

David versus Goliath: Pipelines, Landowners, and the Pressing Need for Law Reform

By Savannah Carr-Wilson, Law Student
Supervised by Calvin Sandborn, Legal Director

Prepared for the Canadian Association of Energy and Pipelines Landowner Associations
(CAEPLA)

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As pipeline companies move to export billions in tar sands oil, pressure is rising for additional pipelines to transport this crude to larger and more distant markets. Many of these proposed pipeline routes cross farms, ranches, and other private land in BC. Pipeline companies need to acquire land use rights from affected landowners before beginning construction, and their practices are subject to federal regulation by the National Energy Board (NEB). However, the current regulatory processes overseen by the NEB are manifestly unfair to landowners, pose unacceptable risks to our environment, and allow companies to escape responsibility for the full spectrum of risks posed by their pipelines. There is urgent need for reform.

Reform is needed to provide simple fairness and equality for landowners. It is also necessary to adequately protect the general environment -- since individual landowners are often best situated and motivated to advocate the protection of specific lands from proposed pipeline operations.

Under the current regulatory regime, landowners have few rights when a company decides to build a pipeline across their land – and the procedures are anything but transparent. This begins right at the outset. For example, before a company can begin to acquire land use rights, it must obtain regulatory approval from the NEB for the pipeline project. However, the main legal notice that companies must give a landowner when the company seeks land mentions all opportunities for participation except the most important regulatory hearing – the only forum where landowners can actually oppose the pipeline project as a whole is not even mentioned.¹ There are also significant barriers to landowner participation in the hearing process itself.²

After a pipeline company obtains NEB approval for a pipeline route, it typically tries to negotiate an agreement with the landowner for use of the land in return for compensation. However, company negotiations are often conducted in a “divide and conquer” fashion that isolates landowners from one another and forces them to make important decisions with lasting consequences in an environment of scarce information.³ And the landowner cannot really say no. If the landowner does not agree, the company can simply force the landowner to accept the pipeline by applying to the NEB for a right of entry order, which the NEB routinely grants.⁴ Then, once the pipeline is in place, landowners become subject to numerous, exacting rules on their own land – for example, regulatory change in the late 90’s prohibited farmers from driving their tractors across buried pipelines in their land without company permission; in 2012 Bill C-38 made this a criminal offence.⁵

Finally, when pipeline companies are finished operating their pipeline, they can apply to the National Energy Board to leave it on the landowner’s property forever.⁶ Formerly, companies had to remove pipelines from the ground when they finished operating them. However,

¹ *National Energy Board Act*, RSC 1985, c N-7 s 87.

² Barry Robinson, *Who Gets to Speak at the Trans Mountain Pipeline Hearings*, online: Ecojustice <<http://www.ecojustice.ca/blog/who-gets-to-speak-at-the-trans-mountain-pipeline-hearings>>.

³ Personal communication with Dave Core, CEO of CAEPLA, (2 October 2013).

⁴ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 8: Right of Entry*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtcptn/pplnrgltncnd/pplnrgltncnd_c08-eng.html>.

⁵ *National Energy Board Act*, RSC 1985, c N-7, s 112(2), s 112(8); see also *Canadian Alliance of Pipeline Landowners’ Assn v Enbridge Pipelines Inc.*, [2008] O.J. No. 1221, Ont. CA, and Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cl 92.

⁶ *National Energy Board Act*, RSC 1985, c N-7, s 74.

following regulatory change in 1985, companies have been permitted to abandon pipelines in place.⁷ As a result, landowners are faced with a double injustice: often forced to accept a pipeline they didn't want in the first place, they are then left with the pipeline and associated risks when the company is finished with it. The abandoned pipeline may lower property values, cause safety hazards, hide historical contamination, and pose future environmental liabilities.⁸

Landowners could end up liable for this contamination under provincial contaminated sites legislation, have to go to court to dispute their liability, or have to pay for the remediation out of pocket if the company has become insolvent. While the NEB is currently in discussions with major pipeline companies to create an abandonment "fund" to cover some of the risks of pipeline abandonment, discussions up to this point indicate that weaknesses in the design and management of this fund could leave landowners or taxpayers cleaning up companies' contaminated sites.⁹

The law reform proposal below outlines concrete steps the federal government must take to address the injustices and environmental risks created by the existing regulatory regime. Current processes allow pipeline companies to deprive landowners of normal incidents of ownership, harm the environment, and potentially saddle landowners with liability for contaminated sites. This proposal makes five recommendations that outline the minimum law reforms needed to ensure landowners are treated fairly, the environment is adequately protected, and the polluter pays.

First, the NEB must ensure greater transparency and fairer procedures for landowner intervention in the certificate hearings that grant regulatory approval for large pipeline projects. The law should require:

- **That s. 87 notices specifically inform landowners of certificate hearings and their opportunity to participate in them.**
- **That such notices inform landowners of legal and other assistance available to them through a Pipeline Landowners' Advocacy Office (see recommendation #5) and organizations such as the Canadian Association of Energy and Pipeline Landowner Associations (CAEPLA).**

The whole playing field is currently unfair as some of the wealthiest and most sophisticated corporations in the world negotiate with farmers and other individual landowners. The NEB must ensure fairer procedures at the front end of these processes: at the regulatory approval stage, and during negotiation of land use rights.

Currently, once a company has determined what lands they need for their pipeline, they must serve a "section 87" notice on landowners. The company must serve this notice before signing

⁷ CAPLA, CAPLA Response to NEB LMCI Discussion Papers, online: CAEPLA <<http://www.landownerassociation.ca/rsrscs/CAPLAResponseToStream3and4DiscussionPapers.pdf>> at p 3.

⁸ National Energy Board, Stream 4: Physical Issues of Retirement and Reclamation Discussion Paper, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/501473/501488/501127/501193/A1D5Y3_%2D_Discussion_Paper_for_LMCI_Stream_4.pdf?nodeid=501271&vernum=-2>.

⁹ For more information, see National Energy Board, *Pipeline Abandonment*, online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pplnbndnmnt-eng.html>>.

any type of agreement for land use rights with the landowner.¹⁰ The notice includes information about the lands of the owner that are required; how the company plans on compensating the owner; the company's valuation of the land; the procedure for approval of the detailed route of the pipeline; and how the landowner can pursue negotiation or arbitration if dissatisfied with the company's compensation offer.¹¹

However, although the s. 87 notice includes some important information for landowners, it actually fails to mention the most important opportunity for landowner intervention - the certificate hearing.¹² The certificate hearing is the hearing to decide whether or not the pipeline project should go ahead. The NEB itself notes that *the certificate hearing is the only hearing landowners can participate in to argue the pipeline as a whole should not be approved.*¹³ The NEB has specifically stated that landowners cannot argue against approval of the project at the later detailed route hearing, because "the purpose of the detail route hearing is to determine the best possible route. Participants should not attend with the plan to argue that the project should not be approved, as that decision has already been made. Anyone wishing to argue against a project's approval should participate in the certificate hearing" [my emphasis].¹⁴

Ironically, current law fails to ensure that landowners even know about this critical certificate hearing.

The problems created by section 87 notices' omission of certificate hearing information are compounded by short timelines for concerned citizens and groups to apply for intervener status at such hearings, and limited public knowledge about how to fill out intervener applications.¹⁵ These factors limit opportunities for landowners to have a say in the projects that affect them. In addition, Bill C-38's recent changes to National Energy Board legislation have narrowed who may participate in these hearings by stipulating that only those "directly affected" or those with "relevant information or expertise" may participate.¹⁶ These changes are new, and it is somewhat unclear how the NEB will interpret them. However, in a recent February 19th, 2014 letter from Kinder Morgan to the NEB, Kinder Morgan argues for a very narrow definition of who is "directly affected," and argues other parties be limited to experts providing knowledge directly related to the project.¹⁷

¹⁰ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 6: Land Agreements*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c06-eng.html>.

¹¹ *National Energy Board Act*, RSC 1985, c N-7 s 87.

¹² Email communication with Dave Core, CEO of CAEPLA, (16 Jan 2014).

¹³ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 5: Detailed Route Hearings*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c05-eng.html#q3>.

¹⁴ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 5: Detailed Route Hearings*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c05-eng.html#q3>.

¹⁵ Peter O'Neill, "National Energy Board 'pulling a fast one'", *Vancouver Sun* (9 January 2014) online: Vancouver Sun <<http://www.vancouversun.com>>.

¹⁶ National Energy Board, *Applying to Participate in a Hearing*, online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pblchrng/pblchrng-eng.html>>.

¹⁷ Letter from Trans Mountain Pipeline ULC to the National Energy Board (February 19th, 2014) available online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2423769/2014-02-19_-_Letter_to_National_Energy_Board_-_Submission_re_Applications_to_Participate_-_A3U7Z7.pdf?nodeid=2421326&vernum=-2>; see also Barry Robinson, *Who Gets to Speak at the Trans Mountain Pipeline Hearings*, online: Ecojustice <<http://www.ecojustice.ca/blog/who-gets-to-speak-at-the-trans-mountain-pipeline-hearings>>.

These changes that restrict public participation and input about a pipeline's impact make it even more important that landowners have their say about projects that will directly affect their land and livelihoods— and are equipped with the knowledge and resources they need to participate fully in hearings. It's really just a matter of basic fairness. To ensure that landowners know about available forums and their legal rights, the law should require:

- that companies provide information about the certificate hearing and the landowner's opportunity to participate in it on s. 87 notices.
- that such notices inform landowners of legal and other assistance available to them through a Pipeline Landowners' Advocacy Office (see recommendation #5 below) and organizations such as the Canadian Association of Pipeline and Landowner Associations (CAEPLA).

Second, if regulatory approval is granted, landowner objections to right of entry orders should be considered fairly and impartially by the NEB. The law should provide that:

- **Landowners have a real option to refuse pipelines on their land;**
- **In making their decision to grant a right of entry order, the NEB must follow explicit criteria that assist them in balancing fairness to landowners with public need for the land.**

Under current law, once pipeline companies obtain approval for their projects through the certificate hearing, they are essentially empowered to force pipelines across private land. Landowners are entitled to compensation, but have few legal rights to challenge the pipeline company, and ultimately cannot refuse to allow pipeline construction on their property.¹⁸

When a pipeline company wants to construct a pipeline on private land, they first try to negotiate an easement agreement with the landowner.¹⁹ The easement agreement is the agreement between the company and the landowner that allows the company to construct, operate, and maintain the pipeline while ownership remains with the landowner.²⁰ It can be negotiated before or after the company receives regulatory approval from the NEB for its project.²¹ However, in negotiating this easement agreement, companies have far more power and information than landowners. Landowners may be unaware of important terms they should negotiate for the easement agreement, or be unable to leverage the pipeline company to include these terms. For example, the law explicitly allows landowners to receive compensation on an annual or periodic basis to be renegotiated every five years – however, hardly any

¹⁸ Note that if landowners want to dispute compensation they must go through the lengthy, expensive NRCAN dispute resolution process. There is no up-front money available for landowner participation in this process, and no guarantee of compensation for landowner expenses. For more information, see <<https://www.nrcan.gc.ca/energy/infrastructure/natural-gas/pipeline-arbitration-secretariat/5915>>; see also National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 7: Compensation*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pplnrgltncnd/pplnrgltncnd_c07-eng.html>.

¹⁹ Note that a company may also negotiate a legally binding "option" agreement with landowners prior to regulatory approval, which becomes an easement agreement if the company decides to exercise the option. For more information, see: National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 6: Land Agreements*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pplnrgltncnd/pplnrgltncnd_c06-eng.html>.

²⁰ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 6: Land Agreements*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pplnrgltncnd/pplnrgltncnd_c06-eng.html>.

²¹ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 6: Land Agreements*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pplnrgltncnd/pplnrgltncnd_c06-eng.html>.

landowners receive annual compensation, but rather end up with a one-time lump sum payment.²²

If easement agreement negotiations are unsuccessful, the company can decide to apply to the NEB for a “right of entry order” to expropriate the land from the landowner.²³ Although landowners have the right to object to the right of entry order, the NEB makes the ultimate decision, and routinely issues right of entry orders.²⁴

The use of such expropriation to obtain pipeline easements is problematic. The NEB’s rationale for expropriation is that they don’t want one landowner holding up the process of constructing a pipeline – yet this rationale is highly questionable. The NEB has other options: for example in the case of Vantage Pipeline, they bent the pipeline route around resistant landowners.²⁵ Expropriation is simply an ultimatum that companies can impose on landowners where they are unable to reach a negotiated easement agreement. For landowners, expropriation masks a more fundamental problem – pipeline companies simply do not have the social license to build pipelines across private land as landowners become more aware of the problems with pipeline regulation. Past experience with the NEB and its regulatory regime gives many landowners little assurance that their rights and the environmental integrity of their land will be respected if they permit a pipeline to be constructed on their land.²⁶

The best option currently available to landowners is to band together under the auspices of a landowner advocacy group such as CAEPLA. When landowners band together they can find power in numbers, and:

- negotiate better terms for their easement agreements, and
- forestall right of entry orders as pipeline companies often do not want to expropriate en masse

However, landowner advocacy groups are under-resourced and cannot be everywhere at the same time. Landowners deserve a fair process from the start that respects their wishes and the integrity of the surrounding environment.

The system needs reform. When landowners contest right of entry orders, their objections should be considered fairly and impartially by the NEB; it should be an option for landowners to “say no” to pipelines on their land where factors that adversely affect landowners outweigh the public need for their land. If the NEB is asked to grant a right of entry order, the NEB should be required to follow explicit decision-making criteria that assist them in balancing fairness to the landowner with public need for the land. For example, the NEB should consider whether a reasonable offer of compensation has been made, how many pipelines are already in place on the land, and how the proposed pipeline would disrupt current or future uses of the land. The

²² *National Energy Board Act*, RSC 1985, c N-7 s 86; Phone conversation with Dave Core, CEO of CAEPLA (14 April, 2014).

²³ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 8: Right of Entry*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c08-eng.html>.

²⁴ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 8: Right of Entry*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c08-eng.html>; Phone conversation with Dave Core, CEO of CAEPLA (14 April, 2014)..

²⁵ Phone conversation with Dave Core, CEO of CAEPLA (13 January, 2014).

²⁶ Phone conversation with Dave Core, CEO of CAEPLA (13 January, 2014).

NEB currently has only vague criteria on its website for right of entry orders; clarifying these criteria will help make the process more transparent and fairer for landowners.²⁷

Reforming right of entry will be a substantial step forward. However, like any reasonable person, landowners will never be willing to accept pipelines on their land as long as they continue to:

- pose environmental and safety risks to their property;
- threaten landowners with criminal penalties for contravention of strict pipeline crossing rules; and
- allow pipeline companies to abandon pipelines in the ground when they are done with them.

These issues must be dealt with by modifications to the regulatory framework. Modifying right of entry practices to make them fairer for landowners is a partial fix; these issues cannot be resolved without looking deeper. The next sections of this proposal consider some “deeper” changes.

Third, changes to laws that infringe on landowners’ interests should address landowner interests and concerns, and only be implemented with full consultation and transparency.

- **Burdening landowners by legislating strict pipeline crossing requirements is an unacceptable response to inadequate construction regulations.**
- **New regulations should be drafted that make companies upgrade their infrastructure.**
- **Because current NEB regulations reference Canadian Safety Association Standards, these should be changed to require companies to bury pipelines deeper and use thicker pipelines in rural areas where farming activities may take place.**

Ensuring greater transparency and better consultation with affected parties prior to regulatory change is of the utmost importance, because regulatory change can override agreed upon terms in easement agreements.²⁸ This means that even if a landowner has the windfall luck of achieving everything they want in their easement agreements, this can be undone by regulation.

For example, regulatory change between 1988 and 1990 imposed strict requirements on landowners’ activities in the area around their pipeline easement – stipulating that landowners had to apply to pipeline companies for written permission before carrying out activities such as driving farming equipment across the pipeline, ploughing deeper than 30 centimeters, or carrying out excavation and construction.²⁹

Landowners unsuccessfully challenged the hardships caused by these restrictions in the court case *Canadian Alliance of Pipeline Landowners’ Assn v Enbridge Pipelines Inc.*³⁰ Farmers brought this class action lawsuit following the 1988 and 1990 regulatory changes. The farmers argued that changing their farming practices to comply with these restrictions had caused and would continue

²⁷ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 8: Right of Entry*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c08-eng.html>.

²⁸ *Canadian Alliance of Pipeline Landowners’ Assn v Enbridge Pipelines Inc.*, [2008] O.J. No. 1221 at paras 52, 61 (Ont CA).

²⁹ *An Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, SC 1990, c 7, s 28.

³⁰ *Canadian Alliance of Pipeline Landowners’ Assn v Enbridge Pipelines Inc.*, [2008] O.J. No. 1221, (Ont CA).

to cause loss of income, increased costs, and diminished property values. However, the judge dismissed the case, stating that the legislation gave them no power to sue, and the terms of their easement agreement did not entitle them to compensation or damages stemming from the changes to the law.

A further regulatory change in the form of Bill C-38 added a new “suite of penalties” for anyone who violated these crossing requirements, making it a criminal offence punishable on summary conviction or indictment.³¹

Many landowners are still unaware of these regulatory changes, which have severe repercussions for them and their farming activities. More consultation is needed with affected parties prior to regulatory change, and more transparency is needed about new regulations that affect farmers’ livelihoods. More consultation and greater transparency will help landowners become participants in changes that affect themselves and their livelihoods, and allow them to act with full information about the risks and liabilities they face with a federally regulated pipeline on their land.

However, instead of holding farmers criminally liable for crossing pipelines in the course of their normal farming operations, a better solution would be to bury pipelines deeper and make them thicker. This will ensure that pipelines are safer from spills, and landowners can still use their property. Currently, NEB regulations regarding pipeline construction reference “CSA standards”; however, the Canadian Safety Association (CSA) document they refer to is not freely available to landowners and the public: it costs approximately \$800 to purchase it.³² Aside from these access issues, there are also problems with the standards themselves. CSA standards state that pipelines may be buried with only 2 feet of cover, and thicker pipes are required only in highly populated areas.³³ Some operators are not even meeting these standards – it is not uncommon to hear of pipelines buried with only one foot of cover.³⁴

It is important to note that to ensure that pipelines are safe, pipeline companies must bury the pipeline with at least five to six feet of cover. There are precedents for such a requirement – for the Alliance pipeline, the state of Illinois cited agricultural safety reasons to force Alliance to bury the pipeline to a depth of five feet.³⁵ CAEPLA states that 5 to 6 feet is the minimum depth necessary on agricultural land; in addition, pipelines need to be thicker in rural areas where farming activity will take place over them.³⁶ Pipelines that are buried shallowly should be dug up and buried deeper so they no longer pose safety risks; this will allow the government to lift some of the more stringent crossing requirements that currently burden landowners. Modifying

³¹ Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cl 92.

³² Search “CSA Z662” in “Shop CSA” at CSA Group, *Shop CSA*, online: Shop CSA – Standards; Training; Subscriptions <<http://shop.csa.ca/en/canada/page/home>>; see also *National Energy Board Onshore Pipeline Regulations*, SOR/99-294, ss 1, 4(1)(d).

³³ Dave Core, *Presentation to the Senate Committee on Energy, the Environment and Natural Resources: February 28, 2013*, online: CAEPLA <<http://www.landownerassociation.ca/property-issues/presentations/142-presentationfebruary282013.html>>.

³⁴ Dave Core, *Presentation to the Senate Committee on Energy, the Environment and Natural Resources: February 28, 2013*, online: CAEPLA <<http://www.landownerassociation.ca/property-issues/presentations/142-presentationfebruary282013.html>>.

³⁵ Mike McGrath, Alliance Pipeline U.S. Integrity & Compliance Coordinator, Powerpoint: “Alliance Pipeline Damage Prevention”, online: <http://iowa.gov/iub/docs/misc/S_and_E/TSI_conference/2008/IUB%20Presentation%20Aug%2008.pdf>.

³⁶ CAEPLA, *TransCanada Q&A*, online: CAEPLA <<http://www.landownerassociation.ca/projects/transcanada-energy-east-project.html>>.

construction practices will create a win-win situation where pipelines and the environment are safer, and landowners can use their land without stringent restrictions and the threat of criminal sanctions.

Fourth, pipeline companies must be held ultimately responsible for the full cost of pipeline abandonment. Specifically:

- **The NEB must ensure that regulation of abandonment enshrines the Polluter Pays principle, and that landowners are not held liable for the costs of pipeline abandonment.**
- **The best-case scenario is 100% removal of the pipeline; if this is not possible, the company should pay to maintain the pipeline in perpetuity.**
- **Regulated companies should not be able to decommission pipelines to sidestep the abandonment process.**

When landowners are forced to accept a pipeline they don't want, they may be receiving a lot more than they bargained for. In the future, when the company decides to shut down the pipeline and "abandon" it, National Energy Board policy is to leave 80% of the pipeline in the ground³⁷ – potentially saddling landowners with a bill for thousands of dollars to clean up the companies' mess.

This wasn't always the case: pipelines used to be completely removed after abandonment. However, following the National Energy Board's 1985 "Background Paper on Negative Salvage Value," which identified a pressing need to establish funds to address the costs of pipeline abandonment, the regulations requiring removal of abandoned pipelines were amended and no longer required companies to remove their pipelines.³⁸

When a pipeline company decides to abandon a pipeline, the company has to apply to the NEB, and there must be a public hearing.³⁹ Abandoned pipelines can either be removed completely or abandoned in place.⁴⁰ The choice between removing the pipeline or leaving the majority of the pipeline in place is left to the company, but the NEB states they "expect companies to fully consider all options" including "current and future uses of the land and the impacts each option will have on the surrounding environment."⁴¹ However, recent NEB hearings on financial issues surrounding pipeline abandonment show many companies prefer nearly 100% abandonment in place, though the NEB has mandated 20% removal for larger pipelines.⁴²

³⁷ National Energy Board, Reasons for Decision MH-001-2012, "Abandonment Cost Estimates" (January 2013), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/782060/782061/918229/918367/A3F4F3_%2D_MH%2D001%2D2012_%2D_Reasons_for_Decision.pdf?nodeid=918198&vernum=-2> at p 85.

³⁸ CAPLA, CAPLA Response to NEB LMCI Discussion Papers, online: CAEPLA <<http://www.landownerassociation.ca/rsrcs/CAPLAResponseToStream3and4DiscussionPapers.pdf>> at p 3.

³⁹ *National Energy Board Act*, RSC 1985, c N-7, s 24(1), 74.

⁴⁰ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 12: Abandonment of a Pipeline*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c12-eng.html#q4>.

⁴¹ National Energy Board, *Pipeline Regulation in Canada: A Guide for Landowners and the Public: Chapter 12: Abandonment of a Pipeline*, online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctptn/pplnrgltncnd/pplnrgltncnd_c12-eng.html#q4>.

⁴² National Energy Board, Reasons for Decision RH-2-2008, "Land Matters Consultation Initiative Stream 3" (May 2009), online: <<https://docs.neb-one.gc.ca/ll>

Once the pipeline company fulfills the conditions of their abandonment order, the landowner receives their land back. However, they don't just get their land – they also get the majority of the pipeline that the company has left behind. This is not a harmless addition: abandoned pipelines can hide historical contamination, cause safety hazards, and pose future environmental liabilities.⁴³

The National Energy Board is aware of this problem and is currently in negotiations with pipeline companies to develop a fund to support abandonment cleanup operations. However, the National Energy Board has agreed that *companies* get to develop the scheme for putting money aside for abandonment.⁴⁴ In any case, the fund isn't in place yet, and its final details will not be announced until May 2014.⁴⁵ However, precedents for such funds are not comforting. Past research by the University of Victoria Environmental Law Clinic regarding potential oil tanker spills from increased Northern Gateway Pipeline tanker traffic concluded that the funds in place that could cover such spills were grossly inadequate, and taxpayers and Mother Nature would likely pick up the bill.⁴⁶

In addition, it is unclear how a proposed fund will be monitored and enforced. The intention is not to pool the fund, but to let companies operate their own funds.⁴⁷ However, after a company abandons a pipeline, the lands are no longer under National Energy Board jurisdiction. This raises questions about who will ensure the company uses their fund for needed cleanup of abandoned pipelines.⁴⁸ The National Energy Board also hasn't addressed what happens if a company abandons a pipeline and then goes bankrupt. Since BC Government policy is to only intervene in "high risk" cases, it is unlikely the government would step in to compel or carry out remediation of a lower risk site.⁴⁹ This means that if contamination is found, the landowner may

eng/llisapi.dll/fetch/2000/90463/501473/501196/564389/557894/A1J9R9_%2D_Reasons_for_Decision_RH%2D2%2D2008%2C_Lan d_Matter_Consultation_Initiative_Stream_3_.pdf?nodeid=557895&vernum=-2> at p 51.

⁴³ National Energy Board, Stream 4: Physical Issues of Retirement and Reclamation Discussion Paper, online: NEB <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/501473/501488/501127/501193/A1D5Y3_%2D_Discussion_Paper_for_LMCI_Stream_4.pdf?nodeid=501271&vernum=-2>.

⁴⁴ National Energy Board, Reasons for Decision RH-2-2008, "Land Matters Consultation Initiative Stream 3" (May 2009), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/501473/501196/564389/557894/A1J9R9_%2D_Reasons_for_Decision_RH%2D2%2D2008%2C_Lan d_Matter_Consultation_Initiative_Stream_3_.pdf?nodeid=557895&vernum=-2> at p 51.

⁴⁵ Letter from the National Energy Board to All pipeline companies regulated under the National Energy Board Act, (1 June 2012), online at <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/782060/795917/822306/A2T8C7_%2D_Letter_to_All_Parties_%2D_RH%2D2%2D2008_Five_Year_Action_Plan_-_Timelines_for_Remaining_Steps.pdf?nodeid=822307&vernum=-2>.

⁴⁶ Calvin Sandborn & Matthew Boulton, University of Victoria Environmental Law Centre, *Financial Vulnerability Assessment: Who Would Pay for Oil Tanker Spills Associated with the Northern Gateway Pipeline?* (October 2010), online: <http://www.elc.uvic.ca/press/documents/2010-02-06-Tanker-Spill-Financial-Vulnerability-Assessment_Jan15%2011.pdf>.

⁴⁷ National Energy Board, Reasons for Decision RH-2-2008, "Land Matters Consultation Initiative Stream 3" (May 2009), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/501473/501196/564389/557894/A1J9R9_%2D_Reasons_for_Decision_RH%2D2%2D2008%2C_Lan d_Matter_Consultation_Initiative_Stream_3_.pdf?nodeid=557895&vernum=-2>.

⁴⁸ National Energy Board, *Pipeline Abandonment*, online: NEB <<http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprcptn/pplnbnndmmt-eng.html#ftn1back>>.

⁴⁹ BC Ministry of the Environment, *Protocol 12: Site Risk Classification, Reclassification and Reporting Version 2.0*, (Online: http://www.env.gov.bc.ca/epd/remediation/policy_procedure_protocol/protocols/pdf/p12_2013.pdf); see also Oil and Gas Commission, *Upstream Oil and Gas Site Classification Tool*, (Online: <http://www.bcogc.ca/node/5762/download>); see also *Environmental Management Act*, SBC 2003, c 53, s 58.

have to litigate liability issues or pay for the cleanup out of pocket if the company is insolvent. If the landowner can't afford to clean up the site, and the government won't, this may leave contaminated sites dotted across our rural landscape – and across the properties of innocent landowners.

A stronger model is needed. For example, the fund could be set up to be similar to the BC Orphan Site Reclamation Fund. The Orphan Site Reclamation Fund is a government fund collected to cover the costs of remediating wells, pipelines, and other infrastructure where the parent company can't be found or can't pay. The fund is collected as a tax on oil and gas production, and collection may be suspended once all known orphan sites are remediated and there is a reasonable contingency amount in the fund.⁵⁰ This model would provide greater independence, assured government oversight, and adequate funds that are available when they are needed.

Finally, it is worth noting that many pipeline companies apply to decommission pipelines to avoid undergoing the abandonment process altogether.⁵¹ Both abandonment and decommissioning mean the company doesn't use the pipeline or part of the pipeline anymore: however, abandonment means there is no more service through the pipeline, while decommissioning means service continues, usually because only one looped part of the pipeline is no longer used.⁵² Decommissioning a pipeline means:

- the company does not need to go through the formal abandonment process,
- there is no requirement for a public hearing, and
- the *Canadian Environmental Assessment Act* is not triggered.⁵³

Decommissioning pipelines is unacceptable and as more pipelines are built and age, there is danger that this will become the loophole that swallowed the rule. Companies should not be able to escape full abandonment proceedings and full liability by simply decommissioning their pipeline.

Leaving landowners with problematic pipelines they never wanted in the first place is unjust and unfair. Leaving them to foot the bill is just unconscionable. The solution is to require that companies remove pipelines in their entirety when the company is done operating them. In the alternative, companies should be required to maintain the pipeline in perpetuity. However, there must also be an adequate, impartially regulated fund in place to ensure any costs of pipeline abandonment are covered even if the pipeline company fails financially.

⁵⁰ Oil and Gas Commission, Information Letter #OGC 06-03, "Tax for Orphan Site Reclamation Fund" (3 February 2006) online: <<http://www.bcogc.ca/node/5566/download>>.

⁵¹ One example can be found at: Nova Gas Transmission Limited, *Peace River Mainline Decommissioning Application*, online: National Energy Board <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/784099/856047/850842/A2Y1W3_-_Peace_River_ML_DeCommissioning_Application.pdf?nodeid=850920&vernum=-2>; application later withdrawn after NEB advised proper application would be leave to abandon; see also John Goudy, "TCPL files major decommissioning application with NEB", online: Law of the Lands – Farm, Energy, and Enviro Law <<http://landownerlaw.blogspot.ca/2012/09/tcpl-files-major-decommissioning.html>>.

⁵² *National Energy Board Onshore Pipeline Regulations*, SOR/99-294, s 1; see also National Energy Board, *Guidance Notes and Exemption Order - Decommissioning Provisions, Amendments to the Onshore Pipeline Regulations, 1999 (OPR) and National Energy Board Processing Plant Regulations (PPR)*, online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrgngmgnb/nshrppln/nshrpplnprcssngplntrgtngdncnt-eng.html>>.

⁵³ National Energy Board, *Guidance Notes and Exemption Order - Decommissioning Provisions, Amendments to the Onshore Pipeline Regulations, 1999 (OPR) and National Energy Board Processing Plant Regulations (PPR)*, online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrgngmgnb/nshrppln/nshrpplnprcssngplntrgtngdncnt-eng.html>>.

[UPDATE: In May, 2014 the NEB issued its Reasons for Decision on Set-Aside and Collection Mechanisms for Abandonment Cost Funding. It provides for mechanisms for companies to set aside funds to pay for pipeline abandonment. While it is beyond the scope of this paper to comprehensively review that new decision, it should be noted that under this decision:

- the NEB gives pipeline companies the option to pay in to their abandonment fund gradually, over a number of years. This leaves open the risk that a company could go insolvent before it has set aside enough money to cover its abandonment costs;
- The fund is designed to cover abandonment costs, based on an apparent assumption that there will not be significant problems after the company has completed abandonment of the pipeline. Questions remain about the applicability and sufficiency of the fund to pay for damage that occurs after the abandonment process is completed (e.g., if the pipeline subsequently corrodes and collapses or is hiding historical contamination); and
- Perhaps most important, there is still no firm commitment to set up a fund to pay for the cleanup of “orphan pipelines” – pipelines where the parent company has become insolvent or cannot be located. In such cases, landowners may still find themselves out of pocket, or out of luck.^{54]}

Fifth, an independent and publicly funded Canadian Pipeline Landowners’ Advocacy Office should be established to help level the playing field between landowners and industry. This office would equip landowners with independent information; provide legal advice and representation to landowners dealing with the NEB and federally regulated pipeline companies; and advocate law reform on the disproportionate power of pipeline companies to exercise right of entry across private land and other issues. The Office should be carefully structured and funded to ensure it is a strong and truly independent advocate for landowners and avoids undue influence by industry or government.

It is important to remember that landowners are not the ones that ask for pipelines to cross their lands. They are quietly working, raising families, and stewarding their land when they are suddenly required to respond to pipeline demands from companies and government. Yet when landowners are called upon to interact with the NEB and federally regulated pipeline companies, the stakes are high and the table is stacked against them. The companies have vastly more money and more information – and operate within a legal framework that is very favorable to them. It is a classic example of an unlevel playing field.

Landowners’ interactions with pipeline companies have profound and long lasting implications for their land and livelihoods. Existing legislation is not adequate to provide landowners with due process and ensure a fair result, making these pipeline-company interactions even more important. For landowners to be able to participate as equal players, they need more resources, more information, and adequate legal advice. They also need someone who is on their side

⁵⁴ National Energy Board, *Reasons for Decision: Set-Aside and Collection Mechanisms MH-001-2013*, May, 2014 https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/782060/927998/946532/2478727/Reasons_for_Decision_-_Set-aside_and_collection_mechanism_MH-001-2013_-_A3X4G5.pdf?nodeid=2477576&vernum=-2

advocating for fairer laws and policies to protect them before they ever come in contact with pipelines companies.

A progressive, independent Canadian Pipeline Landowners' Advocacy Office (CPLAO) that is funded by industry but beholden to no one could be an important player in rectifying all of these problems. Several examples of advocacy offices or advocates already exist, however they provide services only at the provincial level.

In BC there is an Oil and Gas Commission (OGC) Landowner Liaison, whose purpose is to liaise with landowners, promote positive relations between landowners, industry, and the OGC, and ensure oil and gas activities are being properly carried out. The Liaison has the power to order remedial work and shut down non-conforming activities.⁵⁵ This position has been criticized as insufficiently independent because it is within the OGC.⁵⁶ There is also the BC Farmers' Advocacy Office, funded by the Peace River Regional District and the Province of British Columbia. The BC Farmers' Advocacy Office provides landowners with information and useful surface lease data, but no legal advice or representation.⁵⁷

In addition, several useful examples of offices and services are available in Alberta. The Alberta Farmer's Advocate Office within the Ministry of Agriculture and Rural Development assists landowners with helpful information, basic mediation services, and law reform advocacy, but does not provide legal advice.⁵⁸ The Property Rights Advocate Office within the Ministry of Justice answers questions and provides information about relevant law and legal processes, reviews complaints about expropriation, and can make recommendations about property rights in their annual report to the provincial legislative assembly.⁵⁹ Finally, the Alberta Energy Regulator's Private Surface Agreements Registry allows landowners to register private surface agreements with the AER and request AER intervention if they feel a company is not meeting a term or condition of a registered agreement. If the AER investigates and determines the company is not in compliance, they can issue an order to comply.⁶⁰

The CPLAO can build on the models these provincial examples provide. It should provide landowners with information: this could include legal information on the relevant federal law and regulatory processes, and information about companies such as compensation rates paid for easement agreements and the company's past spill record. The CPLAO should develop and provide written materials that summarize common topics of interest, but also make an advocate available to answer questions in person. The CPLAO could also carry out law reform activities in order to advocate for better landowner protection through stronger legislation and regulations. One goal could be to enact legislation similar to consumer protection legislation that requires

⁵⁵ Oil and Gas Commission, *News Release*, "Landowner Liaison Inspector Joins the OGC" (11 December 2003) online: <<http://www.bcogc.ca/node/5628/download>>.

⁵⁶ West Coast Environmental Law, *Oil and Gas in British Columbia: Ten Steps to Responsible Development*, online: West Coast Environmental Law <<http://www.wcel.org/sites/default/files/publications/Oil%20and%20Gas%20in%20British%20Columbia.pdf>> at 9.

⁵⁷ Farmers' Advocacy Office, *Home*, online: Farmers' Advocacy Office <<http://www.farmersadvocate.ca/index.php>>.

⁵⁸ Alberta Ministry of Agriculture and Rural Development, *Farmer's Advocate Office*, online: Farmer's Advocate Office <[http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/ofa2621](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/ofa2621)>.

⁵⁹ Alberta Ministry of Justice and Solicitor General - Property Rights Advocate Office, *About us*, online: Property Rights Advocate Office <http://justice.alberta.ca/programs_services/about_us/prao/index.html>.

⁶⁰ Alberta Energy Regulator, *Private Surface Agreements Registry*, online: Alberta Energy Regulator <<http://www.aer.ca/applications-and-notices/private-surface-agreements-registry>>.

companies to divulge more information to landowners, for example about average amounts of compensation they have paid for similar land. Finally, access to justice is a barrier for many low-income farmers; the CPLAO should employ advocates who are able to give legal advice and provide representation in regulatory proceedings. A comparable model is the BC Workers' Adviser's Office that provides information and representation to injured workers.⁶¹

The CPLAO should be generously funded to be truly effective. However, it must be funded in such a way that it is independent from industry and the government. The CPLAO could be funded by a production tax on industry similar to the tax used to fund the BC Orphan Sites Reclamation Fund (for further discussion, see recommendation #4 above); another potential source of funding is BC Law Foundation funding.

A Canadian Pipeline Landowners' Advocacy Office would empower landowners with information, law reform advocacy, and legal representation. Many landowners currently feel isolated in their interactions with companies, and defeated by their attempts to secure justice through legal processes. The CPLAO will help level the playing field.

Recommendations

We must address the inequalities between landowners and industry to ensure landowners are treated fairly, the environment is adequately protected, and the polluter pays. To summarize, at minimum the following immediate reforms should take place:

- **The NEB must ensure greater transparency and fairer procedures for landowner intervention in the certificate hearings that grant large pipeline projects regulatory approval. The law should require:**
 - **That s. 87 notices inform landowners of certificate hearings and their opportunity to participate in them.**
 - **That such notices inform landowners of legal and other assistance available to them through a Pipeline Landowners' Advocacy Organization (see recommendation #5) and organizations such as CAEPLA.**

- **If regulatory approval is granted, landowner objections to right of entry orders should be considered fairly and impartially by the NEB. The law should provide that:**
 - **Landowners have a real option to refuse pipelines on their land;**
 - **In making their decision to grant a right of entry order, the NEB must follow explicit criteria that assist them in balancing fairness to landowners with public need for the land.**

⁶¹ Ministry of Labour, *Workers' Advisers Office*, online: Ministry of Labor, Workers' Advisers Office, Government of BC <https://www.labour.gov.bc.ca/wab/>.

- **Changes to laws that infringe on landowners' interests should address landowner interests and concerns, and only be implemented with full consultation and transparency.**
 - **Burdening landowners by legislating strict pipeline crossing requirements is an unacceptable response to inadequate construction regulations.**
 - **New regulations should be drafted that make companies upgrade their infrastructure.**
 - **Because current NEB regulations reference Canadian Safety Association Standards, these should be changed to require companies to bury pipelines deeper and use thicker pipelines in rural areas where farming activities may take place.**

- **Pipeline companies must be held ultimately responsible for the full cost of pipeline abandonment. Specifically:**
 - **The NEB must ensure that regulation of abandonment enshrines the Polluter Pays principle, and that landowners are not held liable for the costs of pipeline abandonment.**
 - **The best-case scenario is 100% removal of the pipeline; if this is not possible, the company should pay to maintain the pipeline in perpetuity.**
 - **Regulated companies should not be able to decommission pipelines to sidestep the abandonment process.**

- **An independent and publicly funded Canadian Pipeline Landowners' Advocacy Office should be established to help level the playing field between landowners and industry. This office would equip landowners with independent information; provide legal advice and representation to landowners dealing with the NEB and federally regulated pipeline companies; and advocate law reform on the disproportionate power of pipeline companies to exercise right of entry across private land and other issues. The Office should be carefully structured and funded to ensure it is a strong and truly independent advocate for landowners and avoids undue influence by industry or government.**