

2013

## Situating Sarnia: Unimagined Communities in the National Energy Debate

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### Source Publication:

Journal of Environmental Law and Practice. Volume 25 (2013), p. 81-112.

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### Repository Citation

Scott, Dayna, "Situating Sarnia: Unimagined Communities in the National Energy Debate" (2013). *Articles & Book Chapters*. 2255.

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## **Situating Sarnia: “Unimagined Communities” in the New National Energy Debate**

*Dayna Nadine Scott\**

*This paper argues that the active “unimagining” of downstream communities is crucial to maintaining a notion of unitary national ascent in the rhetoric surrounding the articulation of a new national energy strategy, specifically in relation to the pipeline debates that have gripped and divided Canadians. The exclusion of these unimagined communities downstream is demonstrated by situating Sarnia, Ontario — home to Canada’s biggest petro-chemical complex — both legally and spatially. Examining in detail the recent decision of the National Energy Board approving Enbridge’s application to reverse the flow of oil over a portion of its “Line 9” pipeline between Sarnia and Montreal reveals that the people of the Aamjiwnaang First Nation, downstream of Sarnia’s refineries, need to be actively unimagined if the narrative of a “coast-to-coast” pipeline that will benefit everyone is to be maintained. Strategies for imaginative displacement are explored in the National Energy Board’s consideration of the Line 9 application, in relation to the claims of the Aamjiwnaang First Nation, the renouncing of the Board’s process by Haudenosaunee activists, and in the campaign of prior rhetorical de-legitimation of opposition to pipelines carried out by the federal cabinet. The act of “situating” Sarnia — bringing into view the crucial spatial aspects of the legal and regulatory dynamic — demonstrates the distributional consequences of the pipeline decisions currently being contemplated. In paying attention to the everyday, chronic pollution that inevitably comes with the refining of dirty oil (completely separate from the greenhouse gas emissions tied to the extraction of tar sands crude), we can see that the costs and risks associated with these decisions are delivered as inequities*

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to the communities at the ends of the pipelines.

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Dans cet article, l'auteure fait valoir qu'il est essentiel de pratiquer l'aveuglement volontaire à l'égard des communautés vivant en aval de cours d'eau pour obtenir un consensus national dans le cadre des discussions sur la mise en place d'une nouvelle politique énergétique nationale, particulièrement dans le cadre des discussions qui ont préoccupé et divisé les Canadiens à propos de l'utilisation de pipelines. La ville de Sarnia, en Ontario, où se trouve le plus important complexe pétrochimique au Canada, illustre, sur le plan juridique et géographique, l'exclusion de ces communautés ignorées. Une lecture attentive de la récente décision de l'Office national de l'énergie ayant accueilli la demande déposée par Enbridge pour faire inverser le sens dans lequel s'écoule le pétrole dans un tronçon de sa « ligne 9 » entre Sarnia et Montréal révèle que l'on ne peut accepter le projet de la mise en place d'un pipeline d'un océan à l'autre au bénéfice de tous que si l'on ignore volontairement les membres de la Première nation Aamjiwnaang, lesquels vivent en aval des usines de raffinage de Sarnia. Des solutions de rechange créatives sont explorées par l'Office national de l'énergie dans son étude de la demande concernant la ligne 9, tenant compte des arguments avancés par la Première nation Aamjiwnaang, du refus des militants iroquois de participer aux procédures de l'Office et des campagnes de sensibilisation du cabinet fédéral visant à écarter à l'avance toute légitimité au mouvement d'opposition aux pipelines. Le cas de Sarnia, qui permet de mettre en lumière les aspects géographiques fondamentaux de la dynamique juridique et réglementaire, démontre les diverses conséquences des décisions sur le point d'être rendues à l'égard des pipelines. En pointant du doigt la pollution chronique quotidienne qui accompagne inévitablement le raffinage du pétrole (laquelle pollution est complètement distincte des émissions de gaz à effet de serre associées à l'extraction du pétrole brut des sables bitumineux), nous pouvons constater que les communautés qui se trouvent aux extrémités des pipelines sont exposées de manière injuste aux coûts et aux dangers qu'entraînent ces décisions.

In an inversion of Benedict Anderson's influential idea of imagined communities, eco-critic Rob Nixon recently argued that the idea of the modern nation-state is actually sustained by producing *unimagined* communities — and not only beyond the national boundaries, but within.<sup>1</sup> These are the communities, according to Nixon, “whose vigorously unimagined condition becomes indispensable to maintaining a highly selective discourse of national development”.<sup>2</sup> I argue in this paper that this active unimagining has been prominently employed in the recent pipeline debates that have gripped and divided Canadians.

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<sup>1</sup> Rob Nixon, “Unimagined Communities: Megadams, Monumental Modernity, and Developmental Refugees” in *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) at 150.

<sup>2</sup> *Ibid.*

The Harper government's stated goal is that of "responsible resource development"; a key element of the vision is developing Canada into an "energy superpower" by ramping up extraction activities in Alberta's contested tar sands region.<sup>3</sup> But the singular aim of "development" that is implied in the calls for a new national energy strategy hides from view all of the communities downstream of both the extractive sites and the facilities refining tar sands crude. Their inclusion would in fact disrupt the implied trajectory — it is not "development" in the sense of a unitary national ascent, in which everyone would benefit, but rather a situation in which some benefit, while others suffer devastating losses — to land, culture, livelihoods and health. The exclusion of these unimagined communities downstream is demonstrated in this paper by situating Sarnia, Ontario — home to Canada's biggest petro-chemical complex — both legally and spatially. By examining in detail the recent decision of the National Energy Board (NEB) approving Enbridge's application to reverse the flow of oil over a portion of its "Line 9" pipeline between Sarnia and Montreal, it becomes obvious that the people of the Aamjiwnaang First Nation, downstream of Sarnia's refineries, need to be actively unimagined for the narrative of a unitary national ascent to be maintained.

The act of "situating" Sarnia — bringing into view the crucial spatial aspects of the legal and regulatory dynamic — demonstrates the distributional consequences of the pipeline decisions currently being contemplated. In paying attention to the everyday, chronic pollution that inevitably comes with the refining of dirty oil (completely separate from the greenhouse gas emissions tied to the extraction of tar sands crude), we can see that the costs and risks associated with these decisions are delivered as inequities to the communities at the ends of the pipelines.

The analysis consists of three parts. Part I introduces the contemporary debates around the national energy strategy and reveals how the pipeline proposals currently on the table raise critical environmental justice considerations. Part II situates Sarnia in the national energy picture, spatially, and on the legal landscape by briefly mapping out the problems with the regulation of air pollution there. Part III returns to the theme of unimagined communities by demonstrating that the ability to maintain the tar sands as an icon of national ascent *requires* the descending prospects of communities whose basic ecology is tied to the land, air, and water being impacted by their expansion. Strategies for imaginative displacement are explored in the NEB's consideration of Enbridge's Line 9 Reversal application, in relation to the claims of the Aamjiwnaang First Nation, and in the campaign of prior rhetorical de-legitimation of opposition to pipelines carried out by the federal cabinet. The overall aim is to expose the distributive consequences of the contested pipeline decisions central to the implementation of a new national energy strategy — consequences that are obscured by the rhetoric of development in the Canadian public interest.

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<sup>3</sup> For examples of the "energy superpower" rhetoric and the calls for a new national energy strategy, see Eric Reguly, "North America back in saddle as black gold superpower", (19 November 2011), online: *The Globe and Mail Report on Business* <<http://www.theglobeandmail.com>>; Shawn McCarthy, "National energy strategy gains clout", (10 July 2011), online: *The Globe and Mail Report on Business* <<http://www.theglobeandmail.com>>.

## 1. PART I: PIPELINES DELIVER INEQUITIES

... our aspirations will ultimately be realized in steel.

Alberta Premier Alison Redford<sup>4</sup>

Today, we witness the marked visibility of pipelines in North America. They have featured in front page news stories, both in Canada and in the U.S., for well over a year. They have achieved almost the status of “high politics” in the relationship between Canada and the U.S.<sup>5</sup> In fact, they apparently involve such high stakes that President Obama judged it to be impossible to make a clear call on the Keystone XL in advance of the recent presidential election,<sup>6</sup> and Prime Minister Harper could not seem to allow the hearings of an independent, arms-length administrative panel to proceed with its work on the environmental assessment of the Northern Gateway proposal without pre-empting judgment on the key question of “national interest”.<sup>7</sup> In the 2012 federal budget, the Harper Conservatives put pipelines front-and-center, introducing dramatic changes to the environmental assessment regime in Canada in order to shorten the timeframes by which big energy projects can be approved.<sup>8</sup> So pipelines, for now, are front page news — they are everywhere around us. But once a pipeline is completed, it literally vanishes underground. Once buried, the critical social relationships and power mechanisms that are scripted in and enacted through its flows become blurred.<sup>9</sup> A purpose of this paper is to put them onto the agenda as we move forward with consequential, durable infrastructure choices in pursuit of “national development”.

Energy infrastructure decisions, such as those to build pipelines, create complex systems of interconnection and exchange amongst natural, social, economic and built environments.<sup>10</sup> At the same time, the pipeline is a fixed, durable physical structure that determines the routes of resource flows over time. It creates path de-

<sup>4</sup> Alison Redford verbatim: “We rise together or we fall together” — excerpt from a speech to the Economic Club of Canada, Toronto, on November 16, 2011, *Policy Options: Sustainable Energy*, February 2012, vol 33, no 02 at 8.

<sup>5</sup> To follow the saga, see the reporting in the *Globe and Mail*, in particular: Nathan Vanderklippe, Shawn McCarthy, Campbell Clark and Eric Reguly. Online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>6</sup> Shawn McCarthy & Nathan Vanderklippe, “To Harper’s ‘profound disappointment,’ Obama rejects Keystone”, (18 January 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>7</sup> Shawn McCarthy & Steven Case, “For the Harper government, the Gateway must be open”, (9 January 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>8</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, s. 27(2) as amended by *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c. 19, s. 52.

<sup>9</sup> This is a critical insight emanating from the literature on “networked infrastructures”. For a powerful example, see Maria Kaika, “Landscapes of energy: Hydropower from Techno-Natures to Retro-Natures (Manchester eScholar — The University of Manchester)” (2009) 2 *Harvard New Geographies* 103.

<sup>10</sup> Roger Keil & Douglas Young, “In-Between Canada: The Emergence of the New Urban Middle” in *In-Between Infrastructure: Urban Connectivity in an Age of Vulnerability* (Praxis (e)Press, 2011) 1.

pendence in a literal sense.<sup>11</sup> As David Harvey notes, natural resource economies can tend to develop a “spatial fix” because of the inflexibility of the invested capital.<sup>12</sup> This is exacerbated as further resources are sunk into technologies of extraction and export.<sup>13</sup> The interests favoured by the choice of a pipeline’s route also drive the socio-economics, institutions and structures that regulate resource flows.<sup>14</sup> Of course, the principles by which we have regulated these flows themselves are changing over time, and in Canada have been influenced by privatization, deregulation and commercialization trends over the past three decades.<sup>15</sup>

It is not just crude oil, or diluted bitumen, that flows along a pipeline’s route. Air pollution tags along too, and it is emitted at the point we choose to locate the refineries. Typical environmental health effects for communities downstream of refineries include elevated rates of leukemia and other cancers, asthma and respiratory illness and reproductive disorders.<sup>16</sup> The choice of the pipeline’s route, then,

<sup>11</sup> Jochen Monstadt, “Conceptualizing the political ecology of urban infrastructures: insights from technology and urban studies” (2009) 41 *Pion Journals, Environment and Planning A* 1924 at 1928. There is no “tabula rasa upon which new infrastructure systems can be freely constructed.” Rather, they are subject to a high inertia. Susan Leigh-Star, “The Ethnography of Infrastructure” (1999) 43:3 *American Behavioral Scientist* 377 at 382.

<sup>12</sup> David Harvey, *The Limits to Capital*, 2nd ed. (United States: Verso Press, 2000). Similarly, as Anna Zalick notes, the “technology-intensive industrial enclave” that surrounds “the mining of hydrocarbon-derived energy” renders it “stuck in place” (Zalick, *Protest-as-Violence in Oil Fields: The Contested Representation of Profiteering in Two Extractive Sites*) in S Feldman, C Geisler & G Menon, eds, “Accumulating Insecurity: Violence and Dispossession in the Making of Everyday Life,” University of Georgia Press, 2011, 261–284 at 263).

<sup>13</sup> Harris Ali, “The Political Economy of Environmental Inequity” in *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) 97 at 98. As Ali notes, the pioneering work on the Canadian political economy was done by Harold Innis, who developed the “staples theory” through which generations of Canadians came to understand our role as the “hewers of wood and drawers of water.” Harold Adams Innis, *The cod fisheries: the history of an international economy* (Toronto: University of Toronto Press, 1954). David McNally’s critique complicated the picture by revealing how Innis’ staples theory treats commodities as if they are “simple things”, rather than reflections of relations between people. McNally, “Staple Theory as Commodity Fetishism: Marx, Innis and Canadian Political Economy” (1981) *Studies in Political Economy* 35–63.

<sup>14</sup> Monstadt, *supra* note 11 at 1934.

<sup>15</sup> G Bruce Doern, “Canadian Energy Policy and the Struggle for Sustainable Development: Political-Economic Context” in *Canadian Energy Policy and the Struggle for Sustainable Development* (Toronto: University of Toronto Press, 2005) 3. Monstadt questions whether these trends have produced a new opacity in infrastructure markets, as governance increasingly takes place at international and supranational scales. Monstadt, *supra* note 11 at 1938. See also Alastair Lucas, “The New Environmental Law” in *Environmental Law and Policy*, 3d ed. (Toronto: Emond Montgomery Publications, 2003) 163.

<sup>16</sup> These downstream communities are often referred to as “fenceline communities.” For more, see a recent series of reports on the health risks in these communities at “Chem-

carries distributive consequences. What we need to consider is how particular local burdens can be understood to flow from “specific constellations of power relations” on a broader scale.<sup>17</sup>

The distribution of benefits and risks relating to the environment are the key preoccupations of the environmental justice movement.<sup>18</sup> The movement organizes itself around the notion of disproportionate burdens — “the claim that while pollution is everywhere, it is most easily found in a few choice places, particularly those inhabited by the poor, the racialized, and the marginalized.”<sup>19</sup> Most strikingly, in Canada, is the extent to which environmental inequities plague aboriginal communities.<sup>20</sup> In interrogating systemic questions of power and ownership relating to who profits from and exerts exploitative control over ecological resources, economic capital and social labour, the environmental justice lens also takes account of how these exploitative relationships shape peoples’ everyday physical realities.<sup>21</sup> Thus the fundamental starting point of an environmental justice perspective on the contemporary pipeline debates is to ask why some people and communities are expected, in the context of a national energy strategy, to endure higher degrees of risk than others.

## 2. PART II: PLACING SARNIA IN THE NATIONAL ENERGY PICTURE

The city of Sarnia, Ontario, has not featured centrally in the mainstream debate about the various pipeline proposals under consideration in North America. And yet, from a Canadian perspective, as I will demonstrate in this section, Sarnia

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cal Contamination in Fenceline Communities”, (June 2012), online: *The Collaborative on Health and the Environment* <<http://www.healthandenvironment.org/fenceline>>.

17 Kate Parizeau, “Theorizing Environmental Justice: Environment as a Social Determinant of Health” in *Munk Centre for International Centre Briefings, Comparative Program on Health and Society Lupina Foundation Working Papers Series* (Toronto: University of Toronto, 2006) 101. In a way, this is similar to the method that Timothy Mitchell lays out in *Carbon Democracy*: he advocates for following the “oil itself”, its material qualities and its particular locations of extraction and refining, because in tracing those connections, we discover “how a peculiar set of relations was engineered among oil, violence, finance, expertise and democracy” (Mitchell, “Carbon Democracy” (2009) 38(3) *Economy and Society* 399–432 at 422).

18 This is true notwithstanding the call by critical scholars recently to expand the environmental justice lens to accommodate issues of recognition and procedure, as well as distribution. See for example, Gordon Walker, “Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice” (2009) 41:4 *Antipode* 614–636.

19 Dayna Nadine Scott, “Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution” (2008) 46 *Osgoode Hall Law Journal* 293 at 296.

20 Julian Agyeman, Peter Cole & Randolph Haluza-DeLay, eds, “Introduction” in *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) at 12.

21 Andil Gosine & Cheryl Teelucksingh, *Environmental Justice and Racism in Canada: An Introduction* (Emond Montgomery Publications, 2008).

is in fact a key infrastructural hinge in the national energy narrative that is emerging.<sup>22</sup>

Sarnia's place in the national energy picture was secured early, with the discovery of oil in Lambton County, Ontario, in the 1950s, marked today by the enduring presence of a little village called Petrolia.<sup>23</sup> That discovery led to the development of a deep water port at Sarnia, bordering Michigan, the first node in a system of connections that came to include a tunnel under the St. Clair River<sup>24</sup> and the Bluewater Bridge, now a major border crossing route for truck traffic between Canada and the U.S.<sup>25</sup> The petrochemical industry followed not long after, encouraged by the favourable geologic formations in the area that allow for the storage of liquids and gases underground,<sup>26</sup> and fueled by the synergies in materials and wastes that make facilities for the refining of oil and the production of petrochemicals "good neighbors".<sup>27</sup>

Enbridge built the first major piece of Canadian oil infrastructure.<sup>28</sup> The Inter-provincial Pipeline was built in the 1950s to transport crude oil from Edmonton east towards Sarnia, and in 1976, it was extended to Montreal.<sup>29</sup> Today, this system

<sup>22</sup> This is made visually obvious by the examination of several maps that are now circulating of the crude oil pipeline networks of North America. As an example, see the interactive graphic by the CBC, Canada's Main Pipeline Network, <<http://www.cbc.ca/news/interactives/map-pipeline/>>.

<sup>23</sup> JH Fairbank, *Petrolia Canada: 1908* (R Stirrett Co, 1909). As Christina Burr ("Oil Mania": Colonial Land Policy, Land Speculation, and Settlement in Enniskillen Township, 1830s–1860s, *Social History* 267–306) notes, colonial officials at the time of oil's discovery (1850s) "sought to create a terrain for capital accumulation through dispossession of Native peoples", land tenure rules, and property registration (at 268). In Enniskillen township, just southeast of Sarnia, this process was "uniquely shaped" by the presence of oil.

<sup>24</sup> The discovery of oil in Petrolia started talk of a tunnel under the St Clair River — eventually the world's first subaqueous tunnel — but thirty-five more years were needed before the engineering could catch up. CG Elder, "The St. Clair Tunnel" (1991) 423 *Canadian Rail* 122.

<sup>25</sup> "Bridge Information", (2000), online: Blue Water Bridge Canada <[http://www.bwba.org/bridgeinfo\\_e.html](http://www.bwba.org/bridgeinfo_e.html)>.

<sup>26</sup> This geology was cited by Nova Chemical in a trade presentation from 1980 entitled "Why is Sarnia so Special", found in the Oil Heritage Museum in Petrolia in August 2007; photograph on file with the author; for more technical information, see Sarnia-Lambton Environmental Association, *Geology of Lambton County* (Sarnia, 2005).

<sup>27</sup> While they may be "good neighbors" to *each other*, both refineries and petro-chemical facilities have struggled to make good neighbors to the communities they are located in. This has spurred a movement to assist local communities in extracting commitments from industry, and these have become known as "good neighbor agreements". See for example, Lewis, Sanford & Diane Henkels, "Good Neighbor Agreements: A Tool for Environmental and Social Justice" (1997) 23(4) *Social Justice* 134–151.

<sup>28</sup> Robert D Bott, *Evolution of Canada's oil and gas industry* (Calgary, Alberta: Centre for Energy Information, 2004) at 40.

<sup>29</sup> Natural Resources Canada, "The Atlas of Canada — Pipeline Infrastructure", (2 September 2009), online: *NRCan*

is composed of approximately 3,700 km of mainline and branchlines and transports about 270,000 cubic metres of crude oil a day.<sup>30</sup> The portion between Sarnia and Montreal was reversed in the 1990s when imported light crude became more economical for Sarnia's refineries than western Canadian crude, allowing it to flow westwards into Sarnia.<sup>31</sup> Two other major routes followed: the Transmountain Pipeline takes crude and refined products from Edmonton to Vancouver, and the Kinder Morgan Express, the last of the three major pipelines to be built, transports crude oil from Alberta to Wyoming, Utah and Colorado.<sup>32</sup>

Contemporary pipeline debates have a distinct urgency to them. They are driven by the asserted need for "outlets" for hydrocarbons derived from Alberta's controversial tar sands region, the expansion of which has created a glut of North American crude and bitumen said to be stranded inland.<sup>33</sup> It is now clear that pipeline capacity is presenting the main brake on extraction activities in the tar sands.<sup>34</sup>

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<[http://atlas.nrcan.gc.ca/site/english/maps/economic/transportation/pm\\_pipelines/1](http://atlas.nrcan.gc.ca/site/english/maps/economic/transportation/pm_pipelines/1)>.

Portions of the Interprovincial Pipeline traverse U.S. territory, which gave rise to acrimonious debates at the time that pitted nationalists concerned primarily with Canadian energy security against "free marketers" who favoured pipelines along the cheapest routes possible. G Bruce Doern & Glen Toner, *The Politics of Energy: The Development and Implementation of the NEP* (Toronto: Methuen, 1985). The idea of an east-west pipeline as a symbol of national unity resurfaced in the contemporary national energy strategy debates as Frank McKenna, former premier of New Brunswick, wrote in a June 2012 op-ed to the *Globe and Mail* that a "pipeline from coast to coast . . . would be an extraordinary catalyst for economic growth and a powerful symbol of unity." Frank McKenna, "Let's build a Canadian oil pipeline from coast to coast", (18 June 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>30</sup> Enbridge Inc, "Liquids Pipeline", (2011), online: *Enbridge* <<http://www.enbridge.com>>.

<sup>31</sup> Enbridge, "Line 9 Reversal Phase I Project Overview", (2011), online: *Enbridge* <<http://www.enbridge.com/Line9ReversalProject.aspx>>. For more detail, see the submissions of Imperial Oil, paras 999–1003 of transcript (May 24, 2012). The light sweet crudes travelling to Sarnia from Montreal through Enbridge's Line 9 originate overseas, from tankers docking at Portland, Maine.

<sup>32</sup> Natural Resources Canada, *supra* note 27. A proposed five billion expansion to the Kinder Morgan Trans Mountain pipeline, meant to rival or replace Enbridge's Northern Gateway proposal, was recently announced. David Ebner & Justine Hunter, "U.S. company plans billion-dollar expansion of Trans Mountain pipeline", (12 April 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>33</sup> It is often claimed that plans for billions of dollars worth of new projects proposed in the coming decade will be shelved if pipeline companies cannot find a way to get oil to markets. See, for example, Todd Hirsch, "Coming down the pipe(line) in 2012" (2012) 33:2 *Policy Options*, online: <<http://www.irpp.org>>.

<sup>34</sup> Nathan Vanderklippe, "Canadian crude discount squeezes oil patch", (6 March 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>. See also Donald Barry, who takes a more positive spin on it, arguing that a shortage of pipeline capacity would slow the pace of oil sands development. In his view, industry could focus on achieving greater operational efficiencies, and government could put better regulations in place, leading to improved cost structures, lower carbon footprint, fewer strains on Alberta infrastructure and more time to work out delivery routes. It may also, accord-

This fact motivates not only the proponents of the projects, but also their foes: increased pipeline capacity means more tar sands extraction, more greenhouse gas emissions, and more climate change.

The moniker “dirty oil” is the opposition’s best tool. The operation in Alberta’s tar sands has been analogized to putting a tablespoon of molasses into your sandbox in the summer, letting it soak down deep into the clay, and then trying to get it back in January.<sup>35</sup> As compared to conventional oil, both the extraction process and the refining process are much more difficult, energy intensive and harmful to the environment.<sup>36</sup> The production of one barrel of crude from bitumen generates three times as many greenhouse gas emissions as conventional oil, mainly because it takes so much natural gas to power up enough heat to effectively melt the ‘molasses’ out of the sand and clay. It consumes 3 barrels of fresh water for every barrel of oil it produces — and fills enormous tailings lakes with the polluted result.<sup>37, 38, 39</sup>

Most Canadian refineries are not even capable of processing the bitumen produced in the tar sands operations.<sup>40</sup> For this reason, much of the crude extracted there is sent directly to the U.S. Gulf Coast.<sup>41</sup> But there is increasing panic from the

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ing to Barry, allow Alberta’s bitumen upgrading and refining plans to catch up with oil sands production, creating more jobs in province and adding value to oil sands exports. Donald Barry, “Why Keystone Failed and How to Fix It” (2012) 33:2 *Policy Options* 40 at 42.

<sup>35</sup> Journalist Andrew Nikiforuk calls the tar sands “Alberta’s Magic Sandbox.” Andrew Nikiforuk, “The devil’s tears: Ezra Levant buries the truth in Alberta’s magic sandbox”, (2011), online: *Business Library Online* <[http://findarticles.com/p/articles/mi\\_hb6685/is\\_3\\_37/ai\\_n57491547/](http://findarticles.com/p/articles/mi_hb6685/is_3_37/ai_n57491547/)>.

<sup>36</sup> Natural Resources Defense Council, Western Resources Advocates & Pembina Institute, *Driving it Home: Choosing the Right Path for Fueling North America’s Transportation Future* (2007) at 3.

<sup>37</sup> Dan Woynillowicz, *Oil Sands Fever: The Environmental Implications of Canada’s Oil Sands Rush* (Pembina Institute, 2005) at 29.

<sup>38</sup> “Tailings”, (2012), online: *OilSandsWatchorg* <<http://www.pembina.org>>.

<sup>39</sup> Terra Simieritsch, Joe Obad & Simon Dyer, *Tailings Plan Review: An Assessment of Oil Sands Company Submissions for Compliance with ERCB Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes* (The Pembina Institute and Water Matters, 2009) at 13.

<sup>40</sup> MC Moore *et al* (2011) “Catching the Brass Ring: Oil Market Potential Diversification for Canada”, School of Public Policy Research Papers, University of Calgary, at 9. Also, while fifty-eight per cent of tar sands crude was upgraded in Alberta in 2010, this number is likely to decline as production increases dramatically in the coming years. Department of Energy, Alberta, “Talk About Refining and Upgrading in Alberta”, (January 2012), online: <<http://www.energy.alberta.ca>>. Even today, Canada’s extraction of oil sands crude far outstrips its ability to upgrade it, let alone refine it. Canadian Association of Petroleum Producers (CAPP), *Crude Oil: Forecast, Markets & Pipelines* (CAPP, 2011) at 10.

<sup>41</sup> A total of 56 out of 167 refineries in the U.S. (148) and Canada (19) combined are located in the U.S. Gulf Coast. These refineries are suited to receive the “heavy” tar sands crude by virtue of their experience processing heavy crudes from Venezuela and

oil sector over what is perceived as a bottleneck in the pipeline system that interferes with the ability of tar sands producers to get their product to market.<sup>42</sup> The infrastructure bottleneck in the U.S. Midwest, according to those producers, means that Canadian oil trades at substantial discount to world benchmarks — costing them up to \$50M a day.<sup>43</sup>

In the quest for a necessary outlet for Canadian crude, there are at least three major options currently being contemplated.<sup>44</sup> The first two proposals, TransCanada's Keystone XL and Enbridge's Northern Gateway, provide the necessary context to understand the significance of the third proposal — Enbridge's Line 9 Reversal, for the task of situating Sarnia in the contemporary pipeline debates. The Line 9 Reversal is ultimately the central focus of my analytical work exposing the active unimagining of the Aamjiwnaang First Nation community in the national energy picture.

### (a) The route to the south: Keystone XL

TransCanada's proposed Keystone XL project, would eventually carry up to 700,000 barrels of crude per day from Alberta through the American Midwest. Canadian portions of this line have already cleared regulatory approvals,<sup>45</sup> but garnering support from the Americans has been difficult.<sup>46</sup> Republicans argue that the project will generate jobs, and help the U.S. move to a more secure energy future by reducing dependence on oil producers from what they see as unfriendly political regimes.<sup>47</sup> Feeding this frenzy are Canadian state-sponsored lobbying campaigns

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the Persian Gulf. Morey Burnham, *Tracking Tar Sands Crudes* (Washington DC: Earthworks, 2010) at 4-5.

<sup>42</sup> The epicentre of this glut, as far as Canadian crude is concerned, is the American oil crossroads of Cushing, Oklahoma. See also Scott Hagggett, "Analysis: Canada's 'Cushing moment': A northern pipeline crisis looms", (29 March 2012), online: *Reuters* <<http://www.reuters.com>>.

<sup>43</sup> Nathan Vanderklippe, "Oil price gap costs producers \$50-million a day", (27 March 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>44</sup> At the time this article went to press, even more options were emerging. For example, the *Globe and Mail* revealed that TransCanada was making plans to convert parts of its cross-country natural gas pipeline network to transport crude oil. Access to eastern Canada refineries is one objective, but exports "must be part of the mix", as well. Otherwise, the two large refineries on the east coast (Irving in NB, and Korea National Oil's facility in Nfld.) would be placed in an unacceptably good negotiating position, according to insiders. Carrie Tait and Nathan Vanderclippe, "TransCanada eyes an east coast export alternative", *Globe and Mail*, October 4, 2012, B5.

<sup>45</sup> Governor General in Council, "PC Number: 2010-0489", (22 April 2010), online: *Privy Council Office* <<http://www.pco-bcp.gc.ca>>.

<sup>46</sup> Shawn McCarthy & Nathan Vanderklippe, "TransCanada reapplies for Keystone XL permit", (4 May 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>47</sup> Christopher Helman, "Romney's Billionaire Energy Advisor Lays Out His Vision For Energy Independence", (21 March 2012), online: *Forbes.com* <<http://www.shortform.com>>.

that have sought to re-brand tar sands crude as “ethical oil”.<sup>48</sup>

Critics fiercely oppose the project, suggesting it will raise gasoline prices,<sup>49</sup> increase the emission of greenhouse gases,<sup>50</sup> create the risk of spills over critical aquifers,<sup>51</sup> and pose a risk to pipeline safety.<sup>52</sup> Environmentalists argue that the transport of diluted bitumen through pipelines is a risky and largely untested proposition. “Dil-bit”, as it is known, poses a greater risk of pipeline rupture due to its abrasive and viscous nature.<sup>53</sup> The concentrations of toxins that it contains present major risks to human health and natural ecosystems.<sup>54</sup>

President Obama rejected the application early in 2012, saying the Congress-imposed deadline did not allow for a full environmental assessment.<sup>55</sup> But Obama did invite TransCanada to propose a new route, and in March 2012 he cleared the way for it to begin immediate construction of the southern portion of the Keystone XL — from Cushing, Oklahoma, through to the Texas refineries, with an expedited

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<sup>48</sup> The ethical oil campaign, led online at <<http://www.ethicaloil.com>>, was founded by a Conservative Staffer recently promoted to the Prime Minister’s Office. Campbell Clark, “Tory staffer who left Hill to plug ‘ethical’ oil lands job in Harper’s office”, (14 November 2011), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>. See also charges that the Harper government itself is acting as a “lobbyist” for Big Oil in the dispute over the European Fuel Quality Directive: *Dirty Oil Diplomacy: The Canadian Government’s Global Push to Sell the Tar Sands* (Climate Action Network Canada, 2012).

<sup>49</sup> The reason is simple. Economist Robyn Allen explains (speaking specifically of the Northern Gateway, but the logic is the same): Much of the profit expected by pipeline companies is “attributable to the higher prices Canadian producers expect to capture, every year . . . because the pipeline is built. Since these prices are realized on every barrel of oil produced, not just on barrels exported, the price increase is borne by Canadian refiners and directly passed onto consumers and business.” See also *Tar Sands Oil Means High Gas Prices* (Corporate Ethics International, 2010).

<sup>50</sup> Public Works and Government Services Canada, *GHG Emissions* (Natural Resources Canada, 2012).

<sup>51</sup> John Stansbury, *Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills From the Proposed Keystone XL Pipeline* (University of Nebraska Water Center, 2011) at 17.

<sup>52</sup> *Ibid.* at 36. Bill McKibben’s 350.org has been credited with organizing much of the resistance in the US. Resistance has also been organized at: “Tar Sands Action”, (2012), online: *Tar Sands Action* <<http://www.tarsandsaction.org/>>. McKibben has been called the “hero and spiritual leader of the crusade to stop keystone.” Margaret Wente, “With Keystone, it’s Harvard vs. the heartland”, (8 February 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>53</sup> Anthony Swift *et al*, *Tar Sands Pipelines Safety Risks* (Natural Resources Defense Council, National Wildlife Federation, Pipeline Safety Trust and the Sierra Club, 2011).

<sup>54</sup> For example, 60% of those living near the spill of Dil-bit into the Kalamazoo River in July 2010 experienced symptoms consistent with acute exposure to chemicals like benzene. Martha Stanbury, *Acute Health Effects of the Enbridge Oil Spill* (Michigan Department of Community Health, 2010).

<sup>55</sup> McCarthy & Vanderklippe, *supra* note 6.

approval process to help clear the bottleneck in capacity.<sup>56</sup> In September 2012, TransCanada reapplied for a building permit, proposing a new route that it claims will avoid the ecologically sensitive aquifers of Nebraska.<sup>57</sup>

### (b) The route west: Northern Gateway

Prime Minister Harper's tough talk, in the wake of Obama's rejection of a decision he had once called a "complete no-brainer",<sup>58</sup> was relentless — if "we" cannot get an outlet to the south, he said, we will get one to Asia.<sup>59</sup> The second high-profile proposal on the table is Enbridge's Northern Gateway Project. According to the plan currently before a Joint Review Panel of the National Energy Board,<sup>60</sup> the Northern Gateway would connect Alberta's tar sands with a northern B.C. marine terminal sited in Kitimat.<sup>61</sup> From there, 225 tankers annually would transport the crude across the Pacific to Asia.<sup>62</sup>

The project has the support of many politicians in the federal cabinet whose posturing in the spring of 2012 reached a fever pitch: Canada must diversify away from its exclusive U.S. customer, in the national interest.<sup>63</sup> But the pipeline lacks widespread support in BC. Most British Columbians scoff at the idea of tankers off their coast, and they oppose the chosen route which traverses sensitive mountainous terrain including the Great Bear Rainforest.<sup>64</sup> Environmentalists, opposition

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<sup>56</sup> Megan Slack, "Expanding Our Oil and Gas Pipeline Infrastructure", (22 March 2012), online: *The White House* <<http://www.whitehouse.gov>>.

<sup>57</sup> These aquifers exist in the "Sandhills" region of Nebraska. The Sandhills are especially permeable soil, meaning that bitumen spilled upon them would inevitably and fully leak into the water tables below. Opposition to the previous plan put forth by TransCanada centered on this potentiality. Shawn McCarthy, "TransCanada revises Keystone route", (5 September 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>58</sup> Shawn McCarthy, "Keystone pipeline approval 'complete no-brainer,' Harper says", (26 September 2011), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>59</sup> CBC News, "Harper looks to Asian energy markets after Keystone delay — Politics", (14 November 2011), online: <<http://www.cbc.ca>>.

<sup>60</sup> The NEB conducts quasi-judicial hearings, usually by 3 of 9 Board members for major project applications. In order for these projects to be approved, the Board must issue a Certificate of Public Convenience and Necessity.

<sup>61</sup> Canadian Environmental Assessment Agency, "Application", (5 July 2010), online: *Enbridge Northern Gateway Project* <<http://gatewaypanel.review-examen.gc.ca>>.

<sup>62</sup> Nathan Lemphers, *Pipeline to Nowhere? Uncertainty and unanswered questions about the Enbridge Northern Gateway Pipeline* (The Pembina Institute).

<sup>63</sup> This rhetoric is front and center in the following presentation by Natural Resource Minister Joe Oliver. Reuters Video Gallery, "Canada must diversify energy exports, official says", (2 December 2011), online: <<http://www.reuters.com>>. See also Peter Kent, "After Kyoto and Durban: A question of balance" (2012) 33:2 Policy Options 10.

<sup>64</sup> Anthony Swift *et al*, *Pipeline and Tanker Trouble: The Impact to British Columbia's Communities, Rivers, and Pacific Coastline from Tar Sands Oil Transports* (The Pembina Institute, 2011).

parties, and aboriginal groups are fiercely opposed.<sup>65</sup> At least half of the route crosses unceded territory in B.C., raising the likely prospect of constitutional claims that will take years to resolve.<sup>66</sup> Injunctions and civil disobedience will inevitably follow.<sup>67</sup>

The power dynamic shifted in the spring of 2012 with the introduction of the *Jobs, Growth and Long-term Prosperity Act*.<sup>68</sup> Among the changes introduced were measures to severely curtail public reviews. The Minister also gained a new power to shut down an environmental assessment deemed to be taking too long.<sup>69</sup> Finally, the new Act gives Cabinet the power to override a decision of the supposedly arms-length NEB, even where that Board concludes that a pipeline is not in the Canadian public interest.<sup>70</sup>

Overall, the terrain is shifting constantly. “Big oil” — as a category — in fact obscures the extent to which different energy interests are actively jockeying for position, seeking to get out front, and to secure certain routes and preferential contracts in advance of their competitors. The best example of this is the current race between Kinder Morgan Partner’s proposal to twin its Transmountain pipeline and Northern Gateway — the two are seen to be in direct competition,<sup>71</sup> both seeking to

<sup>65</sup> Mike Hudema, “One Keystone pipeline down, one Gateway pipeline to go”, *Greenpeace Canada* (18 January 2012), online: <<http://www.greenpeace.org>>.

<sup>66</sup> A similar tactic was successfully used in 2007 by the Tsilhqot against would-be loggers. Nancy MacDonald, “Crack in the Northern Gateway pipe dream”, (20 January 2012), online: *Macleans.ca* <<http://www2.macleans.ca>>.

<sup>67</sup> See, for example, Gordon Christie, “Indigenous Authority, Canadian Law, and Pipeline Proposals” (this issue).

<sup>68</sup> *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19), <<http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5524772>> [hereinafter the JGLTPA]. When it was Bill C-38, opposition attempts to have the bill split into pieces and examined separately at committee failed; as did attempts to delay the bill through filibuster. Bill Curry, “871 amendments aimed at ‘bully’ budget”, (10 June 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/politics/871-amendments-aimed-at-bully-budget/article4246053/>>.

<sup>69</sup> The Act will provide for some limited exceptions to the new time limits, to be authorized by the Minister.

<sup>70</sup> The previous Cabinet veto power essentially becomes a Cabinet override: the NEB will lose its exclusive jurisdiction, with Cabinet becoming the final arbiter on pipeline application decisions. This is pursuant to the JGLTPA, which alters s. 54(1) of the *National Energy Board Act* to read: “After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order, (a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or (b) direct the Board to dismiss the application for a certificate.”

<sup>71</sup> Indeed, Kinder Morgan has written the NEB as an intervener in opposition to Northern Gateway. Kinder Morgan, *Letter from Kinder Morgan to Joint Review Panel — Enbridge Northern Gateway Project* (2010). On the other hand, industry insiders also often claim that there will be plenty of capacity for both pipelines, and more. Consider for example, an upcoming conference entitled the “Crude Oil Markets, Rail & Pipeline Takeaway Summit” which will focus on developing new “takeaway infrastructure to

deliver tar sands crude to tankers on the B.C. coast and eventually, Asian markets. While the Northern Gateway has been troubling B.C. environmentalists for two years, it now seems perhaps more likely that the Kinder Morgan plan, which would double its capacity to transport tar sands crude to port, and double the tanker traffic in Burrard Inlet, will prevail — its advantage being that the pipe is already laid.<sup>72</sup> This is also true for Enbridge's "plan B", the third major outlet being pursued, and the most significant for residents of Sarnia and the Aamjiwnaang First Nation.

### (c) The route east: The Line 9 Reversal

The prospect of bitumen travelling east by pipeline is eagerly received in some camps. There is a growing chorus of voices now calling attention to the need to extract more economic benefits and jobs from the tar sands, leading to proposals for upgrading bitumen in Canada rather than shipping it directly abroad.<sup>73</sup> Meanwhile, behind the scenes, several companies in Canada intend to increase their capacity for processing tar sands crude in the coming years — with billions of dollars' worth of upgraders and refineries planned for Alberta's heartland, and for other industrial centres across the country, most notably Sarnia.<sup>74</sup>

According to StatsCan, close to all of the crude oil refined in Sarnia is received by pipeline.<sup>75</sup> About 84% comes from the western provinces, with the re-

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cost-efficiently take crude to new markets in the form of both pipeline and rail", online: <<http://www.crude-markets-rail-capacity-canada.com/>>.

<sup>72</sup> Mike Lee, Jeremy van Loon & Mike Lee, "Kinder Morgan Lapping Enbridge in Canadian Pipeline Race: Energy", (2 February 2012), online: *Bloomberg* <<http://www.bloomberg.com>>. The proposal would require a dredging of the Second Narrows channel in Vancouver Harbour. Patrick Brown, "Supertankers could take over Vancouver Harbour", *Island Tides* (17 May 2012), online: <[www.islandtides.com](http://www.islandtides.com)>. This is not to say that the KinderMorgan plan does not face opposition. Late summer 2012 members of the Squamish and Tsleil-Waututh nations organized a paddle in the Salish Sea to demonstrate their displeasure with the plan. Tsleil-Waututh chief, Justin George, stated: "The people reside here have an obligation to speak up . . . the real benefits aren't here. The real benefits are at the tarsands, to Alberta, to Kinder Morgan shareholders, and to China." Justin Mcelroy, Squamish and Tsleil-Waututh paddle to protest Kinder Morgan pipeline expansion, <<http://www.theprovince.com/news/Squamish+Tsleil+Waututh+paddle+protest+Kinder+Morgan+pipeline+expansion/7179985/story.html#ixzz2840zXPMk>>.

<sup>73</sup> Eric Reguly, "Why Keystone XL is a mistake", (29 December 2011), online: *The Globe and Mail Report on Business* <<http://www.theglobeandmail.com/report-on-business/rob-magazine/why-keystone-xl-is-a-mistake/article2286199/>>.

<sup>74</sup> There has also been a proposal put forward for a refinery in Kitimat, B.C. Such a project may increase the viability of Northern Gateway as it would preclude many political and environmental concerns — chiefly, the need to transport bitumen by tanker — as well as provide significant economic stimulus to the region. Gordon Gibson, "Kitimat refinery would be a game-changer", (20 August 2012), online: *The Globe and Mail Commentary*, <<http://www.theglobeandmail.com>>.

<sup>75</sup> The Supply and Disposition of Refined Petroleum Products in Canada, April 2012 at 49 (Table 5-1. Supply and disposition of petroleum products, Ontario — Refinery supply of crude oil, feedstock charged and total refined petroleum products).

mainder coming though Montreal, mainly from ports in Maine unloading tankers originating overseas.<sup>76</sup> Most of the crude oil is derived from conventional sources, but at least 20% of the “feedstock” received in 2011 was in the form of crude bitumen or oil derived from upgrading bitumen.<sup>77</sup> This proportion is increasing and is forecasted to be as high as 80% by 2015.<sup>78</sup> Sarnia’s Suncor facility is one of the destinations for bitumen and its derivatives from Alberta. In 2004, the company began a billion-dollar project to increase the amount of oil sands crude that it could upgrade, and in a 2007 statement, Suncor boasted about its aim to eventually enable the Sarnia refinery to process up to 40,000 barrels of oil sands crude per day.<sup>79</sup>

Since 2007, the prospects for increased refining of tar sands crude in eastern Canada have only improved. Long-time Sarnia Mayor Mike Bradley delivered a speech shortly after Obama’s rejection of the Keystone XL that gave rise to a headline claiming, “Sarnia vying for Keystone oil”.<sup>80</sup> High-profile commentators like former New Brunswick premier Frank McKenna are calling for a pipeline from “coast-to-coast”, noting that while securing west coast access to markets for tar sands crude is proving difficult, east coast access is “particularly promising.”<sup>81</sup>

<sup>76</sup> There was some indication in the context of the NEB hearings into Line 9, however, that the pipeline coming into Sarnia from Westover was not in use in very recent years (2011 and 2012). This is up from roughly 60% in 2007. Supply and Disposition of Refined Petroleum Products in Canada, December 2007, <<http://www.statcan.gc.ca/pub/45-004-x/45-004-x2007012-eng.pdf>>

<sup>77</sup> The Supply and Disposition of Refined Petroleum Products in Canada, April 2012. <<http://www.statcan.gc.ca/pub/45-004-x/45-004-x2012004-eng.pdf>>.

<sup>78</sup> Canada Oil Sands Opportunities and Challenges to 2015: An Update — Energy Market Assessment — June 2006, available: <<http://www.neb.gc.ca/clf-nsi/rnrgynfimt/nrgyrprt/lsnd/pprntnsndchllngs20152006/pprntnsndchllngs20152006-eng.pdf>>.

<sup>79</sup> Suncor Energy, News Release: Suncor Energy’s Sarnia refinery completes project to improve environmental performance and strengthen integration with oil sands operation, November 26, 2007.

<sup>80</sup> Tyler Kula, “Sarnia vying for Keystone oil — Local — News — Sarnia Observer”, (17 January 2012), online: *Sarnia Observer* <<http://www.theobserver.ca/ArticleDisplay.aspx?e=3439083>>.

<sup>81</sup> McKenna, *supra* note 27. Similarly, former Bank of Canada governor David Dodge stated: “You’ve got to get the stuff to market. And I guess I keep thinking that the really interesting thing is B.C. and the Indians are going to make it difficult to go across the mountains. Bring it east, right?” Mr Dodge told the Globe, saying he believes hundreds of millions of barrels of bitumen could be upgraded daily in central and Atlantic Canadian cities” (Josh Wingrove and Jeremy Torobin, “Former Bank of Canada governor breaks rank with successor over consumer debt”, The Globe and Mail, June 18, 2012, <<http://m.theglobeandmail.com/news/national/former-bank-of-canada-governor-breaks-rank-with-successor-over-consumer-debt/article2419843/?service=mobile>>). More recently, NDP leader Thomas Mulcair threw his support behind the plan in a speech to the Canadian Club of Toronto on September 28, 2012: “Let me be clear, New Democrats support recent proposals to increase West-East pipeline capacity. This is an initiative, led by industry that will pay economic dividends for every region of our country: New markets for producers in the West, high-paying value-added jobs and lower energy prices in the East”, online: <<http://www.ndp.ca/news/building-balanced-21st-century-economy>>.

The lynchpin in this plan is the reversal of Enbridge's Line 9, the portion of the Interprovincial which currently runs westwards between Montreal and Sarnia. As its proponents note, the virtue of this plan is that most of the pipe is already in place:<sup>82</sup> its "re-purposing" would "allow Western crude to be brought all the way to Quebec, supplying a number of refineries along the way".<sup>83</sup> From there, it could link up with the Portland-Montreal pipeline to allow access to the tidal waters of Portland, Maine, and overseas exports,<sup>84</sup> and with the addition of a pipeline extending from Quebec to Saint John, the Irving refinery in New Brunswick could also be supplied.<sup>85</sup>

The first hurdle for Enbridge was cleared on July 27, 2012. Enbridge received regulatory approval from the NEB to re-reverse the flow of the portion of Line 9 that connects the terminal at Sarnia and the station in North Westover, near Hamilton.<sup>86</sup> This project is referred to as the "Line 9 Reversal Phase I", and purports to respond to the request of one customer, Imperial Oil, for access to western crudes for its Nanticoke refinery.<sup>87</sup> What is now "Phase I", however, was in 2008 a part of Enbridge's later abandoned "Trailbreaker" proposal to facilitate the flow of western heavy crudes all the way to Montreal, and eventually onto oil tankers bound for the Gulf of Mexico through Portland, Maine.<sup>88</sup> In fact, before the NEB even held the hearing into the Line 9 Reversal "Phase I" proposal, Enbridge had stated publicly its intention to seek permission from the NEB to reverse the remainder of Line 9's flow once Phase I is complete.<sup>89</sup>

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<sup>82</sup> It is a potential masterstroke for Enbridge: by virtue of requiring minimal construction on a small portion of already-operating pipeline, the proposed Line 9 Reversal skirt the issues that have dogged the Keystone XL and Northern Gateway proposals.

<sup>83</sup> McKenna, *supra* note 27.

<sup>84</sup> Jeffrey Jones, "Green groups seek wider review of Enbridge project", (26 August 2011), online: *Reuters* <<http://www.reuters.com>>.

<sup>85</sup> *Ibid.* See the map available at the Globe & Mail: <<http://www.theglobeandmail.com/report-on-business/conduits-to-the-east/article4602851/?from=4602808>>.

<sup>86</sup> Letter from National Energy Board to Ms Chantal Robert, Supervisor of Regulatory Affairs, Enbridge Pipelines Inc (27 July 2012), online: *National Energy Board* <<http://www.neb-one.gc.ca>> "Decision Letter".

<sup>87</sup> Letter from Imperial Oil Limited to Ms Anne-Marie Erickson, National Energy Board/Secretary (20 September 2011), online: *National Energy Board* <<http://www.neb-one.gc.ca>>. This concern is sometimes referred to by Enbridge as "the business demands of shippers." See Enbridge Pipelines Inc, "Application Pursuant to Section 58 of the NEB Act", (8 August 2011), online: *Enbridge* <<https://www.neb-one.gc.ca>>.

<sup>88</sup> Enbridge Pipelines Inc ("Enbridge") Line 9 Reversal Phase I Project, Application under Section 58 of the *National Energy Board Act* ("NEB Act"), File OF-Fac-Oil-E101-2011-01 01, Enbridge Response to National Energy Board Information Request No. 1, online: <[https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/92263/706191/706437/739010/A2G0L1\\_-\\_Enbridge\\_Response\\_to\\_NEB\\_Information\\_Request\\_No.\\_1?nodeid=739014&vernum=0](https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/92263/706191/706437/739010/A2G0L1_-_Enbridge_Response_to_NEB_Information_Request_No._1?nodeid=739014&vernum=0)>.

<sup>89</sup> Enbridge, Line 9B Reversal Project Overview, online: <<http://www.enbridge.com/ECRAI/Line9BReversalProject.aspx>>.

**(d) Situating Sarnia, spatially**

The significance of the Line 9 Reversal for Sarnia and the Aamjiwnaang First Nation is this: by cutting off the supply from the east, it will force the refineries there to rely near-solely on western sources of oil, leaving them increasingly reliant on emissions-heavy fuels, such as tar sands crude. In other words, the proportion of “feedstock” for Sarnia-area refineries that is derived from bitumen will shift. The roughly 15% of the crude refined in Sarnia that currently comes from eastern ports is light crude; this will be replaced by western sources — at the same time that the proportion of western crudes stemming from the tar sands is also expected to keep rising. For people living downstream of these refineries — for the Aamjiwnaang First Nation — this means more, and more deadly, air pollution and the added risk of spills of diluted bitumen to contaminate the water and soils of their traditional territory.

But greater access to western crudes is eagerly sought by industry in the area, as Mayor Bradley’s position underlines. Sarnia remains an attractive destination to investors: its cachet lies not only in its skilled workforce, but in its “supply convenience” and hyper-connectivity that derives in part from geography.<sup>90</sup> To orient this discussion spatially, I turn now to the situation on the ground.<sup>91</sup>

Lake Huron drains into the St. Clair River which flows south into Lake St. Clair towards Detroit, and eventually into the Atlantic Ocean through Lake Erie, Lake Ontario and the St. Lawrence River. The golf courses, sandy beaches and executive estates along the south shore of Lake Huron slowly give way to the City of Sarnia, a solid working class core and an industrial corridor home to 40% of Canada’s chemical production.<sup>92</sup> This cluster of petrochemical plants and refineries runs along the St. Clair River, site of the infamous “toxic blob” of the 1980s, and eventually leads right up to the fenceline of the Aamjiwnaang First Nation reserve.<sup>93</sup>

The reserve lands have dwindled over the years through various surrenders and suspect land deals, highway expansions and municipal annexations.<sup>94</sup> Pipelines now traverse and refineries and petroleum storage tanks now encircle the reserve.

<sup>90</sup> See for example: “Bio-Industrial Park Sarnia”, online: <<http://www.bioindustrialparksarnia.com>>.

<sup>91</sup> Elaine MacDonald & Sarah Rang, *Exposing Canada’s Chemical Valley: An investigation of cumulative air pollution emissions in the Sarnia, Ontario area* (Ecojustice, 2007).

<sup>92</sup> *Ibid.*

<sup>93</sup> Laurie Adkin’s study of unions and environmentalists around Chemical Valley from the 1950s through the 1990s offers a fascinating case study on the discovery and aftermath of the toxic blob and the general dynamics of Sarnia’s political economy. Laurie E Adkin, “The Politics of Sustainable Development: Citizens, Union and the Corporations” (1998, Black Rose Books).

<sup>94</sup> Sarah Wiebe, *Anatomy of Place: Ecological Citizenship in Canada’s Chemical Valley*, PhD Dissertation in Political Science, University of Ottawa, forthcoming. It is an industrial history facilitated, of course, by colonial law. See also, *The Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CarswellOnt 117 (C.A.).

There are at least 60 high-emitting facilities within 25 km.<sup>95</sup> Each of these facilities is required to report to the National Pollutant Release Inventory (NPRI), a legislated, publicly accessible inventory of high-volume toxic emissions in Canada.<sup>96</sup> In 2011, the World Health Organization rated Sarnia's air quality to be the worst in the country.<sup>97</sup>

In recent years, the Health and Environment Committee of the Aamjiwnaang Band Council has documented a wide range of environmental health effects tied to the high burden of pollution.<sup>98</sup> The people of Aamjiwnaang routinely experience anxiety and fear related to the frequent industrial "releases" or "incidents" that are part of everyday life in Chemical Valley, but there is some indication that the slow poisoning is what they have come to dread most.<sup>99</sup> The chronic health risks of living beside a refinery, or worse — a *cluster* of refineries — are now well known.<sup>100</sup> Residents express "a building anger and lingering sadness upon learning the extent of their health problems and the mounting evidence linking those problems to the actions of their industrial neighbours".<sup>101</sup> The next section surveys the legal landscape governing the release of pollution in Sarnia, and the convoluted "vapour trail of blame" that Aamjiwnaang residents must attempt to navigate as they deal with the mounting health concerns.<sup>102</sup>

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<sup>95</sup> Of these, only 15 are American. MacDonald & Rang, *supra* note 91.

<sup>96</sup> Environment Canada, "National Pollutant Release Inventory", (22 February 2012), online: <<http://www.ec.gc.ca/inrp-npri/>>. For a critique of the NPRI, see Kathryn Harrison & Werner Antweiler, "Incentives for pollution abatement: Regulation, regulatory threats, and non-governmental pressures" (2003) 22:3 *Journal of Policy Analysis and Management* 361. See also John Jackson, *A Citizen's Guide to the National Pollutant Release Inventory* (Canadian Institute for Environmental Law and Policy, 2000).

<sup>97</sup> Tara Jeffrey, "Sarnia's air Canada's worst", *Sarnia Observer* (27 September 2011), online: *Communities* <<http://www.theobserver.ca>>. This distinction was recently lost to the town of Hinton, Alberta. World Health Organization, *Urban Outdoor Air Pollution Database, by country and city* (2012).

<sup>98</sup> Presentations made to the 2008 Environmental Health Symposium by Ada Lockridge, Ron Plain & Margaret Keith; presentations made to the 2011 Community Forum on Pollution and Action by Sharilyn Johnston and Sarah Wiebe, Wilson Plain Jr, Jim Brophy and Margaret Keith, among others (notes on file with author).

<sup>99</sup> (*Amended*) *Notice of Application to Divisional Court for Judicial Review*, filed by Ada Lockridge and Ron Plain, at 14 (available at [ecojustice.ca](http://ecojustice.ca)). See also, for example, the recent mixed-art documentary film, "*Indian Givers*" (2012), produced by the Sarnia/Aamjiwnaang-based Kijig Collective, made collaboratively by and for Native and non-Native youth, shot and edited by Ian Alexander of Rocketship Productions and high school student Sadie Mallon.

<sup>100</sup> See, for example, Lars Barregard, Erik Holmberg & Gerd Sallsten, "Leukaemia incidence in people living close to an oil refinery" (2009) 109:8 *Environmental Research* 985; S Sans *et al.*, "Cancer incidence and mortality near the Baglan Bay petrochemical works, South Wales" (1995) 52:4 *Occupational and Environmental Medicine* 217. Three of eastern Canada's ten major refineries are in the Sarnia area: Imperial Oil, Suncor and Shell.

<sup>101</sup> Scott, *supra* note 19 at 306.

<sup>102</sup> Nixon, *supra* note 1 at 136.

### (e) Situating Sarnia in the Legal Landscape

The topography is complex. There are multiple layers of legal ordering that govern the release of pollution in Sarnia. The central features have been described elsewhere;<sup>103</sup> here I highlight some recent developments. In late 2010, two residents of the Aamjiwnaang First Nation filed a court challenge based on the *Canadian Charter of Rights and Freedoms*. It is a judicial review application arguing that the cumulative impact of the relentless release of pollutants into the air authorized by the Ministry of the Environment (MOE) affects the members of the community in a way that is fundamentally unfair, and is thus unconstitutional.<sup>104</sup> The basis of the claim is this: Ontario's air pollution regulation fails miserably when it is applied to several large, high-emitting facilities clustered together. That regulation allows the MOE to continue to hand out permits without taking into account the background levels of pollution already present.<sup>105</sup> For pollution hotspots like Sarnia, the regime is completely inadequate to protect the health of residents downwind,<sup>106</sup> and the Ministry all but acknowledges this.<sup>107</sup>

Ron Plain and Ada Lockridge, members of the Aamjiwnaang First Nation, claim that the chronic exposures to pollution, and the MOE's failure to assess the cumulative effects on their health, constitutes a violation of their rights to life, liberty and security of the person under s. 7 and their equality rights under s. 15.<sup>108</sup> Specifically, they challenge the Ministry's granting of a new permit to Suncor that allows it to expand its refining operations, and thus increase its release of air pollutants, such as benzene, without any assessment of the cumulative impacts on the health of affected residents of Aamjiwnaang.

Benzene is known as a "non-threshold" toxicant — a substance for which harmful effects are expected to occur at any level of exposure.<sup>109</sup> It is also considered to be carcinogenic to humans and is linked to the incidence of leukemia.<sup>110</sup> Benzene is present in crude oil and gasoline and is used as a raw material in the production of chemicals, such as styrene, and in the manufacture of goods such as dyes, amongst many others.<sup>111</sup> Significant benzene emissions are tied to petroleum

<sup>103</sup> Scott, 2008, *supra* note 19.

<sup>104</sup> Ada Lockridge & Ron Plain, *Notice of Application to Divisional Court for Judicial Review* (Ecojustice, 2010).

<sup>105</sup> For a discussion of a parallel problem with environmental regulation of Alberta's tar sands, see Angela Carter, *Regulating the Environmental Impacts of Alberta's Tar Sands*, in L Adkin, B Miller, N Kroeman & R Haluza-Delay, *First World Petro-Politics: The Political Ecology of Alberta* (2012).

<sup>106</sup> Scott, *supra* note 19 at 321–328.

<sup>107</sup> Environmental Commissioner for Ontario (ECO), *Neglecting our Obligations: 2005-2006 Annual Report — Supplement* (Toronto: ECO, 2006).

<sup>108</sup> Lockridge & Plain, *supra* note 101.

<sup>109</sup> Canadian Council of Ministers of the Environment, *Canada-Wide Standard for Benzene, 2010 Final Report*, January 2012, <[http://www.ccme.ca/assets/pdf/2010\\_benzene\\_rpt\\_final\\_e.pdf](http://www.ccme.ca/assets/pdf/2010_benzene_rpt_final_e.pdf)>, at 1 [hereinafter "CCME"].

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* at 2.

refining and chemicals production.<sup>112</sup> As a volatile hydrocarbon, benzene is a known component of the “fugitive” emissions from refineries,<sup>113</sup> and has been released accidentally in several high profile spills or leaks in Sarnia’s Chemical Valley.<sup>114</sup>

If we consider this pollution and its effects on the health of residents in the context of their status as First Nations people on reserve, the question of their constitutional rights comes into sharp relief. The First Nation is tied to the land; confined to a small portion of its traditional territory that happens to be directly downwind of the industrial cluster. That residents should now be expected to endure these threats to their well-being, perpetuated by the Ministry’s failure to enact an effective, health-protective air pollution regime, they argue, is a violation of s. 7. That they should be forced to choose between subjecting themselves and their families to these risks, and leaving the reserve at great social, economic and cultural cost, they say, also demonstrates that their equality rights are infringed. It is a choice that non-native Canadians do not confront.

### 3. PART III: UNIMAGINED COMMUNITIES AT THE END OF THE PIPE

A broader aim of this paper is to understand the larger socio-historical and politico-legal forces that have furthered the accumulation of pollution burdens in particular places.<sup>115</sup> Pollution in Sarnia persists despite lots of “law” in place to curb it. I have argued in the past that this is, at least in part, because it continues to be cast as “unintentional”.<sup>116</sup> What we are talking about, after all, is *intentional* economic activity (the refining of oil, the production of petro-chemicals) that we know produces emissions known to cause certain identifiable health effects that people in Aamjiwnaang are experiencing at disproportionate levels. Casting the pollution as unintentional allows the communities downstream to remain hidden — to remain “unimagined” in the national energy debate. But Nixon’s notion of “unimagining” is considerably more active than this: it depends on “energetically

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<sup>112</sup> CCME, *supra* note 109, at Table 1. The most significant sources however, are vehicle emissions, wood combustion for home heating and natural gas dehydrators.

<sup>113</sup> Chambers *et al*, *supra*.

<sup>114</sup> See for example, Jack Poirier, “Sarnia issues warning after benzene vapor leak at plant”, *Times Herald* (March 15, 2008). An earlier spill resulted in a fine of \$550,000 against Nova Chemical in Sarnia for “discharging or causing or permitting the discharge of a contaminant, namely benzene, into the natural environment that caused or was likely to have caused an adverse effect”. *R. v. Nova Chemicals* (January 16, 2008), Sarnia IEB file #4602-6H3R67 (Ont. C.J.) (Prosecution Disposition Report (Trial)). For more detail on these incidents and their effect on the Aamjiwnaang community, see D Scott, 2008, *supra* note 19.

<sup>115</sup> As Ali, *supra* note 12 at 97 argues, this is the type of inquiry that may lead to environmental justice analyses that move beyond description to explanation.

<sup>116</sup> For a more complete account of how this pollution comes to be regarded as “unintentional”, please see Scott, 2008, *supra* note 19.

inculcated habits of imaginative limit”.<sup>117</sup> He states:

[A]ssaults on a nation’s environmental resources frequently depend not just on the physical displacement of local communities, but on their imaginative displacement as well, indeed on the prior rhetorical and visual evacuation of those communities from the idea of the developing nation state.<sup>118</sup>

To follow Nixon’s analytical frame, the ability to maintain the tar sands as an icon of national ascent *requires* the descending prospects of communities whose basic ecology is tied to the land, air, and water being impacted by their expansion. The active use of the faculty of imagination is essential to the construction of a national identity that underlies a national energy vision. In the building of such a national identity, we can find instances of the vigorous exclusion of other visions such that communities whose very existence inconveniences or contradicts the desired narrative must be unimagined. Mechanisms or strategies of imaginative displacement may be varied, and here I explore the ways that the Aamjiwnaang First Nation community is unimagined in the national energy debates through the indirect violence of narrow legal reasoning and interpretations by the NEB, and through prior rhetorical de-legitimation by the federal cabinet.

#### **(a) Active Unimagining in the Words and Deeds of the National Energy Board**

The mechanism is one that Nixon terms indirect violence: unimagining happens through the “bloodless, technocratic” and “pseudo-neutral”<sup>119</sup> voice of law. Here I demonstrate its operation in the NEB ruling on Enbridge’s Line 9 Reversal “Phase I” application. As is the case for many environmental assessments, the critical issue in this case came down to the “scope” of the project.<sup>120</sup> The NEB was charged with assessing the environmental effects associated with “the Project”, including effects on both bio-physical elements like air and water quality or fish habitat, and socio-economic effects such as traditional land and resource uses or human health impacts.

To say the NEB scoped the project narrowly is hyperbolic. Facing 18 registered intervenors that included the Aamjiwnaang First Nation, energy corporations, environmental organizations including Equiterre and Environmental Defence, land-owners associations, and several provincial ministries, as well as petitions from concerned citizens, comments from several other aboriginal bands, including the Haudenosaunee Confederacy Chiefs Council, and crowds of Six Nations activists and their supporters that were ejected from the public hearings (necessitating un-

<sup>117</sup> Rob Nixon, (2010) *Unimagined Communities — Developmental Refugees, Mega-Dams, and Monumental Modernity*, 69 *New Formations* 62–80 at 62.

<sup>118</sup> *Ibid.* at 62.

<sup>119</sup> *Ibid.* at 73.

<sup>120</sup> See for example, Doelle & Tollefson, *supra* note 117 at 358. David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003) at 152. Jamie Benidickson, *Environmental Law*, 3rd Revised ed. (Irwin Law, 2008) at 259.

precedented security arrangements),<sup>121</sup> the NEB characterized “the Project” they were assessing as follows:

The Project includes the infrastructure additions and modifications (related to pumps, piping, valves, [etc.] at four existing fenced and graveled sites along Line 9 . . . A new electrical building would also be installed . . . All construction work would be completed on existing Enbridge facilities and surface leases with no planned ground disturbances along the Line 9 right-of-way itself.<sup>122</sup>

Deciding that “the Project” consisted of infrastructure work at four existing fenced and graveled sites allowed the Board to conclude that “the Project sites . . . do not traverse Indian Reserve lands”<sup>123</sup> even though the affected pipeline runs directly under the Aamjiwnaang reserve and the Line 9 segment to be reversed is within the traditional territory of Aamjiwnaang First Nation, as well as the territories of several other Bands including the Chippewas of the Thames and the Oneida Nation of the Thames. In its assessment of possible effects on Traditional Land and Resource Use and on Human Health, the NEB noted under the heading “Project-Environment Interactions” that there would be “No interaction: Construction activities would occur on previously-disturbed, existing industrial sites”.<sup>124</sup> In other words, the Board’s assessment of the environmental effects of this project — one that several intervenors claimed would dramatically change the way oil moves across and is processed in our country — is that they would be confined to four existing fenced and graveled sites.

And yet, in a petition that was organized by intervenor Environmental Defence, over a hundred people agreed:

I am also concerned that the project will lead to an increase in the amount of tar sands oil used in Ontario, which creates more greenhouse gas emissions than conventional oil and creates more air and water pollution when refined.<sup>125</sup>

More pointedly, the Affidavit of Chief Chris Plain of Aamjiwnaang First Nation, filed before the NEB, stated:

We are also concerned that reversing the flow may change the type of oil that is currently being provided to oil refineries and other industrial operators in and around the Sarnia area. In particular, we are concerned that more medium and heavy crude oils from western Canada will be stored and processed at the facilities, which may increase the amount of air pollution and toxic air contaminants that are emitted, released or discharged from the

<sup>121</sup> Tim Groves, *Piping tar sands oil through Ontario protested*, National Energy Boards hearing on Enbridge pipeline reversal shut down, Toronto Media Co-op, May 23, 2012, online: <<http://toronto.mediacoop.ca/story/piping-tar-sands-oil-through-ontario-protested/11014>>.

<sup>122</sup> Appendix I to National Energy Board (NEB) Letter Decision OH-005-2011, Environmental Assessment Report, Pursuant to the *National Energy Board Act*, Line 9 Reversal Phase I Project (EA Report Summary).

<sup>123</sup> *Ibid.* at 6.

<sup>124</sup> *Ibid.* at 10.

<sup>125</sup> Environmental Defence, *Signed Petition for Line 9 Reversal Phase I Project* (2011).

facilities into the airshed.<sup>126</sup>

Chief Plain's concern was based on Enbridge's own response to an information request that Aamjiwnaang First Nation filed as part of the hearing procedure. Enbridge stated that "the total supply of heavy crude oil from western Canada will increase from 1,504,000 to 3,094,000 [barrels per day] from 2011 to 2021".<sup>127</sup> The Aamjiwnaang First Nation submitted that the Project would cause direct and cumulative impacts on its members by delivering different crude types to local refineries and industrial operators.

The Board nevertheless decided that "[s]everal submissions described issues and concerns that were not relevant to the Board's overall assessment of the applied-for Project or to this EA, as scoped", and held as follows:

Beyond the change in flow direction and operating pressures, Project operation would effectively remain unchanged from what Line 9 is currently authorized for. No new continuous operational air emissions sources are proposed. Any required pumping at [Sarnia] would be electrically-driven. Although trace amounts of fugitive GHG emissions can be expected to escape from valves and fittings during pipeline operation, their amounts could potentially decrease compared to past pipeline operations as a result of replacing older valves with newer ones.<sup>128</sup>

Sarnia already shoulders a burden of at least 5 million kilograms of toxic air emissions every year, "more than the NPRI releases from the entire provinces of Manitoba, New Brunswick or Saskatchewan and greater than any other community in Ontario".<sup>129</sup> The predicted effect of this project is to add significantly to that pollution load, and yet, the NEB's ruling on the scope — and specifically its refusal to address what it calls "upstream and downstream" effects — means that its role is reduced to tallying up the emissions from a few valves and fittings.<sup>130</sup>

The Board essentially treated this project as if it was an application to approve, or at most upgrade, an existing pipeline. The broader implications of the reversed flow were not allowed to seep in. The Board did consider reversed flow conditions in terms of their significance for pipeline integrity, which is important, but it did so only in the form of "contingency planning for accidents and malfunctions during operations".<sup>131</sup> The NEB panel took the view that, "[a]s Line 9 already

<sup>126</sup> Affidavit of Chris Plain, Evidence of Aamjiwnaang First Nation, at 22.

<sup>127</sup> Exhibit "G", Enbridge's response to NEB Information Request #1, October 21, 2011.

<sup>128</sup> EA Report Summary, *supra* note 6 at 12.

<sup>129</sup> See the figures in Macdonald and Rang, *supra* note 91. In 2005, it was 5.7 M (at 5).

<sup>130</sup> As Ecojustice counsel Albert Koehl stated in oral argument, the failure to allow discussion of "the issues that are really before the Board and that are entailed by this Application . . . diminishes the trust and respect for this public process and it diminishes the potential respect and legitimacy of any National Energy Board decision to grant an exemption in this case". National Energy Board, Hearing Order OH-005-2011, Enbridge Pipelines Inc (Enbridge), Line 9 Reversal Phase I Project, Application under s. 58 of the *National Energy Board Act* (NEB Act), Volume 2, London, Ontario, May 24, 2012 (in particular paras 680–688 and 722–727).

<sup>131</sup> National Energy Board, *Draft Environmental Screening Report: Line 9 Reversal Phase I Project* (2012) at 4.

exists as a buried pipeline, its potential impacts on bio-physical and socio-economic elements are limited to those resulting from operational activities (e.g., investigative digs) or accidents and malfunctions, the locations of which, if any, cannot be meaningfully predicted".<sup>132</sup>

With respect to the broader implications embedded in the application, the Board explained that it would only consider "upstream Alberta oil sands production" in its cumulative effects assessment to the extent that "these activities may interact with the potential "residual effects" of the Project" (those effects expected even after the applicant implements "mitigation"). In other words, the Board declined to assess the extent to which this application's "environmental effects" may be felt elsewhere — in the form of increased GHG emissions derived from expansion of tar sands production, for example. In the bloodless, techno-language of the Board's ruling: "the Project and oil sands production are sufficiently geographically separated such that there would be no interactions between the residual environmental effects of the two".<sup>133</sup>

In response to the "downstream" concerns raised by Aamjiwnaang First Nation with respect to cumulative effects associated with increasing toxic air emissions in their airshed, the Board indicated that it would not consider the "downstream consumption of oil transported by this segment of Line 9 within the cumulative effects assessment" because:

[r]efining destinations are not likely to change as a result of the Project and the downstream use of refined oil would not be any more identifiable than it is today. The potential for effects of downstream use to act cumulatively with any potential effects of the Project is too speculative to merit consideration.<sup>134</sup>

The refining destinations may not be expected to change, but the "feedstock" processed there *is* expected to change. This evidence was before the Board. The Aamjiwnaang First Nation did speculate — it noted its worry that the change in feedstock would have implications for air quality in and around Sarnia. Those implications should have been assessed. But with the scope of the Project restricted to those four gravelled and fenced sites, and with the extra emissions in Sarnia not counted as cumulative to the emissions from those four sites, then the downstream effects could not be considered as part of the Board's assessment.

Ultimately, the mandate of the NEB in this case was to consider whether the proposed project was in the Canadian public interest, which it took to include an assessment of the predicted environmental effects. The Board's decision indicates that it was satisfied that "it is in the public interest to approve the Project".<sup>135</sup> Ecojustice, having failed to block the application, nevertheless is of the view that the Board's decision contains one "small victory": the ruling requires Enbridge to file an additional application if it wants to ship tar sands crude through the reversed portion of Line 9. The approval granted only applies to light and medium

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<sup>132</sup> *Ibid.* at 5.

<sup>133</sup> EA Report Summary, *supra* note 166 at 23.

<sup>134</sup> *Ibid.*

<sup>135</sup> Decision Letter.

crudes,<sup>136</sup> meaning that people in Ontario may be provided with the opportunity for another public hearing if Enbridge decides to move tar sands crude from Sarnia to Hamilton — an approval, according to Ecojustice counsel Albert Koehl, that is “normally given quietly behind the scenes”.<sup>137</sup> But while this may constitute a small victory for people living in eastern Canada, it cannot be any consolation to residents of Sarnia and the Aamiwnaang First Nation. Bitumen will not be approved to travel further east without another approval, but in terms of air emissions in Sarnia, Phase I is enough to cut off the supply of light crudes: the toxic air emissions will now begin to rise as the proportion of tar sands crudes in the pipelines flowing from the west increases. This would have been true even without the reversal in place, of course, but the Line 9 plan is likely to exacerbate and expedite the problem for Aamjiwnaang.

### (b) Unimagining by Prior Rhetorical De-legitimation

On 6 July 2012, the *Canadian Environmental Assessment Act* was repealed and replaced with a new one, applicable to a narrower class of projects.<sup>138</sup> If filed today, the Phase I application would not be subject to the provisions of the new Act. In fact, the newly introduced changes to the federal environmental assessment regime seem to be designed to limit public participation in exactly the type of scenario that confronted the NEB on the reversal application — in which participants seek to bring in “upstream” impacts of pipeline development.<sup>139</sup> In contrast to the prior system, participants will now have to show that they are “directly affected” by the project proposal,<sup>140</sup> and only factors “directly” related to the project will be considered in the review.<sup>141</sup> This is a measure taken purposefully by the federal government to construct categories of legitimate, and thus *illegitimate*, participation, with the effect of unimagining communities bringing forward claims that cannot mesh with the desired narrative of national development.

The federal cabinet took extraordinary steps over the winter and spring of 2012 to dismiss and discredit legitimate forms of public participation and protest whenever taken in opposition to a pipeline (or, more broadly, its own “responsible resource extraction” vision).<sup>142</sup> In particular, Minister Oliver’s rhetoric around

<sup>136</sup> The decision-letter states: if Enbridge wishes to transport heavy crude oil on Line 9, it will need to apply to the Board for this change under Part IV of the NEB Act” at 27.

<sup>137</sup> Albert Koehl, “It’s all connected: Pipelines, oilsands, environmental rollbacks and global warming,” September 5, 2012: <<http://www.ecojustice.ca/blog/its-all-connected-pipelines-oilsands-environmental-rollback-and-global-warming>>.

<sup>138</sup> *Canadian Environmental Assessment Act, 2012*, *supra* note 8.

<sup>139</sup> Ecojustice & West Coast Environmental Law, *What Bill C-38 means for the environment* (2012).

<sup>140</sup> *National Energy Board Act*, RSC 1985, c N-7, s. 55.2 as amended by *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c. 19, s. 83.

<sup>141</sup> *Ibid.*, s. 58.16(2) as amended by s. 85(1).

<sup>142</sup> Natural Resources Canada, “Harper Government Announces Plan for Responsible Resource Development”, (17 April 2012), online: *NRCan* <<http://www.nrcan.gc.ca>>. The Canadian Press, “Rebranding part of push to streamline environmental reviews”, (28 May 2012), online: *CBC News* <<http://www.cbc.ca>>.

“foreign radicals” influencing the Northern Gateway hearings just as those hearings opened in British Columbia and before any of the several hundred registered participants made their statements and submissions, must be seen as an attempt to deem those submissions “socially-deviant and harmful”.<sup>143</sup> Indigenous activists in particular, are targeted as radicals by this rhetoric, with the intended effect of suppressing resistance and securing “social peace” through pacification.<sup>144</sup> The rhetoric constructed a frame in which the submissions of affected communities to the NEB on the Enbridge application for the Line 9 Reversal were discredited in advance.<sup>145</sup> Residents of affected communities were physically excluded, their concerns were erased, and as a result, their communities remain unimagined in our national energy debate.

Scaling back outwards to the wider pipeline debates across the country, and the various proposals on the table, we can find further examples of the process of active unimagining. Consider the speed and vigour with which the proposals for First Nation ownership stakes in the new upgrader projects in Alberta were rejected.<sup>146</sup> A proposal by the Alberta First Nations Energy Center for a \$6.6 billion dollar upgrading facility had the support of Eric Newell, former CEO of Syncrude, who saw the opportunity as a chance to “bring first nations people to the table as a full partner in resource development”.<sup>147</sup> But Alberta’s Conservative government pulled out of the deal, saying the potential “double-dividend” from linking oil sands development with the economic prosperity of first nations was “too risky” for Alberta taxpayers.<sup>148</sup>

What this makes clear is that the communities downstream of the tar sands expansion are expected to bear the costs of those projects, even as they are actively denied any of the benefits that might flow from them. This is in no way to suggest that indigenous opposition to tar sands expansion or pipelines would evaporate should those benefits materialize, it is simply to reveal how narrowly the idea of “national development” is construed.<sup>149</sup> It is to demonstrate how easily communi-

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<sup>143</sup> Phillippe Le Billon and Angela Carter, “Securing Alberta’s Tar Sands: Resistance and Criminalization on a New Energy Frontier,” in Matthew Schnurr and Larry Swatuk, *Natural Resources and Social Conflict: Towards Critical Environmental Security*, Palgrave MacMillan, 2012, 170–192 at 171).

<sup>144</sup> Zalik, *supra* note 12 at 277.

<sup>145</sup> As Le Billon and Carter argue, in casting attention on actors, rather than issues, the government’s rhetoric de-legitimizes environmental causes more generally (*supra* note 188 at 180).

<sup>146</sup> Carrie Tait, “Alberta rejects first nations refinery as too risky”, (18 March 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> As Gordon Christie noted at the symposium of the papers for this volume, this is in fact very unlikely. Further, as he noted, the positions of First Nations “are not reducible to environmental virtue” or “environmental sell-out”. First Nations are often internally divided. Bands that have signed agreements to secure employment with, or supply products to the tar sands producers, such as the Athabasca Chipewyan First Nation and the Fort McKay First Nation, often mention that, while they recognize the environmental costs of the developments, they have been left with no other viable options for sur-

ties can be evacuated from both place and time as they are “uncoupled from the idea of a national future and a national memory”.<sup>150</sup> Even though their relationship with the land is historically deep, those histories must be purged from our national memory so as to allow the claims of indigenous communities to a sovereign right to decide matters directly affecting their territories to be overcome in the “national interest”.<sup>151</sup>

#### 4. CONCLUSION

The Harper government’s approach to “responsible resource development” focuses almost exclusively on jobs and growth.<sup>152</sup> It emphasizes the widespread benefits of continued tar sands expansion — not just to Alberta, but across the country.<sup>153</sup> Outside of the economic debates, the *distributional* question — the issue of

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vival, with hunting, trapping and fishing rendered impossible (Doug Struck, Canada Pays Environmentally for U.S. Thirst for Oil, *Seattle Times*, June 2, 2006). Others in the region have rejected the idea of development at any cost. But even after signing a deal, leaders of the Fort McKay First Nation continue to advocate for better environmental outcomes (Diane Meili, Oilsands boom creates uneasy wealth in North, Alberta Sweetgrass, May 2007). See also Arno Kopecky, noting the “conundrum for native people around Fort McMurray: Most of them work for the oil sands, even as they complain about the impacts. To some people, that’s hypocrisy. To [others], it simply confirms their role as economic hostages” (Kopecky, “The Age of Extreme Oil”, *The Globe and Mail*, May 18, 2012). Anna Zalik, *supra*, conceives of the attempts to secure the “buy-in” of aboriginal bands in northern Alberta through the mechanism of direct contracting to be just one of a number of consent strategies employed in a project of pacification paving the way to a “social license to operate” in the tar sands (at 273).

<sup>150</sup> I am relying on the trope of national future and memory embedded in Nixon’s idea of “unimagining”, *supra* note 1 at 151.

<sup>151</sup> There is a striking parallel to the story told by geographer Anna Stanley about the way the narrative of federal agencies with respect to nuclear fuel waste gains primacy over the knowledge and claims of the Serpent River First Nation in Ontario. As Stanley explains, when the experiences of Aboriginal peoples disrupt the national interest claim, in this case the idea that all Canadians have benefitted from the use of nuclear fuel, they must be excluded in order to maintain a coherent narrative of development (Stanley, “Citizenship and the production of landscape and knowledge in contemporary Canadian nuclear fuel waste management” (2008) 52(1) *The Canadian Geographer* 64–82).

<sup>152</sup> Natural Resources Canada, “Harper Government Announces Plan for Responsible Resource Development”, (17 April 2012), online: *NRCan* <<http://www.nrcan.gc.ca>>.

<sup>153</sup> McCarthy, *supra* note 3; McCarthy & Case, *supra* note 7; Shawn McCarthy, “Ottawa elbows regulators in quest for final word on pipeline approvals”, (17 April 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>. Last winter, Alberta’s premier Alison Redford and Ontario’s Dalton McGuinty engaged in a high profile spat over the extent to which Ontario manufacturing benefits from the tar sands, with McGuinty charging that Canada’s oil sands-fuelled “petro-dollar” was hurting the competitiveness of Ontario exporters (Karen Howlett, Dawn Walton & Shawn McCarthy, “McGuinty-Redford war of words keeps simmering”, (29 February 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.) The NDP’s Thomas Mulcair reopened the can of worms a month later, charging that Canada is succumbing to “Dutch

the sharing of the costs and benefits — is less obvious. The main opponents of tar sands expansion talk primarily about the risks of oil spills, and the expected increases in greenhouse gas emissions contributing to climate change.<sup>154</sup> According to this view, the tar sands constitute “dirty oil” because of the tailings ponds, the unbelievable scale of the landscape change and water use, but chiefly, because of climate change.

Increasingly, however, indigenous voices are bringing the environmental justice implications into the debate.<sup>155</sup> In Canada, where the reserves, treaty lands and unceded territories of indigenous communities contain much of the fossil fuel wealth caught up in the national energy debates,<sup>156</sup> those voices have resonance because they open up possibilities for a new brand of resistance.<sup>157</sup> As Gordon Christie demonstrates (this volume), a coalition of native communities from northern B.C., the Yinka Dene Alliance, have come out as unequivocally opposed to the Northern Gateway proposal. They are basing their opposition on indigenous law, a distinct form of legal and political authority, which means, in Christie’s assessment, that their opposition constitutes a formidable challenge to the government’s narrow vision based on raw exports of bitumen by pipeline and tanker. In fact, there are a “wide variety of indigenous legal orders, which do not receive the recognition they deserve nationally or internationally, while having to deal with the compounding challenges of European settlement, assimilation, and displacement”.<sup>158</sup> As the “situating” of Sarnia demonstrates, in these “existing and potential conflict zones of mixed international, federal and provincial jurisdictions, indigenous laws and legal traditions emerge as important touchstones”.<sup>159</sup> In particular, according to John Borrows, indigenous laws “embody precepts and practices that connect Aboriginal and non-Aboriginal Canadians to land in a way that is not always possible under the current administration of the common or civil

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disease”, an affliction of oil-exporting nations. The theory is that the raw exports inflate the currency, making exported manufactured goods less competitive (Allan, *supra* note 46 at 22–24). According to journalist Andrew Nikiforuk, one of the first to tie the tar sands to the phenomenon of Dutch disease, “the more Canada relies on bitumen as a trading staple, the less diverse our economy will become” (Nikiforuk, *supra* note 33).

<sup>154</sup> Swift *et al.*, *supra* note 51 at 3; Woynillowicz, *supra* note 35.

<sup>155</sup> Jenny Yuen, “Pipeline protesters arrive in Toronto to rally outside Enbridge meeting”, (8 May 2012), online: *Toronto Sun* <<http://www.torontosun.com>>.

<sup>156</sup> Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya, Extractive industries operating within or near Indigenous territories A/HRC/18/35 (11 July 2011).

<sup>157</sup> For an interesting discussion of the way the “the natural environment shapes political and developmental trajectories”, including the construction of sovereignty, see Usha Natarajan, TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring (2012) 14 *Oregon Review of International Law* 101.

<sup>158</sup> Amar Bhatia, The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World (forthcoming) 14 *Oregon Review of International Law*, at 104 (citing John Borrows).

<sup>159</sup> *Ibid.* at 120.

law”.<sup>160</sup>

This was brought powerfully to the forefront by the Haudensaunee activists who disrupted the NEB hearings into the Line 9 Reversal application. Using the “people’s mic” technique, members of local Six Nations communities claimed a right to free, prior and informed consent and declared that: “the people believe the NEB hearings are illegitimate, inaccessible and undemocratic”.<sup>161</sup> They announced the “end of the official hearing” as members of the Board and lawyers for Enbridge left the room (through the same back door), and commenced the “People’s Hearing”.<sup>162</sup> The NEB resumed the “official” hearing later in the day, with the protests continuing outside, and the applause following the speeches of Haudensaunee opposed to the pipeline reversal plan audible even in the text of the official hearing transcript.<sup>163</sup> The voices of the Haudensaunee clearly influenced how the hearing proceeded, but they were not heard, and they were wholly disappeared in the Board’s ruling.<sup>164</sup> What the NEB’s decision on the Line 9 Reversal application provides is a potent example of the “myriad forces arrayed at every level against the continued assertions of indigenous peoples to determine their own lives and secure their own distinct futures as free as possible from outside coercion”.<sup>165</sup>

In terms of communities “downstream” of the tar sands, we hear occasionally about the case of Fort Chipewyan and the Mikisew Cree First Nation, an aboriginal band downstream of the tar sands along the Athabasca River — site of the contested cancer cluster that resulted in the unfair discrediting of a concerned family physician.<sup>166</sup> We also hear about the scale of destruction of natural habitats, brought to the nation’s attention largely through the determination of scientists like David Schindler.<sup>167</sup> I mention these downstream impacts not to undermine them, nor to over-state the attention they have received. The point is simply to note that to the limited extent that “downstream” communities do factor into the national en-

<sup>160</sup> John Borrows, *Indigenous Legal Traditions* (2005) 19 *Journal of Law and Policy* 167-223 at 196.

<sup>161</sup> Quotes taken from YouTube video posted by Mike Roy, Occupy and Activist mic check Enbridge pipeline hearing May 23 London “The Indignants”, online: <<http://www.youtube.com/watch?v=k6Kflcbgh5A>>.

<sup>162</sup> *Ibid.*

<sup>163</sup> Hearing Order OH-005-2011, Enbridge Pipelines Inc. (Enbridge), Line 9 Reversal Phase I Project, Application under s. 58 of the *National Energy Board Act* (NEB Act), Volume 2, Hearing held at London, Ontario, May 24, 2012, see paras 80–85.

<sup>164</sup> There are parallels to Bhatia’s re-counting of the “magic tricks” (106) and “acts of disappearance” (114) perpetrated against the Haudensaunee by law and the early Canadian state, as well as the resistance to them.

<sup>165</sup> Bhatia, *supra* note 158 at 143.

<sup>166</sup> Josh Wingrove, “Oil-sands report criticizes all stakeholders”, (15 December 2010), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>; Elizabeth Withey, “Just do the right thing by Fort Chip’: physician”, (9 March 2009), online: *Edmonton Journal* <<http://www2.canada.com>>.

<sup>167</sup> Schindler brought the issue to the nation’s attention in 2010, and has been credited with instigating much of the reform that has taken place. Josh Wingrove, “Elevated levels of toxins found in Athabasca River”, (30 August 2010), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

ergy debate, we tend to hear about those downstream of the extractive sites, not those downstream of the refining.

Almost never does the Aamjiwnaang First Nation factor in.<sup>168</sup> Nor, for that matter, do the already over-burdened, mostly black communities on the fencelines of the refineries in Port Arthur, Texas, on the U.S. gulf coast,<sup>169</sup> or the communities in Asia that will be downstream of the refineries expected to pop up to deal with our dirty exports of raw crude and bitumen.<sup>170</sup> The mainstream debate does not include discussion of the pollution associated with the refining of bitumen and its derivatives, because those communities affected do not stand to benefit from tar sands expansion.<sup>171</sup> Including those communities in the debate would derail the myth of uniform national ascent — the clean upward trajectory implied by the national interest claim. And thus, they must be actively unimagined. If they were allowed into view, we would clearly see the distributional consequences — the environmental justice implications — of the crucial infrastructure decisions we are faced with. The seemingly bright future facing the nation with a coast-to-coast pipeline, in which everyone is a winner,<sup>172</sup> requires this unimagining.

It is not just economic value that will drain out of the pipes that empty into the U.S. gulf, the B.C. ports, or the eastern economies; it is also pollution.<sup>173</sup> That

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<sup>168</sup> Activists from the Aamjiwnaang First Nation have begun establish ties with west coast First Nations, however, so this may be starting to change. Ron Plain, an activist from Aamjiwnaang First Nation, attended the Enbridge AGM in Toronto on May 9, 2012 and invited CEO Patrick Daniel to visit Aamjiwnaang to witness the impacts himself ([http://www.enbridge.com/~media/www/Site%20Documents/Investor%20Relations/2012/ENB\\_2012\\_PrelimTranscript-2012-05-09T17\\_30.ashx](http://www.enbridge.com/~media/www/Site%20Documents/Investor%20Relations/2012/ENB_2012_PrelimTranscript-2012-05-09T17_30.ashx)). See also Dayna Nadine Scott and Adrian Smith, “A new ‘climate justice’ alliance is being forged between First Nations youth downstream from Sarnia’s Chemical Valley and Alberta’s Tar Sands. Indigenous Youth Make the Connection” (2012) 46 *Canadian Dimension*; and Dayna Nadine Scott, “Canada Needs a National Energy Strategy”, Opinion, *The Hill Times*, June 25, 2012, 15. Finally, Vanessa Gray, a founder of the Green Teens of Aamjiwnaang has joined the speaking tour, “She Speaks: Indigenous Women Speak Out Against Tar Sands” travelling across the country over the fall of 2012 (Daniel Punch, “Environmental activist speaking up”, *Sarnia Observer*, October 2, 2012, <<http://www.theobserver.ca/2012/10/02/environmental-activist-speaking-up>>).

<sup>169</sup> Ronald L Braithwaite, Sandra E Taylor & Henrie M Treadwell, *Health Issues in the Black Community* (John Wiley and Sons, 2009) at 189; for a more in-depth look at Port Arthur, desired end-point for the proposed Keystone XL pipeline, see Steve Lerner, “Port Arthur, Texas: Public Housing Residents Breathe Contaminated Air from Nearby Refineries and Chemical Plants” in *Sacrifice zones: the front lines of toxic chemical exposure in the United States* (Cambridge, Mass: MIT Press, 2010) 73.

<sup>170</sup> CBC News, *supra* note 56.

<sup>171</sup> Even workers in the oil patch, though, see a need to ease off the rapid pace of tar sands development with the aim of curbing greenhouse gas emissions. Joel Harden & Govind Rao, *Energy Sector Collective Bargaining Research Report* (Communications, Energy and Paperworkers Union of Canada, 2012).

<sup>172</sup> McKenna, *supra* note 27.

<sup>173</sup> The graphic accompanying Eric Reguly’s essay bemoaning the “exporting” of jobs associated with the Keystone XL depicts a big pipe with money signs flowing out the bottom into the U.S. gulf, *supra* note 72.

pollution harms not just individual health, but it erodes family ties and community relationships; it creates community-wide stress that debilitates neighborhoods — emotionally, culturally, economically<sup>174</sup> — and politically.<sup>175</sup> The extraction and upgrading of bitumen in Alberta, the transfer of crude oil by pipe, and its subsequent transformation through the application of technology and the addition of human labour in Sarnia, Ontario, occurs under certain market conditions and capitalist relations of production. In interrogating systemic questions of power and ownership relating to who profits from and exerts exploitative control over ecological resources, economic capital and social labour, an aim has also been to take account of how these exploitative relations shape everyday physical realities on the ground in a particular place.

It is important to keep in mind Harvey's notion of the "spatial fix": pipelines are enduring. It is not just a matter of the retrenchment of the infrastructure of "fossil capitalism",<sup>176</sup> which is troubling, but the fact that the *routes* we decide upon bring long-term consequences for the places and spaces they flow into. They have the potential to dramatically recontour the economies, environments and politics of those communities. In this paper, I undertake the task of situating Sarnia and trying to bring the Aamjiwnaang First Nation — as a community downstream of the tar sands — back into our national imagination. There is much more work to be done. To comprehend fully the distributive consequences of the pipeline decisions we are currently contemplating, we need to reveal and resist the active unimagining of downstream communities in the new national energy debates.

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<sup>174</sup> Robert Verchick, "In a Greener Voice: Feminist Theory and Environmental Justice" (1996) 19:23 *Harv Women's LJ* at 84.

<sup>175</sup> Mitchell, *supra* note 17.

<sup>176</sup> Elmar Altvater, "The Social and Natural Environment of Fossil Capitalism" (2007) 43 *Socialist Register* 37–59.

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