulations tariff to allow for the transportation of heavy crude for the entire Line 9. It is these last two components that provide the rationale to impose conditions on Enbridge related to the entirety of Line 9B.
1255. Given the above, MCK believes that both the construction and operation of the pipeline are necessary considerations for this hearing, particularly given the fact that the pipeline has been operating at reduced capacity and therefore pressures over the past few years.
1256. Notwithstanding our overall objection to the application, I would now like to take some time to propose improvements to the NEB conditions while reiterating some conditions we have previously proposed. I will be speaking to potential conditions put forth by the Board, 9, 10, 11, 15, 17, 22, 24 and 25. That's provided in Appendix 2 of Procedure Update 4. *[Exhibit A47-7]*
1257. First a general comment with respect to all of the conditions. The NEB is proposing that Enbridge undertake numerous studies with reports to be filed to the NEB. It is unclear as to what role the NEB will have in developing Terms of Reference for and evaluating these reports. MCK proposes that the NEB be more involved in setting the parameters for the various works and ultimately evaluating them against a predefined set of criteria.

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1258. For instance, potential Condition 12 requires filing of a leak detection system manual for the project. The leak detection system shall include, among other things, the estimated maximum amount of product released before detection.

1259. **THE CHAIRPERSON:** Can you just speak a bit slower.

1260. **MR. RAGAZ:** Slower. Sure. Sorry.

1261. **THE CHAIRPERSON:** Yes, it's interesting and we want to have time to take notes, and its technical content, so thank you.

1262. **MR. RAGAZ:** Fair enough. Shall I start at the beginning of that paragraph?

1263. **THE CHAIRPERSON:** Why not.

1264. **MR. RAGAZ:** Okay.

1265. So first a general comment with respect to all of the conditions. The NEB is proposing that Enbridge undertake numerous studies with reports to be filed to the NEB. It is unclear as to what role the NEB will have in developing Terms of Reference for and evaluating these reports. MCK proposes that the NEB be more involved in setting the parameters for the various works and ultimately evaluating them against a predefined set of criteria.

1266. For instance, potential Condition 12 requires filing of a leak detection system manual for the project. The leak detection system shall include, among other things, the estimated maximum amount of product released before detection. MCK proposes that rather than simply reporting the maximum estimated product release the NEB should determine a standard for the maximum volume of product that can leak prior to detection. This will provide tangible parameters under which the pipeline can operate. The NEB should also take responsibility for working with Enbridge to determine how to reasonably calculate this amount. This philosophy should be incorporated throughout all of the conditions.

1267. I will now move on to the specific potential conditions. So potential Condition 9 requires that an updated pipeline engineering assessment be carried out, using similar methodology to that filed during the hearing process. As noted by MCK in our written evidence on pages 5 and 6, paragraph 25, [*Exhibit C4-4-2, page 5-6, para. 25*] we have numerous concerns with the methodology used and

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the provided results of the engineering pipeline engineering assessment. Simply replicating the same flawed process exposes the pipeline to risk of failure.

1268. MCK recommends that the NEB mandate Enbridge to carry out an enhanced pipeline engineering assessment incorporating recommendations made by MCK and that a Terms of Reference and final reports be reviewed and enhanced, where necessary, by the NEB prior to project implementation.
1269. In addition, MCK hereby adopts the recommendations of AccuFacts in the report on pipeline safety for Enbridge's Line 9B application to NEB. And that's Exhibit C13-6-3, page 33 and 34.
1270. Potential Condition 10 states in part that Enbridge shall repair all features identified in the updated pipeline engineering assessment that meets CSA Z662-11 criteria, as well as all features triggering the current self-imposed pressure restrictions and file a report.
1271. MCK agrees with this condition, however, we have also recommended that all repairs be carried out using thicker half inch pipe, as is used, for example, in river crossings currently. It is possible that the areas that are receiving repairs are wearing down more quickly than other areas because of environmental factors and therefore installing thicker pipe in these locations is warranted. MCK recommends that this requirement be included in potential Condition 10.
1272. Potential Condition 11 requires Enbridge to file a hydrostatic pressure testing program prior to conducting a hydrostatic test. MCK requests that the condition instead stipulate that Enbridge complete a hydrostatic pressure test prior to applying for leave to open.
1273. Enbridge has noted that a hydrostatic test can cause detrimental impacts to the pipeline and is not the primary tool used by operators to ensure pipeline integrity, for example, in their response to Ontario Information Request 1, page 22. *[Enbridge Response to Ontario IR 1, Exhibit B20 - p. 22]*
1274. Enbridge also noted in the same exhibit that the last test was performed as required by CSA Z662 because the pipeline had sat idle for more than one year. A similar situation exists now, with the pipeline running at less than maximum operating pressure for the last several years. I refer to Exhibit B1, page 26, lines 7 to 9.

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1275. Therefore, MCK suggests that a hydrostatic test is once again necessary prior to applying for leave to open to re-establish the maximum operating pressure and to further assess pipeline integrity.
1276. Potential Condition 15 requires Enbridge to file results of its intelligent valve placement program 30 days prior to applying for leave to open. MCK has provided recommendations in our written evidence on page 23, paragraph 108, *[Exhibit C4-4-2, p. 23, para. 108]* concerning valve placement.
1277. Given stated response times of 1.5 to 4 hours *[Response to MCK IR 1 - Exhibit B18-13, p. 10]* mentioned by Enbridge, for example, in response to MCK Information Request 1, page 10, and actual response times that can be delayed due to hazardous conditions, *[Exhibit C4-4-2, p. 8, para 32]* I refer you to page 8, paragraph 32 of our written evidence, it is evident that all valves should have automatic operation.
1278. The NEB should include a condition that the remaining manual valves be upgraded prior to leave to open as these valves cannot be relied on during an incident. Valves on either side of major watercourse crossings, as determined by potential Condition 22, should also be required, in addition to the valve locations recommended in the intelligent valve placement program.
1279. Potential Condition 17 requires an update on progress with respect to the watercourse crossing management plan prior to leave to open. As I will explain, MCK believes that the full watercourse crossing management plan be completed and implemented prior to granting leave to open. The fact that this document will require some time and effort to complete is not an adequate rationale to compromise safety while this important document is underway.
1280. Potential Condition 22 outlines a watercourse crossing management plan to be undertaken by Enbridge within 18 months of receiving leave to open. MCK agrees with the necessity of this condition and is pleased that it is included, however, we have numerous proposals in terms of the details to be provided in this plan.
1281. Bullet A requests the criteria used to identify major watercourse crossings. MCK believes it would be beneficial to define these criteria prior to undertaking the work, and given the complexity of this task, that an independent body be assigned to establish appropriate criteria.

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1282. Consideration should be given to proximity to downstream larger water bodies, proximity to critical infrastructure, proximity to environmentally significant areas, average flow rates, peak seasonal flow rates, the extent of urbanization in relation to the rate of change of flow, commonly referred to as how flashy the watercourse is, the degree of channelization of the watercourse, the location of recharge areas, bed materials and other parameters deemed relevant.
1283. Local water managers should also be surveyed to assist with this task as they will have the most knowledge concerning watercourses in their area.
1284. Bullet B requires a list of watercourse crossings not meeting these criteria. MCK requests that a list of wetland crossings also be included.
1285. Bullet E, flood frequency analysis are required for 50-year and 100-year flood volumes. MCK requests that, and in addition to flood volume calculations flood plain extents be determined.
1286. This is an important input for emergency response and valve placement to ensure that these activities can take place in the event of a flood occurring. In addition, where applicable, and greater than the 100-year flood, the regulatory storm, for example Hurricane Hazel in much of Southern Ontario, should be used to establish the flood volumes and extents in addition to the 50-year and 100-year storms.
1287. Storm volume and frequency must also be regularly evaluated to account for improvements and calculation methodology and the increased frequency and severity of storm events as a result of climate change.
1288. Bullet G calls for a hierarchy of degraded crossing conditions with remedial actions and timelines. As noted in MCK's written evidence [*Exhibit C4-4-2, p.6-7. para. 25.g*] on page 67, paragraph 25g, a crossing of the Rouge River remained exposed for at least three years prior to being remediated. These timeline are unacceptable and MCK requests that the NEB mandate maximum timelines for repair activities.
1289. MCK proposes that the watercourse crossing management plan be completed 60 days prior to requesting leave to open due to the importance of the information contained within and the expectation that a newly constructed pipeline would similarly be expected to ensure that all watercourse crossings are

not degraded.

1290. MCK also suggests that the period immediately after reversal is one of the most vulnerable, as the pipeline will be exposed to increased pressures which may expose pipeline weaknesses not detected during other inspection activities.

1291. In their written final argument, the Toronto and Region Conservation Authority has identified three proposed conditions concerning geohazard risk assessment, baseline environmental condition reporting and detailed spill response plans for the Toronto region, and that's in Exhibit C39-7-2, the TRCA written final argument, pages 13 to 17.

1292. MCK recommends that the approach outlined by TRCA be applied to all major watercourses and their associated watersheds as defined by potential Condition 22.

1293. Therefore, MCK hereby adopts the proposed conditions listed in the TRCA written argument with the intent that they be applied more generally along the entirety of the pipeline.

1294. Potential Condition 24 requires Enbridge to provide a proposed long-term integrity improvement plan to mitigate and monitor remaining inline inspection reported corrosion, geometry and cracking features within 18 months of Board approval for leave to open. MCK believes that the integrity improvement plan should be required within 12 months of approval of leave to open with an update on progress provided on an annual basis thereafter.

1295. Potential Condition 25 requires an updated deterministic remaining life evaluation for each segment of Line 9 within 18 months of leave to open. The evaluation is to include information on the actual operating pressure cycling dataset.

1296. Given that Enbridge has stated that pressure cycling causes the most damage to the pipeline, for example in Exhibit B1-15, page 91, MCK believes that pressure cycling should be monitored more closely by the NEB, for example, monthly for the first six months and then every six months thereafter, and that cycling frequency should not be allowed to exceed that which has occurred over the last three years as anticipated by Enbridge.

1297. In addition to the potential conditions provided by the NEB in

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Procedural Update 4, MCK provided numerous other recommended conditions which have not been incorporated. The rationale for these conditions is outlined in MCK's written evidence, [*Exhibit C4-4-2, p. 4-14, para. 16-63*] paragraph 16 to 63, which I won't repeat here. My colleague will summarize the outstanding conditions that we have as well as our recommended modifications to the potential conditions at the end of our argument.

1298. So I will now turn it over to our legal counsel, Francis Walsh, who will speak to Issues 7 and 9 concerning consultation with the Mohawks of Kahnawà:ke.

1299. **MR. WALSH:** Thank you, Patrick. And thank you for having us.

1300. My name is Francis Walsh; I'm a lawyer with the MCK Legal Services Department. I've been legal counsel there for almost 10 years so I have considerable experience in Aboriginal law, and I also have a Master's Degree dealing with an Aboriginal law issue, and I sit on the Quebec Bar Committee for Aboriginal Peoples and the Law. Obviously I'm not representing the committee here but I'm just providing a general sense of what my experience is.

1301. I will be providing MCK's position on consultation issues regarding the process filed thus far and the draft potential conditions that have been proposed by the Board regarding ongoing engagement and consultation of First Nations by Enbridge. These issues will also be linked to the issue of the integration of the interests of the Mohawks of Kahnawà:ke in Enbridge's emergency response planning.

1302. The MCK established in its written evidence how the project, and in particular the outstanding safety and security concerns pertaining to the project, and the corresponding potential adverse impacts on its Aboriginal title and rights triggered the Crown's duty to consult. [*Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at para. 35, *Exhibit C4-4-2*] This of course the trigger has been established by the Haida decision, paragraph 35.

1303. The MCK submits that its written evidence establishes a strong prima facia case for the existence of Aboriginal rights of significant economic, social and cultural importance to the Mohawks of Kahnawà:ke that are exercised in the present day within close proximity to Enbridge Line 9B. These rights were also summarized earlier by Chief Phillips and of course in our written evidence. [*Exhibit C44-2 paras. 4-16*]

1304. Furthermore, the MCK submits that the magnitude of the project and the safety and security concerns raised in its written evidence establish a strong potential adverse impact stemming from the proposed project. This is contrary to the views shared by Enbridge yesterday, to the effect that it had not received any evidence that the works that will be undertaken within the Enbridge right-of-way or in proximity to the Enbridge right-of-way are subject to the exercise of Aboriginal rights and that as such the potential impact on First Nations was low.
1305. The conclusions of the ESEIA were also cited in support of this position. It is worth noting that the ESEIA is limited in scope and does not address the issues of a potential significant incident occurring during the operational phase of the project. *[Section 1.1 of ESEIA Exhibit B-1-19]*
1306. As a result, Enbridge concluded that their duty to consult First Nations was at the low end of the spectrum and that the engagement activities that they have reported to the Board have already exceeded their legal obligations. The MCK respectfully submits that Enbridge's narrow view of what constitutes the project as it pertains to First Nations and as to what constitutes potential impacts must be rejected by the Board.
1307. I will not repeat the points raised by Mr. Ragaz, but it suffices to reaffirm MCK's position that this application does not solely pertain to the works that will be undertaken within the right-of-way. This application also pertains to the operation of a pipeline of which the Proponent asks to have the increased capacity to 300,000 barrels per day and to change the type of product that can flow through the pipeline. This is the project that we're talking about here.
1308. It is also curious that when Enbridge discusses the advantages of the project, they are free to talk about the 300,000 barrels of product that will be moved on a daily basis and the wealth that this will create but when they are talking about the discussion of a scope of the duty to consult First Nations while limited to talking about the immediate impacts that stem from the construction phase within the project area only.
1309. This is a project that Enbridge argues will create significant wealth for oil producers, oil refiners, and benefit for the Canadian economy in general. Enbridge argues that it can carry out this project safely and with little risk to Canadians and that this is why it's in the public interest.

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1310. However, even if Enbridge evaluates the risk associated with this project as low, it cannot claim that it is completely risk free. Other intervenors have filed evidence to the contrary and argue that the risks are high.
1311. The fact that there are risks associated with Enbridge's proposed operations and whether Enbridge's wishes -- Enbridge wishes to acknowledge it or not, they are asking First Nations to take on part of this risk. Furthermore, when evaluating the potential adverse impacts it is submitted that we must not look only at the likelihood of an adverse impact but also the potential magnitude of an adverse impact.
1312. Enbridge considered these two aspects yesterday, arguing the potential negative impacts were both remote and minor. Given the outstanding safety concerns that we have established today and the history of pipeline incidents to varying degrees of severity, the MCK does not qualify the risks of an incident as remote. Given the real life Marshall incident that occurred a mere three years ago, we can hardly qualify this risk as minor.
1313. The quantity and quality of product that Enbridge proposes to transport, the potential inverse impacts that this may have on the *sui generis* rights and interests of First Nations, could be significant and far reaching and not compensable with the awarding of damages. [Exhibit C4-4-2 paras. 17-72]
1314. The MCQ's -- the MCK's view on the issue of potential adverse impact is also in line with the Federal Court of Canada's recent clarifications regarding the question of what constitutes a potential adverse impact, and for that we've submitted the *Hupacasath First Nation v. Canada Case 2013 FC 900* at paragraph 57, in particular, which I shall now read:

"...adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. This includes high-level management decisions or structural changes to the management of a resource that may adversely affect Aboriginal claims or rights, even if such decisions have no immediate impact on the resource or the land [on] which it is situated [...] and even if later opportunities for consultations exist in respect of specific actions that may be taken pursuant to such high level decisions or structural changes..." [Hupacasath First Nation v. Canada (Foreign Affairs) 2013 FC 900 at para. 57]

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1315. It is submitted that the authorization sought by Enbridge for its project, especially in its current form, constitutes a serious potential adverse impact on the rights of the Mohawks of Kahnawà:ke in spite of the fact that the adverse impact may not materialize immediately upon Enbridge's application being granted and may only materialize at some point during the operational phase, and even though the MCK may have opportunities to continue discussions with Enbridge in the future.

1316. Considering the strong prima facie case established by the Mohawks of Kahnawà:ke, the importance of the rights involved, and the serious potential adverse impact of this project, the MCK submits that it has met the threshold of establishing the duty to consult at the higher end of the spectrum and not at the low end as was suggested by Enbridge yesterday.

1317. Further to this, and as part of our written evidence on Issue 7, the MCK also outlined how the Crown relied on the NEB process to discharge its duty to consult the Mohawks of Kahnawà:ke on this project. We also identified how Enbridge has thus far failed to adequately identify and address the interests of the Mohawks of Kahnawà:ke along with a failure to adopt measures to mitigate potential impacts of the project on the rights and interests of the Mohawks of Kahnawà:ke. *[See paragraphs 73 to 104 of Exhibit C4-4-2]*

1318. Enbridge made statements yesterday to the effect that it had addressed the concerns of First Nations intervenors, notably by providing information, having open houses, and answering information requests.

1319. The MCK respectfully submits that Enbridge and the MCK have a different conception of what addressing a concern means. As is evident from the concerns canvassed by Mr. Ragaz, the MCK maintains the position that Enbridge has not adequately addressed the concerns of the Mohawks of Kahnawà:ke.

1320. In its written evidence, the MCK also formulated recommendations on how its concerns pertaining to these issues could be addressed. More specifically, the MCK identified conditions that the NEB could adopt for the integration of its concerns pertaining to the safeguard of its interests in the event of a significant incident, including by ensuring that Enbridge included consideration for Aboriginal rights and interests in its emergency response planning. See paragraph 111 of our written evidence. *[See paragraph 111 of Exhibit C44-2]*

1321. The NEB's draft potential conditions failed to meet the standards set

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out by the MCK recommendations regarding these issues. On the issue of Aboriginal engagement specifically, the NEB's draft potential condition is as follows:

"Enbridge shall file with the Board every six months for the first three years of operation, an Ongoing Engagement Report for the continued operation of Line 9. The Ongoing Engagement Report will include, at minimum [...] (h), details regarding discussions with Aboriginal groups..." [See paragraph 21h) of Exhibit A47-7]

1322. From what I gather, this is the only mention of First Nations in the draft potential conditions.

1323. On the issue of emergency response planning, the NEB's draft condition provides for at the end of draft potential Condition 23 that:

"...Enbridge shall also maintain liaison with the relevant municipalities that may be involved in an emergency response on the pipeline and shall consult with them in developing and updating the emergency procedures manual." [See paragraph 23 of Exhibit A47-7]

1324. While there are details contained in the draft potential Condition 21(h) on ongoing engagement with Aboriginal groups pertaining to the frequency of reporting requirements, there's absolutely no direction being provided by the Board as to the content of this obligation.

1325. While we understand that different First Nations may have different concerns pertaining to the project which may make it difficult for the Board to establish an exhaustive list of what discussions need to include, we nevertheless believe that the Board should specify certain basic requirements associated with engagement of First Nations.

1326. In fulfilling its mandate of oversight, the Board is responsible to ensure that ongoing engagement to First Nations goes beyond mere lip service discussions over a specified finite period of time. In fact, draft potential Condition 21(h) is the type of weak and vague engagement that the MCK specifically identified as being insufficient to the Board in its written evidence in paragraphs 103 and 104. *[See paragraphs 103 and 104 of Exhibit C4-4-2]*

1327. More specifically, this draft potential condition does not contain any detail as to what aspects Enbridge must address in discussions with First Nations, nor which First Nations need to be discussed with or on what basis or for what purpose. There's also an arbitrarily suggested three-year expiration date following which Enbridge would no longer have any reporting requirements to the Board, regardless of whether First Nation concerns have been adequately considered and dealt with within that time period.
1328. With respect to draft potential Condition 23, the MCK notes that Enbridge is only required to maintain liaison with municipalities when it comes to the development and updating of emergency response procedure manuals.
1329. While the MCK understands that the primary purpose of this draft condition probably pertains to operating procedures in the case of an emergency, it is submitted that First Nations should also be involved in the development of emergency response procedures when First Nation rights and interests can be identified in close proximity to the pipeline. In such cases, the protection of these interests must be integrated into any emergency response plan.
1330. The exclusion of First Nations from the obligation of being consulted by Enbridge in the development of emergency response planning runs contrary to the evidence that is before the Board, which outlines that First Nations, including the Mohawks of Kahnawà:ke, have identifiable interests in close proximity to the pipeline that should be considered an emergency response planning.
1331. We remind the Board that it must exercise its decision-making function in accordance with the dictates of subsection 35.1 of the Constitution. The Board must consider the potential impact that this project will have on Aboriginal rights and title of First Nations, including Kahnawà:ke, and must consider whether Enbridge is adequately addressed these concerns. This statement is supported by *Quebec v. National Energy Board Supreme Court Canada Decision* from '94, which has been filed as well.
1332. In this instance, the MCK argues that MCK has not -- that Enbridge has not addressed the concerns raised in its written evidence and that the Board's obligation is to establish more stringent accommodative requirements on the Proponent.
1333. The MCK submits that draft potential Condition 21h does not

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adequately consider the concerns raised by the MCK and falls short of the level of accommodation that the MCK is legally entitled to. More specifically, the MCK believes that the Board must ensure that Enbridge has demonstrated that the protection of Aboriginal rights and interests are included in its emergency response plan prior to leave of open being granted.

1334. Providing leave to open without this information exposes First Nations, including the Mohawks of Kahnawà:ke to greater risk of irreparable harm. The MCK therefore submits the draft potential Condition 21h should be significantly revised, and I will read our suggested revision at the end when I make my recommendations.
1335. The MCK expects -- to summarize our position on the consultation issues and the Board's responsibilities regarding consultation, our summary is as follows.
1336. The Crown's duty to consult is at the higher end of the spectrum in this case. The Crown has failed to consult the Mohawks of Kahnawà:ke in any way regarding the project and has elected to rely on the National Energy Board process instead.
1337. Enbridge, while it has engaged with the Mohawks of Kahnawà:ke in information sharing and information request exchanges, has not addressed the legitimate concerns of the Mohawks pertaining to the security and safety of the proposed project both with respect to the safety and security of the project in general and with respect to potential impacts on the exercise of Aboriginal rights and interests and the integrity of its Aboriginal title lands.
1338. The National Energy Board must exercise its decision making function in accordance with the dictates of subsection 35(1) of the Constitution and must ensure that the concern raised by First Nations have been adequately addressed by Enbridge.
1339. The Mohawks of Kahnawà:ke submit that the outstanding issues raised before me by Mr. Ragaz and the concerns I have raised pertaining to consultation, and in particular pertaining to consultation and the development of emergency response planning must be adequately addressed prior to leave to open being granted.
1340. The Mohawks of Kahnawà:ke further submit that the draft potential

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conditions developed by the Board must be revised in order to ensure that our concerns are adequately addressed in accordance with the recommendations outlined in our written evidence and during this final argument.

1341. The MCK would -- well, I'm going to change subjects here a little bit. The MCK would also like to take the Board up on its invitation to comment on Board Ruling Number 17, being Jesse McCormick's motion to strike evidence pertaining to technical annex market diversification which was filed by Environment Canada as part of its written evidence and wishes to raise concerns that Mr. McCormick raised with respect to the technical annex when providing our final argument. *[Exhibit A48-1 at p. 3]*
1342. The MCK respectfully submits that the Board erroneously concluded that admitting the filing of such evidence does not cause prejudice to the other intervenors, by reasoning that other parties would still have the opportunity to make representations on the way that this evidence should be given. *[Exhibit A48-1 at p. 3]*
1343. A party refusing to identify the author of a document effectively prevents other parties that may have opposing interests from fully challenging the quality and reliability of the evidence. Having the ability to take a position on the weight that should be accorded to evidence does not provide a remedy for the inability to fully challenge the actual findings contained in the document itself and therefore we submit that prejudice to the intervenors remains.
1344. In this instance, the MCK argues that permitting Environment Canada to submit evidence without identifying the author of its evidence is prejudicial and is in violation of the duty to act fairly. We respectfully submit that the Board erred by expressing a preference for having a complete record over the requirement that Environment Canada disclose the author of the technical annex.
1345. In this particular instance, the MCK argues that the Board should have weighed the benefit of allowing Environment Canada to submit the evidence versus the nature of Mr. McCormick's request, the prejudice that the lack of disclosure causes the parties and the reasonableness of Environment Canada's refusal to identify the authors of the technical annex.
1346. The MCK submits that in absence of any explanation the refusal to provide the authorship of a document is highly unreasonable. In this instance, we are of the opinion that it would have been in the interest of fairness to exclude this

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evidence. By seeking a complete record at the expense of transparency and fairness, the Board is compromising the integrity of the process.

1347. We therefore respectfully submit that the Board should have excluded the evidence contained in the technical annex. That being said, and in the absence of any ruling to this effect, the Board should accord no weight to this evidence whatsoever. The MCK also hereby adopts paragraphs 18 to 28 of Jesse McCormick's final evidence on this issue. *[Exhibit C58-15 at paras. 18 to 28]*
1348. The MCK would also like to draw the Board's attention to another problematic aspect of Environment Canada's participation in these proceedings. In reading Environment Canada's response to Jesse McCormick Information Request Number 1, it became apparent that there was a certain ambiguity as to whether Environment Canada was providing evidence solely on its behalf or also on behalf of the Government of Canada. *[Exhibit C36-5-1]*
1349. This is highlighted of course by Environment Canada's inclusion of technical annex market diversification that it claimed to be filing on behalf of the Government of Canada to support the NEB's review of the project as background information.
1350. This is contrasted with other answers provided to Mr. McCormick's information request in which Environment Canada responds that it cannot answer certain information requests because these were deemed to be outside of their mandate and that fall within the responsibility of other departments within the government such as Fisheries and Oceans Canada. *[Exhibit C-36-5-1 at para. 1.2 b) and 1.6]*
1351. It is apparent that Environment Canada is effectively being permitted to limit its responses to certain information requests to what is within its mandate all the while being permitted to file evidence or answer other questions on behalf of the Government of Canada.
1352. The MCK submits that the Board should be concerned by this lack of consistency. Either Environment Canada is representing solely the matters under its mandate or it is representing the Government of Canada but it cannot have it both ways depending on the type of question that is being asked or the type of evidence that it feels like submitting on a given issue. Its refusal to provide clear answers pertaining to authorship of evidence is -- only adds to the opaque nature of Environment Canada's participation in this process.

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1353. I'm just going to touch on a couple of little points and we're almost done. Financial capacity and insurance; the MCK also reiterates a recommendation that it made in its written evidence that the NEB ensure that Enbridge has a sufficient financial capacity, including insurance coverage to compensate interest holders, including First Nation interest holders, in the event of a significant spill prior to leave to open being granted.
1354. Now, we heard from Enbridge yesterday that this was sort of unprecedented, and the fact that it was unprecedented seemed to be the rationale behind it not being a condition that should be imposed.
1355. But I think we all know, you know, with the Lac Mégantic situation that happened and the difficulty indemnization that happened after the tragedy, that this can be an issue, and I think the Board is right to be concerned with this issue.
1356. Archaeology; the MCK hereby adopts paragraphs 29 to 54 and the terms and conditions outlined in paragraph 9m to 9p of Jesse McCormick's final argument and supports the position that Enbridge be directed to consult archaeologists, conduct a stage one archaeological assessment where necessary and ensure participation and notification of First Nations. *[Jesse McCormick- Final Argument dated October 6, 2013]*
1357. On the issue of other conditions, the MCK also hereby adopts the terms and conditions outlined in paragraphs 9j to 9l of Jesse McCormick's final argument. The MCK supports the position that Enbridge be required to establish training and contracting opportunities for First Nations and to enter into agreements to address environmental stewardship. *[Jesse McCormick- Final Argument dated October 6, 2013]*
1358. I would now like to express the MCK's final position on this application and the recommendations in case of approval.
1359. The Mohawk Council of Kahnawà:ke is opposed to Enbridge's application being granted. In the alternative, should the Board grant the reversal, the MCK is opposed to the revision of the Line 9 rules and regulations tariff to allow for the transportation of heavy crude.
1360. In the further alternative, should the Board grant the reversal, the

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MCK is opposed to the Board granting an increase in the annual capacity of the entire line from 240 to 300,000 barrels per day. In the further alternative, should the Board grant the reversal, the MCK is opposed to Enbridge being granted an exemption from NEB's leave to open requirements.

1361. In the further alternative, should the Board grant the relief sought, in whole or in part, the MCK submits that the terms and conditions outlined in its written evidence and in our oral final argument of today be imposed by the Board, namely in relation to potential Condition 9, that the Board require enhanced pipeline engineering assessment be completed 60 days prior to leave to open which follows an improved Terms of Reference determined by Enbridge, the Board and a knowledgeable third party.
1362. In relation to potential Condition 10, that all pipeline replacements be completed using one half inch thick pipe; in relation to potential Condition 11, that a hydrostatic test be completed to establish a new maximum operating pressure and to remediate identified deficiencies prior to leave to open; in relation prior to leave to open.
1363. In relation to potential Condition 15, that all manual valves be upgraded to automatic valves and that valves be installed on either side of major watercourses, as defined in potential Condition 22, in addition to both valves identified as required through the intelligent valve placement program.
1364. In relation to potential Condition 21, that Enbridge shall file with the Board a First Nations engagement report prior to requesting leave to open, which shall include a listing of First Nations and other Aboriginal groups that are included in Enbridge's emergency response plan, an inventory identifying the rights and interests and location of these that included First Nations have provided to Enbridge and that will be considered in the event of an emergency situation occurring on those lands; details as to how Enbridge plans to take these rights and interests into account in the event of an emergency situation and how Enbridge will ensure that these rights and interests are not effectively extinguished through an occurrence of a significant event; an inventory identifying any other concerns raised by included First Nations regarding the project and how Enbridge plans to address these concerns.
1365. Enbridge must update this report as part of an ongoing engagement report every six months for the first three years of operation for the continued operation of Line 9. This report must also be updated every year thereafter for the

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duration of the pipeline's operations. The Board must also ensure that First Nations are provided with ongoing capacity funding and resources by the Proponent in order to pursue meaningful engagement throughout this ongoing engagement process.

1366. As you can see, the MCK is not with condition -- our suggestion for potential Condition 21, we're not saying that Enbridge and the MCK necessarily have to come to agreements on all these points. It's important to stress that what we're looking for is Board oversight to ensure that the concerns are adequately addressed.
1367. In relation to potential Condition 22, that the watercourse crossing management plan be completed prior to leave to open; that an independent task force be developed to determine the definition of a major watercourse taking into account flow characteristics, creek and bank materials, proximity to other relevant features, and local knowledge; that wetlands be included in the list of crossings; that larger regulatory storms be included in flood volume and flood plain calculations where available, and that flood plains be determined for all major crossings; that the flood volume frequency and extents be revised biannually or as data becomes available to take into account climate change; that the NEB determine maximum allowable timelines for pipeline deficiencies.
1368. In relation to potential Condition 24, that the integrity improvement plan be required within 12 months of approval of leave to open with an update on progress provided on an annual basis thereafter.
1369. In relation to potential Condition 25, that pressure cycling data be provided to the National Energy Board monthly for the first six months after leave to open and every six months thereafter and that cycling frequency not exceed that of the 2009-2012 period. More generally, that the NEB take a more proactive role in developing Terms of Reference and developing project-specific evaluation criteria.
1370. Other conditions proposed by the MCK include that the following conditions be implemented with respect to the Board's pipeline performance measuring report -- measures reporting requirements program:
1371. The results of features that meet excavation criteria be made available to proximate first responders to provide a heightened awareness of the increased potential for an incident.

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1372. Any ILI features detected that are not investigated or remediated within the prescribed timeframes as set out by the NEB should result in an immediate shutdown of the line until such time as an inspection and repair have been completed.
1373. Any issues that are identified that may become overdue prior to the next reporting period should be followed up on by the Board with interim reporting requirements to proactively ensure timelines are respective
1374. That the NEB require that Line 9 be proactively stopped during significant flooding events to minimize potential impacts resulting from an incident with a definition of significant flooding event to be determined by an independent panel.
1375. That the NEB be required that the field inspections of the pipelines occur after each significant rainfall event within all defined flood plain areas and slope hazards.
1376. That worst case scenario modelling occur with the definition of "worst case" being an actual release that has previously occurred, thereby taking into account human error and other intangibles that cannot be adequately modelled in a worst case estimation exercise.
1377. That a worst case scenario analysis be completed for all high consequence areas.
1378. That Enbridge be required to hold regular meetings with interested stakeholders along the length of the pipeline that can contribute to the database of information available to Enbridge to improve its understanding of local conditions so that reactive response to incidents can be as informed as possible.
1379. That the NEB ensure that Enbridge has not -- has the sufficient financial capacity, including insurance coverage, to compensate interest holders, including First Nation interest holders, in the event of a significant spill prior to leave to open being granted, and that this commitment be under the Board's scrutiny for the duration of the pipeline's operations.
1380. That Enbridge be directed to consult archaeologists to conduct a Stage 1 archaeological assessment where necessary and ensure participation,

notification of First Nations.

1381. Finally, that Enbridge be required to establish training and contracting opportunities for First Nations and enter into agreements and address environmental stewardship agreements.

1382. And that concludes our submission on this issue. Thank you.

1383. **THE CHAIRPERSON:** The Panel has no questions, but we wish to thank the Council for thorough evidence and thorough argumentation.

1384. And of course, Enbridge will have, as you, and many other parties to come, you know, with comments on the conditions. So the Board will be interested in hearing them in reply.

1385. So we thank you very much.

1386. **CHIEF PHILLIPS:** Thank you.

1387. **THE CHAIRPERSON:** Now, I think it's time for lunchtime for everybody.

1388. So upon our return, which is going to be at 2 o'clock, we'll hear from Manufacturiers et exportateurs du Québec. Ensuite ça va être la Municipalité régionale du comté de Vaudreuil-Soulanges, qui sera suivie de l'Union des producteurs agricoles. Ensuite ce sera la Ville de Rigaud, Municipalité de Sainte-Justine-de-Newton, ensuite Très-Saint-Rédempteur et Stratégies Énergétiques si on a amplement le temps.

1389. Alors on se revoie à deux heures. Merci.

--- Upon recessing at 12:57 p.m./L'audience est suspendue à 12h57

--- Upon resuming at 2:02 p.m./L'audience est reprise à 14h02

1390. **LA PRÉSIDENTE:** Alors, bon retour. Alors nous poursuivons avec les Manufacturiers et exportateurs du Québec.

1391. Oh, est-ce que -- un, deux, trois ? Est-ce que ça fonctionne ? O.K. on va -- ah, maintenant ça fonctionne.