

Intelligence MEMOS



From: Kristen van de Biezenbos and James Coleman
To: Canadians Concerned about Pipelines
Date: February 17, 2021
Re: **A 40-YEAR-OLD TREATY COULD SAVE LINE 5**

Joe Biden's early use of his executive power to stop the Keystone XL pipeline raises the question of whether he would use similar authorities to attack existing oil links between the United States and Canada, such as Enbridge's Line 3 and Line 5 pipelines. Line 5 is also under pressure from the state government in Michigan over its Straits of Mackinac crossing.

Shutting down existing pipelines that support Canada and the United States' integrated energy industries raises difficult practical and legal questions. Energy consumers and producers depend on these pipelines, and those originating in Canada that cross US territory and back into Canada are protected by the 1977 Transit Pipeline Treaty. The treaty could prove crucial to preserving these energy links by providing an unexpected bulwark against changing US environmental priorities at the state and federal level.

Built in 1953, Line 5 is part of Enbridge's greater North American pipeline network and stretches from Superior, Wisconsin, to Sarnia, Ontario, crossing under the straits, which link Lakes Michigan and Huron.

Public controversy over Line 5 has centred on that section. After a tugboat anchor hit the pipeline there in 2018, Enbridge proposed building a tunnel to protect the underwater portions. Enbridge has obtained some of the needed permits to build the tunnel, but is facing threats from the state government.

Perhaps the most glaring difference between pipeline permit processes in the two countries is that, in the US, there is generally very little federal involvement, other than issuing cross-border permits and conducting environmental reviews of some crossings of federal land or water. While Washington oversees the safety of interstate and cross-border pipelines, the Federal Energy Regulatory Commission – the US version of the Canada Energy Regulator – does not handle the siting of oil pipelines at all. Thus, depending on their location, some pipelines are built with no individualized federal environmental review, while others may be subject to some review depending on where the pipeline crosses a federal work, federal land, or federal waters.

In the case of Line 5, the state of Michigan is asserting its own siting authority to try to have the underwater segments of the line removed. In June, 2019, the state filed suit to have the underwater pipeline segments of Line 5 decommissioned. Last November, Governor Gretchen Whitmer moved to revoke the easement for Line 5 under the straits, a move Enbridge is fighting. If these efforts are successful, Line 5 could be permanently decommissioned, as it would take years to construct the proposed tunnel and encased pipeline replacement. Enbridge may not continue to pursue these projects if the Mackinac section of Line 5 is removed.

However, the little-known Canada-US treaty may block Michigan's efforts. In the 1977 Pipeline Transit Treaty, the US promised that no American "public authority" would "institute any measures" that "would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbon in transit" unless there was a "natural disaster, an operating emergency, or other demonstrable need temporarily to reduce or stop for safety or technical reasons the normal operation of a pipeline." Enbridge's Line 5 carries oil from Western Canada to Ontario so the treaty would seem to apply. Both Ontario and Quebec have stressed that Line 5 is critical infrastructure to supply them with Canadian oil.

The State of Michigan may make several arguments to avoid operation of the treaty, including the argument that it is shutting the pipeline down in response to one of the explicit grounds for halting the operation of a pipeline under the treaty. The difficulty is that Michigan has also opposed efforts to replace the existing pipeline, making it harder to claim the shutdown would only be temporary.

Relying on recent US Supreme Court decisions, Michigan could also claim that the Pipeline Transit Treaty is not self-executing – meaning Congress would need to pass specific legislation to implement it – and was not intended to preempt state law. The language of the treaty, however, seems clearly aimed at disabling contrary state regulation.

For the better part of a century, Canada and the United States have both prospered from their close energy integration. A new move to loosen the ties that bind them together would raise thorny practical and legal questions for energy consumers, policymakers, and lawyers in both countries, and may give new importance to the long-overlooked treaty.

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